TC02886

Appeal number: TC/2010/08559

VAT – motor vehicles – demonstrator bonus paid by manufacturer to dealer – whether VAT received on bonus and accounted for – silent periods – Elida Table and line of supply – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WHY PAY MORE FOR CARS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE J. BLEWITT
MR J. MIDGLEY

Sitting in public at London on 13, 14 and 15 May 2013

Mr Hitchmough QC leading Ms Belgrano, Counsel for the Appellant

Mr Puzey, Counsel for the Respondents

DECISION

Introduction

1. This is an appeal against HMRC's decision dated 7 October 2010 which refused part of the Appellant's claim made in 2009 for overpaid VAT in relation to bonuses received by the Appellant from motor vehicle manufacturers on its purchases of vehicles used as demonstrators and courtesy cars. We should note that any reference in this decision to demonstrators should be taken to include courtesy cars and that in this decision we use "HMRC" to include its predecessor HM C & E. The part of the Appellant's payment refused relate to VAT periods June 1973 to March 1997 for which HMRC deemed there to be no or insufficient information to reach a conclusion as to whether, on the balance of probabilities, VAT was overpaid by the Appellant. HMRC disagrees with the assertions of the Appellant that:

"From the inception of VAT on 1 April 1973, the policy of HMRC…to my knowledge and on the basis of my experience, was that VAT was due on all demonstrator bonus payments made by manufacturers to dealers, on the basis that these bonus payments amounted to consideration for a taxable supply of services from the VAT registered dealer to the manufacturer…the conclusion I reach from that is that in practice, motor dealers were accounting for VAT on all bonuses irrespective of whether they were categorised as Elida or non-Elida"

2. HMRC contended that the submission which relies on general practice across the motor industry is contradicted by the very existence of the Elida Tables (more about which we will say in due course). In the absence of any direct evidence from the Appellant as to its practices during the silent periods taken together with the limited contemporaneous documents relating to its business, HMRC maintain the Appellant's case is unsustainable. There is also an ancillary issue relating to the entitlement to statutory interest.

3. The Appellant, which is the current representative member of the Why Pay More For Cars VAT Group, comprises of a number of motor dealerships. The Appellant contended that it overpaid VAT on the basis of an erroneous assumption that the bonus payments were consideration for a supply of services by the Appellant to various car manufacturers. The arguments put forward on behalf of the Appellant were helpfully set out in three main submissions;

(a) Whether the practice of HMRC at the relevant time was to treat all bonus payments as consideration for a supply of services by a dealer to a manufacturer on which a dealer should have (and therefore on the balance of probabilities would have) accounted for VAT irrespective of whether the bonus payments followed the line of supply;

(b) In the alternative, whether, where the Elida Table recognises that VAT will have been accounted for on bonuses received from a particular manufacturer, it can be inferred that VAT will also have been accounted for on bonuses received from that same manufacturer in the silent periods;

(c) In the further alternative whether, on the balance of probabilities, the Appellant in any event accounted for VAT on its disputed bonus claims.

4. The Appellant further avers that if the Tribunal finds in its favour on (a) then it is common ground between the parties that statutory interest is due under section 78 VATA 1994. This must also follow if the Tribunal finds in favour of the Appellant on (b) in respect of those cases which the Tribunal infers that in the silent periods the bonus payments did not follow the line of supply of the vehicles. Where the bonus payments followed the line of supply, the Appellant contends that statutory interest is due as the overpayment would have arisen as a result of official error; HMRC disagrees and argues that the overpayment will have resulted from the Appellant's own error.

5. Mr James Puzey represented HMRC and Mr Andrew Hitchmough QC appeared on behalf of the Appellant. We took evidence from two witnesses; Mr Robert Lewis of HMRC and Mr John Ireland, a director of KPMG, for the Appellant. We were also provided with 3 bundles of copy documents to assist us in making our findings of fact.

Terms

6. It may be helpful to set out the various terminologies that will feature in this decision.

(a) Line of Supply: this relates to whether a vehicle was supplied via a VAT registered finance company and where the bonus was paid directly from manufacturer to dealer HMRC (pre *Elida Gibbs*). HMRC did not deem the bonus to be a discount on the price as the sale from the manufacturer was to the finance company rather than to the dealer, and therefore considered the bonus to be subject to VAT.

(b) Elida Table: The ECJ in *Marks and Spencer Plc v CEC* [2002] STC 1036 removed the 3 year cap initially in place which led to a table being compiled in 2002 by HMRC in conjunction with the Society of Motor Manufacturers (SMMT) and Retail Motor Industry Federation (RMIF) and representatives from major accountancy firms setting out the periods and manufacturers for which there is evidence showing that VAT was accounted for by dealers on bonus payments. The treatment of bonus payments, documentation used and line of supply for many manufacturers was shown in the Elida Table which was updated in June 2003, December 2003 and October 2006. Generally, HMRC will accept claims from dealers where the evidence is included in the table.

(c) Silent Periods: periods for which there is a lack of information as to how a bonus payment was made or documented and whether VAT was accounted for by dealers on its receipt; consequently there is no entry on the Elida Table.

(d) Silent Manufacturers: where there is no information as to the manufacturer and therefore it does not appear on the Table.

(e) Italian Tables and Margin Scheme: Following *Commission v Italy* C-45/95 [1997] STC 1062 it was recognised that the sale of a second-hand car was exempt from VAT and that UK law which had required a trader to account for VAT on the profit of a sale (the margin scheme) was held to be incompatible with EU law. As a result of the consequential claims against HMRC, the Italian Tables were drawn up, in the same manner as the Elida Table, in order to facilitate claims.

(f) Input tax block and self-supply: Where cars were purchased for resale, input tax could be recovered. If a car was purchased by a dealer for resale and input tax recovered thereon, but that car was subsequently adopted for use as a demonstrator it was deemed to be a self-supply and output tax had to be declared thereon.

Preliminary Matter

7. We should note at this point that this case has not been designated as a lead case under Rule 18 (2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). Nevertheless the parties invited us to treat it as such on the basis that the issue of "silent periods" has general applicability in a large number of similar appeals before this Tribunal.

Burden and Standard of Proof

8. The burden of proof in this case rests with the Appellant to show on the balance of probabilities that VAT was received by it on all bonuses relevant to this appeal and was wrongly accounted for in the silent periods.

The Appellant's Claim

9. The following table sets out the Appellant's claim:

Manufacturer	Period	Amount in Dispute (£)	Silent Manufacturer or Silent Period
Alfa	March 88 – Dec 89	4,398	Silent Period
Alfa	March 88 – Dec 89	4,398	Silent Period
Bitter	March 88 – Sept 89	1,402	Silent Manufacturer
Burstner	March 84 – Sept 89	371	Silent Manufacturer
Citroen	June 73 – Dec 84	8,965	Silent Period
Colt	March 76 – Dec 77	164	Silent Manufacturer
Daihatsu	March 81 – Dec 83	1,321	Silent Period
Daihatsu	March 95 – March 97	7,421	Silent Period

Daihatsu	March 80 – Dec 83	9,036	Silent Period
De Tomaso	Dec 81 – Dec 82	186	Silent Manufacturer
Honda	March 78 – Dec 80	344	Silent Period
Lexus	Dec 89 – Dec 90	8,898	Silent Manufacturer
Lotus	March 84 – Dec 90	13,050	Silent Manufacturer
Maserati	March 81 – Sept 83	516	Silent Manufacturer
Nissan	March 89 – Dec 91	12,440	Silent Period
Renault	March 89 – Dec 91	14,259	Silent Period
Saab	June 73 – Dec 78	1,295	Silent Period
Saab	June 73 – Dec 78	2,351	Silent Period
Skoda	March 96 – March 97	355	Silent Manufacturer
Volkswagen	June 73 – Dec 73	110	Silent Period
	TOTAL	91,280	

Background and *Elida Gibbs*

Background

10. By way of background, prior to 1 December 1999 motor dealers could not recover input tax on new vehicles purchased for use as demos; a situation known as the "input tax block." Where a car was bought for resale (and input tax recovered on it) but was subsequently adopted for use as a demo, legislative provisions deemed it a self-supply on which output tax had to be declared.

11. Bonuses were paid on condition that the Bonus Plan on which demonstrators were provided - which differed between manufacturers - was met. The terms could include those relating to the running and maintenance of demonstrators and were set out in documents issued by manufacturers. In return for the dealer's compliance, the manufacturer would pay a bonus in respect of each demonstrator. The bonus would be paid either following registration of the vehicle as a demonstrator or when the demonstrator ceased to be used as such, and was put up for sale as a second-hand car.

12. The supply of a vehicle to a dealer by a manufacturer could be via a third party finance company or direct from manufacturer to dealer; that difference affected HMRC's treatment of the demonstrator bonus with reference to the line of supply. In assessing the VAT treatment of bonuses HMRC also had regard to the various documents used to record payment, i.e. credit notes (inclusive or exclusive of VAT),

self-billing invoices or invoices raised by a dealer to a manufacturer. The use of VAT inclusive credit notes should not have resulted in output tax being declared to HMRC; if such VAT was declared it was, in the view of HMRC, an error on the part of the dealer. In the case of a self-billed invoice showing VAT or a dealer's invoice with VAT, HMRC would have expected the VAT shown to have been posted in the dealer's VAT account.

13. From 1 December 1984 the business known as Gordon Lamb Cars Limited (which had traded since 1973) was split into two; John Lamb retained the VW, Audi, Porcshe and Citroen franchises trading under the same vat registration number and Richard Lamb, trading as Gordon Lamb Chesterfield Ltd, acquired the Saab, Honda and Daihatsu franchises by way of a TOGC and became VAT registered with effect from 1 April 1985. With effect from 25 May 1985 the original registration of Gordon Lamb Cars Ltd was recorded as a group registration, with Gordon Lamb Chesterfield Ltd ("the Appellant") acting as the group's representative member. On 12 July 2004 the Appellant changed its name to "Gordon Lamb Cars Limited" and on 9 October 2006 the Appellant changed its name again to "Why Pay More For Cars Ltd" and now trades as a vendor of new cars and light vehicles from 1 Discovery Way, Chesterfield.

14. The Appellant submitted claims from 1973 onwards relating to those parts of the former Gordon Lamb Card Limited which it had acquired in 1984. In addition, as the group representative member it was entitled to include within its claim amounts relating to other group members for periods during which the other members formed part of the group.

15. The Appellant's claim comprises amounts which it submits HMRC required motor dealers to account for output tax on bonuses paid by manufacturers on demonstrator cars and courtesy cars. Prior to the judgment in *Elida Gibbs*, HMRC viewed bonuses as payments for a supply made by the dealer to the manufacturer where the payment was made directly to the dealer but the goods were supplied via a third party such as a finance company.

Elida Gibbs Ltd v CEC [1996] STC 1387 ("*Elida Gibbs*")

16. Elida Gibbs Ltd was a toiletries manufacturer the majority of whose supplies were made to retailers but who also supplied wholesalers or cash and carry traders for resale to retailers. The Company ran two coupon schemes; one whereby the consumer could obtain cash back from the Company by returning discount coupons printed on the labels of its goods. The Company made a claim for repayment of overpaid VAT on the basis that money it refunded for the coupons should have been treated as a discount which reduced the value of its supplies to the retailers or wholesalers. The CJEU held that the cash back payments were a discount which reduced the value of its supplies, and the taxable amount was a sum corresponding to the sale price to the retailers or wholesalers less the value of the coupons, despite the refunds being made to parties having no contractual relationship with the Company.

17. Following the decision in *Elida Gibbs*, HMRC accepted that bonuses paid to vehicle suppliers on demonstrators were a discount to be applied to the consideration

received by the dealer when it sold on the vehicles. That led to a significant number of claims being made by dealers in circumstances where, as a result of the passing of time, records were unavailable. As a result, the Elida Tables were compiled (more about which is outlined in the summary of Mr lewis' evidence) and divided into "Elida" and "Non-Elida" depending on whether the bonuses paid by manufacturers followed the line of supply of the goods (i.e. a non-Elida situation where the bonus payment and goods were supplied directly to the dealer) or not (i.e. an Elida situation whereby the bonus payment was made to the dealer by the manufacturer and the goods were supplied to the dealer via a third party).

18. The Appellant made a claim in May 2000 which covered the period from late 1997 to March 2000 and for which HMRC repaid £143,024 in respect of output tax overpaid by the Appellant in respect of demonstrator and new car sales. In a further claim dated 19 June 2003 which covered the period 1973 to 1996 the Appellant was repaid £390,267 for an "Italian" claim and £25,680 for an "Elida" claim.

19. In respect of the claim which led to this appeal, HMRC took the view that where no information was available on bonuses paid in respect of demonstrators in a particular period, it must be assumed that the bonuses would have been paid without VAT and therefore there could be no claim for overpaid VAT.

Documents

20. It may assist the reader to give a brief summary of the documents referred to, and relied on by the parties. We do not intend to cover each and every document; only those which appeared to us to carry significant relevance to the evidence.

HMRC's Business Brief 16A/97

21. In 1997 HMRC published Business Brief 16A/97 which set out a change in its policy in respect of bonus payments made by manufacturers to dealers. Bonus payments made by manufacturers to persons other than their direct customers, for example a dealer via a finance company, were deemed to be discounts which reduced the value of the supply.

22. At the time that HMRC's Business Brief was published, a 3 year cap for overpayment claims was in existence, it having been introduced on 4 December 1996. Following the House of Lords judgment in *Fleming (t/a Bodycraft) v HMRC/Conde Nast Publications Limited v HMRC* [2008] UKHL 2 which ruled that the cap had been introduced unlawfully, the ECJ's decision in *Marks and Spencer Plc v CEC* [2002] STC 1036 and HMRC's Business Briefs 22/02 and 27/02 invited traders to make uncapped claims and, as a consequence of realising that claims would date back a significant number of years, the Elida Tables were compiled.

<u>The 1978 Letter</u>

23. On 1 February 1978 Mr Dangerfield of HMRC wrote to Mrs Williams at the SMMT in response to earlier correspondence which unfortunately was not put before

the Tribunal. The letter is entitled "Value for VAT of Self-Supplied Motor Cars" and the relevant extracts read:

"In the case of self-supplies by dealers I am afraid that we must maintain the general rule that discounts allowed subsequent to the time of self-supply cannot be taken into account, but if in a particular instance the trader were able to demonstrate to his Local VAT Officer that the additional discount represented a genuine retrospective price reduction, we would of course consider this on its merits."

The 1988 Letter

24. This was a letter dated 24 October 1988 from G. S. Burnes at HMRC to the SMMT entitled "Value for VAT of Self-Supplied Motor Cars: Treatment of Bonus Payments". It reads:

"Our letter of 1 February 1978 to yourselves...advised that we did not generally consider that "discounts" allowed subsequent to the time of self-supply reduced the value for tax. This was because we then considered that most such payments were not actually discounts giving genuine price reductions but were principally payments for supplies of services by the dealer to the manufacturer. We said then, however, that we were prepared to consider each case on its merits.

One major manufacturer introduced a market support programme in 1986 under which it issued VAT exclusive credit notes to its dealers. We ruled that these credit notes were valid, as the payments made were freely given contingent discounts on specific supplies made. I note that in a circular to your members dated September 1986 you correctly draw a distinction between discounts which reduce the value of the supply and payments for supplies of services by the dealer to the manufacturer. In the latter case of course, the use of a credit note is not valid.

Where a rebate earned retrospectively is directly referable to the supply of a car to the dealer by the manufacturer, this can normally be accepted as a contingent discount...It is vital that the supply of the cars involved is direct from the manufacturer to the dealer. If a third party such as a finance company is interposed between the manufacturer negotiating the rebate and the dealer, the payment cannot be accepted as a discount because it is not directly referable to the supply...

The above information is only a statement of the general position..."

SMMT Memorandum

25. This document is dated September 1986 and was circulated to all members of the SMMT. A section of the document entitled "VAT and Demonstrator Cars" makes reference to a manufacturer making an "additional payment" where a vehicle is registered as a demonstrator. The payments are summarised as

"a) a special discount...which reduces the value of the supply of the vehicle. This payment may be made at the time the vehicle is appropriated by the dealer or at some

later date...In these circumstances, the VAT paid by the dealer on the car should reflect its lower value...

b) the manufacturer...pays the dealer for the services of demonstrating the vehicle. This is a taxable supply from the dealer. The dealer might invoice his supplier...plus VAT or the manufacturer...might issue a self-billing invoice. In certain cases a credit note is issued which is used as a self-billing invoice..."

1987 Letter

26. On 30 October 1987 D. R. Land of HMRC wrote to Jennifer Mitchell at the SMMT in a letter headed "VAT Liability of Incentive Payments by Vehicle Manufacturers to High Volume Purchasers." The letter refers to HMRC's earlier view that VAT was not applicable to this type of payment as "*while they are not true discounts on the goods purchased because they do not relate directly to the supply – for example the customer buys from the authorised dealer but negotiates with the manufacturer for the incentives, often without the knowledge of the dealer – there was no evidence that the payments represented consideration for any supply of services by the customer to the manufacturer. We are now aware that services are invariably supplied in such circumstances."*

27. The letter goes on to state that services are supplied where payment is received for fulfilling specific conditions set by manufacturers. Although a number of conditions may be involved, HMRC considered "*the presence of just one is sufficient to make the payment consideration for a taxable supply"*.

DCL Letter

28. We were informed by Mr Puzey that "DCL" refers to an HMRC "Dear Colleague Letter". The document, dated 4 June 1997 (post *Elida Gibbs*) is from HMRC's Policy Directorate and was distributed internally. The purpose of the letter was to provide background to the treatment of demonstrator bonuses and provide examples of where the *Elida Gibbs* judgment altered the previous policy of HMRC and created situations whereby VAT might have been overpaid by traders.

29. The letter states that "*prior to the ECJ decision...we did not accept that there could be a discount, which reduced the value of supplies, when it was given to someone other than the direct recipient of the supply...Given that the manufacturer could not treat the bonus as a discount, it was our view that the payment was the consideration for a supply of services..."*

30. The letter went on to explain that following the decision in *Elida Gibbs*, HMRC accepted that discounts could be made to parties further down a chain of transactions and not just to the manufacturer's direct customer. It set out a number of examples showing the possible treatments that may have been applied to situations including a dealer demo bonus with a finance house where the chain of supply showed the vehicle being supplied via a finance house and the bonus being paid directly to the dealer. In such a situation the various ways in which the bonus may have been treated were set out and the possible resulting under-declarations or over-declarations of VAT.

Another example was a non-Elida situation whereby the vehicle and bonus payment followed the line of supply directly from manufacturer to dealer. The letter again sets out the various ways in which the bonus may have been treated and the possible resulting under-declarations or over-declarations. The final example provided the same information in respect of a fleet buyer's bonus.

Motor Trade Co-ordination Newsletter

31. We were provided with a newsletter dated March 1995 which Mr Lewis confirmed to be an internal HMRC document. The document relates to a specific manufacturer, the name of which was redacted (which we will refer to as X) and expressly refers to the lines of supply in respect of different categories of cases including demonstrators bought on hire purchase. It states:

"...The line of supply...passes through X Finance. Dealers receive a bonus for any demonstrator...adopted. The original line of supply though is not followed as X Finance do not receive the benefit of this payment. These payments are not therefore deemed to be discounts/credits against cars purchased by the dealer, although there may be the odd occasion when the dealer will purchase the car outright from X...It has been agreed with X that these payments are outside the scope of VAT. This is now known to be incorrect..."

Submissions

32. In order for the reader to understand the summary of the witnesses evidence set out below, this may be an appropriate point at which to outline the submissions of the parties. We should note that both Counsel provided written and oral submissions which we found extremely helpful in determining the issues in this case.

HMRC's Case

33. The issue for the Tribunal is whether the Appellant overpaid VAT on bonuses during the silent periods. The Tribunal must bear in mind that information was not always readily available and whilst accepting that HMRC did not always act in a consistent manner, we should deal with the appeal in the context of the time period to which the claim relates.

34. In respect of the 1978 letter, Mr Puzey submitted that in order for the terms in which the document was drafted to have any meaning, "discount" must be read as "bonus" and that the letter clearly envisaged circumstances in which a discount might be accepted by HMRC, albeit those circumstances were not elaborated on in the document. The letter did not state that a bonus discount would be seen as a supply of services or that a taxable supply such that VAT must be accounted for to HMRC and such words could not be inferred; there existed the possibility of the discounts being outside the scope of VAT which was reflected in HMRC's approval of arrangements with Ford in 1986 in which the demonstrator bonus was viewed as a freely given contingent discount since it used VAT exclusive credit notes in order to reduce the value of self-supplied cars.

35. Mr Puzey further contended that the 1988 letter must be looked at as a whole; since it dealt with bonuses on self-supplies, the most important of which was the demonstrator bonus. He submitted that the letter gave further examples of bonuses which HMRC accepted as genuine and that the reference to "a rebate earned retrospectively is directly referable to the supply of a car" and must include a demonstrator bonus. The letter went on to make clear the distinction HMRC made regarding bonuses by saying *"it is vital that the supply of cars involved is direct from the manufacturer to the dealer"* as the bonus was not viewed as a discount if a third party was involved.

36. The document also referred to a memorandum from the SMMT in September 1986 which explained that "additional payments" could either be a special discount which reduced the value of the supply, or a payment for the supply of services by the dealer to the manufacturer. The "additional payments" referred to the two ways of treating a demonstrator bonus including shown outside the scope of VAT.

37. Mr Puzey contended that to read the letter as referring to a line of supply in respect of non-demonstrator bonuses only would be a bizarre interpretation of it. The letter accepted that bonuses could be either a supply of services or a contingent discount. It thereby contradicted the Appellant's case that HMRC drew no distinction in respect of the treatment of demonstrator bonuses, and therefore required all traders to account for VAT thereon.

38. HMRC maintained that its Business Brief 16A/97 had already made clear that dealers who received bonuses which did not follow the line of supply (Elida cases) could seek a repayment of the VAT wrongly accounted for thereon. In those circumstances, Mr Puzey disagreed with the Appellant's contention that there had been no such distinction between Elida and non-Elida situations drawn by HMRC until 2002. Furthermore, HMRC's Guidance Note issued in March 2003 following the Elida Gibbs case demonstrated that it had always been the view of HMRC that payments which followed the line of supply were to be treated as discounts, and those that did not were seen as a supply of services and subject to VAT. The guidance also contained an early version of the Elida Tables which were subsequently amended to take account of further information which became available, and which later made clear whether dealers may have a claim in non-Elida situations due to the traders' mistake, albeit the trader would be expected to provide evidence that it had overpaid in error.

39. Mr Puzey made the point that if, as contended by the Appellant, all dealers had accounted for VAT received, it was unlikely that they would have adopted the use of the Elida Tables (as the Appellant did in 2003) as the Tables were based on the premise that only some of the demonstrator bonuses would have been wrongly treated for VAT purposes. Furthermore, the reliance placed by the Appellant on demonstrator plans did not assist as there was no evidence that HMRC ever saw the plans; it was not the content of the plan which determined whether or not VAT was payable, but rather the accounting practices of individual manufacturers.

40. The contention by the Appellant that the 1987 letter from HMRC had no relevance to demonstrator bonuses was rejected by Mr Puzey, who submitted that in an Elida type situation very similar conditions were imposed in respect of high volume purchases as those imposed in demonstrator plans and the payments caused similar difficulties as to the treatment to be given:

"As you know, the department in the past has indicated that VAT was not applicable to these payments, often referred to as third party discounts. While they are not true discounts on the goods purchased because they do not relate directly to the supply [not because they are a payment for services but because they do not relate directly to the supply], for example the customer buys from the authorised dealer but negotiates with the manufacturer for the incentives, often without the knowledge of the dealer, there was no evidence that these payments represented consideration for any supply of services by the customer to the manufacturer. We are now aware that services are invariably supplied…While it is unlikely that any tax will be deductible, we are aware of cases where manufacturers have of their own volition regarded these payments as consideration for taxable supplies and have consequently self-billed the VAT."

41. Mr Puzey noted that the Appellant relied on HMRC's continued acceptance of self-billing, despite the fact that it did not consider self-billed invoices to be the correct document for the purpose. He contended that Mr Lewis' evidence showed that although HMRC would approve a trader as suitable for self-billing, in those instances, the practice was often extended to a wider range of the trader's activities.

42. In essence, HMRC's starting point was to query why payment was made to a person who was not in receipt of the supply from the person making payment. Then HMRC would look for a reason as to why the payment was something other than a bonus, namely a supply moving from the recipient of the bonus. That position was entirely changed by Elida Gibbs, after which bonuses had to be viewed as discounts rather than as a supply of services. As a result, traders were informed that due to the inconsistent manner in which bonuses had been dealt with until that time, HMRC would extend its acceptance of claims even to non-Elida situations; an extension which would not have been necessary had traders consistently accounted for VAT.

43. Mr Puzey submits that the VAT guide, which makes no specific reference to bonuses, was interpreted by HMRC in such a way as to approve the use of credit notes which it saw as a freely given contingent discount. That undermined the Appellant's argument that traders were required to, and did, wrongly account for VAT. Mr Puzey referred us to a number of examples of manufacturers' practices, including Ford, GM and VW/Audi which showed that credit notes were provided to enable retailers to retain VAT and thereby contradicted the evidence of Mr Ireland that such practices did not occur as asserted by the Appellant.

44. Mr Puzey also contends that the Appellant was wrong to suggest that in the case of self-supply an Elida situation always existed as to accept such an argument was to treat a dealer as two separate entities – i.e. one which received the bonus from the manufacturer and one which supplied a demonstrator vehicle to himself. Such a view was never held by HMRC, nor was such a practice followed by traders.

45. As to the Appellant's first alternative argument, Mr Puzey suggests that to assume that that which took place in a later period occurred in an earlier period would be an erroneous approach for the Tribunal to take, given that the Elida Tables provided only limited information about practices at the relevant time and that which was available in some cases showed that the approaches taken by manufacturers were not consistent. For example Fiat's accounting documents initially did not follow the line of supply from 1988 to 1995, then its practice changed and subsequently changed again.

46. In respect of the Appellant's second alternative argument,Mr Puzey maintained that the Appellant had failed to produce any cogent evidence as to how it accounted for VAT during the relevant period; no one from the Appellant had given evidence to the Tribunal. There wass no evidence before the Tribunal as to whether the Appellant's records for the relevant period were ever seen by HMRC or on what basis they were assessed. To the contrary, there was evidence before the Tribunal, in the form of an HMRC visit report, that the Appellant's Nottingham dealership financed its demonstrators in such a way that VAT could not have been overpaid (i.e. vehicles were re-sold to a finance house and leased back to the dealer).

47. If the Appellant is successful the Tribunal's decision will have the consequence of rendering the Elida Tables redundant on the basis that the Appellant would not have to prove to the requisite standard that VAT was paid on all bonuses throughout the time with which this appeal is concerned. Furthermore bonuses received which were outside the scope of VAT, for instance in the case of Saab, could not have been overpaid.

48. The Appellant's reliance, in part, on its 2009 repayment claim related to a non-Elida situation involving Renault which it contended shows that the Appellant drew no distinction between Elida and non-Elida bonuses when accounting for VAT. Mr Puzey maintained that it has always been open to a dealer to establish its claim on the balance of probabilities even in a non-Elida situation, and that HMRC's decision in respect of the Renault claim relates to the period 1989 – 1991, they being silent periods. Furthermore, in respect of other traders' claims, HMRC submit that they are simply examples of HMRC's position that if a trader mistakenly accounted for VAT on a bonus which should have been treated as a discount, then the tax will be repaid subject to the traders proving its error on the balance of probabilities. As the details of the cases referred to by the Appellant remain unknown, the Tribunal cannot form any meaningful assessment of the evidential basis or factors which led to repayments having been made.

49. In respect of other traders' claims referred to and relied upon by the Appellant, Mr Puzey explained that HMRC had no authority to disclose details of claims by traders unconnected to this case.

50. As to the issue of how the Appellant funded demonstrators, HMRC contends that the evidence of Mr Lewis showed that there could have been no overpayment of VAT. Mr Lewis exhibited a visit report from 1995 in which HMRC recorded that the Appellant purchased demonstrators from Nissan, sold them to a finance house and

repurchased on HP from that finance house. Input tax was reclaimed in full from Nissan and not blocked because the car was for resale to the finance house. On repurchase, input tax was blocked and the VAT on the vehicle was dealt with under the second-hand margin scheme. Consequently it would have been correct to account for VAT to HMRC on any bonus paid given the earlier input tax recovery on purchase. The Appellant accepted that if that were the case, VAT would not have been overpaid. However the Appellant did not accept that that was principally the position in the Appellant's case.

The Appellant's submissions

51. The Appellant also had regard to the 1978 and 1988 letters from HMRC to the SMMT. In applying the general rule as stated in the 1978 letter, it did not treat bonuses as discounts in the relevant period. The self-supply was made by the dealer at the time it adopted the vehicle as a demonstrator, and the bonus payment was made subsequently (depending on the terms of the demonstrator plan). As such, the bonus constituted a "discount allowed subsequently to the time of self-supply" that could not be taken into account. Furthermore, no distinction was drawn in the letter to whether bonus payments followed the line of supply or not.

52. The 1988 letter again drew no distinction between those payments which followed the line of supply and those which did not, that being in line with the general rule that, irrespective of the line of supply, bonuses were not treated as discounts but rather payments for supplies of services.

53. The Appellant relied on the Saab bonus plan dated 1989 (where the bonus did not follow the line of supply) as demonstrating that in order to earn the bonus the dealer had to comply with a number of obligations. When compared with the Saab bonus plan of 1996, the terms were identical yet the bonus did not follow the line of supply. The Appellant contended that there was no basis upon which HMRC could have assessed one bonus payment as a supply of services, but analysed the other in a wholly different way.

54. The references made in the 1988 letter to rebates earned retrospectively which were directly referable to the line of a supply of a car to the dealer by the manufacturer (and were accepted as a contingent discount) were not the types of bonus in issue in this case and should be distinguished as bonuses requiring little more than selling a specific number of cars as opposed to the onerous obligations to be satisfied in order to earn a demonstrator bonus. The significance of obligations on a dealer was also to be found in the letter by the reference which follows, highlighting the terms of a bonus plan (irrespective of the line of supply) which would have led HMRC to identify a taxable supply of services:

"Furthermore, if an allowance is paid for a service performed by the recipient to the manufacturer, this may represent a taxable supply of services to the manufacturer. Again this cannot be seen as a contingent discount. The dealer must issue a tax invoice for his services or account for tax on a self-billing invoice from the manufacturer."

55. HMRC's historic general practice of treating all bonuses as consideration for a supply of services was reiterated in Business Brief 16A/97, which again makes no reference to the line of supply.

56. The manner in which a self-supply charge operated when a vehicle was adopted for use as a demonstrator, having been initially purchased by a dealer for resale also supported the Appellant's contention that no distinction was made by HMRC between bonuses which followed the line of supply and those that did not. The VAT Guide 1991 (paragraph 21 of Appendix C) provided that VAT could not be reclaimed on cars purchased for use as demonstrators. Where unused cars were transferred, for example from sales stock to use as demonstrators, VAT must be accounted for on the original VAT exclusive cost of each vehicle and the VAT paid on a self-supply could not be reclaimed as input tax. That applied irrespective of whether or not a bonus was subsequently paid or whether such a payment followed the line of supply and an anomaly arose from such a scenario whereby a dealer could, on HMRC's case, have its bonus treated as a discount where a vehicle was purchased for use as a demonstrator and the bonus followed the line of supply, but did not where a self-supply was triggered by adopting the vehicle as a demonstrator after initially purchasing the vehicle for resale even where the line of supply was followed.

57. Mr Hitchmough submitted that it should be inferred that where the Elida Table recognised that VAT would have been accounted for in certain periods then on the balance of probabilities, VAT would have been accounted for on all similar bonus payments received from the same manufacturer in silent periods. The case law cited by the Appellant, which is referred to in more detail below, supported such an approach. Mr Hitchmough accepted that the argument was only applicable to silent periods and not to silent manufacturers where no information was available from which such an inference could be properly drawn.

58. It could also be inferred from the evidence that, on the balance of probabilities, the Appellant accounted for VAT on all of the bonus payments received by it, irrespective of the line of supply or period in which the bonus was paid and reliance was placed on the authorities which we refer to later on in this decision in support of this contention.

59. In 2009 the Appellant's claim for overpaid VAT included bonuses paid by Honda between June 1978 and December 1999 and which did not follow the line of supply. The Elida Table showed that VAT would have been paid on the bonuses for the period 1981 to 1997 and accordingly that part of the claim had been repaid. As it appeared that HMRC accepted that the Appellant overpaid VAT on bonuses from Honda for a period of over 15 years, it should be inferred that on the balance of probabilities it also accounted for VAT during the period March 1978 to December 1980.

60. In 2000 a claim made on behalf of the Appellant by Ernst and Young included VAT overpaid on bonuses from Renault between September 1997 and March 2000. The bonuses, according to the Elida Table, followed the line of supply but the document triggering the VAT overpayment was a credit note rather than a VAT

invoice. The claim was based on actual records of VAT accounted for and HMRC was satisfied that, although the bonus followed the line of supply and a credit note used, VAT had been accounted for by the Appellant. When submitting the 2009 claim KPMG included sums in respect of bonuses from Renault between 1992 and 1996 which were initially refused by HMRC but subsequently accepted on the basis that an inference could be drawn from the 2000 claim which was based on the Appellant's records and repaid.

61. Where evidence was available, Mr Hitchmough contended that the Appellant had accounted for VAT on all bonus payments received by it, irrespective of the manufacturer involved, line of supply, accounting documentation or period in which the bonus was paid. In the absence of evidence to the contrary, the Tribunal should infer that the Appellant would also have accounted for VAT in respect of the periods for which no information was available.

The Evidence

62. Mr Robert Andrew Lewis, the witness called to give oral evidence on behalf of HMRC, has been a VAT officer since 1975 and between 1988 and 2001 he was involved in VAT audits of motor manufacturers and dealers. Since 1994 Mr Lewis has held the role of manager of the Motor Trade Unit of Expertise (UoE), part of which involves liaising with motor trade bodies and advising on VAT technical matters applicable to the motor trade industry.

63. Mr Lewis provided us with a background to the Elida Tables, noting that in 2002 HMRC identified that the *Marks and Spencer* case resulted in a significant number of claims from motor dealers. Claims only existed where earlier legislation allowed no deduction on some bonus payments paid by manufacturers to motor dealers on cars purchased from 1973 to 1996 (claims from 1996 had been paid following *Elida Gibbs*, but subject to the 3 year cap).

64. As result of the lack of information that HMRC anticipated would be available for such claims, a meeting took place at which HMRC, the SMMT, the RMIF and some of the major accountancy firms were represented. HMRC described 3 circumstances of which it was aware which impacted on claims:

(a) Where the vehicle was sold directly from the manufacturer to the dealer with the retrospective bonus payment following the same route;

(b) Where the vehicle was supplied by the manufacturer to a second entity (such as a finance company linked to the manufacturer) which then sold the vehicle to the dealer. The manufacturer paid the retrospective bonus direct to the dealer, missing out the finance house;

(c) Where the vehicle was supplied by the manufacturer to a second entity (such as a finance company linked to the manufacturer) which then sold the vehicle to the dealer. The manufacturer paid the retrospective bonus to the finance house which then paid it to the dealer.

65. HMRC took the view that no claims would be payable for (a) or (c) as the VAT should normally have been adjusted by way of credit notes. In respect of (b) HMRC noted a further complexity in that the payment was not always seen as subject to VAT.

66. At a further meeting on 28 January 2003 HMRC agreed to create a matrix showing, as far as possible, the treatment of bonus payments, the line of supply used by each manufacturer and the date of any changes in that treatment. The information came from departmental records and advisors in support of dealer's claims.

67. Guidance was published on HMRC's website in March 2003 in a General Note for motor dealers and Detailed Guidance for claims under the *Elida Gibbs* decision which included the first version of the Table showing treatment of bonus payments by individual manufacturers.

68. Mr Lewis acknowledged that the *Elida Gibbs* decision made it clear that HMRC's earlier view that there had been a supply of services was erroneous. The Table was designed in order that dealers could see for which periods and which marques a claim was likely to be repayable and those for which no information was held. In the latter case, HMRC's guidance made clear that if information was obtained it should be sent to it for consideration.

69. The number of demonstrator cars that a dealer operated was dictated by an agreement with the manufacturer. The agreement was known as the demonstrator plan which usually dictated a minimum number of vehicles to be run, the range of models and their maximum age and mileage at re-sale.

70. Bonuses were paid to assist dealers to meet the costs of the demonstrator vehicles. The normal bonus was a de-fleet bonus (often referred to as a demonstrator or demonstrator support bonus) which was paid to the dealer provided the terms of the demonstrator plan was met.

71. The line of supply referred to the invoice route; the payment of a retrospective amount in respect of some of the cars did not always follow the same route as the invoice for the vehicle. In such cases the payment of the bonus was said to have followed a different line of supply. Prior to *Elida Gibbs* HMRC took the view that if a manufacturer made a payment to someone other than the person invoiced for the goods then the payment could not be a discount to the price of the goods i.e. the manufacturer had not sold the goods to the person to whom the retrospective amount was paid.

72. The documentation used could affect the balance of probability of an error arising in the dealer's records. The procedures and documentation used were usually determined by a manufacturer. A range of documents could be used to pay bonuses to dealers; e.g. credit notes invoices from the dealer and self-billed invoices raised by the dealer. A visit report from 2002 exhibited by Mr Lewis showed that persuading manufacturers to use the correct documents remained a problem for HMRC long after the supply position was clear. Changes to the line of supply could also affect the

documentation used; some manufacturers considered the issue of VAT on bonuses and introduced arrangements to minimise exposure of the dealer to that VAT.

73. HMRC's view where a bonus did not follow the line of supply was that it was a payment for a supply of services which gave rise to output tax. As such, a dealer was expected to declare each sale and output tax on it on its VAT return.

74. Mr Lewis noted that if the dealer was unaware of the VAT issues surrounding such payments, he may have considered the bonus as a reduction in the price of the car and treated it as such in his VAT records. If a dealer reduced his input tax, instead of accounting for output tax, the net amount due would be the same. Provided the VAT was seen as properly due, the result would be the correct amount of net tax due. When inspecting the records a VAT officer was unlikely to have taken any action to correct the position since there was no net under-declaration or over-declaration of tax.

75. Mr Lewis explained that it was likely that where a motor dealer raised a sales invoice and charged VAT for the bonus, or received a self-billed invoice from the manufacturer for the bonus, a VAT officer would expect the VAT shown to be posted in the VAT account of the dealer as the recipient would claim the VAT as input tax. If the dealer failed to post the VAT in a case where the recipient had a VAT invoice on which to claim input tax, it would give rise to an imbalance.

76. Self-billing was seen as a risk by HMTC as there was a higher risk of the recipient failing to declare the VAT since the documents may have bypassed normal sales systems and simply come into the business with the payment. Nevertheless, a compliant business should have accounted for both self-billing and a sales invoice in the same way.

77. In respect of credit notes, in some cases HMRC would see a supply of services with output tax due from the dealer but the manufacturer would have documented the payment by a credit note showing VAT. There would be no indication on the credit note as to how the dealer was to post the VAT; some may have posted output tax, some may have posted it as an input tax reduction and others may not have posted it at all on the basis that the VAT was a reduction to the VAT on the purchase invoice for the car which was not recoverable. Where the error arose as a result of an incorrect decision by HMRC, it was HMRC;s policy to accept that on the balance of probabilities that (unless there was evidence that the company was non-compliant) the VAT which should at the time have been posted to the VAT account was posted, that an error had occurred and pay the amount claimed subject to verification of quantum.

78. Where a supplier allowed a price reduction to his customer, the normal VAT treatment was to see a discount on the price of the goods. If a manufacturer issued a self-billed invoice for a discount, Mr Lewis noted that it would be an incorrect use of the document as would the supplier requiring the dealer to raise a sales invoice to him in respect of the discount. However, in either case, provided the documents showed VAT, HMRC accepted that a compliant dealer was more likely than not to have declared the VAT if that was the document used.

79. Mr Lewis exhibited circulars from manufacturers to dealers which advised them that where a discount such as a bonus was documented in a credit note, the dealer should not have posted the VAT on the credit note to his VAT account. If it did post the VAT shown on the credit note where the note followed the same line of supply as the invoice, Mr Lewis explained that unless there was evidence of misdirection it was not the result of an erroneous decision by HMRC but rather was a mistake.

80. It was the view of Mr Lewis that HMRC's central policy had been consistent: where the documentation of the bonus followed the same line of supply as the invoice for the car, the bonus was a discount. Where it did not follow the line of supply it could not be a discount. Where the bonus was not seen as a discount, either a taxable supply of services or a supply might exist, which was outside the scope of VAT. The application of HMRC's policy by traders and manufacturers was inconsistent.

81. Mr Lewis concluded that that a number of considerations were relevant in establishing whether there had been an error which gave rise to a potential overpayment including: whether the bonus was seen as a supply of services or a discount which depended on the line of supply; whether if it was a supply of services those services were seen as subject to VAT; whether if it was a discount the manufacturer and dealer agreed to affect VAT or not; whether an invoice, self-billed invoice or credit note was used to identify the payment and whether the accounting treatment given to credit notes by a dealer could be identified.

82. Mr Lewis also dealt with a number of specific points raised by the Appellant. The Elida Table showed no inconsistency between Ford and Hyundai: Ford's accounting document was accepted as demonstrating on the balance of probabilities that the dealer would have shown VAT as output tax on his return. Ford dealers should have been in receipt of credit notes from Ford as both the invoice for the car and the bonus came direct from Ford. The documentation was sufficient to create a balance of probability which lead to HMRC paying a claim and it would be unusual for a Ford dealer in receipt of a non-Elida bonus (1973 – 1985) to only have a claim accepted if the dealer provided evidence that he accounted for VAT. The Elida Table in respect of Hyundai showed a standard rated credit note issued by someone other than the person who invoiced the car to the dealer. The person entering the credit note into the VAT records would therefore not have a corresponding invoice and HMRC could form no firm view as to how a dealer would have treated VAT shown on the credit note. The documentation did not satisfy HMRC's requirements although it accepted that a pattern in the situation created a degree of probability in a compliant business.

83. In respect of the Appellant's earlier claim relating to Renault, the Elida Table showed the way payment was documented from 1992 and there was evidence as to how the Appellant dealt with payments from Renault in later periods which led to repayments being made. The repayments for later periods did not impact on earlier periods where no evidence existed as to whether the bonuses were Elida or non-Elida.

84. Mr Lewis' analysis of the evidence available demonstrated that there were at least 4 views of bonus payments:

- A discount on the price of the cars;

- A supply of services arose because the dealer performed services paid for by the manufacturer;

- A supply of services arose because HMRC saw the bonus as a payment which was not a discount but for which HMRC saw evidence deemed sufficient for there to be a supply of some sort;

- A payment for a supply of services arose because HMRC saw the bonus as a payment which was not a discount but for which there was insufficient evidence of a supply and was therefore seen as outside the scope of VAT.

85. Mr Lewis stated that beyond showing the conditions that had to be met to receive a bonus, demonstrator plans did not impact on determining the VAT liability of the payment.

86. The line of supply was the main determinant of whether HMRC would have decided that a supply of services existed and a discount did not. It could be used to see whether HMRC gave an incorrect decision which gave rise to statutory interest.

87. As regards the range of models used as demonstrators, only the largest dealers would be expected to stock at least one representative model from each range. The minimum number and type was determined by the overall unit sales targets set for each dealer.

88. In oral evidence Mr Lewis explained that in the early 1980s he assisted in the audit of some large motor dealerships and was in the team dealing with the assurance of General Motors. From 1994 Mr Lewis' team coordinated motor manufacturers and motor trade issues nationally and he became the manager of the Motor Trade Unit of Expertise giving advice within HMRC about the VAT affairs of the motor industry and liaising with trade bodies.

89. Mr Lewis exhibited a visit report from February 1995 relating to Gordon Lamb in Nottingham which indicated that the Appellant claimed input tax and charged output tax to the finance company. Mr Lewis agreed that the report showed that at the time of that particular visit VAT was not being recovered on demonstrator purchases for the periods examined.

90. He stated that in 1988 the SMMT was told that the line of supply was an important issue relating to VAT and that there was the possibility of bonuses being outside the scope of VAT prior to Elida Gibbs. Mr Lewis referred to the 1987 letter (which addressed fleet bonus payments) stating that the document was relevant as it contained the same policy as that for bonus payments and looked at the same issues; the common logic for both was the line of supply.

91. Mr Lewis told us that although HMRC's approval was required for the use of self-billed invoicing, it was apparent that in the past HMRC had given approval to manufacturers for self-billed invoicing for particular purposes but manufacturers

commonly added other parts of the business to the self-billing system and it was difficult for HMRC to persuade it to change its practice thereafter. He explained that following the introduction of VAT it took a number of years for officers to build up their knowledge and experience.

92. Mr Lewis accepted that from the dealer's perspective demonstrator plans were often identical whether an Elida or non-Elida situation existed and that line of supply may not have been a concept with which dealers were familiar as they would have been reliant on manufacturers.

93. Mr Hitchmough QC referred Mr Lewis to a letter from Peter Lagowski of HMRC to Mr Reid at KPMG dated 27 March 1997 which stated that the trader to which the letter related (Yorkshire Co-operatives Ltd)had "*correctly accounted for VAT*" in respect of its agreement with Peugeot, yet Mr Lewis had accepted that between 1981 and 1995 where a dealer accounted for VAT it had done so in error as the line of supply was direct. Mr Lewis explained that his colleague's assertion in the letter was incorrect and not in line with HMRC's policy as the Elida Table showed that there was a direct line of supply with Peugeot.

94. On behalf of the Appellant, Mr John Ireland, Director of KPMG LLP, a Chartered Accountant and Fellow of the Institute of Taxation, gave evidence.

95. Mr Ireland explained that since 1994 he had been involved in the submission of VAT claims in respect of bonus payments on behalf of a number of motor dealers. He had also worked extensively in VAT and the motor industry since 2007.

96. During the relevant period it was the practice of manufacturers to incentivise their franchised dealers to purchase demonstrator vehicles. The incentives mainly took the form of bonus payments. Conditions were attached to the payment of bonuses, for example the requirement to have the full range of current models or for the vehicle to be maintained in a clean condition at all times during the working day. In most cases the bonus was paid directly by the manufacturer to the dealer. The essential difference between Elida and non-Elida was that, in respect of Elida arrangement the dealer was supplied by a different VAT entity from that which paid the bonus (i.e. a finance company).

97. Prior to *Elida Gibbs* the policy of HMRC to the best of Mr Ireland's knowledge was that VAT was due on all bonus payments on the basis that they represented consideration for a taxable supply of services from the VAT registered dealer to the manufacturer. In support of that assertion he relied on a letter from HMRC to the SMMT dated 1 February 1978 ("the 1978 letter") which states:

"In the case of self-supplies by dealers I am afraid that we must maintain the general rule that discounts allowed subsequent to the time of self-supply cannot be taken into account, but if in a particular instance the trader were able to demonstrate to his Local VAT Officer that the additional discount represented a genuine retrospective price reduction, we would of course consider this on its merits."

98. Mr Ireland noted that a further reference was made by HMRC to that letter in a letter to the SMMT dated 24 October 1988 ("the 1988 letter") which states:

"…if an allowance is paid for a service performed by the recipient to the manufacturer, this may represent a taxable supply of services to the manufacturer. Again this cannot be seen as a contingent discount."

99. Attached to the 1988 letter was a copy of a document sent to the members of the SMMT in 1986 which did not differentiate between Elida and non-Elida cases.

100. Mr Ireland exhibited 2 demonstrator plans issued by Saab in 1989 and 1996. At the time of the 1996 plan, the arrangements changed from Elida to non-Elida which would not have made the manner in which bonuses were to be treated for VAT purposes apparent to dealers at that time. Any distinction would have been made all the more difficult to observe given that the obligations under the plan would have remained, in the main, identical.

101. It was therefore important for there to have been a published policy from HMRC in relation to the issue, if such a policy existed at that time. Mr Ireland was not aware of any published policy having been issued by HMRC during the periods in issue in this appeal.

102. Business Brief 16A/97 confirmed that, following *Elida Gibbs*, bonuses could be treated as discounts by manufacturers. Whilst not specified in the Business Brief, that envisaged the dealer becoming entitled to retain the VAT on such bonuses thereby creating an overpayment of VAT.

103. Mr Ireland noted that the ECJ decision in *Elida Gibbs* was concerned with a discount being given by the supplier to someone other than its immediate customer and by the same reasoning it appeared logical to conclude that the same analysis must also be true in relation to non-Elida situations. Mr Ireland was not aware of any document published by HMRC which differentiated between Elida and non-Elida bonuses.

104. On publication of the Elida Table HMRC first recognised that a distinction should be drawn between the VAT treatment of Elida and non-Elida bonuses. The guidance note states *"Where the documentation of these payments followed the supply chain of the cars, Customs' policy was always to treat them as a discount on the price of the car. No claims should arise in such cases."* Mr Ireland did not believe that this was HMRC's historic policy but rather claimed it was a completely new approach.

105. Mr Ireland drew attention to information contained in the Table which appeared inconsistent with HMRC's stated policy in that, in relation to Hyundai, the Table advised a dealer that there could be a claim under Elida notwithstanding the fact that the bonus followed the line of supply (and was therefore a non-Elida arrangement). A similar inconsistency was found with Ford.

106. Mr Ireland's experience of HMRC's position in dealing with claims other than the Appellant's was that in considering the likelihood of the dealer having originally

accounted for VAT on non-Elida bonuses, it should be assumed that dealers would not have accounted for VAT unless evidence to the contrary was provided.

107. The Appellant's claim in respect of Renault covers the silent period between 1989 and 1991. Similarly the Elida Table did not include any period in respect of Lotus and therefore the Appellant's claim from 1984 to 1990 had been treated as silent.

108. All of the dealerships contacted by Mr Ireland following the release of the Elida Gibbs judgment and introduction of the 3 year cap confirmed that they had been accounting for VAT on all bonuses received irrespective of whether they were Elida or non-Elida. Mr Ireland said he would have been surprised if very many dealerships adopted a different treatment. He concluded that in practice dealers were accounting for VAT on all bonuses whether Elida or not. Save for payments from Saab, HMRC allowed the Appellant's repayment claims submitted in 2000 and 2003 which demonstrated that HMRC was satisfied that the Appellant had accounted for VAT on all bonus payments.

109. Mr Ireland referred to two examples to support his recollection which involved clients of KPMG and his review of their claims. They contained records demonstrating that VAT had been accounted for. He also provided ten further examples of capped claims and correspondence where HMRC accepted that motor dealers had accounted for VAT and paid the claims, albeit the Elida Table noted that the arrangements were non-Elida.

110. He added that contrary to the original version, updated versions of the Elida Table HMRC indicated that no claim was possible in relation to Ford and Hyundai. However he was aware from his experience handling other claims that Ford claims were refused on the basis of the Table until some point subsequent to the final version of the Elida Table in 2006. HMRC accepted that claims would lie in relation to those non-Elida bonuses where there was evidence of an invoice or self-billing invoice as the accounting document for the payment of the bonus. In such cases HMRC was prepared to accept that the dealer would have accounted for VAT on the bonus albeit, in HMRC's view, as a result of an error by the taxpayer.

111. In respect of HMRC's note relating to a visit to the Appellant in February 1995, Mr Ireland accepted that where a dealer funded the purchaser of a demonstrator vehicle by way of HP no bonus claim would fall to be made. However analysis of the statutory accounts of the Appellant demonstrated that that was the exception rather than the rule and discussions with the representatives of the Company confirmed that as their recollection.

112. In support of the Appellant's claim Mr Ireland confirmed that he had examined all of the company's files and discussed its policy regarding treatment of demonstrator vehicles during the relevant period. In so doing he said he had no reason to believe that demonstrator vehicles were financed as suggested in HMRC's visit notes.

113. Mr Ireland did, however, accept that no one from the Appellant had provided evidence as to how it accounted for VAT at present or during the relevant period, nor had it produced any documents which showed that information. Mr Ireland did not go as far as to say that the Elida Tables were redundant but stated that there was no distinction between Elida and non-Elida situations and claimed it was merely a concept drawn up by HMRC in 2002 when faced with a deluge of claims.

114. He said he saw no reason to believe that the Elida Table was incorrect in respect of those cases where it showed that some demonstrator bonuses were paid without VAT where treated by the manufacturer as being outside the scope of VAT.

115. Mr Ireland agreed that the 1978 letter, which referred to the general rule regarding discounts, must be read as meaning bonuses, although he accepted that the letter made no reference to payment in return for demonstrator services or traders accounting for VAT on the discounts received.

116. In respect of the 1988 letter which specifically addressed self-supplies and the treatment of bonus payments, Mr Ireland was asked how he reconciled HMRC's ruling that credit notes were valid as the payments made were freely given contingent discounts with the Appellant's claim that HMRC required VAT to be accounted for on all demonstrator bonuses. Mr Ireland explained that it was uncertain whether the letter referred to demonstrator bonuses or another type of bonus such as volume bonuses. Although the letter referred to the line of supply, it did not make the distinction contended for by HMRC as the reference to non-Elida payments referred to bonuses other than demonstrator bonuses.

117. Mr Ireland agreed that the SMMT circular contemplated that a payment could sometimes be viewed as a special discount and sometimes as a payment for the supply of services.

118. In respect of the 1987 letter, which dealt with incentive payments to high volume purchasers, Mr Ireland did not accept that there was a parallel with demonstrator bonuses and drew the distinction that as more conditions had to be satisfied by a dealer in order to earn a demonstrator bonus, such bonuses were by their nature different to those for high volume purchasers where HMRC had in the past taken the view that they were outside the scope of VAT.

119. A document entitled Motor Trade Coordination Newsletter issued by the Motor Unit of Expertise and dated March 1995 referred to a specific manufacturer and the fact that HMRC had in the past agreed with that manufacturer that a non-Elida situation was viewed being outside the scope of VAT. Mr Ireland said that the Appellant's case was not that all demonstrator bonuses had VAT accounted for on them, but rather the overwhelming majority.

120. Mr Puzey took Mr Ireland to a number of specific examples, for example Fiat and Ford, where for certain periods the Elida Table showed that VAT was deemed to be outside the scope. Mr Ireland expressed doubt as to whether the Table was entirely correct and noted that certain periods post dated the claim period and therefore had no

relevance. A letter from VW to dealers dated 4 March 1998 set out the history of VAT treatment which up to 1996 was viewed as outside the scope and thereafter a credit note was provided which allowed the dealer to retain the VAT. Mr Ireland agreed that the document showed that no VW/Audi dealer would have accounted for VAT on the credit note.

121. A further example was highlighted by Mr Puzey which he claim demonstrated that BMW, in a letter to its accountant dated 28 June 1994, understood the distinction made by HMRC in respect of lines of supply. Mr Ireland disagreed with that claim and said that although HMRC may have distinguished between the Elida and non-Elida situation, there was no difference between the treatment of the two.

122. Mr Ireland accepted that there was confusion in VAT treatment of bonuses as a result of different accounting documents being used but said that where VAT was received by the dealer, irrespective of the document used, the dealer had no reason to do anything other than account for the VAT.

123. Mr Ireland accepted that he had not been present at a meeting which took place on 17 December 2002 at which Mr Lewis, along with HMRC, PwC, SMMT, General Motors, Deloitte & Touche, and RMIF representatives were present where there had been no dissent that HMRC had viewed the treatment of VAT differently depending on the line of supply. His recollection was that a colleague from KPMG had told him after the meeting that there had been mention of the distinction purportedly made by HMRC which both he and his colleague had not heard of before. In respect of the claims in which Mr Ireland was involved his experience was that no such distinction had been drawn by HMRC.

124. As to the issue of the visit report which showed that Gordon Lamb in Nottingham in 1995 were purchasing their demonstrators on finance, Mr Ireland accepted that that was the case for some demonstrators and therefore there would have been no overpayment of demonstrator bonuses. He explained that his analysis of the Appellant's accounts showed that was an irregular occurrence although there was no direct evidence to support his contention and he was unable to say whether it was possible that the same practice occurred in other dealerships across the country or to what extent. He stated that the Appellant's claim in respect of the silent periods had been arrived at by reference to a previous claim which had been agreed with HMRC; the original company records had not been used but the paperwork for the earlier claim had been carefully arrived at.

Case Law

125. We were referred a number of authorities, including:

- *Alberto Culver (UK) Ltd v HMRC* [2011] UKFTT 832 (TC)
- *Guide Dogs For the Blind Association v HMRC* [2012] UKFTT 687 (TC)
- *Dr I Syed v HMRC* [2011] UKFTT 315 (TC)

126. Alberto Culver involved a Fleming claim in respect of which the Appellant did not have actual evidence dating back to the period 1973 to 1997:

"It sought to establish its claim by providing evidence first from the year 2005, and then subsequently for the somewhat longer period from 2001 to 2005, that such reimbursements had been made in the whole of that period, and not claimed."

127. HMRC accepted that the evidence for the period 2001 to 2005 showed that actual reimbursements, and failure to claim input deductions were properly demonstrated. HMRC had rejected the Appellant's claim on the basis that a 1979 visit report referred to the fact that there had been some discussion about the input deductions in relation to the reimbursement of business mileage, and contended that it was likely that the Appellant would then have submitted claims in future, and made a back claim for the period between 1973 and 1979.

128. The Appellant contended that it had not made the relevant claims, and argued that it would have been very curious for claims to have been made in and after 1979 whereafter at some time before 2001 the company must obviously have changed its practice, and once again ceased to make the claims.

129. The Tribunal allowed the appeal, Judge Nolan stating:

"The compelling fact therefore appeared to be the point advanced by the Appellant, namely that it seemed inconceivable that the Appellant would at one time have made the claims, and then implicitly ceased to make them at some point prior to 2001. This seemed to us to be so unlikely that, whilst the Appellant had been remiss in not rectifying the position after the 1979 meeting, the great likelihood nevertheless was that the claims were now valid."

130. In *Guide Dogs for the Blind Association*, the issue was whether the Appellant paid investment management fees throughout the period 1973 to 1990? HMRC contended that the Appellant had not produced sufficient evidence to establish that taxable investment management fees were paid by it throughout the period of the claim. The Appellant did not produce any direct documentary evidence to show that it had paid investment management fees during the relevant period and there was no one working for the Appellant who could give evidence about the provision of investment management services in the 1970s and 1980s.

131. The Tribunal found the evidence on behalf of the Appellant limited in assisting it to determine the issue in the case:

"We found Mrs Aarvold a truthful and honest witness but her evidence was of limited help. As Mrs Aarvold acknowledged, her evidence amounted to no more than saying that GBDA incurred investment management fees during her period with the organisation, no one had ever said anything to her to suggest that there had been a time when GDBA did not pay investment management fees and so she assumed that GDBA had always incurred investment management fees."

132. The Tribunal commented:

"...in which Walton J observed...that once an inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer. Such a presumption is not the exclusive preserve of HMRC but is also available to taxpayers. It is, however, only a presumption and may be rebutted. We agree with the observations of the Tribunal in Dr I Syed v HMRC [2011] UKFTT 315 (TC) on this point at paragraph 38 that:

"In our view this quotation [from Jonas v Bamford] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A, it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present.""

133. The Tribunal allowed the appeal on the basis that Financial Statements for a number of years showed that the Appellant still had investments and investment advisors in 1987 which suggests that they never stopped providing investment management services and, from which the Tribunal inferred charging fees.

Discussion and Decision

134. Before we turn to the issues in this appeal we will set out our findings on the witnesses' evidence. Mr Lewis and Mr Ireland were both credible and professional witnesses who did their best to assist us. We preferred the evidence of Mr Lewis on the basis that we found his knowledge of HMRC's views at the relevant times and the practices within the motor industry to be direct; he had liaised with manufacturers and others within the industry and was responsible for compiling the information contained within the Elida Tables from information gathered from HMRC's records and external sources such as agents representing motor traders. Mr Lewis dealt with bonus payments throughout the relevant period. In comparison, we found Mr Ireland's evidence was confined to his role in acting as accountant for his clients and, although we accept that they were not an insignificant number, we found his evidence as to the records examined in respect of this particular appeal was limited.

135. We will now address each of the Appellant's arguments.

(i) <u>Whether the practice of HMRC at the relevant time was to treat all bonus payments as consideration for a supply of services by a dealer to a manufacturer on which a dealer should have (and therefore on</u>

the balance of probabilities would have) accounted for VAT irrespective of whether the bonus payment followed the line of supply.

136. We accept Mr Lewis' evidence, which we find as fact, that there existed a great deal of confusion at the relevant time as to whether, or how, VAT should be accounted for on demonstrator bonuses and that practices across the industry were inconsistent. We were satisfied that the confusion which existed both within the industry and HMRC had resulted in inconsistent, and on occasions incorrect, advice being given by HMRC to traders, such as the example highlighted in the letter from Mr Lagowski of HMRC to KPMG dated 27 March 1996.

137. We considered the various documents relied on by the parties. The Appellant argued that the general rule set out in the 1978 letter demonstrated that in the claim period bonuses could not have been treated as discounts as they would be *"discounts allowed subsequent to the time of self-supply"*. Whilst that may have been the general rule, the letter goes on to envisage (without specific examples being given) that there may exist circumstances in which "*the additional discount represented a genuine retrospective price reduction."* We accept that no specific reference was made to "the line of supply" however we were satisfied that at a time when VAT was still relatively new and phrases such as "line of supply" may not have been familiar, nevertheless HMRC was making a distinction in relation to self-supplied cars between an additional discount which could be seen as a genuine retrospective price reduction and discounts which did not reduce the value for VAT of the self-supply and the fact that different VAT treatments would apply.

138. In our view the 1988 letter draws a clearer distinction by HMRC; payments which did not follow the line of supply were specifically referred to as not being viewed as discounts and the letter went on to state that retrospective rebates which were directly referable to the supply of a vehicle would normally be accepted as contingent discounts. Whilst we noted Mr Lewis' acknowledgment that dealers may not have been aware of the line of supply issue, we accepted his evidence that manufacturers provided advice on the matter to their dealers and we infer that manufacturers were generally aware of the issue. The letter stated *"if an allowance is paid for a taxable supply of services...this <u>may</u> represent a taxable supply of services..."* (our emphasis) from which we were satisfied that HMRC envisaged situations which did not lead to treating the payment as a taxable supply of services.

139. We did not accept the Appellant's submission that the reference to a rebate earned retrospectively should be construed as meaning different types of bonuses which are distinguishable from demonstrator bonuses; to read the letter in such a way would be to ignore the context of the letter as a whole and we did not agree that we could read a distinction between different types of bonuses into the letter.

140. The SMMT memorandum dated September 1986 explained how various documents were used to record the payment of bonuses which led to different VAT treatments. Whilst the document makes no specific reference to lines of supply, it did

recognise that that there were two different types of treatment for a demonstrator bonus; a special discount or a taxable supply.

141. Business Brief 16A/97 referred to HMRC's *"common practice to treat the bonuses as the payment for a supply of services"*. We agree that there was no specific reference to "line of supply" but note that the purpose of the document was to address the consequences of incorrect VAT treatment by HMRC which had resulted from the "common practice". We also conclude that we could infer that a distinction was drawn by HMRC from the words *"discounts can be given by a supplier for his goods to someone other than his direct customer"* (emphasis added) which in our view indicated that HMRC accepted that discounts could be given to the direct customer which was an implicit reference to the line of supply.

142. We noted the Appellant's argument that given the conditions set out in demonstrator plans, a supply of services existed irrespective of the line of supply. However we concluded that the satisfaction of a condition or conditions in the demonstrator plan by the dealer did no more than serve to make that dealer eligible for the bonus and did not dictate how VAT on that bonus was to be accounted for thereafter.

143. The DCL letter is another example of the distinction which was historically made by HMRC as to treatment of bonuses depending on the line of supply. The letter set out clear examples of where there may have been incorrect tax treatment leading to possible under or over-declarations. Whilst we accept that this document appeared to have been distributed internally, we could not envisage a situation in which, given the evidence of communication between HMRC and the SMMT and Mr Lewis and those concerned with the motor industry, the distinction that was made by HMRC in respect of lines of supply would not have been disseminated to those affected.

144. Even if this was not the case, we were provided with a number of other documents which demonstrated that manufacturers were aware of HMRC's historic policy and the line of supply distinction. For example a letter from BMW (GB) Ltd dated 28 June 1994 states:

"Demonstrator Bonus Credit Notes

There has been much debate/correspondence concerning the treatment of Demonstrator Credit Notes and the associated VAT...The current state of play is as follows, insofar as we have determined it from HM C&E.

Where demonstrators have been financed by BMW Finance (GB) Ltd, HM C&E regard the "chain of supply" of car and credit note to be different, and would not allow the gross value of the credit to be offset. However since 1 December 1993 BMW Finance (GB) has been part of the BMW (GB) VAT group and for cars supplied on or after that date the gross amount of any bonus credit relating thereto can be deducted in arriving at the secondhand value...

I would point out that we are not convinced by the "chain of supply" argument and we are currently investigating ways of circumventing this ruling..."

145. We were satisfied that the examples set out above demonstrate that manufacturers generally were aware of and advised dealers as to the ways in which VAT could be accounted for or not, depending on whether the bonuses could be viewed as discounts.

146. In conclusion we found as a fact that the documentary evidence available to us, taken together with the evidence of Mr Lewis demonstrated that HMRC distinguished between how bonuses were paid and whether VAT was to be accounted for on them or not. We agreed with HMRC's contention that had no distinction been made by HMRC there would have been little or no purpose in compiling the Elida Tables, the purpose of which was to facilitate only those claims in respect of which bonuses had been incorrectly treated by HMRC, and that had no such distinction existed traders would not have based subsequent claims on the Tables. We did not, therefore, accept the Appellant's primary argument that no such distinction was made by HMRC, and we were not satisfied on the balance of probabilities that dealers would have accounted for VAT irrespective of the line of supply.

(ii) In the alternative, whether, where the *Elida* Table recognises that VAT will have been accounted for on bonuses received from a particular manufacturer, it can be inferred that VAT will also have been accounted for on bonuses received from that same manufacturer in the silent periods.

147. We should note that Mr Hitchmough accepted that this argument was not applicable to silent manufacturers on the Table where too little information was available to allow any proper inference to be drawn. Similarly Mr Hitchmough clarified that the argument could not be sustained in respect of Citroen and therefore we have not considered the submissions in respect of Citroen or silent manufacturers.

148. Our concern in respect of the Appellant's first alternative argument was that the approach regularly taken by manufacturers was not only inconsistent with each other but also varied over different periods within individual manufacturers. For those reasons we agree with the submission on behalf of HMRC that the Elida Tables provide "snapshots" of information which consistently changed.

149. Whilst we accept Mr Hitchmough's contention that information was available in respect of some manufacturers which covered a number of years, given the fact that we know from the Elida Table that manufacturers changed their practices, we could not be satisfied on the balance of probabilities that any continuity existed or that it was a safe or proper inference to draw, that where VAT had been accounted for in one period, it had also been accounted for during the silent periods.

150. By way of example, Fiat is shown on the Elida Table as using a number of different practices; until 1988 it was unknown whether the line of supply was followed but an invoice took the bonus outside the scope of VAT, from 1 October 1988 to 31 August 1992 a self-billing invoice which did not follow the line of supply was used, from 1 September 1992 to 31 March 1994 a self-billing invoice was used again but which followed the line of supply, from 1 April 1994 to 30 November 1995

a self-billing invoice which did not follow the line of supply was used; and finally from 1 December 1995 an invoice which did not follow the line of supply was used.

151. Our examination of the Elida Table led us to conclude that there were a significant number of manufacturers which changed their practices, including (with reference to the Appellant's claim) Alfa, Nissan, Saab and VW. In respect of VW we had the benefit of a circular from VW to dealer principals dated 4 March 1998 which outlined its practice of paying demonstrator de-fleeting bonuses by way of a VAT free credit note between November 1987 and August 1996 whereafter the credit note carried VAT which *"has been yours to retain"*. The Elida Table shows that prior to 1987 it had issued a credit note which did not follow the line of supply which could have potentially given rise to an overpayment. Given the changes to its practice and the fact that it was possible but by no means certain that VAT would have been accounted for, we were not satisfied, in the absence of any cogent evidence from the Appellant, that we could draw any inference from the evidence.

152. In respect of manufacturers such as Land Rover and Daihatsu there was simply too little information available from which we could safely draw any proper inferences.

153. For the remainder, such as Honda and Renault (which are relevant to the Appellant's claim) there was information available pertaining to a greater number of years. However we remain concerned given that the evidence available clearly demonstrated that some manufacturers were prone to change their practices for only short periods; for example Saab operated a number of different practices, including issuing an invoice from 1979 to 1980 whereafter it self-billed for only 2 years before changing its system again. We noted the Appellant's contention that the Saab example did not undermine its case as the periods which were outside of the scope of VAT do not relate to the Appellant's claim period. However we conclude that this ignores the point that there existed a clear lack of continuity and as a result of Saab's changes in practice, at times for only short periods, we could not be satisfied that a proper inference can be drawn.

154. Whilst we considered the manufacturers individually, we took the view that to reach an inference purely on that basis would be an artificial exercise which ignored the context of industry practices as a whole. For those reasons we conclude on the balance of probabilities that it would be unsafe to view a manufacturer in isolation and to infer that even where a manufacturer appeared to maintain a certain system for a period of time, it had done so in the silent periods.

155. We considered the authorities cited by the parties and we agreed with the principles set out therein. 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, 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.

(iii) In the further alternative whether, on the balance of probabilities, the Appellant in any event accounted for VAT on the disputed bonus claim.

156. As regards the second alternative argument put forward on behalf of the Appellant, the issues and concerns which we have outlined above are equally applicable, namely the absence of any direct evidence as to the Appellant's practice of accounting for VAT or not during the relevant period and the inconsistent approaches taken by manufacturers.

157. Mr Ireland accepted in evidence that there were circumstances in which the Appellant would not have accounted for VAT. For example where vehicles were leased back after purchase and resale. The visit report dated 15 February 1995 and 9 March 1995 recorded *"Demonstrators – these cars are purchased on finance. Input tax reclaimed from Nissan and then output VAT accounted for (at the same price) the sale to the finance company. No input tax is reclaimed on finance agreement..."* Whilst we noted Mr Ireland's evidence that the latter situation was not the Appellant's common practice and the fact that the visit report post-dates the Appellant's claim, the fact remains that there was no evidence before us upon which we could be satisfied as to the extent of such a practice or the period of time which it covered.

158. There was also evidence which demonstrated that other circumstances existed in which the Appellant would not have accounted for VAT, for example a letter from Saab to all dealers dated 16 May 1994 which stated:

As you are aware the question of VAT on dealer support monies has been somewhat complicated...Because demonstrator bonus payments...are deemed to be a credit note where the credit note does not follow the line of supply of the original invoice, these will be prepared on credit notes outside the scope of VAT."

159. We considered the Appellant's reliance on an earlier claim in 2009 relating to Honda which was paid by HMRC save for the silent period of 1978 to 1980. The records upon which that claim was based were not before us for examination and Mr Ireland did not provide cogent evidence as to any analysis or examination of those records which had been undertaken.

160. We examined the exhibits of Mr Ireland which included a claim letter from the Cooperative Wholesale Society to HMRC dated 6 January 2000 which had annexed to it a schedule setting out the amounts claimed as overpaid in respect of the Priory Motor Group. We were not provided with the source of the figures and Mr Ireland accepted in oral evidence that the records obtained from dealers and which formed the basis of the document may not have been complete. We found as a fact that the documents before us could not and did not provide a complete or accurate picture upon which we could be satisfied on the balance of probabilities that the Appellant had accounted for VAT in the silent periods.

161. In respect of the Appellant's reliance on its earlier Renault claims which were paid by HMRC, we had the benefit of a review letter from HMRC for the attention of Mr Ireland and Mr Lim, the Financial Director of Gordon Lamb Cars Ltd dated 22 December 2010 which set out the position:

"...I can confirm that this review only includes consideration of part of your claim entitled the "Renault claim" as per your request. Whilst the amount of £78,313 only relates to the...period 1992 to 1997, I have however also noted how consideration of the two relating claims affect the "Renault bonus" claim for the years up to 1992 and after 1997...

Your representative has specifically asked that a previous claim which has been accepted in respect of an earlier "Renault claim" be considered as evidence that this claim is payable. Furthermore your representative notes that a claim submitted for periods from September 1997 onward, was based on actual records. I have therefore considered our records in respect of the claim submitted in 2000 for the years/periods 09/97 to 03/00...

Our records do not confirm that this claim was in fact verified or based on actual records but I can confirm that an Officer who considered a later claim submitted in 2003 was of the same opinion as your representative and also agreed payment of the later claim on the basis that the earlier claim (2000) was based on actual records.

A second claim was submitted in 2003 and is detailed to also have included "Renault bonus" overpayments for the years 1994 to 1996. This claim was agreed based on the fact that on balance, the earlier claim for later periods evidenced the way in which you accounted for the bonus payments...I note however that the claim letter submitted by "Shorts" your representative at the time, dated 19th June 2003 specifically states:

"Unfortunately our client does not have any documentary evidence for a claim however we have based figures on the claim made by Ernst and Young, which was agreed."

A visit was carried out to verify the 2003 claim and a moderation exercise was also carried out...I am able to identify that the "Renault" part of the 2003 claim in respect of Elida/Bonus overpayments was limited to the years 1994 to 1996. Furthermore, as the claim included 1,581 Renault units out of 3,448 units making up the total units included in the claim, I am able to compare the 2003 claim with your current claim...for the same period...

I note that your current claim details a "Renault Bonus" overpayment in the amount of £48,910.47 compared to 26% of that amount agreed as due for the 2003 claim which amounted to £12,650 for the same period. The notes to the visit in respect of the 2003 claim, detail that claim was agreed on the provision of actual records at the visit but given the claim letter dated June 2003 it would seem that these may not have specifically related to the "Bonus" overpayments. The Commissioners however consider that on balance the visiting officer in this instance must have been satisfied

that the business had accounted for either output tax or input tax as indicated on the "Elida" table in column 3 or 4...

The 2003 claim was accepted on the basis of an estimated claim and as there were no records available to support that claim, HMRC have seen no evidence to support how the business accounted for the bonuses prior to 1997. The Elida Table only establishes errors that may have occurred from 1992 so they provide no information on which we can establish a balance of probabilities for years prior to 1992.

Therefore where you are unable to provide any actual evidence for the periods prior to 1992, we cannot accept that you are more likely than not to have made the errors stated in the claim..."

162. In light of the explanation set out above, which in the absence of any challenge we accept as an accurate reflection of the position, we conclude that we cannot be satisfied on the balance of probabilities that the Appellant had accounted for VAT. Whilst we acknowledge that the Appellant had evidenced its accounting for VAT in its 2000 claim for the period 1997 onwards, the second claim was not evidenced and related to earlier periods. The current claim dates back even further which in our view provides more scope and a higher likelihood for the Appellant having changed its practices between 1989 and 1991 (the current claim) and 1997 (the 2000 claim). Taken together with the fact that we do not know what evidence the Appellant provided in respect of the 2000 claim, the fact that in 2003 no evidence was available in support of its claim and the absence of any direct evidence from someone who had examined the evidence in 2000 we are not satisfied that the Appellant has discharged the burden of proof in respect of the silent periods.

163. The traders' claims (which do not form part of this appeal) relied on by Mr Ireland did not assist us in determining the issues in this case. There was no direct evidence before us regarding the details or basis of the claims and we conclude that it would be inappropriate to attach any weight to them in such circumstances.

Summary

164. We reject the three contentions of the Appellant. On the evidence available to us, both oral and documentary, we conclude that the Appellant has failed to discharge the burden of proof.

165. As a result of our findings on the substantive issues in this appeal we make no findings on the issue of statutory interest.

166. The appeal is dismissed.

167. 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.

J. BLEWITT
TRIBUNAL JUDGE

RELEASE DATE: 19 September 2013