Neutral Citation: [2022] UKFTT 00239 (TC)

Case Number: TC08559

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/00980

VALUE ADDED TAX – taxpayer in liquidation as an education provider – no refund of course fees to students made – output VAT repayment claim pursued – Article 90 of the Principal VAT Directive – whether there was 'a reduction in the taxable amount' – Regulation 38 of the VAT Regulations 2005 – conditions set in transposing Article 90 within Member States' margin of discretion – procedural and evidential requirements not met – in the alternative, a claim under s 80 VATA 1994 subject to the defence of unjust enrichment and time limit – ***appeal dismissed***

Heard on: 6 May 2022
Judgment date: 05 August 2022

Before

TRIBUNAL JUDGE HEIDI POON
MEMBER MICHAEL BELL

Between

LONDON SCHOOL OF ACCOUNTANCY AND MANAGEMENT LIMITED
Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Edward Mercer of Maddox Legal, instructed by Frost Group Ltd

For the Respondents: Michael Ripley, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant, London School of Accountancy and Management Limited ('**LSAM**') appeals against a decision by the respondents ('HMRC') dated 18 August 2016 whereby an adjustment for a VAT credit contained in the appellant's VAT return for the period ending 30 September 2012 ('09/12 period') was rejected.

2. LSAM is a limited company currently in liquidation; it was in the business of making supplies in higher education to students until 2012. The appeal concerns a claim by LSAM to reduce the 'taxable amount' for VAT purposes at a time after the company entered into administration for services said to have been invoiced to students but never supplied.

3. On the basis of the reduction in taxable amount, LSAM claimed that a VAT credit in the sum of £781,505.76 is due to be repaid by HMRC. The substantive issue for determination in this appeal is whether LSAM is entitled to the VAT credit so claimed as provided by domestic legislation implementing the relevant EU law.

4. Separately, the Notice of Appeal was lodged more than five months after HMRC's review conclusion letter (the appealable decision). HMRC do not object to the appeal proceeding despite the fact that it has been brought out of time. The parties' skeleton arguments have addressed only the substantive issue. The Tribunal exercised its case management powers and admitted the late appeal at the start of the hearing.

EVIDENCE

5. Mr Jeremy Frost lodged a witness statement, and was called as a witness for the appellant. He is joint liquidator of LSAM with Stephen Wadsted, both of Frost Group Limited, and authorised insolvency practitioners in the UK by the Insolvency Practitioners' Association. Mr Frost has provided a witness statement, which includes statements of opinion on his understanding pertaining to the interpretation of the relevant law and authorities. Mr Frost was called as a witness of fact, and we have set aside all his opinion evidence.

6. As to documentary evidence lodged for the appeal, the Hearing Bundle of documents of 614 pages comprises the parties' correspondence in the course of the enquiry, and subsequent to the lodgement of the appeal. Some of the documents referred to in Mr Frost's parol evidence has not been included in the bundle, such as the Statement of Affairs of LSAM as at 9 October 2012. We record aspects of his oral evidence without necessarily accepting the content as proven facts, since we have no sight of the actual documents, such as figures given in relation to the Statement of Affairs. (References are to HB/followed by internal pagination.)

7. To whatever extent that Mr Frost's evidence could have been relevant, we find his evidence largely unreliable, having regard to the evidential basis for the claim upon which he was cross-examined. We conclude that the legal basis and the quantum of the claim cannot be substantiated by reference to either Mr Frost's oral evidence or any documentary evidence.

8. On 31 May 2022, Maddox Legal lodged further documents (post-hearing) in relation to legislative changes in insolvency procedure with effect from 1 December 2020 to make HMRC a preferential creditor. The further documents produced are: (a) a covering letter by Mr Frost referring to certain sections of the Insolvency Act 1986 ('**IA1986**'), (b) the policy paper on 'HMRC as a preferential creditor' published on 30 November 2020 on 'GOV.UK' website, and (c) sections of IA1986 that were referred to by Mr Frost in his letter of 31 May. These documents were not included in the original bundle, and the Tribunal queried where they were in the bundle when Mr Frost made references thereto. The Tribunal did not issue any directions for their production; nor do we find the documents of relevance to the appeal on perusal.

LEGISLATIVE FRAMEWORK

9. Article 90 of the Principal VAT Directive ('PVD') is the successor provision of the former Art 11C(1) under the Sixth VAT Directive. Article 90 provides as follows:

> '1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member State.
>
> 2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

13. Section 80 of VATA, so far as relevant, provides as follows:

> '(1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of—
>
> (a) an amount that was not output tax due being brought into account as output tax, or
>
> (b) an amount of input tax allowable under section 26 not being brought into account,
>
> the Commissioners shall be liable to repay to that person the amount so paid.
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> […]
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> […]
>
> (4) The Commissioners shall not be liable on a claim under this section—
>
> (a) to credit an amount to a person under subsection (1) or (1A) above, or
>
> (b) to repay an amount to a person under subsection (1B) above,
>
> if the claim is made more than 4 years after the relevant date.
>
> (4ZA) The relevant date is—
>
> (a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;
>
> (b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;
>
> (c) in the case of a claim by virtue of subsection (1A) above in respect of an assessment issued on the basis of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(d) in the case of a claim by virtue of subsection (1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.

In the case of a person who has ceased to be registered under this Act, any reference in paragraphs (b) to (d) above to a prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be registered under this Act.

[…]

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

10. At the relevant time, reg 38 of the Value Added Tax Regulations 1995 (SI 1995/2518) ('**the VAT Regulations**') provided, inter alia, as follows:

(1) This regulation applies where–

(a) there is an increase in consideration for a supply, or

(b) there is a decrease in consideration for a supply,

which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.

(2) Where this regulation applies, both the taxable person who makes the supply and a taxable person who receives the supply shall adjust their respective VAT accounts in accordance with the provisions of this regulation.

(3) Subject to paragraph (3A) below, the maker of the supply shall–

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT payable portion of his VAT account.

(4) The recipient of the supply, if he is a taxable person, shall –

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT payable portion of his VAT account.

(5) Every entry required by this regulation shall, except where paragraph (6) below applies, be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the relevant taxable person.

(6) Any entry required by this regulation to be made in the VAT account of an insolvent person shall be made in that part of the VAT account which relates to the prescribed accounting period in which the supply was made or received.

11. Regulation 24 provides for the definitions relevant to reg 38, whereby:

'increase in consideration' means an increase in the consideration due on a supply made by a taxable person which is evidenced by a credit or debit note

or any other document having the same effect and 'decrease in consideration' is to be interpreted accordingly;

'negative entry' means an amount entered into the VAT account as a negative amount; …'

STATEMENT OF AGREED FACTS

12. The Statement of Agreed Facts ('SOAF') dated 14 January 2021 is as follows.

'**Background**

(1) The appellant, LSAM (in liquidation) carried out business as an education provider.

(2) The appellant was incorporated on 26 June 2003 as a limited company. The appellant provided higher education services to students on a commercial basis. The supplies of tuition were subject to the standard rate of VAT. Students were charged separately for associated course materials. No VAT was charged on the supplies of course materials on the basis that they were zero-rated for VAT purposes. Typically, students prepaid some or all of the fees for tuition and course materials and invoices were accordingly issued by the appellant.

(3) Following commercial difficulties, on 9 October 2012, the appellant entered administration and Frost Group Limited was appointed as liquidator. On 24 June 2013 the appellant moved from administration to creditors' voluntary liquidation.

(4) Between April and June 2015, the joint liquidators of the appellant purported to create 'credit notes' for supplies made to approximately 4,000 former students. The 'credit notes' were backdated to 30 September 2012. No repayments of the amounts in the 'credit notes' have been made. Further, Frost Group Ltd has indicated that former students are unlikely to receive full refunds (per its letter dated 19 October 2016).

(5) On 25 June 2015, a final VAT return was submitted by the joint liquidators for the period ending September 2012. The VAT return contained an adjustment which reduced output tax in the period by £782,505.76.

History of Proceedings

(6) Following correspondence between the parties, on 18 August 2016, the respondents rejected the output tax adjustment described at paragraph 5 above. On the same date, the respondents calculated an assessment of £782,505.76 in order to correct the VAT return for the period ending September 2012. The assessment was sent to LSAM on 13 September 2016.

(7) On 19 October 2016, the appellant first made a written claim to the respondents for a VAT adjustment in the sum of £78,505.76.

(8) Following further correspondence between the parties, by letter dated 12 April 2017, the respondents restated its decision that the appellant was not entitled to an adjustment for the period ending September 2012. A request for a statutory review was made by the appellant by letter dated 12 May 2017.

(9) By letter dated 24 July 2017, the respondents notified LSAM that a statutory review of the decision made on 18 August 2016 had been completed and its decision should be upheld.

(10) The appellant issued an appeal to the First-tier Tribunal (Tax Chamber) (the 'FTT') dated 15 January 2018 (stamped as received on 16 January 2018).

(11) On 18 April 2018, the respondents applied for the appeal to be stayed further to await the decision in the case of *Inventive Tax Strategies Ltd (in liquidation)* [2019]

UKUT 221 (TCC) ('*Inventive*'). The appellant objected to a stay. A hearing took place on 2 October 2018 and on 6 October 2018 the FTT granted the application.

(12) Following expiry of the stay, the respondents applied for the appeal to be struck out. This application was withdrawn on 20 March 2020.'

FINDINGS OF FACT

13. In addition to the Statement of Agreed Facts, the Tribunal makes the following findings of fact in relation to certain aspects of the evidence relevant to the substantive appeal.

Background to the 'deal' with CLC

14. From its incorporation in June 2003, a Mr Dakshesh Pramod Patel (FCCA) was the principal and shareholder director of LSAM, which had as its registered office at 4a Roman Road, London E6.

15. Frost Group was appointed as administrators on 9 October 2012. There was a 'deal' with City of London College ('**CLC**') to enable LSAM students to continue their studies. HMRC enquired into the financial arrangements between LSAM, CLC and the students, but neither party has relied on the facts as concerns the arrangements for making their case. For completeness, we note the following Head of Terms (doc/419) dated 22 September 2012, and signed by Mr Patel on behalf of LSAM, and by a Mr Shahzad Yousuf, Chairman and Academic Director of CLC.

16. In the Head of Terms document, LSAM was simply referred to as 'SAM', and CLC was referred to as 'Supplier' (probably in the sense of the substitute supplier of courses formerly offered by LSAM), and the terms are as follows:

> '1. Supplier will take over all the Students that are currently studying at SAM and ensure that every Student will be provided with the educational training Course material, lectures, examination centre, study facilities, study premises, in order that they may complete the course they had enrolled for at SAM.'
>
> 2. Supplier will not ask or request or demand that any student of SAM pay any Additional fees to them other than the Fees that they were or had to pay SAM in the future or fees outstanding, for the current courses they have enrolled with SAM.
>
> 3. Supplier will consider taking over staff that have resigned at SAM. Supplier will make arrangements with self employed Lecturers at SAM.
>
> 4. Supplier will pay £65,000 by latest Thursday 27 September in cleared funds to SAM.'

17. The actual agreement was made on 24 September 2012 under the heading of 'Supply of Goods and Services Contract', which would appear to be a contract of the type with standard terms for adoption, wherein CLC was referred to as 'the Customer', and LSAM was referred to as 'the Supplier' (somewhat confusing when CLC was the 'Supplier' in the Head of Terms). The roles of the parties as assigned in the standard contract would seem to be in accordance with the fact that LSAM would be the party receiving consideration in the contract. The standard terms for Liability were crossed out, and the price as stated in the agreement of £35,000 would have been overridden by the Heads of Terms.

Claim made by VAT Return for period 09/12

18. On a form VAT 100, Frost Group submitted a VAT return for the period 1 July 2012 to 30 September 2012, which was received by HMRC on 25 June 2015. The return was not only to reclaim input VAT on purchases, but also to claim a *refund* of output VAT purported to have been paid to HMRC on sales made with a net value of £3,721,619 (£3.72 million). The relevant

entries on the form are as follows, and it would appear that input VAT of £1,000 was allowed by HMRC, to arrive at the overall disputed quantum of claim at £781,505.76.

(1)	VAT due on sales	(744,323.83)
(2)	VAT reclaimed on purchases	38,181.93
(3)	Net VAT reclaimed	(782,505.76)

Queries of the claim

19. The claim was extensively queried by HMRC, and several issues were raised as regards the nature and the legal basis of the claim, the validity of the procedural mechanism adopted for making the claim, and the quantum of the claim. The responses from Frost Group fell far short of addressing any of these issues, which are summarised below.

Unjust Enrichment

20. In response to HMRC's request for information on the nature of the supplies made by LSAM, and the quantification of the VAT credit, Frost Group produced a spreadsheet calculation based on credit notes issued, and an extract from LSAM's accountancy records to show payment of the original invoices. By letter dated 15 April 2016, HMRC raised the issue of 'unjust enrichment' as follows:

> 'Section 80(3) of [VATA] provides that HMRC shall not be liable to pay a claim if to do so would unjustly enrich the claimant. It might be argued that it is the students, and not LSAM, that have the economic burden of the tax, and therefore to pay the claim would unjustly enrich LSAM.'

21. LSAM was invited to make representations on unjust enrichment, and by letter dated 10 June 2016, Frost Group replied as follows:

> 'Our claim is based on the VAT Regulations 1995 Section 38(6). … This has nothing to do with Section 80(3) or an unjust enrichment claim. VAT output has been declared. Service was not provided. A credit note needs to be raised.'

Email issue of Credit Notes

22. Frost Group replied to HMRC that as the basis for the claim, Credit Notes were issued to students by email for them to take action as an unsecured creditor by lodging a refund claim of any course fee paid which had not been utilised due to the non-delivery of the said course following LSAM going into liquidation. Mr Frost said that some 2,000 credit notes have been issued to potential claimants. An example of credit note (HB/576) shows the following details:

Credit Note	**VAT code**	**Amount**
Course: GAPIBM		
Sum Paid: £5,500		
Period: [left blank]		
Course not completed refund due Date left course: **08/12/2018**		Sum Paid £5,500
Net		£2,310.77
VAT at 20%		£462.15
Total		£2,772.92

23. The Credit Note identifies the student by a number (9763 in this case); no other identifying details such as personal name, date of enrolment, duration of the course are shown; the date of the Credit Note is 18 October 2016. (The peculiarity of the date the student supposed to have left the course is a *future* date, being more than two years after the date of the Note.)

24. LSAM de-registered from VAT on 11 October 2012, according to the date given on the Credit Notes. Potential claimants are to reply by email to Frost Group by completing the attached form entitled 'Proof of Debt -General Form' whereby the personal and bank account details of the 'creditor' are to be provided.

25. Mr Frost stated in his evidence that according to the Statement of Assets and Liabilities for LSAM (not produced), the figure for unsecured creditors stood at £550,000 which included two assessments by HMRC, one for corporation tax and one for VAT totalling £160,000. The net total of unsecured creditors (excluding HMRC) is therefore £390,000, which represents the total of '118 unsecured credit claims' from previous students of LSAM. When asked how the number 118 was established, Mr Frost said it was what 'Mr Patel believed it to be'.

Basis for quantifying the refund queried

26. It was understood by HMRC that the appellant would have issued credit notes with an overall net value of supply exceeding £3.72m in relation to the output VAT refund sought. Multiple questions were put to Frost Group to clarify the basis for quantifying the output VAT supposed to have been overpaid. Some of the questions raised by HMRC are noted from their letter of 25 November 2016:

(1) Of the credit notes sent by email, HMRC asked for the details of the numbers and recipients where issue of the email failed;

(2) Confirmation that no refunds have yet been made to the students, and whether it was the appellant's intention not to refund to the students the fee element;

(3) Course material was supplied to the students at zero-rate, yet the calculation of the claim has not attributed the overall receipt from students to any zero-rate element.

27. An examination of the spreadsheets produced to HMRC to support the alleged value of supply of some £3.72m in relation to courses that were said to be undelivered present the following patterns in relation to the value of supply. These spreadsheets are exhibited as HB/165-185; on each spreadsheet is the title 'Register in 2009' at the top left corner. Each spreadsheet contains 24 columns to form the data base of students identified by numbers and names, and their fee payment account summary.

28. The sampled Credit Note above was issued to student number 9763, whose details are on HB/154 (the 16th entry), and the relevant data in relation to the Credit Note include:

	Name [redacted]	**Reg Date**	**Start Date**	**Finish Date**	**Last Attendance Date**	**Total Months**	**Used Mths**
9763	S-xxx	14/03/2011	14/03/2011	28/02/2013	17/08/2012	24	17
Course Name	**Total Fees Agreed**	**Course Material @ 30%**	**Tuition Fee @ 70%**	**Total Paid**	***Fees Used***	***Fees Overpaid***	***VAT***
GAPIBM	5,500.00	1,650.00	3,850.00	5,500	***2,727.08***	***2772.92***	***462.15***

29. From the data input for student 9763, we infer the significance of the columns of information for the purpose of quantifying the sums of 'Overpaid Fees' of the circa 2,000 potential claimants, which collectively make up the overall quantum of the VAT refund.

(1) The start date and finish date refer to the duration of the course enrolled, and was for 24 months.

(2) The last attendance date of the student was in August 2012, so the student was said to have attended for 17 out of the 24 months.

(3) The student had paid the full agreed fees of £5,500, of which £3,850 was tuition fee subject to VAT at the standard rate.

(4) On that basis, the amount of 'Fees used' was calculated as 17/24 of £3,850, to equate £2,727.08.

(5) The unused fee should be the difference of £3,850 less £2,727.08; that is *£1,122.92*, and not the amount of £2,772.92 shown on the Credit Note, which is inclusive of the Course Material of £1,650.

30. When we look at the rest of the exhibits, the generic error is repeated regularly in the mechanism for quantifying the 'Fees Overpaid' by systematically including the Course Material element. For example, student 9035, (HB/163/first entry) total fees £6,000, course material £1,800, tuition £4,200, fully paid; last attendance 17/3/2011, 'used months' being 12 out of the 18 months of the course. The errors which follow are blatant, whereby:

(a) The fees 'used' were stated at £2,800 on the spreadsheet.

(b) The sum of the 'overpaid' fees that forms part of the claim is stated at £3,200, being the difference between the full fees and the calculation of used fees.

(c) The portion of tuition fees overpaid should have been 6/18 months of £4,200, which is £1,400 (instead of £3,200). However, contractually there would have been no obligation for LSAM to refund a student for any portion of overpaid tuition fee as in this case, where the student left on his own accord before the end of the course, and some 18 months before October 2012 when LSAM went into liquidation.

31. Further anomalies in quantifying 'Fees Overpaid' are noted, such as:

(1) Where a student had not fully paid the Total Fees Agreed, the 'Outstanding Fees' column registers the amount as unpaid. For example, the first entry on HB/155 for student 9840 had an outstanding fee £1,750 against total fees of £4,950, of which £3,465 was allocated to Tuition, and £1,485 to Course Material.

(2) The course duration was for 22 months, and last attendance was on 29/02/2012 (after 9 months into the course, and some 7 months before LSAM went into liquidation).

(3) The student had paid £3,200 when he left, presumably on his own accord, and LSAM did not seem to have pursued the outstanding fee.

(4) Yet, 9 months 'used' fees were being calculated by applying the fraction of 9/22 (months), against the allocated tuition fees of £3,465 (being 70% of the total £4,950, without counting the 30% for course materials as in other calculations), to arrive at £1,417.50 as 'used', and the difference of £1,782.50 as 'overpaid'.

(5) However, the fact that the student did not pay all of the £3,465 Tuition Fees was not factored into the calculation; nor the fact that of the £3,200 paid, £1,485 would have been absorbed by the Course Material costs, leaving only £1,715 against Tuition. If the sum of £1,417.50 was established as the 'used' fees for 9 months, that would only leave *£297.50 overpaid* (not the £1,782.50 that formed part of the claim).

32. The above example of student 9840 with a last attendance date (in February 2012) well before the date of LSAM going into liquidation is far from being the exception. The columns for Registration, Start Date, and Finish Date of the majority of the entries in the exhibits show dates prior to LSAM going into liquidation in October 2012, which would suggest that these students had fully completed, or left on their own accord before the end of, their courses. See for example, HB/166 where almost all of the students were registered and started in 2009, (with a few exceptions in early 2010), and their 'Finish Date' fell within the range from August 2010 to August 2011, with one exception being June 2012.

33. For completeness, we note that the credit notes were all raised in 2016, more than a year after the submission of the VAT return for 09/12 in June 2015. The 2016 credit notes were supposedly issued after HMRC's response to samples of former credit notes, purported to have been raised in April and June 2015 to approximately 4,000 former students prior to the 09/12 VAT return (see SOAF para 4). A sample of the 2015 credit notes (HB/215) in the form a list of 8 names under the heading 'Students who contacted Frost Group Limited for a refund', and against each name is the 'Date Contacted' which ranged from October 2012 to October 2013. HMRC did not consider that the sample credit note showed the necessary details to be valid as a credit note. The 2016 credit notes were then raised supposedly to redress the defects.

LSAM's contract with students

34. The application form to a course came with a 'Learning Contract' (HB/415-418), setting out the terms and conditions over four pages. The student was to sign and date the contract and by so doing became bound by the terms. We note the following terms on page 3 of the Contract:

(1) Under 'Fee Policy' it is stated:

> '4. Enrolment for the course, together with the payment of deposit/full fee, creates a binding agreement, for the duration of the course and is non refundable under any circumstances especially when VISA are refused.'
>
> '9. If the school has provided you with UKBA VISA letters / CAS then please note that FULL FEES will be payable whether the visa is refused or you decide to go to another college, ….'
>
> '10. Once letters of course confirmation have been issued for confirming full-time status there is no refund what so ever even if you have applied for a change to your student visa status to any other statuses …'

(2) Under 'Refund Policy', it is stated, inter alia:

> '3. We also reserve the right to suspend or dismiss any student <u>without refund of fees</u> in the event of misconduct or unsatisfactory attendance/progress.' (emphasis added)

(3) Under 'Attendance Policy', it is stated, inter alia:

> '2. Failure to attend 2 consecutive weeks (without notice) will result in London SAM notifying the UKBA, dismissal from the college and forfeiture of any remaining fees.
>
> 3. We are required by law to record your attendance and supply any or all details when requested by Home Office or any other Law Enforcement agency in the UK.'

APPELLANT'S CASE

35. Mr Mercer submits that consequent on the fact that the appellant went into administration in October 2012, there had been 'a total failure of consideration', and on that basis, an entitlement to the VAT credit arises.

36. Mr Mercer sets out the statutory basis of the appellant's claim by reference to VATA:

(1) Section 4 of the Act sets out that VAT is charged on the supply of goods or services in the UK where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) Section 6 deals with the time of supply, whereby a supplier's services shall be treated as taking place at the time when the services are performed, subject to the deeming by the statutory wording under s 6, whereby if a VAT invoice is rendered or a payment

is received before the applicable time (of performance), then the supply shall be treated as taking place when the invoice is issued and before the payment is received.

(3) It is submitted that the provision under section 6 'is simply to deal with the timing of payment of monies to HMRC' and 'cannot affect the legal analysis of what actually happens' (i.e. whether or not a supply is actually made).

(4) Section 7 concerns the place of supply, and the place of supply is the UK as the appellant as a supplier was based in the UK.

(5) Under s 19, the supply is for a consideration in monetary value, which is to be taken as such amount with the addition of VAT to be equal to the consideration.

(6) Section 25 deals with proposition that if the VAT reclaim exceeds the input tax, a reclaim shall be made.

(7) Under Schedule 11 of the Act, VAT is in respect of a supply, accounted for and paid for, by reference to the time when consideration for the supply is received, whether or not it has been supplied.

37. In relation to the statutory mechanism for making the claim, Mr Mercer submits that the specific reference in reg 38(6) to 'an insolvent person' is directly relevant to this case because:

(1) Reg 38(1)(b) relates to a decrease in consideration, and provides that the taxable person shall adjust his VAT account in accordance with the provisions of the regulation.

(2) In the case of a decrease in consideration, the trader shall make a negative entry in his VAT account.

(3) According to reg 38(4), 'the recipient of a supply in the case of a decrease has a negative entry for the amount of relevant VAT allowable portion of his VAT account'.

(4) 'The specific reference in reg 38(6) to insolvent persons is in relation to the prescribed accounting period, one in which the supply was made or received.' (emphasis original).

(5) The factors to state are the obvious, that there should be a supply – in this case of services; and by reg 38(6), a reference in respect of prescribed accounting periods is to those in which supply was made or received.

38. Looking at the Value Added Tax Directive 2006, Mr Mercer avers that 'it simply confirms the views set out above'; that the Directive is interested in the VAT payable in respect of supply, and that there are particular rules in relation to price reduction in Article 90, dealing specifically with cancellation, refusal, or total or partial non-payment, on the part of the person to whom services are supplied.

39. Mr Mercer submits that it is not necessary in the present case to go through the rules on credit notes, time limits and so on, which are not in the VAT Notice 700/56 on insolvency, because they are 'merely the mechanics', and do not in essence affect the outcome of this case.

40. The 'short point' taken by Mr Mercer from *Inventive* is 'whether the existence of the contractual obligations is of itself sufficient to result in a reduction in the consideration subject to VAT', and 'no actual refund needs to be made'. Mr Mercer distinguishes the facts of the present case from those in *Inventive* and submits that:

(1) The claims here are in respect of VAT on sums for services which were 'never supplied'. It is not a price reduction in real or meaningful sense of the phrase, but 'a total failure of consideration'.

(2) In *Inventive,* there is a contractual claim for recovery of money paid for a supply which had taken place, contrary to the present case. It is not merely a matter of breach of contract, but it is a matter of 'restitution of money paid and received' by trite law analysis.

(3) *Inventive* does not apply to the present case because it was not a cancellation on the part of the supplier, since there simply was not a supply. For the purposes of accounting for VAT, that 'a supply was deemed is trumped by the reality being there was no supply'.

41. In terms of 'commercial reality', Mr Mercer submits that 'the only way to deal with the situation that would have made sense to HMRC was to issue credit notes'. It is averred that issuing those credit notes 'effectively' highlighted that there had been 'a failure to supply for which the students could reclaim, except that there was no money in the pot'. Further, it is submitted that 'if the claim is successful there will be money in the pot from which a partial repayment can be paid' to all unsecured creditors. It is emphasised that this is not a case where there is a repayment of consideration for services, but that there was no service; there was no reduction in price; there was no delivery.

42. Citing *Barlin Associates Ltd v HMRC* [2014] UKFTT 957 (TC) ('*Barlin*') Mr Mercer submits that there is a lacuna in the legislation for LSAM to find some means to gain a refund, and that the appellant relies on the VAT Tribunal's decision in *GMAC* (VTD 17990) which found in favour of the taxpayer in relation to the three-year limitation issue.

HMRC'S CASE

43. HMRC's primary position is that there has been no overpaid tax and there is no entitlement to a reduction in the taxable amount. If this is accepted, the question of quantifying any claim does not arise. Mr Ripley submits that the appeal must fail for three sets of reasons.

(1) Firstly, LSAM does not meet the basic requirements for a reduction in the taxable amount because it has received consideration and not made any refund to customers.

(a) Under Art 90, an actual refund is required to reduce the taxable amount: *Freemans Plc v C& E Comrs* (Case C-86/99) ('*Freemans*'); *FIRIN OOD v Direktor na Direktsia Obzhalvane* (Case C-107/13) ('*FIRIN*'); *K E Entertainments Ltd* [2020] UKSC 28 ('*K E Entertainments*') are authorities supporting this.

(b) LSAM have acknowledged that no refunds have been made (SOAF at [4]). It is also insufficiently clear that any refund of VAT by HMRC to LSAM will in fact be paid to students (and if so, how much).

(c) A vague indication that a dividend may be payable is not sufficient: *Inventive*. Accordingly, although HMRC consider that actual repayment of consideration is required to support an output VAT refund claim, whether that is so is a moot point in this appeal for the same reason that it was moot in *Inventive*.

(2) Secondly, even if LSAM might in principle have been able to obtain a reduction in the taxable amount, LSAM did not fulfil the formal requirements for a refund, including a failure to make a timeous claim.

(a) Regulation 38 cannot apply unless there has been a 'decrease in consideration' (or price reduction) for a supply that has taken place. However, the basis for LSAM's appeal is not that there was a price reduction, but a failure to provide the services, which would appear to be a 'cancellation'. Regulation 38 is not concerned with cancellations.

(b) The 'credit notes' were raised in 2016 after HMRC had expressed views on the shortcomings of the earlier ones raised in April to June 2015. The credit notes

were therefore raised more than a year after the submission of the VAT return in which a credit was taken, and after HMRC had already rejected the adjustments. Such credit notes could not have the effect of retrospectively validating the VAT return and invalidating HMRC's decision.

(c) Even if Reg 38 were in point, LSAM would have been required by Reg 38(6) to adjust its VAT account relating to the prescribed accounting period in which the supply was 'made or received'.

(d) LSAM's claim was simply to make an adjustment in VAT return for the 9/12 period, which is the mechanism for a claim under s 80 VATA for overpaid VAT.

(e) A section 80 claim would have been needed to give effect to adjustments for earlier prescribed accounting periods. Such claims are subject to a 4-year limitation period and unjust enrichment (see 80(3), (4)-(4Z)). No timeous claim appears to have been made.

(3) Thirdly, and insofar as the quantum issue may be relevant, HMRC have raised concerns with LSAM about its calculations of the 'overpaid' VAT, which appear to overstate the sums in question. HMRC's Statement of Case made clear that LSAM must prove the correct value of any reduction in the taxable amount. Despite this, HMRC are unaware of any adequate evidence having been produced to corroborate LSAM's claim.

DISCUSSION

44. The appellant bears the burden of proof in relation to the legal and evidential bases that a refund of the output VAT in the quantum is due to be paid. Having heard both parties' submissions, we determine the appeal by considering the issues raised in respect of: (a) the legal basis for an entitlement to an output VAT repayment; (b) the procedural basis for making such a repayment claim; and (c) the evidential basis for ascertaining quantum.

Legal basis for entitlement to output VAT repayment

Interaction of Art 90 with Art 73

45. Whilst the appeal has focused on the application of Art 90, the Upper Tribunal in *Inventive* has stated that Art 90 and Art 73 are to be read together and construed consistently with each other. Article 73 provides as follows:

> 'In respect of the supply of goods or services, […] the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

46. For the avoidance of doubt, and on this appeal, we note the Supreme Court decision in *K E Entertainments* at [44] that 'there is no difference in meaning between the term "price" in article 90 and the term "consideration" used in article 73'; (see also *Boehringer* at [45]).

47. There are two aspects to Art 73; the first deals with a situation where a supplier 'obtains' consideration, and the second deals with a situation where consideration is to be obtained in the future. The first scenario envisaged by Art 73 applies in the present case, by virtue of LSAM's Fee Policy, which stipulates that '[e]nrolment for the course, together with the payment of deposit/full fee, creates a binding agreement' (§34(1)).

48. The Fee Policy further provides that 'FULL FEES will be payable whether the visa is refused, or you decide to go to another college' (capital original, see §34(1)). In fact, fees were payable in full before LSAM would grant the Visa Letter to customers in support of their visa applications. The second scenario envisaged by Art 73 therefore does not apply in the instant case, because the consideration was obtained upfront, and no part of the consideration was to

be obtained in the future as being contingent upon any condition, such as the grant of a VISA. Where a student was allowed to start a course with fees outstanding, that would be by way of special dispensation and did not alter the analysis that fees were contractually payable upfront.

Case law definition of 'taxable amount'

49. In *Lombard Ingalatlan Lizing Zrt* (Case C-404/16) ('*Lombard*'), the Court of Justice of the European Union ('**the CJEU**') has held at [26] that Art 90(1) 'embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received'. The corollary is that 'the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received'.

50. The Upper Tribunal in *Inventive* accepts, as a general proposition, that the definition of 'taxable amount' in Art 73 is focusing on the 'consideration actually received' for the supply, having regard to the CJEU judgment of in *International Bingo Technology SA v Tribunal Económico-Adminstrativo Regional de Cataluña* (Case C-377/11) [2013] STC 661 ('*International Bingo*'), wherein it is stated:

> '25. Next, it must be borne in mind that it is settled law that the provision [i.e. Art11A(1)(a) of the Sixth VAT Directive, predecessor of Art 73 of the PVD] must be interpreted as meaning that the taxable amount for a supply of services is represented by the consideration actually received for that supply …'

51. Furthermore, the CJEU in *International Bingo* stated at [29] of its judgment that where a supplier receives payment in cash, and that cash is freely at the supplier's disposal, that can only be treated as having been 'actually received' for the purposes of defining 'taxable amount'. This statement by the CJEU in *International Bingo* is subject to the qualification apposite to gambling transactions, where the sum received by the taxpayer could be clearly separated into a part which the taxpayer was entitled to retain, and a part which was not.

52. Outside the context of gambling transactions, the same approach as in *International Bingo* was followed by the CJEU in *Finanzamt Bingen Alzey v Boehringer Ingelheim Pharma GmbH & Co KG* (Case C-462/16) ('*Boehringer*'). For the purposes of this appeal, *Boehringer* specifically addressed the interaction between Art 90 and Art 73 at [45] as follows:

> ' … even though in [*International Bingo*] the Court's analysis concerned the interpretation of Article 73 of the VAT Directive, the interpretation that the judgment provided of the notion of "consideration" laid down in that provision may apply in respect of the words "where the price is reduced" used in Article 90 of the directive, given that both [Article 90] and Article 73 of the directive address the components of the taxable amount.'

53. It is for this reason that Art 90 is to be construed together with Art 73, since Art 90 sets out 'an inverse position to that set out in Art 73' as described by the Upper Tribunal in *Inventive*. By 'inverse position', it means Art 90 is there to provide for 'a reduction in taxable amount' in order to 'undo' the effect of an obtaining of consideration under Art 73.

Case law principles on reduction of taxable amount

54. The legal basis for an entitlement to output VAT repayment is derived from Art 90 of the PVD, which provides that '*the taxable amount shall be reduced accordingly*' in the case of: (i) cancellation, (ii) refusal or (iii) total or partial non-payment, or (iv) where the price is reduced after the supply takes place.

55. The factual matrix in *Freemans* is instructive for present purposes. Freemans was a mail-order business, and it sent catalogues to its 'agents' who made purchases, either as agents for others, or for themselves ('Agents' Own Purchases' or 'AOP'). Agents' own purchases are paid for in instalments, and each agent had a separate credit account. Each time an agent made

a purchase for herself, an AOP discount equal to 10% of the purchase price was credited to that account. Each time an agent made a purchase on behalf of another, a 10% commission was credited to that account.

56. The CJEU in *Freemans* was required to consider whether Art 90 applied in relation to the contractual relations giving rise to the supply which had provided from the very beginning for the grant of a discount, as distinct from the so-called 'normal case' (as referred to by Freemans) where the contractual relations entered into directly between two contracting parties are modified subsequently. In drawing such a distinction, Freemans relied on *Elida Gibbs Ltd v C&E Comrs* (Case C-317/94) [1996] STC 1387 ('*Elida Gibbs*').

57. *Elida Gibbs* concerned coupon schemes operated by a manufacturer of toiletries under which consumers who presented a coupon (distributed by retailers or cut out from a newspaper or magazine) when buying a product in a shop received discount off the purchase price. The prices charged by the manufacturer to wholesalers, and by wholesalers to retailers were not affected by the coupon schemes, but retailers who accepted coupons from consumers could get the value of the coupons refunded to them directly by the manufacturer. Even though there was no direct contractual relationship between the manufacturer and the retailers to whom the sums of any coupon redemption were paid, the CJEU held that the manufacturer could deduct the sums which it refunded the retailers in calculating its taxable turnover for VAT purposes. The fact that the refunds were paid, not to the manufacturer's own customer but to a party further down the supply chain, was held not to matter.

58. On the issue whether Art 90 is engaged by the grant of a discount at the very beginning of the contractual relations giving rise to the supply, the CJEU in *Freemans* concluded at [33]:

> 'In that regard, it suffices to state that the wording of Article 11C(1) of the Sixth Directive [i.e. predecessor of Art 90] does not presuppose such a subsequent modification of the contractual relations in order for it to be applicable. In principle, it requires the Member States to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person … there is no indication that in its judgment in *Elida Gibbs* ... the Court wished to restrict the scope of application of that provision. On the contrary, it is apparent from the facts of the *Elida Gibbs* case that there had been no modification of the contractual relations. Nevertheless, the court held that Art 11C(1) of the Sixth Directive was applicable.'

59. The CJEU in *Freemans* then considered the alternative argument whether Art 90 applied at the point at which the AOP discount was credited to the agent's account, or at the alternative point when an agent actually used those sums. The conclusion reached by the CJEU is at [35]:

> 'However, at the time when it credits the amount in question to the agent's account established in its books, Freemans has not yet actually paid the AOP discount to the agent. Where the agent does not use that amount, Freemans disposes of it by adding it to its profit and loss account. It is only when the customer uses the AOP discount that the discount is actually paid, so that as Art 11C(1) of the Sixth Directive provides, the taxable amount for the corresponding purchase must be reduced accordingly under conditions to be determined by the member states.'

60. In *Inventive* the appellants all carried on tax consultancy businesses which involved the selling of tax avoidance schemes to customers, with a particular emphasis on stamp duty land tax ('SDLT') schemes. The 'Letters of Instruction' used to contract with scheme users all contained an undertaking by the appellants to refund fees to their customers if the underlying SDLT scheme was 'unsuccessful'. It is common ground that the appellants were contractually

obliged to make significant refunds. In terms of the relevance of *Freemans* to the facts in *Inventive,* the Upper Tribunal made the following observations at [50]:

> '… the CJEU does not determine that, where consideration has been obtained, a contractual obligation to repay all or part of that consideration is necessarily insufficient to meet the requirements of Article 90. The CJEU does not draw any distinction of principle between "contractual rights" on the one hand and "actual payments" on the other. Rather, the CJEU concludes that because an agent could still lose the amounts credited to her account (for example if she did not claim them in time) there is no payment of the AOP discount to her at that point. There is no express analysis in paragraph [35] of whether an agent acquired any contractual right to a credit before the point at which she used that credit. That perhaps suggests that a contractual right in itself would not be enough to engage Article 90 since, if it were, the CJEU might be expected to refer to the precise time when the contractual right came into existence. However, while that offers tangential support for HMRC's arguments, we do not consider *Freemans* to be determinative of this point.'

61. As for the tribunals in *Inventive,* no CJEU authorities directly address the issues in front of us, but the principles derived from case law by the Upper Tribunal in *Inventive* provide a strong steer in the present case, as summarised below.

(1) Article 90 could only apply in the circumstances if the obligations of the appellant to make refunds, having received payment from their customers, results in a situation where 'the price is reduced': at [57].

(2) Considerations of economic and commercial reality are of particular importance in a cause such as this. The task is to identify whether, because of a reduction in price, part or all of the consideration has not been received by the taxpayers: at [58].

(3) The CJEU's decision in *Freemans* reflects that the total price fell to be treated as consideration and VAT charged (and accounted for) accordingly because the agent had to perform some further act in order to claim the 10% AOP discount, and because that act might never be performed (leading to Freemans being able to keep the 10%): at [59].

(4) In *International Bingo,* VAT was chargeable only in relation to that part of the stake money which, in reality, was the taxpayer's. The rest of the stake was not truly its money to be dealt with as it thought fit, and not to be treated as consideration: at [59].

(5) In *Elida Gibbs,* the Court held that the VAT for which the taxpayer should account should not reflect receipt of more than the taxpayer actually received, which reinforces the emphasis on commercial realities: at [59].

(6) The commercial realities in *Inventive* are that the appellants have made no actual refunds. In fact, there will be no repayment of the price, or at least it cannot be demonstrated that there will be: at [60].

(7) From the customer's point of view, there would be no reduction in the price in practice: at [60].

Was there a reduction in taxable amount?

62. Applying case law principles in turn as summarised above to the facts in the present case, we find as follows:

(1) From the contractual relations giving rise to the supply, it is clear that the appellant was under no obligation to make any refunds under any circumstances. The Fee Policy at paragraph 10 stated categorically that: 'Once letters of course confirmation have been issued', 'there is no refund whatsoever' (§34(1)). All of the 2,000 potential claimants

listed on the Register 2009 spreadsheets would have received such letters of course confirmation to have their names on the register, which meant no refund would accrue on any contractual basis for there to be a reduction in price in accordance with Art 90.

(2) The economic reality to construe a 'reduction in price' is from the perspective of the taxpayer not having received the full sum of consideration as agreed with each customer. LSAM received the price as agreed with a student for enrolling on a course upfront, no more, no less. Insofar as accounting for output VAT, LSAM paid over output VAT on the *actual* course fees received (excluding course material element).

(3) Even if the validity of the credit notes were to be accepted at face value, the credit notes could not commute into being a reduction of taxable amount. Of the 2,000 credit notes purported to have been issued, no evidence shows that these potential claimants had 'performed some further act' in relation to the supposed credit claims: *Freemans*.

(4) In relation to the historical consideration on which output VAT had been paid, the appellant had the monies at its free disposal, and no part of any consideration had been stipulated as to be retained for contingent refund to the students to give rise to a reduction in taxable amount: *International Bingo.*

(5) To any extent where the course fees had not been fully paid up, and had featured as 'outstanding' fees on the Register, LSAM would not have accounted for output VAT thereon to render the non-payment of those fees a reduction in the 'taxable amount', for the simple reason that the outstanding element did not give rise to a taxable amount in the first place. The output VAT accounted for by LSAM would not have included the sums of outstanding fees; the commercial reality was that LSAM had paid VAT only on what it had actually received: *Elida Gibbs*.

(6) The economic and commercial realities are that the appellant has made no actual refunds to any of its students. While Mr Frost has indicated that a student claimant would rank as an unsecured creditor, that is 'a vague indication' and is not sufficient to equate to a certain prospect of a refund for there to be a reduction in taxable amount: *Inventive*.

(7) For a reduction in price to take place, the appellant would have to be in funds to repay the students not only the VAT element of the course fee, but the related proportion of the actual course fees. In other words, the appellant would have to be in funds to the tune of £3.72m (and had actually repaid the customers) to meet the requirement of 'reduction in the taxable amount' for the related output VAT to be an economic reality. The essential point is, from the students' point of view, there would be no reduction in price in practice, unlike the customers in *Elida Gibbs*.

63. The appellant's appeal therefore fails. There is no legal basis for an entitlement to a VAT repayment under Art 90 because there was no reduction in price resulting in part or all of the consideration not having been received by the appellant. There was no provision for price reduction within the contractual agreements, nor any post-contract adjustments to alter the factual matrix that the *actual* consideration received by the appellant would be repaid to the students to result in a reduction in taxable amount for the related output VAT to be repayable.

64. The appellant's submission does not address the reduction in taxable amount directly, and instead focuses on what is termed 'a total failure of consideration'. By that, we understand that it is argued for the appellant that there had been a failure in course delivery due to LSAM going into liquidation, which gave rise to an entitlement to a refund being made (to the students presumably). This argument seems to be premised on the law of equity, in the sense that fairness directs that the students should be due a refund of their course fees. Whichever equity

maxim or doctrine is being invoked in advancing this argument, it is irrelevant to the determination of this appeal for two simple reasons.

65. First, VAT is principally concerned with the economic and commercial reality of a transaction, and it is to the economic and commercial reality of a transaction alone the European jurisprudence is to be applied. What is required is a change in the consideration actually received by LSAM as the supplier for there to be a reduction in the taxable amount. In the present case, any refund of fees supposed to be due to the students remains a proposition, a vague indication, a remote possibility that is never going to materialise since LSAM does not have the funds in excess of £3.72 million to repay the course fees in tandem with the VAT attached thereto. The credit notes are purely theoretical, and do not represent a decrease in consideration in the real world. Where there is no decrease in consideration as an economic reality, there is no reduction in the taxable amount for Art 90 to be engaged.

66. Secondly, the entitlement under Art 90 is referable to LSAM (the taxpayer), not the students (as recipients of the supply). As Mr Ripley has submitted in reply, LSAM appears to assume that the mere fact of a service not being performed entitles a supplier to a refund of the VAT charged and received. That is not so. The prepayments received by LSAM were in respect of anticipated taxable supplies and they were within the scope of VAT. A tax point would have been triggered by the earlier of payment and the issue of a VAT invoice (per s 6 VATA). In its final analysis, the relevant fact that determines this appeal is whether LSAM had overpaid in output VAT on account of the historical consideration of supply it had actually received from its students: *Lombard*. We have no difficulty in making a finding of fact that there had been no change to the consideration actually received by LSAM for there to be a reduction in the taxable amount under Art 90.

67. In any event, the appellant's submission that there had been a total failure of consideration is not borne out by the facts. The entries on the spreadsheets would suggest that many of the students would have completed their courses, or left years or months before LSAM went into liquidation. Furthermore, the deal with CLC would suggest that the students mid-way through their courses when LSAM went into liquidation were transferred to another college to receive the balance of the delivery of their courses, and for which LSAM received consideration of some £65,000 for making a 'supply' to CLC.

68. The appeal is accordingly dismissed. It is not necessary to consider the procedural and evidential bases of this appeal, but for completeness, we will address these two aspects in brief.

Procedural basis for repayment claim

69. The CJEU in *Lombard Ingalatlan Lizing* at [37]-[38] confirms that Art 90 is 'unconditional and sufficiently precise', and therefore is capable of being relied upon by individuals where a member state has failed to implement the directive in domestic law. Whilst according to EU jurisprudence Art 90 is directly effective, the CJEU nevertheless observes that Art 90 'is not qualified by any condition'; hence, member states are accorded with a degree of discretion in determining the conditions under which the taxable amount is to be reduced.

70. Under Art 90(1), Member States are permitted to set conditions for there to be a reduction of taxable amount. The UK had transposed Art 90 by setting conditions under Reg 38 in the VAT Regulations in relation to the procedural requirements for there to be 'an increase or a decrease *in consideration for a supply*', which includes an amount of VAT, and 'the increase or decrease occurs *after the end of the prescribed accounting period* in which the original supply took place'. Apart from the procedural conditions under Reg 38, the evidential requirement is incorporated into the statutory definition under Reg 24, whereby 'a decrease in consideration' means a decrease 'in the consideration due on a supply made by a taxable person which is evidenced by a credit or debit note or any other document having the same effect'.

71. The mechanism in UK national law for claiming VAT repayment under the terms of Art 90 is therefore by reference to Reg 38. As a matter of statutory construction, the key conditions for a negative entry in the VAT account pursuant to Reg 38 are as follows:

(1) There must have been a 'decrease in consideration' (Reg 38(1)(b)). The phrase 'decrease in consideration' is taken to mean the same as a 'price reduction' in Art 90: *HMRC v K E Entertainments Ltd* [2020] UKSC 28 at [44][1];

(2) The decrease in consideration must occur after the end of the prescribed accounting period in which the original supply took place (Reg 38(1)); and

(3) The 'decrease in consideration' must be evidenced by a credit note or any other document having the same effect (Reg 24).

72. In the present case, the appellant is insolvent, and the specific provision under Reg 38(6) is directly relevant, whereby:

> '(6) Any entry required by the regulation to be made in the VAT account of an insolvent person shall be made in that part of the VAT account which relates to the prescribed accounting period in which the supply was made or received.'

73. HMRC therefore submit that LSAM would have been required by Reg 38(6) to adjust its VAT account relating to the prescribed accounting period in which the supply was 'made or received'. In other words, it is HMRC's case that LSAM should not have simply made an adjustment in the VAT return for the 09/12 period.

74. It is unclear what the appellant's position is as regards Reg 38. The appellant seems to have proceeded on the basis that Reg 38 is irrelevant to establishing its entitlement to the VAT refund. The appellant has relied on *Barlin*, and on the VAT Tribunal's decision in *GMAC* as cited at [43] in *Barlin*:

> '[64] It is common ground that Art 11C(1) [i.e. predecessor of Art 90(1)] has direct effect and that a Member State cannot take away the right conferred by that provision by measures which the Member State takes to establish the conditions under which the right is to be enjoyed. Moreover, the derogation which Member States are permitted to make under Art 11C(1) must be objectively justifiable; the same must be applicable to the conditions which the Member States are required to determine the conditions imposed by Member States are concerned with procedure and evidence. They are not permitted to go further than necessary; and any conditions imposed must be justified [and that] they may be imposed to check that the reduction is not fictitious.
>
> [65] Here the 'condition' imposed by rule 38(1A) is concerned neither with the procedures for making the claim nor with the evidence required to support it. It is a blanket limitation which has the effect of outsing the taxable person's basic right to be taxed on the consideration received by him and no more. As such, the three year limitation on making the claim by reference to the time when the original supply is made is incompatible with Art 11 generally and GMAC's rights under Art 11C(1) in particular. Rule 38(1A) has rendered ineffective GMAC's right to relief. On that basis we think that GMAC is entitled to rely on its Community law rights; and to the extent that the Commissioner's decision seeks to deny GMAC those rights, the decision is wrong. Our conclusion on the three year limitation issue is therefore in favour of GMAC.'

[1] See also the Court of Session decision in *K E Entertainments*: [2018] CSIH 78 at [1] and [77].

75. The short point to be taken from *GMAC* is that the VAT Tribunal fully registered that conditions can be set in transposing Art 90 into domestic legislation, but these conditions need to be 'objectively justifiable'. The VAT Tribunal in *GMAC* found the conditions set under Reg 38 as concerns *procedure* and *evidence* to be objectively justifiable, but that the time-limit condition under Reg 38(1A) to be unjustifiable because it rendered ineffective the taxpayer's right to relief under Art 90. The limitation condition under Reg 38(1A) has been repealed, so there is no time limit for making an adjustment under Reg 38.

76. It is unclear therefore what reliance can be placed on *GMAC* by the appellant given that the offending condition under 38(1A) is no longer in force to debar the appellant from making a claim under Reg 38. However, and as a matter of fact, the mechanism adopted by LSAM to make its VAT repayment claim is simply to make one single negative entry in the VAT return for 09/12 period, which is contrary to the procedural requirement under Reg 38.

77. On one interpretation, the Reg 38 procedural requirement for making a VAT repayment claim is simply too onerous for LSAM to attempt, for it would have required meticulous co-ordination of the sums of consideration, and the purported decrease in consideration related thereto, to be matched up for each prescribed accounting period. Such procedural requirement as a condition is objectively justifiable because it places the onus on the taxpayer to establish from its accounting records the relevant sum in relation to a 'decrease in consideration' purported to have occurred after a prescribed accounting period in which the original supply took place. The fact that the appellant is in liquidation does not exempt it from meeting the procedural requirement in making a Reg 38 claim, as expressly provided under Reg 38(6).

78. Although Frost Group's letter to HMRC dated 10 June 2016 (§21) stated its claim was pursuant to Reg 38(6), this is not borne out by the mechanism adopted by a negative entry on Form VAT 100. In the alternative, we consider the appellant's grounds as stated in its Notice of Appeal, which refer to s 80 VATA as the basis for its claim. In that respect, the LSAM's claim would be pursuant to s 80(1)(b), and staked on the fact that it '*has brought into account as output tax an amount that was not output tax due*' for a prescribed accounting period; that is to say, LSAM had paid output VAT historically which should not have been paid.

79. Quite apart from the fact that no evidence obtains to substantiate that there had been historical output VAT overpayment, the appellant's s 80 claim would be subject to the defence of unjust enrichment (s 80(3)), and the four-year limitation period (s 80(4)-(4Z)). When asked about unjust enrichment, Frost Group's reply of 10 June 2016 was to switch to Reg 38(6) as the basis of its claim. As to time-bar issue, the VAT100 was received by HMRC on 25 June 2015 and purported to be relating to the period 09/12, while the spreadsheets show the receipt of the course fees to be predominantly prior to 1 July 2011, four years prior to the form being submitted to HMRC in June 2015.

Evidential basis for repayment claim

80. It has been emphasised that HMRC remain expressly dissatisfied by the evidence produced by the appellant in support of its calculation of the allegedly overpaid output VAT. The unsound basis of the quantum of the claim is set out in some detail in our findings of fact at §§26-33; and its multiple defects, inconsistent formulae in application, and dubious interpretation of data mean that the quantum of the claim is wholly unsupportable on the face of the evidence, even if the repayment claim had not failed as without any legal basis.

DISPOSITION

81. Accordingly, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 05 AUGUST 2022