UNJUST ENRICHMENT –*s.80(3) VAT Act 1994 – Car leasing companies – change of VAT treatment of "manufacturers bonuses" – Business Brief 16/97*

Basis of Tribunal's jurisdiction – s.83(t)and s.84(10) VAT Act

EC Principle of equal treatment

LONDON TRIBUNAL CENTRE

NATIONAL WESTMINSTER BANK PLC - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: Peter H Lawson (Chairman)
Sunil K Das LLM ACIS
M M Hossain FCA

Sitting in public in London on 2, 3 and 4 October 2002

Michael Conlon QC, Counsel, for the Appellant

Philippa Whipple, Counsel, for the Respondents

DECISION

1. This is an appeal by National Westminster Bank Plc ("the Appellant") which at all material times carried on business as a Bank at 41 Lothbury, London, EC2P 2BP and was registered for Value Added Tax with effect from 1 April 1973 as the representative member of a group registration under VAT No. 243 4890 53.
2. The appeal is against a decision contained in a letter dated 23 August 2001 which was sent by the Respondents from their offices at New King's Beam House, 22 Upper Ground, London SE1 9PJ to Mr J Madgwick, the Group Tax Manager at Lombard North Central plc, a subsidiary company of the Bank. The Respondents did not object to an extension of time for making the appeal. We have annexed the relevant part of the letter as Appendix 2 to this Decision.
3. The disputed decision relates to the refusal of claims under s.80 of the Value Added Tax Act 1994 ("VATA") paid by the Appellant to the Respondents by way of VAT which was not VAT due to them ("the claim").
4. The decision depended on a prior decision taken by the Respondents in relation to the Appellant, namely a decision to apply to the Claim (but not to identical claims by other claimants) the provisions of s.80(3) VATA. The prior decision was notified to the Appellant in a letter dated 12 October 1998, which we have annexed as Appendix 1 to this Decision.

The grounds on which the decisions are disputed are as follows:

5. Lombard North Central plc, and PSA Finance plc (hereinafter referred to as "the Lombard Group") were at all material times members of the Appellant's VAT group.
6. The Lombard Group, amongst other activities, carries on the business of car leasing which involves purchasing cars from manufacturers such as Rover ("the Manufacturers"), and leasing them to business customers for terms of, typically, 24 months or 36 months. On expiry of the leases cars are sold by the Lombard Group as used vehicles through car auctions.
7. At all material times the Manufacturers made periodic payments to the Lombard Group relating to car purchases known as bonuses or subsidies ("Manufacturers Bonuses"). The Lombard Group incorrectly treated Manufacturers Bonuses as consideration for a taxable supply of services to the Manufacturers and accounted for output VAT thereon to the Respondents.
8. Following the decision of the Court of Justice of the European Communities in *Elida Gibbs Limited v Commissioners of Customs & Excise* (Case C-317-94) [1996] STC 1387, the Respondents decided that Manufacturers Bonuses should be treated for VAT purposes as discounts on the purchase price of cars. By Business Brief No. 16/97, issued on 21 July 1997, the Respondents invited car leasing companies to make claims for VAT wrongly accounted for on Manufacturers Bonuses.
9. By letters dated 27 October and 30 October 1997, in reliance on Business Brief 16/97, the Appellant made the Claim for repayments totalling £702,597.50 from the Respondents between 1 July 1994 and 30 September 1995. In a recalculation dated 26 June 1998 the claim was increased to £776,197.44.
10. The Lombard Group and the Respondents entered into correspondence and negotiations concerning the basis and quantum of the Claim and applicable time limits.
11. Between about November 1997 and about June 2000, the Respondents paid substantial claims made on an identical basis by a number of other car leasing businesses which are competitors of the Lombard Group.
12. On 27 July 1998 the Respondents paid a total of £63,235 of the Claim. This left a sum outstanding of £712,962.44.
13. By a decision dated 12 October 1998, taken in relation to the Appellant but not other identical claimants, the Respondents notified the Lombard Group that they were "formally invoking the provisions of section 80(3) VATA" because they considered repayment of the unpaid part of the Claim would unjustly enrich the Appellant.
14. By a letter dated 24 December 1998 the Respondents notified the Lombard Group that they accepted the computation of the unpaid part of the Claim but were "continuing to invoke the unjust enrichment defence".
15. Protracted correspondence between the Lombard Group and the Respondents followed and by a letter dated 4 June 1999 the Respondents informed the Appellant that they were maintaining their position and thereby refusing the Claim.
16. On 17 June 1999 the Appellant complained to the Revenue Adjudicator about the Respondents' handling of the Claim.
17. On 22 February 2001 the Revenue Adjudicator substantially upheld the Appellant's complaint and concluded that the Claim was treated differently from claims by other car leasing companies. The Adjudicator felt unable to recommend payment of the Claim although she strongly criticised the Respondents for their inconsistency of treatment and recommended that they formally reconsider the Claim at the highest level.

18. On 23 August 2001, following a review of the Adjudicator's decision, the Respondents issued the disputed decision to the effect that the prior decision, to rely on s.80(3) VATA in the Appellant's case and refuse the Claim, must stand.
19. In its notice of appeal the Appellant contended that:
    i. The provisions of Article 11A of the Sixth VAT Directive (and in particular Article 11 A(3)(b) thereof) take direct effect and create enforceable Community rights.
    ii. Pursuant to such Community rights the Appellant is entitled to payment of the Claim.
    iii. Payment of the Appellant's claim would not unjustly enrich the Appellant in all the circumstances of the case, having regard to:
        1. payment of identical claims to the Appellant's competitors;
        2. the loss and damage suffered by the Appellant's business as a result of having accounted for VAT on Manufacturers Bonuses and the distortion of competition if the Claim is not paid.
    iv. In deciding to apply s.80(3) in the Appellant's case (but not in relation to identical claims by the Appellant's competitors), the Respondents have breached the general principles of Community law, in particular legal certainty and equal treatment and, accordingly, the disputed decision must be set aside.
    v. Further or alternatively, the disputed decision depended on a prior decision of the Respondents within the meaning of s.84(10) VATA which, by reason of the matters aforesaid, was unfair and unlawful and thereby vitiates the disputed decision.
20. The Appellant reserved the right to amend or supplement its grounds of appeal following service of the Respondents' Statement of Case.
21. The following facts set out in paragraphs 22 to 36 were agreed by the parties.
22. The Appellant is the representative member of a VAT group registration which at all material times included as members Lombard North Central Plc, Rover Finance Limited, Rover Acceptance Limited, Rover Leasing Limited, Rover Credit Limited and PSA Finance Limited (hereinafter referred to as "the Lombard Group"). British Car Contracts is a trading name used by the Lombard Group.
23. The business of the Lombard Group includes car leasing. This involves purchasing cars from manufacturers, such as Rover Group, ("the Manufacturers") and leasing them to business customers. On expiry of the leases the cars are sold by Lombard Group as used vehicles through car auctions. Representative samples of a Master lease agreement were produced to us.
24. At all material times the Manufacturers made periodic payments to the Lombard Group relating to car purchases (hereinafter "Manufacturers Bonuses") on receipt of an invoice or issued self-billing invoices.
25. The Appellant and the Respondents regarded Manufacturers Bonuses as consideration for a supply of services by Lombard Group to the Manufacturers. The Appellant accordingly accounted for VAT to the Respondents on such payments.
26. Following the decision of the European Court of Justice in *Elida Gibbs Limited v Commissioners of Customs & Excise* (Case C-317/94) [1996] STC 1387, the Respondents revised the VAT treatment of Manufacturers

Bonuses and decided that they should be treated as discounts on the purchase price of the cars.

27. On 21 July 1997 the Respondents issued Business Brief 16/97 and on 7 January 1998 issued further guidance in Business Brief 01/98. These Business Briefs stated that if businesses believed they had overpaid VAT in the past three years they should contact their local VAT Office.
28. In reliance on Business Brief 16/97, on 27 October 1997 and 30 October 1997 the Appellant submitted claims for VAT overpaid on Manufacturers Bonuses between 1 July 1994 and 30 September 1995. The amounts originally claimed were subsequently adjusted to £776,197.44.
29. On 31 March 1998 the Respondents informed the Appellant that they accepted the quantum of the claims except as respects Manufacturers Bonuses paid by the Rover Group (totalling £304,161.91) in respect of which they required additional supporting evidence.
30. On 27 July 1998 the Respondents repaid £63,235 of the claims, leaving a total outstanding of £712,962.44.
31. On 12 October 1998 the Respondents informed the Appellant that the outstanding claims totalling £712,962.44 would not be repaid. The Respondents stated that they were "formally invoking the provisions of s.80(3) of the Value Added Tax Act 1994" ("the 1994 Act"). This provides:

    "It shall be a defence in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant"
32. On 24 December 1998 the Respondents informed the Appellant that following verification they accepted the quantum of the outstanding claims, i.e. £712,962.44 apart from a query relating to Rover 820s.
33. Between November 1997 and about June 2000 the Respondents paid claims relating to Business Brief 16/97 by a number of other car leasing businesses without invoking s.80(3) of the 1994 Act.
34. On 17 June 1999 the Appellant complained to Dame Barbara Mills QC, the Revenue Adjudicator, about the Respondents' handling of the claims.
35. On 22 February 2001 the Revenue Adjudicator substantially upheld the Appellant's complaint and found that the Respondents had treated the Appellant's claims differently from those of other claimants and that, on the basis of the evidence she had seen, in no other case had the Respondents purported to rely on s.80(3) of the 1994 Act to refuse a claim.
36. Following a further review in the light of the Adjudicator's decision, the Respondents decided that their decision to refuse the claims must stand and so informed the Appellant by letter dated 23 August 2001 (para 2 above).
37. A Witness Statement was put in by Mr Derek John Waghorn, since 1980 the Group Tax Manager of Lombard North Central plc ("Lombard") and its operating subsidiaries. After stating that British Car Contracts is a trading name used by Lombard, and that Lombard is a member of a VAT group registration of which, at the material time, National Westminster Bank plc ("the Appellant") was the representative member, Mr Waghorn continued as follows:
    a. "I am authorised to make this statement on behalf of the Appellant in support of its Appeal to the VAT and Duties Tribunal against the refusal by HM Customs & Excise ("Customs") to pay a claim for VAT overpaid on bonuses received by Lombard from manufacturers following the purchase of new vehicles for onward lease ("Manufacturers Bonuses").
    b. **Background**

        A major part of the Group's business involves providing finance by

way of leasing agreements to various unconnected commercial organisations. I am responsible for ensuring that the value added tax on such transactions is properly accounted for and that the correct records are maintained. Part of the leasing activity involves the hiring of motorcars either on finance leases or contract hire agreements. The agreements which are the subject of this witness statement are principally contract hire agreements incepted by subsidiary companies of Lombard. The customers were mainly individuals carrying on a business activity or other commercial enterprises such as companies. Non-business or retail customers used other financing products which enabled them to purchase the vehicle in preference to hiring."

38. Mr Waghorn produced a representative sample of a Master Hire Agreement, between British Railways Board and the Lombard operating subsidiaries. Vehicles subject to the agreement were set out in the Schedule to the agreement and further vehicles added from time to time. He also produced representative samples of a standard form agreement involving an individual vehicle.
    a. "**Nature of transactions**

    These transactions", Mr Waghorn continued, "involve the Lombard leasing subsidiary ("the lessor") purchasing a vehicle from a supplying dealer and leasing it to a customer for the term provided in the lease agreement signed by the lessor and the customer. Under the terms of the lease agreement the customer agrees to pay periodic rentals for the duration of the lease. The lessor issues a VAT invoice for each rental due. The Appellant has accounted to Customs for output tax on the lease rentals in question. This VAT is input tax of the lessee which I believe would be fully recoverable.

    Under the terms of the contract hire agreement the lessor may agree to provide maintenance for the vehicle which would be reflected in the price of the rental.

    At the end of the lease agreement the vehicle is returned to the lessor and subsequently sold in the open market. Under the terms of an operating lease agreement, when the motorcar is sold the lessor enjoys/suffers the subsequent effect arising from the volatility of prices of the second-hand market for the vehicle.

    b. **Calculation of lease rentals**

    Rentals are calculated using CALPAK which is an industry standard calculation for pricing rentals. This would reflect the following six factors, which apply equally for Lombard as for its competitors:
        i. **Purchase price of the vehicle**. This will be dependent upon the terms the lessor negotiates with suppliers but will in reality be similar to that paid by other lessors in the market place. The purchase price would include any VAT. At the time covered by this Appeal this could not be reclaimed from Customs by the lessor.
        ii. **Estimated residual value of the vehicle**. This is the lessor's estimate of the second-hand value that the vehicle will realise at the end of the lease agreement and is a negative amount, i.e. it is deducted in calculating the rental. Each lessor will formulate its own views from its own experiences but will also benchmark against available market and survey data. There would be differences

between competing lessors but within a small range of parameters.

iii. **Cost of providing maintenance**. This will be affected by factors such as reliability, costs of labour and parts and service intervals set by the vehicle manufacturers. Surveys show that there are small differences of assessment between competing lessors.

iv. **Interest costs**. The cost to the lessor of funding the vehicle will vary according to market conditions and the size or nature of the lessor's parent company which usually provides the funding. Most lessors have parents, e.g. a Bank, of similar standing which results in funding assumptions within a similar range.

v. **Incentive sums receivable by the lessor**. This is a negative amount and would include such sums as Manufacturers Bonuses, to which this Appeal relates and which I describe at paragraph (e) below. The manufacturers issue identical terms to all lessors.

vi. **Miscellaneous costs**. This would include items such as the cost of providing Road Fund Tax or vehicle breakdown assistance and administration costs to operate the agreement.

c. For a given vehicle there would be small differences in the rentals quoted by competing lessors. The attraction to the customer is the perceived standard, quality and timeliness of the service offered by the competing lessors.

d. Adjustments to lease rentals

Under the agreements which are the subject of this Appeal the rental paid by the customer remained unchanged even if one or all of the pricing factors described above proved to be invalid. The only change to the payment made by the customer during the life of the agreement would be where the actual mileage driven by the customer exceeded the amount agreed in the lease agreement or where the rate of VAT applicable to each rental changed during the life of the agreement.

Moreover, in the period covered by this Appeal, I have ascertained that Lombard frequently failed to realise the anticipated residual value on the sale of the vehicle at the end of the agreement. This meant that the total price of the vehicle plus VAT was not fully factored into the monthly rental. During the calendar years 1995 to 1998 the Lombard leasing companies made net losses of approximately £8m on sales of vehicles which had been the subject of contract hire agreements. Included in this sum would have been vehicles which are the subject of the issue now being considered.

e. **Manufacturers Bonuses**

i. These are payments which a manufacturer may make direct to a lessor as an incentive to encourage a particular volume of purchases or to encourage the purchase of particular vehicle models during a specific period. These arrangements were generally governed by written agreements. A representative sample Contract Hire and Leasing Incentive Agreement, between Rover Group Limited and British Car Contracts was presented to us.

ii. Following purchase of the vehicle from the supplying dealer and after inception of the vehicle lease, Lombard typically

submitted a claim for a Manufacturers Bonus direct to the manufacturer. The manufacturer would check the claim before authorising payment. In most instances payment was made several months after inception of the lease. The payment of bonuses is at the discretion of the manufacturer but eligibility of claims could be cleared in advance.

iii. Where the manufacturer decided to pay a bonus, either the manufacturer prepared a self-bill invoice for the amount of the bonus plus VAT or the Lombard Company issued an invoice. On receipt of such invoice, the Appellant accounted for the VAT shown as its output tax to Customs. So far as I am aware, manufacturers treated the invoice as evidence of entitlement to deduct input tax and recovered the VAT shown from Customs.

f. **The Dispute**

i. Following the decision by the European Court of Justice in the *Elida Gibbs* case and a revised ruling by Customs, it was realised that Lombard should not have accounted for VAT on Manufacturers Bonuses. I am aware that several lessors, including Lombard, made reclaims from Customs for VAT overpaid. Lombard's claim totalling £702,597.50 (later adjusted to £776,197.44) was made to Customs in October 1997. After lengthy correspondence £712,962.44 of this claim was refused and forms the subject matter of this Appeal.

ii. It has been suggested that Lombard would be unjustly enriched if Customs repaid the VAT overpaid. I believe this is incorrect and results from the implication that the VAT on Manufacturers Bonuses was passed on to the lessee. On reconsidering this issue, I believe this analysis to be an over-simplification for the following reasons. The Manufacturers Bonuses were treated as consideration for a supply of services by Lombard to the manufacturers. VAT was accounted for as part of the value of those services. The manufacturers did not bear this VAT, as they were entitled to recover it as input tax. The *Elida Gibbs* case established that the bonuses were not to be treated as consideration for a supply of services but as a rebate on the supply of the vehicles. The vehicle sales were supplies of goods by the supplying dealers to Lombard. The onward leasing of the vehicles by Lombard to its customers was an entirely separate supply of services. The purchase price of the vehicles was only one factor in the fixing of the lease rentals. On disposal of the vehicles in fact Lombard made losses. I am aware (and as found by the Revenue Adjudicator) that Customs paid claims for overpaid VAT made by other lessors in identical circumstances. I do not believe it has ever been suggested that these successful claimants made any arrangements to repay the manufacturers or otherwise "compensate" their lessee customers. Lombard was the only claimant whose claim was refused. In all the circumstances, therefore, I find it difficult to see how a repayment of Lombard's claim would amount to unjust enrichment. To the extent Lombard conceded this during progress of its claim, I now believe this was based on a mistaken analysis.

g. **Change in the law**

With effect from 1 March 1995 the deduction of input tax on cars purchased by lessors for onward lease was no longer excluded from deduction as input VAT. Lease rentals thereafter were calculated by all lessors on the VAT exclusive price of the vehicle. Lombard's claim does not include any Manufacturers Bonuses paid after this change in the law."

39. In a further statement dated 24 September 2002 Mr Waghorn stated as follows:
40. "This statement is further to my statement dated 14 August 2002.

    In paragraph 10 of that statement I referred to the fact that Lombard frequently made losses on the sale of vehicles at the end of their leases. The figure of £8m was a global amount for the calendar years 1995 to 1998 and was extracted from management accounts. In view of the lapse of time the more detailed records had been archived and were not then available.

    I have caused a search of the archives to be made and have retrieved the records relating to resale values of vehicles covered by this Appeal. I produce, as Exhibit "DJW/1", a schedule setting out these figures. I have calculated that the losses on the vehicles in question totalled £5,856,182. As already stated, this figure is the difference between the estimated residual value which formed part of the calculation of lease rentals and the actual resale proceeds."
41. Mr Conlon asked Mr Waghorn to explain the difference between "operating" leases and "finance" leases. Mr Waghorn stated that in both cases, ownership remained with Lombard. In the case of "operating" leases all the risks of ownership lie with Lombard; in the case of "finance" leases all the risks of ownership lie with the lessee. In each case the vehicle is sold at the expiry of the lease. With a finance lease any gain would belong to the lessee.
42. With regard to paragraph 38(b) above Mr Waghorn confirmed that the input tax on the supply of cars was blocked, and was not deductible and could not be recovered.
43. Mr Conlon, for the Appellant, made the following submissions:
44. This is an appeal against a decision of the Respondents dated 23 August 2001 refusing claims under s.80 of the Value Added Tax Act 1994 ("VATA") for repayment of VAT overpaid. The VAT now in dispute is £706,347.44.
45. The claims were made in October 1997. The decision ultimately to reject them depended on a "prior decision" of the Respondents notified on 12 October 1998, to invoke the "unjust enrichment" defence in s.80(3) VATA against the Appellant's claim but not in other identical claims.
46. The Appellant's case is that it is entitled to repayment. A repayment would not, in all the circumstances of the case, unjustly enrich the Appellant. Section 80(3) is therefore inapplicable. Further, or alternatively, the decision to invoke such defence was manifestly unreasonable and wrong in law.
47. In relation to the claim under s.80 VATA the Tribunal's jurisdiction is appellate: section 83(t) VATA.
48. In relation to the prior decision of 12 October 1998, the Tribunal's jurisdiction springs from section 84(10) VATA and its jurisdiction is supervisory.

Background

49. The Appellant is the representative member of a VAT group registration. The group carries on a banking business and includes, as members,

companies in the Lombard group ("Lombard"). Lombard carries on a car leasing business.

50. Lombard's leasing business involves purchasing motorcars from motor manufacturers or dealers and leasing them to business customers. These are operating leases, typically for periods of 24, 36 or 48 months and involve payment of monthly rentals. On expiry of the lease the vehicles are returned to Lombard and sold as second-hand vehicles, usually through auction.
51. At all material times Lombard was entitled to claim from the motor manufacturers periodic payments, known as "Manufacturers Bonuses". These were payments made at the manufacturers' discretion to Lombard as an incentive to purchase vehicles of a particular model or in particular quantities.
52. Manufacturers Bonuses were either the subject of self-bill invoices issued by the manufacturers or were invoiced by Lombard direct. VAT was added to the Bonuses because both the Respondents and the Appellant assumed that the Bonuses were payment for a taxable supply of services by Lombard to the manufacturers. It is common ground that this VAT treatment was incorrect. Following the decision of the European Court of Justice in *Elida Gibbs Limited v CCE* (Case C-317/94) [1996] STC 1387, it became clear that Manufacturers Bonuses should have been treated as discounts or rebates on the purchase prices of the cars. Accordingly, VAT on Manufacturers Bonuses was not VAT at all and should not have been paid to the Respondents.
53. Relying on announcements by the Respondents of the changed interpretation in July 1997 and January 1998, car-leasing companies made claims for repayment of VAT. So far as the Appellant is aware, all lessors were in an identical position. The Respondents repaid the other lessors. When Lombard's claims were submitted, the Respondents decided to invoke the unjust enrichment defence in s.80(3) VATA and then refused the claims. The Respondents regarded Lombard as having passed on the VAT element of the Manufacturers Bonuses to its customers by incorporating it into the pricing of the lease rentals. The Appellant's case is that its pricing of lease rentals follows an industry norm and is no different in principle from that of other car leasing companies. Moreover, calculation of lease rentals is based on at least six factors which remain unchanged even if one of those factors subsequently proves to be invalid.
54. The Appellant complained to the Revenue Adjudicator about the Respondents' refusal of the claim. This complaint was upheld on the grounds that the Respondents had treated the Appellant differently from other claimants. The Adjudicator felt unable to order repayment because the Appellant conceded that it would be enriched if it received repayment. The Adjudicator recommended, however, that the Respondents reconsider their decision at the highest level. The Respondents did so but decided to uphold their refusal. The Appellant's case is that any concessions made about unjust enrichment and the Respondents' power to refuse the claim on such grounds were made on an incorrect basis in law. This is now one of the issues for the Tribunal.

Key facts and chronology

55. The key facts are set out in paras 1 to 18 and 22 to 36 above, and the Statements of Derek John Waghorn, Group Tax Manager for Lombard (paras 37, 38 and 40 above).
56. There seems little dispute that the Appellant accounted to the Respondents for amounts of VAT, which were not VAT due to the Respondents, on incentive payments received from motor manufacturers. Although the quantum of all claims was eventually agreed and the claims

"accepted" (on 24 December 1998) the Respondents had earlier decided (on 12 October 1998) to invoke the defence of unjust enrichment against the Appellant. However, as found by the Revenue Adjudicator, the Respondents did not invoke this defence against other car leasing companies, whose claims they paid in full. The protracted dispute between the Appellant and the Respondents related to the method of pricing the leases and whether the VAT element of the incentive payments was passed on to the ultimate customers (the lessees). Mr Waghorn's evidence deals in detail with the calculation of rentals and uniformity of practice throughout the industry. From the evidence the Appellant will seek to demonstrate that VAT was only one factor in lease rental pricing and that the Respondents' analysis of the transactions and the inferences they drew therefrom were incorrect. In consequence, the Respondents have failed to prove that payment of the claims would enrich the Appellant or, if it would, that such enrichment would be unjust within the meaning of s.80(3) in all the circumstances of this case. Moreover, the Appellant seeks to show on the evidence that the Respondents' "prior decision" in relation to invoking the defence was made without proper regard to principles of domestic and Community law and is therefore flawed.

Issues for determination by the Tribunal

57. The Tribunal is invited to decide the following issues:
    a. Did the Appellant pay the amounts in dispute (£706,347.44) to the Respondents by way of VAT which was not VAT due to them?
    b. Is the Appellant entitled in principle to recover such amounts from the Respondents?
    c. Did the Respondents make a prior decision or decisions in relation to the Appellant on which their decision to refuse the claim depended (s.84(10) VATA refers)?
    d. If there was such a prior decision, was this decision unreasonable or unlawful such that the Appeal should be allowed?
    e. Have the Respondents failed to prove that paying the claim would:
        i. enrich the Appellant?
        ii. any such enrichment would be unjust?
    f. If required, is the Appellant able to mitigate any assertion of unjust enrichment by proving loss or damage within section 80(3A) to (3C) VATA?

Legal Analysis

58. The legal framework is summarised under five subheadings:

A: The right to repayment.

B: Validity of defences in domestic law.

C: Nature of the unjust enrichment defence.

D: Application of other general principles of Community law.

E: Appeal based on a "prior decision".

These are considered in turn.

A: The right to repayment

59. It is settled law that Article 11A(1) of the Sixth Directive confers on individuals rights on which they may rely before national courts: see

particularly *Marks and Spencer plc v CCE* (Case C-62/00) [2002] STC 1036 ("M&S"), para 29 of the Judgement at p.1057e. The levying of VAT on Manufacturers Bonuses was incompatible with Article 11A(1) and therefore was in breach of Community law.

60. It is also settled law that the right to obtain a refund of charges levied in a member state in breach of the rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the Court: see particularly *M&S*, para 30 of the Judgement at p.1057f.
61. In the absence of Community rules on repayment of national charges it is for the domestic legal system in each member state to designate the courts and tribunals having jurisdiction to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. Such domestic rules are subject to the Community law principles of equivalence and effectiveness. In particular such rules must not be less favourable than those governing similar domestic actions; also they must not be such as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law: see particularly *M&S* paragraphs 34 to 42 of the Judgement at pp. 1058 to 1059f.
62. Accordingly, the Appellant's right to repayment derives from Community law. Section 80 VATA, read with sections 83 and 84, provides the domestic procedures. These are subject to the Community law principles of equivalence and effectiveness.

B: Validity of defences in domestic law

63. Provided the principles of equivalence and effectiveness are respected, it is not incompatible with Community law for domestic law procedures to include defences against repayment. *M&S* concerned the imposition of time limits for bringing proceedings (see the Judgement paragraphs 35 et seq). The Court held that legislation shortening the limitation period from six years to three years with retrospective effect was contrary to Community law, in particular the principles of effectiveness, legal certainty and protection of legitimate expectations: *M&S*, Judgement paragraphs 35 to 47. Case law of the Court also demonstrates the same approach to domestic law defence of unjust enrichment: see *Marks & Spencer v CCE* in the High Court [1999] STC 205 ("M&SHC") and cases considered at pp.237a-239h. The domestic law provision, namely section 80(3) VATA, is subject to these principles.

C: Nature of the unjust enrichment defence

64. Section 80(3) VATA provides "... It shall be a defence, in relation to a claim under this section, that repayment would unjustly enrich the claimant." Domestic law contains no definition of unjust enrichment. It is settled, however, that "the jurisdiction of the Court of Justice in relation to the concept of unjust enrichment should inform decisions relating to the defence in our domestic law": per the Lord President (Hope) in *CCE v McMasters Stores (Scotland) (in receivership)* [1995] STC 846 at 853, considered and adopted by Moses J in *M&SHC* at page 236j. The learned judge in *M&SHC* drew certain general principles from the ECJ case law which may be summarised as follows:
    i. undue taxes must be reimbursed in accordance with national procedural rules;
    ii. it is not prohibited for national courts when adjudicating claims to take into account that the burden of the tax was passed on in whole or part to others. (However such defence is not "all or nothing");

iii. Community law does not impose a requirement in domestic law to take account of the defence of unjust enrichment;
iv. The defence requires consideration not only of the question of whether the taxpayer has passed on the overpaid tax but also whether by passing on the charge it suffered loss or damage.

(see pp. 237a to j)

The learned Judge went on to hold that there is no presumption of passing on; the burden of proof is on the Commissioners; if they establish a *prima facie* case this may call for rebuttal by the taxpayer (a shift in the "evidentiary burden") by showing loss or damage; the court should view the taxpayer's position sympathetically because it was the Commissioners who caused the problem in the first place: see Moses J at pp. 237j to 241g.

65. The analysis by Moses J is entirely uncontroversial and appears not to have been questioned by the Court of Appeal [2000] STC 16 42c-44a. As regards point (ii) above, however, Moses J did not hold that there is necessarily always unjust enrichment where the undue tax has been passed on by the claimant to his customer. This is just one factor. This emerges from a close reading of the development of the ECJ case law: see particularly the following passages:
    i. *Hans Just I/S* Judgement paras 26-27
    ii. *San Giorgio* Advocate General, pp.3623, 3628; Judgement paras 13-14
    iii. *Les Fils de Jules Bianco* Advocate General, pp. 1109, 1112; Judgement para 17
    iv. *Société Comateb* Advocate General para 18; Judgement paras 23, 30.
    v. *Kapniki Mikhailides* Judgement paras 32 et seq.

    From the latter case, the principle is that even if it established that the undue charge has been passed on this does not necessarily entail a repayment unjustly enriching the claimant. Courts may take into account all the circumstances. A requirement that the claimant prove that the disputed charge caused an increase in price [and a reduction in the volume of exports] would be contrary to Community law. It is for the court alone to evaluate the evidence.

66. Domestic law provides that where for practical purposes the cost of undue tax has been borne in whole or part by another person (the consumer) loss or damage resulting from mistaken assumptions about VAT law must be disregarded except to the extent it is strictly proved: section 80(3A) to (3C) VATA. Moreover, where there would otherwise be unjust enrichment the claimant must make approved arrangements for reimbursing customers: section 80A VATA and Part VA of the VAT Regulations 1995. These provisions must be viewed in the light of the Community law principle of effectiveness and the ECJ case law, in particular *Comateb* and *Kapniki*. It is implicit in section 80 that the issue of unjust enrichment is to be assessed at the time repayment falls to be made.

D: Application of other general principles of Community law

67. In addition to the applicable principles of law already summarised, it is now settled law that the direct effects of a Directive are not exhausted

(even where that Directive is correctly enacted in domestic law). When Member States exercise the powers conferred on them by Directives the general principles of Community law are engaged and must be observed: see particularly *M&S*, Judgement, paras. 27, 43-44. In addition to the principles of equivalence and effectiveness the principle of non-discrimination (or equality of treatment) is relevant. This requires that similar situations shall not be treated differently unless differentiation is objectively justified: see *Marthe Klensch and Others* (Cases 201 and 202/85) [1986] ECR 3477; *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General* (Case C-377/89) [1991] ECR I-1155, where a provision regarding equal treatment in a welfare Directive overrode a prohibition on unjust enrichment in domestic law.

68. For examples of where the principle of equal treatment has been applied in VAT cases, see *Société Générale des Grandes Sources d'Eaux Minérales Francaises v Bundesamt für Finanzien*)Case C-361/96) [1998] STC 981, Judgement paras 30, 34-48, which concerned proof of claims under the Eighth VAT Directive and *Goldsmiths (Jewellers) Limited v CCE* (Case C-330/95) [1997] STC 1073, Judgement para 11, which concerned the power of derogation in Article 11C(1) of the Sixth VAT Directive and bad debt relief in cases involving non-monetary consideration.

E: Appeal based on a "prior decision"

69. Section 84(10) VATA was enacted to provide relief for the problem encountered by the taxpayer in *CCE v JH Corbitt (Numismatists) Limited* [1980] STC 231. It enables the Tribunal to exercise a supervisory jurisdiction over decisions of the Commissioners which are not themselves appealable decisions but on which a decision under appeal, such as an assessment, depended. A common example is where (as in *Corbitt*) the Commissioners refuse to recognise as sufficient the taxpayer's stock records for the purposes of operating the margin scheme. Section 84(10) has been considered in *CCE v Arnold* [1996] STC 1271 where it was held that there must be dependence between the prior decision and the decision appealed but that the section did not operate where there was in truth only one decision: see particularly at p.1288f-h. Accordingly, whether section 84(10) operates depends on the nature of the decisions and of the decision-making process and on the chronology of events.

The Respondents' Contentions

70. In their Statement of Case dated 28 February 2002 the Respondents make five main points:
    i. The decision of 12 October 1998 was the refusal of the Appellant's claim and was not within section 84(10);
    ii. The Appellant would be unjustly enriched if repaid and has suffered no loss and damage for which it should be compensated (paragraphs 14(b), (d) and (g)).
    iii. The VAT in dispute "washed through" the Appellant and the motor manufacturers and did not stick with anyone; if VAT had not been charged on Manufacturers Bonuses this would have reduced the purchase price of the vehicles and resulted in lower lease rentals;
    iv. The Appellant conceded unjust enrichment to the Revenue Adjudicator and its remedy lies outside the Tribunal;
    v. The Respondents have properly implemented the Sixth Directive and by paying claims by other car leasing companies have not breached any general or specific requirement in law.

Submissions of the Appellant

71. The Appellant submits in support of its case (and in answer to the Respondents' five points) as follows:
    i. The Appellant unquestionably paid the amounts in dispute to the Respondents as VAT. Such amounts of "VAT" were on an assumed supply of services to the manufacturers by the Appellant. The amounts were not VAT. There is in principle a right to repayment.
    ii. The "VAT" amounts were invoiced to the manufacturers but were reclaimable by them as input tax. Accordingly they were not, for practical purposes, borne by the manufacturers. The Appellant incurred VAT on the undiscounted purchase price of the vehicles when they were supplied to the Appellant (as an entirely separate supply of goods) by the dealers. The Appellant could not recover this VAT as input tax under the rules as they then stood.
    iii. The Appellant did not pass on the "VAT" it seeks to reclaim to its lessees. The leases were entirely separate supplies of services. The purchase price of the vehicle formed only one of a number of elements in the calculation of rentals.
    iv. Even if the Appellant is deemed to have passed on the "VAT" it seeks to reclaim that does not of itself establish unjust enrichment. This is for the Tribunal to decide on all the facts.
    v. If the Appellant is not repaid it will suffer loss and damage because other claimants have been paid. By reason also of the losses on resales of the vehicles at the end of the leases, payment of the VAT claimed will not be a windfall profit.
    vi. The Appellant's complaint to the Adjudicator was substantially upheld and amounts to a finding that the Respondents breached the principle of equality of treatment. The Respondents' original treatment of Manufacturers Bonuses was plainly wrong and in breach of Community law. Accordingly, the general principles of Community law are engaged.
    vii. The Appellant did not contest unjust enrichment before the Adjudicator because it assumed that recharging the "VAT" to the manufacturers was deemed to be unjust enrichment in domestic law, i.e. section 80 VATA. This was without regard to Community law principles. If the Appellant is prevented from now pursuing its Appeal (and the Respondents consented to a late appeal) it will be denied an effective remedy.
    viii. Finally, the case is within the jurisdiction of the Tribunal because the decision of 23 August 2001 is within section 80(t) VATA and the prior decision (to formally invoke unjust enrichment) is within section 84(10) VATA.
72. Miss Whipple for the Respondents made the following submissions:

Background

73. "The Appellant appeals against the Commissioners' decision dated 23 August 2001. That letter was written following the Revenue Adjudicator's invitation to the Commissioners to review their earlier decision of 12 October 1998. The Commissioners (by Mike Eland, director general) concluded that the original decision should stand.

Jurisdiction

74. The Commissioners submit that the real decision under challenge is the decision of 12 October 1998. An appeal against that decision is long out of time. No application has been made for an extension of time. The Commissioners would not object to an extension of time, if such an application were to be made, but:
    a. In the absence of such an application being made, strictly the Tribunal has not jurisdiction to hear this appeal; and
    b. The granting of any such extension is a matter for the Tribunal under rule 19 of the Tribunal Rules.

The decision of 23 August 2001

75. By 23 August 2001, all were agreed (Appellant, Commissioners and Revenue Adjudicator) that the unjust enrichment defence was made out in law. The decision of 23 August 2001 is the Commissioners' refusal to exercise a discretion in the Appellant's favour, either to waive the unjust enrichment provisions; and/or to make an ex gratia payment. It is not a substantive decision on the merits of the Appellant's claim – which decision had already been made on 12 October 1998 – but a decision on the exercise of discretion given the Revenue Adjudicator's conclusions in the wider context of the case.
76. It follows that the Appellant's recourse against the decision of 23 August 2001 would have been by way of judicial review (or possibly a complaint to the Ombudsman), as the Revenue Adjudicator recommended. The grounds for JR would have been a failure to take any or sufficient account of the RA's conclusions – a rationality/reasonableness challenge.
77. The Tribunal has no power to review the exercise of the Commissioners' conduct in the sense of its declining to exercise a discretion in the Appellant's favour (see *CEC v Arnold* [1996] STC 1271; *Marks and Spencer plc*, Tribunal Jurisdiction Decision (15302) and High Court [1999] STC 205, 247). The Tribunal has no jurisdiction to consider the decision contained in the 23 August 2001 letter.

Section 84(10) VAT Act 1994

78. Further, this is not, contrary to the Appellant's arguments, a case where section 84(10) applies. That provision on its plain terms applies where the decision under appeal *is* within the Tribunal's jurisdiction but the earlier decision, upon which it depends, would not have been. This case manifests the opposite scenario: the decision under appeal is *not* within the Tribunal's jurisdiction, but the earlier decision, on which it is said to depend, would have been. The purpose of section 84(10) is to prevent any technical objection being raised to the effect that the lawfulness of the decision appealed against could not be questioned because it depended on an earlier appeal decision of the Commissioners that fell outside the jurisdiction of the Tribunal; that is not the case here: the earlier decision was squarely within the jurisdiction of the Tribunal (see *CCE v JH Corbitt (Numismatists) Ltd* [1980] STC 231; and *CEC v Arnold* [1996] STC 1271).

Conclusion on Jurisdiction

79. The appeal lies against the decision of 12 October 1998; the later decision of 23 August 2001 is irrelevant to the statutory appeal process.
80. Any appeal against the 12 October 1998 decision is out of time. Time must be extended on the application of the Appellant (or conceivably on the Tribunal's own motion).

81. This is not a section 84(10) case at all; that provision does not assist in bringing the 12 October 1998 decision within the Tribunal's jurisdiction.
82. If, contrary to the Commissioners' submissions, the Tribunal does consider that the decision of 23 August 2001 is within its jurisdiction, presumably on the basis that it is, substantively, a decision to refuse repayment on grounds of unjust enrichment, then that decision is within section 83(t). The Appellant does not need to invoke section 84(10) at all, because no question of dependence upon an earlier decision arises.

Approach to unjust enrichment

83. The principle of the defence of unjust enrichment is well established, both in Community law and domestic law (see *Hans Just I/S v Danish Ministry for Fiscal Affairs*[1980] ECR 501; and *Marks and Spencer* HC and CA).
84. The defence:
    a. applies where it is established that the charge to tax has been borne in its entirety by someone other than the trader and that reimbursement of the latter would result in unjust enrichment; but
    b. is disapplied if the inclusion of that charge in the cost price has, by increasing the price of the goods and reducing sales, caused the trader damage which excludes in whole or in part any unjust enrichment which would otherwise be caused by reimbursement (*Société Comateb* [1997] STC 1006 at 1020).
85. The case law is quite clear that in order for the defence to be disapplied under (b) above, the loss or damage alleged by the taxpayer must flow from the inclusion of the tax in the purchase price; and not from other factors incidental to the transaction (see *Comateb*; and *Marks and Spencer* HC at 239 b-c). This must logically be the case, quite apart from authority: it would be arbitrary (and discriminatory) if the defence of unjust enrichment could be defeated simply by showing that the underlying transaction in relation to which the wrongful charge was passed on was not, for whatever reason, profitable. For example: two taxpayers pass on the wrongful charge as part of the cost of the goods. One taxpayer runs a successful marketing campaign and makes a profit overall on the sales; the other fails to advertise and makes insufficient sales to generate a profit. It would be contrary to Community principles of legal certainty and equivalence (not to mention unfair) for only the second taxpayer to have the wrongful charge refunded, on the basis alone that failed to make a profit on the transaction.
86. This principle is reflected in section 80(3C) VATA 1994, which defines the "quantified amount" as being loss or damage which results from the mistaken assumptions about the operation of VAT provisions on Manufacturers Bonuses. Further, this provision is a procedural measure in relation to which the Member States have scope in Community law to legislate.
87. The Commissioners bear the legal burden of establishing the defence of unjust enrichment. The appropriate procedure is:
    a. For the Tribunal to review the evidence and establish whether the Commissioners have made out a prima facie case of unjust enrichment; and
    b. If they have, to examine evidence produced by the taxpayer regarding its losses, to see whether, on the evidence as a whole, the Commissioners have established the defence;
    c. If, after considering all the evidence, there is uncertainty or an absence of detail, that should not be held against the trader,

(*Marks and Spencer* HC, 239 f-g, 241 e; and see CA at p. 42-44)

The notice of appeal

88. The Appellant advances its arguments at paragraph 19 of the Notice of Appeal. The Commissioners contend that (subject to points taken on jurisdiction above):
    a. The Tribunal has jurisdiction to consider whether the Commissioners' decision was correct in law. This is an application of the Tribunal's appellate jurisdiction, and falls within section 83(t) VATA 1994. By an application of the principles outlined above, this involves considering whether the Appellant would be unjustly enriched if the amounts claimed (all or part) were repaid.
    b. The Tribunal is not able to consider, as the Appellant asks it to, aspects of the Commissioners' conduct in dealing with the claim. It is, in particular, not able to review allegations of unfairness of treatment by comparison with other taxpayers.
89. Accordingly, as to paragraph 19 of the Notice of Appeal:
    i. Is agreed;
    ii. Is agreed, subject to arguments on unjust enrichment;
    iii. (a) is not justiciable by the Tribunal; (b) is the point which is before the Tribunal to the extent that loss and damage is alleged; distortion of competition is not justiciable by the Tribunal as, on analysis, it goes to the unfairness allegation;
    iv. Is not justiciable by the Tribunal because raised in the context of the unfairness argument (see *Marks and Spencer* Tribunal Jurisdiction Decision 15302) and High Court [1999] STC 205, 247).
    v. Misguided, this is not a section 84(10) case, but if section 84(10) did apply, it is accepted in principle that an error in the earlier decision will vitiate the latter decision under appeal.

Is unjust enrichment made out on the facts?

90. First, it is necessary to establish what amounts are actually being claimed by the Appellant. The Appellant contends (para 71 above) that the VAT in question was that charged to the Manufacturers (incorrectly) on the Bonus payments. But if that was the whole story, the claim would surely fail because there would be unjust enrichment: the Appellant recovered that VAT from the Manufacturers; the Manufacturers in turn (fully taxable traders) would have reclaimed it as their input tax. None of this VAT has "stuck"; there is no loss at all; any repayment would be a windfall to the Appellant.
91. The Appellant's better argument is that:
    a. Whereas it accounted for VAT on the bonus payments, on the basis that they were consideration for a separate supply of services, in fact no such VAT was due;
    b. The proper treatment of those payments *should have been* to treat them as retrospective price discounts on the price of the car (*Elida Gibbs*, which would have given rise to a corresponding right to reclaim some of the VAT accounted for on the car itself.
92. In the latter case, the Appellant did actually bear the VAT (it did not "wash through"). For that reason the Commissioners approach this case as one for a reclaim of overpaid output tax (not an input tax claim); and have

considered whether the cost has been passed on to the customers via the lease rentals.

93. The Commissioners address their arguments to the Tribunal on the basis that this is indeed an output tax reclaim.

Prima facie case

94. The level of rentals is calculated using CALPAK. Amongst the six factors reflected is the purchase price of the vehicle (see Derek Waghorn para 7 1st statement). This, at the material time, would have included VAT on the full purchase price. Thus, the VAT cost of the car is factored into the price at which the car is rented; and the VAT is passed on to the customer in this way.
95. The Commissioners have thus made out a prima facie case for unjust enrichment.

Loss and damage to the Appellant

96. The issue then becomes one of evidence: is there any evidence to suggest that, as a result of passing on that charge, the Appellant has suffered loss and damage? There is no such evidence:
    a. The Appellant's practice in passing on the charge was the same as its competitors. Therefore, its rates were no less competitive because it was passing on the charge.
    b. Newspaper cuttings and the Appellant's own evidence suggests that rental prices came down once the treatment of Manufacturers' Bonuses was clarified. This demonstrates that those costs were being passed on to the customer.
    c. Even if the Appellant suffered loss and damage on the transactions because the projected second hand sale price of these cars was, as it turned out, not achievable, this is not the sort of loss and damage which can defeat a prima facie case of unjust enrichment. It is a coincidental loss on the transaction. Losses could have resulted for any number of reasons, and fall outside section 80(3C) and the case law.
97. The defence of unjust enrichment is established. Indeed, the Appellant itself appears to have accepted in correspondence with Customs and the Revenue Adjudicator that there would, as a matter of law, be unjust enrichment; the Revenue Adjudicator also accepted this and thus was unable to recommend that Customs allowed the Appellant's claim."
98. Mr Conlon's reply to Miss Whipple's submissions was as follows:

"**Introduction**

99. The Respondents make two main points: (1) they attack the Tribunal's jurisdiction and basis of the Appeal; and (2) they assert unjust enrichment is established and that the Appellant has failed to prove loss and damage flowing from inclusion of VAT in the price.

Jurisdiction

100. The Respondents make much of this in an attempt to direct attention away from their decision to "invoke the unjust enrichment defence" in this case but not for claims by other car leasing companies. The Respondents' arguments misinterpret the various decisions, the basis of the complaint to the Adjudicator, the Appellant's case as set out in the Pleadings and the inter-relationship between section 83 and section 84(10) VATA..
101. The letter dated 23 August 2001 from Mike Eland is a decision within section 83(t) VATA. It was the final rejection of the Appellant's claim under section 80 VATA for over £700,000 overpaid VAT. This

decision is within the Tribunal's appellate jurisdiction. Contrary to paragraph 1 of the Respondents' Skeleton, this does not specify which earlier decision it upholds. Plainly, however, it refers back to *final refusal* to pay the claim.

102. The Respondents' letter dated 12 October 1998 is one of a number of "prior decisions" on which the decision of 23 August 2001 depends. The letter of 12 October 1998 is *not* an outright rejection of the claim. It informs the Appellant that the Commissioners are formally invoking unjust enrichment and invites the Appellant's comments. The effect in law is that an evidentiary burden is passed to the Appellant to rebut unjust enrichment. This letter is not itself a decision which is appealable under section 83 VATA. Quantum and liability were not finally decided. The claim remained live at least until the Respondents' letter of 24 December 1998 and possibly until the meeting on 5 October 1999. The Appellant's complaint to the Adjudicator did not limit itself to any particular letter of the Respondents. It was the Respondents' choice to split their decisions as to (a) invoking unjust enrichment, and (b) liability and quantum, in the way they did. Given the legal effect of invoking unjust enrichment (see above) that is unsurprising. In any event a taxpayer is entitled to give a fair reading to the Commissioners' letters: see *R v CCE, ex parte Kay & Co and GUS Limited* [1996] STC 1500 at p.1515j.

103. A major flaw in the Respondents' case is their assertion that the appeal is out of time. The Notice of Appeal clearly sets out the Appellant's case, particularly paragraphs 2-4, 13, 14, 19(4); so also did the application for permission to bring a late appeal. The Respondents consented to this application unreservedly. Contrary to paragraphs 2 and 6 of the Respondents' Skeleton, the letter dated 12 October 1998 is not within section 83(t), so time limits are irrelevant; it is the prior decision on which the decision of 23 August 2001 (which is within section 83(t)) depends. Thus, there is no need for the Appellant to seek further permission to appeal against the letter dated 12 October 1998.

104. The Appellant should not be compelled, as suggested in paragraphs 4 and 5 of the Respondents' Skeleton, to seek judicial review. The Tribunal's powers are sufficient. This would be a breach of the Community law principle of effectiveness and an obstacle to a fair trial. The Respondents' case on jurisdiction is without foundation. They wish to bury or recharacterise the letter of 12 October 1998. The Tribunal is entitled to ask: why? The answer, it is submitted, is that such decision was unreasonable and plainly wrong. Section 84(10) VATA is engaged. It enables the Tribunal, exercising its supervisory jurisdiction, to quash that decision and allow the Appeal against the appealed decision, namely the letter of 23 August 2001.

Unjust enrichment

105. If the Respondents' prior decision of 12 October 1998 is quashed the Appeal succeeds. It is unnecessary to consider unjust enrichment. Did the Respondents act *reasonably* in treating the claim "differently" from those of the other car leasing businesses ... at odds with Customs and Excise's public commitment to act fairly and impartially" (Revenue Adjudicator's decision of 22 February 2001). If the Tribunal is satisfied that this *was* reasonable, it is then necessary for the Tribunal to go on to consider the merits of the unjust enrichment defence.

106. There is some common ground on the legal analysis of unjust enrichment. Where the submissions diverge appears by contrasting paragraphs 15 and 16 of the Respondents' Skeleton with paragraphs 23 and 24 of the Appellant's submissions. The Respondents' conclusions as to application of the defence are too narrow. The basic questions are whether

a repayment would enrich the claimant and whether that would be unjust. Community law does not permit an irrebuttable presumption merely because the undue tax has been passed on. It is still necessary to consider the basic questions. This case is not the simple scenario as in *M&SHC* where VAT was wrongly charged on teacakes and passed on in full to the final consumer. It is more complex. The undue "VAT" on the Manufacturers Bonuses was not borne by the manufacturers. They obtained a deduction. It was in practice borne by the Appellant since it was a cost component of purchasing the cars and deduction was blocked. The Respondents have not shown this VAT was expressly passed on: the onward supply was not of goods but of services. The undue "VAT" was only one factor in the lease pricing and some element of the VAT suffered on purchasing the cars, the Appellant would have to invoice for the VAT *inclusive* amount of the bonus, plus VAT: see Worked Example attached (Appendix 3). On the facts the Respondents have not discharged the burden of proof of showing unjust enrichment.

107. The Respondents' case is that the Appellant must fail unless consequential loss and damage can be shown. On a proper reading of the European jurisprudence, however, this is too narrow. Consequential loss is one factor the Tribunal may consider. The Appellant did suffer direct loss as a result of blocked input tax on purchase of the cars.

108. The Respondents have overlooked another fundamental point. Section 80(3) refers to the situation where "repayment of the amount would unjustly enrich the claimant". Thus, the position can only be judged at the time the Appellant's claim would (but for the refusal) have been paid.

109. The Tribunal is entitled to examine the respective positions of the parties. The Adjudicator found that the Respondents had been guilty of unequal treatment at odds with their Service Commitment. This continued long after the Respondents had refused the Appellant's claim. As a matter of legal analysis, the Respondents breached the Community law principles of effectiveness and equality of treatment. Plainly the refusal itself caused the Appellant loss and damage by creating a distortion of competition and favouring competitors. The Appellant was in fact *unjustly impoverished* by the refusal of its claim because other identical claimants had been (and continued to be) repaid.

110. Lease pricing followed an industry norm. The Respondents have failed to establish that competitors did not also suffer losses on the residual values of leased vehicles.

The Appellant's losses are now detailed in Mr Waghorn's Further Statement and Exhibit "DJW/1". These losses greatly exceed the amount of the claim. If, as seems likely, the Appellant's competitors also suffered losses, the repayments made to those competitors by the Respondents created a cushion against the full extent of those losses. By the Respondents' decisions this is a cushion denied to the Appellant. This breaches the principle of equality of treatment.

111. It is self-evident that the price of the cars was increased by the amount of the undue "VAT". At the time the deduction of VAT on cars purchased by the Appellant was blocked: Article 7 of the VAT (Input Tax) Order 1992. Thus, the difference between the depreciated value of each car and its realised value on resale was correspondingly greater: see Mr Waghorn's statement, paragraphs 9 and 10 and Further Statement, paragraph 3.

112. The whole circumstances of this case are sufficient to entitle the Tribunal to find as a fact that repayment of the claim would not unjustly

enrich the Appellant. The Respondents' arguments should be rejected and the Appeal allowed."

Conclusions

113. Our conclusions are as follows:

i. The letter dated 23 August 2001 from Mike Eland to Mr Madgwick is a decision which falls within s.83(t) VATA 1994. It contains a clear confirmation that the application of the unjust enrichment provision to the Appellant's claims for repayment of VAT was correct. The refusal of the claims by voluntary disclosures of 27 and 30 October 1997 and referred to in the fourth paragraph of Mr Eland's letter of 12 October 1998 was, therefore, confirmed. It was the final rejection of the Appellant's claim under s.80 VATA for over £700,000 overpaid VAT.

ii. The Respondents' letter of 12 October 1998 is one of a number of "prior decisions" on which the decision of 23 August 2001 depends. It was not an outright rejection of the claim. It informed the Appellant that the Commissioners were formally invoking unjust enrichment and invited the Appellant's comments. The letter is not, therefore, itself a decision which could be appealed against under s.83 VATA.

iii. The appeal is not out of time. Indeed the Appellant applied to the Tribunal for permission to make a late appeal and the Respondents consented.

iv. The Respondents have breached the Community law principles of effectiveness and equality of treatment. This is quite clear from both letters written to the Appellant by Mike Eland. In the letter of 23 August 2001 he says "… I fear it is inevitable that some instances will arise where different treatment is incorrectly applied to tax payers in similar circumstances to one of the tax payer's disadvantage. We seek to minimize these occurrences and are always prepared, as here, to investigate and reconsider individual cases when they arise… In this particular case I do not find that the failures by this Department were such as to justify concessionary treatment and hence concluded that the original decision to refuse these claims must stand." If different treatment was incorrectly applied to tax payers in similar circumstances, we would have thought that the correct response might be to reverse the decision in cases where the treatment was incorrect rather than speak of "concessionary treatment." As Mr Conlon pointed out, the Appellant was in fact impoverished, rather than enriched, by the refusal of its claim because other identical claimants had been, and continued to be, repaid. In this case, the losses incurred greatly exceeded the amount of the claim, being put by Mr Waghorn at over £5.8m. If, as Mr Conlon said, and as was likely, the Appellant's competitors also suffered losses, the repayments made to those competitors by the Respondents would have created a cushion against the full extent of their losses. As a result of the Respondents' decisions this is a cushion denied to the Appellant. This is a clear breach of the principle of equality of treatment.

v. In so far as the letter of 12 October 1998 may be regarded as a prior decision within s.84(10) and, insofar as it maybe

necessary, we set it aside as being unreasonable and in breach of the principle of equality of treatment.

"There is no doubt that the duty to act fairly can be infringed where the taxing authorities treat similarly placed tax payers differently" – per Elias J in *R (on the application of British Sky Broadcasting Group plc)* v *Customs & Excise Commissioners* [2002] STC 437 at 447.

vi. In view of our decisions as set out in this paragraph 113, it is not necessary for us to consider unjust enrichment but, in case this appeal should go further, we state that unjust enrichment has not been established for the reasons set out in para 106 above.

114. The appeal is allowed with costs. If the costs cannot be agreed the parties may apply to the Tribunal for directions.

115. Appendix 1
Appendix 2
Appendix 3

PETER H LAWSON

CHAIRMAN

RELEASED:

LON/01/1215

APPENDIX 1

FROM: HM Customs and Excise

Warwick House 67 Station Road

Redhill Surrey RH1 1QU

TO: J Madgwick

VAT Manager, Group Taxation

Lombard North Central Plc

Lombard House 3 Princess Way

Redhill Surrey RH1 1NP

Ref: 243 4890 53 Br 0800 Dated: 12 October 1998

Dear Mr Madgwick

Voluntary Disclosures: Manufacturer's Bonuses

I have now received the advice from my HQ's and am now in a position to advise you of my Department's view as promised in Mr Johnson's letters of 7 & 25 September 1998.

This matter has been the subject of a considerable amount of correspondence and discussion and it now seems appropriate that I explain my Department's position in full as it affects your voluntary disclosures of 27 & 30 October. Whilst most of this advice has been given to you previously I hope you find it helpful to have it summarised in this way.

In the first instance you submitted the claims by voluntary disclosure on the basis that you overdeclared output tax following the publication of Business Brief (BB) 16/97. I pointed out in my letter of 12 December 1997 that a claim for overdeclared output tax in the context of BB 16/97 was incorrect. You subsequently acknowledged, in your letter of 16 December, that the bonuses "should be treated as discounts to the original supply by the manufacturer and input tax adjusted". Despite the voluntary disclosures being in error I considered that the spirit of BB 16/97 primarily called upon me to determine if your business had overpaid VAT. I therefore agreed to consider the claims on the basis that they were for a reduction in the irrecoverable input tax on the original purchase of the car.

Having determined that in your case the bonuses were paid by manufacturers solely for you buying a certain number of their vehicles, I accepted that they should be treated as discounts reducing the value of the supply of the car. However, as I explained in my letter of 18 March 1998, I must consider unjust enrichment before authorising any repayment of tax. My HQ's have reviewed the position again since I informed you that they were minded to invoke this defence. They have found nothing to alter their initial opinion and I am to confirm that the Commissioners are fomally invoking the provisions of Section 80(3) of the VAT Act 1994 in respect of claims made by voluntary disclosures of 27 & 30 October 1997 for VAT periods ending 30/9/94, 31/12/94, 31/3/95 and 30/6/95.

In making this defence the Commissioners consider that, whatever leasing method was offered by leasing companies, the basic cost of the car was paramount. If input tax could not be recovered, as was the case up to 1 August 1995, then the price of the car included VAT and this cost affected the calculation of the rental charges. If however, the value of the car had been less and, therefore, the sticking VAT was less, the lease would have been cheaper for the customer. This is because basic cost components, such as interest, would have been based on a lower value.

The effect of your failure to take into account the lower value of the cars was that you charged your customers more. Consequently, any refund of VAT would unjustly enrich you as you have already recovered the sticking VAT from your customers in the cost of the lease, and you have not undertaken to pass the benefit of the refund on to your customers.

We believe that further proof that you would be unjustly enriched is provided by the wide publicity in the car press about the August 1995 leasing charges. It is clear from this that leasing cars would be cheaper because of the absence of sticking VAT. The implication being that under the old rules any reduction in the value of sticking VAT would have been reflected in the leasing cost of the car the benefit of which would accrue to the customer.

As I have mentioned above, we would of course be prepared to consider any further comment which you may wish to make if you do indeed wish to challenge the defence of unjust enrichment. However, in the absence of any request for consideration, you would have 30 days from the date of this letter to appeal to the VAT Tribunal.

Yours sincerely

S White

APPENDIX 2

FROM: Mike Eland Director General

1st Floor West New King's Beam House

22 Upper Ground

London SE1 9PJy RH1 1QU

TO: J Madgwick

VAT Manager, Group Taxation

Lombard North Central Plc

Lombard House 3 Princess Way

Redhill Surrey RH1 1NP

Dated: 23 August 2001

Dear Mr Madgwick

Your Complaint to the Adjudicator

As you know, following her investigation of your complaint the Adjudicator asked me to review the decision to refuse your 'Elida Gibbs' VAT refund claims on the basis of unjust enrichment. I replied to her at the end of April.

I have fully considered the facts of this case and the process applied to your and similar claims. As found by the Adjudicator, the application of the unjust enrichment provisions to your claims was correct and your company was not singled out for special treatment. However, I do accept that there were other 'Elida Gibbs' VAT claims from the car leasing sector which were repaid unconditionally when they should have been made subject to, and possibly rejected under, the unjust enrichment provisions. I am somewhat cautious on the rejection point because the unjust enrichment provisions can bite differently on what appear to be very similar cases. A lot hinges on the fine detail of contractual relationships and pricing policy. Nevertheless, whatever the outcome would have been, our failure to consider unjust enrichment in appropriate cases is regrettable. Consistency of treatment is an important aim for us and we are re-examining our procedures to identify improvements that can be made.

In the administration of a complicated tax, however, I fear it is inevitable that some instances will arise where different treatment is incorrectly applied to taxpayers in similar circumstances to one of the taxpayers' disadvantage. We seek to minimise these occurrences and are always prepared, as here, to investigate and reconsider individual cases when they arise. As the Adjudicator recently advised you, in this particular case I did not find that the failings by this Department were such as to justify concessionary treatment and hence concluded that the original decision to refuse these claims must stand.

Yours sincerely

Mike Eland.

APPENDIX 3

WORKED EXAMPLE

ROVER 825D (Phoenix)

£ Notes

(1) The Lease

Cost 18,725 (1), (8)

Less estimated residual value (9,233)

"Depreciation figure" 9,492 (2)

Add: Other charges 6,939 (3)

Less: Bonus (700) (4), (8)

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Consideration for lease 15,731 (5)

(2) Disposal

Estimated residual value 9,233

Actual resale proceeds 6,200

Loss on resale 3,033 (6), (7)

NOTES

(1) Includes VAT of £2,788.83 which Lombard could not deduct.

(2) VAT of £2,788.83 not specifically passed on to lessee.

(3) Road tax, AA, handling, servicing, cost of funds.

(4) Lombard charged £700 plus "VAT" of £122.50 but paid £122.50 to C&E as "VAT".

(5) Spread over 36 months i.e. £437 per month plus VAT. This is consideration for a supply of services in the form of a package.

(6) No VAT due because of operation of margin scheme (£6,200 is less than £18,725, therefore there is a 'nil' margin).

(7) No VAT charged to customer: see Note (6).

(8) Lombard claims £122.50 paid as VAT. To recoup its irrecoverable VAT on "bonus" element of purchase price Lombard would need to invoice £822.50 plus irrecoverable VAT of £122.50.