

## Conde Nast Publications Ltd [VAT Decision 18869]

**Whether a late claim for under-recovered input tax pursuant to Regulation 29 of the VAT Regulations 1995 was time-barred in the light of the decisions of the Court of Justice in *Marks and Spencer* and *Grundig Italia*.**

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The Appellant company, CNP, appealed against the Commissioners' decision refusing to refund previously unrefunded input tax claimed late. The input tax related solely to staff entertainment expenditure incurred by CNP since April 1973 and claimed by CNP for the first time by a letter of 27 June 2003. The Commissioners determined that as the claim related to underclaimed input tax, then it did not fall within the scope of s80 VAT Act 1994. Rather, the claim was capped under normal rules relating to Regulation 29(1A) in relation to which no transitional period applied. The appeal concerned the period April 1973 to December 1999 and there was no dispute as to the basis and amount of the claim: the only issue was whether it was time-barred.

Regulation 29(1) was amended by SI 1997 No 1086, and regulation 29(1A) added, from 1 May 1997. The amendment introduced a three year time limit, or "cap", on claims from that date, when the amending statutory instrument came into effect. Before that date there was no time limit on late claims under this Regulation. This bears a parallel with section 80(1) of the Value Added Tax Act 1994 (recovery of overpaid VAT). That provision became, after enactment, subject to a three year time limit, or "cap", on late claims. That time limit was introduced from July 1996<sup>2</sup>.

The Appellant's core contention was that, by analogy with the Court of Justice's approach in *Marks and Spencer plc v Customs and Excise Commissioners* (Case C-62/00) [2002] STC 1036, the Commissioners had failed properly to introduce the new time limits into Regulation 29 in failing to provide a transitional period. Such a period would have been similar to the period that the Court held was required for s80 VAT Act 1994. Further, because of the lack of clarity about the procedure to be used, that period should be an extended transition, in the sense that it should relate to claims made or that could be made within a reasonable period of the final date (1 May 1997), and a further period in which claims could be

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<sup>2</sup> On 18 July 1996 the Paymaster General announced a 3 year "cap" on claims under section 80 Value Added Tax Act 1994, to be effective from that date. The amendment of section 80 by Finance Act 1997, section 47(1) to that effect was deemed to come into force on 18 July 1996.

renewed or claimed once it was accepted that there should have been a transitional period. The analogy with the s80 period (and by reference to the approach of the Court of Justice in *Grundig Italiana SpA v Ministero delle Finanze*, C-255/00, [2003] All ER (EC) 176) would indicate a six month period for both stages. If the second period were operated by the Commissioners on the same basis as the section 80 period (that is, as set out in the various Business Briefs issued by the Commissioners in that regard) then CNP would be able properly to renew its claim. The Appellant contended that the failure on the part of the Commissioners to provide a parallel transitional period for the changes to Regulation 29, and a parallel procedure for late claims, deprived CNP of a right to make a claim in breach of its Community rights and was in breach of the Community legal principles of equivalence and effectiveness.

The Commissioners resisted the Appellant's arguments on several grounds. In reliance on the decision of Lawrence Collins J in *Local Authorities Mutual Investment Trust v Customs and Excise Commissioners* [2003] EWHC 2766 (Ch), they contended that Regulation 29(1A) was not open to challenge on the ground that a three year cap was too short. It was neither disproportionate nor unreasonable. Nor was the amendment to the Regulation in breach of article 1 of the First protocol to the European Convention on Human Rights (peaceful enjoyment of possessions). The application of the relevant Community legal principles in *Grundig Italiana* was designed to prevent retroactively depriving individuals of their claims or of allowing them too short a period to claim. The issue here was not whether Regulation 29(1A) was valid, or otherwise, in the abstract, but whether it should be applied or disapplied in this case.

The tribunal's approach was essentially to seize upon the particular circumstances of the case and to duck the legal argument: it stated that the Tribunal's concern was:

"not with whether the amended form of regulation 29 is, in the abstract, open to criticism by reference to European Community law but whether this appellant has a ground for criticising it and so disapplying it in connection with this appeal. Nor should the tribunal be unduly distracted by the way in which both parties first made and considered the claim under section 80. Assuming for the moment - but not deciding - that the argument presented by [the Appellant] is correct in law, this tribunal nonetheless must focus on whether this appellant has been disadvantaged by that illegality".

The Tribunal found that the Appellant was aware from 1994 at the latest that it had under-recovered in respect of staff expenses yet it took no action to claim until 2003 after it had been prompted by its advisers to do so. The Appellant had however actively considered and rejected the possibility of making a claim both before and after the time limit came in. It formed the view at the time however that any recoverable sums would be modest and not material to it, taking into account the management time that would have been involved in identifying the reclaimable sums, which might have been difficult to identify.

The Tribunal's conclusion therefore was that the Appellant had taken a fully considered view that it was not worth its time to claim this particular form of unclaimed input tax: it essentially decided to write off the amounts. There was therefore no evidence that the amendments introduced to Regulation 29 stopped the appellant making any claim that it was minded to make, or had done any work on making, at that time. There was therefore no disadvantage shown to this Appellant in the introduction of the time limit without a transitional period. It followed that the Appellant's unclaimed input tax on staff entertainment was now the other side of the relevant time limit and it could not in 2003 revisit its earlier decisions not to claim.

Though the Tribunal clearly found the Appellant's legal arguments compelling, it has nevertheless put off to another day the question whether the entry into force of Regulation 29 was tainted by the same illegality as s80 VAT Act 1994 and there still remain a number of appeals in which this question is relevant. It remains to be seen whether the Tribunal will, in any of those appeals, be forced to deal with the legal issue or whether, as in *Conde Nast*, the facts enable the Tribunal to find a lack of prejudice in relation to the particular Appellant such that a finding as to whether there ought to have been a transitional period in the implementation of Regulation 29 is rendered unnecessary.