

## Condé Nast and Fleming

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*The judgment of the House of Lords in Fleming and Condé Nast<sup>1</sup> is the latest instalment of the litigation stemming from the introduction of the three-year caps in 1996 and 1997. The issue for the House was how to deal with the fact that the UK government introduced a time limit for claims under Regulation 29(1) of the Value Added Tax Regulations 1995 ("VATR 1995") without providing for a transitional period in respect of claims already accrued. It was accepted by the Commissioners that the failure to provide for a transitional period was a breach of Community law and that national law which is incompatible with Community law must be disapplied to the extent necessary. The question, therefore, was how far the cap should be disapplied.*

*The Commissioners argued that the cap should only be disapplied to:*

*(i) claims made within a reasonable period after the introduction of the new limitation periods in 1996 and 1997; (ii) alternatively, claims made within a reasonable time after it became apparent to taxpayers that the Commissioners should have provided a reasonable transitional period under Regulation 29(1), (iii) alternatively, claims which could or would have been made within a reasonable transitional period had one actually been provided for. The House (Lord Walker dissenting) held that the cap had to be disapplied to all claims which had accrued prior to the introduction of the caps. It was not possible for the court to cap the claims because it was for the legislature or the Commissioners to provide for a proper, prospective transitional period.*

### Background

In order fully to understand the judgment of the House of Lords, it is necessary to understand at least in outline the chronology of the changes to section 80 of the Value Added Tax Act 1994 ("VATA 1994") and Regulation 29 of the Value Added Tax Regulations 1995 ("VATR 1995") and the litigation that arose from those changes.

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<sup>1</sup> *Fleming (t/a Bodycraft) v HMRC and Condé Nast Publications Limited v HMRC* [2008] UKHL 2

Section 80 VATA 1994 governs claims for overpayment of output tax and Regulation 29 VATR 1995 governs claims for previously underclaimed input tax.<sup>2</sup>

Until 1996 section 80(4) VATA 1995 provided that a claim for repayment of an amount paid by way of VAT which was not due had to be brought within 6 years of the date on which it was paid. However, on 18 July 1996 due to concern at the potential for the Treasury to face very large claims for repayment of tax, the Paymaster-General announced in the House of Commons that section 80 VATA 1994 would be amended to reduce the time limit for section 80 claims to 3 years, that time limit to apply to accrued claims as well as to future claims.<sup>3</sup> The new time limit applied retrospectively and with no transitional period in respect of accrued claims.

Until 1997, Regulation 29 did not provide for any time limit in respect of claims in respect of input tax. However, with effect from 1 May 1997 Regulation 29 was also amended so that claims for input tax could not be made more than three years after the date of the return for the relevant period.<sup>4</sup> That amendment also applied retrospectively and with no transitional period in respect of accrued claims.

In *Marks and Spencer II*,<sup>5</sup> the ECJ held that it had been unlawful under Community law to amend the time limit in section 80 VATA 1994 with retrospective effect and without a transitional period. Following the ECJ's judgment, on 5 August 2002 the Commissioners announced (by way of Business Brief, rather than by amending the legislation) a retrospective transitional period of four months to apply to section 80 claims, such that claims would not be capped for taxpayers with claims that had accrued before 4 December 1996 and who had made a claim or discovered a mistake before 31 March 1997.<sup>6</sup>

However, shortly after the Commissioners' announcement, on 24 September 2002, the ECJ gave judgment in the *Grundig Italiana* case.<sup>7</sup> The ECJ held that in respect of an Italian tax where the limitation period had been reduced from ten or five years to three years, the minimum transitional period could reasonably be assessed at six months. The ECJ further held that it was permissible to apply the new limitation period to actions brought after the expiry of an adequate transitional period even where those actions concerned the recovery of sums paid before the entry into force of the new limitation period.

Following *Grundig Italiana*, the Commissioners amended the retrospective transitional period in respect of section 80 claims, extending it for a further three months to a total of seven months, so that claims made before 30 June 1997 would not be capped.<sup>8</sup>

At no stage did the Commissioners introduce a transitional period for claims under Regulation 29, either prospective or retrospective. That decision should be understood however, in light of the fact that until the judgment of the Court of Appeal in *University of Sussex* on 21 October 2003,<sup>9</sup> the Commissioners took a much narrower view of the application of Regulation 29.

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<sup>2</sup> At the time that Section 80 VATA 1994 and Regulation 29 VATR 1995 were amended, the Commissioners' official view was that Regulation 29 covered only late claims for input tax in relation to periods where the taxable person was due a net repayment of tax, and that section 80 covered late claims for input tax where the output tax for the period exceeded the input tax reclaimable. That view of the law was disapproved in *University of Sussex v HMCE* [2001] STC 1495. [2004] STC 1.

<sup>3</sup> The change was in fact introduced by section 47(2) of the Finance Act 1997 which was deemed to have come into effect on 18 July 1996.

<sup>4</sup> Value Added Tax (Amendment) Regulations 1997, SI 1997/1086

<sup>5</sup> Case C-62/00 *Marks and Spencer plc v Commissioners of Customs and Excise* [2002] STC 1036

<sup>6</sup> See Business Brief 22/02

<sup>7</sup> Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze* [2000] ECR I-8003

<sup>8</sup> See Business Brief 27/02

<sup>9</sup> See note \* above.

## The Fleming and Condé Nast cases

*Fleming* and *Condé Nast* were both cases relating to Regulation 29.

Mr Fleming made a claim on 23 October 2000 under Regulation 29(1) for repayment of input tax paid on the purchase of three sports cars approximately 10 years earlier. That claim was rejected as having been made more than three years after the return for the period in question was due. Mr Fleming lost his appeal to the VAT Tribunal and his further appeal to the High Court.<sup>10</sup> However, the Court of Appeal found in his favour, *Ward and Hallett LJJ* on the grounds that in the absence of a transitional period Regulation 29(1A) was unlawful and must be disapplied, *Arden LJ* on the grounds that Regulation 29(1A) must be disapplied in respect of those who had claimed within a reasonable time following the ECJ's judgment in *Marks and Spencer II*.

*Condé Nast* made a claim under Regulation 29(1) on 27 June 2003 for input tax paid on staff entertainment dating all the way back to the UK's accession to the EEC. That claim was rejected on limitation grounds. *Condé Nast* lost its appeal to the VAT Tribunal on the ground that it had not shown that it would have made a claim during a contemporaneous transitional period, had one been provided for. It also lost in the High Court,<sup>11</sup> but won in the Court of Appeal, which followed the judgment of the majority in *Fleming*.<sup>12</sup>

### Decision of the Majority

There seem to be two leading judgments in the House of Lords, given by Lords Hope and Neuberger, who each agreed with one another but who expressed their Opinions in slightly different terms.

Lord Hope made no distinction between two cases before the House. He held that where legislation provided for a transitional period, however inadequate, it might in principle be possible for a court to make its own assessment of what an adequate transitional period would have been. However, he held that that was not possible on the facts of the present case, as no transitional period had been provided for at all. The issue was "not one of statutory interpretation, for which the court must accept responsibility. There is a gap in the legislation which is unfilled. The primary responsibility for giving a clear indication to taxpayers as to where they stood with regard to the making of claims despite the retrospective introduction of the time limit lay with the legislature and the executive." On that basis, he held that the transitional period had not yet begun. Accordingly, neither Mr Fleming nor *Condé Nast's* claims were barred.

Lord Neuberger could see "no difference in principle or in practice between a case where there is an inadequate transitional period and one where there is no transitional period".<sup>13</sup> He held that a transitional period which was introduced only retrospectively was "little more than hypothetical" and that the "Commissioners' solution to the problem fails on the very grounds that the problem exists, namely that it breaches the principles of effectiveness and legitimate expectations".<sup>14</sup> He rejected the argument that the limitation period should only be disapplied in respect of taxpayers who would have brought claims within a reasonable transitional period: a "period, whether of transition or disapplication, is intended to be for the benefit of anyone who could take advantage of it".<sup>15</sup> Further, he rejected the argument that a transitional period should be deemed to have run from any of the decisions in *Marks and Spencer II*, *Grundig Italiana*, or *University of Sussex* on the grounds, first that it would be impossible for taxpayers to know the length of the period which the court would think appropriate as a period of disapplication and, second, that is unrealistic to conclude that taxpayers should have appreciated that time was running prospectively against them from any of those decisions.<sup>16</sup> Lord Neuberger concluded that the end of the period of disapplication had not yet arrived: it was for Parliament to legislate prospectively, although it would be acceptable for the

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<sup>10</sup> [2005] STC 707

<sup>11</sup> [2005] STC 1327

<sup>12</sup> [2006] STC 1721

<sup>13</sup> Judgment paragraph 82

<sup>14</sup> Judgment paragraphs 85 and 86

<sup>15</sup> Judgment paragraph 97

<sup>16</sup> Judgment paragraphs 98 and 99

Commissioners to communicate a prospective transitional period in clear terms and by extra-statutory means.<sup>17</sup>

Lord Carswell agreed with both Lord Hope and Lord Neuberger and in respect of both appeals. Lord Scott similarly agreed with both Lord Hope and Lord Neuberger as to the result. However, he differed on one point of principle, holding that a transitional period had to be introduced by legislation, rather than by administrative measures such as the Business Briefs.<sup>18</sup>

Like the majority, Lord Walker dismissed the appeal in relation to Mr Fleming. Unlike the majority, he would have allowed the Commissioners' appeal in relation to *Condé Nast* on the basis that the claim was made "*more than a reasonable time after a taxpayer of average diligence would have been aware that regulation 29(1A) could be disapplied*".

### Conclusions and Implications

This appears to be the end of the road for the Commissioners in seeking to apply the time limit contained in Regulation 29(1A) to claims which accrued before 1 May 1997, at least without providing for a fresh transitional period. Further, it is reasonable to expect that the Commissioners will not in future repeat the mistake of announcing a retrospective change in a time limit without explicitly allowing for a transitional period. On that basis the direct application of *Condé Nast* in domestic tax law is likely to be limited to the specific line of litigation from which it arises.

However, the judgment does have wider implications both for tax lawyers and for European lawyers in that it provides an up-to-the-minute indication of how far the UK courts may be expected to go in rewriting national law. Lord Hope in particular drew a distinction between cases where the issue is one of statutory interpretation and cases where there is "a gap in the legislation which is unfilled".<sup>19</sup> Other members of the House similarly expressed the view that there were limitations on how far the court could go in rewriting legislation.<sup>20</sup> Lord Walker however expressed the contrary view, holding that it was not merely within the power of the court but was its "plain duty under EU law" to define an adequate transitional period. Further, he drew a clear distinction, so often blurred, between the obligation of disapplication and the *Marleasing* principle of conforming interpretation, as well as between the interpretative obligation under section 3 of the Human Rights Act 1998 and the obligations of EU law: "Jurisprudence under section 3...such as *Ghaidan v Godin-Mendoza*...is in this context irrelevant and misleading".<sup>21</sup>

Further, one interesting aspect of the case is the decision of the House not to refer the question to the ECJ. As Lord Hope noted, "The problem is far from easy, as the division of opinion in the courts below and in this House so clearly demonstrates"<sup>22</sup>. In *Conde Nast's* appeal in the High Court, Warren J. had rejected the analysis which ultimately found favour with the majority of the House as being "extreme" and, in the view of both Arden LJ in the Court of Appeal and Lord Walker in the House of Lords, it appeared to go beyond what the principle of effectiveness requires. In light of those disagreements as to the ambit of that principle and the obligation of disapplication, and against the background of the widely publicised financial repercussions of their "extreme" analysis, the majority of the House nevertheless confidently decided that the matter was *acte clair*.

*Christopher Vajda QC and Valentina Sloane appeared for the Commissioners.*

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<sup>17</sup> Judgment paragraph 104 to 107

<sup>18</sup> Judgment paragraph 20

<sup>19</sup> See paragraph 10.

<sup>20</sup> See Lord Scott at paragraph 20 and Lord Carswell at paragraph 77.

<sup>21</sup> Paragraph 62, for the contrary view see per Arden LJ in *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] STC 1252

<sup>22</sup> See Lord Hope at paragraph 6.