



**Appeal number
FTC/87/2012**

Value Added Tax – input tax – repayment supplement – whether repayment supplement payable in respect of VAT credit claimed other than in VAT return

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**THE COMMISSIONERS FOR HER
MAJESTY'S REVENUE AND CUSTOMS**

Appellants

- and -

OUR COMMUNICATIONS LIMITED

Respondent

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 18 November 2013

**Michael Jones, instructed by the General Counsel and Solicitor to HMRC,
for the Appellants**

Conrad McDonnell, instructed by Neumans LLP, for the Respondent

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from the First-Tier Tribunal (Tax) (Tribunal Judge Greg Sinfield and Mr Harvey Adams FCA) dated 26 September 2012 [2012] UKFTT 604 (TC). By its decision, the First-Tier Tribunal allowed an appeal by Our Communications Ltd against a decision of the Commissioners of Her Majesty's Revenue and Customs (who I will refer to, together with their predecessors, as "HMRC") to refuse to pay repayment supplement under section 79 of the Value Added Tax Act 1994. The issue before the First-Tier Tribunal was whether section 79 applied to a claim for payment of a VAT credit not made in a VAT return, but which had been accepted by HMRC exercising their discretion under regulation 29(1) of the Value Added Tax Regulations 1995. The First-Tier Tribunal held that it did. HMRC appeal with the permission of the First-Tier Tribunal. As is common ground, the appeal turns on a short point of statutory construction.

The facts

2. The facts are clearly and succinctly set out in the First-Tier Tribunal's decision at [3]. For present purposes, the key facts may be summarised as follows. Our Communications submitted its VAT return for period 01/06 promptly on 3 February 2006 claiming repayment of a certain sum. By a letter dated 3 March 2006, Our Communications claimed repayment of a further £1,488,006.74 in relation to period 01/06. Subsequently Our Communications promptly submitted returns and claimed repayments in respect of periods 02/06 and 03/06. HMRC subjected Our Communications' returns for 01/06, 02/06 and 03/06 to extended verification. During this process, HMRC decided that part of the claim made in the letter of 3 March 2006 related to period 02/06. HMRC subsequently disallowed large parts of Our Communications' input tax claims for the periods 01/06, 02/06 and 03/06, but on 19 December 2008 the VAT and Duties Tribunal allowed Our Communications' appeal against that decision. On 4 March 2009 (more than 30 days after the Tribunal's decision) HMRC paid Our Communications the input tax which it had been denied. HMRC subsequently paid Our Communications repayment supplement in respect of the sums claimed in its returns, but refused to pay repayment supplement in respect of the £1,488,006.74 claimed in the letter of 3 March 2006.

Repayment supplement

3. Repayment supplement was introduced by section 20 of the Finance Act 1985 following recommendations made in 1983 by the Committee on Enforcement Powers of the Revenue Departments (commonly known as the Keith Committee). The Committee recommended that an automatic surcharge ought to be introduced for failure by a taxpayer to furnish a VAT return or to pay the VAT shown on the return. Such a surcharge was introduced by section 19 of the Finance Act 1985 (now section 59 of the 1994 Act). The Committee also suggested that a "form of repayment supplement would be an appropriate concomitant" of such a surcharge scheme where the return in question showed

that an amount was due from HMRC to the taxpayer: see paragraph 24.5.8 of the Committee's Report. In other words, repayment supplement was intended to be HMRC's equivalent to the taxpayer surcharge and was designed to operate in relation to repayment VAT returns in much the same way as the surcharge does in respect of returns where a payment is shown due from the taxpayer to HMRC.

4. Repayment supplement has accordingly been described as a "spur to efficiency" of HMRC: see *Customs and Excise Commissioners v L. Rowland & Co (Retail) Ltd* [1992] STC 647 at 655 (Auld J).

The legislation

5. Section 79 provides, so far as relevant, as follows:

"Repayment supplement in respect of certain delayed payments or refunds

- (1) In any case where—

- (a) a person is entitled to a VAT credit, or

...

and the conditions mentioned in subsection (2) below are satisfied, the amount which, apart from this section, would be due by way of that payment or refund shall be increased by the addition of a supplement equal to 5 per cent of that amount or £50, whichever is the greater.

- (2) The said conditions are—

- (a) that the requisite return or claim is received by the Commissioners not later than the last day on which it is required to be furnished or made, and

- (b) that a written instruction directing the making of the payment or refund is not issued by the Commissioners within the relevant period, and

- (c) that the amount shown on that return or claim as due by way of payment or refund does not exceed the payment or refund which was in fact due by more than 5 per cent of that payment or refund or £250, whichever is the greater.

- (2A) The relevant period in relation to a return or claim is the period of 30 days beginning with the later of—

- (a) the day after the last day of the prescribed accounting period to which the return or claim relates, and

- (b) the date of the receipt by the Commissioners of the return or claim.
- (3) Regulations may provide that, in computing the period of 30 days referred to in subsection (2A) above, there shall be left out of account periods determined in accordance with the regulations and referable to-
- (a) the raising and answering of any reasonable inquiry relating to the requisite return or claim,
 - (b) the correction by the Commissioners of any errors or omissions in that return or claim, and
 - (c) in the case of a payment, the following matters, namely-
 - (i) any such continuing failure to submit returns as is referred to in section 25(5), and
 - (ii) compliance with any such condition as is referred to in paragraph 4(1) of Schedule 11.
- (4) In determining for the purposes of regulations under subsection (3) above whether any period is referable to the raising and answering of such an inquiry as is mentioned in that subsection, there shall be taken to be so referable any period which-
- (a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry, and
 - (b) ends with the date on which the Commissioners-
 - (i) satisfy themselves that they have received a complete answer to the inquiry, or
 - (ii) determine not to make the inquiry or, if they have made it, not to pursue it further,
- but excluding so much of that period as may be prescribed; and it is immaterial whether any inquiry is in fact made or whether it is or might have been made of the person or body making the requisite return or claim or of an authorised person or of some other person.
- (5) Except for the purpose of determining the amount of the supplement-
- (a) a supplement paid to any person under subsection (1)(a) above shall be treated as an amount due to him by way of credit under section 25(3) ...

- (6) In this section ‘requisite return or claim’ means—
 - (a) in relation to a payment, the return for the prescribed accounting period concerned which is required to be furnished in accordance with regulations under this Act, and
 - (b) in relation to a refund, the claim for that refund which is required to be made in accordance with the Commissioners' determination under section 33 or (as the case may be) the Commissioners' determination under, and the provisions of, section 33A or 33B.

...”

6. Section 25 of the 1994 Act provides, so far as relevant, as follows:

“(1) A taxable person shall -

- (a) in respect of supplies made by him, and
- (b) in respect of the acquisition by him from other Member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as ‘prescribed accounting periods’) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a ‘VAT credit’.

...

(6) A deduction under subsection (2) above and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations; ...”

7. Regulation 29(1) of the 1995 Regulations provides:

“Subject to paragraph (1A) and (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.”

8. Regulations 198 and 199 of the 1995 Regulations, which were made under section 79(3), contain further details about computing the period of 30 days under section 79(2A), but it is not necessary for the purposes of this decision to set them out.

The First-Tier Tribunal’s decision

9. As the First-Tier Tribunal recorded at [14], there was no dispute before the First-Tier Tribunal that Our Communications was entitled to a VAT credit within section 79(1) in the sum of £1,488,006.74. Furthermore, HMRC accepted that, on a literal reading of section 79(2), each of the three conditions for a repayment supplement was satisfied:
 - (i) Our Communications’ returns for 01/06 and 02/06 were received by HMRC on or before the due dates;
 - (ii) HMRC did not issue a written instruction directing the making of the payment of the VAT credit within the relevant period; and
 - (iii) the amounts shown on the returns did not exceed the payment which was in fact due by way of VAT credit by more than 5% or £250.
10. HMRC nevertheless contended that section 79 should be interpreted as only applying to claims for payment of VAT credits which have been made in returns submitted on time, and hence Our Communications did not qualify for repayment supplement since it had made its claim by the letter dated 3 March 2006. The First-Tier Tribunal rejected this contention for the reasons it gave at [17]-[19]. In summary, the First-Tier Tribunal concluded that the wording of section 79 was clear, that interpreting it in the manner contended for by Our Communications did not lead to anomalies and that interpreting it in that manner was in accordance with the underlying policy.

The arguments on the appeal

11. HMRC contend that the First-Tier Tribunal erred in law in its construction of section 79. HMRC argue that, as a matter of necessary implication, section 79 only applies where the amount in question is shown as due on the requisite return or claim, which in the case of a claim for payment is the return for the prescribed accounting period concerned.
12. In support of this argument, counsel for HMRC submitted that the First-Tier Tribunal’s construction of section 79 gave rise to anomalies which could not have been intended by Parliament. He gave two examples to illustrate this argument.

13. Example 1. Suppose that the taxpayer's VAT credit for a period is £100. The taxpayer puts in a return on time, but in error only claims £70 on that return. HMRC process the return, but make the payment outside the 30 day time limit provided by section 79(2A). Three months later the taxpayer realises his error and writes to claim the remaining £30, relying on HMRC's discretion as provided by regulation 29(1). HMRC accept that claim and repay the £30 within a week of receiving it.
14. In this example, the result one would expect would be that HMRC would have to pay repayment supplement in respect of the £70, but not in respect of the £30. Counsel submitted, however, that, on the First-Tier Tribunal's interpretation of section 79, repayment supplement would be payable in respect of the £30 as well. This was because HMRC would not have issued the payment instruction in respect of the £30 within 30 days of the return as required by section 79(2)(b) and (2A).
15. The First-Tier Tribunal's answer to this point was to interpret the word "claim" in section 79(2A) as having the same meaning as in section 25(6) and regulation 29(1) i.e. such claim as HMRC may allow or direct. Thus the First-Tier Tribunal construed "return or claim" in section 79(2A) as being broader than "requisite return or claim" as defined by section 79(6).
16. Counsel for HMRC submitted that this interpretation of section 79(2A) was erroneous for three reasons. First, because it would be incongruous to construe the words "return or claim" in section 79(2A) as having a different meaning to the same words elsewhere in section 79.
17. Secondly, because it was inconsistent with the statutory history. Section 79(2A) was introduced by section 19 of the Finance Act 1999. The time limit within section 79(2)(b) as originally enacted was a "period of 30 days beginning on the date of the receipt by HMRC of that return or claim [i.e. "the requisite return or claim" referred to in section 79(2)(a)]". Thus, prior to the enactment of subsection (2A), there was no suggestion that the time limit in section 79 could refer to claims to VAT credits made otherwise than in a VAT return. It followed that, if the First-Tier Tribunal was correct in its interpretation of section 79(2A), then the enactment of that subsection would have represented a substantial change in the ambit of the section. One would expect to see an indication of that intention in the Explanatory Notes to the relevant clause of the 1999 Finance Bill, but the Notes contain no such indication. Rather, they indicate that the purpose of section 79(2A) was to close a loophole involving premature returns.
18. Thirdly, because the First-Tier Tribunal's interpretation of section 79(2A) itself gave rise to anomalies. It produced the result that an inquiry by HMRC into a return would suspend the 30 day period under section 79(3)(a); but an inquiry into a claim made otherwise than in a return would not, because (3)(a) only applies to inquiries into "the requisite return or claim". Similarly, a period referable to the correction by HMRC of any errors or omissions would be discounted for the purposes of the time limit if they were errors or omissions in the "requisite return or claim" under section 79(3)(b); but not if they are in a claim made outside a return.

19. Example 2. Suppose that the taxpayer's VAT credit a period is £100. The taxpayer puts in his return, and in error only claims £70 on that return. The return is submitted by a taxpayer a week after the deadline for submission. HMRC process the return, but make the payment outside the 30 day time limit provided by section 79(2A). Three months later the taxpayer realises his error and writes to claim the remaining £30, relying on HMRC's discretion as provided by regulation 29(1). HMRC accept the claim and repay the £30, but do not do so until six months after receiving the claim.
20. In this example no repayment supplement is due in respect of the £70 because the return was late, and so the section 79(2)(a) condition is not fulfilled. For same reason, however, no repayment supplement is due in respect of the £30 either. The point of this example is to show that, even on the First-Tier Tribunal's interpretation of section 79, it is not the case that every claim which HMRC process late will give rise to a repayment supplement.
21. Finally, counsel for HMRC pointed out that HMRC's construction did not necessarily leave a taxpayer in the position of Our Communications without a remedy, because it could claim interest under section 78(1)(d) of the 1994 Act if the delay was due to HMRC's error.
22. In response, counsel for Our Communications submitted that the First-Tier Tribunal's construction of section 79 was supported by (i) the statutory language, (ii) common sense and (iii) policy and fairness.
23. So far as the statutory language was concerned, counsel for Our Communications argued that the wording of section 79 was clear and admittedly applied to the facts of the present case.
24. So far as common sense was concerned, counsel for Our Communications argued that it clearly could not have been intended that section 79 would provide for a supplement to an amount which was in excess of the payment in fact due to the trader. Thus on HMRC's case the repayment supplement must be 5% of the lesser of the amount due to the taxpayer and the amount claimed by the taxpayer in his return. This was not what section 79 said, however. Moreover, it would be unworkable in a case where HMRC paid part of the VAT credit on time and part late, as one might not know which payment related to which amount.
25. As to policy and fairness, counsel for Our Communications argued that the purpose behind section 79 of spurring HMRC to efficiency was equally applicable to claims made in returns and to claims made in some other manner authorised by HMRC. There was no good reason for requiring claims to be made on one piece of paper rather than another. On the contrary, HMRC's approach gave taxpayers an incentive to overclaim in their returns and was capable of operating unfairly.
26. Counsel for Our Communications accepted that, on different facts to the present case, it was possible to envisage anomalies in the operation of section 79, but submitted that that did not compel the conclusion that the section should be construed as HMRC contended. He argued that this was particularly

so given that the potential anomalies concerned the provisions relating to the relevant period, particularly section 79(2A), rather than section 79(2), which laid down the conditions for repayment supplement. He pointed out that there was no evidence that such anomalies had in fact arisen in any actual case, and suggested that this indicated that there was no real problem with section 79. More fundamentally, he submitted that, if the clear wording adopted by Parliament in the existing legislation produced anomalous results, then it was for Parliament to amend the legislation and not for the courts to do so under the guise of interpretation.

Discussion and conclusion

27. In considering the correct construction of section 79, the starting point is the wording of the relevant provisions. The key provision is section 79(2), which sets out the conditions which must be satisfied in order for the taxpayer to be entitled to repayment supplement. It is common ground that section 79(2) does not explicitly state that the claim to payment of VAT credit must be made in the return. Accordingly, HMRC must establish that this is necessarily implied. Necessarily is the not same thing as reasonably or sensibly.
28. Having considered the rival arguments summarised above, I have come to the conclusion that HMRC are correct and that this is necessarily implied. There are three main reasons for this.
29. First, section 79(6) defines “requisite return or claim” for the purposes of section 79 as meaning, in the case of a payment, the return for the prescribed accounting period. It is the requisite return or claim that is referred to in two out of the three conditions in section 79(2) (namely (a) and (c)), in the regulation making power for computing the relevant period in section 79(3) (see (a) and (b)) and in the limitation on that power contained in section 79(4). Thus, in the case of a payment, the whole scheme of section 79 revolves around the return.
30. Secondly, while it is true that section 79(2A) refers to “a return or claim”, rather than “requisite return or claim”, it seems to me to be implicit that the words “a return or claim” refer back to the return or claim mentioned in section 79(2)(a) and (b). I consider that it would be very odd for the words “return or claim” in section 79(2A) to have a wider meaning than the same words in section 79(2), and especially odd for the word “claim” to refer to different things altogether in the two contexts. Furthermore, I agree with HMRC that the former reading is supported by the statutory history and that the First-Tier Tribunal’s interpretation gives rise to anomalous results that Parliament could not have intended. I am not persuaded by counsel for Our Communications’ argument that it is for Parliament to correct any anomalies that may result from the clear wording of the existing legislation, since I do not consider that, considered as a whole, the wording compels the conclusion for which Our Communications contends.
31. Thirdly, as counsel for HMRC pointed out during the course of his oral submissions, the limit of 5% (or £250) contained in section 79(2)(c) only applies to “the amount shown on that return or claim”, that is to say, the

requisite return or claim referred to in section 79(2)(a). In the case of a claim to payment, that means on the return. The First-Tier Tribunal's interpretation of section 79 would enable this limit to be circumvented simply by making a claim which is more than 5% greater than the amount actually due by letter. That cannot have been Parliament's intention.

32. For these reasons, the appeal is allowed.

MR JUSTICE ARNOLD

Release date: 26 November 2013