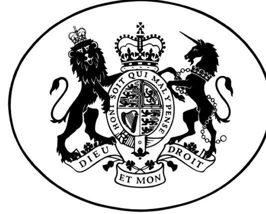

TC02495

Appeal number: TC/2012/03811

VAT – default interest – input tax – sections 74 and 83(1)(q) VATA 1994 – correct taxpayer assessed – commercial restitution – set off – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DUDMAN GROUP LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD J MANUELL
MRS J DIXON

Sitting in public at 45 Bedford Square London WC1A 3DN on 23 November 2012

Mr S Dudman, Director, and Mr N Montgomery, Accounts Manager, for the Appellant

Mr B Robinson, Presenting Officer, for the Respondents

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DECISION

1. The Appellant appealed against default interest charged to it under section 74 of the Value Added Tax Act 1994 ("VATA"), in the sum of £11,143.19, for the late payment of VAT. Payment was due by 31 July 2007 and was not made until 21 December 2010.

2. Liability to interest on VAT recovered late arises in accordance with section 74 VATA. Section 74(2) provides for interest to be charged from the reckonable date (by section 74(5)(c), the date the VAT return was required to be made) until payment. Section 83(1)(q) provides for an appeal to the First-tier Tribunal concerning interest. Section 84(6) provides that the tribunal has no power to vary an assessment by way of interest.

3. The Appellant's case in summary was that it and its sister company Dudman Investments Ltd are wholly owned by Dudman Holdings Ltd. The Appellant operates quarries and sells aggregates, concrete and cement. The properties it occupies are owned by Dudman Investments Ltd. Both companies operate out of the same offices. Both companies are VAT registered. They share their accounting system. Dudman Investments Ltd has only submitted VAT returns as nil, with the exception of the VAT input which is the subject of the present appeal. Following an assurance visit by HMRC officers on 27 November 2008, HMRC notified the Appellant that it had claimed £71,091.13 as input on the purchase of a property, Half Tide Quay, an input which should have been claimed by Dudman Investments Ltd. The Appellant sought to argue that because both companies were members of the same group, HMRC were not deprived: the disputed payment had been resolved by HMRC paying £71,091.13 to the Appellant, after which £71,091.13 had been paid to HMRC. It was a circular transaction.

4. This argument was set out at greater length in the skeleton argument prepared by Mr Montgomery, the Appellant's accounts manager, which in effect comprised his evidence, to which Mr Stephen Dudman (a director) contributed as he saw fit in the course of the appeal hearing. Mr Montgomery said that there had been delay on the part of HMRC and that the matter had been handled by some 12 different HMRC staff, giving rise to delay and confusion. The interest figures produced showed that HMRC had stopped charging interest on 5 July 2012. Mr Montgomery said that there had been an agreement with HMRC that no interest would be charged to the Appellant because there had been no loss of revenue.

5. Mr Robinson for HMRC (who had initially outlined the issues at the beginning of the hearing for the benefit of the Appellant and the panel) relied on his skeleton argument. There had been a suspension of interest but that was not indicative of any agreement by HMRC that there was no loss or interest due. There had been debt management issues for the whole group of Dudman companies. This was a situation of different corporate identities. The interest was properly due.

6. HMRC had produced an agreed bundle of documents for the hearing, which included copies of all documents on which either party wished to rely, including the official notices as well as electronic and written correspondence. This was examined during the hearing by the panel with the assistance of both sides. The Appellant's representatives were given every opportunity to comment and to draw attention to any relevant items within the agreed bundle.

7. The panel reserved its determination, which now follows. The panel is satisfied that there was no agreement about suspension or cancellation of interest between HMRC and the Appellant, whether to the effect alleged by Mr Montgomery and Mr Dudman or otherwise. Neither witness was able to point to any document or series of documents where the date and principal terms of the alleged agreement were set out, nor by whose authority any such agreement was concluded on either side. The witnesses appear to have been labouring under a misunderstanding. While the panel is chiefly concerned with the issues in the present appeal, the documents produced in the agreed bundle show that the Appellant and its sister companies had a number of ongoing compliance problems during the material period of time. Indeed, in January 2010 a winding up petition in a six figure sum was foreshadowed by HMRC against the Appellant, a threat repeated by HMRC on 12 September 2011 in a substantial five figure sum. That underlying situation goes some way towards explaining why a number of HMRC staff were involved in dealing with the tax affairs of the constituent companies of the Dudman group. It is, however, clear from the correspondence that Mr Tom Culbert, Higher Officer, VAT Assurance, had a continuous and supervisory involvement with the VAT interest dispute which is the subject of the present appeal. The panel finds at best that the relevant staff of the Appellant heard what they hoped to hear, influenced by a mistaken and erroneous view of the legal position. There was no indication that any external advice was ever sought by the Appellant to test or guide their understanding.

8. Moreover, in the panel's experience, and as the documents produced in the present appeal show, it is HMRC's strict practice to record any compromise or accommodation in writing. That is, of course, in accordance with normal commercial practice. The materials from which the panel were invited to infer an agreement were wholly insufficient for any such purpose; any such inference was in any event blocked by Mr Culbert's letters dated 30 September 2011 and 20 November 2011 which set out an accurate history of the matter. The panel so finds.

9. The panel finds that the arguments advanced on the Appellant's behalf have no substance at all. It was the Dudman group of companies' decision to operate in a particular way. It is trite law that every company has a separate legal personality. It is equally trite law that every VAT registered tax payer is separate from another, even if closely related, whether as corporations or individuals. The claim that there was no loss to HMRC is specious because there was no dispute that VAT input had been wrongly claimed. The VAT position had to be established separately for each company in the Dudman group. VATA prescribes in section 73 how that must be done, that is, by the registered tax payer filing the appropriate return by the due date. It is undisputed that the necessary return was not filed on time by the Appellant. Interest thus became payable.

10. The accuracy of the interest calculation was not challenged. For reasons which were not explained, HMRC ceased to charge further interest at the applicable rate on 5 July 2012, but that was not supportive of the Appellant's case. It is simply to the Appellant's slight advantage. HMRC have not sought to raise any further interest demand so the matter rests there.

11. The appeal is dismissed.

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD J MANUELL
TRIBUNAL JUDGE

RELEASE DATE: 2 February 2013