TC04005

Appeal number: TC/2012/00228

Value Added Tax - Do-it-yourself builders scheme - Lower rate of VAT - What had been determined by the earlier appeals - Current appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LADY HENRIETTA PEARSON **Appellant**

- and -

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN

Sitting in public at 45 Bedford Square in London on 28 August 2014

Ian Wadhams of Ingenhaag LLP on behalf of the Appellant

Les Bingham of HMRC on behalf of the Respondents

DECISION

Introduction

1. This was a curious Appeal, where it seemed that matters had become very confused.

2. The hearing before us purported (wrongly) to be the third hearing in one and the same Appeal all related to the VAT that had been wrongly charged by suppliers to the Appellant in respect of "do-it-yourself" building works.

3. The actual subject matter of this hearing was that although at the second hearing, the Appellant's appeal to recover the whole of the VAT that she had suffered, namely VAT of £40,233.18 had been allowed, when HMRC came to refund the VAT in accordance with that decision they reduced the amount repayable by £27,641.22. This was because they then contended that they were only liable to refund under section 35 VAT Act 1994 the VAT actually chargeable. They accordingly contended that the relevant suppliers to the Appellant should only have been charging VAT at the rate of 5% under section 29 VAT Act, rather than the full rate of VAT (i.e. the rate that the suppliers had charged, and the rate that HMRC had originally contended that they should have charged, until proved wrong in the second hearing).

4. Since HMRC contended that they were now only liable to refund VAT at the 5% rate, they said that the Appellant's only right of recovery in relation to the rest of the VAT suffered was to seek repayment of excess amounts of consideration that had actually been paid some years before to the suppliers, whereupon the suppliers would fail to recover the VAT (i.e. the VAT in excess of 5%) that they had wrongly accounted for to HMRC because the 4-year period for recovery had indeed expired.

The stages of the dispute in more detail

5. The first hearing in this Appeal, in which the Appellant was seeking to recover under section 35 VAT Act the full amount of VAT that she had suffered, namely £40,233.18, was heard by Judge Colin Bishopp and Richard Thomas on 11 October 2012. In drafting the decision (which was to dismiss the appeal) Judge Bishopp had felt that the Tribunal had received insufficient evidence of what had actually been done to the building. The draft decision was therefore circulated to the parties for comment. Lady Pearson's accountant commented that the Tribunal had misunderstood the facts and that Lady Pearson had further evidence in the shape of photographs and plans which would support her case.

6. As a result a further hearing was arranged with an identically constituted Tribunal on 19 April 2013. After this second hearing, the Tribunal issued its decision [2013] UKFTT 332 (TC) allowing the Appellant's appeal, because they decided that the further evidence did indeed support the proposition that the Appellant had undertaken a residential conversion.

7. When HMRC came to refund the VAT to the Appellant, following the second hearing, they reduced the repayable amount by £27,641.22. As we indicated in the Introduction, they did this because they contended that the liability to refund VAT under section 35 VAT Act applied only to VAT properly chargeable, HMRC then contending that, because the suppliers should have charged VAT at the 5% rate, rather than at the various full rates applicable when the supplies were made, HMRC should refund to the Appellant only the £12,591.96

Accordingly a distinction was drawn. VAT equal to the 5% rate was refunded under the claim under section 35. As regards the balance, HMRC suggested that the Appellant's only remedy was to seek to recover, in some form of contractual claim, the VAT that ought not to have been charged, in other words the element of VAT over 5%. It was common ground that even if the Appellant had some basis for claiming this refund from the various suppliers, (most of it, it seemed, from one supplier), the suppliers would be unable to recover the VAT in question from HMRC since the four-year period for refunds of wrongly-paid VAT had expired.

Our decision

8. There are three distinct points at stake in this hearing before us.

The first issue

9. The first issue is the question, in relation to which there was no discussion and no dispute between the parties, of whether, if the limit of HMRC's liability to refund VAT had been raised in the correct and proper manner, their contention that only the 5% element was liable to be repaid under section 35, was correct. While the point was barely dealt with, our conclusion was that HMRC was right to say that the VAT repayable under section 35 was properly limited in this way. The point appeared to have been the subject of several Tribunal decisions, albeit also the subject of comments in those decisions that the result seemed to be somewhat unfair. An obvious consequence was that HMRC ended up having collected, and then retained, a certain amount of VAT that ought not, in retrospect, to have been charged. There has to be finality to tax and refund claims, however, and while the amount would have been recoverable from the original suppliers had the four-year period not expired, it had expired and that would (subject to the third point that we address) have been the end of the matter. The position is exacerbated by the fact that claims by self-builders are only allowed at the completion of the work which may have lasted for several years, as in this case, and so the four-year period may already have ended before HMRC decide that a claim is excessive.

The second issue

10. The second issue is that while we do not dispute the conclusion just given, the difficulty that the Respondents face in this case is that there was a final decision of the First-tier Tribunal hearing, allowing the Appellant's Appeal. That Appeal was quite clearly an appeal to claim the full £40,233.18, and the unambiguous decision of the Tribunal was that the Appeal was allowed. The Tribunal happened to mention in paragraph 2 of the decision that:

> *"The matter reaches us by way of an appeal against HMRC's refusal, conveyed by letter of 15 September 2011 and upheld on review, to repay to the appellant the VAT, amounting to £40,233.18, she had incurred on the building costs. No issue is taken about the amount of the claim; the only issue we are required to determine is whether the conditions on which a repayment may be made are satisfied."*

11. The conclusion reached by the Tribunal was the simple proposition that *"the Appellant has undertaken a residential conversion with the intended scope of s. 35. The appeal must therefore be allowed."*

12. There was nothing stated at the end of that second hearing to the effect that there should be another adjournment. That was the decision of the Tribunal, and when the time limit for seeking to appeal against the decision had expired, and no effort has been made to bring an appeal out of time, that is plainly the end of that appeal process. It is accordingly obviously wrong for this appeal to be given the number shown at the head of this Decision, because our decision is nothing to do with the original appeal since that has concluded and there has been no appeal. Had there been an application to appeal, it would have needed to have been coupled with an application to raise a completely new point that had not been remotely addressed in either the first or second hearings. We rather imagine that the application to appeal would have been dismissed on the basis that just as the suppliers would have been out of time to recover wrongly paid VAT in the amounts in excess of 5%, so HMRC would be out of time to raise further points in opposition to the decision of the Tribunal that the Appellant had won her appeal to recover £40,233.18.

13. It seems to us that the situation in the present case is precisely analogous to the situation where an appellant might assert that he is exempt from tax on some particular receipt, and properly appraised there might be two tenable grounds on which HMRC might dispute the claimed exemption. Their proper course is of course to raise both. One may be wrong, and therefore HMRC needs to raise both in the hope that it can win on one or other of the two points. It seems to us that HMRC would never consider the strategy of raising only the one point, making no mention of the second, and then still assert that the tax was owing if the taxpayer had won its appeal.

14. In the present case, it would have been perfectly possible for HMRC to have raised its primary argument, namely that VAT at the full rate was properly charged and that none of it was recoverable under section 35, but that failing that then if the right rate of VAT payable by the suppliers would have been 5%, then the claim under section 35 would have had to be limited to that amount. Two results of this would have been that the Tribunal would have had to deal with both contentions and the Appellant would have known that were she to win on the first point and lose on the second, it might have been prudent to make protective claims for repayment of the balance of the VAT against the suppliers. We have not troubled to consider whether suppliers might then have been in time to make protective claims for recovery from HMRC of wrongly-paid VAT, but this would at least have been a point that would have been clear to the parties a very considerable time before the point was actually raised in this case.

15. Our decision in this case is accordingly that HMRC have ignored the clear implication of the decision of the Tribunal after the second hearing, namely that the Appellant won her appeal which was an appeal to receive her claimed refund of £40,233.18, and it is not in order to refuse a large part of the refund on a basis that HMRC had failed to raise in the concluded appeal.

16. We should make two further observations.

17. The first relates to the Respondents' representative's claim that it was rather extraordinary that we should not support the refusal by HMRC to meet the balance of the repayment claim if we agreed (as we have indicated that we do) that, properly appraised, the effect of the statutory provision and indeed several earlier Tribunal decisions was that the recoverable amount under section 35 should have been limited, as claimed by HMRC, to the

5% element. The explanation for our refusal is simply the fact that the matter has already been litigated in this case. There has been a final decision by the Tribunal, no longer subject to any possible appeal, and the outcome of that appeal, which HMRC has in large part ignored, was that the Appellant was entitled to £40,233.18.

18. We should secondly comment on an observation in the review decision, refusing to refund the balance of the VAT, in which the reviewer included the following paragraph:

> *"In correspondence, your representative has argued that when this case was previously heard at tribunal in respect of an "eligibility issue", the tribunal stated that "no issue is taken with the amount of the claim". I consider that the tribunal were referring to the fact that the point in dispute was the overall eligibility of the claim, and that the amount was not being addressed. In my opinion it was not a statement from the tribunal meaning that the amount claimed was accepted as correct at that point in time. They were merely referring to the fact that this was not the disputed issue being decided by that particular appeal."*

19. There are two obvious and related answers to those points. Firstly, the dispute was whether the Appellant should sustain her claim to recover the full amount, and the decision was that her appeal was allowed. Nobody limited the first hearing to *"an eligibility issue"*. HMRC might have done in that they failed to raise any other issue but it is wrong to say that this was the limited and agreed subject matter, and that everybody was clear that one of the parties might think of some other point later, and then wish to raise a completely new argument. Secondly, the answer to the point implicit in the last sentence of the quotation is that indeed, the issue of "eligibility" was the only point raised "by that particular appeal", but that was because HMRC forgot to raise the other point. There cannot be appeal after appeal on the same subject matter, when parties suddenly decide, having lost, that they wish to advance some quite new point.

The third point

20. The third point is one that we mentioned to the parties, in that we indicated that we understood that a recent ECJ case concerning a request from Italy had perhaps had some influence on the issue of whether somebody that had been charged a VAT-inclusive amount by a supplier might be able to recover that amount directly from the national court's exchequer, even though the primary route to recovery was to reclaim a repayment from the supplier, and hope that the time limit for the supplier's subsequent recovery from the exchequer had not lapsed.

21. Neither party had heard of the case, and so naturally neither advanced any point in relation to it. The case in question was *Banca Antoniana Popolare Veneta SpA, incorporating Banca Nazionale dell'Agricoltura SpA v. Ministero dell'Economia e delle Finanze, Agenzia delle Entrate* [2012] STC 526. Without contentions from either party, we are not going to consider any possible relevance of this case, since it is obviously irrelevant unless the Respondents appeal successfully against our decision on what we have described as the second point. We concede that in the relevant case, there was the somewhat special point that the interpretation of the disputed point as between standard-rated or zero-rated status of the supplies was a problem of the Italian taxation authorities' own creation. Arguably that might have been the critical issue in that case. In this context, however, it is notable that the reason why HMRC did not raise the 5% issue is that they conducted this

present appeal at the outset and during the two first hearings on the basis of their interpretation that the amount of VAT chargeable by the suppliers was the full rate. It does seem to lie somewhat ill in the mouth of HMRC now to be contending that the Appellant's recovery right under section 35 is limited because HMRC's primary arguments have been wrong all along and that the proper amount of VAT for the suppliers to have charged was not the full amounts, as HMRC themselves had contended. We also note that the point that we raised in the last sentence of paragraph 9 above might mean in many cases that the prospect of an Appellant seeking to recover excess consideration paid to his supplier, and the supplier then seeking to make a repayment claim against HMRC might be so illusory that this might be a factor that should be taken into account in considering whether the present provision for refunds is fair and reasonable or not.

22. This, however, is irrelevant to our actual decision. Our decision is that the decision of the Tribunal in the second hearing stands and that the Appellant is now entitled to recover the balance of the award, resulting from that decision, that has to date been refused by HMRC. We said in the opening sentence of this Decision that this matter had become confused, in that whilst the hearing was described as a further hearing in the original Appeal, this was plainly not the case. We have treated this Appeal as a further appeal in relation to the Appellant's claim to the refund originally claimed, and our decision is that there is no occasion to amend the decision in the second hearing, such that the balance of the Appellant's claim, not so far paid to her, should now be paid.

Right of Appeal

23. This document contains full findings of fact and the reasons for our 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.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASED: 11 September 2014