[2015] UKFTT 0531 (TC)

TC04681

Appeal number: TC/2014/05678

VAT – Repayment Supplement; calculation of 30 day period; whether repayment supplement due; whether written instruction directing the making of the repayment issued within the relevant period; yes; whether repayment supplement payable; no; VATA 1994 s79(2)&(3); VAT Regulations 1995 Reg 198,199. Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VOGRIE FARMS **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC FCIArb
ROLAND PRESHO FCMA, CGMA

Sitting in public at George House, 126 George Street, Edinburgh on 14 September 2015

James Anderson CA, James Anderson & Co, Chartered Accountants, Straiton, by Edinburgh for the Appellant

Ross Anderson, advocate, instructed by the Office of the Advocate General for HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. S79 VATA is designed to achieve prompt repayment by the respondents (HMRC) of overpaid tax. Normally, they do so within 30 days of a repayment claim being made. A supplement may be due to the trader, if HMRC are slow in making repayment of VAT. The questions in this appeal are how that 30 day period is calculated and whether HMRC issued written instructions within the relevant period directing the making of that repayment. The sum at stake is £7,346.76. This is the amount of a repayment supplement said to have been paid by HMRC to the appellant in error, in respect of which they subsequently issued an assessment, which the appellant disputes in this appeal. HMRC appear to have set-off that sum from a subsequent repayment claim.

2. A hearing took place at George House, Edinburgh on 14 September 2015. The appellant, a farming partnership, was represented by James Anderson CA, of James Anderson & Co, Chartered Accountants, Straiton, by Edinburgh. Eric Darling, one of the partners of the appellant, also attended and gave evidence. HMRC were represented by Ross Anderson, advocate, instructed by Louise Carlin of the Office of the Advocate General on behalf of HMRC. Mr Ross Anderson led the evidence of Allan Allport, an HMRC official. Both witnesses produced short written statements. A joint bundle of documents and skeleton arguments were also produced.

3. At the outset of the hearing, Mr Ross Anderson tendered two further documents to which there was no objection. The first was a print-out of an HMRC electronic file entry dated 29/4/14; the second was a similar entry dated 1/5/14.

Facts

4. The appellant is a partnership and has carried on business as farmers for many years. Eric Darling is one of the partners; the others are his wife and their three daughters.

5. In early 2014, the appellant had a large poultry facility constructed at their farm. The total cost of the expenditure on this project, which included demolition costs was in the region of £2m. In its VAT return for the quarter ending 31 March 2014, the appellant claimed a repayment of £146,935.25. This was largely attributable to the considerable costs of construction of the poultry facility. The appellant's VAT return was received electronically by HMRC on 1 April 2014.

6. Within HMRC is a Repayment Supplement Team. Mr Collier referred to below, is a member of that Team. The Team investigates the processing and verification of VAT returns to ascertain whether the statutory conditions for repayment are met. That Team reviews all repayment supplements paid to traders in excess of £5,000.

7. A system of automated credibility checks is applied to all repayment returns. Some returns fail the credibility checks and are investigated further. The appellant's return fell into that category, although it is not clear why. It may simply have been the size of the claim.

8. An electronic entry[1] in HMRC's records discloses that on Monday 28 April 2014, Steve Collier, an HMRC assurance officer contacted Messrs James Anderson & Co by email and requested supporting evidence to vouch the repayment claim. The electronic entry contains a reference to "18/04/14" (which we assume was typed in error) as well as to "28 –April 2014, 15.44". This time is automatically generated when an electronic entry is made. Mr Collier thus raised a reasonable inquiry in relation to the appellant's return. He considered it necessary to do so.

9. At about 15.52 on the same day, Mr James Anderson responded by email and attached various invoices relating to the repayment claim; these were said to make up the bulk of the repayment claim for the quarter 03/14.

10. Later that same day, at about 16.17hrs, Mr Collier made a further electronic entry describing the claim, noting that invoices had been produced, observing that there was no reason to doubt the claim and that the repayment date was "30/04/14". Mr Collier, who was responsible for making the initial decision on the repayment claim, thus decided that it should be met in full. He recorded that "0" days should be deductible for the purposes of calculating any repayment supplement. Thus, at this stage Mr Collier was satisfied that he had received a complete answer to his reasonable inquiry.

11. This decision had to be approved by a more senior officer. An electronic entry dated 29 April at 10.33 records another assurance officer, Paul Minns, recommending to a Senior Officer Alison Beckest that repayment be made.

12. An electronic entry dated 1 May 2014 at 14.48 records that Alison Barclay, the most senior among these officers noted that the repayment should be made in full. It also notes that a repayment supplement might be appropriate as there was said to be a one day delay. Her action (by electronic means) led to the claim being finally authorised for payment and submitted to a main frame computer, whereupon a Remittance Advice and VAT Payable Order was automatically generated at and released from HMRC offices in Wolverhampton.

13. There was no further human intervention until the Remittance Advice and VAT Payable Order had been generated. It was generated automatically consequent upon Alison Barclay's authorisation, and its terms disclosed that there had been calculated automatically and by electronic means, a repayment supplement based upon the date of receipt of the return (1 April 2014) and the date the decision to repay was confirmed electronically by Alison Barclay (1 May 2014).

[1] All references to electronic entries are to hard copy prints from HMRC electronic records, some of which are included in a file known as an *electronic folder*

14. Batches of such documents are generated, printed and dispatched on a daily basis.

15. A payable order in the sum of £154,282.01 was generated by HMRC not later than 1 May 2014. That sum comprised the repayment claim of £146,935.25 and a repayment supplement of £7,346.76. The document generated was headed *Remittance Advice and VAT Payable Order*. The text of the letter noted the crediting of the appellant's VAT account in the sum of £154,282.01 and included a reference to a repayment supplement of £7,346.76. The text also offered the appellant the opportunity to consider repayments of VAT being made directly into its bank account. It noted that a signed authorisation was required to enable that to be done. The bottom third (or thereby) of the document contained the payable order which was separable from the rest of the document by a perforated line in the paper. As it was generated by virtue of the same computerised authorisation and formed part of the same document as the *Remittance Advice*, it probably bore the same date as the *Remittance Advice* (1 May 2014).

16. HMRC's electronic ledger relating to the appellant contains entries showing that the repayment claim and the repayment supplement were authorised on 1 May 2014, and the appellant's account with HMRC credited with the sums of £146,935.25 and £7,346.76 ie a total of £154,282.01.

17. On 8 May 2014, Mr James Anderson emailed Mr Collier informing him that the appellant had not yet received payment. Mr Collier responded immediately by email stating that a payable order had been issued to the appellant on 1 May 2014. He also noted that HMRC were unable to make payment by the BACS system as they did not have the appellant's bank details on file. However, the appellant had given HMRC its bank details some 30 years ago when it was first registered for VAT. Those details have not changed.

18. The *Remittance Advice and VAT Payable Order* was delivered by the postal services to the appellant at their business address on 12 May 2014. The envelope was not retained. It was not sent by *recorded delivery*. There was no evidence of any established practice of doing so. There is no explanation as to why such a document bearing a date 1 May 2014 did not reach the appellant until 12 May 2014.

19. On the same day (12 May 2014), the *VAT Payable Order* was lodged in the appellant's bank account.

20. The Repayment Supplement Team reviewed the supplement of £7,346.76 and came to the view that a repayment supplement was not, after all, due, that the repayment supplement had been paid in error, and fell to be returned to HMRC. Accordingly, an Assessment dated 8 August 2014 in the sum of £7,346.76 was raised against the appellant.

21. The appellant sought a review. The review upheld the decision to assess. The appellant appealed to this Tribunal.

Appellant's Submissions

22. The appellant argues, in summary, that (i) the day on which HMRC raised and completed their inquiry (28 April 2014) should be **included** and thus counted in the calculation of the 30 day period which therefore (no delay having been caused) came to an end on 30 April. The VAT payable order was dated 1 May 2014 and fell outwith, not within, that period. Accordingly, the repayment supplement was properly due; (ii) there was no evidence that the authorisation date and release date of the payable order was the claimed date of 1 May 2014. For that reason too, the statutory conditions have not all been met and the repayment supplement was properly due. There was no explanation for the delay in payment. Moreover, the HMRC records produced contained a number of errors and they, too, originally thought the written instructions were issued outwith the 30 day period, triggering liability to pay the supplement, which was in fact paid. The statutory provisions should be construed as meaning that HMRC were bound to make payment within a reasonable time which they did not do.

HMRC Submissions

23. HMRC say that the requirements of section 79(2)(b) were met at latest on 1 May 2014; the written instruction does not have to be a communication with the appellant or a third party; and although the period between 1 April and 1 May 2014 was 31 days, one day for reasonable inquiry fell to be deducted and so that the instructions directing payment were issued within the statutory period of 30 days. In the course of his submissions Mr Ross Anderson referred to the *Bills of Exchange Act 1882 ss2, 13* and 55, *VATA 1994 s79*, the *VAT Regulations 1995 regs 198 and 199*, *DPP v Turner* [1974] AC 357, *Rhokana Corporation Ltd v IRC* [1938] AC 380, *Honig v Sarsfield* [1986] 59 TC 337 and *Beast in the Heart Films (UK) Ltd v HMRC* [2009] UKFTT 230 (TC). We consider some of the detail of his well-presented arguments below along with the appellant's submissions.

Statutory Background

24. S79(1) VATA 1994 provides that where a person is entitled to a VAT credit and certain conditions are satisfied, the amount payable to him by way of payment or refund is to be increased by 5%. The relevant conditions are that the requisite return or claim is made timeously, and, by s79(2):-

> (a) …….
>
> (b) that a written instruction directing the making of the payment or refund is **not**[2] issued by the Commissioners within the relevant period,
>
> ……

25. S79(2A) provides, so far as material, that:-

[2] Emphasis added

> 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
>
> ……
>
> (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 on the date on which the Commissioners-
>
> (i) satisfy themselves that they have received a complete answer to the inquiry, or
>
> (ii) …….

26. The Value Added Tax Regulations 1995 provide *inter alia* as follows:-

> 198
>
> In computing the period of 30 days referred to in section 79(2)(b)….. periods referable to the following matters shall be left out of account-
>
> (a) the raising and answering of any reasonable inquiry relating to the requisite return or claim
>
> 199
>
> For the purposes of determining the duration of the periods referred to in regulation 198, the following rules shall apply-
>
> (a) in the case of the period mentioned in regulation 198(a), it shall be taken to have begun on the date when the Commissioners first raised the inquiry and it shall be taken to have ended on the date when they received a complete answer to their inquiry.

Discussion

27. There are two main issues to resolve. The first is the proper interpretation of s79(2)(b) and its application to the facts as we have found them to be. The second is

the computation of the 30 day period, and, in particular, whether a reasonable inquiry raised and completely answered within the same day is a day which falls to be left out of account in determining whether the 30 day condition has been met.

28. As a preliminary, we record that we found both witnesses to be generally reliable and credible. Mr Darling did not add much to what is revealed by the documents in the bundle. His principal grievance was what he perceived to be the delay between 1 and 12 May 2014 when his firm was deprived of the use of the repayment sum then acknowledged to be due.

29. Mr Allport was not involved in the repayment claim but was able to explain, at least generally, the systems HMRC had in place and to explain some of the abbreviations and other technical terms used in the HMRC electronic records referred to above. He had no explanation for the fact that a *Remittance Advice and VAT Payable Order* dated 1 May 2014 was not received by the appellant until 12 May 2014. There was no evidence from the postal authorities or any evidence of its practices in the locality of appellant's farm.

Written instructions-s79(2)(b)

30. It is pertinent to begin with what s79(2)(b) does not say. It does not refer to a cheque or payable order. It does not say to whom the written instructions have to be issued; and, in particular, it does not say they have to be issued to a third party. It does not require a cheque to be issued. It does not require payment to be made by a specified date. It does not require payment or written instructions to be made or issued by any particular method such as recorded delivery. Any one or more of these matters could have been stipulated in the legislation, primary or secondary, but this has not been done. None of these matters needs to be read into the legislation even if it were legitimate to do so.

31. Nor is there room for importing the implied term proposed by Mr James Anderson in his submissions. The statutory language does not justify it. It would render redundant the detailed provisions about the 30 day period and the issuing of written instructions.

32. The fact that the payable order here was not received by the appellant until 12 May 2014 (which, on any view, falls outwith the 30 day period) is irrelevant except insofar as it casts light on the evidence as to the date written instructions directing the making of the repayment were issued.

33. In our view, the phrase *written instructions* means just that and can take any written form. There is no legislative restriction on the form of writing. Accordingly, instructions in electronic form must be regarded as *written instructions.* Any other conclusion in this modern age would be absurd.

34. The phrase *directing the making of the payment* seems to us to be equally straightforward. While it is true that a payable order or a cheque may be a written instruction which directs the making of a payment, it is equally possible that the cheque or payable order is the consequence of the issue of written instructions

directing the making of a payment. That seems to be the position here. The setting in train of the process whereby Mr Collier's original decision was approved, ultimately by Alison Barclay, and the authority to make the repayment issued by her, by electronic means to another department or arm of HMRC, which was all recorded in HMRC's electronic folders and ledger, constituted written instructions directing the generation and issue of the *Remittance Advice and VAT Payable Order* on 1 May 2014. If that is correct, then the condition laid down by s79(2)(b) is satisfied if those instructions were issued within the relevant period.

35. Although the *VAT Payable Order* is a bill of exchange within the meaning of s3(1) of the 1882 Act, the word *issued* in s79(2)(b) does not have the special meaning given by the 1882 Act to bills of exchange, which by s2 are issued when first delivered to a person who takes it as a holder. When a cheque is delivered to a creditor and accepted, it constitutes payment and discharges the debt in question subject to the resolutive condition that if the cheque is dishonoured the discharge is void *ab initio.*[3]

36. *Issuing* instructions does not therefore mean making payment or delivering a cheque or payable order or securing the transfer of funds through the BACS system. For that reason, therefore, the date on which the *Remittance Advice and VAT Payable Order* was received by the appellant (12 May 2014) is largely irrelevant. In similar vein, *making* an assessment within a specified period does not require *service* on the taxpayer within that period.[4]

37. Nor does *issuing* necessarily mean communicating with a *third party*, although it may include it. *Beast in the Heart* is an example of written instructions taking the form of instructions by HMRC to their bankers to transfer funds to a trader's bank and thus directing the making of payment to the trader.[5] The tribunal in that appeal, which had some unusual procedural twists, took the view that for a written instruction directing payment to be issued by HMRC some act was required by which instructions *go forth from the Commissioners: something which happened between officers of the Commissioners is not enough*[6].

38. We have difficulty with that *dictum*. HMRC argue that it was made *per incuriam* and cite *Rhokana*. While we did not find that case helpful, the *dictum* does not seem to us to take full account of the statutory language. In many cases, the issue of a cheque in settlement of a repayment claim will normally be preceded by instructions directing that a cheque be dispatched. These will be internal communications between one department and another, as here, and often by electronic means. Such instructions appear to us to fall four square within the statutory language, even although it can be accepted that the provision was or may have been designed to achieve prompt repayment by HMRC of overpaid tax. The example given in *Beast in*

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[3] *Turner* at 367H-368A

[4] *Honig* at 249J-250A

[5] See paragraphs 30 and 32.

[6] Paragraph 24

the Heart of putting a cheque in the drawer does not seem to us to be apt and is at odds with the modern, largely automated, electronic system which operated in the present appeal. A cheque is or may be a form of payment. The statutory language of s79, for whatever reason, requires the issue of instruction not the issue of a cheque or other payable order.

39. We should also add that we agree with the observation in *Beast* that the burden of proving whether and when an instruction directing payment was issued lies on HMRC. That onus has been discharged. The appellant offered no evidence to show that the events recorded electronically (leaving aside the view that a supplementary payment was due) were incorrect or that the system operated in a way which would lead to the conclusion that no written instructions directing repayment were issued on or before 1 May 2014. The *Remittance Advice* bears the date 1 May 2014, and it and the *VAT Payable Order* which would have borne the same date can reasonably be presumed (which we do) to have been dispatched together on that day; this is in accordance with the evidence, which we accepted, of the system in operation at the time. It was not subjected to any significant challenge which would have caused us to reach a different conclusion.

Computation of 30 Day Period

40. HMRC received the return on 1 April 2014. The 30 day period began on that date. The thirtieth day was 30 April 2014 if no period of reasonable inquiry is counted. 1 May 2014 was the 31st day. On that basis, liability to pay repayment supplement would arise. This is how the period was originally calculated electronically. No period was allowed for the, albeit very short, reasonable inquiry that was actually made.

41. The date on which the reasonable inquiry was raised was 28 April 2014. The date on which HMRC were satisfied that they had received a complete answer to that inquiry was about an hour later on the same day. That period must be left out of account. It occurred on 28 April 2014. 28 April 2014 is a date that must therefore be left out of account.

42. If 28 April 2014 is left out of account, then 1 May 2014 was the 30th day and not the 31st day. We have found that written instructions directing payment of the VAT credit were issued on 1 May 2014. On that basis, the condition mentioned in s79(2)(b) has **not** been met as the written instructions **were** issued within the relevant 30 day period.

43. The appellant's argument that as the period of reasonable inquiry was less than 24 hours, 28 April should be included in the calculation of the 30 day period, cannot be sustained. The law does not take account of fractions of the day unless some special reason required it.[7] If the period of reasonable inquiry ended instead, on say, 29 April at 11am, the period would have spanned two days but would have endured

[7] See *Trow* at pages 914G-915A, 920G-921A-F; 923D, 927E; see also *Stair Memorial Encyclopaedia of the Laws of Scotland vol 22 (Time)* paragraph 820. (Lexis Nexis online)

for less than 24 hours. In those circumstances, it seems to us that two days would have been left out of account, rather one day. It would be wrong to say that no period should be left out of account because it endured for less than 24 hours.

Other Matters

44. Although it is not entirely clear, the general position appears to be that HMRC require to be expressly authorised by a trader before they pay VAT repayments through the BACS system. This appears to be different from payment to HMRC by a trader by direct debit using the online banking system employed in conjunction with the electronic rendering of VAT returns. We were referred to a standard form of online receipt bearing the date 1/11/13 and relating to the appellant confirming a direct debit instruction and giving a direct debit reference. It is reasonably clear from this document that it is concerned with payments by the trader to HMRC and not repayments. Whatever the actual practice may be, we have been unable to identify any obligation on the part of HMRC, whether statutory or contractual, to make the repayment by the BACS system in this case. Nor have we identified any legitimate expectation that such a method would necessarily have been adopted in this case.

45. In these circumstances, the fact that HMRC were provided with the appellant's bank details many years ago and that these details are still accurate, does not matter. In any event, any failure by HMRC to use the BACS system relates primarily to the method and date of payment rather than the written instructions directing payment to be issued which we have identified above as the electronic authorisation by Alison Barclay which led to the automatic generation of the Remittance Advice and VAT Payable Order and its subsequent release to the appellant.

Conclusion

46. We find and conclude that

(a) The requisite return for the period ending on 31 March 2014 was received timeously by the Commissioners on 1 April 2014, which was the day after the last day of the prescribed accounting period to which the return related namely the period ending on 31 March 2014.

(b) HMRC first considered it necessary to make, and raised a reasonable inquiry relating to the requisite return on 28 April 2014 at about 15.44hrs. The inquiry made was a reasonable inquiry.

(c) By about 16.17hrs on the same date (28 April 2014), HMRC had satisfied themselves that they had received a complete answer to the inquiry.

(d) The inquiry is to be taken as having begun and having ended on the same day, namely 28 April 2014. The period between the raising and answering of the inquiry was a reasonable period.

(e) The raising and answering of the inquiry on 28 April 2014 relating to the requisite return is a period which must be left out of account in computing the period of 30 days referred to in s79(2)(b) of VATA 1994.

(f) The 30 day period began on 1 April 2014, being the day after the last day of the prescribed accounting period to which the requisite return related, namely 31 March 2014.

(g) In calculating the 30 day period, 28 April 2014 must be left out of account. Accordingly, the 30 day period ended on 1 May 2014.

(h) A written instruction directing the making of the repayment was issued electronically by HMRC on 1 May 2014 and led to the automatic generation of the *Remittance Advice and VAT Payable Order* both dated 1 May 2014.

(i) Such instruction was issued within the relevant period of 30 days as so calculated.

(j) The condition specified in s79(2)(b) was not satisfied. Accordingly, the VAT credit of £146,935.25 should not have been increased by the addition of a supplement equal to five per cent of that amount (namely £7,346.76).

(k) The sum of £7,346.76 was paid in error to the appellant and falls to be repaid by the appellant to HMRC. The Assessment in that amount must therefore stand good and the appeal must be dismissed.

Result

47. The appeal is dismissed.

48. 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.

J GORDON REID QC FCIArb

TRIBUNAL JUDGE
RELEASE DATE: 30 October 2015