[2017] UKFTT 577 (TC)

TC06020

Appeal number: TC/2013/3013

VALUE ADDED TAX – repayment supplement – period during which reasonable inquiries were undertaken – whether repayment can be payable in respect of part of a VAT credit – yes – APPEAL ALLOWED IN PART

FIRST-TIER TRIBUNAL
TAX CHAMBER

GLOBAL FOODS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN
NIGEL COLLARD

Sitting in public at Royal Courts of Justice on 12 and 13 June 2016.

Mr Tristan Thornton, Tax Advisor, for the Appellant

Ms Marika Lemos of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Global Foods Limited ("the Appellant") against a decision by the Commissioners of HM Revenue & Customs ("HMRC") by letter dated 21 February 2013 that repayment supplement was not payable to the Appellant in the sum of £26,045.14 in respect of the VAT accounting period ended 31 October 2010.

Introduction

2. In summary, repayment supplement is a penalty payable by HMRC in certain circumstances when they do not authorise payment of sums legitimately claimed (usually on a VAT return in which the input tax claimed exceeds the output tax due) within 30 days of receipt of the return. The 30 day clock starts on receipt of the relevant VAT return and ends when the written instruction directing the making of the payment to the taxpayer is issued by HMRC. In computing the period of 30 days periods may be left out of account to allow for the raising and answering of reasonable inquiries into the return.

3. There were a number of contentions raised in the present appeal which has already been the subject of a preliminary hearing and judgement given by Judge Aleksander on 22 December 2014 ([2014] UKFTT 1112 See paras 85 - 90 below). In summary, however, the Appellant contended that the period from receipt of the return to what the Appellant viewed as the date on which written instruction for payment was made exceeded 30 days.

4. The Tribunal were provided with a bundle of documents and heard oral evidence from Tristan Thornton on behalf of the Appellant and Officer David Taylor on behalf of the Respondents.

Chronology of verification

5. The Appellant operates a large cash and carry business in Cardiff. As part of that business the Appellant trades in excise goods, most relevant to the present appeal, alcoholic goods.

6. The Tribunal understands, from the evidence of Mr Taylor and by reference to two "MTIC [1]Control and Progress Logs" produced by HMRC that, on 2 November 2010, the Appellant was allocated to the "drinks project", a co-ordinated project investigating generally the incidence and scope of MTIC in supply chains of duty paid alcohol products. The activities of the drinks project are shown on one of the logs "the Drinks Project Log".

7. On 22 November the Appellant was the subject of a prearranged visit by HMRC officers. At that visit the officers extracted certain data and information from the Appellant and requested further documentation, including invoices. At the visit the

[1] MTIC stands for Missing Trader Intra-Community, and is a generic term which covers VAT evasion arrangements within the EU which depend on a trading concern within the arrangements failing to pay its VAT obligations.

director of the Appellant indicated the invoices would be available the following day. HMRC rang on 23 November 2010 but the information was not then available. This activity was recorded on the Drinks Project Log.

8. On 25 November 2010 the Appellant rendered its VAT return to 31 October 2010 ("the Period 10/10 Return") claiming a net repayment in the sum of £520,902.83.

9. Following receipt of the return the Appellant was subject to a verification of the claim shown on the return. Activities in relation to the verification exercise were shown on a separate log to the drinks project ("the Verification Log").

10. By reference to the Drinks Project Log there were further communications between the Appellant and HMRC on 29 and 30 November 2010 concerning the documentation requested at the meeting on 22 November 2010. A further meeting was arranged for 16 December 2010.

11. By letter dated 1 December 2010 HMRC wrote to the Appellant notifying it that the Period 10/10 Return had been selected for verification. The letter identified that the reason for selection for verification was in connection with Missing Trader Intra-Community ("MTIC") VAT fraud. The letter stated that HMRC's strategy to tackle MTIC fraud "includes verifying repayment claims submitted by such traders and involves *but is not restricted to*, checks on all UK business involved in the transaction chains" (emphasis added). It continued "the aim of the verification process is to establish the facts and the true nature of the relevant transactions".

12. On 2 December 2010 HMRC wrote a second letter to the Appellant entitled "request for information". The letter referred to a visit that had taken place to the Appellant's premises on 22 November 2010 (three days prior to the submission of the return) and to outstanding information from that visit. In addition, and "in order for me to start the verification process", a number of documents were requested including the VAT summary for the Period 10/10 Return, all sales and purchase invoices over £10,000, details of any EC sales undertaken by reference to identified documents, any export documentation warranting input tax claims and any due diligence/commercial checks undertaken on both suppliers and customers.

13. The Drinks Project Log indicates that HMRC had a telephone conversation with a director of the Appellant on 14 December 2010. HMRC were still concerned at that point that they had not received all the information requested. It is clear that this phone call was only recorded on the Drinks Project Log. The Log did not specify which documentation was missing (i.e. that requested at the visit of 22 November 2010 or that requested in the letter of 2 December) but the note of the call did also make reference to moving "this verification" forward. A meeting was arranged for 16 December 2010 in the afternoon.

14. On 16 December 2010 there were two visits to the Appellant's premises. Officer Ian Maxstead attended in the morning, the Drinks Project Log noted that he downloaded electronic data at that time but not what the data was. The second

meeting was that which had been pre-arranged. The director of the Appellant was interviewed and sales and purchase records relating to transactions with International Brands were uplifted. A receipt was issued for those records. These records were returned on 5 January 2011.

15. When the International Brands documents were returned on 5 January 2011, it is apparent from the Drinks Project Log that further documentation was uplifted, certainly including bank statements for the period June to December 2010 and a "DD pack" for International Brands. The Tribunal understands the DD pack to be the due diligence information obtained by the Appellant prior to its dealing with International Brands. By reference to the letter of 2 December 2010 it is clear that the bank statements and DD documents represented documents of the type requested.

16. On 28 January 2011 the Drinks Project Log ended with an extended verification exercise of the Period 10/10 Return being commenced under the control of Mr Taylor, following a hand over meeting on 25 January 2011.

17. By reference to the Verification Log there was apparently no activity between the issue of the letter of 2 December 2010 and 7 February 2011 when a director of the Appellant chased HMRC for repayment. The Verification Log notes (and Mr Thornton's evidence of the conversations he had with the director) indicated that at that time the director in question was under the impression that he had provided all records in relation to the claim. Mr Taylor indicated that he would confirm what records were held and what further documentation was required. He, however, confirmed that he was unable to make the repayment claimed at that time.

18. On 8 February 2011 Mr Taylor wrote to the Appellant. By that letter certain information and documentation was requested. The specific documents requested did substantially overlap with the documents which had been requested by the letter of 2 December 2010. The letter also stated "In addition to the above information I will need to see details of, and supporting documentation for, any zero rated dispatches or exports, and the associated purchases. This should include evidence that the goods have been removed from the UK. I understand, however, that you have already provided some documentation relating to dispatches to my colleagues in Excise which I am due to review on 10 February 2011". This appears to the Tribunal to be the same information that had been requested on 2 December 2010 which, as set out at paragraph 12 above, requested "any export documentation that is likely to warrant input tax claims".

19. Also on 8 February 2011, the Appellant wrote by email to Mr Taylor. The email stated that some of the documentation requested had, in the opinion of the Appellant's director, already been provided. However, the email acknowledged that details of the zero rated sales to EU members had not been provided but were available for review.

20. The log does not refer to the review of documentation, held by the excise team in HMRC, taking place. However, in evidence, Mr Taylor confirmed that it did take place on or about 10 February 2010.

21. By email dated 14 February 2011 Mr Taylor contacted the Appellant to confirm a proposed meeting for 15 February 2011. By that email he stated "Please be aware that for your zero-rated dispatches I would like to see a 'basket' of evidence that the goods were sold to a trader registered in another country and that the goods were transported out of the UK. Please see sections 4 and 5 of Public Notice 725". A link to the notice was provided. (See paragraph 97 for the relevant terms of Notice 725).

22. Mr Taylor attended at the Appellant's premises on 15 February 2011. The meeting note recorded that he asked for various items of documentation including export documentation, purchase invoice and sales invoices. The note also identified that the Appellant's director referred to "transaction packs" (these are a compilation of the relevant export documentation) but that it would take time to get them. Also recorded in the note, and apparently raised for the first time, is a reference to retrospective discounts. The Appellant received certain discounts from manufacturers which were paid in a VAT period later than the period includingthe original supply. The Appellant knew it would earn these discounts and so could sell the goods on at a price apparently lower than the purchase price (creating more input tax than output tax in relation to the supply of the goods – at least in the period of purchase and sale of those goods).

23. By letter dated 18 February 2011 HMRC requested "A list of, and transaction packs for, each drawback deal to include, where held, purchase invoice, customer purchase order, sales invoice, sales ledger card, evidence of payment, freight/transport invoices, AAD, CMR and any other evidence that the goods are removed from the UK."

24. The Appellant's representative was instructed in March 2011 and began corresponding with HMRC by letter dated 22 March 2011 and received by HMRC (as per the Verification Log) on 24 March 2011. Perhaps understandably, the focus of this letter was to establish the extent to which HMRC considered the Appellant to be involved in trades affected by MTIC fraud. No mention is made in the letter of the information requested.

25. There was an internal HMRC meeting on 29 March to discuss the ongoing verification exercise.

26. On 4 April 2011 the Appellant's director emailed HMRC to confirm that the requested documents were available to be collected. By letter dated 5 April 2011 HMRC indicated that the records would be collected on 8 April 2011. There is no record in the Verification Log of the documents in fact having been collected on 8 April 2011.

27. By letter dated 20 April 2011 the Appellant's representative again wrote to HMRC. The letter again focused on establishing whether HMRC considered the Appellant to have been in the chain of supply leading to MTIC fraud.

28. Period 01/11 was placed into verification by a letter dated 26 April 2011. The letter was in precisely the same format as that of 1 December 2010.

29. The Verification Log indicated that, on 26 April 2011, records collected (presumably those collected on or about 8 April 2011) from the Appellant had arrived in Bristol for review by Mr Taylor. It is implicit from the Verification Log that they had arrived at some point prior to 26 April 2011. However, Mr Taylor has a working pattern whereby he takes leave during school holidays. It is apparent that he returned to work after the Easter break on 26 April 2011. The Verification Log also recorded that the period 01/11 return would not be eligible for a repayment supplement as it had been rendered one day late.

30. By letter dated 10 May 2011, HMRC responded to the Appellant representative's letter of 20 April 2011. In addition to confirming that the verification exercise concerned UK and EU missing trader fraud, the letter stated:

> "**Verification of period 10/10**
>
> I can confirm that I have now received deal documentation relating to the 'drawback' (i.e duty paid alcohol) transactions from Global and am carrying out the verification of the 10/10 VAT return.
>
> I have scheduled the drawback transaction, and enclose a copy of the schedule. These deals do not appear to account for the whole repayment claim …
>
> Please could you confirm that I have been provided with all drawback transactions undertaken during the period? Could you also, initially, provide an explanation and supporting calculations for the outstanding amount? On receipt of this I may require further information and supporting evidence of the VAT claim"

31. This letter also set out Mr Taylor's understanding of the movement of goods giving rise to the Appellant's claim to drawback and the eligibility to zero rate. Mr Taylor explained his understanding as that "in the drawback deals the duty paid goods are transported from Seabrooks Warehousing in Rainham to Loendersloot Internationale Expedite BV in the Netherlands. The goods remain under Global's ownership and are held in Global's account in Loendersloot. … The goods are then transported duty suspended to Cotrama Logistique at which point they are allocated to Global's customer account."

32. Concerned that the Appellant was moving its own goods from the UK to the Netherlands without having registered for VAT in the Netherlands, there was an internal meeting on 18 May 2011 at which the question of a requirement that the Appellant be registered in the Netherlands was considered. Following that meeting Mr Taylor continued to investigate whether the Appellant was required to account for VAT at the standard rate in respect of the movement of its own goods to the Netherlands and determined that the issue needed to be discussed with the relevant HMRC policy team. This was recorded in the Verification Log on 28 June 2011.

33. On 4 July 2011 Mr Taylor wrote to the Appellant's representative. This letter again questioned whether he had received details of all drawback transactions and

sought supporting calculations or an explanation for the input tax claim. He also sought confirmation of his understanding of the movement of goods.

34. On 14 July 2011, the Appellant's representative confirmed by email that the Appellant would provide the documentation requested.

35. By email dated 21 July 2011 the Appellant's representative notified Mr Taylor: "I am informed that the VAT reclaim not covered by drawback relates to the general trading of the company. I will write to you further in this point, but in brief, the reclaim is partly due to the disparity between the full invoice value from its supplier and the invoice value to its customer. Due to the fact that the business relies on retrospective rebates from its suppliers to bring the prices down, the amount it pays out for a supply will invariably be more than it invoices its customers on paper." This was acknowledged by Mr Taylor on 22 July 2011, informing the Appellant's representative that he would be away for the summer.

36. The promised calculations were provided by the Appellant's representatives under cover of a letter dated 8 August 2011. By that letter it confirmed that drawback deals represent £278,988.54 of the total Period 10/10 Return repayment claims with the balance of £241,914.29 arising from the retrospective rebate system. The letter explains "as you will be aware, a number of our client's suppliers will charge a list price for goods pending their hitting certain targets they will get a repayment of Xp per case. Our client factors in these expected payments to its prices which means that it often invoices its customers for less than it pays its suppliers until those rebates are calculated. The VAT on their purchase invoice is then greater than the VAT on their sales invoices giving rise to a reclaim."

37. HMRC responded to the 8 August 2011 letter on 16 September 2011 (Mr Taylor having by then returned to the office). Mr Taylor acknowledged the explanation given of retrospective discounts and requested details of the purchases and related discounts and copies of the agreements between the Appellant and its suppliers giving rise to the discounts. On this issue it concluded "I am unable to consider making a repayment of any of the VAT claim until the above information is received." As regards the movement of goods giving rise to zero rating, Mr Taylor sought confirmation of the basis on which zero rating for the drawback deal goods was determined.

38. A series of calls and emails were exchanged on 16 September 2011 and 1 and 2 November 2011; however, a full response to HMRC's letter was not provided until 10 November 2011. By that letter the Appellant, via their representatives, confirmed that the non-drawback claim (i.e. the rebates claim) amounted to £241,914.29. As regards the explanation of for zero rating it was argued that the goods were own goods moved to the Netherlands and then sold to the Appellant's customers. As a consequence, it argued, the movements were not liable to VAT in the UK.

39. The Verification Log then showed on 16 November 2011 "non-drawback mismatch".

40. On 15 December 2011 Mr Taylor wrote two letters, one to the Appellant and one to its representatives. On the question of zero rating for the transfer of own goods to the Netherlands Mr Taylor referred the Appellant to the terms of Notice 725 and stated that, unless the Appellant is registered for VAT in the Netherlands, the movement of goods is not eligible to be zero rated and the movements were to be treated as domestic supplies and subject to VAT at the standard rate. He indicated that he proposed to issue an assessment to output tax in respect of the movements which had been zero rated.

41. In the letter to the Appellant's representative of the same date, the same points regarding zero rating were made with a more in depth technical analysis. In addition, in relation to the retrospective discounts, Mr Taylor sought further information, in particular the agreements and credit notes relating to the discounts.

42. The Appellant's representative responded with further technical analysis justifying zero rating for the movement of goods by letter dated 20 December 2011 and the analytical dialogue continued in HMRC's response of 18 January 2012. Further exchanges occurred on 3 and 24 February 2012. These technical issues are the subject of the judgment of Judge Aleksander (see paragraphs 86 - 91).

43. The matter of the outstanding information concerning the retrospective discounts arose again on 1 March 2012 when the Appellant's representative provided certain (but not all) information requested by Mr Taylor. By his response dated 15 March 2012 Mr Taylor expressed his concern that, by reference to the information provided, it appeared that the Appellant had not been granted a high enough rebate to justify the discount level offered to its customers such that the Appellant appeared to operate at a consistent loss. He requested again the documentary audit trail for the rebates and discounts.

44. As will be noted from paragraphs 30, 33, 36 and 38 above, HMRC had repeatedly questioned the accuracy of the contention that £241,914.29 of the claim was attributable to the retrospective discounts/rebates, as the evidence provided simply did not support that level of claim. By letter dated 12 April 2012 the Appellant's representative provided a full and detailed explanation of the rebate process. Critically, however, the Appellant's representative also identified that, despite the numerous requests by HMRC for full drawback deal documentation, there were a number of drawback deals that had been missed. The majority of the hitherto requested documentation relating to these transactions was supplied under the cover of that letter.

45. For the first time, following this letter, it was possible for HMRC to reconcile the various components of the VAT credit claimed on the return as between the retrospective rebates and the drawbacks.

46. The parties met on 18 April 2012. The ongoing debate regarding the movement of own goods to the Netherlands continued. As regards the retrospective discounts, the mechanics and accounting for rebates was again explained. This, together with

the invoices, credit notes etc already provided, would have enabled HMRC to verify that part of the VAT credit attributable to the rebates.

47. During the meeting, the note also recorded that the Appellant's representative requested an interim and without prejudice repayment of any part of the claim that HMRC accepted. The note stated "when retro discounts on non-drawback deals resolved DT will consider releasing repayment on those".

48. The final documentation relating to the drawback claims was provided to HMRC on 23 April 2012.

49. On 28 May 2012 the Appellant provided HMRC with the evidence that they had applied for a Netherlands VAT registration.

50. By email dated 30 May 2012 Mr Taylor started the internal process for repayment of the sums claimed on the returns. The process involved a number of levels of authorisation within HMRC. The relevant authorisations were given on 30 May 2012 and 6 June 2012. The repayments were finally made in 3 tranches pursuant to bank authorisations made as follows: £49,664.74 on 15 June 2012, £453,238.09 on 18 June 2012 and £18,000 on 22 June 2012.

Legislation

51. Value Added Tax Act 1994, section 79 provides for a "repayment supplement" in certain circumstances in which payment on a VAT return showing a net sum due to the taxpayer is delayed:

> (1) In any case where:
>
> (a) A person is entitled to a VAT credit, …
>
> 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 … shall be increased by the addition of a supplement equal to 5 per cent of that amount …
>
> (2) The said conditions are:
>
> (a) That the requisite return … 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 that payment … is not issued by the Commissioners within the relevant period, and
>
> (c) That the amount shown on that return … as due by way of payment … does not exceed the payment or refund which was in fact due by more than 5 per cent of that payment …
>
> (2A) the relevant period in relation to a return … 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 relates, and

(b) the date of the receipt by the Commissioners of the return …

(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 …

(c) in the case of a payment, the following matters, namely:

…

(ii) the compliance with any such condition as is referred to in paragraph 4(1) Schedule 11.

(4) In determining for the purposes of the 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

52. Value Added Taxes Act 1994 Schedule 11 paragraph 4(1) provides:

The commissioners may, as a condition of allowing or repaying input tax to any person, require producton of such evidence relating to VAT as they may specify.

53. The Value Added Tax Regulations made pursuant to what is now s79(3) provide:

198 – Repayment supplement – Computation of Period

In computing the period of 30 days referred to in section 79(2)(b) of the Act, 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,

(b) the correction by the Commissioners of any errors or omissions in that requisite return or claim, and

(c) in any case to which section 79(1)(a) of the Act applies, the following matters, namely—

(i) any such continuing failure to submit returns as is referred to in section 25(5) of the Act, and

(ii) compliance with any such condition as is referred to in paragraph 4(1) of Schedule 11 to the Act.

Regulation 199, Repayment Supplement – Duration of period

For the purpose 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;

(b) in the case of the period mentioned in regulation 198(b), it shall be taken to have begun on the date when the error or omission first came to the notice of the Commissioners and it shall be taken to have ended on the date when the error or omission was corrected by them;

(c) in the case of the period mentioned in regulation 198(c)(i), it shall be determined in accordance with a certificate of the Commissioners under paragraph 14(1)(b) of Schedule 11 to the Act;

(d) in the case of the period mentioned in regulation 198(c)(ii), it shall be taken to have begun on the date of the service of the written notice of the Commissioners which required the production of documents or the giving of security, and it shall be taken to have ended on the date when they received the required documents or the required security.

Submissions

54. As set out above the VAT credit sought was repaid to the Appellant in three tranches on 15, 18 and 22 June 2012 and respectively 569, 572 and 576 days after the return was rendered and thereby the repayment claim made.

55. HMRC contend that reasonable inquiries were raised on 2 December 2010 and that they were not satisfied that they had received complete answers to those inquiries until 30 May 2012 with the consequence that the repayment clock was running for only 23, 26 and 30 days and no repayment supplement is due.

Appellant's submissions

56. By its appeal the Appellant raised a number of contentions:

(1) The Appellant contended that, within the period 2 December 2010 to 30 May 2012, there were a number of days which were not attributable to the raising and answering of reasonable inquiries such that the 30 day count for repayment supplement was running against HMRC. In particular, it was contended that the period from 16 December 2010 to 14 February 2011 and the period from 23 April 2012 to 30 May 2012 should not be excluded as relating to reasonable inquiries.

(2) In the alternative, the Appellant contended that, as regards the payment of £99,100.31 attributable to retrospective discounts/rebates, HMRC should have made a part repayment and that there was no reasonable inquiry relating to that part of the VAT credit claimed from 18 April 2012.

16 December 2010 – 8 February 2011

57. It was the Appellant's case that HMRC opened an inquiry by its letter of 2 December 2010 requesting that certain documentation and information be provided. It was contended that the directors of the Appellant believed that they had provided everything sought pursuant to the request when documents were collected on 16 December 2010 and that all other material had been available to HMRC had they sought to review it. It was further contended that, as the drawback packs had been provided to the excise team in HMRC, HMRC had all the information they required and thereby had a complete answer to the inquiry raised by the letter of 2 December 2010.

58. The Appellant contended that the conduct of the HMRC officers who were originally involved in the verification exercise clearly indicated that they considered that complete answers had been provided or that HMRC had decided not to pursue the inquiry further at that time. The officers in question were not called to give evidence and the Appellant alleged that there is no relevant evidence that reasonable inquiries were made from 16 December 2010 until 8 February 2011, certainly in the period from 5 January – 8 February 2011.

From 23 April 2012

59. The Appellant contended that it is unarguable that no additional information was outstanding on any inquiries post 23 April 2012 on the basis that all material had been provided regarding the retrospective rebates by 18 April 2012, and all documentation concerning the movement of goods was provided by 23 April 2012. Thus, the only matter outstanding was the Netherlands registration.

60. The Appellant contended that HMRC misdirected themselves in insisting that the Appellant be registered for VAT in the Netherlands and requiring compliance with Notice 725 such that the transfer of the Appellants own goods constituted a domestic supply subject to VAT at the standard rate.

61. It was asserted that the requirement to register in the Netherlands was not, in any event, an inquiry as it was not a question or request for information. It was, rather, a change in status of the Appellant. Nothing could be given to HMRC and no question was outstanding once it was clear that the Appellant was not registered in the Netherlands.

62. Whilst the Appellant accepted that the previous decision of Judge Aleksander confirmed that the raising of an inquiry into zero rating in the circumstances of the Appellant was reasonable (despite being rooted in an error of law), it was contended that no findings were made as to what the inquiry amounted to and when it ran from and to. By reference to *Raptor Commerce Limited [2010] UKFTT 335* and *Alliance & Leicester plc VTD 20094* (see para 73 below) it was contended on behalf of the Appellant that simply waiting for confirmation of registration was not a question.

63. The Appellant described the requirement to register as a precondition for repayment. It was highlighted that HMRC had a power pursuant to paragraph 4(1) of Schedule 11 VATA 1994 to impose conditions which, if not complied with, would stop the repayment supplement clock from running (regulation 198(c) VAT Regs). Thus it was argued that, where no condition had been imposed, it was not appropriate for it to form the subject of an inquiry thereby stopping the clock.

64. Critical to the Appellant's case was the assertion that, by waiting for confirmation that it was registered in the Netherlands, HMRC were not undertaking reasonable inquiries but were simply seeking to challenge the liability of the supplies made by the Appellant, which could not amount to reasonable inquiries.

Supplement on £99,100.31

65. As indicated above, in the alternative, the Appellant contended that repayment supplement should be payable on £99,100.31 as the only conceivable outstanding issue after 18 April 2012 was the Netherlands registration which was irrelevant to that part of the VAT credit applicable to the retrospective discounts/rebate.

End date

66. The Appellant also contended that the end dates for the purposes of calculating repayment supplement were the dates the payments were received i.e. 15, 18 and 26 June 2012.

HMRC's submissions

67. HMRC contended that the period of reasonable inquiry ran from 2 December 2010 through to 30 May 2012 and that, following the case of *Tarn-Pure AG Limited [2017] UKFTT 102* , the end date for the purposes of section 79(2)(b) was in fact 30

May 2012 when Mr Taylor requested authorisation for payment. Payment of the full sum was authorised on that date with the consequence that the number of days falling to account for repayment supplement were limited to the 8 days at the start before the inquiries were open.

68. HMRC contended that all enquiries opened from 2 December through to 15 December 2011 met the test for "inquiry" and were reasonable, including the requirement that the Appellant evidence that it was registered for VAT in the Netherlands.

69. HMRC analysed the correspondence and interaction between the Appellant (and its representative) and HMRC such that the request to provide information set out in HMRC's letter dated 2 December 2010 was a request for substantial documentation regarding the claim to zero rate the movement of goods to the Netherlands. The scope of that request is set out in full at para 12 above. HMRC contended that it is clear that the documentation requested was not fully provided on 16 December 2010 and that the email from the Appellant's director of 8 February 2011 established clearly that he was well aware that there was information outstanding. By reference to the meeting on 15 February 2011 HMRC further contended that the Appellant director was aware of the requirements of Notice 725. They contended that, in order to justify zero rating, the Appellant needed to provide all the requested information and evidence that they were registered for VAT in the Netherlands.

70. So, HMRC contended, there was a pattern of repeatedly requesting the same documentation through the course of 2011 establishing that they were not satisfied that they had received a complete answer to their inquiries.

71. In June 2011 it was contended that HMRC specifically opened a new line of inquiry. By reference to the Verification Log it was asserted that Mr Taylor sought policy guidance on the need for the Appellant to be registered for VAT in the Netherlands. This inquiry persisted through the eventual provision of all the transaction documentation through to the provision of evidence of registration in the Netherlands.

72. HMRC contended that every inquiry raised by them was concerned with checking that the conditions for zero rating were satisfied and, until duly satisfied that zero rating was appropriate, they could not be said to have received a complete answer to their inquiries.

73. As regards the part payment in respect of the retrospective discounts HMRC contended that the question of whether the Appellant was entitled to zero rate the supplies lay at the heart of the inquiries and until that was determined there was no basis on which to make even a part payment to the Appellant. HMRC's submissions were not entirely clear on whether they considered there was even a power, let alone an obligation on them, to make a part payment as they contended that no part payment was due in any event.

Discussion

74. The shape of the legislative provisions concerning repayment supplement has changed over time. Following the judgment of the High Court in *CEC v L Rowland & Co Retail Ltd [1992] STC 647* the provisions of section 79 were amended to their current form. Unfortunately, Parliament did not also amend the provisions of regulations 198 and 199. Much case law has arisen as a consequence between what has been described as the "objective" approach apparently required by the regulations and the subjective approach applied by the primary statute as to when the clock on the 30 days should stop and start as referable to reasonable inquiries. The majority of that case law is at FTT level and therefore not binding. However, a review of the authorities provided leads the Tribunal to reach the following conclusions regarding the approach to be adopted:

(1) The aim of repayment supplement is to ensure that HMRC are diligent in processing and making payment of VAT reclaims. However, the 30 day period in which HMRC can reasonably be expected to process diligently claims must be balanced by a reasonable expectation that they have the information and documentation reasonably necessary to verify the claim *Marlico Limited [2015] UKFTT 528 paras 77 and 78*)

(2) The subjective approach of the primary legislation is to be adopted when determining the start and end dates of the period during which the clock has stopped (*Purple International VTD 18243 para 23, Cellular Solutions (T. Wells) Limited VTD 19903 para 8*)

(3) In order to constitute an inquiry HMRC must be contemplating return specific inquires and not some general investigation (*Purple International VTD 18243 para 26, Cellular Solutions (T. Wells) Limited VTD 19903 para 9*).

(4) It is possible to have multiple inquiries which may be successive or simultaneous relating to a single period (*Cellular Solutions (T. Wells) Limited para 12*)

(5) An inquiry must be a question (*Cellular Solutions (T. Wells) Limited para 14* from *L Rowland & Co Retail Ltd; Raptor Commerce Limited [2010] UKFTT 335 para 56*)

(6) An inquiry may be made of any person including another officer of HMRC (*S&I Electronics Plc VTD 20078 para 37, Raptor Commerce Limited para 68*)

(7) The repayment supplement clock stops running against HMRC when the officer forms an opinion that it is necessary to ask questions of someone (*S&I Electronics Plc para 37*)

(8) An inquiry will be reasonable provided that the questions are proportionate and not prompted by an ulterior motive that is of no immediate relevance to the verification of the claim (*Alliance & Leicester plc VTD 20094 para 18*)

(9) An inquiry will be unreasonable where HMRC seek information that they know the taxpayer will not have and cannot obtain (*Marlico Limited para 82*)

(10) The repayment supplement clock will begin to run against HMRC again when the Commissioners are satisfied that they have a complete answer and not when they have considered the information and concluded whether repayment is appropriate (*Alliance & Leicester plc para 21)*

(11) The burden of proof rests with HMRC to show when the clock should stop running against them (*Marlico Limited para 81*)

(12) The clock finally stops once the payment is authorised (see para 122 - 129 below for detailed discussion on this issue).

75. There are in essence two periods where the parties dispute that reasonable inquiries were being undertaken: between 16 December 2010 and 8 February 2011 and then from 23 April 2012 – 30 May 2012. Separately there is the issue of whether HMRC should be liable to repayment supplement in respect of the non repayment of sums established as due in respect of retrospective rebates/discounts.

Start date of reasonable inquiries

76. There also appeared to be some minor dispute as to whether the start point for the inquiries was 2 December 2010 (being the date of the letter in which the inquiries were opened), 3 December 2010 (being the day following the letter and the date which the parties accepted was the relevant date for the purposes of the preliminary issue hearing) and 4 December 2010 which was the date on which the Appellant stated it received the letter.

77. As a consequence of the conclusions reached on the other issues under appeal whether it was 2, 3 or 4 December 2010 makes no difference to the outcome of this appeal. However, this Tribunal considers that the parties should be bound by their agreement as to the relevant date before the preliminary issue the start date for the reasonable inquiries is therefore 3 December 2010.

16 December 2010 – 8 February 2011

78. On the basis of the evidence presented to the Tribunal as narrated at paragraphs 14 – 18 above it is the Tribunal's view that the Appellant had not, as a matter of fact, given HMRC a complete answer by 16 December 2010 to the inquiries they raised by letter of 2 December 2010.

79. There was no evidence directly from either the Appellant directors nor from the relevant HMRC officers as to the substance of the meeting on 16 December 2010. All that is available to the Tribunal is the Drinks Project Log. That log records that on 16 December 2010 Ian Maxstead (an officer of HMRC) downloaded electronic data and that Officers Miles and Cook uplifted sales and purchase records relating to transactions with International Brands but that they requested "DD pack relating to IB and bank statements for pervious six months". The DD packs and bank statements were documents that had been requested by letter of 2 December 2010 and were clearly outstanding; however, even had they not been, HMRC were at liberty to raise further inquiries consecutively or concurrently.

80. On 17 December 2010 the Drinks Project Log shows that the weather prevented the return of the International Brands documentation and the collection of the further information. Thus at that point there was no complete answer and it was reasonable that HMRC were not so satisfied that there was a complete answer.

81. On 5 January 2011 it is apparent that a (limited) DD pack for International Brands was collected as were bank statements for June 2010 – 3 December 2010. At that point still missing from the list of documents requested in the letter of 2 December 2010 were, at the very least: VAT summary for period 10/10 and export documentation warranting input tax claims (these being explicitly referred to in HMRC's letter of 8 February 2011).

82. On behalf of the Appellant Mr Thornton contended that as at 16 December 2010 and certainly as at 5 January 2011 it was reasonable for the director of the Appellant to have concluded that HMRC had determined not to pursue the inquiries in the 2 December 2010 letter with the consequence that the inquiries raised were treated as concluded in accordance with section 79(4)(b)(ii). He accepted that HMRC renewed the inquiries by their letter of 8 February 2011.

83. The only direct evidence available to the Tribunal on this issue is the Verification Log which records that, in a telephone call on 7 February 2011, the director of the Appellant appeared to indicate that all the requested information and documentation had been provided. Mr Thornton gave hearsay evidence that the note reflected the director's belief at the time.

84. From the evidence available it is clear that the Appellant had not provided all the documentation requested. There is no evidence that HMRC had said that it was no longer required and the conduct of the verification exercise would indicate the opposite. Whatever the Appellant's director believed to be the case it is the Tribunal's view that it should have been clear that there was outstanding information required by HMTC. On this basis the Tribunal considers that HMRC have satisfied, on the balance of probabilities, that the inquiry requiring the production of, at the least, the VAT summary and the export documentation was ongoing throughout the period from when it was requested in the 2 December 2010 letter through to 8 February 2011 from when the Appellant accepts that reasonable inquiries were running.

Requirement to register in the Netherlands

85. The Appellant accepts that reasonable inquiries were ongoing until 23 April 2012. From that date they contend that there were no reasonable inquiries ongoing because the requirement to be registered in the Netherlands did not amount to an inquiry.

86. As indicated in para 3 above this matter has come before the tribunal on a preliminary matter. There were four issues before the tribunal:

(1) Whether an exporting trader is required to be registered for VAT in the member state to which goods are exported in order for the supply to be zero

rated under regulations 134 of the VAT Regulations 1995, or, if different, under Directive 2006/112EC?

(2) If the answer to the Issue 1 question is "yes", what are the consequences on the validity of the relevant VAT return in which a VAT credit is claimed in respect of the supply to the other member state?

(3) If the answer to the Issue 1 question is "no", having regards to the fact that Issue 1 has yet to be determined by the courts, does an inquiry by HMRC on the basis that the exporting trader was required to be registered in the other member state amount to a reasonable inquiry under Regulations 198(a), VAT Regulations 1995?

(4) If the answer to the Issue 3 question is "yes", how does this affect the determination of the beginning and end dates of the 30 day period in section 79(2A) VAT Act and any period left out of account?

87. The tribunal determined Issue 1 in the Appellant's favour determining that in the circumstances in which the Appellant transferred their own goods, in this case from the UK to the Netherlands for onward supply cross border, there was no requirement for them to be registered in the Netherlands in order to zero rate the movement of goods to the Netherlands. Issue 2 thereby fell away.

88. In the context of the issues that have come before this Tribunal, the submissions and answer to Issue 3 were curious. The judgement of the tribunal notes at para 60 "The Appellant did not really engage with the question as drafted … In essence they say, it was unfair that the appellants bear the cost of HMRC's mistaken interpretation of the law." HMRC submitted that it was reasonable for them to make inquiries as to whether the supplies were standard rated and on that basis represented reasonable inquiries. The tribunal determined that given the uncertain state of the law on Issue 1 it was reasonable for HMRC to make inquiries as to whether the Appellant was registered.

89. The question posed of or by Judge Aleksander centred on whether an inquiry as to whether the taxpayer was "required to be registered" was reasonable. That question was answered in the affirmative.

90. As to Issue 4 the parties agreed that the relevant inquiry began the day after the date of the first letter inquiring about why the appellants treated the disputed supplies as zero-rated. As to when the repayment supplement clock restarted the Appellant submitted that it was the earliest point at which HMRC could have accepted that the appellant's arguments that the returns were correct. HMRC submitted that it restarted when they had satisfied themselves that they had received a complete answer to the question; they considered this to be when they were satisfied that the Appellant was in fact registered in the Netherlands.

91. The tribunal rejected both submissions. At paragraph 80, and by reference to the judgments in *Alliance & Leicester* and *Raptor*, the tribunal determined that the clock restarts when HMRC were satisfied that complete answers had been given by

the Appellants to HMRC's questions, not when HMRC had completed their analysis of those questions.

92. The challenge for this Tribunal to determine is what in fact was the inquiry raised and, by reference to the evidence, when either HMRC were, or should have been, reasonably satisfied that they had received a complete answer to the question they raised as to the Appellant's "requirement to be registered".

93. It is therefore necessary to determine what inquiries were in fact raised in the present case and when a complete answer was given such that any reasonable body of commissioners would have been satisfied that such an answer had been received.

94. It is clear that reasonable inquiries represent a question or request for information and that they may be made of the Appellant, another officer of HMRC or a third party (see para 73 above).

95. On 18 May 2011 the question of the requirement for a Netherlands Registration was discussed by Mr Taylor with a number of named individuals (presumably all employees of HMRC). On 28 June 2011 Mr Taylor notes that the Appellant is not registered for VAT in the Netherlands and that the relevant supplies should be standard rated "subject to the impact of the DSMEG regs". He flags that he will discuss with policy. At this point it is thus clear that Mr Taylor is fully aware of the fact that the Appellant is not registered in the Netherlands but remains unclear as to whether there is a requirement to be so registered. At this point the Tribunal considers that, consistent with the judgement of Judge Aleksander, HMRC were making inquiries as to whether the Appellant was required to be registered in the Netherlands.

96. The Appellant's representative provided an analysis as to why there was no requirement to be registered in the Netherlands by letter dated 10 November 2011. HMRC wrote to the Appellant on 15 December 2011 stating "I have now received an explanation from Aegis of the movement of the goods in your drawback deals and the basis on which you have zero rated these supplies under s18(3) and s18(4) Value Added Taxes Act 1994 and Article 155 Directive 2006/112 EC." The letter then articulates why HMRC consider that s18(3) and (4) do not apply. It also goes on to state very clearly that, as the terms of Notice 725 have not been met, the transfer of own goods was required to be taxed at the standard rate. The letter indicates that Mr Taylor intends to issue an assessment to recover the output tax not accounted for.

97. Notice 725 requires:

> "9 Transfers of own goods between Member States
>
> 9.1 What is the position if I transfer of [sic] my own goods?
>
> A transfer of your own goods from one Member State to another within the same legal entity, for example between branches of the same company, is deemed to be a supply of goods for VAT purposes.

9.2 Is the supply liable to VAT?

The transfer of your own goods is liable to VAT in the same way as any other intra-EC supplies of goods described in this notice.

9.3 Can the supply be zero rated?

The supply can be zero rated subject to the conditions in paragraph 4.3

9.4 Is acquisition tax due?

You will normally be liable to account for acquisition VAT in the Member State to which the goods are transferred.

9.5 Registering for VAT in the Member State to which the goods are sent.

You may need to be registered for VAT in the Member State to which the goods were dispatched in order to meet your obligations to account for acquisition tax and also to account for VAT if you subsequently supply the goods there. You will also be able to use that VAT registration number ti support zero rating of the deemed supply in the UK (see paragraph 4.3)"

Paragraph 4 and in particular 4.3 provides:

4 Zero rating of supplies to VAT registered customers in another member state – general requirements …

4.3 When can a supply of goods be zero rated?

The text in this box has force of law
A supply from the UK to a customer in another EC Member State is liable to zero rate where: • You obtain and show on your VAT sales invoice your customers EC VAT registration number …

You must not zero rate a sale, even if the goods are subsequently removed to another member state if you: supply the goods to a UK VAT registered customer (unless that customer is also registered for VAT in another Member State. In such cases they must provide their EC VAT registration number and the goods must be removed to another EC Member State)"

98. The Appellant contended that, as at 15 December 2011, whilst other inquires remained outstanding (concerning documentation and regarding the retrospective discounts), there was no outstanding inquiry regarding the requirement to register in the Netherlands. HMRC were aware that the Appellant was not so registered and, by reference to the terms of Notice 725 and in particular that having force of law in para

4.3, so far as HMRC were concerned the transfer of own goods was liable to VAT at the standard rate. The Appellant contended that HMRC were seeking to impose what turned out to be an unlawful condition on repayment and that, thus, was not a reasonable inquiry.

99. Had HMRC raised an assessment for the output tax it considered to have been under declared as set out in the letter of 15 December 2011, the input tax which was the subject of the return verification would have been recoverable but would have been offset by a charge to output tax and the VAT credit claimed would have thereby been reduced. Thus HMRC contend that at all times during which they were challenging the Appellant's entitlement to zero rate (by reference to the law as they believed it to be) there were ongoing reasonable inquiries.

100. Judge Aleksander determined that, despite their erroneous view of the law, HMRC were entitled to stop the clock running in respect of inquiries as to whether the Appellant was required to be registered in the Netherlands and that the clock started running again when they had (or should have been satisfied that they had) received a complete answer. The Appellant did not appeal that judgment and is therefore bound by it.

101. This Tribunal must apply that conclusion to the facts as presented. It is the view of this Tribunal that all inquiries as to whether the Appellant was required to be registered for VAT in the Netherlands were, to HMRC's satisfaction answered by 15 December 2011. By that date HMRC had determined (incorrectly) that the Appellant was required to be registered in order to zero rate the transfer of own goods and absent such a registration the supplies were standard rated. This Tribunal considers that requiring the production of the certificate of registration in the Netherlands was not an inquiry into the Appellant's "requirement to be registered". Applying the conclusion of Judge Aleksander the clock stopped running on that particular inquiry on 15 December 2011.

102. As is apparent from the chronology of the investigation other inquiries were ongoing until 23 April 2012 as there remained documentation and information outstanding concerning the retrospective discounts until 18 April 2012 and missing documents on the own goods transfers until 23 April 2012.

103. The critical question however remains as to whether the requirement to provide a Netherlands VAT registration certificate represented a reasonable inquiry independent of the other ongoing inquiries. On balance, and in light of the approach taken by Judge Aleksander, the Tribunal considers that it was a reasonable inquiry.

104. It is clear that the requirement to provide a VAT registration number from the Netherlands was not a condition imposed under Schedule 11 paragraph 4(1) (that provision permits HMRC to impose conditions on allowing or repaying input tax recovery). HMRC did not direct such a condition. The requirement imposed was pursuant to terms of a Notice with force of law (albeit incorrect to so require). By their correspondence HMRC sought to ensure compliance with the Notice by requiring that the Appellant produce the certificate of registration and, in so doing, in

the Tribunal's view, did raise a specific inquiry/request for documentation, namely evidence of registration compliant with the erroneous requirement to be registered.

105. The Tribunal therefore considers that it is reasonable to exclude from the 30 days the period in which they were waiting for confirmation that the Appellant was registered for VAT in the Netherlands.

106. Ms Lemos contended that HMRC were reasonably satisfied that they had a complete answer as at 30 May 2012. The Appellant considered that, if the certificate of registration was relevant at all, the clock should have restarted on 28 May 2012.

107. The Tribunal agrees with the Appellant. HMRC had requested confirmation that the Appellant was registered for VAT in the Netherlands. On 28 May 2012 Mr Thornton spoke with Mr Taylor then provided the relevant documentation. The documentation, unquestionably, represented a complete answer to the inquiry. It is perfectly reasonable to expect that HMRC would recognise the documentation and should immediately have been satisfied that they had a complete answer to the inquiry. The repayment supplement clock therefore restarted on 28 May 2012.

Is repayment supplement due vis a vis the VAT credit retrospective discount?

108. Following the disclosure of all requested material concerning the restrospective rebates/discounts on 12 April 2012, which was discussed at the meeting on 18 April 2012, and the provision of the final additional drawback material under cover of the letter dated 23 April 2012, HMRC were satisfied that the Appellant was entitled to the input tax and thereby the VAT credit relating to retrospective discounts in the sum of £99,100.31. Even if the Appellant had not provided the Netherlands VAT registration, £99,100.31 VAT credit would have been repayable to the Appellant.

109. The Appellant contends that repayment supplement should be payable in relation to the delay over 30 days on that sum.

110. HMRC contend that there is only one relevant period in relation to each claim with the consequence that if inquiries are ongoing in relation to any part of the VAT credit then repayment supplement is not payable. It was implicit (if not explicit) in the argument presented by Ms Lemos that there was no enforceable obligation on HMRC to make any part payment and accordingly repayment supplement would not be due on that basis.

111. In *R (on the application of UK Tradecorp) [2004] EWHC 2515* the High Court examined a claim for a declaration made by the claimant that, in relation to periods in which no repayment supplement was payable, interest was payable.

112. The Court considered the obligations placed on HMRC, determining that, in respect of verification of VAT credits, "the commissioners are under a duty to conduct a reasonable and proportionate investigation into the validity of claims for a refund and repayment and a duty to act proportionately both in respect of the investigation and in dealing with the taxable person's claims generally. See *R (on the application of Deluni Mobile Ltd [2004] EWHC 1030*. … The commissioners are

entitled to take a reasonable time to investigate claims prior to authorising deductions and repayments and what is a reasonable time within which to complete an investigation must depend on the particular facts: *Strangewood [1987] STC 502*. … The postponement of repayment of input tax pending the outcome of the investigation is, as a matter of principle and subject to questions of proportionality, entirely compatible with the Sixth Directive. Whilst the burden of proof is upon the taxable person to establish that the investigation of his unadmitted and unadjudicated claim and the failure to make a part or interim payment is unreasonable or disproportionate, the burden is on the commissioners to justify non-payment of it once the claim is admitted or established and the period of investigation of any cross-claim." (paragraph 18).

113. The court continues, at paragraph 21: "If and when in the course of an investigation, a claim is in whole or in part admitted or established, then there arises a prima facie entitlement to deduction and payment and (if the deduction exceeds the tax due) the taxable person should be so informed and, unless there is established to on the part of the commissioners a right of retention, the payment should be made. Implicit in the duty of the commissioners to maintain a balance is a duty to keep under consideration whether any particular investigation should be continued or concluded and whether an interim part payment can or should be made."

114. Lightman J identified a number of factors to be considered when undertaking the balancing exercise:

(1) The need to protect the revenue

(2) The likely outcome of the investigation

(3) The effect of withholding funds on the taxpayer business

(4) The nature and complexity of the inquiries necessary to verify the claim

(5) Whether an interim or part payment should be made ahead of the conclusion of the investigations (bearing in mind the taxpayers track record)

115. In the Tribunal's view Lightman J makes it abundantly clear that, whilst there is a balancing exercise to be undertaken, a taxpayer can and should reasonably expect that repayment will be made of such part of a VAT credit shown on a return as is uncontested or otherwise through investigation established and that there is an enforceable obligation on HMRC to make that repayment with due diligence.

116. The question then arises as to whether, when HMRC fail to make a payment which could reasonably be expected to be made, the non-payment of that sum attracts repayment supplement?

117. Both parties relied on the judgment of Stephen Oliver QC in *Olympia Technology Ltd (No 2) VTD 19647*. The case concerned a situation in which Olympia made a claim to input tax recovery in respect of 25 transactions. A full verification exercise was undertaken. Through the course of the verification process part payments were made to the taxpayer. Some of those payments were made within 30

days (excluding periods of reasonable inquiry). The final payment was made outside the required 30 days and repayment supplement was paid in relation to it. The case concerned whether the taxpayer was entitled to repayment supplement in respect of the full repayment (including those payments made inside 30 days) on the basis that part of the payment had fallen outside the 30 days.

118. In that case the taxpayer ran essentially the same argument as HMRC sought to run in this matter: namely that there is a single claim to a VAT credit relevant to a single period and repayment supplement applies to the whole of the VAT credit (or as HMRC contend here) or none of it. HMRC had sought in *Olympia* to argue that each claim for input tax represented a separate claim to VAT credit.

119. The tribunal determined, in the taxpayer's favour, that there is a single period and a single VAT credit. However, when considering the taxpayer's entitlement to repayment supplement the tribunal considered that the conditions contained in section 79(2) had to be considered in respect of each payment. On the facts of Olympia the requirements of 79(2)(b) concerning the written instruction for the making of the payment being within 30 days were, in the tribunal's view, met in relation to some but not all of the payments made.

120. At paragraph 17 the tribunal states: "We are satisfied that on its ordinary and unstrained meaning section 79(2)(b) can be read as recognising part payments and part refunds of the VAT credit for the particular period, taking the VAT credit as a single amount. Thus where by the end of the prescribed period, extended because the clock has stopped to enable reasonable inquires to be made, a part payment has (as here) been made to a taxable person, the amount of that part payment earns no repayment supplement."

121. The Tribunal considers it is clear from the judgment in *Olympia* that, certainly in that case, HMRC considered that repayment supplement was due in relation to a part payment and that part payments are clearly the proportionate response in situations in which part of a VAT credit is accepted or established. It is true to say that the tribunal was not looking at the scope of reasonable inquiries but this Tribunal considers that it is implicit from the facts of the case that HMRC were investigating independently the 25 different transactions giving rise to the input tax claimed and that one by one or group by group they were satisfied that the claims were established and repayments were made save for the last few. There is nothing in the judgment to indicate that, had one of the earlier payments been made outside 30 days from the date on which reasonable inquiries into the associated transaction were answered, a repayment supplement would not have been due.

122. On this basis the Tribunal considers that as regards £99,100.31 HMRC had received a complete answer to all the inquiries raised and would reasonably have been satisfied that the Appellant was entitled to that part of the VAT credit claimed following the meeting on 18 April 2012 and certainly at some point shortly after 23 April 2012. As no sum was repaid until 15 June 2012 it is clear that repayment was not made within 30 days excluding reasonable inquires and repayment supplement is due on that sum.

The date on which written instruction was given making payment

123. On the question as to when the clock stopped running under section 79(2)(b) (written instruction for payment) in the present case there was a disagreement as to the various authorities.

124. By reference to the tribunal decision in *Beast in the Heart Films (UK) Ltd [2009] UKFTT* 230 Mr Thornton argued that the written instruction to make payment was "issued" only when HMRC have passed the final instruction to the bank to make payment for the credit of the taxpayer. It was Mr Thornton's case that, in order to have been received on the dates on which the payments were received, the written instruction would have had to have been within a day or so before receipt.

125. By contrast Ms Lemos referred to *Marlico Commerce Limited* paras 92 and 93 as confirmation that the relevant date for the clock to stop running was not the date of repayment and, by reference to the evidence in *Marlico*, despite the use of the Faster Payment Service (FPS), it was reasonable to conclude a processing or clearing time at the bank of 3 working days.

126. Relying on *Vogrie Farms [2015] UKFTT 531* Ms Lemos contended, as per paras 34 – 39, that all that was required to be proven by HMRC was that the process for payment had been initiated by the relevant officer even where the final payment was subject to internal approvals before a final instruction effecting payment was issued to the bank. She contended that this case supported an end date of 30 May 2012, when Mr Taylor emailed requesting that the claim be released for payment.

127. Ms Lemos also referred to the judgement in *Tarn-Pure AG Limited* which preferred the analysis of both *Vogrie* and *Marlico* over that adopted in *Beast in the Fields*.

128. On this point the Tribunal has determined that the case law does not provide a clear answer to the present case. *Tarn-Pure AG* focused on a document called VOPS 240 which was described as the internal instruction. The tribunal concluded that it was the necessary written instruction preferring it to the written instruction of the submission of the payment file for BACS processing. Mr Taylor did not know what the VOPS 240 was and there was certainly no such form available to the Tribunal.

129. The Tribunal were shown the email dated 30 May 2012 from Mr Taylor to Doug Armstrong who the Tribunal understands was the authorising officer. The email states "please forward the following periods for release". Mr Armstrong then sends an email to Peter Ford "can you authorise these repayments". The authorisation is "approved" by Peter Ford on 6 June 2012. A log indicates on 11 June 2012 that "authority to release claim in full obtained". This then apparently led to the bank instruction.

130. The Tribunal is of the view that the written instruction to make payment is that of Peter Ford who approved the payments. The emails from Mr Taylor and Doug Armstrong were, in the Tribunal's view, requesting authority and did not represent a written instruction making payment as authority could have been denied. Once Peter

Ford had approved the payments the remaining process leading to payment were administrative. Absent a VOPS 240 the Tribunal considers that the email from Peter Ford most closely reflects the instructions accepted in *Vogrie* and *Tarn-Pure AG*.

Decision

131. The Tribunal therefore concludes:

(1) The 30 day period commenced on 25 November 2010 the date on which HMRC received the Appellant's 10/10 return.

(2) As regards the payment of £99,100.31 being the sum claimed in respect of retrospective discounts there should be left out of account in calculating the 30 days the period from 3 December 2010 (the day after the letter opening the reasonable inquiry) to 23 April 2012. All payments were authorised on 6 June 2012. Accordingly, the number of days excluding those for reasonable inquiry is thereby 51 days. Repayment supplement is therefore due in the sum of £4,955.01 is payable.

(3) As regards the payment of £421,801.78 in respect of the movement of own goods there should be left out of account in calculating the 30 days the period from 3 December 2010 to 28 May 2012. All payments were authorised on 6 June 2012. Accordingly the number of days excluding those for reasonable inquiry is 18 days and no repayment supplement is due.

132. The appeal is allowed in part.

133. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 24 JULY 2017