TC02031

Appeal number: TC/2011/04546

Time limits. VAT repayment. Interest.

FIRST-TIER TRIBUNAL
TAX CHAMBER

NATIONAL BANK OF KUWAIT (INTERNATIONAL) PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q.C.
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square, London WC1 on 12 APRIL 2012.

Howard Harris for the Appellant

Imral Afzal, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 01 December 1999 the appellant wrote to the respondent claiming to recover £178,329.42 as under claimed input tax under the Value Added Tax regime. That claim followed the decision of the Court of Justice of the European Union in *Customs and Excise Commissioners v First National Bank of Chicago (C-172/96)*. The claimant also included a claim for "statutory interest at the official rate".

2. The respondent accepted the claim and, on 28 March 2001, agreed to pay £147,852 together with "statutory interest" thereon. The appellant accepted that position and the appropriate payment was duly made together with statutory interest calculated at £58,634.73. The statutory interest was calculated in accordance with section 78 Value And it Tax Act 1984.

3. On 28 April 2011, which was more than 10 years after the repayment had been made, the appellant submitted a claim to the respondent on the basis that the interest paid had been calculated as simple interest, whereas, the appellant contended, it should have been calculated on a compound interest basis. By its letter dated 17 May 2011, the respondent rejected the claim for compound interest and contended that the appellant's claim, whatever might be the merit of interest being paid on a compound basis rather than I simple basis, was out of time.

4. The relevant statutory provision is section 78 Value Added Tax Act 1984, which, by subsection 11 provides that a claim for repayment under that section *"shall not be made more than three years after the end of the applicable period to which it relates."*

5. There can be no doubt that limitation periods are compatible with Human Rights provisions, as the appellant concedes.

6. It appears that the appellant's contention that compound interest should have been paid has been awakened by the reference to the Court of Justice of the European Union in *Littlewoods Ltd v HMRC [2010] EWHC 1071.*

7. The appellant puts its case on the basis that the time limit under section 78 of the 1994 Act applies only to new claims whereas its claim for compound interest is not a new claim but, rather, is the re-opening of a claim made in December 1999.

8. In *John Wilkins (Motor Engineers) Ltd v HMRC [2010] STC 2418* the Court of Appeal had to decide whether a second or "successive" claim could be made for interest pursuant to section 78 of the 1994 Act. It held that such a second or successive claim could be made provided that it was within the statutory limitation period. In that case simple interest had been paid on a claim for repayment, but following the decision of the Court of Appeal in *Sempra Metals [2005] STC 687* a second claim had been made for further interest once a calculation was undertaken on a compound interest basis. Mr Afzal places significant reliance upon paragraph 67 in the judgement of Lord Justice Laws where the judge refers to the claim for compound interest in that case as being a "second or repeat" claim. That is not a finding or proposition of law. It was a view taken by the court upon the facts of the case.

9. There is no doubt in our minds that the appellant's claim for compound interest, instead of the simple interest paid in 2001, is a new or repeat claim. We have only to stand back and look at the factual situation, the passage of time and then apply common sense to arrive at that conclusion. We find that in 2001, after the repayment with statutory interest (as then understood) had been paid, the appellant considered that it had received all that it was due to receive in respect of the repayment that it had claimed. So far as the appellant was concerned, the matter was at an end. The appellant's desire to re-open the matter and to have interest re-assessed on a compound basis was only awakened in 2011 because it became aware that others were running the argument that the interest payable should have been calculated on a compound basis.

10. We do not consider that as a matter of law, fact or common sense the contention that interest should be re-assessed on a compound basis can be seen as anything but a new or fresh claim. Mr Harris contended that it was not a new or fresh claimant but, rather, "the re-assertion of an entitlement which (as it transpired) was implicit in and part and parcel of our original claim for interest." We cannot accept that contention because the expression "re-assertion" carries with it the implication that a claim for compound interest was previously asserted. If that is so, which we rather doubt, it is wholly surprising that when the respondent paid only simple interest in 2001, the appellant did not protest to the respondent and say that it had been wrong to pay only simple interest because the appellant was entitled to receive compound interest. Mr Harris acknowledged that it might have been open to the appellant to embark upon the path of litigation to assert such a right to compound interest, whereas the appellant was now seeking to put forward its claim (whether re-asserted or new) in the light of litigation on that issue, pursued by others. The fact that it did not do so and/or even assert that it had been paid the wrong amount of interest leads us to infer that, at that time, the respondent believed that it had received all the interest that it was due to receive.

11. We reject the notion that this was in fact the "re-assertion" of a previously made claim. Mr Harris then puts his contention on the basis that the 1999 claim was for all interest which was lawfully due. That may be so, but it has to be seen in the context of what was then perceived to be the true legal position; regardless of the fact that the law may thereafter have been differently understood in the light of much later judicial decisions. It is an overwhelming inference of fact that in 2001 the appellant believed that it had received all interest properly due to it. If it did not hold that belief, then it is reasonable to think that it would have protested to the respondent that the proper sum had not been paid and that it was owed a further sum. It did not do so.

12. That being so, we proceed on the basis that a second or subsequent claim for interest is, as a matter of law, permissible. In the *Wilkins* case the second claim was able to proceed because, as a matter of fact, it had been brought within the statutory three-year limitation period. As a matter of fact, this appellant's second claim has not been brought within that statutory three-year limitation period. The new claim had to be brought within the three years of the end of the applicable period, that is, by sometime in April 2004. On any view of the matter this claim has been brought more than seven years thereafter.

13. Mr Harris sought to avoid that consequence by arguing that the "applicable period" was, in effect, open ended because if it was not open ended the end date in April 2004 "would operate unfairly to exclude the subsequent correction of a fundamental error, not manifest until some years later, similar in all practical effect to the targeted legislation set aside in the *Fleming and Emmott* cases". There are numerous instances in the law journals of cases decided many years ago, which, on the basis of a different declaration of the applicable law by a superior court many years thereafter, could or should have been decided differently. It is an important principle of law that there should be finality to litigation. That is why, once a limitation period has expired or time for appealing has expired, the mere fact that the law has been changed or differently understood (by reason of judicial pronouncement) is not a circumstance that causes the earlier limitation period or appeal period to be extended. If the law was otherwise, it would follow that the Limitation Act 1980 would be emaciated.

14. Mr Harris' final argument was that the appellant is not making a new claim but, rather, simply asking the respondent to correct an error in the calculation that it made in 2001. In other words, to calculate interest on a compound basis because, says the appellant, it should have approached the matter in that way in 2001. That, in our judgement, is no more than seeking to dis-apply limitation provisions by creating a fiction that a mistake occurred in 2001. The answer is that there was no mistake in 2001 on the basis of the law as it was then understood by all concerned. This is simply another way of saying that if the law changes or is declared to be different than previously understood (by reason of a later judicial decision) an applicable limitation period can be overridden by referring to the earlier judgement or decision. Our jurisprudence does not support such a proposition which would similarly have the effect of emaciating the provisions of the Limitation Act 1980 and, in this case, the limitation period set out in section 78(11) of the 2004 Act.

15. In the foregoing circumstances we are satisfied that the appellant's appeal cannot succeed and that the respondent's application for it to be struck out must succeed.

16. 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.

GERAINT JONES Q.C.
TRIBUNAL JUDGE

RELEASE DATE: 17 May 2012