TC02602

Appeal number: TC/12/01082

VAT – ***Strike-out Application – Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 - Section 80 VATA 1994 – recourse for a refund of VAT – Council Directive 2006/112/EC Act 132(1) – sport and physical education – non profit making organisations – Refused and claims stood over awaiting ECJ decision.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE EARLSFERRY THISTLE GOLF CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE W RUTHVEN GEMMELL,WS
PETER R SHEPPARD, FCIS, FCIB, CTA

Sitting in public at George House, 126 George Street, Edinburgh on 5 February 2013

Stuart Bruce for the Appellant

Elizabeth McIntyre, Officer of HMRC, for the Respondents

DECISION

Introduction

1. The Appellant, Earlsferry Thistle Golf Club ("ET"), appealed the Decisions of the Respondents ("HMRC") to reject a claim made on 27 March 2009 and a further direct effect claim made on 11 October 2011, in respect of VAT paid on charges levied by a neighbouring golf club ("GC") following the European Court of Justice Decision in *Canterbury Hockey Club and Canterbury Ladies Hockey Club v HMRC Case C-253-07* (*Canterbury Hockey*) as both ET and GC were both non profit making clubs.

2. HMRC had rejected the 2009 claim on the grounds that ET did not qualify under Section 80 of VATA.

3. ET appealed under VATA Section 83(1) (b) and the Tribunal directed that the Appeal should be stood behind the case of *The Bridport and West Dorset Golf Club Limited* [2011] UKFTT 354 (TC) TC 01214 *(Bridport)* which was decided by the First-tier Tribunal on 1 June 2011 and, subsequently, appealed to the Upper Tribunal whose Decision published on 30 July 2012 was then appealed to the Court of Justice of the European Union ("ECJ").

4. The total VAT paid by ET to GC was £41,503.07.

5. HMRC again rejected the claims on the grounds that ET did not qualify for repayments under Section 80 VATA.

6. ET made a further appeal which incorporated all the consolidated supplies which HMRC now request is struck out.

The Facts

7. ET is an artisan's club whose premises neighbour a golf course in Elie in Fife owned by GC.

8. ET has 60 members and only one member of ET is also a member of GC.

9. GC charge ET an annual fee to allow ET's members to make use of the golf course at certain restricted times, such fee being calculated by reference to the applicable fees of GC's members.

10. Following the ECJ Decision in *Canterbury Hockey,* ET approached GC and entered into an agreement that GC would obtain, for a fee, repayment of VAT which GC had collected from ET and paid to HMRC. The agreement was considered necessary because ET was not registered and there was no mechanism to make such a claim.

11. ET agreed with GC that ET would continue to fully provide its own independent claim with HMRC.

12. ET was not VAT registered and GC did not issue VAT invoices to ET.

13. ET received £20,399.97 from GC.

14. No evidence was led as to how this sum was calculated but it appeared to have been the cash sum, less expenses due by ET to GC, that GC received from HMRC after HMRC had restricted the amount of output tax overpaid by deducting input tax overclaimed.

15. As no evidence was led, it was unclear to the Tribunal whether GC had applied for the full amount of output tax overpaid and, consequently, whether HMRC had considered or not whether GC had been repaid in full by receiving full recovery of input tax when submitting returns and paid a sum representing the full amount of output tax overpaid less any input tax overclaimed.

The Applicant's Submissions

16. ET made extensive submissions which are summarised as follows –

17. ET say that as they have never been VAT registered and, as the recipient of supplies, they cannot bring an Appeal under Section 80 VATA.

18. ET say they are entitled to bring an Appeal under Section 83(1)(b) and that its rights under EU law would not be protected if its Appeal were to be struck-out prior to the substantive issue in *Bridport* having been decided.

19. ET say that HMRC's practice in denying exemption entitlement before the outcome of the *Bridport* Tribunal is contrary to EU law; that HMRC's insistence of the issue being routed to its supplier deprives ET of Article 132(1)(m)'s application and cites the judgement of *Patrick Kelly v National University of Ireland* C-104/10 where the ECJ stated that member states may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its own effectiveness. ET say that the consequence of this could be that HMRC would remain unjustly enriched.

20. ET say that they are unable to obtain a fully adequate remedy from its supplier, due to what ET say is HMRC's unlawful practice of repaying suppliers only in part by setting off input tax which they say is contrary to the principles of VAT neutrality as expressed in the ECJ decision in *D A Rompelman and E A Rompelman-Van Deelen v Minister van Financien* Case C-268/83. ET also say the practice is contrary to Article 167 of the VAT Directive.

21. Furthermore, ET say that the claim cannot be made by GC in the prospect that it "might" be willing to cooperate as that is no claim at all.

22. ET say that the nature of the Appeal is not one which concerns reimbursement but it concerns the scope of tax.

23. ET say that HMRC have been unjustifiably enriched by the retention of a substantial part of the VAT it has incorrectly collected at the expense of ET who should not have to bear tax and suffer the loss of interest thereon.

24. ET say that under EU law and the UK interpretation of that law routing ET's claim as one of the final consumers to GC would limit the amount of refunds that could be obtained by the raising of a civil action by ET against GC.

25. ET say the only impediment which stands in the way of them being fully reimbursed by the Commissioners directly is Section 80(7) of VATA.

26. ET say that they are not entitled to invoke direct effect against a supplier and that such action can only be against HMRC.

27. ET alleges that the UK has not implemented Article 132(1) (m) correctly.

28. ET say that there is a clear distinction between the right or claim to repayments of amounts paid to national authorities in breach of EU law and, on the other hand, the national provisions giving effect to that right or claim.

29. ET say the appeal concerns chargeability which, if found to be unlawful, would give rise to repayments and that it does not concern restitution as that can only come in to play if HMRC lose the *Bridport* Appeal at ECJ.

30. Consequently, ET say that the decision in *Danfoss A/S and Sauer-Danfoss ApS, Case C-94/10 (Danfoss)* is of no assistance to HMRC since, in that case, there was an admission that the tax had been unduly levied and there was no dispute on chargeability.

31. ET say that repayments and interest which they may be entitled to are the consequence and complement of the rights confirmed on individuals under EU law and that HMRC's interpretation of Section 80(7) is being interpretated in such a way as to prevent ET from exercising its EU right to repayment should its direct effect claim on exemption succeed.

32. ET say that the prospect of success lies with the lead case of *Bridport*. If the Item 3 exemption is lawful their claim will not succeed but that if it is found to be unlawful then the Tribunal should provide ET with the judicial protection of its EU rights by allowing its Appeal to progress.

HMRC's Submissions

33. HMRC say that ET's claim does not meet the criteria of Section 80 VATA and that ET's only recourse for a refund of VAT is to contact the supplier GC for a refund of any VAT they believe they have been overcharged.

34. HMRC refer to *Danfoss* and, in particular, the statement at paragraph 19, "by its first question the National Court asked the Court of Justice, in essence, whether a Member State may oppose a claim for reimbursement brought by an operator to whom the amount of duty unduly paid has been passed on, on the ground that he is not the person liable for payment of that duty and has therefore not paid out the corresponding amount to the tax authorities" and at paragraph 29 "accordingly the answer to question 1 is that a Member State may oppose claim for reimbursement of a duty unduly paid, brought by the purchaser to whom that duty has been passed, on the ground that it is not the purchaser who has paid the duty to the tax authorities, provided that the purchaser is able, on the basis of national law to bring a civil action against the taxable person for recovery of the sum unduly paid and provided that the reimbursement, by that taxable person, of the duty unduly paid is not virtually impossible or excessively difficult".

35. HMRC say that there is no right for a direct effect claim as GC is still an active club and, therefore, a civil action could be brought against them by ET.

Decision

36. Central to the issue in this case was the First-tier Tribunal Decision in *Bridport* concerning the VAT liability of green fees charged by the golf club to non members.

37. The Decision was that the golf club supplies to non members of green fees are exempt from VAT.

38. HMRC issued Revenue & Customs Brief 25/12 stating that they believed the Tribunal had erred in interpretating EU law and remained of the view that where clubs ran membership schemes and make charges to non members for the use of certain sporting activities, such as green fees, the charges should be standard rated.

39. They appealed to the Upper Tribunal on 30 July 2012 which said "it would feel considerable unease in refusing to refer the matter to the European Court of Justice" and so did.

40. Decisions of the First-tier Tribunal are binding only on the parties to the Decision. Consequently, HMRC do not propose to pay other claims already submitted, are not inviting new claims in the wake of the *Bridport* Decision and any claims submitted are rejected.

41. The *Bridport* Decision now the subject of a reference to the ECJ is expected to be decided at the earliest in the summer of 2013.

42. The position is that HMRC have advised clubs to continue to account for VAT on green fee income. If this practice is followed and, if HMRC lose their case at ECJ, clubs should not be financially disadvantaged as long as clubs have submitted a further claim to HMRC and can do so for any period covering the preceding four years. Accordingly, clubs who submitted a claim by the previous deadline of 31 March 2009 can submit further claims, and although HMRC will reject them, the

alternative of awaiting the final *Bridport* Decision before making a claim may result in periods of claim dropping out.

43. ET say that HMRC have been unjustifiably enriched but this cannot be determined until the final decision in the *Bridport* case.

44. In respect of the claim already made, GC have clearly received a refund, which in turn resulted in them making a repayment to ET .

45. The Tribunal received no evidence as to whether or not GC had received in effect repayment of the full amount paid by ET to GC less GC's expense notwithstanding that ET and HMRC differed on the lawfulness of whether or not HMRC might have deducted input tax overclaimed from the output tax overpaid.

46. There was, similarly, no evidence led by HMRC that they had, however structured, repaid the full amount to GC. Instead HMRC simply stated that that was a matter between ET and GC.

47. The issue, therefore, relates to whether, if it is due, a full repayment has or will be made (for which insufficient evidence was led) and the premise that, if it has not been made, that either HMRC or GC have been unjustifiably enriched.

48. The Tribunal considered that the amount of any input tax overclaimed by GC should be the subject of an assessment or a decision by HMRC giving the taxpayer the opportunity to appeal to the Tribunal but no evidence was led as to whether or not HMRC had done so nor whether there had been an Appeal.

49. The Tribunal considered that, following on from the above, any incompatibility with UK VAT Regulations and interference with the principles of VAT neutrality would need to be brought before the Tribunal by GC.

50. If HMRC have refunded to GC all the output tax GC overpaid then there is no unjustified enrichment by HMRC.

51. The Tribunal were persuaded by the Decision of *Danfoss* and, accordingly, that ET's immediate remedy lay with GC.

52. No evidence was led as to what remedies had been considered by ET in relation to demanding all the output tax they had overpaid to GC and, consequently, the Tribunal considered the issue of direct effect.

53. In the absence of evidence that such a claim was virtually impossible or excessively difficult and, in light of HMRC's contention that GC continued to be in existence as a functioning golf club, the Tribunal were of the view that HMRC were correct. Section 80 VATA did not apply to ET and the only recourse for a refund, in the absence of evidence that it was either virtually impossible or excessively difficult to do so, lay with the supplier, GC, for a refund of any VAT that ET believed had been overcharged.

54. In order, however, for the amount of VAT overcharged to be ascertained with any certainty, a final decision of the *Bridport* case, currently before the ECJ, is required.

55. Only when the amount of overcharged VAT, if any, is known, can ET ascertain from GC if they have been correctly reimbursed and, if not, and if the circumstances so determine, consider the issue of direct effect.

56. Accordingly, the Tribunal direct that the application to strike-out be refused and that the consolidated Appeal should be stood over, and all time limits extended, accordingly, until 60 days after the case of *Bridport*, currently in the ECJ, is resolved. Any party may apply at any time for these directions to be amended, suspended or set aside.

57. 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.

W RUTHVEN GEMMELL,WS
TRIBUNAL JUDGE

RELEASE DATE: 14 March 2013