TC02643

Appeal number: TC/2011/01664

VAT – claim for repayment of overpaid output tax – what constitutes a claim for the purposes of section 80 VAT Act 1994 – date of claim – whether claim completed or remained outstanding – whether claim withdrawn or abandoned – appeal struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

WEBSONS (8) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS RAYNA DEAN FCA

Sitting in public in Prestatyn on 24 January 2013

Mr Michael O'Donnell of The Priory Partnership, Chartered Accountants for the Appellant

Mr Bernard Haley of HM Revenue & Customs for the Respondents

DECISION

Background

1. This is our decision on an application by the Respondents dated 12 July 2012 to strike out the appeal. We find the following facts which were not disputed.

2. At all material times the appellant operated amusement arcades in Prestatyn, Bangor and Shotton. It accounted for VAT on takings from certain gaming machines. On 18 September 2006, following the decision of the ECJ in the case of *Finanzampt Gladbeck v Linneweber c-453/02* the Appellant's representative The Priory Partnership ("Priory") wrote to HMRC in the following terms:

> "*Following the Linneweber case before the European Court of Justice, we understand that VAT may have been wrongly charged prior to 5 December 2005. We therefore wish to lodge an appeal against overpaid VAT for the preceding 3 years. ie, 1 July 2003 to 5 December 2005.*
>
> *Please note your files accordingly and advise us what action needs to be taken.*"

3. HMRC replied to Priory on 4 October 2006. The letter requested further information in the following terms:

> "*The claim is apparently based on the recent ECJ decision in the case of Linneweber, could you please advise why you consider this supports your client's claim?*
>
> *I would also be grateful if you could supply the following information in respect of the claim:*
>
> …
>
> *In order to quantify the pending reclaims I am enclosing vat 652 forms and would request that you complete and return them to myself at the above address.*"

4. The reference in this letter to VAT Form 652 was a reference to the standard form which HMRC expects taxpayers to use to correct certain errors in previous returns. The form anticipates a brief explanation of how the error arose and the amount of the error for each accounting period for which a claim is being made.

5. Priory did not reply to this letter. Mr O'Donnell of Priory who appears on behalf of the appellant was unable to say why that was the case. He was not dealing with the matter at that time.

6. On 9 November 2006 HMRC issued Business Brief 20/06 setting out their general position in relation to claims following *Linneweber*. It stated that claims for repayment should be supported by certain evidence and that claims without that evidence would be rejected.

7. On 18 December 2006 HMRC wrote further to Priory. This appears to have been a standard letter and did not specifically refer to the previous correspondence. It set out HMRC's view of the tax status of various types of gaming machines and stated as follows:

> "*… Your letter claims that your machines were similar to the machines considered to be exempt prior to 6 December 2005; however you have failed to produce evidence to support this claim …*
>
> *… If, after reading the above information, you consider your business to still have a valid claim, please contact us before the 31st January 2007, and we will officially record your intention to further pursue your claim. However if we do not hear from you by 31st January 2007, we will assume that you have no wish to pursue your claim, and no further action will be taken in relation to your voluntary disclosure …"*

8. The appellant contends that Priory did not receive this letter. Mr O'Donnell said that Priory has a system for recording all post received and there is no record of receipt. Mr Haley did not challenge this and we find as a fact that whilst the letter was properly addressed to Priory, for whatever reason it was not received by that firm. In the circumstances the appellant did not indicate to HMRC its intention to pursue the claim and HMRC considered the correspondence closed.

9. There was no further contact or correspondence until July 2010. However in the period up to July 2010 there were developments affecting Linneweber claims. Rank Group Plc appealed a number of decisions in relation to VAT on gaming machines claiming that HMRC applied different tax liabilities to identical gaming machines in breach of the principle of fiscal neutrality. The VAT Tribunal released its decisions on those appeals in 2008. HMRC appealed unsuccessfully to the High Court. In June 2010 the Court of Appeal referred the issue to the ECJ.

10. Whilst the Rank litigation was proceeding, in March 2010 HMRC issued Business Brief 11/10. It stated as follows:

> " *Claims that have previously been rejected (for whatever reason) and which are not under appeal will not be considered. No new claims for the repayment of VAT paid for the period between 1 November 1998 and 5 December 2005 can be made.*
>
> *The aim is to process all existing claims, where satisfactory evidence to support the claim has been provided, by 31 March 2011.*"

11. Priory wrote to HMRC on 28 July 2010 as follows:

> "*We refer to previous correspondence and in particular our letter of the 18th September 2006 when, on behalf of our clients, we lodged an appeal against overpaid VAT.*

We understand that following the decision in the case of Rank, and as outlined in Revenue & Customs Brief 11/10, that these claims are now being considered.

We therefore now wish to pursue this claim…

Please advise us of what further information you require to pursue the claim."

12. HMRC responded on 18 August 2010 as follows:

"*If you are satisfied that your client is entitled to make a claim, as per the guidance in Revenue & Customs Brief 10/11 (sic), then please make a claim in writing with details of figures etc …*"

13. Priory replied on 28 September 2010 enclosing a schedule setting out the claim for a refund of overpaid VAT. The schedule covered the period November 1998 to December 2005 and identified an overpayment of £164,343. We note that this period is longer than the 3 years identified in the September 2006 letter.

14. On 14 October 2010 HMRC replied stating:

"*… all claims are subject to the normal time limits. Since the claim was not received until 29th September 2010 it falls outside the time limits as detailed in Section 80(4) of the VAT Act 1994. Consequently, the submitted claim for £164,343 in respect of periods 11/98 – 12/05 is formally rejected.*"

15. The letter went on to outline the appellant's rights to request a review of the decision or to appeal to this Tribunal.

16. Priory wrote on 26 October 2010 stating:

"*Our claim was originally submitted on the 18th September 2006 … Our claim was not actively pursued at that time due to ongoing developments in the case. However following the outcome of the First Tier Tribunal Decision in Rank Leisure our client now wishes to pursue the claim.*"

17. Priory requested a review of the decision and the outcome of the review was notified to the appellant on 21 January 2011. The review noted the previous correspondence in 2006 and stated:

"*As no contact was received the claim made in September 2006 is considered to be closed and therefore any further claims made in relation to this are considered to be new claims.*"

18. On that basis the decision on review was to confirm that Priory's letter dated 28 September 2010 was correctly treated as a new claim and was correctly rejected as being out of time.

The Appeal

19. On 14 February 2011 the appellant lodged its notice of appeal to the tribunal. The grounds of appeal contend that a "protective claim" was made on 18 September 2006 within the prescribed time limits. The appellant stated that it was not relying on a new claim made in 2010.

20. The present proceedings were then stayed for a period pending the ECJ reference in the Rank appeal. Following expiry of the stay, HMRC made the present application to strike out the appeal. The grounds of that application are as follows:

> (1) HMRC refused the original claim in its letter dated 18 December 2006. There had been no appeal against that decision and HMRC would object to any extension of time to appeal that decision.
>
> (2) The appellant's appeal against the review decision dated 21 January 2011 had no reasonable prospect of success and ought to be struck out pursuant to Rule 8(3)(c). The claim was made more than 3 years after the end of the relevant accounting period.

21. In a letter to the Tribunal dated 20 August 2012, Priory confirmed their position that they were not seeking an extension of time to appeal any decision in the letter dated 18 December 2006. The appellant's case was that no decision was made in relation to that claim until it was rejected in October 2010 and that rejection was confirmed on review in January 2011.

Outline of the Parties' Submissions

22. At the hearing of the appeal Mr Haley on behalf of the respondents put the case for a strike out on a rather different basis to that set out in the application. He contended that the appellant's correspondence in 2006 could not amount to a claim at all because it did not quantify the amount of tax said to have been overpaid. In the alternative he argued that even if it did amount to a claim then it had been abandoned or withdrawn and the only existing claim was that made in 2010 which was plainly out of time.

23. During the course of his submissions Mr Haley conceded that if we were to find that the letter dated 18 September 2006 was a claim and it had been rejected by the letter dated 18 December 2006 then HMRC would not object to an application for permission to appeal out of time. The basis for that concession was that the letter dated 18 December 2006 did not set out the appellant's rights of appeal, and in the letter dated 21 January 2011 the appellant had been given 30 days in which to appeal. This was a shift in position from ground (1) of the application identified above but we consider it was an appropriate concession to make.

24. Mr O'Donnell on behalf of the appellant did not object to Mr Haley pursuing his additional ground of strike out, namely that there had been no claim in 2006. He submitted that in 2006 there had been what he described as a "protective claim". That

claim had not been rejected until at least 2010 which meant that the present appeal was in time. He further submitted that HMRC could not unilaterally treat a claim as withdrawn or abandoned. They must either accept a claim, or reject it giving reasons for that rejection and thus engaging the rights of appeal.

25. We deal with the parties' submissions in more detail below, but we can summarise the issues before us as follows:

(1) Did the appellant make a claim for repayment in September 2006?

(2) If so, when if at all did HMRC reject that claim?

(3) If HMRC did not reject the claim, did the appellant abandon or withdraw the claim?

Consideration of the Law

26. There is no dispute that any claim by the appellant, whenever made, was a claim under *section 80 VAT Act 1994* and was subject to *Regulation 37 VAT regulations 1995*. *Section 80 VAT Act 1994* in so far as relevant for present purposes provides as follows:

> " *(4) The Commissioners shall not be liable on a claim under this section … if the claim is made more than [4 years] after the relevant date.*
>
> …
>
> *(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.* "

27. *Regulation 37* provides as follows:

> *"Any claim under section 80 of the [VAT Act 1994] shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."*

28. To make a claim under section 80 HMRC expects taxpayers to use Form 652 which, if properly completed would comply with regulation 37. However this form is not prescribed by statute or regulation.

29. In *Reed Employment Ltd v HMRC [2011] UKFTT 200 (TC)* the FtT was concerned with various repayment claims pursuant to section 80. In 2003 Reed made a claim for repayment of output tax covering the period 1973 to 1990 ("the 2003 Claim"). The claim was refused and Reed appealed. In 2009 Reed sought to make a further demand for repayment ("the 2009 Demand") which it contended was an

amendment to the 2003 Claim. The issues before the FtT in so far as relevant for present purposes were as follows:

> (1) Does the FtT have jurisdiction to determine whether the 2009 Demand was an amendment to the 2003 Claim, and
>
> (2) If the FtT does have such jurisdiction, was the 2009 Demand an amendment to the 2003 Claim or a new claim.

30. We were not referred by the parties to the decision in *Reed Employment*. However we have found the discussion in that case to be helpful in considering the issues in the present appeal.

31. The tribunal stated in *Reed Employment* at [95] that the jurisdiction of the FtT in relation to claims for repayment stems from the rejection of a claim. It derives from *section 83(1)(t) VAT Act 1994* which provides as follows:

> *" (1) … an appeal shall lie to the tribunal with respect to any of the following matters:*
>
> *…*
>
> *(t) a claim for the crediting or repayment of an amount under section 80 …"*

32. In considering the question of jurisdiction the FtT referred to the decision of the VAT Tribunal in *University of Liverpool v HM Customs & Excise (Decision 16769)*. That appeal was also concerned with the issue of whether there was a new claim or an amendment to an existing claim. The VAT Tribunal in that case distinguished claims which had been completed and claims which were outstanding. An outstanding claim could be amended but a completed claim could not be amended. At [26] and [29] the tribunal stated:

> "*26. I find it helpful in dealing with the instant case to distinguish between claims made under s. 80 which are outstanding, and those which have been completed. By completed I mean a claim which:*
>
> *a) has been met in full by the Commissioners;*
>
> *b) has been met in part by the Commissioners and the time limit for appealing against the rejection of the remainder prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;*
>
> *c) has been met in part by the Commissioners, the taxpayer has appealed against the rejection of the remainder, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired or the appeal has been compromised;*

d) has been rejected in full by the Commissioners and the time limit for appealing against that rejection prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;

e) has been rejected in full by the Commissioners, the taxpayer has appealed against that rejection, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired, or the appeal has been compromised.

…

29. Any claim that has not been completed is an outstanding claim, i.e. one which in my judgment is a claim for the purposes of s. 80 of the 1994 Act."

33. The FtT in *Reed Employment* also referred to a decision of the VAT Tribunal in *John Martin Group v HM Revenue & Customs (Decision 19257)*. The tribunal in that case agreed with the distinction drawn in *University of Liverpool* between completed claims and outstanding claims. The question for the tribunal was whether on the facts a claim under s.80 had been completed. It held that the claim was outstanding and relied in particular on the absence of any reference to appeal rights in the document purporting to be a decision.

34. In determining the jurisdiction point, which was not a point argued before us, the FtT in *Reed Employment* stated at [102]:

"*The jurisdiction of the Tribunal is conferred by s 83(1)(t) and encompasses the claim made under s 80. It is in our view inherent in that jurisdiction that the Tribunal must be able to determine, in case of dispute, the nature, scope and extent of the claim or claims before it, and the time at which a relevant claim has been made. That, in our judgment, must include whether claims that are made at different times are separate claims or whether they are a single claim which is made at the time of the earlier one. That is a question of fact and law that the Tribunal must concern itself with in the exercise of its jurisdiction under s 83(1)(t).*"

35. The FtT in *Reed Employment* went on to consider the nature of the claims in that case. Before considering the particular facts it stated at [106]:

"*Whilst it is accepted that if an original claim has ceased to have currency then no purported amendment can revive that claim and become part of it, the converse does not hold true. Where an original claim is uncompleted, it is not the case that every subsequent claim expressed to be an amendment is such. That depends on the nature of both the original claim, and the later purported amendment.*"

36. Then at [110] the FtT stated:

> " *110. There is no definition of "claim" in VATA, nor any provision for amendment of a claim. The starting point, therefore, we think is that any assertion of a right to repayment must be regarded as an individual, discrete claim, separate from any other, unless it is shown to be in essence as one with an earlier claim.*"

37. The FtT's description of "*any assertion of a right to repayment*" echoes the VAT Tribunal in *University of Liverpool* at [25] where it stated:

> " *The various references to "claim" in s. 80 of the 1994 Act provide nothing to indicate that the word is to be given anything other than its ordinary meaning. Applying that meaning, a claim is a demand for something as due*."

38. The decision of the FtT in *Reed Employment* was recently upheld by Roth J in the Upper Tribunal (*Reed Employment v HMRC [2013] UKUT 0109 (TCC)*). Roth J referred at [29] to section 80(6) and regulation 37 as the "*formal requirements for submission of a claim*". In considering the distinction between a new claim and an amended claim he stated:

> "*31. … I consider that 'claim' should here be given its ordinary meaning. In this context it means a demand for repayment of overpaid tax …*
>
> *33. … Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances.*"

39. In all the decisions referred to above it appears that the original claims satisfied regulation 37. Hence the original claims being considered stated an amount and provided a calculation. The issues concerned whether and in what circumstances those original claims could be amended. The question we have to decide on this appeal is whether the assertion of the right to a refund in Priory's letter dated 18 September 2006 amounted to a claim for the purposes of section 80.

Decision

40. We consider the three issues we have identified above in the light of the considerations of law just set out.

(1) Did the Appellant make a Claim for Repayment in September 2006?

41. It is clear that the letter dated 18 September 2006 did not comply with the requirements of regulation 37. Whilst it was in writing, it did not state the amount of the claim or the method by which the amount was calculated. Nor did it suggest that such details would be provided. There was no response by the appellant to the letter dated 4 October 2006 which requested those details. The appellant's letter can however be described as asserting a right to repayment.

42. It is plainly important to be able to identify a claim for the purposes of section 80. In particular the date on which a claim is made must be identifiable and certain in order to apply the time limit in section 80(4). A claim made more than 4 years after the "relevant date" as defined in section 80 cannot be repaid. We consider that the importance of identifying when a claim is made is one reason why regulation 37 lays down formalities for making such a claim. Regulation 37 is not concerned with the substantive validity of a claim. It is concerned with the formality of making a claim. For example a claim cannot be made orally. Otherwise there would be considerable scope for disagreement as to what was said, when and by whom.

43. Similarly it is important to know precisely what the claim relates to. It is for that reason that regulation 37 requires a claim to state the amount of the claim and the method of calculation. Those matters will help to define the scope of any claim under section 80.

44. The Upper Tribunal in *Reed Employment* noted at [30] that there was no definition of "claim" in the VAT Act 1994. However that appeal was not concerned with the question of whether a claim had been made and we do not consider that it intended to lay down a general rule that any assertion of a right to repayment would amount to a claim. It was more concerned with the scope of what both parties agreed was a claim. It is implicit from what it said at [33] that some attempt must be made to quantify the claim and/or state the method of calculation even if full figures and further documentation are to be provided later.

45. Similarly the VAT Tribunal in *University of Liverpool* was concerned with whether what was accepted to have been a claim had been completed or was still outstanding. We do not consider that at [25] the VAT Tribunal intended to lay down a general rule that any demand for overpaid output tax should be treated as a claim under section 80.

46. Mr Haley on behalf of HMRC referred us to the decision of the FtT in *Bartholomew Corvi t/a Seaview Café v HM Revenue and Customs [2011] UKFTT 758*. In that case it was clear that the claim was out of time. It also did not specify the amount of the claim or the method by which it had been calculated. The tribunal struck out the appeal. In doing so the tribunal noted that the claim was "*unspecified and unquantified*" although it is not clear whether this in itself would have caused it to strike out the appeal. The tribunal also accepted HMRC's submission that the VAT legislation did not recognise protective claims.

47. As noted above, the appellant contends that the letter was a "protective claim". We do not accept that submission. Neither the VAT Act 1994 not the 1995 Regulations make provision for a protective claim. Indeed there appeared to be some confusion as to precisely what the term "protective claim" means. Mr O'Donnell described the letter of 18 January 2006 as a protective claim in the sense that it was an incomplete claim conditional on the outcome of the litigation following *Linneweber*. He relied upon an extract from HMRC guidance in the context of claims for repayment of customs duties. The guidance stated "*protective claims can be accepted as full or incomplete claims*". We do not consider that the guidance produced by Mr O'Donnell in the context of claims to repayment of customs duties is of general application. In particular it is not authority for the proposition that in the context of VAT claims under s.80 VAT Act 1994 traders are entitled to rely on incomplete protective claims.

48. We note Revenue & Customs Business Brief 75/09 issued in connection with claims for repayment of VAT in relation to mechanised cash bingo machines. The Brief referred to the ongoing litigation by Rank and stated that any repayments made in reliance on a High Court decision in that litigation would need to be repaid if HMRC were successful in a higher court. It then said:

> "*Businesses may therefore prefer to wait until the final outcome of the litigation is known although protective claims can be lodged.*"
>
> [emphasis added]

49. Mr Haley submitted that the term protective claim in this context was used to indicate a claim which satisfied regulation 37 but where the maker was unsure whether it would succeed or not, for example because of outstanding litigation. The claim was made in anticipation that it would not be accepted or rejected by HMRC until the outstanding litigation was concluded.

50. We also note that the FtT and the Upper Tribunal in *Reed Employment* were dealing with what the FtT described at [7] as a "protective claim". However it seems to us that all these references to protective claims in the context of section 80 are used in the sense described by Mr Haley. There is no statutory provision or regulation which gives effect to a claim which does not satisfy regulation 37. As stated above some attempt must be made to quantify the claim and state the method of calculation.

51. It is true that the correspondence from HMRC in October 2006 and December 2006 does refer to "*the claim*". We do not think that this terminology was used with the present issue in mind. It was simply shorthand for the appellant's assertion of a right to repayment made in the September letter. By using such a description we do not consider that HMRC were accepting that it was a valid claim, subject only to verification. They were inviting a valid claim to be made on Form 652. However there was no reply to the October letter and therefore no valid claim was made.

52. For the reasons of certainty given above we consider that it is only where a demand for payment or the assertion of a right to repayment satisfies regulation 37

that it is to be treated as a claim pursuant to section 80. Priory's letter dated 18 September 2006 did not satisfy those requirements and therefore did not amount to a claim under section 80.

53. Our findings on issue (1) lead us to the conclusion that there was no claim in September 2006 and therefore there was no appealable decision arising out of the correspondence in 2006. HMRC might be said to have made a decision not to accept or reject the demand made in the September 2006 letter. In other words not to treat it as a claim. That may be an appealable decision within *section 83(1)(t) VAT Act 1994* however for the reasons given above there was no claim to be accepted or rejected and an appeal against such a decision would stand no reasonable prospect of success. In all the circumstances it is appropriate to strike out the appeal either pursuant to Rule 8(2)(a) (we have no jurisdiction because there was no decision) or Rule 8(3)(c) (the appellant's case has no reasonable prospect of success).

54. For the sake of completeness we will however consider issues (2) and (3).

(2) If a Claim was made, have HMRC Rejected that Claim?

55. If we are wrong on the first issue and the September letter was a claim, HMRC would have been entitled to reject it on the basis that it did not comply with regulation 37. However they did not reject it in terms. Rather they wrote seeking further information, including information as to the quantum of the claim.

56. Mr O'Donnell referred us to the HMRC VAT Refunds Manual at VR 9200 where HMRC gives guidance to officers dealing with claims in the light of the VAT Tribunal decision in *University of Liverpool*. It states as follows:

> " *Whenever a claim is refused, either in whole or in part, you must ensure that*
>
> - *the claimant is told in writing that the claim has been refused;*
> - *the letter explains why the claim is being refused;*
> - *the claimant is told of his right to ask for a review of the decision and of his right to appeal to the Tax Tribunal (under section 83(c) or (t)); and*
> - *the claimant is told that he has 30 days from the date of the letter in which to lodge his appeal.*"

57. We accept this is how HMRC must deal with a claim which has been validly made. They are also of course entitled to seek further information before accepting or refusing a claim. They requested further information in the letter dated 4 October 2006. In their letter dated 18 December 2006 they identify that evidence to support the claim is required. The letter also gives information to the appellant setting out how HMRC would deal with claims so that the appellant could consider what course of action to take.

58. The appellant was being given the opportunity to confirm to HMRC that it still considered it had a valid claim. We do not consider that the December letter could reasonably amount to the rejection of a claim. In reaching that conclusion we are not so much concerned with the absence of any reference to rights of appeal, which the VAT Tribunal in *John Martin Group* considered to be significant. That fact would be more relevant to an application to appeal out of time if one were made. Rather it is the absence of any final determination of the claim following a consideration of its merits.

59. In the circumstances, if the September letter was a claim then in our view it would have remained an outstanding claim, subject to HMRC's argument that it was implicitly withdrawn or abandoned. If it remained an outstanding claim then on the basis of the reasoning contained in the previous tribunal decisions referred to above it remained open to the appellant to amend the claim by including details of the amount of the repayment claimed and the method of calculation. That information was provided by Priory, although not until their letter dated 28 September 2010.

60. We do not need to address for present purposes whether the appellant was entitled to amend the claim to extend the period to which it related.

(3) Was the Claim Withdrawn or Abandoned

61. The only basis on which Mr Haley suggests that the claim was withdrawn or abandoned is because the appellant failed to respond to the opportunity given in the letter dated 18 December 2006 to confirm to HMRC that it intended to pursue the claim. It is not suggested by Mr Haley that there was any express withdrawal or abandonment of the claim.

62. We have found as a fact that the appellant did not receive that letter. It cannot be said therefore that the appellant consciously decided not to avail itself of the opportunity to indicate its intention to pursue a claim. The highest that HMRC could put their case on withdrawal or abandonment is that the failure of the appellant to respond to the letter dated 4 October 2006 together with the passage of time amounted to withdrawal or abandonment of the claim.

63. We were not referred to any authority as to what circumstances might give rise to the implied withdrawal or abandonment of a claim. Mr O'Donnell referred us to a number of cases where discussions between a taxpayer and HMRC had "gone to sleep" (*Schuldenfrei v Hilton (Inspector of Taxes) [1999] STC 821*; *Delbourgo v Field [1978] STC 234* and *Former North Wiltshire District Council v HMRC [2010] UKFTT 229 (TC)*).

64. In *Delbourgo* and *Schuldenfrei* the Court of Appeal was concerned with whether the taxpayer and the Inland Revenue had reached a "section 54 agreement". In both cases it held that there had been no sufficient meeting of minds. In the present case, withdrawal and abandonment do not require a meeting of minds. We agree with Mr O'Donnell that they are, if anything, unilateral acts on the part of an appellant and cannot, without more, arise from unilateral acts on the part of HMRC. *Former North*

Wiltshire District Council is concerned with extending the time for a late appeal and does not help in the present context.

65. In the absence of any authority directly in point it seems us that withdrawal requires a conscious decision on the part of an appellant to withdraw the claim and some act of withdrawal. In contrast a claim might be abandoned where by his conduct an appellant induces HMRC to reasonably consider that he no longer wishes to pursue the claim. The question of abandonment might be tested by reference to whether a reasonable observer, fully appraised of the facts, would consider that the claim had been abandoned.

66. There is no evidence from which it might be inferred that the appellant had withdrawn the claim. We can see why HMRC might reasonably have considered that the claim had been abandoned given the absence of any response to the October and December letters. However with knowledge that the December letter had not been received by the appellant and knowing that there was ongoing litigation in relation to the VAT liability of gaming machines, in our view a reasonable observer would not reach the conclusion that the appellant had abandoned its claim.

67. In the circumstances, if there had been a claim in September 2006 we would find that it had not been withdrawn or abandoned by the appellant.

Generally

68. For the reasons given above we find that Priory's letter dated 18 September 2006 did not amount to a claim for the purposes of section 80 VAT Act 1994 and we therefore strike out the appeal.

69. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 16 April 2013