TC04678

Appeal number: TC/2013/06970

VAT – Repayment supplement – date when inquiry started –whether inquiry reasonable - date when payment instructed by commissioners – HELD –inquiry started by request for specific information – not reasonable inquiry to request documents should have known not in taxpayer's possession –repayment supplement payable.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Marlico Limited **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Short
Mr William Haarer (Member)

Sitting in public at Keble House, Southernhay, Exeter on 2 June 2015

Mr Richard Staunton of Francis Clark LLP chartered accountants and Mr Mark Crump director of Marlico Limited for the Appellant

Mr Simon Pritchard and Mrs Tricia Morgan-Davies, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns the Appellant's claim for a repayment supplement for a VAT repayment made by HMRC for the 02/13 period, under s 79 Value Added Tax Act 1994 ("VATA 1994"). In particular, the Appellant claims that the repayment made by HMRC was subject to unreasonable delay, being paid beyond the 30 days of reasonable inquiry time given to HMRC under s 79(3). The dispute between the parties centres on when the thirty day inquiry window should be treated as both starting and stopping, which depends on facts, disputed between the parties, about when correspondence was received, when inquiries were first raised and when payments should be treated as being made by HMRC.

2. The Appellant applied to HMRC for a repayment supplement for the 01/13 and 02/13 periods on 24 May 2013. This was rejected by HMRC on 29 July 2013 and the Appellant appealed to this Tribunal on 9 October 2013.

3. The Appellant's appeal notice claimed that a repayment supplement was due for both the 01/13 and 02/13 periods but subsequent to the making of the appeal HMRC accepted that a repayment supplement was due for the 01/13 period.

Preliminary issues.

4. Having heard from both parties at the oral hearing on 2 June the Tribunal issued directions requesting further information from both sides; that HMRC should produce evidence of when payment of the VAT repayment was initiated from HMRC's bank, that the Appellant should provide evidence of when HMRC's letter to them of 27 March 2013 was actually received by them and copy bank statements demonstrating when repayment of the VAT for the 02/13 period was received by them.

5. The parties were given the opportunity to request a further oral hearing having seen this additional evidence but agreed that no further oral hearing was required. Both parties did make further written submissions in response to the additional evidence which was provided.

Background facts.

6. The Appellant submits VAT returns on a monthly basis.

7. The Appellant's business is the wholesale supply of alcoholic and non-alcoholic drinks.

8. HMRC's Specialist Investigation Unit had been working with the Appellant because of HMRC's problems with Missing Trader Intra-Community ("MTIC") fraud since 2006 and the Appellant was put on a continuous monitoring project involving extended verification. HMRC met with the Appellant on 6 February 2013 and wrote in a follow up letter making clear that the Appellant would be obliged to provide monthly information as part of that verification process.

9. The Appellant responded to this in an email of 4 March 2013 confirming the type of information which was required by HMRC. It was in response to this email that HMRC arranged a meeting with the Appellant on 19 March.

10. The Appellant submitted its 02/13 VAT return on 7 March 2013, which gave rise to a repayment of £60,910. This return was selected for a "pre-credibility check".

11. The Appellant and their representatives had a meeting with HMRC on 19 March 2013. That included general discussions about the information which was required for the 02/13 return verification process. HMRC's notes of that meeting refer to clarification about the time when documents should be submitted relating to the 02/13 return "*including evidence of removal and AADs..... as soon as possible*". The Appellant is recorded as asking for clarification of the documents required, pointing out that AAD documents were held by the Appellant's shipper, not by them. HMRC were recorded as advising that the Appellant needed to obtain the information from the shippers to support its VAT reclaim. The notes also record a discussion of the Appellant's export of soft drinks to Spain and that for one customer the Appellant arranged for delivery to Spain on a "DDU" (Delivery Duty Unpaid) basis.

12. The Appellant's representative sent an email to HMRC on 21 March 2013 confirming the action points from that meeting including specific information to be provided which related to the 02/13 return and stating that it was agreed at the meeting that "*if there are any issues with the return these will be discussed with Mark (Mr Crump) as soon as you become aware of them*". That email note of the meeting also stated that "*Mark (Mr Crump) will provide you with evidence that the goods left the UK (i.e. AAD/CMR) regarding the January and February 2013 VAT returns. This information for further periods may not be required if you are satisfied as this information is held with Seabrooks (the shipper) and is hard to obtain*".

13. HMRC responded on 22 March 2013 by letter to clarify certain matters discussed at the meeting on 19 March, including stating that in respect of goods moved under duty suspension "*Marlico needs to hold evidence of the receipted AAD for each movement as per Notice 725 paragraph 15.4"*. No mention was made in that letter of the evidence required for the export of the soft drinks to Spain on a DDU basis.

14. HMRC wrote to the Appellant on 27 March 2013 confirming that the Appellant's 02/13 VAT return had been selected for verification. That letter did not refer to any specific issues which were being investigated as part of the verification process.

15. Specific information was provided to HMRC by the Appellant on 28 March 2013, including "back up information for under bond transfers at Seabrooks" (the goods moved under duty suspension) and HMRC was informed that CMRs for exports during the 02/13 period had been posted to HMRC, (relevant to the soft drinks exported to Spain). That email also referred to the Appellant's attempts to obtain the primary information required from Seabrooks about the goods moved under duty suspension.

16. 29 March and 1 April were bank holidays.

17. The Appellant's representative called HMRC on 3 April about the evidence being supplied and HMRC wrote to the Appellant on 4 April pointing out that the information which the Appellant had referred to in their 28 March email available from Seabrooks was "*not sufficient for our purposes*" and that the photocopied CMRs which had been provided for the 02/13 period were not acceptable, referring to Notice 725 section 5.1.

18. The Appellant's representative wrote to HMRC on 12 April 2013 and pointed out that while they had requested a receipted AAD for each movement, movements of duty suspended goods between bonded warehouses were verified by electronic ADs under EMCS (Electronic Management Control System) with no requirement for hard copies or other information and that the formal documents requested by HMRC did not exist. However the Appellant had provided information from Seabrooks which provided ARC numbers (Administrative Reference Codes, evidence of a particular movement of duty suspended goods through EMCS). In respect of the export of soft drinks to Spain the Appellant pointed out that, as HMRC were aware, these were being exported indirectly and therefore the Appellant could not hold the original CMRs, but suggested some alternative information which could be provided.

19. On 22 April an officer in HMRC's CITEX Operations confirmed to the officer in charge of verifying the Appellant's 02/13 return that he had checked all of Marlico's bonded warehouse movements on EMCS and they were all "receipted off".

20. HMRC responded to the Appellant on 24 April 2013 stating since Seabrooks had provided the ARC information for the duty suspended movements, HMRC would accept this as good evidence that the goods had been properly accounted for for VAT and excise duty purposes and that this evidence would be acceptable going forward. However the letter stated that HMRC still required either copies of original CMRs or sales invoices showing the actual recipient of the goods in relation to the soft drinks exported to Spain and the payments for the 02/13 (and 01/13) periods would be withheld until original CMRs and customer sales invoices were received.

21. The Appellant's representative emailed HMRC on 26 April 2013 to say that original CMRs were not available and to discuss alternative evidence of the 02/13 exports. In that email they said "*As I have repeatedly told you, as an indirect removal Marlico do not hold an original CMR, it is in fact impossible for them to have one as by definition they did not remove the goods. To continually request one either demonstrates that you are not reading my emails or are deliberately requesting information that my client simply cannot hold*". The email attached customer invoices as alternative evidence of the export of the goods to Spain.

22. HMRC sought further clarification on 30 April 2013 in relation to some of the invoices provided, the Appellant's representative replied on 8 May 2013 and HMRC confirmed that they were happy with the response on 10 May 2013.

23. A separate chain of emails was exchanged on 30 April relating to details of the duty suspended movements. HMRC confirmed that they were happy with the information which they had received on this aspect of the Appellant's VAT return on 30 April.

24. HMRC confirmed that the repayment claims for the 02/13 (and 01/13) periods could be released on 10 May 2013.

The Law – s 79 VATA 1994.

Repayment supplement in respect of certain delayed payments or refunds.

(1) In any case where—

(a) a person is entitled to a VAT credit, or

(b) a body which is registered and to which section 33 applies is entitled to a refund under that section, or

(c) a body which is registered and to which section 33A applies is entitled to a refund under that section, or

(d) the proprietor of an Academy who is registered is entitled to e refund under s 33B

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 or refund shall be increased by the addition of a supplement equal to 5 per cent. of that amount or £50, whichever is the greater.

(2) The said conditions are—

(a) that the requisite return or claim 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 the payment or refund is not issued by the Commissioners within the relevant period, and

(c) that the amount shown on that return or claim as due by way of payment or refund does not exceed the payment or refund which was in fact due by more than 5 per cent. of that payment or refund or £250, whichever is the greater.

*(2A) The **relevant period** in relation to a return or claim is the period of 30 days beginning with the later of—*

(a) the day after the last day of the prescribed accounting period to which the return or claim relates, and

(b) the date of the receipt by the Commissioners of the return or claim.

(3) Regulations may provide that, in computing the period of 30 days referred to in subsection (2A) above, there shall be left out of account periods determined in accordance with the regulations and referable to—

(a) the raising and answering of any reasonable inquiry relating to the requisite return or claim,

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

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

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

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

(4) In determining for the purposes of regulations under subsection (3) above whether any period is referable to the raising and answering of such an inquiry as is mentioned in that subsection, there shall be taken to be so referable any period which—

(a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry, and

(b) ends 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.

25. It is agreed that the only matter in dispute between the parties is whether the condition at s 79(2)(b) was met; whether HMRC issued instructions for payment within the 30 day period set out in s 79(2A).

26. The manner in which the 30 day period is calculated is set out in the VAT Regulations SI 1995/2518 at Regulation 198:

> "*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*"

27. More details of how that period is calculated are set out in Regulation 199:

> "*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"*

Appellant's Arguments.

28. The Appellant argues that HMRC have exceeded the 30 day period during which repayment should have been made to them and that repayment supplement is therefore due.

29. The Appellant argues that no specific issues in relation to the 02/13 return were raised in their meeting with HMRC on 19 March 2013. The main issue discussed at that meeting was the hope that the Appellant would be removed from continual monitoring. HMRC's letter of 22 March 2013 made no specific reference to the 02/13 return. In the Appellant's view no inquiries were being raised by HMRC into the 02/13 return during this period.

30. The Appellant accepts that queries were raised about the 02/13 return in HMRC's letter of 27 March 2013 but points out that this was not received by the Appellant until 4 April 2013 as evidenced by the email from Mr Crump to Mr Staunton of that date. In the Appellant's view, on the basis of the decision in *Global Foods Ltd v HMRC ([2014] UKFTT 1112(TC))* the 30 day clock should stop running only on the date when HMRC's inquiry letter was received by the Appellant, by reference to the objective test set out in Regulation 198. Up to that point, 4 April, HMRC had already spent nearly 30 days asking for information.

31. The Appellant argues that the 30 day clock started running again on 8 or 10 May when their advisers provided the final information to HMRC which allowed them to make a decision about the 02/13 period VAT. That information had been received by HMRC on 8 May, which was, in accordance with Regulation 199 *"the date when a complete answer was received"*. This was when the Commissioners were able to satisfy themselves that they had received information to complete their inquiry under s 79(4)(b).

32. In the Appellant's view there was then a further period until 21 May 2013 before the Appellants actually received the repayment from HMRC which should also be included in the period of delay. They argue that the date when the 30 day clock finally stops is not the date when payment is sent by HMRC, but the date when that payment is received by the Appellant's bank. The onus is on HMRC to demonstrate the date when payment was made, or written instructions were given to make the payment into the Appellant's bank account.

Respondents' Arguments.

33. HMRC argue that they received the Appellant's return for the 02/13 period on 7 March 2013. The 30 day time limit under s 79(2A)(b) started running on 7 March 2013. At the meeting between the parties on 19 March 2013 HMRC requested further information from the Appellant, this was the raising of a "reasonable inquiry". They point out that Appellant has not suggested that the inquiry itself was not reasonable. The Appellant did not provide all of the information required from this reasonable inquiry until 8 May 2013.

34. HMRC argue that for the purposes of s 79(4) they were first satisfied that they had received a complete answer to their inquiry on 10 May 2013 and that the time

referable to the raising of a reasonable inquiry is the 53 day period from 19 March (the date of their meeting with the Appellant) to 10 May 2013.

35. HMRC argue, by reference to the decision in *HMCE v L Rowland and Co (Retail) Ltd* ([1992] STC 647) that the reasonable inquiry time envisaged under s 79(4) includes time to consider any information provided as part of that inquiry. The 53 day period from 19 March until 10 May was taken up with HMRC's consideration of the information provided by the Appellant and there was no unreasonable delay in considering or actioning the correspondence.

36. HMRC also argue that although the Appellant has argued that there are periods during this 53 day period when the clock should be started and stopped to calculate the 30 days allowed to HMRC, they have not provided any details of when or why this should happen.

37. HMRC issued instructions to make payment to the Appellant on 16 May 2013. Excluding the 53 days taken for the reasonable inquiry, that was only 18 days after the date when the 02/13 return was received (7 March).

Witness Evidence

38. Patricia Morgan-Davies, officer of HMRC provided a written witness statement dated 29 August 2014 and gave oral evidence to the Tribunal. Mrs Morgan-Davies was the officer in charge of verification of the Appellant's 02/13 VAT return. Her evidence concerned HMRC's contacts with the Appellant from 6 February 2013 to 24 May 2013.

39. Mrs Morgan-Davies did not attend HMRC's meeting with the Appellant on 19 March but her evidence gave a summary of the visit report, including that the Appellant's representative asked about the best time to submit records for the 02/13 period and the timescale for the release of repayment claims for the 02/13 period which related to soft drinks sales made to customers in Spain.

40. Mrs Morgan-Davies confirmed that a letter was issued on 27 March 2013 advising the Appellant that the 02/13 period had been selected for verification; on 28 March 2013 the Appellant notified HMRC that evidence of the zero rated goods removed from the UK in the 02/13 period had been posted to HMRC; on 4 April HMRC notified the Appellant that the CMRs supplied concerning the export of the zero rated goods were insufficient because they were redacted copies.

41. Mrs Morgan-Davies was allocated the verification of the 02/13 period on 10 April 2013. She was notified by the Appellant's adviser on 12 April 2013 that they were contacting the relevant parties for more information about the zero rated exports. On 18 April (before any additional information was received from the Appellant) Mrs Morgan-Davies had a conversation with Excise Officer Symons and he confirmed that the documents held by HMRC detailing the bonded warehouse arrangements were acceptable. Officer Symonds made further internal verification checks and confirmed that these were satisfactory on 23 April 2013. HMRC wrote to the Appellant on 24 April 2013 confirming that the evidence provided from the bonded warehouse was

acceptable but that original CMRs and customer invoices were still required. On 30 April the Appellant emailed HMRC providing customer invoices matching the bonded warehouse information. HMRC confirmed that this information finalised the query. Nevertheless there was further email correspondence from 26 April until 10 May 2013 between HMRC and the Appellant's advisers regarding goods sold to Spain, including goods sold in the 02/13 period. HMRC declared that the repayment could be released on 10 May.

42. In respect of the payment process for the repayments, Ms Morgan-Davies said that the "credibility query" against the 02/13 period was cleared on 16 May 2013 and a "VAT 711" form was issued (the form for releasing payments on a suspended period). We were shown HMRC's ledger entries showing this authorisation. The Appellant's representative called HMRC on 20 May saying that the 02/13 repayment had not been received. Mrs Morgan-Davies advised the Appellant's representative by telephone on 21 May that according to their records payment had been made.

43. Before the Tribunal Mrs Morgan-Davies was asked to explain the ledger entries provided by HMRC showing the payment made to the Appellant. She explained that the ledger entries provided were HMRC's primary record of when payments were made and that she understood that any bank authorisation would have been done prior to the ledger entries. In her view, payment was authorised by HMRC on 16 May 2013.

Evidence of payment process.

44. At the hearing the Tribunal requested further information about the payment processes used by HMRC to make repayment of VAT, including banking records to demonstrate when funds were actually instructed to be paid from HMRC's accounts to the Appellant. The additional information provided from HMRC was in the form of a witness statement of Clare McEwen, higher officer of HMRC dated 29 July 2015.

45. Ms McEwen's statement explained that she had been involved in processing "credibility repayments" for four years. Credibility means ensuring the validity of repayment claims put through by traders. She confirmed that she had seen screen prints of the V711 form for the Appellant's 02/13 repayment showing that it had been completed on 16 May at 09.13 am and countersigned at 09.27am on the same day.

46. Ms McEwen explained that after sign off, the V711 form would have gone for "batching" and been keyed into HMRC's mainframe computer, Vision. She could not confirm when the details of this form V711 had been batched, but suggested that "*she could see no reason why a form countersigned at 9.27 am would not have been batched on the same day*".

47. After a form has been entered into the Vision system, an electronic file is automatically sent to Citibank (HMRC's bank for this Appellant). Citibank would then release a giro for payment to the Appellant's account. Ms McEwen said that a bank giro would usually take at least three days to be processed and that no processing is done over the weekend. She concluded that she "*found it wholly unlikely*

that a payment could have reached a trader's bank account on 21 May if the bank received the file from HMRC's mainframe computer any later than Friday 17 May 2013...." and "*unlikely that the file was received by the bank after Thursday 16 May 2013 as three working days from Thursday would be Tuesday 21 May 2013*".

Witness evidence of Mark Crump

48. Mr Crump, owner and managing director of the Appellant, provided a witness statement dated 31 July 2014 to the Tribunal and gave oral evidence at the hearing.

49. Mr Crump stressed that the Appellant always made a full evaluation of all new clients and took its compliance obligations very seriously using a team of professional advisers to support this. The Appellant has always had a good relationship with HMRC and had no previous issues in making VAT reclaims.

50. However Mr Crump said that after the meeting with HMRC on 6 February 2013 when the Appellant was subject to continual monitoring and extended verification checks, his experience of HMRC was "extremely frustrating" as a result of; unworkable operational requests, HMRC's lack of understanding of the business processes; mixed and incorrect messages from HMRC; absence and sickness of HMRC officers and "stalling tactics" by HMRC who requested unreasonable information, including evidence which the Appellant could not possibly provide. Mr Crump said that the subsequent re-appointment of Mrs Morgan-Davies as the Appellant's officer had dramatically improved the situation.

51. Before the Tribunal Mr Crump also suggested that it was unreasonable for HMRC to have stopped making VAT repayments during the period while the Appellant was under continual monitoring. HMRC pointed out that this argument had not been raised prior to the hearing by the Appellant and that HMRC had not prepared any evidence or arguments on this point. The Appellant accepted HMRC's objections and agreed not to pursue this.

52. Before the Tribunal Mr Crump confirmed that he had received HMRC's letter dated 27 March 2013 at his home office address on 4 April.

53. In response to questions from HMRC Mr Crump said that he was not aware that the 02/13 period had been selected for verification prior to receipt of HMRC's letter of 27 March 2013, which was the first time that the Appellant had been formally notified of HMRC's intention to select this period for extended verification.

Other evidence seen

54. HMRC note of meeting of 6 February 2013, not dated or signed.

55. HMRC letter to Appellant 22 February 2013 and Appellant's email response of 4 March 2013.

56. HMRC note of meeting of 19 March 2013, not dated or signed.

57. Appellant's advisers note of meeting of 19 March, dated 20 March 2013.

58. Email from Appellant's advisers to HMRC following up on 19 March 2013 meeting, dated 21 March 2013.

59. Letter from HMRC to Appellant dated 22 March 2013 responding to email of 21 March re 19 March meeting.

60. HMRC letter to Appellant re 02/13 verification, dated 27 March 2013.

61. Email from Appellant (Mr Crump) to advisers confirming date of receipt of 27 March 2013 letter as 4 April.

62. Email from Appellant to HMRC follow up to meeting of 19 March setting out information being forwarded to HMRC, dated 28 March 2013.

63. HMRC letter to Appellant's advisers dated 4 April 2013 concerning evidence provided by Appellant of export of soft drinks.

64. Letter from Appellant's advisers to HMRC dated 12 April 2013 concerning evidence provided re duty suspension movements and indirect exports.

65. Letter from HMRC to Appellant's advisers dated 24 April 2013 accepting evidence provided re duty suspended movements and requesting original CMRs for indirect exports.

66. Email from Appellant's advisers of 26 April 2013 reiterating that Appellant did not hold original CMRs for indirect exports and providing invoices from customers as alternative evidence of export.

67. Letter from HMRC to Appellant's advisers dated 10 May 2013 confirming release of repayment claim of 02/13 period.

68. Screenprint of HMRC ledger details showing bank giro authorisation on 16 May 2013 of 02/13 VAT repayment of £60,910.27.

Findings of Fact.

69. On the basis of the evidence provided to the Tribunal we make the following findings of fact:

70. Discussions between HMRC and the Appellant at their meeting of 19 March 2013 did not raise any specific issues with the Appellant's 02/13 VAT return, but discussed in general terms the timing and type of information which was required.

71. The first formal notification of HMRC's enquiries into the Appellant's 02/13 tax return was HMRC's letter to the Appellant of 27 March 2013.

72. HMRC's letter of 27 March 2013 was received by Mr Crump, on behalf of the Appellant on 4 April 2013.

73. The queries raised by HMRC related to two distinct aspects of the Appellant's VAT return; the treatment of supplies made from one bonded warehouse to another, the "duty suspension" inquiry and the treatment of goods exported to Spain "the indirect export" inquiry.

74. HMRC's meeting with the Appellant on 19 March discussed detailed aspects of the Appellant's business including the indirect export of soft drinks to Spain and the reliance on Seabrooks, the Appellant's shipper, to provide evidence of duty suspended movements of goods.

75. In the case of both the duty suspension inquiry and the indirect export inquiry HMRC eventually accepted information other than that originally requested to support the Appellant's VAT return.

76. HMRC confirmed to the Appellant that it had received sufficient information about the duty suspension inquiry on 30 April and about the indirect exports on 10 May.

Decision.

77. We have proceeded on the basis that the overall aim of the repayment supplement is to ensure that HMRC are diligent in processing and making payment of VAT re-claims.

78. There needs to be a balance between HMRC's obligation to act diligently and the need for sufficient information to be provided by the taxpayer and considered by HMRC. That is the reason for s 79(3) VATA 1994 exclusion from the 30 day period of periods referable to the raising of a reasonable inquiry.

79. In this case the Appellant's return was made on 7 March and re-payment was not received by the Appellant until 21 May, a period of 76 days in all. The question for this Tribunal is whether HMRC can rely on the "stop clock" rules at s 79(3) VATA 1994 to reduce that period to less than the 30 days which would trigger the payment of a repayment supplement.

When does the 30 day period start?

80. The parties are agreed that period starts from receipt of claim by HMRC on 7 March 2013. It is also clear on the face of the legislation that the 30 day period begins with the date of the receipt of the claim i.e. the 30 day period includes the day of receipt of the claim. On that basis the 30 day period within which HMRC should have paid the claim starts to run from 7 March 2013.

"*Reasonable inquiry time*"

81. The exclusion from the 30 day period ("stop clock period") for HMRC to make reasonable enquiries begins on the date when "*the commissioners first consider it necessary to make such an inquiry"* (under s 79(4)(a)). On the face of the legislation this trigger relates only to the decision made by HMRC, not the time when it is

communicated to the Appellant, although there is a discrepancy between the subjective test in s 79(4)(a) and the objective wording of Regulation 199 which refers to the date when an inquiry is "first raised". However the onus is on HMRC to evidence when it was that they considered it necessary to make "such an inquiry". The legislation refers to a specific inquiry, being "*the reasonable inquiry relating to the requisite return*". HMRC argued that the clock should be treated as stopping at the time of the meeting with the Appellant on 19 March when HMRC notified the Appellant that information was required to substantiate the 02/13 return.

82. Our view is that the legislation requires HMRC to have identified more than a general need for information, HMRC need to have formulated a specific question which needs to be answered by the Appellant. This is supported by the FTT decision referred to by HMRC, *Future Components Limited v Revenue & Customs Commissioners* ([2010] UKFTT 101 (TC)). In this case we think that the first time that a specific question was raised was in HMRC's letter of 22 March relating to the duty suspension movement of goods and in their letter of 4 April relating to the export evidence required to substantiate the soft drinks exports to Spain. The Appellant argues that the 22 March letter did not make specific reference to the 02/13 period, which is correct, but it is clearly written in response to questions raised in the Appellant's email of 21 March about the documents required for the 02/13 period in the parties' meeting on 19 March. Therefore our view is that, taking account of the objective approach of Regulation 199, the earliest that the clock can be treated as stopping for the purpose of s 79(3) is 22 March, 14 days after the return was put in.

83. It is not clear from the Appellant's written appeal whether part of their case is that the inquiries raised by HMRC were not reasonable. However, from what was said before the Tribunal and on the basis of the correspondence seen, in particular the letters of the Appellant's adviser dated 26 April and 12 April 2013, the Appellant does suggest that some elements of HMRC's inquiry were not reasonable, in particular that the requests made for AAD information from the Appellant in their letter of 22 March and original CMR's in their letter of 4 April were not reasonable because the Appellant's method of exportation (indirect exportation) meant that original CMRs could not be in the Appellant's possession and AAD information would only be held by the shipper and not by the Appellant.

84. There is also an implicit suggestion in the Appellant's arguments that as a result of a new HMRC officer managing the inquiry, they were being asked to provide information which had never been required in the past and which it was not reasonable for the taxpayer to provide.

85. The question for the Tribunal is whether HMRC's request for AAD information on 22 March and original CMRs on 4 April was not a reasonable inquiry and so does not mean that HMRC can rely on the "clock stopping" for the period of that inquiry under s 79(3).

86. HMRC continued to ask the Appellant for AAD information until 24 April when after internal discussions they accepted that the alternative information provided

by the Appellant was acceptable, subject only to further detailed checks of that information.

87. HMRC clarified that they required CMRs relating to the indirect exports in their letter of 22 March 2013 but did not make clear until 4 April that photocopied CMRs were not acceptable and persisted in asking for original CMRs until they received the Appellant's letter of 26 April pointing out that original CMRs could not be provided and could never be provided by an Appellant in the position of Marlico who was exporting indirectly.

88. Our conclusion on this point is that, given HMRC's previous dealings with this Appellant and the information which was given to HMRC at the meeting with the Appellant on 19 February, it was not reasonable for HMRC to ask either for hard copy AAD information or for original CMRs. As referred to by the Appellant in their correspondence with HMRC, it is made clear in HMRC's own guidance notes for the public, Notice 725, that when indirect exports are made evidence other than the original CMRs is what is required from taxpayers. Equally, Notice 197 states that the EMCS means that "*there should no longer be any paper based movements when excise goods are moving throughout the UK and EU in duty suspension*". It is hard to see how it can be reasonable for an officer of HMRC to ask for information which is other than that publicly stated to be the information required from taxpayers making this kind of supply.

89. Therefore we agree with the Appellant that HMRC should not have the benefit of the "stop clock" period from 22 March to 26 April for periods when it was asking for information from the Appellant which it should have known it could not hold. It is only after receipt of the Appellant's email of 26 April 2013 that HMRC accepted the alternative information provided by the Appellant, in the form of back up information from Seabrooks and customer invoices from the Appellant. It is our view that the "stop clock" period starts from 26 April and runs until the date when HMRC confirm that they have received a complete answer to both of these queries, the end of the reasonable inquiry time.

The end of the reasonable inquiry time.

90. Like the trigger for the start of the reasonable inquiry time, on the face of the legislation the end of the period is entirely dependent on a determination by the Commissioners that they "*satisfy themselves that they have received a complete answer to the inquiry*" under s 79(4)(b). In contrast, Regulation 199 refers to "*the date when they received a complete answer to their inquiry"* The end date is not dependent on any notification to the Appellant, but again, the onus is on HMRC to demonstrate when they considered that their inquiries were complete.

91. HMRC provided written confirmation in an email of 30 April in response to information from the Appellant's advisers of the same date that they were happy with the information which they had received from the Appellant about the duty suspended goods. In response to information emailed from the Appellant's advisers on 8 May HMRC confirmed that they were satisfied with the information about the indirect

export of soft drinks to Spain on 10 May 2013. That email was written on 10 May at 09.49 and therefore it is our view that while HMRC must have satisfied themselves that they had received a complete answer to their query before they wrote the email of 10 May, the earliest that they could reasonably be treated as having received a complete answer, by considering the information provided on 8 May was 9 May 2013. We are treating 9 May 2013 as the latest date on which the "clock stop" period should be treated as ending under s 79(3) VATA 1994.

The date when the payment was instructed.

92. Repayment supplement will be due to the Appellant if a "written instruction directing the making of the payment" was not issued by the Commissioners within the relevant 30 day period. Again, the trigger for the end of the period is internal to the Commissioners; it is when they instruct payment, not when that payment is received by the Appellant. We do not accept the Appellant's arguments on this point that the relevant date here is the date when payment is received into the Appellant's bank account. On the face of the legislation it is the Appellant who takes the risk of any delay in payment processing in the banking system, the time, from HMRC's perspective, stops at the point when they take the last action necessary by them to make the payment.

93. Unfortunately HMRC could not provide us with any direct evidence of when this payment was actually instructed by them. We saw the ledger entries made on 16 May 2013 and HMRC argued that this should be treated as the date when payment was instructed by reference to usual practice and the likely time for a payment to be processed in the banking system. We know that payment was received by the Appellant on 21 May 2013 (a Tuesday) and that on the evidence of Ms McEwan that indicated that the latest date when that payment could have been instructed by HMRC was Friday 17 May. In the absence of any clear evidence from HMRC of the date when payment was actually instructed, we have accepted Ms McEwan's logic and are treating Friday 17 May as the date when payment was instructed by HMRC.

94. We have concluded that:

(1) The thirty day relevant period for making this VAT repayment payment started on 7 March 2013 and, without more, payment should have been instructed on 5 April. However, HMRC did raise queries on this return which caused the clock to stop, but not from the date of their meeting with the Appellant on 19 March or from the date of the issue of the verification letter of 27 March, but from the date when HMRC formulated its enquiries on the basis of information which could reasonably be expected to be provided by the Appellant, which was 26 April 2013 at the earliest. The period from and including 7 March to but excluding 26 April is 50 days.

(2) We accept that HMRC were pursuing reasonable enquiries from 26 April until the date when they were satisfied with the response to their both of their queries, on 9 May 2013. There was then a further period of 8 days before payment was instructed by HMRC, from but excluding 9 May until 17 May 2013.

(3) The total amount of time from receipt of the VAT return until payment was instructed by HMRC is, on this basis, 58 days excluding HMRC's "reasonable inquiry" time. This is well in excess of the 30 day period available to HMRC under s 79 and repayment supplement is therefore payable to the Appellant for this period.

95. 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.

Rachel Short.

TRIBUNAL JUDGE
RELEASE DATE: 30 OCTOBER 2015