[2018] UKFTT 189 (TC)

TC06430

Appeal number: TC/2017/04763

VAT – claim for repayment of overpaid VAT – claim prepared and submitted to incorrect email address – whether claim "made" before 1 April 2009 – s 121 Finance Act 2008

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDGBASTON GOLF CLUB LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
IAN PERRY

Sitting in public in Birmingham on 6 March 2018

Glyn Edwards of MHA MacIntyre Hudson LLP for the Appellant

Karleen Ellis, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal arises from a claim by the appellant for a repayment of overpaid output VAT based on the decision in *Revenue & Customs Commissioners v Bridport Golf Club* (Case C-495/120), reported at [2014] BVC 1. The dispute for resolution in this appeal was whether the claim in question had been made by the 31 March 2009 deadline set down in s 121 Finance Act 2008. The claim had been sent with an incorrectly addressed email on 31 March 2009.

The facts

2. We received short witness statements (and heard oral testimony) from Paul Taylor (formerly a VAT Manager with Begbies Traynor Group, who advised the appellant in 2009 in relation to its claim) and Martin Nutter of HMRC. We also received a bundle of documents. We find the following facts, none of which were particularly contentious.

3. As its name implies, the appellant operates a golf club. In or around early 2009, along with many similar clubs, it became aware of the possibility that it had been accounting for output VAT incorrectly on green fees charged to non-members and on members' subscriptions. It instructed Begbies Traynor Group ("BTG") (which had recently acquired a specialist VAT advisory firm for which Mr Taylor had worked) to submit a claim on its behalf to HMRC in order to protect its position. Mr Taylor thought BTG had been engaged on a sub-contract basis to do the work by the appellant's normal accountants Bloomer Heaven, as a result of the good previous working relationship between Bloomer Heaven and the previous VAT advisory firm; whether or not that was the case, it does not affect our decision.

4. The period to be covered by the claim was in two parts. First, there was a historical claim covering the period from 1990 up to 4 December 1996 (known as a "Fleming claim", after the litigation which gave rise to the limited opportunity to make such claims outside the normal limitation period); second, there was a more current claim for the period 1 April 2006 to 31 March 2008, governed by the usual three year time limit (as it then was). Subsequent claims were made (without problems arising) in relation to subsequent periods.

5. After a great deal of work compiling a detailed claim, it had reached a fairly advanced stage by late March 2009. Whilst it was not regarded as completely finalised, the 31 March deadline for submission was looming and the decision was taken to submit the claim (in reasonable, though not perfect, condition) before the deadline passed. Thus on 31 March 2009, Mr Taylor submitted a claim by email, with a large volume of supporting information and calculations. He in fact appears to have sent the claim twice on that day, once by email timed at 17.34 and once by email timed at 19.14.

6. Or, to be more accurate, he thought he submitted the claim. In fact, instead of submitting it to the email address which had been publicised by HMRC for email

submission of claims (martin.nutter@hmrc.gsi.gov.uk), he submitted it to martin.nutter@hmrc.gov.uk. In other words, he omitted the letters "gsi" from the email address.

7. The email was not received by HMRC. Mr Taylor did not recall having received any acknowledgement or non-delivery message in response to his emails, so was not aware of its non-receipt. HMRC had made it clear that they were dealing with a great many "Fleming" claims of various sorts in the period leading up to the 31 March 2009 deadline (indeed, Mr Nutter informed us that 3,500 such claims had been received in the 72 hours leading up to the deadline, over 2,500 of them on the last day), and that no prompt response could be expected by those submitting the claims.

8. BTG's acquisition of the VAT advisory firm did not work very well and by late 2009 BTG lost a lot of the VAT advisory work that had come with its original acquisition. Mr Taylor was made redundant by BTG in January 2010.

9. In mid-2010 BTG sought to check the position on the appellant's claim. On 14 June 2010, following a telephone call a short while earlier, BTG sent an email to Mr Nutter (this time using his correct email address), providing more information about its despatch. Mr Nutter was still unable to find any trace of the claim, so he replied by email on 15 June 2010 confirming that fact and asking for any further information that might assist him in tracking it down.

10. BTG carried out an extensive search of their own and were able to find a copy of the email sent by Mr Taylor on 31 March 2009 at 17.34. On 22 December 2010 they forwarded a copy of that email to Mr Nutter (at his correct email address), including the detailed documents attached to it.

11. Further correspondence followed relating to both this and later claims. None of the content of that further correspondence is relevant to this appeal. Finally, on 9 March 2017 HMRC formally rejected the appellant's claim by letter dated 9 March 2017. This decision was upheld, following a statutory review, by letter dated 24 May 2017. The appellant notified its appeal against HMRC's decision to the Tribunal on 16 June 2017.

The legislation

12. Section 80 Value Added Tax Act 1994 ("VATA") provided, in relevant part, as follows:

> "**80 Credit for, or repayment of, overstated or overpaid VAT**
>
> (1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.

…

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

…

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 4 years[1] after the relevant date.

(4ZA) The relevant date is—

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

…

(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."

13. Regulation 37 of the Value Added Tax Regulations 1995 provided as follows:

"Any claim under section 80 of the Act 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."

14. Section 121 Finance Act 2008 provided, in relevant part, as follows:

"**121 Old VAT claims: extended time limits**

(1) The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009.

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[1] The time limit was increased from 3 years to 4 years from 1 April 2009, but the previous 3 year time limit still applied from 1 April 2009 in relation to repayment claims for prescribed accounting periods ending on or before 31 March 2006 – see paragraph 36, Schedule 39 Finance Act 2008 and articles 2 and 6 of the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provisions and Savings) Order 2009.

…

(3) In this section—

"input tax" and "prescribed accounting period" have the same meaning as in VATA 1994 (see section 96 of that Act),

...

(4) This section is treated as having come into force on 19 March 2008."

The arguments

15. On behalf of the appellant Mr Edwards argued, in outline, that there was a distinction between a claim being "made" and that same claim being notified or communicated to HMRC. The distinction was analogous to the distinction between an assessment being "made" and then subsequently being "notified" to the taxpayer (as referred to in section 73(1) VATA); as was made clear in section 77 VATA, the time limits applicable to HMRC assessments applied to them being "made", and not to them being "notified" and this was acknowledged by HMRC in their VAT Assessements and Error Correction manual at VAEC6080 (which stated that "it is clearly undesirable that our time limit rules should attach to a date which is neither obvious or routinely disclosed to taxpayers. Consequently, all assessments must have to be notified to the taxpayer within the time limit for making the assessment in order to demonstrate that it was indeed made in time.")

16. In his submission, the appellant had clearly "made" a claim in the relevant sense (that is to say, in a way analogous to HMRC "making" an assessment, distinct from "notifying" it). Having clear evidence that it had done so before the 1 April 2009 deadline (in the form of the emails sending it to the wrong email address), it was not time-barred and the subsequent notification of that claim to HMRC (when it was resent, as an attachment to the email dated 22 December 2010) did not fall foul of the time limit in section 121 Finance Act 2008.

17. At the very latest, he argued (and Ms Ellis did not appear to dispute this point), the appellant should be regarded as having "made" the original claim when it was finally sent to the correct email address at HMRC attached to the email dated 22 December 2010, so that all the periods dealt with in the claim which were still within the four year cap at that time were clearly the subject of a valid claim.

18. In putting forward these arguments, Mr Edwards referred to *Quintain Estates Limited v CCE* [2004] VAT Decision 18877 and *Olivers of Hull Limited v HMRC* [2001] VATD 17434. In *Quintain*, the VAT & Duties Tribunal had found as a fact that the relevant claim (a voluntary disclosure on form 652) had been posted to HMRC but not received. Nonetheless, it found that the relevant claim had been "made", essentially because once it had been posted it was "beyond recall". In *Olivers*, HMRC had no

record of the claim being received but the tribunal accepted that it had been delivered to the local VAT Office by hand; not surprisingly, therefore, the tribunal accepted that the claim had been "made" at that time.

19. Ms Ellis argued, in effect, that we should not read the two-stage process of "making" and "notifying" an assessment across to the process of making a repayment claim. There was nothing to indicate such a parallel should be drawn, and indeed in *Quintain,* the tribunal had said that "it is reasonable to assume that the making of a claim necessarily includes taking steps to notify the Commissioners of the claim that is being made." Furthermore, she referred to Regulation 37 of the VAT Regulations, which required a claim to be "made in writing to the Commissioners", which implied rather more than simply preparing a claim and doing some act which was intended to bring it to their attention but which could not be effective for that purpose due to an error on the part of the person seeking to do so.

Discussion and decision

20. The question before us is this: at what point in time could it properly be said that the appellant's repayment claim was "made in writing to the Commissioners" in the circumstances outlined above?

21. "Claim" is defined in the Oxford English Dictionary as "A demand for something as due; an assertion of a right to something." In ordinary English usage, it is possible to have a claim (for example a claim for damages for personal injury) without taking any action to assert or enforce that claim. Advancing a claim is different from having a claim. In the present case, the time to be ascertained is when the appellant "made" its claim in writing to the Commissioners.

22. Mr Edwards asks us to find that this took place at or before the time when the crucial emails were sent on 31 March 2009. He draws a parallel with the case of an assessment, where section 73 VATA provides a two stage process by using the words "… [the Commissioners] may assess the amount of VAT due from him to the best of their judgment and notify it to him" (s 73(1)) and "the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly" (s 73(2)). As Blackburne J in the High Court said in *Courts plc v Commissioners for Customs and Excise* [2003] EWHC 2541 (Ch), [2004] STC 690 (at [53]):

> "There is a distinction between the decision of the commissioners to make an assessment, the making of the assessment and the notification of the assessment."

23. However, it is clear that the difference between "assessing" the tax due and "notifying" that assessment emerges from the specific language actually used in section 73 VATA.

24. There is no similar dichotomy in the legislation with which we are concerned here. HMRC are only required to make a relevant repayment "on a claim being made for the purpose" (s 80(2) VATA); any such claim must "be made in such form and manner and shall be supported by such documentary evidence as the Commissioners

prescribe by regulations" (s 80(6) VATA); and, according to the relevant regulation, must be "made in writing to the Commissioners". None of this language connotes a two stage process for making a claim under s 80 VATA which is analogous to the two stage process of making and notifying an assessment under s 73 VATA. The single question is what action is required before it can properly be said that a claim has been "made in writing to the Commissioners".

25. On the plain meaning of those words, we reject any suggestion that a claim can properly be said to have been made in writing to the Commissioners before any attempt has been made to deliver that claim to them. Accordingly we reject Mr Edwards' submission that the claim was "made" (within the meaning of s 80 VATA) at the time it was prepared and finalised ready for despatch to HMRC (or indeed at any other time before an attempt was made actually to despatch it).

26. The remaining question is whether, by sending the claim to an incorrect email address, it could properly be said that the appellant had by that action "made" its claim "in writing to the Commissioners".

27. We note that in *Quintain*, the VAT and Duties Tribunal held that the posting of a claim to the Commissioners before expiry of the time limit, even where they did not receive it until after such expiry, meant that the claim had been "made" before the time limit had expired. The essence of its reasoning was summed up as follows (at [92]):

> "It seems to me that the essence of entrusting a claim to the Post Office is that once the letter is in the hands of the Post Office it is, so far as the taxpayer is concerned, beyond recall and in that sense has been made."

28. We would respectfully agree with this approach, subject to the obvious qualification that the letter must have been correctly addressed. Applying it to the modern medium of email, in a situation where HMRC had provided a specific email address to which claims could be sent, we would take a similar view – i.e. if it could be proven that a claim had been sent before the deadline to the correct email address, then that claim would have been "made" in time.

29. The difficulty with the appellant's case, however, is that it did not send the claim to the correct email address. That is the modern equivalent of misaddressing a letter sent through the postal service, but with the added factor that even a single misplaced character in an email address means the email will not reach its destination. Unfortunately, Mr Taylor made a mistake and did not include the crucial ".gsi" element in the email address to which the claim was intended to be sent. We all make mistakes. Mr Taylor had clearly been working at speed under a great deal of pressure in compiling the claim, but unfortunately none of that can affect our view: the fact of the matter, unfortunate though it may be, is that the mistake in the email address meant that the claim had clearly not been made "to the Commissioners" before 1 April 2009.

30. The appeal must therefore be DISMISSED.

31. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 5th APRIL 2018