



TC01595

Appeal number: TC/2010/04577

Value Added Tax – Application to strike out repayment claim – s. 80 (1) Value Added Tax Act 1994 – three year time limit – s. 80 (4) Value Added Tax Act 1994 – whether valid claim for repayment of output tax was made pursuant to Regulation 37 Value Added Tax Regulations 1995/2518 – Application allowed.

FIRST-TIER TRIBUNAL

TAX

**BARTHOLOMEW CORVI T/A
A & B CORVI SEAVIEW CAFE**

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: W Ruthven Gemmell, WS

Sitting in public at George House, 126 George Street, Edinburgh on 11 November 2011

No appearance for the Appellant

Kim Tilling, H M Revenue and Customs for the Respondents

© CROWN COPYRIGHT 2011

DECISION

Introduction

1. This is an Application by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to Strike Out an appeal by Bartholomew Corvi T/A A & B Corvi Seaview Café ("BC") to claim VAT paid on a gaming machine intimated on 13 February 2011 in respect of takings in "a period prior to 2005".
2. The grounds of the Application were that the claim was for an unspecified amount that was unquantified and, even if the claim was valid, it was received outside the statutory time limits imposed by Section 80(4) VAT Act 1994.
3. No appearance was made by BC.

Legislation

4. At the material time, the relevant provisions of Section 80 Value Added Tax Act 1994 ("VATA 1994") were as follows:

(1) Where a person has (whether before or after the commencement of this Act) paid an (amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him.

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

(3)....

(4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim."

5. Regulation 37 of the VAT Regulations SI 1995/2518 provides:

"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 is calculated."

6. In short, this appeal concerns the question whether the Appellant made a valid claim in respect of the overpayment of VAT within Regulation 37 within the three year time limit imposed by s80(4).

Cases Referred To

A Russell Heating v HMRC [2008], (TC20681)

Botanical Catering Ltd v HMRC [2009], (TC00212)

Enviroengineering Limited v HMRC [2011], (TC01221)

The Facts

7. The following facts were found –

8. BC is a sole proprietor and had been registered for VAT since 1993.

9. On 13 February 2001, BC wrote to the Protective Claims Error Correction Team of HMRC in Liverpool stating that BC had had a gaming machine on his premises for many years and had paid VAT on the takings. It had been brought to his attention that there were cases pending where it may not have been correct to have been charged VAT for a period prior to 2005. The letter stated “I would like to register my interest in this to claim any refund of VAT depending on any future developments. P.S. I no longer have a machine since last year”.

10. HMRC replied by letter dated 5 April 2011 stating that HMRC were only considering claims received in relation to gaming takings from the period 1 November 1998 to 5 December 2005. The letter stated “The protective claim you have submitted is incomplete as it is unspecific and is unquantified which does not constitute a valid (sic). However, all claims are subject to the normal time limits. Since the claim was not received until 17 February 2011, it falls outside the time limits as detailed in Section 80(4) of the VAT Act 1994. Consequently, the claim is formally rejected”.

11. On 28 April 2011 BC submitted an appeal against the decision to refuse the claim.

12. Accompanying the appeal was a letter dated 26 April in which BC sought to quantify the claim and advised that as it was only a protective claim the time limits to bring a claim should not apply.

13. On 7 July 2011, HMRC issued a Notice of Application to strike out the appeal on the grounds that the claim did not satisfy the legislative requirements and that the claim had been brought late.

Submissions by HMRC

14. HMRC say there are transitional arrangements in place following the change of time limit from three to four years to prevent any claim made between 1 April 2009 and 31 March 2009 or thereafter for periods ending 1 April 2006 for this type of VAT reclaim.

15. HMRC say the claim must fail as the claim made by letter 13 February 2011 was both unquantified and unspecific and contrary to the legislative requirements.

16. HMRC say that BC has failed to demonstrate that the claim was made timeously and that until such time as a claim is complete, in terms of satisfaction of Regulation 37, it is not a valid claim.

17. HMRC refer to the case of *A Russell Heating* as authority for the proposition that the legislation cannot be disapplied on the grounds of hardship or exceptional circumstances, except so far that is provided within the legislation, which it is not in the case of Section 80.

5 18. HMRC cite the appeal of *Enviroengineering Limited* as authority for the proposition that the Tribunal may exercise its powers to strike out an appeal under Rule 8(3)(c) of the Tribunal Procedure (First tier) (Tax Chamber) Rules 2009 and confirmation of the effect of “capping provisions”.

10 19. HMRC says if a late claim is allowed this would sidestep the statutory capping provision in respect of which HMRC would suffer prejudice.

20. HMRC say that as the claim was subject to a three year cap, the claim needed to be made by 2008.

15 21. HMRC say that as no date was specified in the original claim, they do not know whether it was to the end of or during 2008 but say that it is irrelevant as the claim was not made at any time during 2008, nor by 1 April 2009 at the latest.

22. HMRC say that there is no such concept in the VAT legislation as a protective claim and that the taxpayer must either make a claim or not make a claim.

20 23. HMRC refer to the case of *Botanical Catering Limited* as authority for the proposition that Section 80 of the VAT Act 1994 gives no discretion either to the HMRC or to the Tribunal in relation to claims that are made out of time.

Reasons for Decision

25 24. The claim made on 13 February 2011 in respect of “ a period prior to 2005” is clearly out of time in terms of Section 80 of the VATA 1994. Similarly, any such claim under Section 80 requires to be made in terms of Regulation 37 which state that the claim must be 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”. No such statements were made and so the claim was unspecified and unquantified.

30 25. No basis for a “protective claim” under the VAT legislation that was put forward and no authority was produced, that even if there were a protective claim, this would allow the time limits to be waived or modified.

26. Consequently, following the Judge’s decision in the *A Russell Heating* case the Tribunal cannot alter the correct legal option on the basis of individual circumstances.

35 27. The claims and questions were made outside the three year limit applicable and can be disallowed under Section 80.

28. The Application to strike out the appeal under Rule 8(3)(c) is allowed.

29. 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.

10

**W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE**

15

RELEASE DATE: 23 NOVEMBER 2011