



**TC01731**

**Appeal number: TC/2010/343**

*Application for substitution of a party – Tribunal Procedure Rule 9 –  
whether subject matter of appeal is assignable – effectiveness of assignment  
– whether to add or substitute a party*

**FIRST-TIER TRIBUNAL**

**TAX**

**In the appeal of NEW MILES LIMITED**

**Mr BEVERLEY HILTON-FOSTER**

**Applicant**

**- and -**

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

**Respondents**

**TRIBUNAL: Judge Peter Kempster**

**Determination without a hearing**

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## DECISION

1. References in this decision notice to the Tribunal Procedure Rules are to The Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (as amended).

2. Pursuant to Tribunal Procedure Rule 29 the parties consented to this application being decided without a hearing and the Tribunal considered it was able to determine the matter without a hearing. As communicated to the parties in advance of the determination, and no objection having been received, the items considered in determining the application were:

- (1) Notice of appeal dated 8 December 2009;
- (2) Rule 9 application dated 21 October 2010 and exhibited deed of assignment;
- (3) Notice by the Respondents (“HMRC”) dated 24 February 2011;
- (4) Letter from Barnard Atkins (Applicant’s representative) to HMRC dated 15 June 2011 and enclosed bundle;
- (5) Letter from Barnard Atkins to the Tribunal dated 23 June 2011; and
- (6) Letter from HMRC to the Tribunal dated 23 June 2011.

### *Background*

3. By a notice of appeal dated 8 December 2009 New Miles Limited (“the Appellant”) appealed against a decision by HMRC to refuse payment of compound interest on a repayment of VAT refunded to the Appellant (“the Appeal”). In January 2010 the proceedings were stayed pending developments in other cases concerning similar questions of law.

4. On 21 October 2010 the Applicant made an application to be substituted for the Appellant as the appellant in the Appeal (“the Application”). The Application states:

“The Applicant makes this application to the Tribunal pursuant to a Deed of Assignment entered into between [the Appellant] and the Applicant, attached hereto as Exhibit 1, to the effect that the Applicant became entitled inter alia to the rights of action of [the Appellant] relating to this appeal. The Applicant submits that the requested substitution has become necessary because of a change in circumstances since the start of proceedings under [Tribunal Procedure Rule] 9(1)(b) ...”

5. The deed of assignment (“the Deed”) is dated 11 October 2010; is executed by the Applicant (as assignee), the Appellant (as assignor) and a third party; and witnessed for each party. The third party was a commercial creditor of the Appellant and the Applicant undertook to pay the liability due to the third party.

6. The Deed recites:

“(A) The [Appellant] has a claim against [HMRC].

(B) As the intention is that the [Appellant] will be dissolved, it will not be possible for the [Appellant] to pursue the claim. The [Appellant] therefore wishes to assign any and all of its rights under the claim to the [Applicant] and the [Applicant] has agreed to accept that assignment. The [Applicant] will thus be able to pursue the claim in their own name.”

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7. The operative provision of the Deed states:

“2 **Assignment**

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In consideration of the sum of £1, receipt of which is acknowledged, the [Appellant] hereby assigns and transfers to the [Applicant] absolutely all its rights, title and interest in arising out of or relating to all claims and causes of action or other rights or relief (including costs), whether arising in (or in respect of) contract, tort, negligence, breach of duty, breach of statute or statutory instrument, breach of directly effective European Community law rights or otherwise, against HMRC (or any successor), including any claims arising out of or connected to overpaid Value Added Tax which was wrongly levied against the [Appellant] by HMRC (and therefore including any claims to compensation by way of an additional payment representing the difference between simple interest received by the [Appellant] to date and compound interest, arising from the loss of the use of money) (the "Claim") with the intent that hereafter the [Applicant] shall be solely entitled to pursue the Claim in their names and to any and all proceeds, profits, damages, compensation, interest or other money of whatever kind or however arising out of any action or proceedings related to the Claim, to hold for the [Applicant] for his absolute use and benefit.”

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8. The only other provisions of the Deed to note are:

(1) Clause 3.2 states:

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“The [Appellant] shall immediately notify HMRC of the assignment constituted by this Deed, such notification shall be made substantially in the form set out in the Schedule to this assignment.”

(The schedule is not with the papers submitted to the Tribunal.)

(2) Clause 7.3 contains a “blue pencil” provision preserving the remaining parts of the Deed if any part is unenforceable.

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9. On 22 February 2011 HMRC served a notice which stated:

“[HMRC] ... would not dispute the assignment that the Appellant seeks to make is capable of being made. However, it is ultimately for the Tribunal to decide whether that assignment has been properly made. The Tribunal will determine the success or not of the Appellant's case and accordingly it would be for the Tribunal to satisfy itself that any right of action being pursued in this matter is being pursued by someone with a right to do so. [HMRC] would contend that the precedent case of *HMRC v Midlands Co-Operative Society* (2008) EWCA Civ 305, suggests that the appropriate course of action would

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be for the Tribunal to add the [Applicant] as an appellant rather than the assignment being effected by a substitution.”

10. On 15 June 2011 the Applicant’s representative (who also acts for the Appellant) wrote to HMRC setting out their representations, the relevant parts of which are as follows:

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“... you state that *HMRC v Midlands Co-operative Society* ... "suggests that the appropriate course of action would be for the Tribunal to add the [Applicant] as an appellant rather than the assignment being effected by substitution". We do not understand why you consider *Midlands* as authority for that proposition. There is no discussion in the case with regard to the proper means whereby the validity of the transfer of rights can be recognised within tribunal procedure. There is however reference to a previous application which Midlands Co-operative Society had made to be substituted for the Leicester Co-operative Society (as a result of the transfer of the rights) under rule 13 of the VAT Tribunal Rules (SI 1986/590), in relation to an appeal concerning a liability to VAT rather than a repayment of VAT, which HMRC had not opposed (see paragraph 12). Rule 13 deals exclusively with the substitution of a "successor" to the rights and liabilities of the appellant, not the addition of the successor as another appellant.

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If the transfer of rights is valid - and you do not provide any objections to the proposition that it is - this ought to be recognised by way of the substitution of the [Applicant] for the [Appellant] as appellant.

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If the [Applicant] is merely added as appellant, then the [Appellant] will be a 'fifth wheel' in the proceedings as it will have divested itself of its rights. Furthermore, it is anticipated that it will shortly be struck off, and so will cease to exist.

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It is difficult to see what useful purpose is met by retaining the [Appellant] as an appellant alongside the [Applicant] therefore.

HMRC's stance appears to be that it does not object to the application, but considers that a hearing is desirable so that the Tribunal can satisfy itself that the assignment is valid and that a direction substituting the [Applicant] for the [Appellant] is appropriate.

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With respect, if HMRC does not have objections to the application, one would have thought that the appropriate course is to allow the Tribunal to decide the application on the papers, allowing for the possibility that the Tribunal may want to call a hearing of its own motion. It is unusual for HMRC to request a hearing to deal with an application without having particular objections to the application made.”

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11. On 23 June 2011 HMRC wrote to the Tribunal reiterating the points made in their 22 February notice (¶ 9 above) and consenting to determination of the Application without a hearing. On the same date the Applicant’s representative wrote to the Tribunal consenting to determination of the Application without a hearing.

45 12. By way of further background I note:

(1) the Appellant's representative has confirmed to the Tribunal that the Appellant is still in existence (letter dated 24 March 2011 refers); and

5 (2) a number of other taxpayers with appeals before the Tribunal have entered into identical assignment documentation (with other assignees) and so the outcome of the Application is of wider importance beyond the parties to the current proceedings. I should note that in ¶¶ 29 & 30 below I refer to legislation that does not extend to Scotland or Northern Ireland, so that further consideration may be required in respect of any other taxpayers whose affairs are governed by jurisdictions other than England & Wales.

10 *Relevant law*

13. Section 78 VAT Act 1994 states (so far as relevant):

*“Interest in certain cases of official error*

(1) Where, due to an error on the part of the Commissioners, a person has—

15 (a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or

20 (b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or

(c) (otherwise than in a case falling within paragraph (a) or (b) above) paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or

25 (d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section.

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(3) Interest under this section shall be payable at the rate applicable under section 197 of the Finance Act 1996.

...

35 (10) The Commissioners shall only be liable to pay interest under this section on a claim made in writing for that purpose.”

14. I understand that the Appellant made a claim under s 78(10) and that was paid by HMRC but calculated on a simple interest basis, rather than a compound interest basis.

40 15. Tribunal Procedure Rule 9 provides:

*“Substitution and addition of parties*

(1) The Tribunal may give a direction substituting a party if—

(a) the wrong person has been named as a party; or

(b) the substitution has become necessary because of a change in circumstances since the start of proceedings.

(2) The Tribunal may give a direction adding a person to the proceedings as a respondent.

(3) A person who is not a party to proceedings may make an application to be added as a party under this rule.

(4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.

(5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate.”

16. The position under the procedure rules applicable to the VAT & Duties Tribunal (which was replaced by the current Tribunal with effect from April 2009) was stated in Rule 13 Value Added Tax Tribunals Rules 1986, SI 1986/590:

*“Death or bankruptcy of an appellant or applicant*

(1) This rule applies where, in the course of proceedings, the liability or interest of the applicant or appellant passes to another person (“the successor”) by reason of death insolvency or otherwise.

(2) The tribunal may direct, on the application of the Commissioners or the successor, and with the written consent of the successor, that the successor shall be substituted for the applicant or appellant in the proceedings.

(3) Where the tribunal is satisfied that there is no person interested in the application or appeal, or the successor fails to give written consent for his substitution in the proceedings within a period of two months after being requested to do so by the tribunal it may, of its own motion or on application by the Commissioners and after giving prior written notice to the successor, dismiss the application or appeal.”

17. In *HMRC v Midlands Co-operative Society* [2008] STC 412 two co-operative societies, Midlands and Leicester, carried on similar businesses; in 1995 the business of Leicester was transferred to Midlands; in 2003 Midlands submitted VAT repayment claims retrospective to 1973; HMRC refused to pay the part of the claims that related to VAT paid by Leicester prior to the transfer of its business to Midlands. The High Court ruled in favour of the taxpayer, holding (at ¶ 42) that there was nothing in the VAT code, either expressly or by necessary implication, to prohibit a taxable person, entitled to the benefit of an overpayment claim (under s 80 VAT Act 1994), from passing the benefit of that claim to another; accordingly, the formal arrangements that transferred Leicester’s business to Midlands were effective to transfer to Midlands the benefit of Leicester’s s 80 claim.

18. In *Midlands Co-op* Blackburne J commented *obiter dicta* (at ¶ 12):

5 “There is, I should say, an irony in [HMRC’s] present stance, although  
it is irrelevant to the outcome of this appeal since it has not been  
suggested that any estoppel arises as a result, in that it was Midlands  
that submitted the VAT return in respect of Leicester's last period of  
10 VAT prior to the transfer and, without objection by [HMRC], paid the  
VAT shown on the return. What is more, when [HMRC] concluded  
that VAT had been under-declared for that last period and made an  
assessment on Leicester for the additional VAT claimed to be due and  
15 Leicester appealed against the assessment, Midlands was directed by  
the tribunal, without objection by [HMRC], to be substituted as  
appellant in Leicester's place pursuant to reg 13 of the Value Added  
Tax Tribunals Rules 1986, SI 1986/590. (Regulation 13, which is  
expressed to apply 'where, in the course of proceedings, the liability or  
20 interest of the applicant or appellant passes to another person (“the  
successor”) by reason of death insolvency or otherwise', empowers the  
tribunal to 'direct, on the application of the Commissioners or the  
successor, and with the written consent of the successor, that the  
successor shall be substituted for the application or appellant in the  
proceedings.')

19. The decision of the High Court was upheld by the Court of Appeal [2008] STC  
25 1803 where Arden LJ stated:

30 “[2] In my judgment, the judge was correct for the reasons he gave. As  
he held, [HMRC] have to show that there is some provision in the  
relevant statutory scheme which expressly or by implication precludes  
an assignment by operation of law of a claim for repayment under s 80  
of VATA. Both he and this court have been referred to certain  
35 provisions of VATA and the Value Added Tax Regulations 1995, SI  
1995/2518 made thereunder. There is no express legislative prohibition  
on assignment in the provisions to which we have been referred, and in  
my judgment none of them gives rise to the implication that the  
transfer of claims under s 80 was not permitted in the circumstances of  
this case.

40 [14] ... where a statute refers to a person who has paid VAT, and gives  
him a right of repayment, the statute must in my judgment be taken, in  
the absence of contrary indication, to have intended to include a person  
in whom he has vested that right. In my judgment, the contrary  
indication would have to be clearly stated because the right to a  
45 repayment is a right of property which should not be restricted without  
clear wording. It would follow that if a person has assigned a chose in  
action to another so as to invest in him the right to sue for it, and to  
give a good receipt, HMRC could not properly pay the assignor.

[18] ... As I have said, it is to be presumed, unless otherwise stated,  
that a right which is created by statute is assignable under the general  
law in the same way as rights created by the general law, unless statute  
otherwise clearly provides.”

*Consideration*

20. I consider three questions:

- (1) Can the subject matter of the Appeal be assigned?
- (2) If so, does the Deed effect such an assignment?
- 5 (3) If so, how should the Applicant be added to or substituted into the proceedings?

*Can the subject matter of the Appeal be assigned?*

21. The Appeal has barely progressed beyond the notice of appeal. HMRC have not been required to provide a statement of case because the proceedings have been  
10 stayed. The notice of appeal states (in section 7 of the notice) that the result sought by the Appellant is, “The payment of interest on a compound basis.” The grounds of appeal (in section 6 of the notice) are:

- 15 “(i) [HMRC] have wrongly assessed their liability to pay interest to the Appellant under s 78 VAT Act 1994 and/or the amount of interest so payable;
- (ii) [HMRC] have wrongly failed to give effect to the Appellant’s EC law right to compound interest in circumstances where ... the nature of the Appellant’s claim is restitutionary ...”

22. Now these are deep waters. Whether certain VAT repayments should carry  
20 compound (rather than simple) interest has exercised the tax tribunals and the courts for some time; see, for example, *Chalke v HMRC (Re VAT Interest Cars Group Litigation)* [2009] STC 2027; *John Wilkins (Motor Engineers) Ltd v HMRC* [2009] STC 2485; *Littlewoods Retail Ltd v HMRC* [2010] STC 2072 & [2011] STC 171; and  
25 *Grattan Plc v HMRC* [2011] SFTD 297. The state of play as at the time of preparing this decision notice is that the CJEU is considering questions referred to it in *Littlewoods* (CJEU Case C-591/10).

23. Neither party has provided me with any detailed argument on this matter. The Applicant clearly assumes that the subject matter of the Appeal can be assigned, and HMRC state they “would not dispute the assignment that the Appellant seeks to make  
30 is capable of being made” (see ¶ 9 above) but without any reasons for that view. In the general litigation to date (some of which is cited above) taxpayers have advanced two bases for entitlement to compound interest:

- 35 (1) A statutory claim under the UK domestic VAT code (s 78 VAT Act 1994) – this was discounted by Vos J in *Littlewoods* but may, of course, revive if there are onward appeals; and
- (2) Restitutionary compensation for the UK state’s failure to implement correctly EU VAT law – this is one of the questions referred to the CJEU in *Littlewoods*.

24. I consider that the Appellant’s grounds of appeal contemplate both potential  
40 bases of entitlement. In relation to the first basis, the Appellant’s argument is likely

to be that HMRC accept the existence of a s 78 claim but dispute its method of calculation. I consider a s 78 interest claim is assignable for the same reasons as a s 80 repayment claim was held to be assignable in *Midlands Co-op*. See in particular Arden LJ at [18] (quoted at ¶ 19 above).

5 25. In relation to the second basis, the position is more complicated because the answers to be given by the CJEU in response to the *Littlewoods* referral may point in one or more of a number of different directions. If those answers point to a taxpayer having some right(s) exercisable through the courts other than this Tribunal then, although of importance to the parties, that does not affect the Application before me.  
10 If, in addition or instead, those answers point to a taxpayer having some right(s) exercisable through this Tribunal then, again, *Midlands Co-op* leads me to conclude that in the absence of a specific statutory bar that right should be assignable.

15 26. For the reasons given in ¶¶ 24 & 25 above, although the background law in relation to compound interest claims is still developing, I conclude that in relation to proceedings before this Tribunal a claim for compound interest is capable of assignment by the Appellant.

*Does the Deed effect such an assignment?*

20 27. This point was specifically raised by HMRC in their notice dated 22 February 2011 (quoted at ¶ 9 above) but HMRC do not advance any arguments as to “whether that assignment has been properly made.”

28. As stated at ¶¶ 5 & 8 above, the document supplied to the Tribunal is missing a schedule but it is dated, executed and witnessed, and is stated to have been delivered. As already stated, no particular challenges have been put by HMRC.

29. In *Midlands Co-op* Arden LJ stated (at [9]):

25 “VATA and the regulations thereunder take effect subject to the general law unless the general law is excluded. Under the general law, the right to a repayment of monies overpaid to HMRC is a chose in action. Under the general law, choses in action are assignable under s  
30 136 of the Law of Property Act 1925. That section provides, so far as material, as follows:

35 '(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

40 (c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person claiming under him; or

5 (b) of any other opposing or conflicting claims to such debt or thing in action; he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925 ...”

10 30. The requirement in s 136 LPA 1925 to give notice to the “other person from whom the assignor would have been entitled to claim such ... thing in action” was addressed by Clause 3.2 of the Deed (quoted at ¶ 8 above) and it is apparent that HMRC are aware of the Deed. As already stated, and held in *Midlands Co-op*, there is no specific statutory bar in VAT Act 1994 to assignment

15 31. For the reasons given in ¶¶ 28 & 30 above I conclude the Deed effected an assignment of the subject matter of the Appeal.

*How should the Applicant be added to or substituted into the proceedings?*

20 32. The procedure, considered in *Midlands Co-op*, available to the VAT & Duties Tribunal under the old Rule 13 (see ¶ 16 above) permitted a direction to substitute a successor (eg an assignee) for an appellant. The provisions of the current Rule 9 (see ¶ 15 above) are not the same.

25 33. Rule 9(3) refers to an application to be *added* as a party – that is not the nature of the Application, and it clear from the correspondence from the Applicant’s representative (quoted at ¶ 10 above) that this is not the desire of the Applicant. Rule 9(2) permits the *addition* of a person as a *respondent* (though not as an appellant) – although I note again that addition as a party is not preferred by the Applicant. Rule 9(1) permits the *substitution* of a *party* (ie either appellant or respondent) if “the substitution has become necessary because of a change in circumstances since the start of proceedings.” I consider that those words in Rule 9(1) are wide enough to include a change in circumstances consisting of a valid assignment of the subject matter of an appeal, and also that a substitution is necessary because the Appellant has assigned its claim to the Applicant.

*Decision and Direction*

35 34. For the reasons stated at ¶¶ 26, 31 & 33 above the Application is GRANTED. Accordingly, pursuant to Tribunal Procedure Rule 9(1) the Tribunal DIRECTS that the Applicant is substituted for the Appellant in these proceedings.

40 35. 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 Tribunal Procedure Rule 39. 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.

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**TRIBUNAL JUDGE**  
**RELEASE DATE: 9 January 2012**

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