



TC02281

Appeal number: TC/2011/08992

VAT – INPUT TAX – repayment supplement – whether repayment supplement payable in respect of VAT credit claimed other than in VAT return – held yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OUR COMMUNICATIONS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
MR HARVEY ADAMS FCA**

Sitting in public at 45 Bedford Square, London on 20 September 2012

**Conrad McDonnell, counsel, instructed by Neumans LLP, for Our
Communications**

**Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. Our Communications Limited (“Our Communications”) appeals against a decision of the Respondents (“HMRC”) in a letter dated 17 October 2011 refusing to pay repayment supplement under section 79 of the Value Added Tax Act 1994 (“VATA”). Our Communications claimed VAT credits in relation to two VAT periods after it had submitted the VAT returns for those periods. HMRC paid the VAT credits but did not do so within the 30 day period specified in section 79. Our Communications claimed repayment supplement which HMRC refused to pay on the ground that the VAT credits had not been included in Our Communications’s VAT returns.

2. The only issue in this appeal is does section 79 of the VATA apply to claims for payment of VAT credits not made on a VAT return but accepted by HMRC exercising their discretion under regulation 29(1) of the Value Added Tax Regulations 1995 (SI 1995/2518) (“the VAT Regulations”)?

Facts

3. The facts of this appeal were not in dispute. On the basis of the witness statement of Mr Mian Dar, director of Our Communications, and the bundle of documents, we find the material facts to be as follows.

(1) Our Communications made VAT returns on a monthly basis. Our Communications submitted its VAT return for 01/06 on 3 February 2006 and it was received by HMRC on 6 February 2006. The return showed a repayment of £1,712,481.75 due from HMRC to Our Communications.

(2) In a letter dated 3 March 2006 to HMRC, Our Communications claimed a repayment of a further £1,488,006.74 in relation to period 01/06.

(3) On 6 March 2006, Our Communications submitted its VAT return for period 02/06 which was received by HMRC on 8 March 2006.

(4) On 22 March 2006, Our Communications submitted further information to HMRC about certain outputs which had not been included in the 01/06 return or the claim of 3 March. Invoices for those supplies had been issued on 31 January but the supplies had not in fact taken place and credit notes cancelling them had been issued on 7 February 2006. The VAT amounts on these credit notes totalled £950,250.

(5) On 19 April 2006, Our Communications submitted its return for period 03/06 which was received by HMRC on 20 April 2006. The return showed a repayment of £1,278,004.22 due from HMRC to Our Communications.

(6) HMRC subjected the three returns for periods 01/06, 02/06 and 03/06 to extended verification, and refused to repay the amounts of input tax to Our Communications. HMRC noted that part of the claim made by Our

Communications in its letter of 3 March 2006 related to the period 02/06, not 01/06 as had originally been claimed by Our Communications, and the adjustments to the returns took account of that.

(7) In two decisions dated 28 July 2006 and 7 September 2006, HMRC disallowed a large part of Our Communications's input tax for the period 01/06. In a decision dated 3 October 2006, replaced by a decision dated 5 January 2007, HMRC disallowed a large part of Our Communications's input tax for the periods 02/06 and 03/06.

(8) Our Communications appealed against the decisions to refuse the input tax claims. The appeals were heard together in late 2007 and January 2008. In a decision released on 19 December 2008 (*Our Communications Ltd v Revenue & Customs* [2008] UKVAT V20903 (19 December 2008)), the VAT and Duties Tribunal allowed Our Communications's appeals.

(9) As a result of the decision of the VAT and Duties Tribunal, the amounts which were in fact due to the Appellant were as follows:

Period	Output tax	Input tax	VAT credit
Period 01/06	2,821,501.26	5,071,739.75	(2,250,238.49)
Period 02/06	1,499,006.25	7,749,657.67	(6,250,651.42)
Period 03/06	7,550,007.54	8,828,011.76	(1,278,004.22)

(10) The total amount of VAT credits due was £9,778,894.13.

(11) By letter dated 17 February 2009, Our Communications claimed repayment supplement in respect of the total amount of input tax which HMRC had incorrectly withheld (i.e. £9,699,240.25).

(12) On 4 March 2009 HMRC paid Our Communications the input tax that it had been denied for periods 01/06, 02/06 and 03/06 which totalled £9,699,240.25. The repayment was made after a period of more than 30 days had elapsed, leaving out of account the period of HMRC's reasonable enquiries.

(13) In a letter dated 31 March 2009, HMRC stated that Our Communications was entitled to repayment supplement in relation to the claims made on its VAT returns for periods 01/06, 02/06 and 03/06 but not in relation to the voluntary disclosure or additional claims amounting to £1,488,006.74 it made by letter of 3 March 2006. HMRC considered that the repayment supplement due was as follows:

Period	Amount of claim as per return	Repayment Supplement (at 5%)
01/06	£1,712,481.75	£85,624.08
02/06	£5,300,401.42	£265,020.07
03/06	£1,278,004.22	£63,900.21
Totals	£8,290,887.39	£414,544.36

(14) HMRC paid £414,544.36 to Our Communications on 2 April 2009 in respect of the claims included in the VAT returns for the three periods 01/06, 02/06 and 03/06.

(15) On 16 September 2011, Our Communications wrote to HMRC to seek further repayment supplement in respect of the periods 01/06 and 02/06, in respect of the sum of £1,488,006.74.

(16) On 17 October 2011, HMRC decided that no further repayment supplement was due to Our Communications. HMRC's stated reason was "that the voluntary disclosure amounts of £537,756.74 and £950,250 are not eligible for repayment supplement".

Legislation

4. Section 79 of the VATA relevantly provides:

"Repayment supplement in respect of certain delayed payments or refunds

(1) In any case where-

(a) a person is entitled to a VAT credit ...

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 ... is not issued by the Commissioners within the relevant period, and

(c) that the amount shown on that return ... as due by way of payment ... does not exceed the payment ... which was in fact due by more than 5 per cent of that payment ... 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.
- (5) Except for the purpose of determining the amount of the supplement-
- (a) a supplement paid to any person under subsection (1)(a) above shall be treated as an amount due to him by way of credit under section 25(3) ...

(6) In this section “requisite return or claim” means-

(a) in relation to a payment, the return for the prescribed accounting period concerned which is required to be furnished in accordance with regulations under this Act ... "

5. The term "VAT credit" in section 79(1)(a) of the VATA is defined in section 25(2) and (3) which provides as follows:

"(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a “VAT credit”."

6. Section 25(6) of the VATA states that a deduction under subsection (2) and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations. The relevant regulation is Regulation 29(1) of the VAT Regulations, which at all material times read as follows:

“(1) Subject to paragraph (1A) and (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.”

7. Regulations 198 and 199 of the VAT Regulations contain detailed rules for computing the period under section 79(3). The regulations provide:

“198 Computation of period

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,

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

(c) in any case to which section 79(1)(a) of the Act applies, the following matters, namely

- (i) any such continuing failure to submit returns as is referred to in section 25(5) of the Act,
- (ii) compliance with any such condition as is referred to in paragraph 4(1) of Schedule 11 to the Act.

199 Duration of period

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;
- (b) in the case of the period mentioned in regulation 198(b), it shall be taken to have begun on the date when the error or omission first came to the notice of the Commissioners and it shall be taken to have ended on the date when the error or omission was corrected by them;
- (c) in the case of the period mentioned in regulation 198(c)(i), it shall be determined in accordance with a certificate of the Commissioners under paragraph 14(1)(b) of Schedule 11 to the Act;
- (d) in the case of the period mentioned in regulation 198(c)(ii), it shall be taken to have begun on the date of the service of the written notice of the Commissioners which required the production of documents or the giving of security, and it shall be taken to have ended on the date when they received the required documents or the required security.”

Summary of submissions

8. Mr Conrad McDonnell, who appeared for Our Communications, submitted that, on the language of section 79, HMRC have no lawful basis for refusing the repayment supplement. Section 79(1)(a) of the VATA is not limited to the VAT credit shown in a taxable person’s VAT return as originally filed but refers to the actual VAT credit due to the taxable person. Mr McDonnell further submitted that Our Communications satisfied all the conditions in section 79(2)(a), (b) and (c). Our Communications was entitled to repayment supplement on the full VAT credits in each of the two periods 01/06 and 02/06 and the fact that part of the credits was not included in the VAT returns but arose subsequently was irrelevant. HMRC should now pay Our Communications a further £74,400.34.

9. Mr McDonnell also advanced an alternative argument that, even if it was not entitled to repayment supplement on the VAT credit that arose on its additional claim for period 01/06, Our Communications was entitled to repayment supplement on an additional £923,651.42 VAT credit due for period 02/06. This VAT credit arose as a

result of HMRC making an adjustment to Our Communications's VAT return for the period and not as a result of any further claim by Our Communications.

10. Mr Michael Jones, who appeared on behalf of HMRC, submitted that, when read in the light of its context and purpose, section 79(1)(a) of the VATA applies only to claims for VAT credits properly made on returns furnished on time for the relevant periods. Mr Jones contended that the general rule is that VAT credits must be claimed on a return for the period in question. Although HMRC have a discretion to accept late claims (and generally do), such claims are outside the machinery of section 79 and cannot benefit from repayment supplement. The VAT credit in section 79(1)(a) is the amount shown as payable (subject to the tolerance permitted by section 79(2)(c)) on the "requisite return" referred to in section 79(6).

11. In relation to the alternative argument put forward on behalf of Our Communications, Mr Jones submitted that it was not clear whether the £923,651.42 was part of the £5,327,000 claimed on the return and in respect of which repayment supplement had already been paid or was part of the later adjustment of £950,250 in which case the position was the same as the other amounts claimed otherwise than in a return.

Discussion

12. We were told that no previous Tribunal has had to consider the point that arises in this appeal. We were referred to the decision of the VAT and Duties Tribunal in *Olympia Technology Limited (No.2) v HMRC* (2006) VATTD 19647. In that case, HMRC paid approximately 25% of a VAT credit late, having paid the balance within the relevant period. The appellant sought repayment supplement on the whole of the VAT credit not just the part that was paid late. The Tribunal dismissed the appeal. In analysing section 79 of the VATA, the Tribunal held at [14]:

“... the context of the term VAT credit in section 79(1)(a) does not admit of its being construed as a collection of different VAT credits, and consequently of different "amounts", wherever that word is found in section 79. In summary, there is one VAT credit arising for each claim for each prescribed accounting period the amount of which falls to be increased by the 5% repayment supplement, always given that the conditions in section 79(2) are satisfied.”

The Tribunal in *Olympia Technology* was not considering the issue that arises before us and we do not read the phrase "there is one VAT credit arising for each claim for each prescribed accounting period" as indicating that there can only be one claim for VAT credit in each accounting period ie the VAT return. In our view, the Tribunal was pointing out that a VAT credit is the excess for that period. It may change as errors and omissions are found and corrected as envisaged by section 79(3)(b)

13. Section 79(1) provides that where a person is entitled to a VAT credit and the conditions in section 79(2) are satisfied then the amount of the VAT credit is increased by the repayment supplement. VAT credit is defined in section 25(3) as the

amount by which input tax deductible by a taxable person in an accounting period exceeds output tax due, if any, from that person for the period.

14. HMRC accepted that Our Communications was entitled to the VAT credits in the relevant periods, including the amounts claimed after the returns for those periods had been furnished. Further, HMRC accepted that, on a literal reading, the conditions in section 79(2) had been satisfied in that:

- (1) the VAT returns were received by HMRC on or before the due dates;
- (2) HMRC did not issue any written instruction directing the payment of the VAT credit within the relevant period; and
- (3) the amounts shown on the returns did not exceed the VAT credit by more than 5% of the amount actually due.

15. Mr Jones submitted that section 79 must be read as only applying to claims for VAT credits which are made in returns submitted on time. He contended that this limitation is implicit in section 79 when read in its proper context. Section 79(2)(b) requires a written instruction directing the payment of the VAT credit to be issued by HMRC within the relevant period. The relevant period is 30 days from the later of the day after the end of the accounting period to which the return or claim relates and the date of receipt of the return or claim. Mr Jones submitted that "return or claim" in section 79 is the "requisite return or claim" mentioned in section 79(2)(a). The requisite return is defined in section 79(6) as the return "for the prescribed accounting period concerned" ie the one in which the VAT credit arose. Mr Jones contended that section 79(6) exhaustively defines "requisite return or claim" so as to exclude claims for a VAT credit made otherwise than in a return for the prescribed accounting period concerned. HMRC's interpretation is that there is a necessary link between the return for the accounting period in which the VAT credit arose and section 79. Where that link is broken, eg by a claim made after the return has been furnished, section 79 cannot only apply.

16. Mr Jones also submitted that Our Communications's interpretation would lead to anomalous situations. He gave the example of a person who, having furnished a return on time, submitted a claim for a VAT credit or increased VAT credit after the 30 day relevant period had expired. If section 79 were to apply then the person would automatically become entitled to a repayment supplement in respect of the late claim because the relevant period would have already expired before HMRC could issue a written instruction for the payment of the VAT credit.

17. We do not accept HMRC's interpretation of section 79. We consider that the wording of the section is clear and it is neither necessary nor correct to restrict that section to VAT credits claimed in a return. Section 79(1) does not refer to any return. VAT credit is defined in section 25(2) and (3) of the VATA by reference to accounting periods not returns. Section 25(6) and regulation 29(1) of the VAT Regulations provide that a claim for a VAT credit must be made in a return for the period save as HMRC allow or direct either generally or specifically. In our view these provisions show that VAT credits may be claimed other than in returns. In fact, HMRC have directed generally that input tax may be claimed late and other than in a

return (see paragraph 10.5 of Notice 700 May 2012 and the previous edition) provided that the taxable person uses the appropriate method prescribed in Notice 700/45 (July 2011). It was not suggested that Our Communications had failed to use the proper method to make its claims. In conclusion, we consider that section 79(1)(a) applies to claims for payment of VAT credits made other than in returns. Our Communications satisfied the conditions in section 79(2)(a) and is entitled to repayment supplement on the whole of VAT credit claimed for periods 01/06 and 02/06.

18. We do not accept that interpreting section 79 of the VATA to apply to claims for VAT credits made other than in returns leads to anomalies. The defined term "requisite return or claim", which refers to a return claiming a VAT credit and the claim for refund under section 33, 33A or 33B, is not used in section 79(2A) or (3)(c). We consider that the omission of "requisite" in section 79(2A) was deliberate. In our view, "claim" in "return or claim" in section 79(2A) has the same meaning as in section 25(6) and regulation 29(1) of the VAT Regulations ie such claim as HMRC allow or direct. Interpreting section 79(2A) in that way means that the relevant period would not start until the claim for a VAT credit is received by HMRC and, further, could be extended by the matters in section 79(3)(c). This appears to be what is contemplated in regulations 198 and 199 of the VAT regulations. On that interpretation, no anomalies would arise from section 79 applying to claims made other than in returns eg by voluntary disclosure.

19. We note that repayment supplement has been described as a "spur to efficiency" (see *Rowland & Co (Retail) Limited v CCE* [1992] STC 647 at 655). If HMRC's interpretation of section 79 of the VATA were correct then the spur to efficiency would be limited to VAT credits claimed in VAT returns. Mr Jones accepted that, on HMRC's interpretation, where a taxable person discovers after a return had been furnished that, through no fault of HMRC, he should have claimed a VAT credit (or a larger VAT credit) and makes a late claim, there is no sanction against HMRC for undue delay in processing that claim. It seems strange to us that the government should, as a matter of policy, encourage the efficient payment of a VAT credit claimed in a return but not one claimed as allowed or directed by HMRC but otherwise than in a return. In our view, the efficient processing and payment of claims for VAT credits is as desirable in the case of claims made in returns as it is in the case of late claims. We do not base our decision on this view but it reinforces our conclusion that section 79(2A) or (3)(c) apply to returns and claims other than the "requisite return or claim".

20. In view of our decision that Our Communications was entitled to repayment supplement on all of the VAT credit claimed for periods 01/06 and 02/06, it is not necessary to consider whether Our Communications is, in any event, entitled to repayment supplement in relation to the VAT credit of £923,651.42 for period 02/06. In case we are wrong, however, we deal with the point briefly below.

21. Mr McDonnell submits that the VAT credit of £923,651.42 arose as a result of HMRC's instruction to account for an overstatement of output tax in period 01/06 by a reduction in output tax in period 02/06 when the credit notes were issued. He contends that the VAT credit was based on HMRC's instruction so must be a claim

made as specifically directed by HMRC. Mr Jones responds by pointing out that repayment supplement has already paid on whole of the amount shown on the return for period 02/06 and if £923,651.42 was not included in the return then the repayment supplement is not payable for same reasons as in HMRC's primary argument.

22. We accept HMRC's submissions on this point. If our decision that section 79 applies to claims other than claims made on a return is wrong then repayment supplement is not payable on the VAT credit of £923,651.42 because it was not claimed in a return. Section 79 does not distinguish between amounts of VAT credit that arise as a result of a claim by a taxable person and amounts that arise from directions by HMRC. On HMRC's interpretation, the only claims for VAT credit that can benefit from repayment supplement are claims made on a return for the period furnished on time.

Decision

23. For the reasons given above, our decision is that section 79 of the VATA applies to all payments of VAT credits whether they are claimed in a VAT return or otherwise after the return has been submitted. It follows that Our Communications is entitled to repayment supplement on the full amount of its VAT credit for periods 01/06 and 02/06. The appeal is allowed.

Rights of appeal

24. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 26 September 2012