



TC02287

Appeal number: MAN/2008/00393, MAN/2008/00593, MAN/2008/00772

VAT – interest – Appellant winning appeal against refusal of HMRC to repay input VAT after 31 March 2009 – HMRC paying repayment supplement under section 79 VATA 94 – whether interest also payable – section 85A VATA 94 applied – whether section 84(8) VATA 94 could continue to apply to this appeal – held no – application for direction under para 7 of Schedule 3 to SI 2009/56 dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE HIRA COMPANY LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public in Manchester on 27 September 2012

Nigel Gibbon, instructed by Raffles & Co Limited, for the Appellant

Jennifer Newstead of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns the obligation of HMRC to pay interest, in addition to
5 a repayment supplement, in respect of its late payment of a VAT repayment claim.

2. The Appellant, which among other things dealt in mobile phones, claimed
repayments of input VAT in respect of purchases of mobile phones made in 2006.
HMRC refused the claims, considering the Appellant to be an MTIC trader and not
entitled to make such claims under the *Kittel* principle. The Appellant appealed to the
10 VAT and Duties Tribunal in 2008 against such refusals.

3. The Appellant eventually won its appeals against HMRC's refusal. The
decision of this Tribunal to that effect was issued on 6 June 2011.

4. In the meantime, the VAT and Duties Tribunal had been abolished and
replaced by this Tribunal with effect from 1 April 2009, and from the same date an
15 amendment had been made to the Value Added Tax Act 1994 ("VATA 94"), the
effect of which was to abolish a right to interest in such cases if HMRC are obliged to
make a repayment supplement under section 79 VATA 94.

5. The Appellant applied to the Tribunal by two notices of application dated 25
July 2011 and 6 September 2011 for directions in relation to costs, repayment
20 supplement and interest. The costs and repayment supplement issues have been
resolved by agreement between the parties. All that remains outstanding from the two
notices of application is the matter of interest.

6. HMRC accepted that they were required to pay a repayment supplement, and
duly did so on 27 September 2011. The Appellant has not disputed that the
25 supplement was due under section 79 VATA 94.

7. The parties are agreed that if the Tribunal's decision had been issued before 1
April 2009, HMRC would also have been obliged to pay interest under section 84(8)
VATA 94.

8. HMRC maintain however that because of the repeal of section 84(8) VATA
30 94 by Article 3 of and paragraph 221 of Schedule 1 to the Transfer of Tribunal
Functions and Revenue and Customs Appeal Order 2009 (SI 2009/56) ("the Transfer
Order"), any potential obligation to pay interest fell away when 1 April 2009 arrived
before the issue of the Tribunal's decision in these appeals.

9. The Appellant maintains that by virtue of paragraph 7(3) of Schedule 3 to the
35 Transfer Order, the Tribunal is empowered to direct that interest should be payable
under section 84(8) VATA 94, and in the interests of fairness and justice it should do
so in this case. HMRC argued that no such power arises under paragraph 7(3).

10. It is common ground between the parties that the only basis upon which
interest may be payable by HMRC is pursuant to section 84(8) VATA 94. Other

arguments were originally put forward by the Appellant but all were withdrawn either before or at the hearing of its application.

11. The parties requested that the Tribunal only issue a decision in principle at this stage on the question of whether the Appellant has an entitlement to interest under section 84(4). They were confident that if interest is found to be due, there would be no difficulty in agreeing the amount.

The facts

12. The facts are brief and uncontested, and are summarised sufficiently in the introduction above.

The legislation

13. Section 84(8) VATA 94, before it was "omitted" from section 84 by virtue of Article 3 of and paragraph 221(1) and (10) of Schedule 1 to the Transfer Order, provided (so far as relevant to this application) as follows:

"(8) Where on an appeal it is found—

15

(b) that the whole or part of any VAT credit due to the appellant has not been paid,

so much of that amount as is found not to have been paid shall be paid with interest at such rate as the tribunal may determine..."

14. The omission of section 84(8) VATA 94 with effect from the "commencement date" (1 April 2009) was made subject to transitional provisions, contained in paragraph 9 of Schedule 3 to the Transfer Order (introduced by Article 6 of that Order), which provided (so far as relevant to this application) as follows:

"9.—

(1) This paragraph applies in relation to any decision of a VAT and duties tribunal made before the commencement date.

(2) On and after that date, the following provisions continue to apply as they applied immediately before that date—

(a) section 84(8) of the Value Added Tax Act 1994"

15. If the matter ended there, it would be agreed that the Appellant's application is misconceived (on the basis that the decision of the Tribunal on its appeals was issued on 6 June 2011, well after the 1 April 2009 "commencement date"). However, the Transfer Order contains further transitional provisions. In particular, under paragraph 7 of Schedule 3 to the Transfer Order (introduced by Article 6 of that Order), it was provided (so far as relevant) as follows:

"7.—

(1) This paragraph applies to current proceedings that are continued before the tribunal by virtue of paragraph 6.

(2)

5 (3) The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may—

(a) apply any provision in procedural rules which applied to the proceedings before the commencement date; or

(b) disapply any provision of Tribunal Procedure Rules.

10 (4) In sub-paragraph (3) "procedural rules" means any provision (whether called rules or not) regulating practice or procedure before an existing tribunal."

16. It is common ground that these appeals fall within paragraph 7. What is disputed is the extent of the Tribunal's powers under that paragraph.

15 17. The entitlement to interest under section 84(8) VATA 94 has been replaced, from 1 April 2009, by section 85A VATA 94, which provides (so far as relevant) as follows:

"85A— Payment of tax on determination of appeal

20 (1) This section applies where the tribunal has determined an appeal under section 83.

(2) Where on the appeal the tribunal has determined that—

(a) the whole or part of any disputed amount paid or deposited is not due, or

25 (b) the whole or part of any VAT credit due to the appellant has not been paid,

so much of that amount, or of that credit, as the tribunal determines not to be due or not to have been paid shall be paid or repaid with interest at the rate applicable under Section 197 of the Finance Act 1996.

.....

30 (5) Nothing in this section requires HMRC to pay interest—

(a) on any amount which falls to be increased by a supplement under section 79 (repayment supplement in respect of certain delayed payments or refunds); or

(b) where an amount is increased under that section, on so much of the increased amount as represents the supplement."

Arguments

Arguments for the Appellant

5 18. Mr Gibbon argued that under paragraph 7 of Schedule 3 to the Transfer Order, the Tribunal has the power to make a direction that section 84(8) VATA 94 should continue to apply to these appeals, notwithstanding the express "omission" of it under paragraph 221(1) and (10) of Schedule 1 to the Transfer Order. (The appeals were, of course, decided after the commencement date of 1 April 2009).

10 19. The basis for this argument was that in all the circumstances of the case, it would be "fair and just" for the entitlement to interest to continue in relation to these appeals. This was essentially because the appeals had arisen and been brought under the "old rules" at a time when the Appellant, if successful, would have been entitled to interest; and the facts giving rise to the appeals had occurred in 2006, some three
15 years before the commencement date for the changes – and much of the delay in the intervening period had been because of HMRC's delay in issuing appealable decisions. The Appellant had a legitimate expectation that the rules in relation to interest applying to its appeals would not be adversely changed after its right of action had arisen or after it had commenced its appeals and whilst Mr Gibbon did not claim
20 that this legitimate expectation itself provided a legal basis for the claim, it should weigh heavily when determining what was "fair and just".

20. He argued that the entitlement to interest had been contained in "procedural rules" within the meaning of paragraph 7, because there was nothing to suggest that a statute could not include "procedural rules"; he submitted that section 84 VATA 94
25 contained various provisions which might be regarded as "procedural" – in particular, the obligation to pay a disputed assessment (or show hardship) before an appeal could be entertained. He submitted that the right to interest in section 84(8) was one such provision and therefore fell clearly within the terms of paragraph 7.

21. Mr Gibbon confirmed he was not arguing that any general right to interest
30 arose under EU law, his argument was based solely on his interpretation of the transitional provisions as giving rise to a power for the Tribunal to direct interest, and his submission that it would be fair and just in this situation to make such a direction.

Arguments for HMRC

22. On the pivotal issue, Mrs Newstead argued that section 84(8) VATA 94 could
35 not come within the definition of "procedural rules" for the purposes of paragraph 7 of Schedule 3 to the Transfer Order. It was a substantive provision conferring an entitlement to interest. The intention of Parliament was quite clear. It had fixed the cut-off point for entitlement to interest at 1 April 2009 for appeals decided by that date, and this appeal clearly missed that cut-off point.

23. Arguments as to what was "fair" or "just" were irrelevant, as no power arose for the Tribunal to make any direction. The rules, as fixed by Parliament, were clear and the transitional procedural provisions could not be used to drive a coach and horses through them.

5 **Decision**

24. I agree with Mrs Newstead's arguments. I consider that entitlement to interest is a matter of substantive law, not a matter of procedure. I consider therefore that no power arises under paragraph 7 for this Tribunal to direct the payment of interest, paragraph 7 being concerned with matters of procedure and not substantive law.
10 Parliament has made it clear that the "old rules" in relation to interest do not apply in relation to any appeal decided after 31 March 2009 and accordingly the Appellant's entitlement to repayment supplement under section 79 VATA 94 (which is not disputed) removes any entitlement to interest under the new interest provisions in section 85A VATA 94.

15 25. The Appellant's application is therefore dismissed.

26. These are proceedings to which the "old rules" on costs apply and, having heard the submissions of the parties on the question of costs, I direct that:

(1) HMRC must pay the Appellant its wasted costs incurred by reason of HMRC's failure to attend the hearing earlier fixed for this application, but

20 (2) subject thereto, the Appellant must pay to HMRC their costs incurred in connection with this application.

27. The parties are at liberty to apply for further directions to resolve any points that cannot be agreed between them following the issue of this decision in principle.

28. This document contains full findings of fact and reasons for the decision. Any
25 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)"
30 which accompanies and forms part of this decision notice.

35 **KEVIN POOLE**
TRIBUNAL JUDGE

RELEASE DATE: 1 October 2012