



**TC02616**

**Appeal number: TC/2011/04137**

*VAT - overpayment of output tax charged by Appellant to business customer registered for VAT; reimbursement arrangements with HMRC; whether arrangement a binding contract; whether reimbursement arrangements ultra vires; Appellant crediting customer with reimbursement to reduce customer's indebtedness to Appellant; whether reimbursement made "in cash or by cheque"; assessment to recover repaid VAT on grounds of unjust enrichment; whether Appellant unjustly enriched; whether Appellant incurred loss or damage through mistaken assumptions made in his case about the operation of VAT provisions; VAT 1994 s80(1)(3), 80(4A), 80B, 80(3B); VAT Regulations 1995, regulations 43B, 43C, 43G; whether Tribunal has jurisdiction to consider public law remedy; appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SYSTEMS ALUMINIUM LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE J GORDON REID QC, FCI Arb  
Dr HEIDI POON CA, CTA, PhD**

**Sitting in public at George House, Edinburgh on 10 and 11 October 2012**

**Mr J Pentland for the Appellant (Pinsent Masons LLP until 2 October 2012)**

**Sean Smith QC, instructed by the Office of the Advocate General for Scotland for the Respondents**

## DECISION

### Procedure since 10 January 2013

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1. We refer to the *decision* issued on 10 January 2013. Following the direction contained in paragraph 67, the Appellant, by letter dated 7 February 2013, applied to amend its grounds of appeal. Essentially, the proposed amendment sought to argue that the Appellant was no longer unjustly enriched due to its detrimental change of position in relying on the Arrangement described at paragraphs 19-25 of the *decision*. The Appellant relied on (i) the loss of its ability to call a creditors' meeting of FMC, (ii) the loss of its ability to recover further monies from the Administrators of FMC to put further pressure on them to consider pursuing the directors of FMC for wrongful trading, (iii) the Appellant's decision to stop pursuing the Administrators, (iv) the requirement to undertake the proceedings before the Tax Tribunals and the related significant time and expense of doing so. The amended grounds stressed its position of financial hardship and referred to the written statement of Mr Pentland.

### Subsequent Events and Correspondence

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2. However, on 24 January 2013, the Sheriff at Airdrie, nominated and appointed two insolvency practitioners from Pricewaterhouse Coopers LLP to be the provisional liquidators of the Appellant. They intimated their appointment to HMRC's solicitor by letter dated 13 February 2013. By email to the Tribunal dated 18 February 2013, HMRC, in effect, challenged the validity of the attempt (apparently by the former directors of the Appellant) to amend the Grounds of Appeal, under reference to Part II of Schedule 4 to the Insolvency Act 1986, which gives to the provisional liquidators power to bring or defend any action or other legal proceeding in the name and on behalf of the Appellant.

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3. Accordingly, on 25 February 2013, the Tribunal issued Directions (intimated to the provisional liquidator and to HMRC's solicitor). These Directions were in the following terms:-

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1 The joint Provisional Liquidators are requested to inform the Tribunal and the Respondents within 14 days of the release of these Directions whether they wish to maintain the Appeal in the name of and on behalf of the Appellant.

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2 If they do so, the joint Provisional Liquidators are requested within the same period to inform the Tribunal and the Respondents whether they adopt the terms of the Application dated 7 February 2013, a copy of which is appended hereto.

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3 If they do not so adopt the terms of the Application dated 7 February 2013, or do so or otherwise wish to add to or modify its terms, they are requested to do so and to inform the Tribunal accordingly, and

lodge with the Tribunal and intimate to the Respondents any such additions or modifications all within the same period.

4 The Respondents are authorised to make such response as they consider appropriate within seven days after the expiry of the same period. Any  
5 such response shall be lodged with the Tribunal and intimated to the joint Provisional Liquidators.

4. By email to the Tribunal dated 26 February 2013, a representative of the joint provisional liquidators intimated that *Mr Pentland sought and was given permission from PwC (the joint Provisional Liquidators) prior to 7 February 2013 to make the  
10 application on behalf of Systems Aluminium Limited. We therefore respectfully request that this application remains in place and is considered by the Tribunal accordingly.*

5. On 27 February 2013, HMRC submitted to the Tribunal a formal response to the email dated 26 February 2013. They argue, for various reasons, that there is no  
15 adequate basis on which the Tribunal may proceed to receive the Grounds of Appeal contained in the Application dated 7 February 2013. In the first place, they say that the *permission* granted does not make Mr Pentland the agent of the provisional liquidators. The entitlement to pursue these proceedings lies in the provisional  
20 liquidators which they cannot exercise by granting such permission. In the second place, such an appointment is impermissible having regard to paragraph 12 of Schedule 4 to the 1986 Act (power to appoint agent to do any business which the liquidator is unable to do himself). In the third place, HMRC argue that Mr Pentland cannot be appointed as agent in such a way as to exercise functions which the  
25 provisional liquidators do not themselves supervise. Reference was made to *The Scottish Granite Co* 1866 17 LT 533. HMRC also maintain objections to the substance of the Application.

6. The provisional liquidators have not addressed themselves to the terms of the  
30 Directions dated 25 February 2013. They have not responded to HMRC's formal response which was intimated to them on 7 March 2013 by the Tribunal.

#### **Amendment of Grounds of Appeal**

7. Even assuming that the provisional liquidators are adopting the terms of the  
35 Application dated 7 February 2013, and that the technical objections to it are thereby cured, the Application must be refused. The Application raises no new material beyond what has already been advanced and considered in relation to the Appellant's detrimental reliance case. The facts, as we have found them to be and our findings in  
40 our *decision* dated 10 January 2013, are such that the argument based on detrimental change of position, is bound to fail. We refer, in particular to paragraphs 18, 26, 27, 28, 55, 58-61. No purpose would be served by allowing the Grounds of Appeal to be amended as proposed. The Application dated 7 February 2013 to amend the Grounds of Appeal, on the assumption that it is valid, is refused.

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## **Disposal**

8. This Decision should be read together with our findings contained in our *decision* dated 10 January 2013. Together, they now deal with all aspects of the appeal before us, which is dismissed. The usual rights of appeal are now triggered by the release of this Decision, should the provisional liquidators wish to exercise such rights in the name and on behalf of Systems Aluminium Limited.

9. This document, read with the Tribunal's *decision* dated 10 January 2013, 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.

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**J GORDON REID QC, FCI Arb  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 March 2013**