



TC03546

Appeal number: TC/2012/00977

*VALUE ADDED TAX – claim for bad debt relief – s36 VATA 1994 and
Regs 165A and 166 VAT Regulations 1995 – whether claim made within
time specified – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**INFINITY HOLDINGS LIMITED
(in administration)**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MRS SONIA GABLE**

Sitting in public at 45 Bedford Square, London WC1 on 13 and 14 March 2014

Ian Bridge, Counsel, instructed by Morgan Rose, Solicitors, for the Appellant

**Lucy Wilson Barnes, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. The Appellant (“Infinity”) appeals against the decision of the Respondents (“HMRC”) made on review on 24 November 2011 upholding an earlier decision made on 16 September 2011 that Infinity was not entitled to bad debt relief in the sum of £4,063,141.29 under section 36 Value Added Tax Act 1994 (“VATA”) and Regulation 165A Value Added Tax Regulations 1995 (“the Regulations”) in respect
10 of supplies made by Infinity in October 2005 and between January and June 2006. The reason for the decision was, in summary, that no claim was made to HMRC within the time required as specified in Regulation 165A of the Regulations.

2. HMRC’s position is that the claim for bad debt relief was not made within the time required because no claim was made until June 2011, which except in respect of
15 one small debt, was outside the time limit prescribed by Regulation 165A. Although a letter of 17 June 2011 sent by Infinity’s solicitors referred to a claim for bad debt relief having been made by a letter dated 1 July 2009, HMRC have no record of such letter (or the subsequent letters referred to which are said to have been sent chasing the claim) being received and it is on this basis that they say the claim was not made
20 within the time required. They also contend that a claim needs to have been received before it can be said to have been made.

3. Infinity contends that the earlier letters were sent on the dates they bore and it is possible that they were received by HMRC but not allocated to the relevant file or alternatively not delivered by Royal Mail although posted. In any event, Infinity
25 contends that posting of the claim is sufficient to constitute the making of the claim.

4. The appeal therefore concerns whether a claim for bad debt relief was made before June 2011. It is in essence a preliminary point because if the appeal succeeds then the claim would need to be considered on its merits, which we understand has not yet happened.

30 The evidence

5. We had a witness statement from Mr Simon Thakor (“Mr Thakor”) the Chief Executive of Infinity. We heard oral evidence from Mr Thakor and he was cross-examined. We found that much of Mr Thakor’s evidence was vague and lacked credibility and reliability in a number of respects and therefore have approached it
35 with caution, being reluctant to accept it in a number of instances without corroboration.

6. We also heard evidence from Mr Surjinder Cheema (“Mr Cheema”) the General Manager of the Infinity Group, in which position he is responsible, among other things, for supervising the Group’s administrative office. Mr Cheema gave evidence
40 on issues relating to the creation and posting of the letters in dispute and was cross-examined. We found Mr Cheema’s evidence to be credible, although as we find later,

of limited assistance on the issues in dispute. We also heard from Mr David Hodgson, another witness from Infinity, who is an IT Manager, who was also cross-examined on his witness statement relating to the IT records of the letters in dispute.

5 7. There was also a witness statement from Ms Imogen Davidson, Infinity's administrator. The purpose of Ms Davidson's statement was to introduce various documents which are of relevance to the matters in dispute, in particular the Administrator's report and statement of proposals dated 29 September 2010 and extracts from notes of meetings which took place with Mr Thakor in July and September 2010 prepared by Ms Davidson's predecessor as administrator. Due to
10 family commitments Ms Davidson was unavailable to give oral evidence and be cross-examined. In the circumstances, there being no issue about the genuineness of the documents Ms Davidson exhibited, we admitted the documents as evidence, and also Ms Davidson's statement, but on the basis that we would be cautious in giving any weight to the statement itself on the basis that she was not available to be cross-
15 examined on it.

8. The final witness for Infinity was Mr Neil Wileman, a computer forensic analyst, whose reports of 19 July and 29 August 2013 on his examination of a floppy disc said to contain documents including the letters in dispute were admitted. Mr Wileman gave oral evidence by telephone and was cross-examined. We found Mr
20 Wileman to be a knowledgeable witness and his report and oral evidence were credible.

9. Three officers gave evidence for HMRC, Ms Rita Coelho who gave evidence on the arrangements for receiving post in HMRC's Leicester Office, Ms Jayne Holden, who made the initial decision to refuse Infinity's claim, and Mr George Edwards who
25 made the review decision which is the subject of the appeal. Save for one aspect of Ms Coelho's evidence regarding the possibility of correspondence received by HMRC going missing, we found the evidence of all these officers to be credible and reliable.

10. We also received copies of other documents and correspondence which we have reviewed in the course of making our findings of fact.

30 **Findings of Fact**

11. From the evidence that we heard and the documents we received we make the following findings of fact.

12. On 7 May 2009 Infinity received advice from its accountants that it was
35 appropriate for Infinity to apply for bad debt relief in respect of a number of customers who had not paid Infinity. This advice was prompted, it appears, from HMRC in January 2008 querying whether certain invoices in respect of which input tax had been claimed had in fact been paid and informing Infinity that the entitlement to claim input tax is forgone under "Bad Debt Relief regulation" if payment had not been made within six months of supply, or if later, the due date for payment.

13. As a precursor to making a claim for bad debt relief, Mr Thakor's evidence was that a number of letters all dated 15 May 2009 were sent to Infinity's debtors notifying them that the debt in question remained unpaid and asking for immediate payment. We were given copies of these letters. Reminders appeared to be sent on
5 16 June 2009, with the same text as the earlier letter but with the heading "2nd draft". None of the witnesses were able to explain that heading; it might have been intended to indicate that this was the second request for payment.

14. We were shown copies of envelopes addressed to the number of the addressees of these letters bearing post marks of 16 June 2009 which had been returned by Royal
10 Mail as undeliverable bearing legends such as "Gone Away" or "no longer at this address". Each of these envelopes show stickers which indicate that they were sent by special delivery which would have of course required a signature by the recipient. We were shown only one substantive response; a copy of a letter from H C Systems Limited indicating that it could not pay the money it owed Infinity.

15 15. It would appear that the documents from which these letters were created were to be found on the floppy disc that Mr Wileman examined, which we refer to in more detail later.

16. Although HMRC have expressed doubts as to whether the letters making the bad debt claim to HMRC were created on the dates alleged by Infinity they made no
20 direct challenge to the letters sent to bad debtors in May and June 2009, which henceforth we refer to as the "Bad Debtor Letters". The evidence we saw as to the envelopes from the returned letters and the reply from H C Systems leads us to conclude that these letters were created and sent on the dates shown on the copies we saw.

25 17. Mr Thakor's evidence was that following a lack of a positive response to any of the Bad Debtor Letters, Infinity proceeded with a claim for bad debt relief in respect of the unpaid debts referred to above. In his witness statement he says that on 1 July 2009, Mr Palkesh Thakor ("Mr P Thakor"), the sole director of Infinity, completed
30 form VAT 427 and sent (by special delivery) the same, together with supporting evidence, (which would have amounted to some eighty pages in total, comprising the evidence that the bad debtors had been chased for payment) to HMRC at two separate offices, one in Blackburn and one in Leicester under cover of a letter of the same date. Mr Thakor confirms, in his statement that he did not post the letter himself but it
35 "would have been posted by Special Delivery by one of the employees in the administrative office". Mr Thakor said in his statement that Mr P Thakor had confirmed to him that both letters were sent by special delivery.

18. We have seen a copy of two letters on Infinity's notepaper, both dated 1 July 2009 and signed, we were told by Mr P Thakor, claiming relief for the VAT on the bad debts concerned, this claim being made on a Form 427, a copy of which we have
40 also seen, and which specifically refers to the fact that the form can be used for this purpose where, as in this case, the Applicant's VAT registration has been cancelled. Both the letter and the form disclosed Infinity's VAT number. The Form 427 was

signed by Mr P Thakor and has been dated 1 July 2009. The guidance notes on the form indicate that the form should be sent to a specific HMRC address in Liverpool.

19. Mr Thakor's evidence was that the claim was sent to the HMRC offices in both Leicester and Blackburn as a precautionary measure, because Infinity had been
5 advised by HMRC in April 2006 that its VAT office had moved from Leicester to Blackburn, and they were not sure which of HMRC's offices were dealing with its tax matters. Mr Thakor stated that the letters were not addressed to a specific officer at HMRC as over the years it had received numerous letters from different offices, including Liverpool, Blackburn and Leicester and never really had an individual
10 contact, which is why, Mr Thakor explains, the claim was sent to HMRC's offices generally for onward sorting to the relevant department on receipt.

20. Mr Thakor's evidence in his witness statement was that by early August 2009, Infinity not having received a response to its letter of 1 July 2009 from either office to whom it had sent been sent, "I sent by special delivery reminder letters to HMRC"
15 at both offices. He said he did not personally post the letters but that he knew that since those were his instructions "the letters would have been posted by special delivery" by one of the employees in the administrative office.

21. We have seen copies of letters on Infinity's letterhead dated 10 August 2009 addressed to HMRC's offices in Leicester and Blackburn, and again not being marked
20 for the attention of any particular officer which state "I still have not had any kind of response from you so I have again enclosed my original letter and all supporting documentation supporting this claim". It appears that the letter is signed by Mr Thakor.

22. Mr Thakor's evidence in his witness statement was that no response having
25 been received to these letters, a further reminder was sent on 14 September 2009 to both offices, and he gave the same evidence as in relation to the previous letters, that is to the effect that he had not posted the letters himself, but they would have been posted by special delivery by one of the employees in the administrative office.

23. Mr Thakor's oral evidence was significantly different on the posting issue. Mr
30 Thakor was pressed in cross-examination as to why, if the letters were sent by special delivery, the tracking number would not have been kept. Mr Thakor's evidence was that these records were no longer available. We doubt, however, that if the letters were sent by special delivery, the tracking records would not have been available either through the company's own records or through Royal Mail who would certainly
35 have them available during the period when reminder letters were sent. In the absence of a reply to a letter Mr Thakor believed had been sent by special delivery, before sending a reminder letter (which Mr Thakor himself signed) it is likely that the tracking number would be sought so as to establish what had happened to the original letter. This is because the whole point of sending a special delivery letter is that the
40 question as to whether it has reached its destination can easily be established.

24. Consequently, Mr Thakor changed his evidence from the categorical statements in his witness statement that the letters would have been sent by special delivery to

suggesting that, contrary to his instructions, they might have gone (presumably in all three cases) by ordinary post by mistake.

25. We do not find that evidence plausible when looking at the circumstances of the claim. The Bad Debtor Letters had been sent by special delivery. The bad debt claim was for a sum in excess of £4million. On Mr Thakar's evidence the failure to obtain repayment of that amount was a major factor contributing to Infinity's administration. It was therefore vital to its financial position to secure it. In those circumstances, it is likely that a company in Infinity's position would do everything possible to ensure that the claim reached its correct destination. It is perhaps surprising that it was not taken to an HMRC office by hand, a course of action taken by Mr Mike Bathia, Infinity's accountant, on 30 March 2009 in relation to a protective voluntary disclosure to recover £3.8million of output tax which was made in person at the HMRC office in Leicester, the city in which Infinity was based. If the letter were not delivered by hand, the obvious course would be to deliver it by special delivery, and if mistakenly it was found that the first letter had not been sent as instructed, as Mr Thakor suggested in his oral evidence it might not have been, then extra care would be taken that any subsequent letters were so sent. Mr Thakor's revised evidence supposes that his instructions were not carried out on three successive occasions and he gives no evidence as to whether he checked at each stage whether the letters had been sent according to his instructions.

26. In our view Mr Thakor's evidence on the posting issue does not establish on the balance of probabilities (the standard of proof to be applied to this case) that the letters were posted as alleged, whether by special delivery or otherwise. At best Mr Thakor can say that he gave instructions that they should be posted by special delivery, but he cannot be sure that those instructions were carried out and, somewhat implausibly, he never checked when reminders came to be sent, that his previous instructions had been carried out. In our view that is insufficient to demonstrate that the letters were actually posted whether by special delivery or ordinary post.

27. In that regard HMRC's evidence that the letters were not received is another factor tending against a conclusion that the letters were posted. If at least some if not all the letters were sent by special delivery, which as we have found, would be the expected method of postal communication for a claim of this size, then HMRC's records would show their receipt. Ms Holden's evidence, which we accept, was that HMRC retained records of all special delivery mail so she checked the post records held at the Blackburn office. No special delivery post was received from Infinity between 29 June 2009 and 15 October 2009.

28. Ms Coelho carried out the same exercise in the Leicester office and we saw a copy of HMRC's records of receipts of special delivery mail for July, August and September 2009 which show no special delivery post received from Infinity or its associated companies in those months.

29. On the basis of this evidence and Mr Thakor's inconclusive evidence we conclude that if the letters were posted they were not posted by special delivery.

30. We therefore turn to the question as to whether they were sent by ordinary post. We do so in the light of our earlier observations that if Mr Thakor was right in his evidence that he instructed that all the letters concerned be sent by special delivery, then on three successive occasions his instructions were not carried out and he made
5 no investigations as to why that was the case, or even whether it was the case, as no check of the tracking records was made.

31. Of course we accept Mr Bridge's submission that if it were the case that the letters might have gone by ordinary post, the fact that HMRC says it has no record of receiving them does not mean they were not sent. We accept that there is scope for
10 letters being lost in the post (although again in this case that would, somewhat unlikely, have had to have happened on three successive occasions) or, more plausibly, physically received at the relevant HMRC office but not properly allocated to the relevant file or appropriate officer, particularly where the letter concerned was not marked for the attention of any particular officer. Ms Coelho gave what was in
15 our view unrealistic evidence to the effect that such events never occurred in HMRC's Leicester office but we cannot accept that. Mr Edwards gave more realistic evidence to the effect that from time to time letters would go astray or not be entered on to the taxpayer's electronic file, which is supposed to be updated each time any officer in HMRC has contact with the taxpayer on a particular issue.

32. Ms Holden gave evidence as to how post not addressed to a particular officer was dealt with in the Blackburn office, based on her experience of working next to the post room team and seeing how they operate. Her evidence which we accept, is that if
20 a piece of post has a VAT number on, the first thing that would be done would be to look on HMRC's electronic folder to see if anyone who has an interest in that case has been dealing with it. Therefore Ms Holden thought it unlikely that post not
25 specifically addressed to an officer but bearing a VAT number would not be properly allocated. She gave examples concerning Infinity itself including the letter written by Morgan Rose, Infinity's solicitors, chasing up the claim in June 2011 (to which we refer in more detail later) which found its way to Ms Holden quite promptly even
30 though it was simply addressed to the Written Enquiries Team in Southend.

33. Therefore, for the six letters concerned (three to each office) not to have found their way to the correct officer HMRC's system for allocating post to unspecified officers would have had to have failed on all six occasions which in our view would be unlikely.

34. We are also sceptical of the position that important letters of this kind would have been sent by post to unnamed officers, to two different HMRC offices as a precaution. In our view it is more likely that before an important letter of this kind were sent, if there was any doubt as to where it should be sent, enquiries would have been made as to what the appropriate destination should be. This would not have been
35 difficult to achieve by looking at the Form 427 itself which, as we have observed, contained a clear statement that it should be sent to a particular HMRC office in Liverpool. Mr Thakor had no explanation as to why the possibility of sending the letter to the place indicated on the very form that made the claim was not considered,
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even though his evidence was that Infinity had had dealings with the Liverpool office in the past.

35. It would also have been open to Infinity to have made enquiries of individual officers with whom it was actually dealing at the time, through its solicitors, The Khan Partnership, or have asked its solicitors those details, and again this would have been a likely course to take if Infinity was unsure as to the where to send the letters. The evidence shows that The Khan Partnership were in correspondence with Mr Bradshaw and Ms Trencher of HMRC on other matters in June 2009. Those officers operated out of HMRC offices in Salford and Blackburn respectively so it would have made more sense to write to those offices rather than Leicester, and if the decision was taken to write to Blackburn (which it was) it would have been logical to address the letter to an officer in that office with whom there had been recent dealings.

36. It is also surprising that when Morgan Rose came to follow up the claim in 2011 and try to establish whether any HMRC officer had picked up the claim it gave the names of nine different HMRC Officers with whom Infinity had dealt with since 2005, but it did not include those with whom it had the most recent contact before the claim was allegedly made, namely Officers Bradshaw and Trencher. Mr Thakor's explanation, which we found unconvincing, was that this was an oversight.

37. We therefore do not accept Mr Thakor's main explanation as to why the letters were sent to two HMRC offices, one of which had not been dealt with significantly for a number of years, without any named officer on the letters, namely that Infinity had dealt with numerous offices and officers over the years and never really had an individual contact at any particular office.

38. We were not assisted by any other evidence that might corroborate Mr Thakar's assertion that as he had given instructions for the letters to be posted those instructions would have been carried out.

39. Mr Cheema could recall very little about the production and posting of the six letters in question. He remembered preparing letters to HMRC and the Bad Debtors Letters, with both Mr Thakor and Mr P Thakor being involved in telling him what to put in the letters and providing him with the envelopes. His evidence with regard to the Bad Debtors Letters was that he was given the relevant customer names from Mr P Thakor and the figures from Mr Bathia. His recollection of the letters to HMRC was much less. He says he can vaguely remember preparing them but could not recall any specific instructions being given to him for posting them, or the arrangements for signing them. This is also apparent from the fact that he thought the letters would have been dispatched in a normal window envelope, which clearly could not have been the case bearing in mind the extensive documents to be included with the letters, which Mr Cheema accepted in cross-examination. We therefore derive no assistance from Mr Cheema's evidence in establishing what happened to the letters after they were prepared.

40. Events after the letters to HMRC were allegedly posted do not support the fact of posting; in our view they tend to lend support to a finding that they were not

5 posted. On Mr Thakor's evidence, he did not have an opportunity to pursue a response to HMRC after 14 September 2009, his attention being taken away from the bad debt claim because various companies in the Infinity Group were involved in a variety of different disputes, and insolvency of Infinity became more probable because of decisions by HMRC to refuse various VAT payments.

10 41. In fact the bad debt claim was not further pursued with HMRC until it appears that Morgan Rose were instructed to deal with it, in June 2011, presumably at this stage with the authority of Ms Davidson as Infinity's administrator. On 17 June 2011 Morgan Rose wrote to the HMRC Written Enquiries Team in Southend, having been told that all enquiries relating to bad debt relief should be directed to that office. The letter simply asked for confirmation as to the position in respect of the claim, having disclosed that the claim was made on 1 July 2009 to the HMRC offices in Blackburn.

15 42. As we have observed above, this letter was promptly directed to Ms Holden who replied on 6 July 2011 that they could not trace receipt of the claim. Ms Holden's letter concluded as follows:

"I have had responsibility for your client's VAT affairs since January 2010. I am surprised that in the last 18 months I have not received any correspondence from your client chasing up this claim for bad debt relief. If you have copies of any such correspondence please could you also provide copies."

20 43. We share Ms Holden's surprise. We do not find it plausible that Mr Thakor would have left the matter unresolved after September 2009, and made no attempt to chase the matter up, particularly by telephone contact with the various HMRC offices involved in the Infinity Group's ongoing VAT matters. On Mr Thakor's own evidence the failure to meet the bad debt claim was one of the reasons Infinity went into administration. In those circumstances we would have expected a flurry of activity in trying to establish what was happening to the claim in circumstances where the survival of the company depended on its successful resolution. We therefore do not accept Mr Thakor's evidence that it was simply a case of prioritising other matters.

30 44. Ms Holden wrote to Morgan Rose on 16 September 2011 refusing the claim on the basis that HMRC had not received evidence that the claim was made within the period specified in Regulation 165A(1) of the Regulations. It is common ground that if the claim was not made until Morgan Rose's letter of 17 June 2011 then, except in respect of one small debt, it was out of time.

35 45. As we have previously mentioned, Mr Edwards upheld Ms Holden's decision on review. His reasons given in his letter of 24 November 2011 were as follows:

"This decision has been reached after a thorough review of the documents provided by you, and other HMRC records.

40 From these records I am unable to identify that there is concrete evidence of the claim being received by HMRC within the time scales required. Although you have provided copies of correspondence sent to HMRC offices in July, August and September 2009,

5 there is no record of this being received at HMRC premises. I am satisfied that Officer Holden has undertaken reasonable and proportionate checks, with HMRC colleagues, in order to establish a note of any correspondence being received and has been unable to confirm any record of this. Furthermore, you have been unable to provide proof of posting or evidence that the claim was pursued anytime after September 2009 until June 2011. For these reasons I am confident that Officer Holden has acted within Regulation 165A of the VAT Regulations 1995 which detail the time within which a claim must be made ...”.

10 46. As we have observed, on 19 August 2010 Infinity entered administration. It appears that in advance of this occurring, a meeting took place with the proposed administrator on 1 July 2010 at which the situation of outstanding disputes with HMRC appears to have been discussed. We have seen the proposed administrator’s note of that meeting which makes reference to there being an outstanding claim of bad debt relief of £4million. Mr Thakor says that he cannot remember whether he was present at that meeting and whether he was the source of the information. Ms Davidson, in her witness statement says that Mr Thakor was at the meeting and provided information. In our view it is likely that Mr Thakor was at the meeting, bearing in mind its importance in the light of the proposals for administration and that he was the source of the information and we so find. There is no reference to any documents being produced to support the making of the claim, such as copies of the correspondence allegedly sent in 2009 and so we conclude none were produced at this stage.

25 47. There was a further meeting with the administrator on 7 September 2010. Mr Thakor confirmed that he was present at that meeting. The extract from the handwritten note of the meeting, prepared by Ms Davidson’s predecessor as administrator makes reference to the claim for bad debt relief. It records:

“Paperwork required. Any appeal to 1st Tier Tax tribunal – Mike to provide paperwork. VAT 427 done.”

30 48. Mr Thakor’s evidence was that he believed the paperwork, that is the letters to HMRC, the Form 427 and the supporting documentation, had at this point already been provided by Mike Bathia, Infinity’s accountant.

35 49. We reject that evidence; Mr Thakor was unable to say when the documentation had been provided. The note is consistent with a request that Mike Bathia provide the administrator with the documentation that backed up the claim, not that it had already been provided. We therefore find that the documentation had not been provided at this point. Had the letters been sent, Mr Thakor at this point is more likely to have told the administrator that a claim had been made in July 2009, but no response had been received from HMRC, despite it being chased. We therefore find that this note is further evidence tending to show that the letters had not in fact been sent.

40 50. There is one further piece of evidence relating to events after the administration to which we should refer. The then administrator prepared a report and statement of proposals to the Company’s creditors dated 29 September 2010. This report makes reference to the claim for bad debt relief; in the summary of assets it appears as an

asset with a book value of £4,066,120 and in paragraph 3.4 of the body of the report there is the following statement:

5 “The Company has three VAT Tribunal cases. The claims are for overpaid output VAT outstanding VAT refunds and VAT bad debt relief. The outcome of each claim is currently uncertain.”

10 51. The reference to the bad debt relief claim being the subject of a Tribunal case is clearly wrong but it is a further indication that no documents had at this time been produced to the administrator giving details of the claim. Had this happened it is unlikely that the error of what appears to be rolling up the bad debt relief claim with Infinity’s then current two Tribunal cases would have occurred.

15 52. It appears from the foregoing analysis of the evidence so far that, aside from the fact that the Bad Debtor Letters were posted (and we accept that if Infinity had gone to all the effort of preparing and sending such letters and collating all the supporting material that they should have been expected to follow through with a claim to HMRC after no positive responses were received) the evidence tends strongly to a conclusion that the six letters to HMRC were not in fact posted.

20 53. However we need to consider that evidence carefully in the light of the evidence as to the creation of the six letters, and in particular Mr Cheema’s evidence on that issue and Mr Wileman’s forensic report on the floppy disc allegedly containing those documents.

25 54. Mr Cheema’s evidence was that all documents he created on his computer would be saved locally to “My Documents” rather than the server. Some time during the latter part of 2010, Mr Cheema’s computer malfunctioned and it became impossible to access the hard drive and the data on it, which would have included all the letters created by Mr Cheema. Mr Hodgson discovered this when he had found difficulty in accessing documents created by Mr Cheema when in 2013 he was asked by Mr Thakor to search for all word documents created by Mr Cheema in 2009. When Mr Hodgson reported that to Mr Thakor, Mr Thakor handed Mr Hodgson some 60 floppy discs. Mr Hodgson reviewed these and found one disc containing word files created by Mr Cheema in 2009. Mr Hodgson’s evidence was that he could see on examining the disc that the documents concerned were created in 2009 but there was no indication of more precise dates as to when the data was created on the disc itself.

35 55. Mr Wileman undertook a forensic examination of the floppy disc in question which was the subject of his report of 19 July 2013.

40 56. Mr Wileman located twenty Microsoft word documents on the disc including a number of the Bad Debtors Letters, recorded on the disc as having been written on 15 May 2009, and the letters to HMRC in July and September 2009, recorded as having been written 1 July and 14 September 2009 respectively. With regard to the August reminder letter allegedly sent to HMRC these are shown as “file markers” that is a

marker that shows where the file was opened and then saved, overwriting the previous content. These documents are shown as having been written on 10 August 2009.

57. Mr Wileman's evidence in his report, and confirmed by him in his oral evidence, was that there was no evidence of tampering with the documents. With regard to the possibility that they might have been created at a later date than that appearing on the disc he stated in his report:

10 "To create the documents on a later date it would require two computers, both with the clocks adjusted to suit the dates you wished to appear within the documents. The documents would then have to be typed out in full to ensure that the embedded dates remain within targets dates. In conclusion it would be incredibly difficult and time consuming to "forge" the dates within these documents, and it would require specialist software to check the embedded dates within the documents."

58. Mr Wileman, although maintaining his view that the documents were not forged, and that there was no evidence that the clock had been turned back, did accept in answer to questions from the Tribunal, that the creator of a document could change the actual time shown on his computer now to say, 1 July 2009, and create a document which showed that date as the creation date in its document properties. Mr Wileman's answer was that in order to maintain that appearance, you would have to be extremely confident that no subsequent changes to the document indicated changes made on a more recent date which would throw some confusion into when the document was originally created, but he did agree that it was possible, with extreme care, to create a document with the clock wound back, and not open the document again and then copy it to a floppy disc, in which case there would be no way of telling that the clocks had been changed.

59. It is therefore clear that the evidence on creation points to it being more likely than not that the letters were created during 2009, as alleged, but the possibility of them having been created later cannot be ruled out.

60. If we accept that the documents were created on the dates alleged in 2009, but not posted, then this gives rise to the unlikely scenario that all six letters were produced but, coincidentally, never posted. If we accept that the letters were created as alleged and therefore it was more likely than not that they were posted, then this gives rise to the equally unlikely scenario that all six letters either failed to be delivered by Royal Mail or, if delivered, failed to be allocated to the correct officer within HMRC on all six occasions.

61. In our view the key issue is whether the Appellant has satisfied us that the letters were posted, and notwithstanding the evidence on creation, in our view overall the evidence on posting and the subsequent conduct of Infinity does not satisfy us that they were. In that regard:

(1) Mr Thakor had no direct knowledge on whether the letters were posted and we found his evidence on the whole to be unreliable;

- (2) Mr Cheema could not remember much about the creation of the letters and nothing at all about their posting;;
- (3) It is unlikely that letters of this kind, making a claim for over £4million on which the company's survival depended, would sent by ordinary post, Infinity was not able to produce any evidence that they were sent by special delivery, or that at the time when the letters were not responded to whether they checked they had in fact been sent by that method;
- (4) HMRC's own records show no relevant receipts by special delivery and they have systems in place designed to ensure that imprecisely addressed mail bearing a VAT number is correctly allocated, a process which was effective when Morgan Rose wrote in June 2011;
- (5) Mr Thakor's explanations as to why no follow up took place other than by letter and why no follow up took place at all for 21 months was unconvincing; and
- (6) No evidence was given to the administrator as to the claim having been made when requested in September 2010.

62. On balance therefore and notwithstanding the evidence on the creation and sending of the Bad Debtor Letters and the creation of the letters to HMRC we find that the Appellant has not proved on the balance of probabilities that the letters concerned were sent. On that basis, subject to a submission Mr Bridge made on whether the reference in the administrator's report on 29 September 2010 amounted to the making of the claim which we deal with in our conclusions below, the earliest date on which it could be said that the claim was made was in June 2011.

The Law

63. As a result of our findings of fact, our discussion of the legal issues arising can be relatively brief.

64. Section 36 VATA deals with claims for bad debt relief and so far as relevant provides as follows:

- “(1) Subsection (2) below applies where –
- (a) a person has supplied goods or services and has accounted for and paid VAT on the supply,
 - (b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
 - (c) a period of 6 months (beginning with the date of the supply) has elapsed.
- (2) Subject to the following provisions of this section and to regulations under it the person shall be entitled, or making a claim to the commissioners, to a refund of the amount of VAT chargeable by reference to the outstanding amount.
- (3) In subsection (2) above ‘*the outstanding amount*’ means –

(a) if at the time of the claim no part of the consideration written off in the claimant's accounts as a bad debt has been received, an amount equal to the amount of the consideration so written off;

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(b) if at that time any part of the consideration so written off has been received, an amount by which that part is exceeded by the amount of the consideration written off;

and in this subsection '*received*' means received either by the claimant or by a person to whom has been assigned a right to receive the whole or any part of the consideration written off.

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...

(5) Regulations under this section may –

(a) require a claim to be made at such time and in such form and manner as may be specified by or under the regulations;

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(b) require a claim to be evidenced and quantified by reference to such records and other documents as may be so specified;

(c) require the claimant to keep, for such period and in such form and manner as may be so specified, those records and documents and a record of such information relating to the claim and to anything subsequently received by way of consideration as may be so specified;

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(d) require the repayment of a refund allowed under this section where any requirement of the regulations is not complied with;

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(e) require the repayment of the whole or, as the case may be, an appropriate part of a refund allowed under this section where any part (or further part) of the consideration written off in the claimant's accounts as a bad debt is subsequently received either by the claimant or, except in such circumstances as may be prescribed, by a person to whom has been assigned a right to receive the whole or any part of that consideration;

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(f) include such supplementary, incidental, consequential or transitional provisions as appear to the commissioners to be necessary or expedient for the purposes of this section;

(g) make different provision for different circumstances.

...”

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65. Part XIX of the Regulations sets out in more detail the scheme for bad debt relief. Regulation 165A, so far as relevant, provides as follows:

“(1) Subject to paragraph (3) and (4) below, a claim shall be made within the period of 4 years and 6 months following the later of –

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(a) the date on which the consideration (or part) which has been written off as a bad debt becomes due and payable to or to the order of the person who made the relevant supply; and

(b) the date of the supply.

(2) A person who is entitled to a refund by virtue of section 36 of the Act, but has not made a claim within the period specified in paragraph (1) shall be regarded for the purposes of this Part as having ceased to be entitled to a refund accordingly.”

5 It can be seen by virtue of this provision that claims in respect of all of the debts in respect of which the Bad Debtors Letters were written, having arisen in 2005 and 2006, were made outside the four years and six month period in Regulation 165A if made only in June 2011, leaving just one small debt arising in February 2007 as made in time.

10 66. Regulation 166 makes some provision as to how a claim is to be made as follows:

15 “(1) Save as the Commissioners may otherwise allow or direct, the claimant shall make a claim to the Commissioners by including the correct amount of the refund in the box opposite the legend “VAT reclaimed in this period on purchases and other inputs” on his return for the prescribed accounting period in which he becomes entitled to make the claim or, subject to regulation 165A, any later return.

20 (2) If at a time the claimant becomes entitled to a refund he is no longer required to make returns to the commissioners he shall make a claim to the commissioners in such form and manner as they may direct.”

25 67. In this case Infinity had been de-registered for VAT purposes when the claims were allegedly made, so Regulation 166(2) would have applied. In fact HMRC have made no formal direction as envisaged by this provision, but in practice, such claims are made on Form 427, which as we have seen, makes reference to the form being used for this purpose.

30 68. In the light of any prescription by HMRC on this issue, we received submissions as to what constitute the making of a claim for the purpose of section 36 VATA. Mr Bridge submitted that by analogy with the Civil Procedure Rules, which state that a claim form is served when posted the claim would be made when posted. Miss Wilson Barnes submitted that for a claim for bad debt relief to be “made” it has to be communicated which meant that it had to be shown that the letters in question had been received not merely posted.

35 69. The Tribunal also suggested that the provisions of deemed service in section 7 of the Interpretation Act 1978 may be relevant, if it could be said that VATA authorised or required the claim to be made by post.

70. In the event it has not been necessary for us to consider these matters because of our finding of fact that the letters were not posted. Mr Bridge accepts that his case depends on satisfying us that the letters were posted which Infinity has failed to do.

40 71. It remains for us to consider whether the reference in the administrator’s statement of proposal referred to in paragraph 50 above could be regarded as the making of a claim for the purpose of section 36.

72. HMRC, as creditor of Infinity, were sent the statement at their Enforcement Office in Worthing.

73. Mr Bridge did not make his submissions on this point with any great force and it is clear to us that the argument that the short reference in paragraph 3.4 of the statement and the one line reference in the summary of assets to the amount of the claim could amount to the making of the claim is misconceived.

74. The document was prepared for an entirely different purpose and was addressed to creditors generally. It could not be construed as also having a purpose of notifying HMRC of the claim and clearly was not intended to do so. Although as we have found, neither section 36 nor the Regulations are specific about how a claim is to be made, it is to be implied that the claim should be accompanied by information concerning the relevant debts included in the claim to enable verification to take place as is envisaged by Regulation 166, set out in paragraph 66 above, which deals with the situation where the claimant is still registered for VAT. In relation to taxpayers who have ceased to be registered, HMRC may be taken to have impliedly made a direction under Regulation 166(2) by indicating on Form 427 that it may be used to claim bad debt relief and the guidance notes to the form indicate the evidence that need to be submitted with it.

75. Consequently, in our view there is no basis in which the Administrator's statement of proposals can be said to be the making of a claim by Infinity under section 36 VATA.

Conclusion

76. As Infinity has not satisfied us that the six letters purporting to notify HMRC of its claim under section 36 VATA were ever posted and we have found that there was nothing else that constituted the making of a claim for bad debt relief before June 2011, we must dismiss the appeal.

77. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 7 May 2014