



**TC04020**

**Appeal number: TC/2014/01499**

*VALUE ADDED TAX – claim to repayment under section 80(1A) VATA 1994 – claim capped by section 80(4) – effect of the transfer of a going concern on entitlement to make that claim considered – appeal had no reasonable prospect of success – appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**APN BUSINESS CONSULTANTS LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public in Manchester on 28 July 2014**

**The Appellant did not appear but invited the Tribunal to proceed in his absence**

**Mr William Brooke of HM Revenue & Customs for the Respondents**

## DECISION

1. Mr Allan Naylor originally traded as a sole proprietor as a business consultant.  
5 He was registered for VAT as such.
2. Mr Naylor's VAT return for period 02/05 was due for submission on or before 31 March 2005. He failed to make the return and as a result on 15 April 2005 HMRC issued a central assessment to VAT in the sum of £3,295 for that period. Mr Naylor paid that assessment.
- 10 3. On 1 November 2006 the appellant took over Mr Naylor's business as a going concern. Mr Naylor was the sole director of the appellant.
4. On 2 January 2007 the appellant submitted a VAT 68 which is a request for the transfer of a registration number as part of the transfer of a business as a going concern. The form recorded the agreement of Mr Naylor and the appellant to various  
15 conditions including:
  - (1) The appellant would send in any outstanding VAT returns due from Mr Naylor.
  - (2) The appellant would pay any VAT due on supplies made by Mr Naylor before the business was transferred
  - 20 (3) The appellant would have no right to claim any money paid by Customs & Excise (as they were) to Mr Naylor before the VAT number was transferred.
  - (4) Mr Naylor would have no right to claim any money paid by Customs & Excise to the appellant.
  - (5) The appellant would be entitled to reclaim any input tax which Customs &  
25 Excise would normally have paid to Mr Naylor if the VAT number had not been transferred.
5. At this time the 02/05 return of Mr Naylor remained outstanding and the central assessment stood.
6. On 15 January 2007 Mr Naylor submitted a VAT 1 application for registration  
30 on behalf of the appellant. The form identified that the appellant had taken over Mr Naylor's business and that the appellant wished to keep his VAT number.
7. The appellant was registered for VAT with effect from 31 October 2006 and Mr Naylor's VAT number was reallocated to it.
8. In or about April 2012 Mr Naylor on behalf of the appellant submitted the 02/05  
35 return showing a nil amount due. The submission of that return and accompanying correspondence was treated by HMRC as a claim for repayment of the sum previously paid in respect of the central assessment. The claim was made in or about April 2012. Strictly it was a claim made by the appellant.

9. HMRC have refused to make repayment of the sum of £3,250 shown as due from the appellant. The amount claimed is the amount showing on the appellant's VAT account with HMRC. It is slightly different from the amount of the assessment but nothing turns on that fact.

5 10. The issue on this appeal is whether HMRC are bound to repay the appellant the sum of £3,250. The appellant's grounds of appeal are that it has an equitable right to repayment of the sum overpaid.

10 11. HMRC contend that they are entitled to refuse repayment, and they have applied to strike out the appeal pursuant to Tribunal Rule 8(3)(c) on the basis that it has no reasonable prospect of success. That is the application which is before me.

15 12. By letter dated 8 July 2014 Mr Naylor on behalf of the appellant stated that he was unable to attend the hearing but invited the tribunal to determine the appeal on the basis of his written evidence. I have had regard to all the correspondence from Mr Naylor and from the appellant in relation to the matters under appeal. I am satisfied that it is in the interests of justice to hear this application in the absence of Mr Naylor.

13. Putting to one side for a moment the fact that there had been a transfer of the VAT number, I am satisfied that the appellant's claim for repayment would be capped as a result of section 80(4) Value Added Tax Act 1994 ("VATA 1994").

20 14. Section 80(1) VATA 1994 provides for the Commissioners to credit a person with any VAT he has accounted for which was not output tax due from that person as follows:

*"80(1A) Where the Commissioners –*

*(a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and*

25 *(b) in doing so, have brought into account as output tax an amount that was not output tax due,*

*they shall be liable to credit the person with that amount."*

30 15. However the liability to credit the amount assessed is subject to section 80(4) which provides as follows:

*"80(4) The Commissioners shall not be liable on a claim under this section –*

*(a) to credit an amount under subsection (1) or (1A) above, or*

*(b) ...*

35 *if the claim is made more than 3 years after the relevant date."*

16. In the present circumstances, by virtue of section 80(4ZA) the relevant date is the end of the prescribed accounting period in which the assessment was made. In other words, it is 31 May 2005. Hence HMRC were not liable to repay any claim made after 31 May 2008.

5 17. There is no means for the appellant to avoid the operation of section 80(4) and because its claim was made after 31 May 2008 HMRC are not liable to repay it.

18. I now return to the fact that the assessment was made on Mr Naylor in April 2005 but subsequently his VAT registration was transferred to the appellant. The provisions dealing with transfer of a VAT registration number on the transfer of a going concern are contained in Regulation 6 Value Added Tax Regulations 1995. In  
10 so far as relevant they provide as follows:

“ 6(3) Where the transferee of a business or part of a business has under  
paragraph (1) above been registered under Schedule 1 or 1A to the Act in  
substitution for the transferor of it, and with the transferor's registration  
15 number —

(a) any liability of the transferor existing at the date of the transfer to make a return or to account for or pay VAT under regulation 25 or 40 shall become the liability of the transferee,

(b) any right of the transferor, whether or not existing at the date of the transfer, to credit for, or to repayment of, input tax shall become the right of the transferee,...

(c) any right of either the transferor, whether or not existing at the date of the transfer, or the transferee to payment by the Commissioners under section 25(3) of the Act shall be satisfied by payment to either of them.

(d) any right of the transferor, whether or not existing at the date of the transfer, to claim a refund under section 36 of the Act shall become the right of the transferee, ...

(e) any liability of the transferor, whether or not existing at the date of the transfer, to account for an amount under Part XIXA of these Regulations, shall become that of the transferee, and

(f) any records relating to the business which, by virtue of these Regulations or a direction made by the Commissioners, are required to be preserved for any period after the transfer shall be preserved by the transferee unless the Commissioners, at the request of the transferor, otherwise direct.”

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19. As at the date of the transfer from Mr Naylor to the appellant, Mr Naylor had a liability to make the 02/05 return and to account for VAT in respect of that period (Regulation 6(3)(a)). However Mr Naylor had already paid an assessment without making a return. When the appellant came to make the return in April 2012 it showed  
40 a nil liability. It was at that time that the appellant made a claim for repayment of the sums paid pursuant to the assessment.

20. None of the other provisions of Regulation 6(3) entitle the appellant to reclaim an overpayment of VAT output tax made prior to the transfer of the going concern. The other provisions relate specifically to credit for input tax and bad debt relief.

5 21. It may be that Regulation 6(3)(a) where it refers to a liability to account for VAT carries with it the right to reclaim overpaid VAT under section 80. In any event however it is clear from the Court of Appeal in *Midlands Co-operative Society v Revenue & Customs Commissioners* [2008] EWCA Civ 305 that a right to repayment under section 80 is a property right that can be assigned.

10 22. For present purposes therefore I shall take it that either Regulation 6(3)(a) operated to transfer to the appellant the right to a repayment under section 80, alternatively that the appellant took an assignment of that right from Mr Naylor at the time of the transfer. Whatever the position, the transfer or assignment could not grant any wider right to repayment than that enjoyed by Mr Naylor. The claim would therefore still be capped by section 80(4) for the reasons described above.

15 23. I am satisfied that HMRC are not liable to make a repayment of the VAT assessed for period 02/05 either to the appellant or indeed to Mr Naylor if he still retained his original rights under section 80. In those circumstances I must dismiss the appeal.

20 24. 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)”  
25 which accompanies and forms part of this decision notice.

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**JONATHAN CANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 19 September 2014**

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