[2013] UKFTT 166 (TC)

TC02582

Appeal number: TC/2011/00405

VAT – S80 Claim for a refund – question if claim was made within statutory time limit – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

H & W STAFF SPORTS & RECREATION ASSOCIATION **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN HUDDLESTON

Sitting in public in Belfast on 13 June 2012

Ms. Kim Tilling, HMRC
Mr. Lowry, Halliday Lowry Architects

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DECISION

Appeal

1. The decision under appeal in this case is HMRC's rejection of the Appellant's claim to recover overpaid value added tax ("VAT") in the sum of £9,262.13 for the periods 16 August 2003 to the 5 December 2005.

2. That decision was communicated to the Appellant by way of a letter dated the 12 August 2010 and was confirmed on review.

Background Facts

3. The facts are as follows.

4. The Appellant is a company limited by guarantee, operating from premises at 6-10 Dundela Avenue, Belfast, BT1 3BQ and, as its name suggests, is a sports and recreation association. It is registered for VAT under VAT Registration Number 252024993.

5. It would appear that on the 27 September 2010 HMRC received a letter ("the September 2010 letter") from the Appellant's representatives, Messrs. Halliday Lowry, Accountants, enclosing a copy of an earlier letter dated the 16 August 2006. That earlier letter ("the August 2010 letter") purported to be a letter of claim in respect of overpaid VAT for the period 16 August 2003 to the 5 December 2005 and was made under Section 80 of the Value Added Tax Act 1994 ("VATA").

6. The origins of the claim arose out of the ECJ decision in the *Linnewebber* appeal and was for the total amount of £9,262.13.

7. The September 2010 letter referred to the August 2010 letter as a "letter of appeal" and advised that neither the Appellant nor their representatives had received a reply to that earlier letter.

8. HMRC's position is that after receipt of the September 2010 letter that they conducted a search and concluded that no claim had previously been received in connection with the Appellant or, indeed, the subject matter and, accordingly, no decision had been issued nor claim lodged.

9. On that basis, HMRC wrote to the Appellant on the 12 October 2010 rejecting the claim indicating that it fell outside the statutory time limits imposed by Section 80 VATA.

10. By their letter of the 26 October 2010 the Appellant's representatives sought a review of the decision. That review was conducted and, by way of a letter of the 10 December 2010, the original rejection was confirmed.

Legislation

11. Section 80 of VATA provides as follows:

"(1) Where a person:

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended); and

(b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount.

(4) The Commissioners shall not be liable on a claim under this Section:

… (b) or repay an amount to a person under sub section (1)(b) above

if the claim is made more than three years after the relevant date."

12. For the purposes of this appeal the "relevant date" (which is defined in Section 80(4)Z(a) is not in dispute and is the 30 September 2006.

13. The only other statutory provision which is relevant is Regulation 37 of the Value Added Tax Regulations 1995 ("the Regulations") which states as follows:

> *"Any claim under Section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."*

HMRC's Case

14. HMRC's case is relatively straightforward. Their position is that the claim first came to their attention by virtue of the letter which they received from Halliday Lowry on the 24 September 2010 and that as that was clearly after the statutory cut off date of 30 September 2006 it is out of time.

15. HMRC take the view that whilst it is asserted by the Appellant that the letter of 16 August 2006 was sent, that the onus of proof in that regard rests with the Appellant and that they neither have discharged that, nor have they provided documentary evidence to demonstrate the assertion that the August 2006 letter was, in fact, sent.

16. In the alternative, HMRC contends that if the claim was made within the legislative time limits, that it was not a valid claim insofar as it did not satisfy Regulation 37 in that:

> (1) it did not provide the methodology in respect of which the claimed amount was calculated; and
>
> (2) it failed to reference the documentary evidence which was required to support the claim.

17. In support of HMRC's argument that the Appellant has failed to demonstrate that a claim was made (and if made that it was made timeously) HMRC rest on a number of facts:

> (1) that HMRC's letter of 24 September 2010 referred to the August 2006 letter as being a letter of appeal, and not a letter of claim;

(2) that the copy letter of the 16 August 2006, signed by Mr. McCormick, the Club Treasurer, is wrongly addressed to HM Customs & Excise;

(3) that the letter dated 16 August 2006 is pre-dated and therefore is not accurate as to the date upon which it was (if, in fact, it was) sent;

(4) that there was considerable delay between the alleged submission date of 16 August 2006 and HMRC's letter of the 24 September 2010 effective "chasing up" the claim – notwithstanding that there were opportunities, for example a VAT visit which took place on the 13 March 2008 – when the query could in fact have been raised; and finally

(5) that there is no corroborative documentary evidence which establishes the making of the claim.

18. As to the case law in this area, the Tribunal was referred by HMRC to *Metal Treatments (Birmingham) Limited (VTD 18614)* by way of confirmation that the burden of proof lies with the Appellant as to the making of a claim, with that burden then being discharged (or not) on a balance of probabilities.

19. As regards the legal test for satisfaction of Regulation 37, we were referred to the case of *Nathaniel & Co. Solicitors (TC 00734)* to establish the proposition that the test for satisfaction of Regulation 37 is an objective test, ie. did the claim contain sufficient information to allow a reasonably competent officer to understand the way in which the amount claimed had been calculated.

20. HMRC's case is that neither the burden of proof for submission of a claim, nor the legal test of what constitutes a claim, has been satisfied.

The Appellant's Case

21. I have said that HMRC's case is relatively straightforward. The Appellant's case is equally straightforward – they assert that the letter of 16 August 2006 was, in fact, signed and posted and that it constituted a valid claim pursuant to Regulation 37 and was submitted within the time limits stipulated by Section 80(4) VATA.

22. The Appellant's were represented by Mr. Lowry of Halliday Lowry, Accountants.

23. Mr. Lowry opened the Appellant's case by explaining matters insofar as he could from his own file.

24. He explained that, as a result of the *Linnewebber* case he had written to a number of clients, including the Appellants, alerting them to the possibility of making a claim for overpaid VAT based on the decision in that case.

25. In the present case, we were provided with a copy letter from Mr. Lowry's file dated the 16 August 2006 (being the same date as the alleged letter of claim) and addressed to Mr. J. McCormick at his home address, 70 Moss Road, Ballygowan, BT23 6LF.

26. That letter appeared to be in a standard form (at least standard insofar as it was common to other letters which Mr. Lowry sent to similar clients) and enclosed a draft letter which (it was suggested to Mr. McCormick):

"… you could sign and forward to the VAT office in order to have a claim in place."

27. We were then furnished with a copy of a letter purporting to be from the Appellant, again dated 16 August 2012, addressed to Belfast VAT Office, Custom House, Custom House Square, Belfast, BT1 3ET in the following terms:

> *"Dear Sir*
>
> *Following the ECJ decision in the case of Linnewebber, we wish to make a Section 80 claim for the repayment of VAT paid on gaming machine takings in the period 16 August 2003 to 5 December 2005 amounting to £9,262.13. The output VAT paid on gaming machine takings in the period was £12,128.58 and the input VAT recovered on machine rental in the period was £2,866.45."*

28. The letter was signed J. McCormick (Treasurer) and was marked at the top (in manuscript) "Copy for J. McCormick". It appeared from what Mr. Lowry said that that copy letter was returned to Halliday Lowry and retained upon their file.

29. Halliday Lowry had, as I have said above, a number of similar cases, including one involving a similar club in Bangor, County Down. As Mr. Lowry said, very little happened in relation to those cases pending the outcome of the decision in *Rank Group plc.*

30. It would seem, from what Mr. Lowry said, that it was only after the satisfactory settlement of a claim which Halliday Lowry themselves were doing for that other client, that they were prompted to write to HMRC to ask about progress in relation to the Appellant's claim and led to the September 2010 letter.

31. Mr. Lowry called evidence from both Mr. McCormick, the Appellant's Treasurer, and Mr. James McFerran, the Club Secretary, and both gave sworn testimony.

32. Mr. McCormick gave evidence to the Tribunal that the 16 August 2006 was a Wednesday (being the date upon which Halliday Lowry despatched their letter with the enclosed draft to HMRC) which he then suggested was received at the Club on the Thursday.

33. He gave evidence that he signed that letter in the Club's premises and that he left the signed copy for the Secretary to then post.

34. Mr. McCormick, who had held the post of Treasurer for in excess of 50 years, gave clear testimony as to his established practice – which largely was done on a volunteer basis - and which habitually involved him being at the Club's premises on Thursdays and again on Saturdays.

35. As regards the copy letter which found its way to Halliday Lowry's file, he gave evidence that that was filed in the accountant's file and left for Halliday Lowry to collect as part of the monthly collection carried out by them when they called to collect the records which allowed them to undertake the VAT returns for the club.

36. Mr. McCormick also gave evidence that he was aware of the delay arising out of the process of *Rank* through the judicial system, and that, therefore, he wasn't anticipating an immediate reply in relation to the claim.

37. After cross examination the Tribunal asked Mr. McCormick to confirm his recollection of when he received the letter.

38. He confirmed that the letter was waiting for him at the Club's premises – as was customary.

39. At that point the Tribunal did indicate to him that the copy letter from the accountant's file which had been presented to the Tribunal indicated that the correspondence from the accountant had been posted initially to his home address, and that presumably the letter had in fact gone to him at that address.

40. Mr. McCormick indicated that he couldn't remember the detail, which the Tribunal fully accepts given that these events happened some five to six years ago.

41. We then heard from Mr. James McFerran, the Club Secretary, who gave evidence that he both recalled the letter, because of its importance, and that he wrote the envelope, sealed and stamped it, leaving a copy marked for Mr. McCormick.

42. Again, Mr. McFerran gave a very clear picture of his involvement in relation to the Club activities, where he had worked as a volunteer for approximately 22 years.

43. He gave evidence that he went to the Club most mornings and that he customarily posted letters on behalf of the Club. He had, he indicated, an established procedure.

44. It is equally clear, however, that he did not document any of this and that his evidence was based on his personal recollection of events some five to six years previously.

45. Because of the significance of these events, the Tribunal allowed the Appellant some time after the Hearing within which to review their records to see whether or not there was any documentary corroboration of the events depicted.

46. We were furnished with, firstly, a copy of Minutes of the Club meeting of Monday 28 August 2006, which recorded an apology from Mr. McCormick.

47. There is, however, an extract within those Minutes in the following terms:

> "*Possibility we can claim VAT back on fruit machines of £9,200 through accountant – not sure if we can get it, but Rep says that a test case has been won in Europe."*

48. We were then furnished with some trade publications in which the issue was discussed, including specific direction after the decision in *Rank*.

49. The letter which we received from Halliday Lowry also provided details of fire damage in February 2007 which had been referred to in the witnesses' evidence.

50. The letter confirmed that the damage did not affect the office itself, but that the necessary arrangements became a preoccupation of the officers during the course of a period of approximately 18 months.

51. In relation to these observations, HMRC made the following points in reply:

(1) firstly, that the Minute of the meeting on the 28 August 2006 (some 12 days after the date upon which the letter was allegedly sent) and that yet it spoke of a claim being made in the future tense;

(2) that whilst Mr. McCormick was absent, the minutes recorded that Mr. McFerran was in attendance at that meeting and, therefore, he could have clarified that point;

(3) as regards the fire, HMRC took the view that it was largely irrelevant as it did not occur at the time when the alleged claim was made, and did little to explain the lack of contemporary documentary evidence.

52. As to case law which was of assistance to the Appellant, we were referred to *Quintain Estates Development plc (VTD 18877)* and the more recent case of *Heronslea Limited v Customs for Her Majesty's Revenue and Customs (TC 00978).*

53. In that latter case, Judge Redston concluded (in relation to a question whether a return had been validly made) as follows:

> *"Once the posting date has been established, the onus is on HMRC to prove that the return was not delivered in the normal course of post. HMRC have not discharged this burden ….."*

Decision

54. I have been quite detailed in terms of the factual dispute before me, but I have adopted that course for obvious reasons as this case turns very much upon its facts.

55. The question which this Tribunal must answer is whether or not there is evidence that, on a balance of probabilities, the Appellant made a claim and, if it did, if that claim was made within the statutory time limit and if it complied with the requirements of Regulation 37.

56. In the absence of documentary evidence, the Appellant necessarily must rely on the testimony of Mr. McCormick and Mr. McFerran.

57. I found both witnesses helpful in the extreme, and very clear on what clearly is their very established routine is the performance of their respective roles for the Club.

58. Nonetheless, I rather fear that their evidence focused more on that routine than on the issue in question, ie. whether this particular letter was both signed and dated and then posted to HMRC. Whilst both gave clear evidence to that effect, nonetheless, I have to bear in mind that we are speaking of events some five to six years ago and that both have had considerable challenges in the intervening periods – one, personally, regarding the loss of his wife, and both collectively in terms of managing the Club through what clearly was a disruptive period as a result of the fire incident in 2007.

59. I must also take into account that I asked Mr. McCormick to repeat his evidence which then I myself was able to challenge because it transpired that the letter from the accountants was posted directly to him at his home address and not to the Club as he originally suggested in his evidence.

60. I make no criticism as to that, but it is something which I do need to bear in mind.

61. On balance, I have concluded that both witnesses were focused more on their established procedures and practices than on the provision of detailed evidence as to this particular matter, and one can hardly blame them for that given the lapse of time.

62. Taking all of that into account, however, I am not satisfied that the Appellants have in fact discharged the onus of proof upon them to establish that on a balance of probabilities the letter was posted and, therefore, that a valid claim was made within the statutory time limit.

63. Having established that, it is entirely reasonable, therefore, to deduce that it may well have been only in September 2010 that HMRC became aware of the claim.

64. That being the case, it clearly, at that point, was out of time.

65. Having so found, I dismiss the appeal.

66. No order as to costs.

67. If you are dissatisfied with the outcome of the application for permission to appeal the decision in this appeal, either party has the right to apply to the Upper Tribunal for permission to appeal. Such an application must be made in writing to the Upper Tribunal at 45 Bedford Square, London, WC1B 3DN no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet "Appealing to the Upper Tribunal (Tax and Chancery Chamber).

IAN HUDDLESTON

TRIBUNAL JUDGE

RELEASE DATE: 6 March 2013