Neutral Citation: **[2023] UKUT 295 (TCC)**

Case Number: UT/2022/000058

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London

VAT – REPAYMENT SUPPLEMENT – s.79 VATA 1994 – Purchase of properties - whether the inquiry by HMRC requesting a full set of backup documents requires more than sales invoices and purchase document – Yes – Whether it is reasonable to request underlying documents regarding the 'chargeable event', including TR1s – Yes. HMRC inquiries conducted within the relevant period – regulation 198 and 199 VAT Regulations 1995 – Appeal dismissed.

Heard on: 07 July 2023
Judgment date: 12 December 2023

Before

MR JUSTICE RICHARD SMITH
JUDGE VINESH MANDALIA

Between

BOLLINWAY PROPERTIES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Ripley, counsel, instructed by Nigel Gibbon & Co

For the Respondents: Peter Mantle, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. In a decision released on 2 September 2021, the First-tier Tribunal (Tax Chamber) ('the FtT') dismissed the appeal by Bollinway Properties Limited ("Bollinway") against the decision of the respondents ("HMRC") that a repayment supplement under section 79 of the VAT Act 1994 ("VATA") in respect of £71,084,816.43 claimed by Bollinway in its VAT return for the period 10/18 submitted on 2 November 2018, is not payable.

SUMMARY OF THE ISSUES AND DECISION OF THE FTT

2. Bollinway is a property business which forms part of a corporate group owned by Acepark Limited ("Acepark"). On 10 April 2018, Acepark acquired Toys "R" Us Properties Limited ("TRUP") for £1 with a view to maximising the value of its property portfolio. On 17th September 2018, TRUP sold 27 properties to Bollinway.

3. The background to the claim to a repayment supplement made by Bollinway is uncontroversial and was summarised in paragraphs [2] to [4] of the decision of the FtT:

> "2. Bollinway submitted a VAT return for period 10/18 in which a repayment of £71,170,729.68 was claimed. That amount represented the input tax incurred on the purchase of a property portfolio ("the Properties") from Toys "R" Us Properties Limited ("TRUP") on 17th September 2018 for the sum of £355,853,648.39 plus VAT. Bollinway asked the Respondent ("HMRC") to set-off the amount of its credit which corresponded to the amount of output tax TRUP would become liable to pay to HMRC.
> 3. The sum of £71,084,816.43 was allocated by HMRC to TRUP's VAT account on 21st December 2018 and the remaining amount of £85,913.25 was authorised for repayment to Bollinway on 21st December 2018.
> 4. Bollinway claims repayment supplement of £3,554,240.82 being 5% of the sum of the £71,084,816.43 which was credited against TRUP's liability for the same amount.
> 5. In essence, HMRC says that Section 79 is not applicable to the amount set against TRUP's VAT liability, but even if it was so applicable, no repayment supplement was due because HMRC satisfied the rules requiring their inquiries to be conducted within a "relevant period". Bollinway says that section 79 applies to the application of the £71,084,816.43 against TRUP's liability and the time taken to agree the set-off exceeded the relevant period so that repayment supplement is due.

4. The FtT concluded, at paragraph [162] of its decision:

> (1) Bollinway assigned its right to a VAT credit of £71,084,816.4371 to TRUP;
>
> (2) As a result of the assignment Bollinway was no longer entitled to claim the repayment supplement under section 79 on the amount of £71,084,816.43;
>
> (3) Even if Bollinway was able to rely on section 79, despite the assignment and the consequent lack of payment to it, HMRC's issue of the requisite direction on 20 December 2018 took place within the relevant period of 30 days from the submission of the VAT return on 2 November 2018.

FACTUAL AND PROCEDURAL BACKGROUND

5. The facts in the appeal were not in dispute and the FtT Judge dealt with the matter on submissions only. Her findings of fact are set out at paragraphs [15] to [58] of the decision.

The material facts and findings for the purposes of this appeal can be taken from the decision of the FtT and may be summarised as follows.

6. On 17th September 2018, Bollinway purchased TRUP's property portfolio for the sum of £355,853,648.39 plus VAT. Bollinway submitted an option to tax and VAT registration in relation to the acquisition of the Properties to have effect on 17 September 2018. Bollinway's first VAT accounting period ended on 31 October 2018.

7. On 1 October 2018, TRUP raised an invoice to Bollinway, showing sale of the Properties for the sum of £355,853,648.39 plus VAT. Following the sale of the Properties to Bollinway, TRUP ceased to trade on 1 October 2018. HMRC were notified about this fact on 28 November 2018.

8. TRUP was due to account for the VAT on the sale of the Properties on its VAT return for the period ending 3 November 2018, notwithstanding it had ceased to trade on 1 October 2018.

9. Bollinway's representatives, MHA Moore and Smalley ('MHA'), submitted its 10/18 VAT return with a cover letter received by HMRC on 2 November 2018. In that letter MHA said:

> "Given the unusually large amount of tax due on this supply, it would seem more appropriate for all parties including HMRC to make appropriate entries in the VAT records for each taxpayer, rather than making the repayment to Bollinway and awaiting the payment from TRUP."

10. In an email dated 19 November 2018 sent to MHA, Mr Mark, HMRC's customer compliance manager for the Toys "R" Us group, asked some questions about the connection between TRUP and Bollinway, whether MHA was responsible for the submission of the VAT return for TRUP and for some further information about Bollinway. MHA replied by email later on the same day.

11. On 20 November 2018, HMRC asked Mr Duncan Hopkinson, a director of Bollinway (who had contacted Mr Mark to request a copy of TRUP's previous VAT returns) for a copy of the sale and purchase agreement by which Acepark Ltd bought TRUP. Mr Hopkinson replied on 28 November 2018 explaining that there was no sale and purchase agreement as the shares were deemed worthless and only bought for £1. The purchaser would therefore not obtain any warranties etc. A copy of the stock transfer form was provided. It was at that point therefore that HMRC were given more details about the background to the sale of the Properties and the fact that TRUP (owing £71,084,816.43 in output tax) had no value.

12. Meanwhile, on 20 November 2018, in what HMRC described as a standard letter issued by the "central system", and for which Mr Mark later apologised, HMRC refused the request for the "appropriate entries" to be made.

13. On 21 November 2018, Mr Chow of HMRC, who worked with Mr Mark, sent an email to MHA explaining that TRUP's VAT returns for 08.18 and 09.18 had been selected for review and requested a narrative of anticipated future sales and purchases for the next two periods. Mr Chow also confirmed that he would be reviewing the VAT return for Bollinway and asked for a schedule of sales and purchase invoices and "a full set of backing documents". MHA replied on the same day explaining that they could not comment on the 08/18 and 09/18 VAT returns as MHA had only become involved with the company in September 2018 and would forward the request to the company.

14. On 26 November 2018, MHA replied by email to the request for documents made by Mr Chow on 21 November 2018 explaining that there was a single transaction in Bollinway's VAT return being the purchase of the Properties. It was said that the "agreements by which

the properties were transferred" were attached. It was explained that an option agreement had been entered into on 12 August 2018 which was exercised on 17 September 2018 and the exercise notice was also attached. It was explained that, as shown by the agreements, the consideration was satisfied by the assumption by the purchaser of the seller's debt.

15. The attachments consisted of a call option agreement ("the Option Agreement") dated 12 August 2018, an undated, but signed option notice ("the Option Notice"), and a draft form of the debenture attached as a schedule to the Option Agreement ("the Transaction Documents").

16. The Transaction Documents were not simple documents. They set out arrangements for the grant of an option by TRUP to Bollinway which are overlaid with financing arrangements and the need for third party consents. In essence, they showed that:

A) TRUP gave Bollinway an option to buy the Properties in accordance with the terms of a sale agreement set out in the Option Agreement if a "trigger event" occurred;

B) If the option was exercised in accordance with the terms set out, which included completion of an Option Notice (which on its face required the notice to be signed and dated):

(a) the parties agreed that the purchase price would be paid on a date set by reference to an interest payment date in July 2019;

(b) the purchase price was calculated with reference to what was referred to as the "Loan" although the Loan was not in fact one of the numerous defined terms and was therefore not immediately identifiable by a reader;

(c) the transfer of the Properties would be in the form set out in a schedule (using a Land Registry form TR5) unless certain conditions were not met in respect of one or more of the properties ("the Remaining Property"), in which case, the transfer of the Remaining Property would take place using one or more form TR1s.

17. The draft TR5 attached in the schedule did not state the identity of the transferee of the Properties.

18. The Option Notice provided at this point was signed but not dated.

19. The actual transfer forms for the legal transfer of the Properties were not provided at that time. The forms used were, in fact, TR1s and not the form TR5 set out in the schedule to the Option Agreement.

20. On 27 November 2018, MHA emailed Mr Mark about the letter of 20 November 2018 asking how, given the significant amount of tax to be paid and reclaimed, HMRC intended to deal with the recovery and subsequent payment of the VAT. Mr Mark apologised for the 20 November 2018 letter, saying that it had been issued without his team's knowledge.

21. Later on the same day of 27 November 2018, Mr Mark asked if there was a dated Option Notice given that the one sent was undated.

22. On 28 November 2018 MHA emailed Mr Mark saying that it would be helpful to understand HMRC's intention as soon as possible. Clarification of the mechanics for a repayment to Bollinway was sought. In addition, HMRC was told that, following the sale of the Properties, TRUP had ceased to trade and was in the process of de-registering for VAT.

23. That was likely to result in the cancellation of TRUP's 10/18 VAT return and the issue of a replacement final return to 1 October 2018 with a consequent timing impact for the payment of VAT by TRUP.

24. Later on the same day (28 November 2018), Mr Mark responded to MHA with what he described as an interim reply to the VAT issue. He said that HMRC's intention at that point was to make the offset, but consideration was being given to whether it was easier to carry out the offset once TRUP's return had been filed declaring the output tax due. He queried why it was proposed to deregister TRUP so soon before the 10/18 return was due.

25. On 30 November 2018, MHA replied to Mr Mark explaining that TRUP needed to deregister as it ceased to make taxable supplies on 1 October 2018. However it was queried whether it would make more sense to stop the deregistration process and submit the 10/18 return. Confirmation was sought that as previous returns had taken advantage of the seven-day filing extension for online filing, that would also be permitted for the 10/18 so that the return was not due until 10 December 2018.

26. Mr Mark responded on the same day to say that Mr Chow would respond further in due course but noted that MHA were in possession of a return for TRUP that covered the relevant period. Deregistration was not automatic and there would be processes that HMRC would undertake to ensure that deregistration was appropriate.

27. On 2 December 2018, a dated copy of the Option Notice was sent to Mr Mark by MHA.

28. On 6 December 2018, MHA emailed Mr Mark and Mr Chow seeking definitive guidance on the VAT payment, noting that it was only two working days before the filing and payment deadline for the TRUP 10/18 return. It was recognised that the "form of the transaction" had only been disclosed to HMRC in the previous week and it was explained that TRUP did not have the funds to pay its output tax liability and was reliant on the repayment due to Bollinway. It was suggested that it may be easier to "disregard" the 10/18 TRUP VAT return and await the 99/99 deregistration return.

29. On 7 December 2018, Mr Chow wrote to MHA and confirmed that the TRUP 10/18 return should be submitted by its expected due date.

30. On 10 December 2018, the TRUP 10/18 VAT return was submitted showing an output tax liability of £71,084,816.43.

31. On 13 December 2018, Mr Mark asked MHA for a headed signed letter of authority from a director of Bollinway requesting offset.

32. On 14 December 2018, there were two streams of emails running in parallel. First, Mr Mark reiterated that they hoped to undertake the offset quickly and asked if the letter of authority could be sent to him that day. MHA replied and queried whether the letter sent on 27 November and the appointment of MHA as agent for both TRUP and Bollinway would suffice to authorise the offset. Mr Mark confirmed that a letter signed by a director of Bollinway was required. He noted that Mr Chow would email MHA for some further details later in the day. This prompted MHA to ask if they should wait for Mr Chow's email and Mr Mark confirmed that they should not. He said that the information sought by Mr Chow was for other issues and the letter of authority was becoming a matter of urgency given the impending holiday season. He provided an extract from the HMRC offset guidance to indicate the necessary information for the letter. That guidance described the offset as involving the following:

> "Key principles - Assignor must request Offset in writing

The Assignor must make a written request asking HMRC to offset their credit to part pay or clear the debt of another entity or several entities. HMRC must agree to and authorise this request in order to give the Offset effect.

The Offset request will:

- be presented on letter headed paper of the Assignor;
- be expressed as an absolute offset in unequivocal and irrevocable terms;
- be signed by all necessary authorised officials (Directors, Company Secretaries, Partners etc.);
- specify the legal entities making and benefitting from the offset; and
- specify the amount offset and the tax or duty periods concerned.

The Assignor may still be entitled to a reduced credit if not all of the money is required to clear the Assignee's (Assignees') debt(s).

Authorising officials

It is essential that the Offset is made "under the hand of the Assignor".

Where the Assignor is a company, this means that the person(s) with authority to enter into the Offset has(ve) done so, and this will be evidenced by the production of a document containing all the necessary signatures.

It may be that the signature of one director only is sufficient to create a valid Offset of a debt owed to the company; but whether that is so will depend on what the company's Articles of Association require.

If the company can be committed to binding agreements on the basis of the signature of one director only, there is no reason in principle why that director's sole signature should not be sufficient to create a valid Offset of the debt owed to the company by HMRC. In cases such as this, it is quite reasonable for HMRC to satisfy itself that the Offset is valid, by asking the company to demonstrate that the signature of one of their directors is enough to bind to the company."

33. In the second series of emails, Mr Chow confirmed that HMRC were looking to progress the offset and asked for the required letter of authority. He said that in the meantime he would be looking to finalise his compliance due diligence on the transaction and asked about the financing of the purchase of the property portfolio, Bollinway's intended use of the properties and the planned occupancy of them, as well as for confirmation of the option to tax position on the Properties.

34. MHA emailed in reply asking whether the information was needed in order to clear the Bollinway return for repayment. Mr Mark then brought the two email conversations together by responding to say that two actions were needed to bring the matter to resolution: (i) review of the repayment return submitted by Bollinway by obtaining information on a number of aspects of the transaction; and (ii) obtaining the signed authorisation. He noted his understanding that the offset was MHA's preferred solution and that the financial situation of TRUP in fact precluded its payment of the output tax followed by release of the payment claimed by Bollinway. He noted that, if things had changed in that regard, that alternative could be explored further, but the release of the payment to Bollinway would not in any event be immediate due to the governance required in respect of large repayments.

35. MHA confirmed that the letter of authorisation would be sent on 17 December 2018 (14 December 2018 being a Friday). In the meantime, it was said that MHA would respond to Mr Chow shortly. The queries raised were noted to be minor but very late. Later that day, MHA replied to Mr Chow's email of 14 December 2018, but expressed concern that the information had only just been requested and noted that the option to tax had been filed with Bollinway's application for VAT registration.

36. On 17 December 2018, Mr Chow confirmed that the option to tax notifications had been received and asked for evidence confirming that the change in legal ownership of the Properties had occurred.

37. On 18 December 2018, MHA replied to Mr Chow saying that evidence in the form of the transfer agreement in the sales invoice had already been provided. It was suggested that if HMRC used the information from the options to tax they could confirm the ownership of the Properties by searching the Land Registry. However, later that day MHA sent a copy of the forms transferring title to each of the properties (TR1s) to Mr Chow.

38. As Mr Mark had still not seen a letter of authority from a Bollinway director on Tuesday 18 December 2018, he sent an email to MHA as well as the directors of Bollinway to ask if one had been sent.

39. On 19 December 2018, a copy of the signed letter from Bollinway (dated 17 December 2018) was emailed to Mr Mark by Mr Hopkinson. In that letter ("the Letter of Authorisation") Mr Hopkinson wrote, on behalf of Bollinway, that Bollinway was content to receive repayment of VAT in the normal way if that was the more efficient means of processing repayment. However, if HMRC wished to proceed with the set-off and that would be the quickest way of processing repayment, HMRC should accept the letter as confirmation that Bollinway were prepared to receive repayment on that basis. The letter went on to state that:

> "2. This letter confirms that Bollinway is prepared to assign a proportion of its right to repayment to TRUP, if that is the most efficient means of both receiving repayment and settling the VAT due on TRUP's 10/18 VAT return.
> 3. I have signed the letter as a director of Bollinway Properties Ltd. I have the authority to bind the company to this assignment.
> 4. The amount of offset required to settle the liability for TRUP's 10/18 VAT return is £71,084,816.43. The remaining £85,913.25 repayment due to Bollinway on its 10/18 VAT return can therefore be repaid to the company."

40. A screenshot shows that HMRC recorded that tax of £71,084,816.43 was due from TRUP on 10 December 2018 and that on 20 December 2018 a credit for a matching amount was entered onto the system.

41. On 2 January 2019, MHA wrote to Mr Chow to ask whether the enquiries into the Bollinway VAT repayment had been completed. Mr Chow replied on the same day confirming the review had been completed and the set-off had taken place and had been recorded on the relevant ledgers.

42. On 21 December 2018, HMRC released the balancing £85,913 to Bollinway.

43. On 22 March 2019, MHA emailed Mr Chow regarding a possible repayment supplement due to Bollinway. MHA provided a timeline of events and argued that HMRC had delayed repayment of the VAT refund, and therefore a 5% repayment supplement was due on the VAT reclaimed of £71,170,729.

44. On 31 May 2019, the repayment supplement team issued a decision to Bollinway. It was agreed that a repayment supplement was due, but only on the VAT refund of £85,913.

45. On 7 June 2019, the repayment supplement of £4,295 calculated as 5% of £85,913 was paid to Bollinway. HMRC's position is that the payment of that repayment supplement was made in error, but HMRC does not seek to recover the amount paid.

THE APPEAL TO THE UPPER TRIBUNAL

46. The central issue in the appeal concerns the question whether a 5% repayment supplement is due from HMRC pursuant to section 79 of VATA on the ground that HMRC

failed to pay promptly the VAT credit triggered by the invoice for the purchase of the Properties. The value of the supplement in dispute is £3,554,240.82.

47. Bollinway was granted permission to appeal by the Upper Tribunal by Judge Jonathan Richards (*as he then was)* on all grounds, formulated by the UT as follows:

> (1) The FTT erred in law in holding that Bollinway assigned its entitlement to its VAT credit or part thereof to TRUP;
>
> (2) The FTT erred in law in holding that a repayment supplement can become due under s.79 VATA only where HMRC make an actual payment to a taxpayer and/or in holding that the set-off against TRUP's liability was something other than actual payment;
>
> (3) The FTT erred in law (including in the sense set out in Edwards v Bairstow) in concluding that a period of 26 days should be left out of account for the purposes of s.79(4) VATA:
>
> > (a) by misconstruing the scope of HMRC's request for information set out in their emails of 23 November 2013 and subsequent communications;
> >
> > (b) in its findings as to the extent to which Bollinway answered HMRC's requests before 21 December 2018; and/or
> >
> > (c) in its conclusions as to the reasonableness of HMRC's requests for information.

48. In addition to seeking to uphold the reasoning of the FtT, HMRC have raised an alternative argument in their 'Rule 24' Response dated 6 July 2022. HMRC claim there was agreement between the parties that, if HMRC satisfied themselves that the sum of £71,170,729.68 was due to the Appellant as a VAT credit as claimed, that amount, less any relevant input tax credit to which TRUP was entitled, as claimed in its relevant VAT return, should not be paid by HMRC to the Appellant but should be set-off against TRUP's VAT liability to the Respondents, by way of credit to TRUP's VAT account with the Respondents. By reason of the Agreement the Appellant gave up any entitlement to payment of that amount of £71,084,816.43 to it by HMRC.

49. We are grateful to Counsel for their clear and helpful submissions, both in writing and at the hearing before us although we have not found it necessary to refer to each and every point they raised. Counsel addressed the grounds in the order formulated when permission to appeal was granted. It is however common ground between the parties that Bollinway must succeed on Ground 3 in order to succeed in the appeal before us. We propose therefore to address ground three first. We then consider the extent to which, if any, we should address grounds one and two and the alternative argument advanced by HMRC.

THE LEGISLATION

50. The relevant statutory provisions are set out in paragraphs [93] to [95] of the decision of the FtT. Section 79 VATA provides for a "repayment supplement" in the following circumstances:

> **"Section 79 VATA Repayment supplement in respect of certain delayed payments or refunds**
>
> (1) In any case where:
>
> > (a) a person is entitled to a VAT credit, or
> >
> > (b) a body which is registered and to which section 33 applies is entitled to a refund under that section, or

(c) a body which is registered and to which section 33A applies is entitled to a refund under that section, or

(d) the proprietor of an Academy who is registered is entitled to a refund under section 33B, or

(e) a charity which is registered is entitled to a refund under section 33C,

and the conditions mentioned in subsection (2) below are satisfied, the amount which, apart from this section, would be due by way of that payment or refund shall be increased by the addition of a supplement equal to 5 per cent of that amount or £50, whichever is the greater.

(2) The said conditions are:

(a) that the requisite return or claim is received by the Commissioners not later than the last day on which it is required to be furnished or made, and

(b) that a written instruction directing the making of the payment or refund is not issued by the Commissioners within the relevant period, and

(c) that the amount shown on that return or claim as due by way of payment or refund does not exceed the payment or refund which was in fact due by more than 5 per cent of that payment or refund or £250, whichever is the greater.

(2A) The relevant period in relation to a return or claim is the period of 30 days beginning with the later of:

(a) the day after the last day of the prescribed accounting period to which the return or claim relates, and

(b) the date of the receipt by the Commissioners of the return or claim.

(3) Regulations may provide that, in computing the period of 30 days referred to in subsection (2A) above, there shall be left out of account periods determined in accordance with the regulations and referable to:

(a) the raising and answering of any reasonable inquiry relating to the requisite return or claim,

(b) the correction by the Commissioners of any errors or omissions in that return or claim, and (c) in the case of a payment, the following matters, namely:

(i) any such continuing failure to submit returns as is referred to in section 25(5), and

(ii) compliance with any such condition as is referred to in paragraph 4(1) of Schedule 11.

(4) In determining for the purposes of regulations under subsection (3) above whether any period is referable to the raising and answering of such an inquiry as is mentioned in that subsection, there shall be taken to be so referable any period which:

(a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry, and

(b) ends with the date on which the Commissioners:

(i) satisfy themselves that they have received a complete answer to the inquiry, or

(ii) determine not to make the inquiry or, if they have made it, not to pursue it further,

but excluding so much of that period as may be prescribed; and it is immaterial whether any inquiry is in fact made or whether it is or might have been made of the person or body making the requisite return or claim or of an authorised person or of some other person…

…

(6) In this section "requisite return or claim" means:

(a) in relation to a payment, the return for the prescribed accounting period concerned which is required to be furnished in accordance with regulations under this Act, and

(b) in relation to a refund, the claim for that refund which is required to be made in accordance with the Commissioners' determination under section 33 or (as the case may be) the Commissioners' determination under, and the provisions of, section 33A, 33B or 33C."

51. The definition of "VAT credit" is found in section 25 VATA which at the relevant time provided as follows:

> "25 Payment by reference to accounting periods and credit for input tax against output tax
> (1) A taxable person shall:
>
> (a) in respect of supplies made by him; and
>
> (b) in respect of the acquisition by him from other member States of any goods, account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
> (3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit"

52. Insofar as relevant to the matters in dispute, Regulation 198 and 199 of the VAT Regulations 1995 ("Regulation 198 and 199") provided as follows:

> "198. **Computation of period**
> In computing the period of 30 days referred to in section 79(2)(b) of the Act, periods referable to the following matters shall be left out of account:
>
> (a) the raising and answering of any reasonable inquiry relating to the requisite return or claim…"
>
> 199 **Duration of period**
> For the purpose of determining the duration of the periods referred to in regulation 198, the following rules shall apply:
>
> (a) in the case of the period mentioned in regulation 198(a), it shall be taken to have begun on the date when the Commissioners first raised the inquiry and it shall be taken to have ended on the date when they received a complete answer to their inquiry…"

53. Adopting the legal framework, in summary, Bollinway claims that s79 VATA provides for a 'repayment supplement' if four conditions are met. Here:

i) Bollinway had an entitlement to a VAT credit as defined in s25(3) VATA (subs.(1)(a));

ii) The requisite return or claim was made in time (subs.(2)(a));

iii) The written instruction was not issued by HMRC within the relevant period (subs.(2)(b)). The "relevant period" is 30 days. In the present case, that period commenced when HMRC received the return (subs.(2A)(b)). However, in calculating the number of days, periods referable to raising and answering any reasonable inquiry relating to the relevant VAT return are left out of account. An inquiry is taken to have begun when first raised and ended when completely answered (reg.199 of the VAT Regulations 1995, SI 1995/2518 ("the VAT Regs")); and

iv) The amount shown on the return as due by way of payment or refund did not exceed the payment or refund which was in fact due by more than 5% of that payment or £250, whichever is greater (subs.(2)(c)).

GROUND THREE

54. At paragraphs [133] to [161], the FtT Judge addressed whether HMRC's written instruction on 20 December 2018 was issued within the "relevant period" required by section 79 VATA. The Judge recorded, at [133], that it is common ground that Bollinway's VAT return was received on 2 November 2018, the instruction for crediting TRUP's VAT account was issued on 20 December 2018 and there are 49 calendar days between the two dates.

55. At paragraph [135], the Judge said:

> "Bollinway accepts that the following enquiries were reasonable enquiries and, subject to what is said about the time of day at which the inquiry was raised on 14th December 2018 below, the time taken for those enquiries may be left out of account in determining whether the "relevant period" requirements have been met:
>
> (1) 23-26 November (3 days);
>
> (2) 14 December (1 day);"

56. The issue between the parties in the appeal before us concerns the FtT's findings and conclusions concerning the period between 27 November to 18 December 2018 (22 days). That turns on the inquiry made by HMRC on 23 November 2018 to which Bollinway responded on 26 November 2018.

57. The parties agree that the relevant issue before us is:

i) Whether the FtT erred in law in holding that HMRC's email of 23 November 2018 included a request for the TR1s; and

ii) If not, whether the FtT erred in law in holding that the request made was "reasonable" for the purpose of s.79 VATA.

58. The relevant exchange of emails between HMRC and MHA is summarised in paragraphs [25] and [26] of the decision of the FtT but, for completeness, it is useful for us to set out their contents. On 21 November 2018, Mr Chow of HMRC sent an email to MHA stating:

> "Toys R Us Properties' (VRN: 866955363) 08/18 and 09/18 returns have been selected for review.
>
> Before I am able to recommend repayment, I shall need to conduct a review of these returns. Would you mind providing me with the following please:
>
> - A schedule of sales and purchase invoices
> - A full set of backing documents
> - A narrative of anticipated trade for the next 2 periods, for both sales and purchases.
>
> Thank you in advance."

59. MHA responded on 21 November 2018 in the following terms:

> "I cannot comment directly on the 08/18 and 09/18 VAT returns for Toys R Us Properties Ltd (TRUP), as I only became involved in providing advice to TRUP and Bollinway Ltd in late September. I have forwarded the email to my client and will ask them to respond directly. The individuals at the client are covered by the existing email protocol.
>
> Are you responsible for reviewing the first VAT return for Bollinway Ltd?"

60. HMRC responded by email on 23 November 2023 in the following terms:

"I can confirm that I'll be reviewing the VAT return for Bollinway Ltd. Likewise, could you please provide me with:

- A schedule of sales and purchase invoices
- A full set of backing documents

Thank you."

61. As the FtT summarised at paragraph [26] of its decision, MHA replied on 26 November 2018, stating that:

"…There was a single transaction in the VAT return under review, being the purchase of a portfolio of commercial properties. I attach the sales invoice and schedule of properties.

Also attached is the agreements by which the properties were transferred. An option agreement was entered into on 12 August 2018, which was exercised on 17 September 2018 (exercise notice attached). As you will see from the agreements, the consideration was satisfied by the assumption by the purchaser of the seller's debt.

Please let me know if you need any further details…"

62. The FtT Judge rejected Bollinway's claim that, when MHA responded on 26 November 2018, the information provided satisfied the inquiry made by HMRC on 23 November 2018. She did not consider the documents provided were sufficient to provide a complete answer, finding that:

a) The Properties were not transferred by the Transaction Documents provided, which consisted of the Option Agreement and the undated Option Notice, but by the TR1s. The Option Agreement set out the expected form of the legal transfer via a TR5 but that form of document was not used for the transfers which took place; *(paragraph 147)*.

b) The key document which triggered the VAT point was the legal transfer, not the sales invoice because the VAT arose on the supply of goods, in this case the grant of a major interest in land (Schedule 4(4) VATA). MHA were aware that they needed to provide the documents by which the Properties were transferred; *(paragraphs 148 and 149)*

c) The inadequacies of the Transaction Documents in showing that the actual transfers took place must be seen in the following context: *(paragraph [150])*

(i) HMRC were addressing a very large transaction involving supplies of property for £355,853,648.39 giving rise to a large repayment claim of more than £71 million;

(ii) Bollinway was a new company with no VAT history;

(iii) The VAT return for TRUP showing its VAT liability had not been submitted and was not submitted until its due date of 10 December 2018;

(iv) A receiver had been appointed over TRUP's holding company and TRUP itself was a company with no value but an expected liability to HMRC of £71,170,729.68;

(v) The Transaction Documents were complex documents dealing with the refinancing. The option granted to Bollinway could only be exercised on the occurrence of trigger events and, even then, the transfer of the Properties was conditional on matters such as third-party consents. It was therefore unclear until the transfers were seen whether the conditions had been satisfied for any of the Properties and therefore whether any had been transferred; and

(vi) The TR1s provided on 18 December showed the transferee was Bollinway. No other document provided before then had shown that legal transfer to Bollinway had taken place.

(d) The Option Notice sent by MHA to HMRC on 26 November 2018 was undated. (paragraph [154])

63. The Judge said, at paragraph [156], that the obligation was on Bollinway and its advisors to provide the most relevant documents – the legal transfers of the Properties. She rejected the claim that a full set of backup documentation in an accounting context would not be expected to include the Land Registry transfer documents, stating that:

> "…this was not an accounting exercise, but conduct of what the parties have accepted was a reasonable inquiry into Bollinway's VAT return and verification of its claim for more than £71 million repayment in a context where the only supply was a transfer of land. The Transaction Documents did not show the actual transfer of the Properties which triggered the VAT point. Indeed, I would expect an adviser to realise that the key document was in fact the legal transfers. It was not reasonable to ask HMRC to carry out Land Registry searches to identify the change in ownership. It was incumbent on Bollinway to provide the complete answer; and this was particularly so in this case given that 26 Land Registry titles were transferred by the TR1s, with some of the Properties having more than one title.

64. Having considered the inquiry made by HMRC and the material provided by Bollinway in response, the Judge concluded at paragraph [158]:

> "I therefore find that the period from 23 November to 18 December – amounting to 26 days – should be excluded from the total of 49 days from 2 November until 20 December. That leaves 23 days and as a result I conclude that HMRC completed the written instruction directing the making of the payment within the relevant period of 30 days."

65. The Appellant claims that if (as Bollinway contended before the FtT) there was no request for the TR1s on 23 November 2018 or (alternatively) the request was made unreasonably, then it is clear that HMRC did not make instruction for payment within the "relevant period" and the repayment supplement is due to Bollinway, subject to the other grounds of appeal.

66. Mr Ripley submits that the repayment supplement provisions can only operate properly if a "reasonable inquiry" for the purpose of the statute is confined to: (i) a matter relevant to the VAT return in question, and (ii) a sufficiently clear question that a taxpayer ought to have been aware that it was still outstanding. He submits that, ultimately, the statute requires a division between those periods where a reasonable inquiry is outstanding for which the taxpayer is responsible and other periods for which HMRC are responsible. He submits that it was wholly artificial for the FtT to hold Bollinway responsible for the delay between 27 November 2018 and 18 December 2018.

67. Mr Ripley referred us to the decision of Auld J in *Customs and Excise Commissioners v L Rowland & Co (Retail) Ltd* [1992] STC 647, in which a taxpayer's returns were chosen for verification. The VAT officer was satisfied that the claim was valid and repayment was authorised. However, the time between receipt of the claim and authorisation of repayment exceeded the 30-day time limit set out in the relevant regulations by which repayments must be made if repayment supplement is not to be incurred. Auld J said that if "reasonable inquiry" were subject to the interpretation favoured by the Commissioners to include the time taken for all internal investigations and administrative procedures, they would be under no pressure to complete an enquiry within a reasonable time. He said, at [655]:

> "In my judgment, the protection to the taxpayer, such as it is, and the spur to efficiency on the part of the commissioners are not to be found in giving the word 'inquiry' in this context the broad meaning contended for by the commissioners and then seeking to qualify it in time, as well as in nature, by the word 'reasonable'. It is to be found in the ordinary and natural meaning of the word 'inquiry' in its context, namely 'periods ... referable to ... the raising and answering of any reasonable inquiry relating to the requisite return or claim' (see s 20(3)(a) and reg 41(a)). The inquiry contemplated by these words is not a general one in the sense of a general investigation. It is an inquiry relating to a particular return in respect of which a supplement may be payable if the claim in it for repayment is not dealt with promptly. The combination of the words 'the raising and answering of any ... inquiry' also indicates that the word 'inquiry' is used in the sense of a question or questions put to the taxpayer for him to answer, not an inquiry in the sense of an investigation concluded by a report. The word 'raising' itself in this context is clearly used in its ordinary and natural meaning of putting an inquiry or question to, or making an inquiry of, the taxpayer about his claim for repayment. As Mr Heim, the tribunal chairman in the Five Oaks Properties case, observed (at 324), 'it implies the act of enquiring'. It certainly does not fit readily into the notion of a decision by a body remote from the taxpayer, like the Value Added Tax Central Unit, to instigate an inquiry in the sense of an investigation, as the commissioners contend. If there were any room for doubt about that on the construction of s 20(3) and reg 4(a), it would, in my judgment, be removed by the concluding words of reg 5(a) that the period for which the 'clock is stopped' ends when the commissioners 'received a complete answer to their inquiry'. This must mean when the commissioners have received a complete answer to the inquiry that they had caused to be made to the taxpayer about the return in question.
>
> On such an interpretation there is no need to seek to provide what would be at best only notional protection to the taxpayer against inefficiency and delay by the commissioners by treating the word 'reasonable' as applicable to the time taken by the commissioners as well as to the nature of the inquiry. It is for the taxpayer to justify, or cause to be justified, his claim for repayment once the commissioners have raised an inquiry with him about it. If he answers it completely and promptly, or causes or enables such an answer, he will not lose his entitlement to a supplement. If he delays or has difficulty in providing a complete answer promptly, he will risk losing his entitlement to a supplement. The matter is in his hands and the period for which the 'clock is stopped' while he deals with it is readily identifiable. In this respect I gratefully adopt the reasoning of Mr Hilton, the tribunal chairman in this case, that of Mr Heim, the tribunal chairman in the Five Oaks Properties case, and also the helpful commentary in Sweet and Maxwell's Encyclopaedia of Value Added Tax."

68. For the purposes of calculating the 'relevant period of 30 days', section 3 of VATA provides that there shall be left out of account periods determined in accordance with regulations and referable to "the raising and answering of reasonable inquiry relating to the requisite claim". Although the inquiry contemplated cannot simply be a general one in the sense of a general investigation, nothing said by Auld J in *L Rowland & Co (Retail) Ltd* suggests that HMRC was under some obligation to identify any form of specific documents. It is an inquiry relating to a particular return in respect of which a supplement may be payable if the claim for repayment is not dealt with promptly. The focus is on the steps taken by the parties in raising and answering any reasonable inquiry that HMRC had caused to be made to the taxpayer about the return in question, and the date upon which HMRC received a complete answer to the inquiry.

69. In their email of 23 November 2018, HMRC had confirmed that the VAT return for Bollinway was being reviewed and asked for a schedule of sales and purchase invoices and a full set of backing documents. That was not on any view some form of general investigation

being undertaken by HMRC but a specific inquiry into the VAT return by which Bollinway made a repayment claim in excess of £71 million. We accept, as Mr Ripley submits, that there was no express request for TR1s, but we do not accept the request for a "full set of backing documents" is properly to be read as those documents which simply support the schedule of sales and purchases. The request for 'a full set of backing documents' must be considered in context and was required to enable HMRC to establish whether a supply of goods or services has been made, the value of the supply and the amount of any VAT liability. In the context of a grant, assignment or surrender of a major interest in land which amounts to a supply of goods, such a request encompasses the transfer documents themselves for the purchase of land or property.

70. Indeed, the information before HMRC regarding the repayment claim was limited. As the FtT Judge noted, at [147], Bollinway claimed the 'Transaction Documents' provided in response constituted the agreements by which the Properties were transferred. The Judge noted the Properties were not in fact transferred by those documents which consisted of an Option Agreement *(which set out the expected form of the legal transfer to be via a TR5)*, and an undated Option Notice. It was, as the FtT Judge said at [151], particularly incumbent upon HMRC to carry out full inquiries before approving the repayment claim. In our judgment, in carrying out the inquiry, HMRC were not restricted to requiring a VAT invoice, reading the date on it, and confirming that that date was within the prescribed accounting period covered by the Bollinway Return. They were reasonably entitled to make inquiries to ascertain if the relevant transfers of the Properties, the 'chargeable event', in this case the supply of goods, had in fact taken place.

71. Mr Ripley submits that the FtT wrongly considered the TR1s highly relevant to whether Bollinway was entitled to a VAT credit. He submits that was based on a misconception that *"the key document which triggered the VAT point was the legal transfer, not the sales invoice"*. Mr Ripley submits that is incorrect because, contrary to what the Judge said, the tax point was triggered by the sales invoice and, even if there had been no legal transfer, it would not follow that there had been no supply for VAT purposes. Mr Ripley submits that the date of the obligation to pay output tax and the right to recover input tax are determined by the time of supply rules in s.6 VATA 1994.

72. We accept that the 'time of supply' provisions set out in Section 6 of VATA comprise a hierarchy of rules for determining the time when a supply of goods or services is treated as made for the purposes of VAT. The term "tax point" is commonly used to refer to the point in time when a VAT liability arises. Except where an 'actual tax point' arises before the 'basic tax point', or the supply is one to which regulations made under section 6(14) apply, the 'default position' set out in s.6(2) is that a supply of goods is treated as made:

> (a) if the goods are to be removed, at the time of the removal;
>
> (b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;
>
> (c) if the goods (being sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it becomes certain that the supply has taken place or, if sooner, 12 months after the removal.

73. Mr Mantle accepts that the 'tax point' here for VAT purposes was when the relevant invoice was issued by TRUP but submits that the Judge was clearly concerned in her decision with the 'chargeable event' as referred to in Article 62(1) of the Principle VAT Directive (2006/112/EEC) *(i.e. the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled)* rather than the time of supply. Article 167 provides

that a right of deduction shall arise at the time the deductible tax becomes chargeable. The FtT Judge noted, at [148], that there was the grant of a major interest in land in this case. Schedule 4(4) VATA provides that such grant is a supply of goods. Plainly, land comprises 'goods' that are not to be removed and so the supply of goods is treated as made when the land is made available for the customer. In this context, the basic tax point is therefore normally the date of completion. Mr Ripley accepts that TR1s can in some cases be relevant. We are in no doubt that the TR1s were plainly relevant here and capable of assisting not only in the determination of the point in time when any VAT liability had arisen, including whether the 'actual tax point' arose before the 'basic tax point' but, more fundamentally still, whether the corresponding transactions had actually been carried out such that the VAT credit claimed by Bollinway was, in fact, due.

74. In this regard, we accept the submission made by Mr Mantle that, reading the decision as a whole, including paragraphs [148] and [157], in considering what information HMRC had requested, and the reasonableness of that request, a primary focus of the FtT Judge was whether the supplies accounted for as inputs received by Bollinway in its VAT return had actually taken place. As Mr Mantle submits, the TR1s were the (definitive) evidence that the supplies which Bollinway itself described to HMRC as having received, had actually occurred. They were the legal transfers that in fact transferred the relevant major interests in the Properties from TRUP to Bollinway.

75. As Auld J said in *L Rowland & Co (Retail) Ltd*, and the FtT Judge said at paragraph [156] of her decision, it is for the taxpayer to justify, or cause to be justified, his claim for repayment once the Commissioners have raised an inquiry with him about it. We accept the submission made by Mr Ripley that, as a matter of law, the repayment supplement is due wherever the statutory conditions are satisfied. However, the question whether those conditions are satisfied in computing the periods to be left out of account when determining the relevant period of 30 days will inevitably involve, as here, a fact sensitive analysis as to the raising and answering of any reasonable inquiry.

76. The Judge correctly set out the relevant statutory provisions and the law relating to repayment supplements. Bollinway's appeal seeks to characterise the outcome of the fact-sensitive evaluative exercise undertaken by the FtT Judge as an error of law. However, as the authorities show, the scope for such an assertion is narrowly circumscribed. Recently, in *Instagram, LLC v Meta 404 Limited* [2023] EWHC 436 (Ch), Richards J summarised the approach to be taken to appeals against factual and evaluative findings. He said:

> "23. Appellate courts have repeatedly, and recently, been warned that they should not lightly interfere with factual findings of a first-instance tribunal. The principle is well known and it is not necessary to set out extensive quotes from authority to make it good. The following extract from Lewison LJ's judgment in *Volpi v Volpi [2022] EWCA Civ 464* explains the principle with characteristic clarity:
>
> > The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
> >
> > i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
> >
> > ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

77. It is clear in our judgment that the FtT was entitled to conclude that the request made by HMRC was for the TR1s, that such request was "reasonable" for the purpose of s.79 VAT and that the relevant period ended on the date the Commissioners satisfied themselves that they had received a complete answer to the inquiry.

78. It follows that, in our judgment, the FtT Judge was entitled to find that the period from 23 November to 18 December – amounting to 26 days – should be excluded from the total of 49 days from 2 November until 20 December, for the reasons she set out.

79. The parties agree that in order to succeed in the appeal before us, Bollinway must succeed on Ground 3 of the grounds upon which permission was granted. It has not done so. Grounds 1 and 2 and the alternative argument raised by HMRC in the Rule 24 response are therefore academic and it is not necessary for us to address them.

DISPOSITION

80. For the reasons given above, this appeal is dismissed.

COSTS

81. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by Rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE RICHARD SMITH
JUDGE VINESH MANDALIA

V. Mandalia

Release date: 12 December 2023