TC01696

Appeal number TC/2011/00393

"Fleming" claim for VAT Refund – golf professional fees – claim rejected on basis it did not satisfy Regulation 37 – question concerning what information provided – long delays in requesting information – Appeal allowed.

FIRST-TIER TRIBUNAL

TAX

GRAHAM LAING **Appellant**

- and -

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

TRIBUNAL: Judith Powell
Mrs R Watts Davies F.C.I.P.D. M.I.H

Sitting in public at 45 Bedford Square, London WC1 on 7 December 2011

The Appellant in person

Mr Philip Rowe HMRC Officer, for the Respondents

DECISION

The Appeal

1. This is an appeal against a decision by HMRC to reject a claim made by the Appellant for a refund of VAT under section 80 of the Value Added Tax Act 1984 (VATA). The claim was rejected on the basis that the original letter putting forward a claim (which was written before the time limit for making this particular type of claim had expired) was not sufficient to satisfy the provisions of regulation 37 VAT Regulations 1995 which stipulates the form which a claim must take and the information required to satisfy regulation 37 was not provided until after the time limit had expired.

2. The Appellant appeared in person and gave oral evidence and Mr Rowe represented the Respondents. Both of them were most helpful and forthcoming and this was of great assistance to us in hearing the Appeal.

The law

3. The law is straightforward. A claim for relief under section 80 VATA 1984 must be in accordance with the requirements of regulation 37 VAT Regulations 1995 which states that it shall be (i) in writing; (ii) state the amount of the claim and (iii) state the method by which that amount was calculated.

The Facts

4. The Appellant first registered for VAT purposes in 1979. His main business was as a golf equipment retailer but he gave some private golf lessons as well. He charged a "round figure" for his lessons and this amount included any associated VAT. His accountant calculated his total VAT on the basis of his turnover and he accounted for the amount due at the end of each quarter.

5. In 2000 he deregistered for VAT because his role with the golf club changed. Another individual took over his business for the next four or five years but in or around 2007 the Appellant resumed running the business and re registered for VAT. Of course he had a new number when he re registered.

6. In February 2009 the Appellant received a letter from an organisation called VAT Refunds. This letter alerted the Appellant to the possibility that he might have overpaid VAT on the fees for golf lessons and explained there was opportunity available until 31 March of that year to claim a refund. This claim is known by the Respondents as a Fleming claim because the opportunity arises as a result of a decision bearing that name. The Appellant contacted VAT Refunds and spoke on the telephone at length to the author of the letter, a Mr O'Connor. Having established that he might qualify for a refund the Appellant contacted someone he knew well and who had engaged Mr O'Connor in the past. He received a glowing recommendation for what Mr O'Connor had achieved. The Appellant's turnover was fairly modest and he did not want to incur substantial professional fees and so he was attracted by the terms

on which VAT Refunds acted which was to charge a success only fee based on the amount of VAT recovered.

7. By the time he decided to proceed, the 31 March 2009 deadline for making claims was fast approaching. He signed an engagement letter on 9 March. He was asked to assemble the information to make the claim and as he did not hold his old records he visited his accountant who did have records going back to the time in question and in particular had copies of accounts which the Appellant picked up and gave to Mr O'Connor prior to the deadline. The accounts for 1988 to 1990 showed the fees for the golf lessons as a separate item but accounts for the other years only showed his turnover as a single figure. The Appellant also gave Mr O'Connor other details as requested including the VAT registration number.

8. Mr O'Connor wrote to HM Revenue and Customs on 28 March 2009. This letter advised that the Appellant had overpaid VAT in respect of golf tuition fees. It quantified the amount said to be overpaid. It went on to explain the Appellant had accounted for VAT in error out of his profit margin by accounting for 7/47ths of the tuition fees as output tax whereas the tuition service was exempt from VAT in accordance with Value Added tax Act 1994 Schedule 9 Group 6 item 2. The letter confirmed that the Appellant was fully taxable, had not charged VAT to his clients and had not issued VAT invoices so that a successful claim would not result in unjust enrichment. The letter referred to a schedule on which the VAT was calculated.

9. The respondents were overwhelmed with similar claims at this time. Mr O'Connor had sent the March letter to the Leeds office but a Fleming claims team based in Belfast was set up to deal with these claims and all the papers were forwarded to that office. The first communication from HMRC to Mr O'Connor was by letter of November 30 2009 from the Belfast office written by Mrs Caron Davies. This letter asked for further information to support the claim - including evidence of the Appellant being VAT registered throughout the period in question and asking for his full trading name and address as well as Form 64-8 containing authority for Mr O'Connor to act for the Appellant - Mrs Davies said there was no schedule showing the calculation attached to the letter of 28 March. Mrs Davies asked for a response by 23 December 2009 and said that if it was not received by then she would consider "rejecting the claim". The Appellant was not aware of this letter until recently. Upon hearing of it he was surprised to learn what information was apparently missing from the March letter since he had supplied all the information to Mr O'Connor in March 2009 before Mr O'Connor first wrote on his behalf to HMRC.

10. Mr O'Connor telephoned Mrs Davies on two occasions on 14 and 21 January and promised to send information to her on a piece meal basis. Notwithstanding these assurances he did not send any further information to her and on 24 February 2010 Mr Carlisle (who was also part of the Fleming claims team at the Belfast office) wrote to Mr O'Connor and explained that Mrs Davies had left the team and he had taken over the case. Mr Carlisle gave a further deadline of 14 days from the date of his letter for the information to be sent and said that if it was not sent "I am rejecting the claim". On 1 March 2010 (and therefore before the 14 days had expired) Mr O'Connor wrote to Mr Carlisle. He did not send the original Schedule that was apparently missing

from his original letter but enclosed what he described as a revised schedule and also the accounts for 1988-97. Apart from not enclosing a copy of the original schedule he did provide all the missing information and also revised upwards the amount claimed by some £900 based mainly on revised estimates of the amounts of tuition fees for years where they were not itemised separately; he revised downwards the fees for earlier years but revised upwards the amounts for later years giving a net additional amount of claim.

11. On 21 May 2010 Mr Carlisle wrote to Mr O'Connor rejecting the claim. This was on the basis that as there was no computation of the claim in the first letter of 28 March 2009 as required by Regulation 37 of the VAT Regulations 1995 that letter was not a valid claim. The computation was not received until the letter of 1 March and so the claim was not complete until then which was out of time. It seems that Mr Carlisle had sought internal advice about this case. We were shown a memo written by Mr Carlisle to the central Policy department asking for their advice and describing the missing information and that he proposed dealing with the first letter not as a claim but as an intention to make a claim so that the claim was not finalised until the missing information was supplied which was then too late for the claim to succeed. There is no evidence of a written response from the Policy department but Mr Rowe said there was some indication on the file that they agreed with this approach or at least did not dissent from it.

The Submissions

12. The Appellant was not aware of any difficulty with the claim until he was sent a copy of Mr Carlisle's letter of 21 May with the formal rejection. After he received a copy of the letter rejecting the claim he spoke to Mr O'Connor who apparently reassured him that all would be well and there was nothing unusual in this initial rejection. However since then he has been unable to make further contact with Mr O'Connor despite telephoning him many times and feels let down by him. He agreed that there must be some doubt whether the schedule was enclosed with the first letter but is surprised if it was not given that Mr O'Connor had the information in time and had obviously calculated the amount reclaimed on a basis that strongly implied he had the relevant information in front of him.

13. Mr Rowe agreed that a schedule could well have gone astray in transit between Leeds and Belfast. He expressed surprise that the schedule was not supplied when requested and that it has in fact never been sent to HMRC. We were shown a copy of the email between Mr Carlisle and his technical adviser which showed that similar information had apparently been missing from other cases involving claims by Mr O'Connor. Mr Rowe agreed that, prior to the letter from Mr Carlisle rejecting the claim, there had not been any indication from either Mrs Davies or Mr Carlisle that the initial letter was not regarded as a claim but merely as an intention to make a claim. He agreed that the information supplied by Mr O'Connor within the extended time scale offered to him first by Mrs Davies and then Mr Carlisle was all that they had requested apart from a copy of the original schedule and Mr Carlisle did not make a further request for that before rejecting the claim nor did he indicate that this was the feature which caused the claim to fail.

Our decision

14. Neither party was faultless in dealing with or progressing this claim. HMRC was overwhelmed with similar claims but did not comment on the original letter for some months. Mr O'Connor seems to have let the Appellant down in terms of keeping him informed and then assisting him with dealing with HMRC. He should have sent the original schedule when requested and we must infer that he had either never prepared a schedule or had failed to keep a copy. HMRC did not indicate that the claim might fail or be treated as an intention to make a claim rather than as a claim which needed further discussion and this approach seems to have been adopted only when Mr Carlisle assembled a group of claims all submitted by Mr O'Connor and concluded that the information had never been supplied. If this was his approach he should have made that clear when he rejected the claim and allowed Mr O'Connor the opportunity to send him a copy of the original schedule. However even if the original letter had not enclosed a copy of the schedule we find that the letter itself contained sufficient information to satisfy the requirements of regulation 37. It was in writing, it did quantify the claim and it did state the method by which it was calculated. Plainly, further information was required and there might have been discussion about the method used to quantify the claim but such difficulties might arise even where detailed computations are provided and this was not a difficult claim to make involving as it did the recovery of a relatively small amount of VAT where VAT exclusive fees had been charged and accounted for out of turnover. Certainly the VAT registration number was missing and the period for which the claim was made was not described but this does not seem to offend the requirements of regulation 37. We are sure that the claim will require further discussion in light of the further information provided in March 2010 but Mr Rowe agreed that any claim was likely to require some discussion in all but the most straightforward of cases.

15. We find that the claim was made in time even if the schedule was not included as stated. We make no finding whether the schedule was included although we suspect it was omitted but have reached our conclusion on the basis that the letter on its own was sufficient to satisfy regulation 37. Accordingly we allow the Appeal.

16. 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.

TRIBUNAL JUDGE
RELEASE DATE: 22 December 2011