[2016] UKFTT 180 (TC)

TC04966

Appeal number: TC/15/03188

Value Added Tax - Repayment Supplement - whether period exceeded or covered by period for raising and answering of reasonable enquiries - meaning of inquiry - determining period of inquiry - whether supplement due – yes - Value Added Tax Act Section 79. Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHAUN DAVID CORRIGAN **Appellant**

- and -

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

TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS
MEMBER IAN SHEARER

Sitting in public at George House, 126 George Street, Edinburgh on Tuesday, 23 February 2016

Charles Rumbles, for the Appellant

Philip MacLean, Solicitor, Office of the Advocate General for Scotland, for the Respondents

DECISION

1. Shaun David Corrigan ("SC") appealed against a decision by HM Revenue and Customs ("HMRC") dated 16 September 2014 to uphold the decision dated 27 June 2014 refusing to pay a VAT repayment supplement under section 73(2) of the Value Added Tax Act 1994 ("VATA") in respect of SC's VAT credit claim of £24,522.74 for the VAT period 05/13.

2. A repayment supplement is a form of compensation paid in certain circumstances when HMRC do not authorise payment of a legitimate claim within 30 days of the receipt of a VAT return. The 30 day repayment supplement clock starts on the date of the receipt by HMRC of the return, as long as this is after the last day of the accounting period to which the return relates, and ends when a written instruction directing the making of the payment or refund is issued by HMRC. In computing the period of 30 days, periods may be left out of account to allow for the raising and answering of reasonable inquiries relating to the requisite return or claim.

3. The issue in the appeal is the extent to which the time taken for HMRC's enquiries can be left out of account in determining whether the period for making the payment exceeded 30 days and, in particular, when the inquiry window started, which depends on facts, disputed between the parties.

Preliminary Issue

4. HMRC put forward a submission that paragraph 32 of SC's Skeleton Argument, which stated "the appellant (SC) further contends that it was not 'reasonable' for the respondents to make a five hour return journey to obtain information which could have been requested and communicated electronically by the appellant", constituted a new ground of appeal which should be refused.

5. HMRC say this is an attack on reasonableness and challenges the concept of HMRC making a visit rather than the means of it; is an afterthought supported by no evidence and no witnesses; is prejudicial to HMRC and was only intimated to HMRC some 14 days prior to the hearing but after the deadline for witness evidence had passed.

6. SC say they are not amending the grounds of the appeal and that timing and reasonableness are central to their case. They refer to paragraph 22 of their Skeleton Argument which states "The Respondent contends that both the '10 day visit period' and '4 day period' as determined are periods that are permissible in determining '*reasonable*' as defined by Section 79 and Regulation 198". SC say that each part of the language of regulation 198(a) must be considered individually; that is to say, whether an inquiry was raised, whether an answer was received and whether the inquiries were reasonable.

7. In doing so, SC say that HMRC have the onus of responsibility; that all the tests are outwith the control of SC; that they are not suggesting that there was no justification for HMRC to have made a visit at all but instead question whether it was reasonable for HMRC to make that journey without making any preliminary questions and without making any enquiries, and then leaving out of account time between arranging the visit, and the visit itself.

8. HMRC referred the tribunal to *North Weald Golf Club v HMRC* [TC/2009/11819] a decision which concerned an application for permission to amend the grounds of appeal and referred to the overriding objectives set out in Rule 2 of the Tribunal Procedure (First-tier Tribunals) (Tax Chamber) Rules 2009, to deal with cases fairly and justly by conducting a balancing exercise, weighing the interests of justice and questions of prejudice to either or both of the parties.

9. The tribunal considered that paragraph 32, when read with paragraph 22 of SC's Skeleton Argument, did not challenge the right of HMRC to make a visit, did not challenge the concept of a visit and that the issue of reasonableness was integral to the issue before the tribunal. Accordingly, to that extent, paragraph 32 did not constitute a new ground of appeal and it was in any event in the interests of justice for the issue to be considered during the hearing.

Legislation

10. Appendix 1

Authorities

11. Appendix 2

The Facts

12. From the evidence before the tribunal, the following facts were found:-

13. SC is a sole trader, trading as Shaun Corrigan Joiners, primarily as a joiner but also involved in the construction of "new build" homes, and is based in Ardgour near to, but some distance from, Fort William, in the Scottish Highlands.

14. Evidence was given to the tribunal by Philip Hedley Holliday, a VAT Assurance Officer of HMRC, based in Inverness and by Alan Allport of HMRC who, since mid-2012, has been an Officer on the Repayment Supplement Team based in Wolverhampton. Both witnesses were credible and gave full explanations of the electronic diary records systems, and acronyms, utilised by HMRC.

15. SC submitted quarterly VAT returns and, consequently, submitted a VAT return in respect of the period 1 March 2013 to 31 May 2013 (05/13). This was received by HMRC on 30 June 2013 and claimed a credit of £26,016.96.

16. It was explained to the tribunal by Messrs Holliday and Allport that within HMRC is a Repayment Supplement Team of which Mr Allport was a member. A

system of automated credibility checks is applied, by computer, to all repayment returns and those that the computer "fails" are investigated further to ascertain whether or not all the conditions contained within section 79 VATA have been met to deduce if, in fact, the repayment supplement is applicable.

17. Mr Allport was allocated a letter dated 16 April 2014 from SC's representative requesting a repayment supplement in relation to the 05/13 VAT return. This return had been received by HMRC at Southend-on-Sea on 30 June 2013. As this return failed the credibility checks on 1 July 2013, a pre-repayment credibility query, known as a D1610 report, was generated also on 1 July 2013. This was forwarded to HMRC's Credibility Branch in Liverpool for checking on 2 July 2013 but could not be resolved, based on the information available to them, and so the D1610 report was referred to a local compliance team on 5 July 2013, in Dundee, for further verification.

18. Extracts from HMRC's electronic file covering entries on 8 February 2013, 11 July 2013 and 12 July 2013, submitted on the day of the hearing by HMRC, and accepted by SC's representative and the tribunal, showed that, in respect of a prior repayment supplement claim for the quarter 11/12, Paul Minns a Higher Officer of HMRC had, on 8 February 2013, made a note to a colleague allowing a repayment but making the comments that SC's main business activity was a joiner/builder who was currently working on two "new builds". The entry stated that SC had paid standard rate VAT in the past but had in the last three returns started having zero rated income. The entry stated that invoices and a detailed report supported this but that at the next Urgent Credibility Query (UCRE), a visit should be organised to "check liabilities, white goods etc." It was explained that the next UCRE would take place when a claim next failed the automated credibility or computer check. It was further explained that a repayment had to be authorised by two officers of HMRC, in this case Margaret Laurenson and Paul Minns.

19. The electronic file entry for 11 July 2013 showed a note completed by Alexia Lloyd, an officer of HMRC, which stated "PAUL - as per your note of previous UCRE, selected for visit. Full CV requested with checks made on liabilities. No delay no susp periods". Mr Allport understood that Alexia Lloyd was based in HMRC's Dundee office and explained the terms "no delay" and "no susp periods" as meaning there was no departmental delay and that there were no suspended periods.

20. The electronic file entry for 12 July 2013 showed an entry written by James Parkin whom, the entry stated, had quickly realised that it would be proper, and more appropriate, to pass this to HMRC's Inverness office as the postcode in question was PH33. It was explained that HMRC allocated tasks to various offices based on postcodes within the United Kingdom.

21. The matter then passed to the visits booker, Rachel Brown, based in HMRC's office in Glasgow, or that at least is where she corresponded from, and who it was claimed telephoned SC on 16 July 2013 and on the same day sent a letter. This letter headed up "Check of VAT records - details of visit" referred to the telephone conversation earlier that day and stated, as agreed, that an appointment had been made

for one of HMRC's officers to visit SC and showed the details of the date, time and place of the visit. The letter said "the purpose of the visit is to check your repayment return for the period of 5/13 and to examine the records that relate to this return. If we need to look at records for any other periods, we will let you know……. I have enclosed a list of the records that the visiting officer will need to see. Please make sure that these are available for the visit." No list of the records the visiting officer would need to see was submitted to the tribunal and it was unclear from the evidence that there was any such list in this particular case.

22. The 16 July 2013 letter continued with a heading entitled "About the visit" and said "At the start of the visit, we will need to talk to you so that we understand how your business works and how your records and accounts are kept. We may also want to look around your business premises. We will then check some of the VAT records and may need to speak to the person responsible for them, if that is not you. At the end of the visit, we will discuss any findings with you and answer any questions you have." The letter continued "I enclose fact sheets CC/FS1a *General Information about compliance checks* and CC/FS3 *Visits – by agreement or with advance notice…..*".

23. On 17 July 2013 Mr Holliday checked his in-tray on the electronic folder at which time the details of the agreed visit came to his attention and booked an office pool car. On 29 July 2013 he carried out the necessary preparation work for the visit which involved an examination of the electronic folder to check previous visits and notes and accessed the Vision System which shows all taxpayers VAT returns. He also made use of a return analysis tool which provides an Excel spreadsheet which he took to the visit and made a note of the questions he wished to ask in his notebook.

24. On arrival at SC's premises, when parking his car, Mr Holliday saw an excavator which was an important part of the physical evidence he wished to obtain during his visit. The inspection concentrated on the VAT return and the purchase invoices but he also looked at the sales transactions, so that output tax could be correctly considered and assessed, although these were fewer in number than purchases. He said that in similar cases, it was generally important to see physical evidence of major purchases, particularly large items. If such items of plant and machinery were not on site at the time of the visit, assurance officers might possibly still insist on seeing them. Making inquiries by telephone would not give comparable physical evidence.

25. Mr Holliday was satisfied that the bulk of the claim could be made but, by subsequent letter dated 5 August 2013, prepared on 2 August 2013, he wrote to SC advising him that as a result of the checks HMRC had made, they believed there were inaccuracies in the return which meant that the amount of VAT claim for the period 1 March 2013 to 31 May 2013 was incorrect. The letter stated that the reasons for this had been explained in more detail in Mr Holliday's email dated 1 August 2013 which, in evidence, were given as relating to kitchen appliances and a carpet supplied to some of SC's customers. Mr Holliday explained that his opinion at that time was that the input tax on these items was blocked by Treasury Order. The letter adjusted the amount of net VAT from the declared amount of £26,016.96 to £24,522.74 and stated

"as a result of our check you are entitled to a VAT credit of £24,522.74 for this period. We will credit this amount to your account".

26. On 2 August Mr Holliday also passed the claim, the D1610 report, through to his manager, Moira Maciver, to authorise the release of the payment, which she did on 5 August 2013. On 7 August 2013, officer Carol Potts in the Credibility Team, arranged for the necessary documentation forms to be input and the repayment of £24,522.74 was released to SC by payable order on 8 August 2013.

27. Correspondence then ensued from SC's accountant and on 14 November 2013, Mr Holliday arranged for the amount of the input tax originally disallowed of £1,494.22 to be reinstated. On 16 April 2014, the accountant wrote to the Respondents claiming Repayment Supplement for the full amount of the repayment.

28. On 27 June 2014, Mr Allport wrote to SC advising that the first part payment of £24,522.74 in relation to 05/13 did not qualify for the Repayment Supplement in accordance with Section 79 VATA. The letter stated "Repayment Supplement is a penalty levied against the Department for failing to reach a predetermined measure of efficiency ie not authorising a valid repayment return within 30 days (net) from the original date of receipt by the Department, subject to certain conditions, Section 79 of the VAT Act 1994 refers. Should any of these conditions not be met then the Repayment Supplement is not applicable".

29. The letter 27 June 2014 set out aspects of the legislation and stated "the total time taken to authorise the above return first part payment of £24,522.74 from the date of receipt of 30/06/13, to the date of authorisation by the commissioners of 08/08/13, was 40 days. The time that can be left out of account begins on the date that you were initially contacted regarding the inquiry 16/07/13, to the date that we were satisfied that the claim could be authorised, 02/08/13. This equates to 18 days. Therefore the net amount that this VAT claim was withheld was 22 days; hence repayment supplement is not applicable in this instance".

30. In relation to the second part payment of £1,494.22 for 05/13, the 27 June 2014 letter stated "having considered the sequence of events and the time that has elapsed from the date of receipt to the date of authorisation, in accordance with the legislation governing Repayment Supplement, Section 79 VAT Act 1994, I can inform you that in these specific circumstances there was a delay in the authorisation of the VAT return for the period ending 05/13 second part payment and, as a result, Repayment Supplement is due". The letter stated that "the part payment of £74.71 will be made shortly" and stated that "it would appear on this occasion the processing of your VAT return has fallen short of our usually high standards and that has resulted in the supplement being due".

31. SC's representative replied to this letter on 24 July 2014 stating, amongst other matters, that "Mr Holliday could not accommodate a visit date any earlier than 30 July 2014 (sic – the tribunal considered this to be a typographical error for 2013) (14 days after the telephone call) despite my client being available at an earlier date to deal with the inquiry. Mr Holliday's examination centred exclusively on the alleged

non-deductible items. Those items were ultimately the subject of the delayed second payment. Mr Holliday accepted in writing that he was wrong to delay any part of the 05/13 VAT return claim", which was a legitimate repayment claim. The letter stated that Mr Holliday had incorrectly assumed that SC was a housing developer, selling on dwellings, as opposed to a business constructing relevant dwellings to clients' plans.

32. The letter continued "I do not consider the delay between Mr Holliday contacting my client to make a visit appointment and the date of that appointment as an acceptable period to be left out of account. Mr Holliday's motivation in arranging the visit was to determine the accuracy of one return for the period 05/13. The records of the business were available to Mr Holliday at any earlier date. The 30 July 2013 was the earliest date Mr Holliday could make the appointment to examine the business records".

33. David Milligan of HMRC, who shares an office with Mr Allport, replied to the letter of 24 July 2014 on 16 September 2014, carrying out a review reiterating HMRC's view that the time taken was between 30 June 2013 and 8 August 2013 which was 40 days and that the time left out of account began on 16 July 2013 to the date the claim could be authorised on 2 August 2013, which equated to 18 days. As the visit date of 30 July 2013 was the date suggested by HMRC and not necessarily SC's preferred date, Mr Milligan applied what he said was "internal guidance" to make a four day allowance with, it was stated, "the result that the net amount that this VAT claim was withheld was 26 days, hence a repayment supplement is still not applicable".

34. Mr Holliday gave evidence that he did not know why the 30 July 2013 date had been chosen but he thought he might have been the only person available and that that date was the next available on his work calendar which would have been reviewed by Rachel Brown. He confirmed that once his visit was booked by Rachel Brown, that meant he had to undertake the visit. In answer to a question from the tribunal, he said that in such cases, he would not usually ask the trader specific questions prior to a visit, nor did he in this case. He was not aware of any other specific questions about the 05/13 return being put to SC by the Respondents between 30 June 2013 and the day of his visit. Mr Holliday confirmed that he was satisfied that he had all the answers to his questions and explanations he required on 30 July 2013 and that, in his experience, a letter booking an appointment usually had an attached list.

35. Mr Allport gave evidence that the claim was acceptable but had failed because of the net delay; confirmed that, based on the 11/12 return and the notes within the HMRC electronic system, a visit would take place as soon as the next repayment supplement credibility computer check failed; and that he considered the inquiry began when the visit booker contacted the taxpayer, in this case on 16 July 2013, being the first date that HMRC could guarantee that the taxpayer knew the return was to be investigated. He stated that internal HMRC guidance said that merely leaving a message on a trader's answerphone, for example, would not be enough to establish that an inquiry had begun. Mr Allport was also of the view that the inquiry started when a question was first asked. It was then suggested to Mr Allport that this might be a later date than the date when the taxpayer first knew that the return was to be

investigated. Mr Allport stated that when a visit was booked the trader is notified that an investigation will take place and a telephone call is followed up with a letter that would "notify that questions will be asked". He added that once the decision is taken to visit, the letter "notifies the information that the trader would need to provide". This was normally in the form of a "standard attachment", comprising lists of relevant records.

36. Mr Allport conceded that much of the timing of the work carried out by HMRC in relation to their enquiries was in their control but that HMRC themselves apply a reasonableness test as to whether a visit is necessary and the time taken to make and conclude their enquiries but, at the same time, they need a requisite amount of time to do so. It was in the application of such a reasonableness test that Mr Milligan reduced the period from 18 days to 14 days. Mr Allport thought that there was no internal guidance produced by HMRC so that, to some extent, the decision to deduct days is based on the discretion of the officer concerned and that the reasonableness of HMRC can be appealed to a tribunal.

37. It was agreed by the parties that the substantive issue was whether the period from Tuesday 16 July 2013 to Tuesday 30 July 2013, reduced by four days by HMRC, should be taken into account in calculating the relevant period provided in Section 79(2) (b) of VATA. It was further agreed that the period began on 30 June 2013 and that the relevant period ended either on 5 or 8 August, that is to say a period of either 37 or 40 days, but that, in any event, it was not relevant for the purposes of this dispute which of those dates was used in calculating the period to be left out of account which HMRC say are either 26 or 29 days and which SC says is either 36 or 39 days.

SC's Submissions

38. SC says that Regulations 198(a) and 199(a) are objective tests where the term "inquiry" has to be considered, having regard to the ordinary definition of that term, and that the term "inquiry" in the context of Section 79 VATA and Regulations 198 and 199 determines that the respondents must begin a search or investigation into the composition of the 05/13 claim for repayment and to begin an inquiry they must request information from SC to determine what is contained within the 05/13 VAT return.

39. SC says that the ten day visit period and the four day period are not part of HMRC's internal guidance and that Mr Allport has distanced himself from Mr Milligan's decision, as the former has no knowledge of a four day limit applying in any other cases although he accepted this time period in his letter of 9 February 2015.

40. SC says that Rachel Brown's letter of 16 July 2013 was a generic letter, was not specific and did not on the face of it even list any records that required to be seen. Such a letter could have been issued to any taxpayer. In short it asked no specific questions and no evidence had been submitted to the tribunal that a specific question was asked until 30 July 2013.

41. SC says that HMRC had made up their minds in February 2013 that a visit would automatically follow the next time there was a failure to meet the automatic check by computer so that there was no need for any questions about the 05/13 return because it was going to happen anyway.

42. SC says that at the conclusion of the 30 July 2013 visit, HMRC had all the answers to their questions and accordingly for the purposes of Regulation 198(a) the period of the inquiry is one day, that is to say 30 July 2013, when all their questions were asked and answers given. Accordingly, whether 5 August or 8 August is chosen the periods are both in excess of 30 days, being either 36 or 39 days and accordingly the repayment supplement is due.

43. SC refers to Auld J in *Rowland & Co (Retail) Ltd v Commissioners of Customs and Excise* as authority that an inquiry is "question or questions put to the taxpayer for him to answer" and does not warrant any wider construction. Reference was made to *Cellular Solutions (T Wells) Limited* where the chairman stated "the first issue of interpretation of Section 79 is the meaning of inquiry. The ordinary meaning of the words at the end of subsection (4) ("whether it [the inquiry] 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") seems to indicate that inquiry means a single question to a particular person, rather than in the income tax sense of a more general enquiry (with an e) into a tax return (Section 9A Taxes Management Act 1970). This was the interpretation given in the *Rowland* case……". After considering the case, the tribunal stated that they were obliged to follow *Rowland* and interpreted "inquiry" as meaning a question.

44. This approach, SC says, was followed in *Alliance & Leicester PLC, Global Foods Ltd, Vogrie Farms, Raptor Commerce Limited* and *Marlico* cases and HMRC first raised the "inquiry" during the visit to SC's premises on 30 July 2013. Prior to that date no questions had been directed to SC seeking answers or requiring information or documentation in respect of the 05/13 VAT return; HMRC did not commence any search or investigation by questioning and did not seek any information in relation to the 05/13 return until the visit of 30 July 2013.

45. SC says that HMRC's reliance on the wording of Section 79 VATA in determining the start date for "raising and answering" would result in SC being unaware and unable to dictate or influence the commencement of any inquiry by HMRC.

46. SC says that the *Alliance & Leicester* decision must be seen against the background of a continual basis of visits to that organisation because of its size. In *Future Components Ltd*, Judge Aleksander, when considering a case where an HMRC officer telephoned the taxpayer on 14 November and arranged to visit on 24 November which was the first available date in his diary, stated "for the purposes of Section 79, the inquiry is not limited to questions to be put to the taxpayer…. If we are wrong on this point, at the very latest, the inquiry would have first been raised at the time of the visit on 24 November".

47. SC refers to *Marlico* and, in particular, to Judge Short's statement in relation to "reasonable inquiry time". She said "the exclusion from the 30 day period ('stop clock period') for HMRC to make reasonable enquiries begins on the date when 'the commissioners first consider it necessary to make such an inquiry' (under Section 79 (4)(a)). On the face of the legislation this trigger relates only to the decision made by HMRC, not the time when it is communicated to the Appellant, although there is a discrepancy between the subjective test in s79(4)(a) and the objective wording of Regulation 199 which refers to the date when an inquiry is 'first raised'. However, the onus is on HMRC to evidence when it was that they considered it necessary to make 'such an inquiry'. The legislation refers to a specific inquiry, being '*the reasonable inquiry relating to the requisite return*'. HMRC argued that the clock should be treated as stopping at the time of the meeting with the appellant on 19 March when HMRC notified the appellant that information was required to substantiate the 02/03 return. Our view is that the legislation requires HMRC to have identified more than a general need for information, HMRC need to have formulated a specific question which needs to be answered by the appellant. This is supported by the FTT decision referred to by HMRC, *Future Components Limited*".

48. Accordingly, the period of 30 days was exceeded, the repayment supplement should be made and the appeal should be allowed.

HMRC's Submissions

49. HMRC say that 11 days of the period from 16 July 2013 to 30 July 2013 should be taken out of account as referable to the raising and answering of HMRC's reasonable inquiry into SC's VAT return for the period 05/13 and, consequently, HMRC are not liable to pay a VAT repayment supplement in respect of £24,522.74.

50. HMRC say that the dispute relates to the condition in Section 79(2)(b) VATA; *"that a written instruction directing the making of the payment or refund is not issued by the Commissioners within the relevant period"* and Section 79(3) which allows for regulations to be made providing for periods of time for *"the raising and answering of any reasonable inquiry relating to the requisite return"* to be left out of account in calculating the relevant period of 30 days.

51. HMRC say there is an inconsistency between Section 79(4) VATA and the regulations made under Section 79(3) of the same Act. Section 79(4) states that the period "(a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry" and Regulation 199 of the Value Added Tax Regulations 1995 (SI 1995/2518) ("the VAT Regulations") provides that the period which can be left out of account in calculating the relevant period begins on the date "when the Commissioners first raised the inquiry".

52. HMRC referred to Judge Bishopp's consideration of this point in *Alliance & Leicester PLC* where he said, "in *Refrigeration Spares (Manchester) Limited v Customs and Excise Commissioners* [2002 Decision 17603], the President pointed out the difference between Regulation 199, which provides that the clock is deemed to have stopped when the Commissioners "first raised the inquiry", and Section 79(4)(a)

which provides that it stops on "the date on which the Commissioners first consider it necessary to make such an inquiry". The difference arises from the timing of the enactments: Regulation 199 is a re-enactment without material amendment of Regulation 5 of the Value Added Tax (Repayment Supplement) Regulations 1988 (SI 1988/1343), while the current wording of Section 79 derives from provisions added to its own predecessor, the 1983 Act, by Section 20 of the Finance Act 1985 and amended in 1988 and 1992, on the latter occasion because the Commissioners considered that the decision in *Rowland & Co (Retail) Limited* was too generous to taxpayers. The need to bring the regulations into line with the Act was apparently overlooked. So far as it is necessary to do so, I intend to do as the tribunal did in *Refrigeration Spares,* that is to construe Regulation 199 in a manner which is consistent with enabling primary legislation, namely Section 79." He continued "I am not persuaded that the mere selection of a return for pre-payment verification amounts to an inquiry in the sense meant by Section 79".

53. HMRC referred to *Purple International Ltd*, where the taxpayer was informed by the Commissioners on 11 July that repayment was to be withheld pending further enquiries, and contacted on 17 July to request a visit which was to take place on 19 July. The tribunal held that no enquiries had been raised until 19 July but that the period referable to the raising and answering of an inquiry started on 11 July. This was a multiple traders (MTIC) fraud case and considered three different phases of inquiry into the claim. HMRC say this was referred to and is consistent with Judge Bishopp's decision in *Alliance & Leicester PLC.*

54. HMRC say that there are two distinct matters, the first is the period referable to raising and the answering of any reasonable inquiries and, secondly, the consideration of what amounts to an inquiry. They refer to Auld J in *Rowland & Co:* – "In my judgement, the protection to the taxpayer, such as it is, and the spur to efficiency on the part of the Commissioners are not 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'…. The inquiry contemplated by these words is not a general one in the sense of a general investigation…. 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". HMRC then drew the tribunal's attention to section 79(4)(b) and in particular to the words "and it is immaterial whether an inquiry is in fact made or whether it is or might have been made…..".

55. HMRC referred to *McCreevy Construction Ltd* which involved a building services company and where HMRC decided on 25 March that a payment could not be authorised without further inquiry, based on the fact that the repayment was considerably higher than any of the previous repayment returns during the previous 12 month period. An HMRC official was instructed to arrange a site visit on 5 April. The earliest date available upon which an inspection could be made was 16 April and the visit was arranged for that day. The tribunal decided that the clock stopped on the date that "the Commissioners first considered it necessary to make inquiry, in this case, 25 March".

56. HMRC say that the date when HMRC first considered it necessary to make an inquiry was at the latest 16 July 2013, when SC was told of the visit. That is the date when the clock stopped but HMRC say that it could be argued to have been earlier. In support of this, HMRC refer to *Future Components Ltd*. HMRC say that the inquiry ended on 30 July 2013 which was the date on which they were satisfied they had received a complete answer to their inquiry and that the inquiry had to be reasonable in the sense it had to be reasonably necessary for the making of a decision to make a payment to SC.

57. HMRC say that the inquiry into SC's return also had to be reasonable in the sense that it was carried out within a reasonable period of time and that a period of 10 days from contacting SC to the actual visit was reasonable. HMRC say that a total of 11 days should be allowed for their reasonable inquiry and that the period from 17 July 2013 to 26 July 2013 includes eight working days and two non-working days. The journey to SC's principal place of business involved a 2½ hour journey from Inverness by car and the visit required a full working day.

58. HMRC say that the written instruction was either issued on 5 August or within 26 days (37-11) for the purposes of Section 79(2)(b) or in the alternative it was issued on 8 August 2013 or within 29 days (40-11) for the purposes of the same section. Accordingly, on either basis, 26 or 29 days, the written instruction was issued within the relevant period and SC are not entitled to VAT repayment supplement in either case.

Decision

59. The tribunal considered the various authorities they were referred to by HMRC and SC, all of which were either VAT Tribunal or First-tier Tax Tribunal decisions and, therefore, persuasive with the exception of *Customs and Excise Commissioners v L Rowland & Co (Retail) Ltd.* The tribunal considered that the *Rowland* case was binding and, accordingly, as interpreted in *Cellular Solutions (T Wells) Limited* and confirmed in *Alliance & Leicester PLC,* interpret "inquiry" as meaning a question. Section 79 VATA mirrors the imposition on the taxpayer of surcharges if his VAT and any requisite payments are late. There are, therefore, obligations on both the taxpayer and HMRC.

60. In *Alliance & Leicester PLC*, further to the statement already referred to in this judgement, Chairman Bishopp also referred to the President in *Refrigeration Spares*, at paragraph 32, who said "…. Parliament gave the Commissioners only 30 days in which to process repayment claims. In limited circumstances the period is extended; but any extension must be within the spirit of section 79 which demands expedition on the Commissioners' part". Chairman Bishopp then said: "It is important also to bear in mind both the purpose of section 79 and the words actually used. The section allows the Commissioners 30 days in order to process repayment claims before any penalty (in the shape of a supplement) becomes due. The suspension of the running of time afforded by subsection (4) relates to the raising and answering of an inquiry; the section states clearly that the suspension ends when the Commissioners have received a complete answer to the inquiry and not when they are satisfied that the return is

correct. I echo the comment of Auld J in *Rowland & Co* that an inquiry is a 'question or questions put to the taxpayer for him to answer' and does not warrant any wider construction."

61. The tribunal noted that, in interpreting Section 79(4), it is immaterial whether any inquiry is in fact made but noted that in the circumstances of this case inquiries were made and answered on 30 July 2013.

62. The tribunal considered the issue before them was whether the telephone call and letter dated 16 July 2013 amounted to an inquiry in the sense of a question or questions and not as Auld J put it a general inquiry in the sense of a general investigation, and related to any reasonable inquiry relating to the requisite return. The tribunal had to consider whether the actions on that date started the "stop clock" period.

63. As Judge Short stated in *Marlico Limited*, the 30 day exclusion period for HMRC to make reasonable enquiries begins on the date when "the commissioners first consider it necessary to make an inquiry". She went on to note the discrepancy between the subjective test at Section 79(4)(a) VATA and the objective wording of Regulation 199 of the VAT Regulations which refers to the date when an inquiry is "first raised". The tribunal agree with Judge Short that the legislation refers to a specific inquiry, being the "reasonable inquiry relating to the requisite return" and requires HMRC to have identified more than a general need for information. HMRC need to have formulated a specific question which needs to be answered by the taxpayer.

64. The tribunal considered that the letter of 16 July 2013, as produced before the tribunal, identified only a general need for information. It clearly stated that until SC's claim was checked, HMRC would not be able to make a repayment and it made it clear that the purpose of the visit was to check the repayment return for the period 05/13 and to examine the records that relate to this return. The tribunal considered that if there was a list of records attached to that letter then the terms of that list might be capable of being construed as formulating a specific question, but no such list was produced to the tribunal and no such construction could be made. Accordingly, on the evidence, what the letter of 16 July 2013 did not do, was ask a specific question which needed to be answered.

65. The tribunal considered therefore that the "inquiry" began and ended on 30 July 2013, notwithstanding that it took five hours of travelling to complete the round trip; that no specific questions had been put to SC prior to that date; that it was common ground that the specific questions were answered on 30 July 2013; and, accordingly, one day should be taken out of account as referable to the raising and answering of HMRC's reasonable inquiry into SC's VAT return for the period 05/13. Accordingly, the relevant period was 36 days, or, in the alternative, 39 days, both of which exceeded 30 days and, consequently, HMRC are liable to pay the VAT repayment supplement.

66. The appeal is allowed.

67. 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.

W RUTHVEN GEMMELL
TRIBUNAL JUDGE

RELEASE DATE: 11 MARCH 2016

Appendix 1

Legislation

Section 79 Value Added Tax Act 1994

Repayment supplement in respect of certain delayed payments or refunds

(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.

The Value Added Tax Regulations 1995 (No. 2518)

Computation of period
Regulation198

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,

Duration of period
Regulation 199

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;

(b) in the case of the period mentioned in regulation **198(**b), it shall be taken to have begun on the date when the error or omission first came to the notice of the Commissioners and it shall be taken to have ended on the date when the error or omission was corrected by them;

Appendix 2

Authorities

Customs and Excise Commissioners v L Rowland & Co (Retail) Ltd [1992] STC 647

Watford Timber Co Ltd v CEC LON/96/1223 (VTD 14756)

Purple International Ltd v CEC LON/02/1139 (VTD 18243)

McGreevy Construction Ltd v HMRC LON/04/1572 (VTD 19877)

Cellular Solutions (T.Wells) Ltd v HMRC [LON/05/0268] [VTD19903]

Alliance & Leicester PLC v HMRC, [2007] VATDR 240 (VTD 20094)

Beast in the Heart (UK) Ltd v HMRC [2009] UKFTT 230 (TC)

Megantic Services Limited v HMRC [2010] UKFTT 125 (TC)

Future Components Limited v HMRC [2010] UKFTT 101(TC)

Raptor Commerce Ltd v HMRC [2010] UKFTT 335 (TC)

Global Foods Ltd v Revenue and Customs Commissioners [2014] UKFTT 1112 (TC)

Marlico Limited v HMRC [TC/2013/06970][TC04678]

Vogrie Farms v HMRC [2015] UKFTT 0531