[2017] UKFTT 855 (TC)

TC06250

Appeal number: TC/2017/02435

VAT – claim for a refund of overpaid VAT – included a Fleming claim – preliminary issue as to whether or not the claim was made within time – the claim was made within time – preliminary issue found in favour of the Appellant

FIRST-TIER TRIBUNAL
TAX CHAMBER

KNOTT END GOLF CLUB LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MRS MARY AINSWORTH

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 9 November 2017.

Mrs Judith Dugdale, Chartered Accountant, for the Appellant

Mr Andrew Cameron, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is against HMRC's refusal to accept a *Fleming* claim by the Appellant, Knott End Golf Club Limited ("Knott End") for a refund of overpaid VAT upon the basis that it was not made on or before 31 March 2009 and so was time-barred. This hearing was a preliminary issue as to whether or not the claim was made within time. The parties have sensibly agreed that if we find that the claim was made on or after 1 April 2009 the appeal is to be dismissed whereas, if it was made on or before 31 March 2009 the appeal should be stayed to allow the parties to seek to resolve the substantive dispute.

2. We note at this stage that although the appeal to this Tribunal is late, HMRC have consented to it being brought out of time. We therefore grant the necessary extension of time for the appeal.

Background

3. The factual background is not in dispute. As its full name suggests, Knott End is a golf club. Knott End has been VAT registered since 1973 and historically treated green fees (being charges for access to the greens for visiting non-members) as taxable supplies, charged relevant golfers VAT and accounted to HMRC for the output tax.

4. However, on 16 October 2008, the Court of Justice of the European Union ("the CJEU") handed down judgment in *Canterbury Hockey Club and Canterbury Ladies Hockey Club v Revenue and Customs Commissioners* (Case C-253/07) [2008] STC 3351 ("*Canterbury Hockey Club*") to the effect that under the Sixth VAT Directive, certain services closely linked to support, supplied by a non-profitmaking organisation to persons taking part in sport, are to be exempt from VAT.

5. A number of golf clubs, including Knott End, were of the view that *Canterbury Hockey Club* caused green fees to be exempt from VAT. In order to protect its position, Knott End (through its chartered accountants, Moore and Smalley LLP ("Moore and Smalley")) sought to make a claim for overpaid VAT. They say that they did so by a letter dated 30 March 2009 ("the 2009 Letter'). The 2009 Letter claimed the recovery of overpaid VAT on green fees from the year ended 31 December 1990 to the year ended 31 December 1996 and from the year ended 31 December 2006 to the year ended 31 December 2009. In doing so, Moore and Smalley clearly had in mind in respect of 1990 to 1996 what is well known as a *Fleming* claim. In *Fleming t/a Bodycraft v Revenue and Customs Commissioners* [2012] UKHL 2, [2008] 1 WLR 195, the House of Lords held that the three year time limit was to be disapplied in cases of all claims for deduction of input tax which accrued before the introduction of the time limit (and so where the entitlement to deduct accrued before 1 May 1997). By Revenue and Customs Brief 07/08, HMRC stated that they also treated this as applicable to claims for the repayment of overpaid output tax and so disapplied the time limit for claims where the rights had accrued at 4 December 1996. As more fully set out in the legal framework below, this was

implemented by section 121 of the Finance Act 2008. However, this included a requirement that the clam be made before 1 April 2009.

6. HMRC's position is that they have no record of the 2009 Letter having been received. In any event, there was no acknowledgement of the claim or correspondence from Moore and Smalley or Knott End following it up until Moore and Smalley's letter dated 16 February 2016 ("the 2016 Letter"). This referred to (and enclosed a copy of) the 2009 Letter and noted that there had been no response. The 2016 Letter also referred to (and enclosed a copy of) a letter dated 8 May 2014 ("the 2014 Letter") which had claimed for overpaid output tax in the sum of £33,425.06 for the period from 1 January 2010 to 31 December 2013 and again noted that there had been no response. The 2014 Letter had not made any reference to the 2009 Letter or any *Fleming* claim.

7. By an email dated 13 October 2016 ("the 2016 Email"), the claim was amended to £15,945.09 for the period from 1 January 2010 to 31 March 2014. This email also enclosed revised calculations for the *Fleming* claim made in the 2009 Letter to £10,907.38.

8. Moore and Smalley's letters had been prompted by the vindication of Knott End's view as to the effect of *Canterbury Hockey Club* upon the status of green fees. In *Revenue and Customs Commissioners v Bridport and West Dorset Golf Club Limited* (Case C-495/12) [2014] STC 663, the CJEU held that green fees were exempt from VAT when supplied by non-profitmaking organisations. The position was summarised as follows by HMRC in *Revenue and Customs Brief 25 (2014): VAT – Supplies of sporting services by non-profitmaking bodies* (published on 25 June 2014 and withdrawn on 4 April 2017):

> "…
>
> *Background*
>
> Bridport and West Dorset Golf Club is a non profit making members' golf club. Under EU Law supplies by non profit making bodies of services closely linked and essential to sport to persons taking part in sport are exempt from VAT. In UK law, where the body operates a membership scheme, any supplies to individuals who are not members are excluded from the exemption on the basis that the fees received represent 'additional income' for the purposes of EU Law.
>
> The Bridport appeal concerned green fees paid by visitors (non members). Bridport had made a claim for repayment of VAT on green fees arguing that the exclusion of supplies made to non members was not permissible under EU law.
>
> The European Court of Justice (CJEU) found that where a supply is made by a non profit making body it is immaterial whether it is provided to a member of the body or a visitor. It took the view that a member state has no power to exclude certain groups of recipients of services from the benefit of the exemption. Additional income could not be construed in such a way that it would lead to such a restriction in the scope of the exemption.

> The CJEU also rejected the argument that the exclusion of supplies to non members was permissible on the basis that it had the effect of reducing distortion of competition between members clubs and commercial organisations.
>
> *Implications of the judgment*
>
> As a result of the CJEU judgment, HMRC accepts that supplies of sporting services to both members and non members of non profit making sports clubs qualify to be treated as exempt from VAT. This is provided that the services are closely linked and essential to sport and are made to persons taking part in sport. HMRC will legislate by 1 January 2015 to reflect this.
>
> HMRC will ensure any future changes comply with the decision of the CJEU.
>
> …"

9. HMRC replied to the 2016 Letter and the 2016 Email on 15 November 2016 and allowed the claim for the period from 1 April 2010 to 31 March 2014 in the sum of £15,203.34 and interest of £313.84. HMRC disallowed the sum of £741.75 for the period 1 January 2010 to 31 March 2010 as out of time. There is no appeal against this element of the decision. However, this letter also included the decision which is the basis of this appeal, rejecting the *Fleming* claim and also the claim for the period for the year ending 31 December 2006 to the year ending 31 December 2008 (together "the Claim") stating that there was insufficient evidence of posting and no trace of receipt. The decision making officer stated as follows:

> "In my letter of 4th August 2016 I explained that HMRC could find no trace of ever having received a letter dated 30th March 2009 from your agent concerning a potential claim for periods 1990-2008.
>
> I requested evidence from your agent to show that this letter had been posted but they have been unable to provide me with any. Furthermore there is no trace of any correspondence having been received which queried the lack of a response by HMRC to this letter until Moore and Smalley's letter of 16th February 2016.
>
> Unfortunately in these circumstances I am unable to accept that a valid "Fleming" claim for the periods 1990-2008 was made before the closing date for such back dated claims of 31st March 2009 and the amount of £10,907.38 (as notified in your agent's email of 13th October 2016) will not be repaid."

10. Knott End requested a review of this decision, which resulted in it being upheld by a letter dated 15 February 2017. Knott End appealed to the Tribunal by a notice of appeal dated 17 March 2017. The grounds of appeal are admirably succinct:

> "Our belief is that Moore and Smalley sent the VAT claim in good time."

The Legal Framework

11. The legal framework was not in dispute.

12. Claims for credit for, or repayment of, overstated or overpaid VAT are dealt with at section 80 of the Value Added Tax Act 1994 ("VATA 1994"). The relevant subsections (in their form as at the time of the 2009 Letter – with effect from 1 April 2009, subsection 80(4) was changed from three years to four years) are as follows:

> "(1) Where a person –
>
> has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount.
>
> (1A) Where the Commissioners –
>
> (a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, have brought into account as output tax an amount that was not output tax due,
>
> they shall be liable to credit the person with that amount.
>
> (1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of –
>
> (a) an amount that was not output tax due being brought into account as output tax, or
>
> (b) an amount of input tax allowable under section 26 not being brought into account,
>
> the Commissioners shall be liable to repay to that person the amount so paid.
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (2A) Where –
>
> (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
>
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.
>
> …
>
> (4) The Commissioners shall not be liable on a claim under this section –
>
> (a) to credit an amount to a person under subsection (1) or (1A) above, or
>
> (b) to repay an amount to a person under subsection (1B) above,
>
> if the claim is made more than 3 years after the relevant date.

(4ZA) the relevant date is –

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

(b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(c) in the case of a claim by virtue of subsection (1A) above in respect of an assessment issued on the basis of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(d) in the case of a claim by virtue of subsection (1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.

In the case of a person who has ceased to be registered under this Act, any reference in paragraphs (b) to (d) above to a prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be registered under this Act.

…

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

…"

13. The form and content of such claims are provided for by regulation 37 of the Value Added Tax Regulations 1995 ("VATR 1995") as follows:

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

14. The time limit for *Fleming* claims relating to overstated or overpaid VAT is provided for in the following subsections of section 121 of the Finance Act 2008:

> "(1) The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009.
>
> …

> (4) This section is treated as having come into force on 19 March 2008."

15. It was common ground that we have no discretion or power to extend time under section 80 of VATA 1994, whether in respect of the *Fleming* claim element of the Claim or the 'ordinary' time limit for the remainder of the Claim. We agree that this is clear from the wording of section 80. Although not binding on us, we are fortified in our view by the First-tier Tribunal decision of *Botanical Catering Ltd v HMRC* [2009] UKFTT 265 (TC) (Lady Mitting) at [7]:

> "[7] … Section 80 gives no discretion either to the Commissioners or to the tribunal. It is absolutely clear and has to be applied. …"

16. It was also common ground that the claim is made for the purposes of section 80 VATA 1994, regulation 37 of VATR 1995 and section 121 of FA 2008 when it is received by HMRC.

17. Section 7 of the Interpretation Act 1978 provides as follows:

> "7. Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

18. For completeness, we note that HMRC also referred us to the First-tier Tribunal decision of *Bissell Homecare (Overseas) Inc* (LON/02/904) VATD 18217 (Judge Angus Nicol and Caroline de Albuquerque) and the Upper Tribunal decision of *Taylor Clark Leisure v HMRC* [2014] UKUT 0396 (TCC) (Lord Doherty). We have considered these authorities and reach the view that given the narrow parameters of the present case they do not add anything to the legal framework set out above for the purposes of this hearing.

Findings of Fact

19. The only oral evidence in the case was from Mrs Dugdale. We found her to be an obviously honest, straightforward and highly credible witness. Mr Cameron (rightly, in our view) did not suggest otherwise. We accept her evidence and make the following findings of fact. In doing so, we bear in mind that the burden of proof in establishing that the Claim was made within time is upon Knott End and that the standard of proof is that of the balance of probabilities.

20. At all material times, Mrs Dugdale dealt with Knott End's affairs on behalf of Moore and Smalley and continues to do so. In 2009, she was an associate director of Moore and Smalley and is now a corporate director. She is a chartered accountant.

21. Moore and Smalley were, unsurprisingly, dealing with a substantial number of *Fleming* claims. A colleague had sent a template letter to Mrs Dugdale and others to

be used in such circumstances, which included the appropriate address. This was the template and address used for the 2009 Letter.

22. Moore and Smalley's procedure in 2009 was to send important letters to HMRC by guaranteed next day special delivery. The intended recipient's name and address would be set out on a label and a counterfoil which would both come from a book issued by the Royal Mail. The label would be removed from the book and placed on the envelope, whereas the counterfoil would remain in the book as a record of having been sent. The postman would collect all such post from Moore and Smalley.

23. Mrs Dugdale is confident that the latter was written on 30 March 2009 as it bears this date, is signed by her and her computer records show that this was when the document was created. We accept her evidence in this regard.

24. The Royal Mail book containing the relevant counterfoil is no longer available as, Mrs Dugdale told us, the counterfoils are destroyed after 12 months given their volume and given that any non-delivery or misdelivery would normally be expected to have come to light within 12 months. There is no other documentary record of postage.

25. However, Mrs Dugdale gave very vivid evidence that the 2009 Letter was collected by the Royal Mail postman. Mrs Dugdale said that she was still in reception to see it being handed to the postman at some time between 3.30pm and 4.00pm. She said that this was a coincidence in that she had not had it in mind to wait until the postman arrived. However, she was aware that this was an important letter, at that point it was a £90,000 claim even though it reduced to nearer £10,000 and Moore and Smalley were acting on a 'no win no fee' agreement. She was therefore keen to ensure that it was in the post and so took particular notice when the postman arrived. Mrs Dugdale was sure that she had addressed the 2009 Letter correctly and noted that she had sent other such letters in previous days to the same address which were received by HMRC without any difficulty. We note at this stage that the address appearing on the 2009 Letter was correct. We accept Mrs Dugdale's evidence that she saw the letter being given to the postman, that it was therefore posted by guaranteed next day special delivery (which is stated on the top of the letter) and that it was correctly addressed.

26. Mrs Dugdale informed us that she was aware that no acknowledgement or receipt had come from HMRC but she assumed that this was because the case was stood behind other appeals relating to green fees. She said that an internal decision was taken not to chase HMRC in such appeals. She said that, with hindsight, she wished she had. However, in 2014 a new manager came to Moore and Smalley who expressed his concern that a decision letter had not been issued by HMRC. It was at that point that the 2014 Letter was sent (albeit that there was no reference to the 2009 Letter until the 2016 Letter). We accept that this is an accurate explanation of Mrs Dugdale's thinking at the time without commenting at this stage whether or not this was a reasonable approach to take or as to the impact (if any) of this.

The Parties' Submissions

HMRC

27. Mr Cameron's central argument was that there was no documentary evidence to support the assertion that the 2009 Letter had been sent. He said that there was no record of it having been received. Further, Moore and Smalley would have been aware that it had not been acknowledged and that there had been no decision letter. However, they did nothing to chase or even refer to the 2009 Letter until 2016. It was, Mr Cameron submitted, unreasonable for Moore and Smalley to leave the matter in abeyance for so long, which casts doubt on whether or not it had in fact been sent at all. Mr Cameron said that section 7 of the Interpretation Act 1978 did not take the matter further as there was insufficient evidence of postage.

Knott End

28. The essence of Mrs Dugdale's submissions was that, whilst she could not provide any documentary evidence, her own witness evidence was that it had been sent.

Discussion

29. Having considered all the evidence and submissions, we find that the Claim was made within time in that the 2009 Letter was received by HMRC on or before 31 March 2009. This is for the following reasons.

30. First, we must consider the totality of the evidence in reaching our decision. The absence of documentary evidence is not therefore determinative, as there is an explanation (which we accept) as to why it is not available; namely, that the volume of items sent by guaranteed delivery meant that records were only kept for 12 months.

31. Secondly, as set out above, we accept Mrs Dugdale's evidence that the 2009 Letter was handed to the postman.

32. Thirdly, whilst we accept that it would have been reasonable to investigate the matter earlier, the reasonableness or otherwise of Knott End's or Moore and Smalley's conduct is not relevant. As the parties agree, we have no discretion to extend time and so we must find either that it was made within time or it was not. At its height, the failure to chase HMRC might in some cases cast doubt upon whether or not it was in fact sent. However, as we have already found, we have no such doubts here.

33. Fourthly, we find that section 7 of the Interpretation Act 1978 is engaged as, again, we have found that the 2009 Letter was properly posted by handing it to the postman and it being properly addressed. HMRC has not been able (or sought) to prove to the contrary and so service is deemed to have taken effect at the time it would be delivered in the ordinary course of post. This is 31 March 2009.

34. Fifthly, there is no evidence of the 2009 Letter having been returned undelivered.

Disposition

35. It follows that we find in favour of Knott End in respect of the preliminary issue: the 2009 Letter was received by HMRC on 31 March 2009 and so the Claim was made within time.

36. We therefore reject HMRC's submission that the appeal should be dismissed. In principle, the substantive appeal therefore remains. However, we agree with the parties' suggested approach and so stay the appeal for six months. If the remaining matters have not been resolved within six months of the release of this decision the parties shall write to the Tribunal to seek further directions.

37. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 30 NOVEMBER 2017