TC02547

Appeal number: TC/2012/03647

VAT – capping provisions – section 80(1A) VATA 1994 – section 80(4) VATA 1994 – failure to make VAT returns – central assessments later found to be excessive when returns made – claims for repayment capped — appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDITH DIANNE HITCHEN **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 21 January 2013

The Appellant did not appear and was not represented

Mr William Brooke of HM Revenue and Customs on behalf of the Respondents

DECISION

Background and Findings of Fact

1. When this appeal was called on for hearing there was no appearance on behalf of the Appellant. The notice of hearing had been sent to her experienced professional advisers, the VAT People, on 19 September 2012. By email dated 9 January 2013 those advisers notified the tribunal that they were no longer acting for the appellant. Steps were taken to contact the appellant on the morning of the hearing without success.

2. I was satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed with the hearing pursuant to rule 33 of the Tribunal Rules. As at the date of the release of this decision the Appellant has not contacted the Tribunal to explain her absence.

3. The underlying facts are relatively straightforward and I make the following findings of fact from the documentation before me.

4. The appellant trades as a livestock farmer. She has been registered for VAT since 1 May 1983. She failed to make VAT returns for VAT periods 03/02 and 06/02. As a result central assessments for these periods totalling £64,527 were issued by HMRC on 24 February 2005 as follows:

03/02	-	£31,845
06/02	-	£32,682

5. On 23 August 2006 HMRC allocated a sum of £59,356 to these assessments from a payment made by the appellant. The 03/02 assessment was treated as paid in full and £27,400.01 was treated as reducing the 06/02 assessment.

6. On 15 January 2009 the appellant made returns for these two periods. The returns showed a total amount due of £3,694.70 for the two periods being £3,072.66 for period 03/02 and £622.04 for period 06/02. Those returns were processed and accepted by HMRC and treated as a claim for repayment. The amount apparently overpaid on the appellant's VAT account was £55,550.31 which presumably took into account other small adjustments.

7. By letter dated 23 January 2009 HMRC acknowledged receipt of the returns but stated that the overpayment would not be repaid or credited to the appellant's VAT account. It relied on *section 80(4) Value Added Tax Act 1994* ("VATA 1994") as authority for refusing to make repayment.

8. There followed correspondence between the appellant's legal advisers, Eversheds, and HMRC which led to a decision refusing repayment dated 9 November

2011. There was a request for a review of that decision. The review dated 31 January 2012 upheld the decision to refuse repayment.

9. An appeal against the decision was lodged with this tribunal on 29 February 2012. The VAT People were acting for the appellant in relation to the appeal and the grounds of appeal were as follows:

> "*HM Revenue & Customs have disallowed repayment of a credit due following the withdrawal of Central Assessments in respect of period 03/02 & 06/02 by the lodgement of the actual returns. The assessments were dated February 2005 and the returns lodged in January 2009. The Appellant's case is that by effect of the Finance Act 2008 which amended the VAT Act 1994, specifically section 80(4), on 21 July 2008, the time limit for submitting a 'claim' is 4 years from the end of the prescribed accounting period when the assessment was made. The claim [lodgement of returns] was made within 4 years of that date. The overpaid VAT assessed should therefore be repaid.*"

10. The bundle of documents before me included correspondence between Eversheds, the Appellant's then advisers, and HMRC. It refers in part to the treatment of sums relating to a separate VAT entity, namely the appellant and Mr John Charles Hitchen trading as John Charles and Associates. That correspondence is not relevant to the issue raised by the appellant in her notice of appeal.

Reasons for Decision

11. *Section 80(1A) VATA 1994* provides as follows:

> "*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*"

12. That section covers the circumstances in the present case where HMRC made central assessments for periods 03/02 and 06/02. It later turned out once actual returns were submitted that HMRC had brought into account output tax which was not due from the appellant. Prima facie therefore HMRC are liable to credit the appellant with the amount overcharged.

13. *Section 80(4) VATA 1994* currently provides as follows:

> *"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) …

if the claim is made more than 4 years after the relevant date."

14. This provision is known as the four year cap. Four year capping was introduced with effect from 1 April 2009. Prior to that date there was a three year cap. The "relevant date" for these purposes is defined by *Section 80(4ZA)(d)* as the end of the prescribed accounting period in which the assessment was made.

15. The appellant's ground of appeal is on the basis that the capping period to be applied in these circumstances is the 4 year cap. I do not accept that argument. The 4 year cap was introduced by *section 118* and *paragraph 36 Schedule 39 Finance Act 2008*. That provision was brought into effect on 1 April 2009 by *SI 2009/43 Regulation 2(2)*. By way of a transitional provision *Regulation 6* provided as follows:

> "*Paragraph 36 is disregarded where, for the purposes of section 80 of VATA 1994 (credit for, or repayment of, overstated or overpaid VAT), the relevant date is on or before 31st March 2006.*"

16. The assessments for both periods were made on 24 February 2005. The relevant date was therefore 31 March 2005 which was the end of the appellant's prescribed accounting period in which payment was made. Hence *paragraph 36* fell to be disregarded and three year capping applied. Any claim for credit against the central assessments had to be made by 31 March 2008. The claim was made on 15 January 2009 and was therefore made more than 3 years after the relevant date. It was therefore caught by *section 80(4) VATA 1994.*

17. I am satisfied that these provisions operate so as to prevent the appellant from claiming credit or repayment of the tax which she has overpaid. In those circumstances I must dismiss the appeal.

18. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 15 February 2013