

B E T W E E N:

THI LEISURE TWO PARTNERSHIP

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

**Tribunal: Mr Stuart Lightman (Chairman)
Mr John Brown CBE, FCA, ATII**

Mr Graham Chase of D J Freeman (solicitors) for the Appellant

Mr Hugh McKay of Counsel, for the Respondents

Sitting in public in London on 17 May 2000

Decision: 5 October 2000

DECISION

Introduction

1. The disputed decision of the Commissioners is contained in a letter of 5 March 1999 wherein they refused to pay repayment supplement on a payment which they should have made to the Appellant some time before. We were told that this was the first appeal which raised the question of the relationship of an official error interest payment payable by the Commissioners under s.78 VATA 1994 and a repayment supplement payable by the Commissioners pursuant to s.79.

2. This appeal highlights a monetary relationship between s.78 VATA 1994 and s.79. The interest which the Commissioners may be required to pay under s.78(1) is variable and is set, for the purposes of s.78 VATA 1994 et al, by Regulation 5(1)(c), Air Passenger Duty and other Direct Taxes (Interest Rate) Regulations 1998 (SI 1998/1461). Interest is calculated for 'the applicable period' and, for the period over which interest calculated as due to the Appellant, the prescribed rates were 6% to 5 January 1999 and 5% from 6 January 1999. The prescribed rate peaked at 15% in 1981/82. The repayment supplement provided for in s.79(1) VATA 1994 is at a flat rate of 5% without regard to any period extending from the date when the amount in question was properly due to the taxpayer and when it was actually paid. Thus, and particularly when interest rates are comparatively low, it is likely that a 5% flat rate based on the amount due may significantly exceed a payment of interest when the principal amount is paid within a reasonable time. In the context of this Appeal, 5% of £1,339,996

amounts to £66,990.80 whereas interest calculated at the prescribed rates amounted to only £16,850.91. Taking an interest rate of 5% a payment would coincidentally have to be delayed for 12 months, and also be due to an error on the part of the Commissioners, before the amount due as interest equated with the repayment supplement. Thus the situation is created, when interest rates are low and a payment is made within 12 months, where the application of s.79 may generate a greater amount payable by the Commissioners than under s.78.

3. The consequences of this are obvious. A person to whom both sections may arguably apply is influenced towards securing the application of whichever section generates the greater amount due to him. In considering this appeal, the proper application of the law is paramount and any such monetary influence totally disregarded.

4. The Appellant was represented by Mr Graham Chase of D J Freeman and Co, Solicitors, and the Commissioners by Mr Hugh McKay of Counsel. Neither representative called any witness but the parties submitted an agreed statement of facts, Mr McKay also provided a skeleton argument and Mr Chase provided a small bundle of correspondence. The Statement of Facts did wholly not coincide with the Statement of Case produced by the Commissioners, but we saw no need to formally amend the latter.

5. On 14 October 1998 the Appellant made a repayment claim for period 09/98 in the sum £1,364,233.66. This gave rise to a prepayment enquiry. By coincidence the Respondents had a visit booked with the Appellant on that day. It transpired that the Appellant, who submits monthly returns had not had [sic] a return for 08/98. It also transpired that the 09/98 return had the 08/98 figures within it. The 08/98 repayment was separated out, it amounted to £15,209.37 which was authorised for repayment on or about 21 October 1998.

The Facts

6. The following is a copy of the parties' Statement of Facts. The significance of the appeal is the fact that the Appellant claims to be entitled to a greater sum in repayment supplement under s.79 VATA 1994 than to interest under s.78, and the parties are not in agreement as to which payment should apply.

- (1) The Appellant is THI Leisure Two Partnership, registered for VAT under number 710 2068 87. The Appellant's business is that of property investment.
- (2) On 14 October 1998 the Appellant submitted its VAT return for the period of one month to 30 September 1998. That return showed a claim for repayment in the amount of £1,364,233.66.
- (3) The Respondents enquired into the above return. Such enquiries resulted in £15,209.37 of the repayment being identified as appropriate for the return for the period to 31 August 1998. This amount was authorised for repayment on or about 21 October 1998.
- (4) The balance of the repayment for the period amounted to £1,349,024.29. Of this amount:
 - (a) £9,018.29 was authorised for repayment by the Respondents on 13 November 1998; and
 - (b) £1,339,996 was denied repayment by the Respondents by a letter dated 9 November 1998, written by Mr Little of the Chester VAT office.
- (5) The decision to deny repayment in the amount of £1,339,996 was the subject

of an appeal by the Appellant, under reference LON/1998/1461.

(6) In a telephone conversation held on 24 December 1998 Mr Little of the Chester VAT Office agreed that the Appellant was after all entitled to a VAT credit in respect of the amount of £1,339,996. In view of such agreement, the appeal referred to in paragraph (5) above was withdrawn by the Appellant on 11 January 1999.

(7) By a letter dated 13 January 1999 the Respondents suggested that repayment be effected by inclusion of a credit for £1,339,996 in the Appellant's return for the month of December 1998. This suggestion was made in the context of a return anticipated to show a net payment to the Respondent in excess of £1,339,996. The Appellant agreed to this course of action.

(8) The Respondents have paid statutory interest pursuant to section 78 of the Value Added Tax Act 1994 in the sum of £16,850.91 for the period commencing on 13 November 1998 [this being the date when the repayment of £9,018.29 was authorised] and ending on 1 February 1999.

(9) The Appellant accepts that no repayment supplement is due in respect of the amounts of £15,209.37 and £9,018.29 as referred to in paragraphs (3) and (4)(a) above.

(10) The Respondents accept that:

(a) the return for the period to 30 September 1998 was received not later than the last day on which it was required to be furnished, as provided in section 79(2)(a) of the 1994 Act;

(b) for the purpose of section 79(2)(b) of the 1994 Act the date of receipt of such return was 14 October 1998;

(c) the amount shown on such return as due by way of refund (namely £1,364,233.66) does not exceed the refund in fact due (namely £1,349,024.29) by more than 5 per cent of that payment as referred to in section 79(2)(c) of the 1994 Act.

(11) For the purposes of calculating the period of 30 days referred to in section 79(2)(b) of the 1994 Act the Appellant accepts that the period commencing on 26 October 1998 and ending on 9 November 1998 [this is the date of the letter denying repayment of £1,339,996], amounting to 15 days, comprises reasonable enquiry time.

(12) The Respondent [sic] accepts [sic] that reasonable enquiry time for the purposes of section 79 of the 1994 Act ended on 13 November 1998.

Additional Fact

7. Despite paragraphs (11) and (12) of the Statement of Facts we were not addressed on the question of what might have been reasonable enquiry time. In fact the Chairman's notes includes the following from Mr Chase's submissions "No dispute basis over 30 day period. Only dispute those in skeleton argument". However Mr McKay contended that the whole twist of s.79 was that of punishment and indicated that the only issue was on the 30 day argument. In any event neither party made any submissions to support what it thought should be the "reasonable enquiry" time.

The Legislation

8. There is set out below the relevant extracts from ss.78, 78A and 79 VATA 1994.

“78. Interest in certain cases of official error

- (1) (1) Where, due to an error on the part of the Commissioners, a person has —
- (a) accounted to them for an amount by way of output tax which was not output tax due from him and which they are in consequence liable to repay to him, or
 - (b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or
 - (c) (otherwise than in a case falling within paragraph (a) or (b) above) paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or
 - (d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section.

- (2) Nothing in subsection (1) above requires the Commissioners to pay interest —
- (a) on any amount which falls to be increased by a supplement under section 79; or
 - (b) where an amount is increased under that section, on so much of the increased amount as represents the supplement.
- (3) Interest under this section shall be payable at [the rate applicable under section 197 of the Finance Act 1996].

....

- (7) The “applicable period” in a case falling within subsection (1)(d) above is the period —
- (a) beginning with the date on which, apart from the error, the Commissioners might reasonably have been expected to authorise payment of the amount on which the interest is payable, and
 - (b) ending with the date on which they in fact authorise payment of that amount.
- (8) In determining in accordance with subsection (4), (6) or (7) above the applicable period for the purposes of subsection (1) above, there shall be left out of account any period by which the Commissioners’ authorisation of

the payment of interest is delayed by the conduct of the person who claims the interest.

(8A) The reference in the subsection (8) above to a period by which the Commissioners' authorisation of the payment of interest is delayed by the conduct of the person who claims it includes, in particular, any period which is referable to —

(a) any unreasonable delay in the making of the claim for interest or in the making of any claim for the payment or repayment of the amount on which interest is claimed;

(b) any failure by that person or a person acting on his behalf or under his influence to provide the Commissioners —

(i) at or before the time of the making of a claim, or

(ii) subsequently in response to a request for information by the Commissioners,

with all the information required by them to enable the existence and amount of the claimant's entitlement to a payment or repayment, and to interest on that payment or repayment, to be determined; and

(c) the making, as part of or in association with either —

(i) the claim for interest, or

(ii) any claim for the payment or repayment of the amount on which interest is claimed,

of a claim to anything to which the claimant was not entitled.

(9) In determining for the purposes of subsection (8A) above whether any period of delay is referable to a failure by any person to provide information in response to a request by the Commissioners, there shall be taken to be so referable, except so far as may be prescribed, any period which —

(a) begins with the date on which the Commissioners require that person to provide information which they reasonably consider relevant to the matter to be determined; and

(b) ends with the earliest date on which it would be reasonable for the Commissioners to conclude —

(i) that they have received a complete answer to their request for information;

(ii) that they have received all that they need in answer to that request; or

(iii) that it is unnecessary for them to be provided with any information in answer to that request.

(10) The Commissioners shall only be liable to pay interest under this section on a claim made in writing for that purpose.

s.78A Assessment for interest overpayments

(1) Where —

- (a) any amount has been paid to any person by way of interest under section 78, but
- (b) that person was not entitled to that amount under that section

the Commissioners may, to the best of their judgment, assess the amount so paid to which that person was not entitled and to notify it to him.

79. 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,

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 period of 30 days beginning on the date of the receipt by the Commissioners of that return or claim, 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.

(3) Regulations may provide that, in computing the period of 30 days referred to in subsection (2)(b) 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.

[Such Regulations have been promulgated.]

(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.

(5) Except for the purpose of determining the amount of the supplement

- (a) a supplement paid to any person under subsection (1)(a) above shall be treated as an amount due to him by way of credit under section 25(3), and
- (b) a supplement paid to any body under subsection (1)(b) above shall be treated as an amount due to it by way of refund under section 33.

(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.

(7) If the Treasury by order so direct, any period specified in the order

shall be disregarded for the purpose of calculating the period of 30 days referred to in subsection (2)(b) above.

The Appellant's Grounds of Appeal

9. The Appellant's submissions are set out in its Grounds of Appeal. The appeal is against a refusal by HM Customs and Excise to pay repayment supplement pursuant to s.79 of the Value Added Tax Act 1994. The Appellant's claim for repayment supplement arises from a decision by HM Customs and Excise to refuse credit for input tax, which was the subject of an appeal under reference LON/98/1461. That appeal was withdrawn when HM Customs and Excise accepted that the input tax was eligible for credit, which acceptance was unconditionally obtained on 24 December 1998 by way of a telephone conversation. The input tax in question was originally claimed in the Appellant's return for September 1998 which was received by Customs on 14 October 1998. Following the acceptance by HM Customs and Excise that the input tax was eligible for credit, and to avoid further delay in effecting a repayment having regard to the Christmas and New Year holidays, it was agreed that the input tax included in the September 1998 return would be offset against output tax which would otherwise have been due in respect of the December 1998 return. This return was submitted to Customs on 20 January 1999. Taking this date as the end of the s.79 period, it is more than 30 days in length, after allowing for reasonable enquiries. Accordingly, the Appellant claims repayment supplement at the rate of 5% of the input tax in dispute of £1,339,996.

The Respondents' submissions

10. Section 79 VATA 1994 provides for the payment of repayment supplement. Section 78 VATA 1994 provides for the payment of interest in cases of official error.

11. The Commissioners submit that the s.79 and s.78 regimes are separate and quite distinct. They say this for reasons of logic, the wording and purpose of the provisions and their effect such that payment of an amount under one provision should, of itself, preclude payment under the other: it is certainly true that a payment of repayment supplement precludes a payment of s.78 interest: see s.78(2) VATA 1994. And the Commissioners submit that the converse is true also.

12. Sections 78 and 79 operate differently: s.78 applies interest throughout the period that the taxpayer is kept out of his money. Section 79 applies repayment supplement by providing for the payment of a flat 5% of the sum to be repaid. That reflects its nature as a sanction similar to the surcharge applied to traders for late payment, rather than as commercial restitution.

13. The thing that gives rise to repayment supplement is undue delay in processing repayment returns or claims: see s.79(2)(b) VATA 1994. The repayment supplement regime applies only where the returns or claims are processed outside the permitted 30 day period (subject to reasonable enquiries).

14. Any payment, even if not of the full amount claimed, is, in the Commissioners' submission, sufficient processing of a return for these purposes. A refusal, in the Commissioner's submission, amounts to sufficient processing.

15. The Commissioners submit that where the taxpayer is dissatisfied with a lower payment than that which he thinks is due, or a refusal to make a due payment, his remedy is to appeal. If he succeeds (either by Decision, consent or whatever) he is entitled to the repayment of the disputed sum together with s.78 interest. But he is not entitled to repayment

supplement if his claim was processed in time.

16. In this case, the Appellant appealed, the Commissioners admitted their error, the repayment was made by deduction from the December return and the Commissioners paid s.78 interest of £16,850.91 in respect of the period from the date of the reduced payment of the September return to the date of repayment (13 November 1998 to 1 February 1999).

17. The Appellant's argument produces the surprising result in that it would give rise to a payment of commercial restitution together with a further sum. This would amount to an over-recovery.

Decisions

18. It appears to us that the start date for the 'relevant period' could be 14 October 1998 which is the date when the Appellant made a repayment claim in the sum of £1,364,233.66. This date is evident from paragraph 2 of the Respondent's Statement of Case. It is also stated in that same paragraph that 'This gave rise to a prepayment [sic] enquiry.' However, it is agreed in paragraph 11 of the Statement of Facts that 26 October 1998 is the start date.

19. According to paragraph 5 of the Respondents Statement of Case 'the enquiries regarding the 09/98 return took from 15 October 1998 to 9 November 1998'. On that date the Respondents informed the Appellant that the Appellant was not entitled to the repayment as claimed, but only to £9,018.29.

20. It is stated in paragraph 11 of the Statement of Facts that the Appellant accepts that the period commencing 26 October 1998 and ending 9 November 1998, thus amounting to 15 days, comprises reasonable enquiry time. In paragraph 12 it is stated that the Respondent accepts that reasonable enquiry time for the purposes of s.79 ended on 13 November 1998, which, given the agreed start date of 26 October 1998, adds a further 4 days to take the total days to 19.

21. The decision to refuse payment was subject to appeal and it was subsequently accepted that the Appellant was entitled to the repayment of £1,339,996 as claimed.

22. The conditions of s.79(2) must be satisfied. The conditions of s.79(2)(a) and (c) are s.79(2)(b) requires that a written instruction directing repayment is made within the 'relevant period'.

23. No written instruction was issued until the letter was sent to the Appellant on 13 January 1999 as recorded in paragraph 7 of the Respondent's Statement of Case.

24. If the agreed start date is 26 October 1998 and the date of the written instruction taken as 13 January 1999 the time span between the two dates is $(6+30+31+13) = 80$. Even if the maximum reasonable enquiry time of 19 days is deducted from 80 the date of issue of written instructions is clearly outwith the statutory 30 days and the Respondent must be entitled to the Repayment supplement.

25. We consider the statements in paragraph 14 as regards the processing of VAT returns to be of doubtful relevance. The law, in s.79, makes no reference to "sufficient processing" of VAT returns. What the law requires for the repayment supplement to become payable is, inter alia, for the Commissioners to fail to issue a written instruction directing the making of the payment or refund within the 'relevant period'. The question is quite simply whether or not a written instruction was issued within the 'relevant period'. The 'relevant period' is normally 30 days but may be extended by time spent on the raising and answering of any reasonable enquiry relating to the claim. It cannot be accepted that 'any payment, even if not of the full

amount claimed, is ... 'sufficient processing' of a VAT return, nor can it be accented that 'a refusal is also sufficient processing' even if we considered that processing of a VAT return were relevant. The payment of only part of the amount claimed, as was the case in this appeal, or a refusal to pay the full amount claimed, is of no relevance in the context of s.79. What we must look for is the start date for the 'relevant period' and any period which is referable to 'the raising and answering of any reasonable enquiry' which may properly extend the normal 30 day period.

26. It is quite obvious that the intention of the legislation would not permit a s.79 payment without deducting any lesser relevant s.78 payment already made, and we consider that the mechanics of this is achieved through the operation of s.78A. Accordingly, our decision is that, in the present circumstances, the Appellant is entitled to the repayment supplement which it is claiming, but pursuant to s.78A it is obliged to repay the interest already made pursuant to s.78.

27. We were not addressed as to costs. If either party contends that it is entitled to costs, and this is not agreed, it should apply to the Tribunal for it to be determined by any Chairman.