[2021] UKFTT 0309 (TC)

TC08251

VAT repayment supplement – Section 79 VATA 1994 - did the taxpayer retain the ability to claim repayment supplement on the amount of VAT credit transferred to and set against another taxpayer's VAT liability – no – calculation of relevant period if Section 79 applies.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06449

BETWEEN

BOLLINWAY PROPERTIES LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER

The hearing took place on 20 and 21 May 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the circumstances of the pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Nigel Gibbon instructed by MHA Moore & Smalley LLP for the Appellant

Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. This appeal concerns a refusal by the Respondents ("HMRC") to pay to the Appellant ("Bollinway") a repayment supplement pursuant to section 79 VAT Act 1994 ("Section 79") in respect of Bollinway's VAT return for accounting period 10/18.

2. Bollinway submitted a VAT return for period 10/18 in which a repayment of £71,170,729.68 was claimed. That amount represented the input tax incurred on the purchase of a property portfolio ("the Properties") from Toys "R" Us Properties Limited ("TRUP") on 17th September 2018 for the sum of £355,853,648.39 plus VAT. Bollinway asked the Respondent ("HMRC") to set-off the amount of its credit which corresponded to the amount of output tax TRUP would become liable to pay to HMRC.

3. The sum of £71,084,816.43 was allocated by HMRC to TRUP's VAT account on 21st December 2018 and the remaining amount of £85,913.25 was authorised for repayment to Bollinway on 21st December 2018.

4. Bollinway claims repayment supplement of £3,554,240.82 being 5% of the sum of the £71,084,816.43 which was credited against TRUP's liability for the same amount.

5. In essence, HMRC says that Section 79 is not applicable to the amount set against TRUP's VAT liability, but even if it was so applicable, no repayment supplement was due because HMRC satisfied the rules requiring their inquiries to be conducted within a "relevant period". Bollinway says that section 79 applies to the application of the £71,084,816.43 against TRUP's liability and the time taken to agree the set-off exceeded the relevant period so that repayment supplement is due.

BACKGROUND

6. The decision which is the subject of the appeal was made in a letter dated 31 May 2019.

7. On 28 June 2019 Bollinway wrote to HMRC requesting a formal reconsideration. The decision was confirmed in a letter of 4 July 2019.

8. On 9 July 2019 HMRC was asked to carry out a statutory review of the decision. In a letter dated 6 September 2019 it was confirmed that the review upheld the decision.

9. Bollinway submitted a Notice of Appeal on 4 October 2019.

10. ADR was attempted but did not settle the dispute.

GROUNDS OF APPEAL

11. In essence, Bollinway's grounds of appeal maintain that Bollinway meets the conditions set out in section 79(3) VATA for a repayment supplement to be paid, as explained more fully in the description of Bollinway's case below.

EVIDENCE

12. An agreed hearing bundle was provided. In addition, Bollinway's representatives applied on 17 May 2021 for the addition of some further emails.

13. There was no objection to the addition of the further emails which provided some missing links in the full chronology. They were therefore duly admitted.

BURDEN OF PROOF

14. The burden of proof rests with Bollinway and is the usual civil standard of the balance of probabilities.

FINDINGS OF FACT

15. The facts in this case are not in dispute. Consequently, the hearing proceeded by way of submissions only. The findings below are generally a reflection of the agreed chronology. However, in paragraph 28 I have made findings based on my assessment of the evidence which go beyond the chronology itself. The findings in paragraph 28 are based on my reading of the relevant documents having received submissions about their operation by Mr Mantle.

16. At all relevant times TRUP and Bollinway were connected companies; they were both controlled by Acepark Ltd. Acepark had bought TRUP for £1 following the appointment of a receiver for the Toys "R" Us holding company which had owned TRUP.

17. Bollinway's first VAT accounting period ended on 31 October 2018.

18. On 17th September 2018 Bollinway purchased TRUP's property portfolio for the sum of £355,853,648.39 plus VAT. Bollinway submitted an option to tax and VAT registration in relation to the acquisition of the properties to have effect on 17 September 2018.

19. On 1 October 2018, TRUP raised an invoice to Bollinway, showing sale of the Properties for the sum of £355,853,648.39 plus VAT. Following the sale of the Properties to Bollinway TRUP ceased to trade on 1 October 2018. HMRC were notified about this fact on 28 November 2018.

20. TRUP had previously agreed non-standard VAT periods and was due to account for the VAT on the sale of the Properties on its VAT return for the period ending 3 November 2018. It was agreed that as an electronic filing, the return was due for submission and payment was due by 10 December 2018. As explained below, this was not affected by the fact that it had ceased to trade on 1 October 2018.

21. Bollinway's representatives, MHA Moore and Smalley ('MHA'), submitted its 10/18 VAT return with a cover letter which, although dated 10 October 2018, the parties agree was, in fact, received by HMRC on 2 November 2018. In that letter MHA said:

> "Given the unusually large amount of tax due on this supply, it would seem more appropriate for all parties including HMRC to make appropriate entries in the VAT records for each taxpayer, rather than making the repayment to Bollinway and awaiting the payment from TRUP."

22. In an email dated 19 November 2018 sent to MHA, Mr Mark, HMRC's customer compliance manager for the Toys "R" Us group, asked some questions about the connection between TRUP and Bollinway, whether MHA was responsible for the submission of the VAT return for TRUP and for some further information about Bollinway. MHA replied by email later on the same day.

23. On 20 November 2018 HMRC asked Mr Duncan Hopkinson, a director of Bollinway (who had contacted Mr Mark to request a copy of TRUP's previous VAT returns) for a copy of the sale and purchase agreement by which Acepark Ltd bought TRUP. Mr Hopkinson replied on 28 November 2018 explaining that there was no sale and purchase agreement as the shares were deemed worthless and only bought for £1. The purchaser would therefore not obtain any warranties etc. A copy of the stock transfer form was provided. It was at that point therefore that HMRC were given more details about the background to the sale of the Properties and the fact that TRUP (owing £71,084,816.43 in output tax) had no value.

24. Meanwhile, on 20 November 2018 what HMRC described as a standard letter issued by the "central system", and for which Mr Mark later apologised, was issued refusing the request for the "appropriate entries" to be made.

25. On 21 November 2018 Mr Chow of HMRC, who worked with Mr Mark, wrote an email to MHA explaining that TRUP's VAT returns for 08.18 and 09.18 had been selected for review and requested a narrative of anticipated future sales and purchases for the next two periods. Mr Chow also confirmed that he would be reviewing the VAT return for Bollinway and asked for a schedule of sales and purchase invoices and "a full set of backing documents". MHA replied on the same day explaining that they could not comment on the 08/18 and 09/18 VAT returns as MHA had only become involved with the company in September 2018 and would forward the request to the company.

26. On 26 November 2018 MHA replied by email to the request for documents made by Mr Chow on 21 November 2018 explaining that there was a single transaction in Bollinway's VAT return being the purchase of the properties. It was said that the "agreements by which the properties were transferred" were attached. It was explained that an option agreement had been entered into on 12 August 2018 which was exercised on 17 September 2018 and the exercise notice was also attached. It was explained that, as shown by the agreements, the consideration was satisfied by the assumption by the purchaser of the seller's debt.

27. The attachments consisted of a call option agreement ("the Option Agreement") dated 12 August 2018, and an undated, but signed option notice ("the Option Notice"). I refer to these documents together as "the Transaction Documents" later in this decision. (I note that MHA said that the "Debenture" entered into in the transactions was also provided. In fact, it was only the draft form of the debenture attached as a schedule to the Option Agreement which was provided, although this has no impact on the decision made by me.)

28. I find that the Transaction Documents were not simple documents. They set out arrangements for the grant of an option by TRUP to Bollinway which are overlaid with financing arrangements and the need for third party consents. I find that, in essence, they showed that:

(1) TRUP gave Bollinway an option to buy the Properties in accordance with the terms of a sale agreement set out in the Option Agreement if a "trigger event" occurred;

(2) If the option was exercised in accordance with the terms set out, which included completion of an Option Notice (which on its face required the notice to be signed and dated):

(a) the parties agreed that the purchase price would be paid on a date set by reference to an interest payment date in July 2019;

(b) the purchase price was calculated with reference to what was referred to as the "Loan" although the Loan was not in fact one of the numerous defined terms and was therefore not immediately identifiable by a reader;

(c) the transfer of the Properties would be in the form set out in a schedule (using a Land Registry form TR5) unless certain conditions were not met in respect of one or more of the properties ("the Remaining Property"), in which case the transfer of the Remaining Property would take place using one or more form TR1s.

29. The draft TR5 attached in the schedule did not state the identity of the transferee of the Properties.

30. The Option Notice provided at this point was signed but not dated.

31. The actual transfer forms for the legal transfer of the properties were not provided at that time. As explained later in these findings, the forms used were, in fact, TR1s and not the form TR5 set out in the schedule to the Option Agreement.

32. On 27 November 2018, MHA emailed Mr Mark about the letter of 20 November 2018 asking how, given the significant amount of tax to be paid and reclaimed, HMRC intended to deal with the recovery and subsequent payment of the VAT. Mr Mark apologised for the 20 November 2018 letter, saying that it had been issued without his team's knowledge.

33. Later on the same day of 27 November 2018, Mr Mark asked if there was a dated option notice given that the one sent was undated.

34. On 28 November 2018 MHA emailed Mr Mark saying that it would be helpful to understand HMRC's intention as soon as possible. Clarification of the mechanics for a repayment to Bollinway was sought. In addition, HMRC was told that, following the sale of the properties, TRUP had ceased to trade and was in the process of de-registering for VAT. That was likely to result in the cancellation of TRUP's 10/18 VAT return and the issue of a replacement final return to 1 October 2018 with a consequent timing impact for the payment of VAT by TRUP.

35. Later on the same day of 28 November 2018 Mr Mark responded to MHA with what he described as an interim reply to the VAT issue. He said that HMRC's intention at that point was to make the offset, but consideration was being given to whether it was easier to carry out the offset once TRUP's return had been filed declaring the output tax due. He queried why it was proposed to deregister TRUP so soon before the 10/18 return was due.

36. On 30 November 2018 MHA replied to Mr Mark explaining that TRUP needed to deregister as it ceased to make taxable supplies on 1 October 2018. However it was queried whether it would make more sense to stop the deregistration process and submit the 10/18 return. Confirmation was sought that as previous returns had taken advantage of the seven-day filing extension for online filing, that would also be permitted for the 10/18 so that the return was not due until 10 December 2018.

37. Mr Mark responded on the same day to say that Mr Chow would respond further in due course but noted that MHA were in possession of a return for TRUP that covered the relevant period. Deregistration was not automatic and there would be processes that HMRC would undertake to ensure that deregistration was appropriate.

38. On 2 December 2018 a dated copy of the option notice was sent to Mr Mark by MHA.

39. On 6 December 2018 MHA emailed Mr Mark and Mr Chow seeking definitive guidance on the VAT payment, noting that it was only two working days before the filing and payment deadline for the TRUP 10/18 return. It was recognised that the "form of the transaction" had only been disclosed to HMRC in the previous week and it was explained that in those circumstances described TRUP did not have the funds to pay its output tax liability and was reliant on the repayment due to Bollinway. It was suggested that it may be easier to "disregard" the 10/18 TRUP VAT return and await the 99/99 deregistration return.

40. On 7 December 2018 Mr Chow wrote to MHA and confirmed that the TRUP 10/18 return should be submitted by its expected due date.

41. On 10 December 2018 the TRUP 10/18 VAT return was submitted showing an output tax liability of £71,084,816.43.

42. On 12 December 2018 Mr Mark emailed MHA asking for a telephone call to discuss the set off. Details of that call have not been provided in the evidence.

43. On 13 December 2018 Mr Mark asked MHA for a headed signed letter of authority from a director of Bollinway requesting offset.

44. On 14 December 2018 there were two streams of emails running in parallel. First, Mr Mark reiterated that they hoped to undertake the offset quickly and asked if the letter of authority could be sent to him that day. MHA replied and queried whether the letter sent on 27 November and the appointment of MHA as agent for both TRUP and Bollinway would suffice to authorise the offset. Mr Mark confirmed that a letter signed by a director of Bollinway was required. He noted that Mr Chow would email MHA for some further details later in the day. This prompted MHA to ask if they should wait for Mr Chow's email and Mr Mark confirmed that they should not. He said that the information sought by Mr Chow was for other issues and the letter of authority was becoming a matter of urgency given the impending holiday season. He provided an extract from the HMRC offset guidance to indicate the necessary information for the letter. That guidance described the offset as involving the following:

> "Key principles - Assignor must request Offset in writing
>
> The Assignor must make a written request asking HMRC to offset their credit to part pay or clear the debt of another entity or several entities. HMRC must agree to and authorise this request in order to give the Offset effect.
>
> The Offset request will:
>
> - be presented on letter headed paper of the Assignor;
> - be expressed as an absolute offset in unequivocal and irrevocable terms;
> - be signed by all necessary authorised officials (Directors, Company Secretaries, Partners etc.);
> - specify the legal entities making and benefitting from the offset; and
> - specify the amount offset and the tax or duty periods concerned.
>
> The Assignor may still be entitled to a reduced credit if not all of the money is required to clear the Assignee's (Assignees') debt(s).
>
> Authorising officials
>
> It is essential that the Offset is made "under the hand of the Assignor".
>
> Where the Assignor is a company, this means that the person(s) with authority to enter into the Offset has(ve) done so, and this will be evidenced by the production of a document containing all the necessary signatures.
>
> It may be that the signature of one director only is sufficient to create a valid Offset of a debt owed to the company; but whether that is so will depend on what the company's Articles of Association require.
>
> If the company can be committed to binding agreements on the basis of the signature of one director only, there is no reason in principle why that director's sole signature should not be sufficient to create a valid Offset of the debt owed to the company by HMRC. In cases such as this, it is quite reasonable for HMRC to satisfy itself that the Offset is valid, by asking the company to demonstrate that the signature of one of their directors is enough to bind to the company."

45. In the second series of emails Mr Chow confirmed that HMRC were looking to progress the offset and asked for the required letter of authority. He said that in the meantime he would be looking to finalise his compliance due diligence on the transaction and asked about the financing of the purchase of the property portfolio, Bollinway's intended use of the properties

and the planned occupancy of them, as well as for confirmation of the option to tax position on the properties.

46. MHA replied and explained that they were now facing a number of competing priorities. It was noted that information been provided previously and it had been assumed that this had been sufficient. It was therefore asked whether the response to the question should be given priority over the letter of authority. Mr Chow confirmed by email on the same day that the letter of authority should be accorded first priority.

47. MHA emailed in reply asking whether the information was needed in order to clear the Bollinway return for repayment. Mr Mark then brought the two email conversations together by responding to say that two actions were needed to bring the matter to resolution: review of the repayment return submitted by Bollinway by obtaining information on a number of aspects of the transaction; and obtaining the signed authorisation. He noted his understanding was that the offset was the MHA preferred solution and that in fact he had understood that the financial situation of TRUP precluded payment of the output tax by it followed by release of the payment claimed by Bollinway. He noted that if things had changed in that regard that alternative could be explored further, but the release of the payment to Bollinway would not be immediate due to the governance required in respect of large repayments.

48. MHA confirmed that the letter of authorisation would be sent on 17 December 2018 (14 December 2018 being a Friday). In the meantime it was said that MHA would respond to Mr Chow shortly. The queries raised were noted to be minor but very late. Later that day MHA replied to the Mr Chow's email of 14 December 2018, but expressed concern that the information had only just been requested and noted that the option to tax had been filed with Bollinway's application for VAT registration.

49. On 17 December 2018 Mr Chow confirmed that the option to tax notifications had been received and asked for evidence confirming that the change in legal ownership of the properties had occurred.

50. On 18 December 2018 MHA replied to Mr Chow saying that evidence in the form of the transfer agreement in the sales invoice had already been provided. It was suggested that if HMRC used the information from the options to tax they could confirm the ownership of the properties by searching the Land Registry. However, later that day MHA sent a copy of the forms transferring title to each of the properties (TR1s) to Mr Chow.

51. As Mr Mark had still not seen a letter of authority from a Bollinway director on Tuesday 18 December 2018 he sent an email to MHA as well as the directors of Bollinway to ask if one had been sent.

52. On 19 December 2018 a copy of the signed letter from Bollinway (dated 17 December 2018) was emailed to Mr Mark by Mr Hopkinson. In that letter ("the Letter of Authorisation") Mr Hopkinson wrote, on behalf of Bollinway, that Bollinway was content to receive repayment of VAT in the normal way if that was the more efficient means of processing repayment. However, if HMRC wished to proceed with the set-off and that would be the quickest way of processing repayment, HMRC should accept the letter as confirmation that Bollinway were prepared to receive repayment on that basis. The letter went on to state that:

> "2. This letter confirms that Bollinway is prepared to assign a proportion of its right to repayment to TRUP, if that is the most efficient means of both receiving repayment and settling the VAT due on TRUP's 10/18 VAT return.
>
> 3. I have signed the letter as a director of Bollinway Properties Ltd. I have the authority to bind the company to this assignment.

> 4. The amount of offset required to settle the liability for TRUP's 10/18 VAT return is £71,084,816.43. The remaining £85,913.25 repayment due to Bollinway on its 10118 VAT return can therefore be repaid to the company."

53. A screenshot shows that HMRC recorded that tax of £71,084,816.43 was due from TRUP on 10 December 2018 and that on 20 December 2018 a credit for a matching amount was entered onto the system.

54. On 2 January 2019 MHA wrote to Mr Chow to ask whether the enquiries into the Bollinway VAT repayment had been completed. Mr Chow replied on the same day confirming the review had been completed and the Set-Off had taken place and had been recorded on the relevant ledgers.

55. On 21 December 2018, HMRC released the balancing £85,913 to Bollinway.

56. On 22 March 2019, MHA emailed Mr Chow regarding a possible repayment supplement due to Bollinway. MHA provided a timeline of events and argued that HMRC had delayed repayment of the VAT refund, and therefore a 5% repayment supplement was due on the VAT reclaimed of £71,170,729.

57. On 31 May 2019, the repayment supplement team issued a decision to Bollinway. It was agreed that a repayment supplement was due, but only on the VAT refund of £85,913.

58. On 7 June 2019 the repayment supplement of £4295 calculated as 5% of £85,913 was paid to Bollinway. HMRC's position is that the payment of repayment supplement was made in error, but HMRC does not seek to recover the amount paid.

59. The Bollinway ledgers on HMRC's system showed:

02/11/18 Claim received	£71,170,729.68 CR
20/12/18 Trans out credit	£71,084,816.43
21/12/18 Repay auth	£71,170,729.68 CR
21/12/18 Repay auth act	£71,170,729.68 CR
21/12/18 Set off against tax	£71,084,816.43 CR
21/12/18 Credit to repay	£85,913.25 CR
21/12/18 PO approved	£85,913.25

BOLLINWAY'S CASE

60. In short, Mr Gibbon submitted that Bollinway was entitled to a "VAT credit" as defined in the Value Added Taxes Act 1994 ("VATA"), the sum claimed as repayment was not greater than the sum due and HMRC did not issue instructions for payment within the relevant period required under Section 79 of 30 days. He submitted that a "VAT credit" under section 25 VATA is the amount by which credit for input tax exceeds output tax due from the taxpayer. Section 25(3) refers to the amount "due" and therefore a VAT credit arises before payment. The fact of payment or non-payment does not alter its existence. He submitted that the wording "would be due" in section 79 is forward looking. He submitted that, in contrast, HMRC are seeking to read Section 79(1)(a) as if it referred to where a person "would be paid" a VAT credit and that inserted too much into the words of the legislation.

61. Mr Gibbon referred to the example of the set-off provisions contained in section 81 VATA under which HMRC do not in fact pay the tax credit to the taxpayer. HMRC's guidance in the Repayment Supplement Manual shows that HMRC accept that repayment

supplement is payable if the set-off under section 81 does not take place within the relevant period, even though no payment is in fact made.

62. Mr Gibbon also referred to the HMRC manual guidance regarding assignment of a right to repayment or credit "to a debt owed to HMRC by another taxpayer". He submits that that guidance is consistent with the approach taken by HMRC in this case when the letter from a director of Bollinway was required and that HMRC are applying a view of assignment which correlates with the ordinary meaning of that word. In order for there to be an assignment there must first be a VAT credit owed by HMRC to the taxpayer.

63. Turning to the requirements of Section 79(2)(c), Mr Gibbon submitted that the provision is concerned with comparing the amounts declared as due on the VAT return with the amounts which ought properly to have been declared. It looks at the position prior to any payment in fact being made and regardless of whether payment is in fact made. In this case the amount shown as due for repayment on the Bollinway's VAT return (£71,084,816) was not greater than the sum which was in fact due to be paid by HMRC.

64. Given these conditions are met, Mr Gibbon submitted that it is then necessary to decide whether HMRC issued instructions for payment within the relevant period of 30 days.

65. Bollinway accepts that four days should be left out of account as days relating to reasonable enquiries relating to Bollinway's return. Bollinway does not accept the other days relied upon by HMRC as being left out of account:

(1) Queries about the relationship between Bollinway and TRUP and between Acepark Limited and TRUP are not relevant to Bollinway's return.

(2) HMRC was provided with sufficient information regarding the property transfers and a request for full backup documentation in an accounting context would not be expected to include the Land Registry documents. Even if those were required, they should have been requested by HMRC on 23 November 2018 or even on 27 November 2018.

(3) It was not a reasonable request to ask for a dated copy of the Option Notice;

(4) The request for the signed letter of authority from Bollinway was not an enquiry relating to its VAT return. In addition, HMRC's manuals state that "The clock will continue to run while DMB process and 'authorise' set-off and any balancing payment".

(5) The request for legal transfer documents was not a reasonable request because the documents were not required to verify Bollinway's VAT return.

66. Reliance is placed on the case of *Lookers Ellesmere Port Ltd v C & E Commrs* and *Customs and Excise Commissioners v Rowland & Co (Retail) Ltd* [1992] STC 647 regarding the necessary level of detail for enquiries.

67. At the hearing Mr Gibbon submitted that there would be no statutory control of the checking and enquiries by HMRC in a situation where a taxpayer wished to set-off their VAT credit against another taxpayer's debt if arrangements such as these did not fall within Section 79, although he recognised my suggestion that the taxpayer with the VAT credit, such as Bollinway, could always change their mind and ask for the repayment up until the point at which the VAT credit was applied against the other taxpayer's debt and that such action would then fall within the repayment supplement provisions of Section 79.

68. Mr Gibbon submitted that Section 79 was, as HMRC contended, a spur to efficiency. HMRC should not be able to rely on saying that in this case there is no need for compensation for being kept out of money. The spur to efficiency should be treated as sufficient purpose

for Section 79 to be interpreted to apply in this case. Section 79 would be otiose if it was necessary to show cost or damage to the taxpayer as a result of the delay. A purposive construction should be applied to Section 79 to reflect its function and that should inform its application in a case such as this.

69. He submitted that the clock was only stopped for HMRC when the entry "Trans Out Credit" of £71,084,816.43" was made on 20 December 2018 on HMRC's ledger system. There was no agreement in place on or before 12 December 2018, as HMRC say, because HMRC had not completed their verification exercise. In addition, the correspondence shows that Bollinway was happy for the application of their credit to take place, but no agreement was in place until HMRC confirmed that such action could be taken and the required letter of authorisation was produced.

70. He submitted that HMRC had not dealt with the situation in an efficient or timeous manner. It had been within HMRC's control to have acted more efficiently so that no issue of repayment supplement would have arisen. It was accepted that the circumstances surrounding the VAT returns were potentially of real concern for HMRC, given that the transactions were between connected parties and such a large sum was involved. HMRC had every right to satisfy itself that the supplies were in fact made and the VAT return claim made by Bollinway was correct. However, it was not for the taxpayer to second-guess HMRC's mind when the full set of backing documents was requested. That was a very general enquiry and did not identify specific documents. The individual handling the responses at MHA was an accountant and not a lawyer and may therefore not have realised which documents constituted the legal transfers. If HMRC required the actual transfers – the TR1s - they should have specifically asked for them. It was not necessary for HMRC to see a dated option notice as the date of transfer was on the invoice. The TR1s were essentially icing on the cake and not necessary for verification of the transactions.

71. Considering the guidance in HMRC's manuals, VATRS10220 indicates that set-off is treated as being equivalent to payment.

HMRC'S CASE

72. Mr Mantle submits that the payment of repayment supplement from HMRC would give Bollinway a windfall of more than £3.5 million. In this case Bollinway was asking for the VAT credit to be set against an amount due from TRUP. The circumstances are in contrast to the paradigm case where the taxpayer is exposed to the loss of the use of money for a period of time. In addition, the claim in this case is opportunistic as Bollinway submitted its VAT return on 2 November 2018, requesting that the VAT credit should be set against an unidentified amount due from TRUP and TRUP did not submit its VAT return until 10 December 2018. Therefore it was only at that point that HMRC had all the information necessary to calculate the precise amount of the set-off requested by Bollinway. It only took 10 further days for that set off to take place.

73. He submits with reference to various parts of Section 79 that the section only applies where there is an actual payment or refund to the taxpayer.

74. He submits that there was an agreement between HMRC and Bollinway evidenced by emails between them and the letter dated 17 December 2018. HMRC have power to enter into such an agreement pursuant to paragraph 1 of Schedule 1 VATA, which gives HMRC responsibility for the care and management of VAT and, so, a managerial discretion. That power enables HMRC to deal, by way of making agreements with the relevant taxable person or persons, pragmatically with particular VAT liability situations, such as that which affected Bollinway and TRUP in the scenario with which this appeal is concerned.

75. It was an implied term of the agreement between HMRC and Bollinway that the set-off would be treated as fully and timeously discharging TRUP's liabilities declared on its 10/18 VAT Return and that no surcharge, interest or penalty would be payable by TRUP to HMRC in respect of those declared liabilities. That was a reasonable, necessary and obvious term in the circumstances of the agreement. It was also an implied term that HMRC would process the set-off within a reasonable period of time after the making of TRUP's 10/18 VAT return. The agreement over-rode any obligation on HMRC to pay the amount used in the set-off to Bollinway.

76. HMRC do not dispute that Bollinway's 10/18 VAT return showed that Bollinway had an entitlement to a VAT credit within the meaning of that expression in subsection 25(3) VATA and Section 79(1)(a). A VAT credit will not always be required to be paid by HMRC. In particular, section 25(4) contemplates a VAT credit being held over to be credited at a later date, either by HMRC's direction or on the taxpayer's own application.

77. However, Section 79 is concerned with situations in which a person is entitled to payment of a VAT credit. Reference is made to FTT cases such as *Tarn-Pure AG Ltd v HMRC* [2017] UKFTT 102 (TC) which he submits make clear that the instruction referred to in Section 79(2)(b) must relate to the making of a payment. Further references in Section 79 to payment re-enforce this conclusion.

78. It is recognised that a purpose of Section 79 is to incentivise HMRC to act reasonably promptly in certain scenarios, by giving HMRC a financial incentive to do so, through imposing a cost on not doing so. This has been called a "spur to efficiency". However, given repayment supplement is paid to a taxable person over and above what it would otherwise be paid, the purpose of repayment supplement is also to act as a form of "standardised" compensation for taxable persons being kept out of sums which they are entitled to be paid by HMRC, as recognised in *CCE v L Rowland & Co (Retail) Ltd* [1992] STC 647,QBD at 652h-j and *Corrigan* [2016] UKFTT. No such compensation right arose in this case.

79. In response to Bollinway's comparison to Section 81, Mr Mantle submits that that section operates automatically and there is no question of section 79 applying.

80. He submits that set-off is not a form of payment, relying on Halsbury's Laws of England, Volume 11, Civil Procedure, para 383 'Distinction between set-off and payment".

81. The HMRC Manual provisions relied upon by Bollinway in relation to the application of the 30 day period to set-offs is directed at situations where there is both a set-off and a balancing payment. Section 79 continues to apply to any balancing payment.

82. HMRC does not say there was an assignment of a right by Bollinway to TRUP. Although there can in principle be an assignment by a taxable person to another person of certain claims for payment against HMRC provided by VATA (e.g. a claim for repayment under s 80 VATA – see *Midlands Co-operative Society Ltd v HMRC* [2008] STC 1803), Bollinway do not rely on any assignment (in writing or otherwise) of all, or part, of any debt or chose in action by Bollinway to TRUP. HMRC's manual makes clear that the mechanism is not a formal assignment, but a request by the taxable person entitled to a credit to HMRC for what is actually a set-off to discharge the debt of another entity to HMRC, leading to an agreement between that taxable person and HMRC. Bollinway had, by virtue of that agreement, foregone payment to it of part of the amount shown on its return as a VAT credit. Section 79(2)(c) should be interpreted in that light. A purposive interpretation of that subsection should take into account the amount of VAT credit which HMRC are liable to pay to Bollinway as a result of the agreement.

83. However, if there had been a valid assignment by Bollinway to TRUP of the entitlement to the VAT credit shown on Bollinway's 10/18 VAT return, that would have vested in TRUP the relevant legal right and all the remedies for it. Thus, in that scenario as well, Bollinway would have had no right to any payment from HMRC and no right to repayment supplement on the amount set off against TRUP's liability.

84. In relation to the relevant period, HMRC maintain that 20 December was the 18th day of the relevant period. 31 days between 2 November 2018 and 20 December 2018 should properly be left out of account. Verifying a VAT return is not just an accountancy exercise. It is reasonable for HMRC to satisfy themselves, not least when facing a claim for input tax credit of over £70 million, about the relevant series of supplies to the taxable person.

85. In the context of applying the provisions contained in Regulations 198 and 199, Mr Mantle submits that Bollinway are incorrect in claiming that if an enquiry is sent by HMRC after 5:00 pm the next day is the first day that can be left out of account.

86. Mr Mantle relies upon the case of *Rowland* and in particular the statement that: "The taxpayer's protection lies in his own promptness in completely answering or arranging to have answered the questions put to him. He can control the length of time for which the clock is stopped."

87. If Section 79 is to be applied to the circumstances in this appeal, the period between HMRC requesting the letter of authorisation and the provision of that letter should be excluded from the relevant period. If the provisions in section 79(2) referring to inquiries made about the VAT return exclude the time period for the requisite letter to be provided, that adds weight to the arguments that it is inappropriate to apply section 79 in the circumstances.

88. At the hearing Mr Mantle submitted that the extent of the enquiries raised by HMRC was particularly justified given that it was Bollinway's first VAT return; there was a very large amount claimed in excess of £70 million and Bollinway's VAT return showed no outputs or taxable supplies. This was all in the context of TRUP having financial difficulties and a receiver having been appointed so there was particularly good reason to check that the supply of goods had in fact happened. He submitted that evidence in an email shows that Bollinway understood that HMRC was asking for the documents showing the transfer of the properties, but then failed to provide those documents and instead provided agreements which were inadequate evidence of the actual transfers. At no point before the completion of enquiries did HMRC say that all of the documents requested had been received.

89. Mr Mantle worked through the provisions in the documents relating to the transfers of the properties and in particular noted that the Option Agreement specifically provided for a signed and dated option notice. Accordingly, the undated option notice appeared invalid on its face. In addition, the definition of "Purchase Price" in the Agreement was complex and did not in itself confirm the consideration; and "Completion Date" was stated to run from the date of the option notice. Also, it was not clear on the face of the option notice which properties had been transferred as there were noted exclusions. The TR5s did not state that Bollinway was the transferee and therefore the TR1s were also needed to evidence the transfers of the properties. When queries on these matters were raised Bollinway had not sent a copy of the legal transfers of the properties to HMRC, which would have provided evidence of the relevant supplies. It was not reasonable to expect HMRC to carry out searches at the Land Registry.

90. He submitted that given the request by HMRC for the "full set of backing documents" was not fully answered until 18 December 2018, 26 days should be left out of the calculation of the relevant period. Alternatively, at the very least, 10 days should be left out from 23

November 2 to December when the dated Option Notice was received and two days for 17-18 December for the provision of the TR1s should be excluded.

91. Mr Mantle submitted that the enquiries relating to the relationship between Bollinway and TRUP and TRUP and Acepark Ltd were also reasonable in the context of the transactions.

MATTERS RAISED IN THE HEARING

92. In response to matters raised by me at the hearing:

(1) Mr Gibbon confirmed that TRUP would not have had a liability to pay a surcharge if the Bollinway credit had not been applied to the amount of output tax due from it and it had therefore been late in making payment as this would have been TRUP's first default.

(2) Neither Mr Gibbon nor Mr Mantle was able to refer me to any more authority regarding the legal mechanics involved in a set-off and in particular whether payment is treated as having been made, beyond a reference in Halsbury's Laws to the treatment of set-offs of counterclaims in civil litigation. Mr Mantle submitted that this showed that set-off did not involve payment and that Bollinway had not argued otherwise. Instead, Bollinway was arguing that the reference to payment should be viewed as encompassing the circumstances in this case.

(3) Both Mr Mantle and Mr Gibbon submitted that applying the guidance in *R* v *Montila* ([2004] UKHL 50) headings should be taken into account but given less weight than the text of the sections because the headings are not amendable.

THE LAW

93. Insofar as relevant to the matters in dispute Section 79 VATA said at the relevant time:

> "**Section 79 VATA 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, or
>
> (c) a body which is registered and to which section 33A applies is entitled to a refund under that section, or
>
> (d) the proprietor of an Academy who is registered is entitled to a refund under section 33B, or
>
> (e) a charity which is registered is entitled to a refund under section 33C,
>
> 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 relevant period, 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.

(2A) The relevant period in relation to a return or claim is the period of 30 days beginning with the later of:

(a) the day after the last day of the prescribed accounting period to which the return or claim relates, and

(b) the date of the receipt by the Commissioners of the return or claim.

(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…

…(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 or (as the case may be) the Commissioners' determination under, and the provisions of, section 33A, 33B or 33C.

94. The definition of "VAT credit" is found in section 25 VATA which at the relevant time said:

> 25 Payment by reference to accounting periods and credit for input tax against output tax
>
> (1) A taxable person shall:
>
> (a) in respect of supplies made by him; and
>
> (b) in respect of the acquisition by him from other member States of any goods,
>
> account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
>
> (3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit".

95. Insofar as relevant to the matters in dispute, Regulation 198 and 199 of the VAT Regulations 1995 ("Regulation 198 and 199") said:

> "**198 Computation of period**
>
> 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…"
>
> **199 Duration of period**
>
> 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…"

DISCUSSION

96. In essence, in the standard case envisaged by Section 79 involving a claim to repayment of VAT by a taxpayer, the legislation grants the taxpayer a repayment supplement set at 5% of the amount due to them if HMRC fails to complete its enquiries into the taxpayer's VAT return and issue a direction making payment within a specified "relevant period", provided that the amount claimed in the return is not more than 5% greater than the amount in fact due to be paid. In the case of *Rowland* this was described as a "spur to action" by HMRC.

97. The parties agree that at any time prior to the letter dated 17 December 2018, but received by HMRC on 19 December 2018, Bollinway could have chosen to ask for repayment in the normal way. TRUP would have been liable to pay £71,084,816.43 output tax and if the 30

day relevant period had been exceeded Bollinway would have been entitled to repayment supplement under Section 79 on the £71,170,729.68 repayment which would have been made to it. However, as explained above in the findings, that is not the course of action which took place. £71,084,816.43 of Bollinway's VAT credit was set against TRUP's output tax liability. For the reasons I explain below, that action was the result of Bollinway assigning its entitlement to the VAT credit to TRUP.

98. It is common ground that the VAT legislation does not make express provision for the circumstances of this case. Indeed, I would go so far as to say that a fundamental problem in this case is that it concerns what is, in effect, a practical and pragmatic easement operated by HMRC which is not envisaged by the legislation. The issues arising from seeking to do so are highlighted by practical issues:

(1) The relevant period in which HMRC is required to conduct its inquiries into the VAT return is calculated with specific allowance for time referable to the raising and answering of any reasonable enquiry into the VAT return. Mr Gibbon submits that the time taken after HMRC asked for the necessary letter of authorisation for that letter to be produced is not time referable to the raising and answering of a reasonable enquiry into the VAT return. I agree, but that conclusion then, in my opinion merely serves to show that Section 79 is not designed for such a situation. A taxpayer could simply prolong the period by not producing the correct documentation and contrive to qualify for a repayment supplement. When this example was put to Mr Gibbon his response was that HMRC should reach an agreement with the taxpayer first and at that point the relevant period would end so additional time to produce the requisite letter would not be taken into account. However, I find little basis to conclude that HMRC would be able to reach such an agreement until the correct documentation (as described later) was provided. Moreover, the action required under Section 79 is the issue of a written instruction directing the making of a payment, not an agreement with a taxpayer;

(2) TRUP did not submit its VAT return until 10 December 2018. Therefore it is only at that point that HMRC had all the information necessary to calculate the precise amount of the set-off requested by Bollinway. Section 79 makes no provision for delay in processing a set-off caused by the party to whom the VAT credit is to be applied submitting a VAT return later than the party who was originally entitled to the VAT credit. Indeed, the application of Section 79 would beg the question as to which VAT returns can be the subject of inquiries by HMRC - do the provisions of Section 79 extend to consideration of the returns of both the transferor and transferee of the VAT credit?

99. Such reservations would be of little consequence though if the circumstances of this case properly fell within the wording of Section 79. There are many instances where tax legislation applies beyond the standard scenario in which it is used. However, for the reasons I now explain I have concluded that Bollinway's claim to repayment supplement on the amount of £71,084,816.43 does not give rise to repayment supplement under Section 79.

The application of Section 79

100. In order for repayment supplement to be payable by HMRC, Section 79 requires one of the cases set out in Section 79(1) to apply and the conditions in Section 79(2) to be satisfied.

Section 79(1) – the extent of Bollinway's entitlement to a VAT credit

101. The parties agree that Bollinway was entitled to a VAT credit. Section 25(2) makes clear that such entitlement arises at the end of the prescribed accounting period. This entitlement is then subject to specific provision enabling HMRC to withhold payment of a credit or for the credit to be rolled over to the next prescribed accounting period in certain circumstances.

102.In essence, Mr Mantle argues that Bollinway gave up the right to be paid the repayment supplement when it entered into an agreement with HMRC to apply its entitlement to a VAT credit to TRUP's liability to pay VAT and/or that section 79 depends upon there being a payment or refund which did not arise on that application of Bollinway's VAT credit.

103.I do not agree that there was an agreement entered into by Bollinway with HMRC under which it gave up the right to be paid the repayment supplement. Instead, I consider that the correct analysis of the actions taken is that Bollinway assigned entitlement to £71,084,816.43 of its VAT credit to TRUP.

104.The reasons why I conclude that the actions gave rise to an assignment of the entitlement to £71,084,816.43 of the VAT credit are:

(1) The terms of the Letter of Authorisation which stated that Bollinway was prepared to assign a proportion of its right to repayment to TRUP;

(2) Mr Hopkinson's confirmation in the Letter of Authorisation that he had the authority to bind Bollinway to the assignment;

(3) the Letter of Authorisation was provided in accordance with the requirements identified by Mr Mark in the email of 14 December 2018 setting out the HMRC guidance for "assignment to offset a taxpayer's credit to part pay or clear the debt of another entity". That guidance seeks to reflect the requirements for a legal assignment under section 136 LPA (which are set out in the Annex to this decision).

105.Mr Mantle submitted at the hearing that the Letter of Authorisation did not satisfy the requirements of section 136 of the Law Property Act 1925 ("LPA") for there to be a legal assignment of the chose in action. (I set out the text of section 136 in the Annex hereto for ease of reference.) However, I consider this to be a matter which goes to issues of enforceability rather than whether the action should properly be categorised as an assignment. Even if the requirements for a legal assignment under section 136 LPA were not satisfied, an equitable assignment could still have arisen; and in the circumstances of this case I find that it did.

106.I recognise that in the Letter of Authorisation Mr Hopkinson wrote:

> "If you wish to proceed with an offset and that is the quickest way of processing repayment, you should accept this letter as confirmation that we are prepared to receive payment on that basis…

107.I have considered whether the reference to payment therein alters my view regarding the assignment. I consider that the reference must be construed in the context of the letter overall and the references to assignment therein. The assignment was the operative part of the letter and reference to "receiving payment" must be viewed in that light. It is therefore no more than colloquial phrasing or reference to receiving actual payment of the balance of £85,913.25.

108.As a result, I conclude that the reference to "processing repayment" must be taken to refer to the processing of the repayment of the £85,913.25, as there could be no expectation of Bollinway that it would receive any of the £71,084,816.43 as repayment after the assignment to TRUP.

109.It is clear that assignments of the right to repayment/VAT credits take place (see for example the case of *Emblaze Mobility Solutions Ltd v Revenue and Customs Commissioners*[2018] UKUT 373 (TCC)); and I am satisfied that an assignment took place in this case. Neither party has identified any restriction excluding the ordinary law as to the ability of a person to assign choses in action. Mr Mantle recognises that in the case of

Midlands Co-operative Society Ltd v HMRC [2008] STC 1803 a claim for repayment under section 80 VAT was found by the Court Of Appeal to have been validly assigned. In that case the assignment was a legal assignment, but the court expressly envisaged the possibility of an equitable assignment (at para 30f-g).

110.This leads onto the question of the application of Section 79 where an assignment of the right to a VAT credit takes place.

Does section 79 apply where there is an assignment of a right to a VAT credit?

111.As noted above, section 25 VATA identifies the existence of a VAT credit by reference to the prescribed accounting period. At that point an amount which is due under Section 25(3) is a VAT credit.

112.Section 79 applies where a person "is entitled" to a VAT credit and the conditions in Section 79(2) are satisfied. Entitlement to a VAT credit is not sufficient on its own.

113.Mr Gibbon submits that Section 79 is forward-looking as a result of saying that the amount which "would be due by way of that payment or refund shall be increased". He submits that effectively as long as the taxpayer is entitled to a VAT credit at some point that is sufficient. However, I consider that Section 79 must be read as a whole. This means concluding that the repayment supplement only arises when both a requirement of section 79(1) is met (i.e. in this case the taxpayer is entitled to a VAT credit) and the conditions in section 79(2) are met. Until that point the right to a repayment supplement cannot arise.

114.I therefore consider that the requirement that "a person is entitled to a VAT credit" and the requirement that conditions in subsection (2) are satisfied need to be met at the same time. Section 79 is not phrased to encompass situations where a person is or "has been" entitled to a VAT credit.

115.Once Bollinway assigned its right to the VAT credit it was no longer entitled to it. Instead, the assignment meant that TRUP was now entitled to the credit of £71,084,816.43 to set against its output tax liability for that amount. There is a separate set of issues as to whether the assignee could claim repayment supplement if the amount assigned to it resulted in a repayment to it. That is not a matter before me, but I would comment that such a claim would cause further issues regarding the design of Section 79, not least as to which VAT return should be considered as that to which the relevant period inquiries should relate, as noted earlier.

116.The parties made detailed submissions regarding the purpose of Section 79 and the extent to which it is tied to payments or refunds. The heading can be taken into account by me applying the approach set out in *Montilla*. This means that the words used in the heading are relevant but are not as determinative as the words used in the section itself. The heading says "Repayment supplement in respect of certain delayed payments or refunds." It is therefore setting a context where a payment or refund is made, not to actions which are treated as being economically equivalent to the net result of two payments made from A to B and B to A.

117.The words used in Section 79 are structured around the concept of a payment or refund. The situations envisaged by Section 79(1) all involve a payment or refund. In particular, Section 79(1)(a) refers to the entitlement to a VAT credit which itself requires reference back to section 25 VATA defining a VAT credit as the amount of the excess of the credit less the output tax due (or if there is no output tax due, the amount of the credit) which shall be paid to the taxable person by the Commissioners. In this case there was no payment either to Bollinway or TRUP. Bollinway had assigned its right to the VAT credit and the setting off against the output tax due from TRUP by it meant that there was no payment to it.

118.The parties have referred me to Halsbury's for consideration of whether the set off involves payment. In the context of a claim and counterclaim in litigation, Halsbury's states:

> "Payment is satisfaction of a claim made by or on behalf of a person against whom the claim is brought, and the person paying performs the obligation in respect of which the claim arises, which thereby becomes extinguished; set-off exempts a person entitled to it from making any satisfaction of a claim brought against him, or of so much of the claim as equals the amount which he is entitled to set off, and thus to the extent of his set-off he is discharged from performance of the obligation in respect of which the claim arises."

119.Bollinway asked for the ability to set off its right to repayment of the £71,084,816.43 against TRUP's output tax liability. Neither party has sought to claim that the set-off of the £71,084,816.43 VAT credit against the corresponding amount of output tax due by TRUP involved an actual payment of £71,084,816.43 by HMRC.

120.Cases such as *UBS AG v HMRC and DB Group Services v HMRC* [2016] UKSC 13 confirm that a purposive approach should be applied to legislative construction, but I am not satisfied that the purpose of the legislation extends to making provision for repayment supplement where there is no actual payment given my conclusions about the wording of Section 79. For the reasons I explain later, the purpose of a "spur to action" for HMRC is in fact maintained without the extension sought by Bollinway and I therefore see little basis to extend the words of the legislation in the way which would be needed.

121.Mr Gibbon submitted that this conclusion means that the "spur to action" underlying section 79 was negated. However, I do not agree. At any stage prior to submitting the Letter of Authorisation the directors of Bollinway could have decided to retain the right to repayment of the VAT credit and claim any repayment supplement arising thereon if the conditions of section 79(2) were met, but chose not to do so. HMRC were exposed to that risk until receipt of the Letter of Authorisation on 19 December 2018 and therefore should have proceeded on the basis that a repayment may in fact be made with the application of Section 79 up until receipt of that letter.

122.I have considered whether the benefit of the VAT credit was assigned but the potential entitlement to a repayment supplement was retained by Bollinway. However, neither party has argued that the Letter of Authorisation had this effect. In addition, given my conclusions above regarding the construction of Section 79 and the time at which entitlement to a VAT credit is taken into account, I see little basis on which Section 79 can result in entitlement to be paid the repayment supplement when there is no payment or even application of the VAT credit to that person.

123.HMRC decided to pay repayment supplement on the amount of the VAT credit which had not been assigned to TRUP. HMRC has subsequently said that this was paid in error, but has not sought to reclaim the payment. It is therefore not in issue between the parties. Arguments were therefore not put to me about it and I make no further comment on it save for the fact that I take into account the fact addressed in the parties' submissions that section 79(2)(c) sets out the condition that the amount shown on the return as due by way of payment or refund does not exceed the payment or refund which was in fact you by more than 5% of that payment or refund (or £250, if greater). In a situation such as this, the assignment of such a large proportion of the VAT credit inevitably means that there is a question as to whether the payment shown on Bollinway's VAT return as due to it should be compared with the actual payment of £85,913 or the total pre-assignment value of £71,170,729.68. This is another illustration of the issues faced with applying Section 79 to a situation for which it was not designed.

124.Mr Gibbon submitted that Section 79 is applied where there is an automatic set off under section 81 VATA and therefore it should also be applied in this case. That section applies where an amount is due from the Commissioners to a taxpayer and that person is liable to pay a sum by way of VAT, penalty, interest or surcharge. In such a case section 81 operates automatically so that the amount payable to the taxpayer is set against the amount owed to the taxpayer. Notwithstanding HMRC Manual statements relied upon by Mr Gibbon, Mr Mantle submitted that Section 79 does not apply to the amount otherwise due to the taxpayer which is set off.

125.Mr Gibbon submitted that the HMRC Manual guidance shows that HMRC's own guidance expressly deals with set-offs in the context of Section 79 and therefore must be considered to view the "set-off" of Bollinway's VAT credit against TRUP's liability as falling within Section 79.

126.The Repayment Supplement Manual at VATRS 10100 says:

> "Any decision to set off must be made quickly and any discussion about whether it is right to set repayment supplement off against a debt must be documented, as the time taken for the setoff process is not deductible."

127.At VATRS 10220 HMRC says:

> "In a case involving set off there is a referral to DMB via TRUCE work bench repayment return has been approved. If reasonable enquiries have been made then the clock will have stopped and re-started on completion of those enquiries. The clock will continue to run while DMB process and 'authorise' set-off and any balancing payment. "

128.Considering the Manual extracts in the context of the guidance in which they sit:

(1) In the context of the section 81 set-offs, the "clock runs" while HMRC process and authorise that set-off. That is consistent with the conclusion I have reached that the time for the provision of the Letter of Authorisation is not time taken into account under Section 79. However, in contrast to the circumstances of this case, an automatic set-off under section 81 is a process entirely within HMRC's control. In a case such as this the process is dependent on the correct form of authorisation being provided by the taxpayer.

(2) it is clear that the guidance is addressing the application of section 81 set-offs where the amount set-off is set against an amount owed by the same taxpayer. For reasons which are not obvious, HMRC purports to distinguish in its guidance between "set-off" where a credit is set against the same taxpayer's liability and "offset" where a third party is involved. HMRC's guidance about the application of section 81 should not therefore be treated as applying to what it refers to as offsets, i.e. the situation in this case.

129.I therefore conclude that HMRC's guidance regarding section 81 set-offs does not undermine the conclusions I have reached above. Furthermore, the operation of Section 79 in practice by HMRC in a situation where section 81 applies raises some notably different issues. For example, there would be little basis to conclude that the taxpayer ceased to be entitled to a VAT credit where section 81 applies. The taxpayer has not assigned or transferred the entitlement.

130.I recognise that the set-off under section 81 raises similar issues as to whether the set-off involves "payment", but in the absence of further explanation of the basis on which Section 79 is, or is not applied to a section 81 situation, I must conclude that, if applied, it may be on the basis of concessionary/pragmatic practice.

131.Therefore for all these reasons I conclude that once Bollinway assigned the benefit of the VAT credit of £71,084,816.43 to TRUP it was no longer able to claim the payment of the

repayment supplement under Section 79 if HMRC failed to meet the relevant period conditions for its inquiries into Bollinway's VAT return.

132.However, as explained above, I now address those relevant period rules on the assumption that Bollinway could continue to rely on Section 79 after the assignment to TRUP.

Application of the relevant period rules

133.It is common ground that the Appellant's VAT return was received on 2 November 2018; that the instruction for crediting TRUP's VAT account was issued on 20 December 2018; and that the number of calendar days between the two dates is 49. The parties have agreed that the instruction on 20 December 2018 is a written instruction directing the making of the payment or refund issued by the Commissioners.

134.The matter in dispute is whether the Commissioners' written instruction on 20 December 2018 was issued within the "relevant period" required by section 79. The effect of Section 79(2A) in this case is that the relevant period is the period of 30 days beginning with the date of the receipt by the Commissioners of the return or claim, i.e. 2 November 2018.

135.Bollinway accepts that the following enquiries were reasonable enquiries and, subject to what is said about the time of day at which the inquiry was raised on 14th December 2018 below, the time taken for those enquiries may be left out of account in determining whether the "relevant period" requirements have been met:

(1) 23-26 November (3 days);

(2) 14 December (1 day);

136.The rules for determining what days may be taken into account are provided by Section 79 and Regulations 198 and 199.

137.Section 79(3) provides the statutory authority for Regulations 198 and 199, enabling those Regulations to leave out of account periods determined in accordance with the regulations and referable to the raising and answering of "any reasonable inquiry relating to the requisite return" or claim. At the heart of the matters disputed is the question of what constitutes a "reasonable inquiry" into the Bollinway return submitted on 2 November 2018.

138.Section 79(4) provides that in determining whether any period is referable to the raising and answering of such an inquiry, the end date for inquiries is the later of the date on which the Commissioners satisfy themselves that they have received a complete answer to the inquiry or determine not to pursue it further, but excluding so much of that period as may be prescribed.

139.Regulations 198 and 199 then specify that the period referable to the raising and answering of any reasonable inquiry relating to the requisite return is left out of account in determining the relevant period; and in so doing the period for such inquiries is taken to have ended on the date when the Commissioners received a complete answer to their enquiry.

140.These provisions have been considered in the case of *Rowland*, to which both parties have referred me. In that case it was made clear that determination of the period for reasonable enquiries was not judged by reference to HMRC's capacity to deal with the matters; and inquiries are not general ones in the sense of a general investigation, but those raised in relation to a particular return in respect of which a supplement may be payable (see 655 d-j).

141.In addressing the reference in the Regulations to the dates on which the Commissioners receive a complete answer to an enquiry Auld J said at 656c-d:

> "It is for the taxpayer to justify, or cause to be justified, his claim for repayment once the commissioners have raised an inquiry with him about it.

> If he answers it completely and promptly, or causes or enables such an answer, he will not lose his entitlement to a supplement. If he delays or has difficulty in providing a complete answer promptly, he will risk losing his entitlement to a supplement. The matter is in his hands and the period for which the 'clock is stopped' while he deals with it is readily identifiable."

142.The first matter is therefore to identify what query or queries raised by HMRC were reasonable inquiries into Bollinway's return submitted on 2 November 2018. It is then necessary to determine what period should be left out of account in calculating the 30 days in relation to any such inquiries.

Reasonable inquiries

143.Mr Gibbon accepts that the following enquiries were reasonable enquiries:

(1) the email of 23 November 2018 in which HMRC requested a schedule of sales and purchase invoices as well as "a full set of backing documents" for the property transfers;

(2) the email of 14 December 2018 in which HMRC requested the following information:

(a) How has the purchase of the properties been financed and when this will be paid?

(b) Can you confirm the option to tax position on the properties?

(c) Can you please clarify how Bollinway intends to use these properties in its business?

(d) Relatedly, who will occupy the properties going forwards?

144.Given my conclusions regarding the days which should be left out of account in relation to those inquiries I do not address Mr Mantle's submissions regarding other potential reasonable inquiries.

Days left out of account in relation to the inquiries

145.Mr Gibbon submits that when MHA responded on 26 November 2018 the information provided then satisfied the inquiry made by HMRC. MHA attached the following to their response:

(1) sales invoice ;

(2) a schedule of properties ;

(3) the Transaction Documents.

146.I do not consider that these documents were sufficient to provide a complete answer to the enquiry of 23 November 2018 for the following reasons.

147.Mr Gibbon submits that the Transaction Documents constituted the agreements by which the properties were transferred. However, the properties were not transferred by those documents which consisted of the Option Agreement and the undated Option Notice, but by the TR1s. The Option Agreement set out the expected form of the legal transfer via a TR5. However, it was only the expected/draft document and in fact that form of document was not used for the transfers which took place.

148.Furthermore, as Mr Mantle submitted, the key document which triggered the VAT point was the legal transfer, not the sales invoice. That is because the VAT arose on the supply of goods which in this case was the grant of a major interest in land (Schedule 4(4) VATA).

149.MHA described the Transaction Documents as the ones "by which the properties were transferred". I agree with Mr Mantle that that description shows that MHA were aware that they needed to provide the documents by which the properties were transferred. The problem is that the documents provided did not include those by which the properties were transferred.

150.The inadequacies of the Transaction Documents to show that the actual transfers took place must be seen in the following context:

(1) HMRC were addressing a very large transaction involving supplies of property for £355,853,648.39 giving rise to a large repayment claim of more than £71 million;

(2) Bollinway was a new company with no VAT history;

(3) the VAT return for TRUP showing its VAT liability has not been submitted and was not submitted until its due date of 10 December 2018;

(4) TRUP's holding company had had a receiver appointed and TRUP itself was a company with no value but an expected liability to HMRC of £71,170,729.68;

(5) The Transaction Documents were complex documents dealing with the refinancing. The findings above show that the option granted to Bollinway could only be exercised on the occurrence of trigger events, and even then the transfer of the Properties was conditional on matters such as third party consents. It was therefore unclear until the transfers were seen whether the conditions had been satisfied for any of the Properties and therefore whether any had been transferred;

(6) The TR1s provided on 18 December showed the transferee was Bollinway. No other document provided before then had shown that legal transfer to Bollinway had taken place.

151. It was therefore particularly incumbent upon HMRC to carry out full inquiries before approving the repayment claim.

152.Mr Gibbon has relied upon the case of *Lookers* to say that it is not reasonable for HMRC to raise a general enquiry about the transaction and, without any follow up, to expect production of specific non-accounting documents. He submits that it was only on 17 December that HMRC asked for the specific documents, i.e. the legal transfers.

153.In *Lookers* the judge found that HMRC had referred the repayment claim to an officer who was already fully committed on other work. He therefore did not start to address the matter for 12 days after being asked to do so. The reliability of the officer's evidence was called into question by the judge and considered to be "symptomatic of a casual and unstructured approach" of the relevant HMRC office in dealing with repayment claims. The judge specifically noted that this had considerable influence on his decision. The judge accepted that the taxpayer knew nothing of the HMRC officer's attempts to make contact. There was then further delay before the HMRC officer contacted the taxpayer and arrange a verification visit and yet more delay after that call and before the visit. The judge made clear that HMRC should have followed up the initial telephone calls with a letter or email and considered the officer should have contacted the taxpayer more quickly. As a result the 30 day period had been exceeded.

154.This is a very different set of circumstances. In *Lookers* there were significant delays in properly engaging with the taxpayer at all. That is not the case here. Mr Mark and Mr Chow were in regular and close contact with MHA. Mr Chow, for example, identified that the Option Notice sent on 26 November was undated the day after its receipt.

155.The provision of an undated copy by MHA was an obvious omission on the face of the documents and it is therefore probably not surprising that HMRC was able to identify it quickly. I do not consider that it was incumbent on them at that point to identify that the request for full backing documents had not been complied with and that the actual transfers were outstanding, given the description provided only one day before by MHA.

156.Furthermore, the obligation was on Bollinway and its advisors to provide the most relevant documents – the legal transfers of the Properties. I do not consider that *Lookers* is authority for me to go beyond the clear words of the legislation specifying that the Commissioners should receive a "complete answer" to their enquiry or to go beyond the clearly binding authority of *Rowland* which makes clear that it is for the taxpayer to provide a complete answer to any reasonable enquiry.

157.Mr Gibbon submits that a full set of backup documentation in an accounting context would not be expected to include the Land Registry transfer documents. Be that as it may, this was not an accounting exercise, but conduct of what the parties have accepted was a reasonable inquiry into Bollinway's VAT return and verification of its claim for more than £71 million repayment in a context where the only supply was a transfer of land. The Transaction Documents did not show the actual transfer of the Properties which triggered the VAT point. Indeed, I would expect an adviser to realise that the key document was in fact the legal transfers. It was not reasonable to ask HMRC to carry out Land Registry searches to identify the change in ownership. It was incumbent on Bollinway to provide the complete answer; and this was particularly so in this case given that 26 Land Registry titles were transferred by the TR1s, with some of the Properties having more than one title.

158.I therefore find that the period from 23 November to 18 December – amounting to 26 days – should be excluded from the total of 49 days from 2 November until 20 December. That leaves 23 days and as a result I conclude that HMRC completed the written instruction directing the making of the payment within the relevant period of 30 days.

159.There is one further matter raised by Mr Gibbon in his submissions. He says that an email sent by HMRC after 5:00pm is deemed received the following day and therefore the day count only starts on the following day. He says therefore that as the email sent on 23 November 2018 asking for the backing documents was sent at 5:25pm it should be treated as received on 24 November 2018. He relies on HMRC manual VATRS10100 which states:

> First contact with the trader begins the enquiry time and the repayment supplement clock stops only when it is reasonable for HMRC to expect the customer to have received our request for additional information
>
> • 2 working days after sending your letter
>
> • the day of your telephone call or email if you make it before 5pm that day
>
> • the day after your call or email if you make it after 5pm that day.

160. In fact it would make no difference to the outcome in this case as the days excluded would be reduced from 26 to 25. However, for the avoidance of doubt I do not agree with Mr Gibbons' construction.

161.He relies upon guidance in HMRC's Manuals. However, Manual guidance cannot displace the law and is describing HMRC's opinion. I consider that the statement in the Manuals is, in effect, a concession indicated by HMRC which goes beyond the terms of the legislation. The legislation makes no such provision for treating an inquiry made by email as being made on any day other than that on which it is sent. Regulation 199(a) refers to the period referable to the raising and answering of any reasonable inquiry as beginning "on the date when the Commissioners first raised the inquiry". Mr Gibbon has not referred to any

legislation altering the meaning of the plain words or any case suggesting anything other than that plain meaning be applied.

CONCLUSION

162. I have therefore concluded that:

(1) Bollinway assigned its right to a VAT credit of £71,084,816.4371 to TRUP;

(2) As a result of the assignment Bollinway was no longer entitled to claim repayment supplement under section 79 on the amount of £71,084,816.43;

(3) Even if Bollinway was able to rely on section 79, despite the assignment and the consequent lack of payment to it, HMRC's issue of the requisite direction on 20 December 2018 took place within the relevant period of 30 days from the submission of the VAT return on 2 November 2018.

163. Therefore the appeal is dismissed. The decision made by HMRC that repayment supplement is not payable in respect of £71,084,816.43 claimed by Bollinway in its VAT return submitted on 2 November 2018 is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

164. 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.

TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 2 SEPTEMBER 2021

Annex

Section 136 Law of Property Act

Legal assignments of things in action.

(1)Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice:

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice —

(a) that the assignment is disputed by the assignor or any person claiming under him; or

(b) of any other opposing or conflicting claims to such debt or thing in action

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act, 1925.