A Premier case for VAT recovery insolvency

15/06/2015

Tax analysis: Why is the Premier Foods case so important for the future of VAT recovery in insolvency situations? Timothy Jarvis, partner at Squire Patton Boggs, explores the details of this case and argues that the result is potentially exciting news for customers in insolvency situations who have been incorrectly charged VAT.

Original news

R (on the application of Premier Foods (Holdings) Ltd) v Revenue and Customs Commissioners, [2015] EWHC 1483 (Admin), [2015] All ER (D) 205 (May)

The claimant erroneously paid approximately £4m VAT to the interested party (QCL), which it paid to the defendant Revenue and Customs Commissioners. The claimant contended that HMRC should refuse to repay QCL, which subsequently went into administration, unless it undertook to reimburse it in full, but HMRC refused and the claimant sought judicial review. The Administrative Court, in allowing the application, held that Reemtsma Cigarettenfabriken GmbH v Finance Minister: C-35/05 [2007] All ER (D) 266 (Mar) applied, such that the claimant was entitled to recover the mistakenly paid VAT directly from HMRC.

What is interesting about the litigation brought by Premier?

The litigation brought by Premier relates to VAT that was incorrectly charged to it by a supplier. Normally when a customer, such as Premier, is incorrectly charged VAT by its supplier the customer's remedy is a common law restitution claim against the supplier--with the supplier having a statutory right of recovery against the taxation authority in respect of the VAT. However, in *Reemtsma Cigarettenfabriken GmbH v Finance Minister* the Court of Justice of the European Union (CJEU) acknowledged that this principle did not apply in *all* circumstances and in *some* circumstances the customer could have recourse directly to the taxation authority. The CJEU held:

'If reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, these principles may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly.'

This principle was endorsed by the Court of Appeal in *Investment Trust Companies (in liquidation) v HMRC* [2015] EWCA Civ 82, [2015] All ER (D) 181 (Feb).

The Premier litigation is interesting because it is the first practical example of the application of the *Reemtsma* principle before the UK courts.

What were the facts in the Premier litigation?

Premier had been incorrectly charged VAT by its supplier QCL--which were in administration. QCL owed substantial sums to various creditors.

HMRC brought an action to deny Premier the ability to recover the VAT incorrectly charged to it by QCL as input tax.

Premier argued that the *Reemtsma* principle was directly in point. This was because if Premier brought a common law restitution claim against QCL, relying on QCL to bring a statutory recovery action against HMRC, it would become one amongst many unsecured creditors of QCL in respect of the monies recovered. The practical consequence of this would be that:

- Premier would not be able to recover the VAT incorrectly charged to it by QCL on a pound for pound basis
- HMRC would be able to recover the input tax incorrectly claimed by Premier on a pound for pound basis

Therefore *Reemtsma* was engaged because, applying normal mechanisms, the recovery of the VAT had become 'impossible or excessively difficult' for Premier.

HMRC's response was that if it were to pay out directly to Premier under a common law restitution claim it would still be liable to refund the VAT if QCL brought a statutory recovery action against it under the Value Added Tax Act 1994, s 80 (VATA 1994). HMRC would in effect have to pay out twice and thus HMRC argued, in the absence of a mechanism for determining which of the two potential claims had priority, it should not be exposed to the double payment risk thereby defeating Premier's claim.

What did the High Court decide?

The High Court squared the circle by considering the unjust enrichment defence to VATA 1994, s 80.

VATA 1994, s 80(3) confers a defence against a VATA 1994, s 80 action if the making of a payment would 'unjustly enrich the claimant'. The High Court concluded that if Premier were to claim successfully against HMRC then QCL would be unjustly enriched if it were to make a separate statutory claim against HMRC. Therefore, QCL could not make such a claim and HMRC's concern that it was subject to dual claims evaporated.

This produced a fiscally neutral outcome. Premier recovered the VAT that was incorrectly charged to it by QCL from HMRC. However, the VAT incorrectly charged to Premier was not recoverable as input tax.

Is this a positive result for customers in insolvency situations?

The outcome of the Premier litigation is very good news for customers in insolvency type situations who have been incorrectly charged VAT. The circumstances of the insolvency situation may mean that it is 'impossible or excessively difficult' to recover the VAT directly from the supplier meaning that the customer has a directly enforceable restitution action against HMRC.

Timothy Jarvis' practice focuses on private equity, banking and corporate finance transactions. He also has extensive experience in relation to VAT planning and administration, as well as stamp duty and stamp duty land tax planning. In addition, Tim advises employers on the set up and administration of their employee share schemes.

Interviewed by Kate Beaumont.

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