

Challenging the VAT three-year cap

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Local Government analysis: Etienne Wong, barrister at Tax Chambers (15 Old Square), considers the decision in *Leeds City Council v Revenue and Customs Commissioners*, a case in which the local authority sought repayment of overpaid VAT.

Original news

Leeds City Council v Revenue and Customs Commissioners [2015] EWCA Civ 1293

What did the Court of Appeal decide in this case?

The case concerns claims for the repayment of overpaid VAT (ie VAT accounted for or paid to HMRC when it was not due).

Such claims are generally made under section 80 of the Value Added Tax Act 1994 (VATA 1994).

Historically, such claims were subject to a limitation period of six years, running from when the VAT was paid (or, where the payment had been made because of a mistake, from when the taxpayer discovered, or could with reasonable diligence have discovered, the mistake).

VATA 1994, s 80 was amended by the Finance Act 1997, which imposed the so-called three-year cap (reducing the limitation period to three years from the date of payment and removing the extension previously applicable in the case of mistakes).

The change had retrospective effect, and led to litigation (see C-62/00: *Marks & Spencer plc v Customs and Excise Commissioners* and *Fleming v HMRC* [2008] UKHL 2, [2008] All ER (D) 151 (Jan), for example) and eventually to section 121 of the Finance Act 2008 (FA 2008), which disapplies the three-year cap in relation to claims for the repayment of VAT accounted for or paid in VAT accounting periods ending before 4 December 1996, but only where the claim is made before 1 April 2009.

In *Leeds City Council*, the council sought repayment of VAT overpaid on a range of activities. HMRC accepted that, in all but one case, VAT had been overpaid. They repaid:

- o VAT accounted for or paid in VAT accounting periods ending before 4 December 1996 where the claim was made before 1 April 2009, and
- o VAT accounted for or paid in VAT accounting periods ending on or after 4 December 1996 where the claim was made in time

but refused repayment of VAT accounted for or paid in VAT accounting periods ending on or after 4 December 1996 where the claim was made out of time (ie outside the three-year cap).

The council sought to disapply the three-year cap by arguing that it offended against a number of applicable European principles (namely, the principles of effectiveness, legal certainty, proportionality, legitimate expectations and equivalence). The Upper Tribunal held that it did not, and found in HMRC's favour.

The council appealed to the Court of Appeal.

It argued that the limitation period should be relaxed in relation to its claims because of special circumstances, being, namely, that:

- o the provisions in Directive 77/388/EEC (Sixth VAT Directive) by virtue of which the council's relevant activities were taken outside the scope of VAT (being the Sixth VAT Directive, art 4(5), now art 13(1) of Directive 2006/112/EC (the Principal VAT Directive)) had not been implemented in the UK
- o the said art 4(5) was in any event very difficult to understand and apply
- o HMRC's published position on the activities was not only wrong in law, but misled even a reasonably attentive taxpayer because it did not mention art 4(5), focusing instead on what ultimately turned out to be irrelevant questions, and
- o at the time the claims were made by the council, the limitation period was practically unknown and unknowable

The Court of Appeal did not consider any of the above factors justified any extension or other relaxation of the limitation period, and dismissed the appeal.

Do you perceive any other local authorities will be able to use the combination of VATA 1994, s 80 and FA 2008, s 121, in order to present cases to HMRC for VAT repayment?

VATA 1994, s 80 imposes the three-year (now four-year) cap on claims for the repayment of overpaid VAT.

FA 2008, s 121 disapplies the cap in relation to VAT accounted for or paid in VAT accounting periods ending before 4 December 1996, but only where the claim is made before 1 April 2009.

The council sought to disapply the three-year cap, and was unsuccessful. There is nothing in the Court of Appeal judgment to encourage other taxpayers seeking to similarly dislodge or extend the limitation period. Rather, it reinforces its validity and the importance of challenging HMRC's position without delay (where it is considered they are legally wrong) and ensuring that claims for the repayment of overpaid VAT are made in time.

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Interviewed by Emily Jones.

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