Repayment of overpaid VAT for groups of companies (Revenue and Customs Commissioners v Taylor Clark Leisure plc)

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Tax analysis: Etienne Wong, barrister at Old Square Tax Chambers, explains how, in this case, the question was not which member of a VAT group had a right to claim overpaid VAT, but the much narrower question of whether claims by a former member of the group should be treated as having been made by the representative member of that group.

Revenue and Customs Commissioners v Taylor Clark Leisure plc [2018] UKSC 35, [2018] All ER (D) 55 (Jul)

What are the practical implications of this case?

The Supreme Court judgment in *Taylor Clark* should be noted not only for what it says, but also for what it does *not* say.

There has been much debate where:

- a member of a VAT group—say, X—makes supplies,
- the representative member of the group accounts to HMRC for VAT on those supplies, with
- X bearing the economic burden of the VAT, and then
- X leaves the group or the group is dissolved,
- the VAT for which the representative member accounted (and the cost of which X bore) turns out not to have been due (or to have been in excess of what was actually due), and
- the right exists under section 80 of the Value Added Tax Act 1994 (VATA 1994) to repayment of the overpaid VAT

as to whether X or the representative member is the person with the right to claim repayment (under VATA 1994, s 80) of the overpaid VAT.

Although this very much remains a live issue, it was not the question that the Supreme Court considered in *Taylor Clark*.

The issue there was much narrower, being whether the claims actually made (under VATA 1994, s 80) by a company (Carlton) which used to be a member of the Taylor Clark VAT group, had been made by Carlton in its own right—as HMRC argued—or if they had been made on behalf of the representative member of the VAT group (the taxpayer, Taylor Clark Leisure plc)—as the taxpayer argued.

On the wider 'who is entitled to claim repayment' question, the only reference the Supreme Court made was in its mention of the hearing (in, presumably, a case involving MG Rover) scheduled for January 2019 before the Court of Appeal, and its only comment was how 'its [the Supreme Court's] discussion of the nature of the statutory regime in the [UK] in relation to an extant VAT group [would] indirectly have a bearing on [the discussions that would take place before the Court of Appeal]'.

What was the background?

The case concerns VAT overpaid from 1973 to 1998.

The VAT had been overpaid by the taxpayer, which had been the representative member of the Taylor Clark VAT group from 1973 to 2009. The business to which the overpaid VAT relates was transferred to a (then) newly-incorporated company, Carlton, in 1990.

Carlton was a member of the Taylor Clark VAT group at the time, and remained so until 1998, when it was sold out of the Taylor Clark corporate group.

It became clear in the latter half of the 2000–2010 decade that VAT had been overpaid by the taxpayer. This was accepted by HMRC.

In 2007, Carlton made four claims under VATA 1994, s 80, for the repayment of VAT overpaid by the taxpayer between 1973 and 1998. Although the claims were made citing the VAT registration number of the VAT group, they were made on Carlton's own headed notepaper. More significantly, they were made without the knowledge of, or notification to, the taxpayer, which remained oblivious until 2009, when HMRC brought the matter to its attention.

The question arose as to whether the taxpayer or Carlton was the person with the right to claim repayment of the overpaid VAT, and this resulted in rival appeals from each of them against HMRC.

What did the Supreme Court decide?

Although the complex history of the Taylor Clark saga gave rise to a number of issues, only one of those issues came before the Supreme Court—namely, whether the taxpayer (which had not made any claims under VATA 1994, s 80, itself) was entitled to rely on the claims actually made by Carlton.

If not, then, because of the nature of the claims, the taxpayer would be time-barred from making any claims itself.

The taxpayer's main argument was that the rights underlying the claims were rights of the single taxable person constituted by the VAT group, and that, in the circumstances, the claims made had to be treated as made on behalf of the VAT group.

This was rejected by the Supreme Court, which held that the taxpayer could not rely on the claims Carlton had made.

It also clarified that the single taxable person emerging from the VAT grouping provisions was not the VAT group but only the representative member (from time to time) of the group.

More generally, on claims for the repayment of overpaid VAT, the court held that:

'The person entitled to submit a claim during the currency of a VAT group, unless the claim has been assigned, is either the current representative member of the VAT group or a person acting as agent of that representative member.'

In *Taylor Clark*, the taxpayer had conceded that it had not made any claims under VATA 1994, s 80, itself, and the court found, on the facts, that Carlton had not been acting as the taxpayer's agent when making the four claims actually made—it had been acting in its own right. The fact that the VAT registration number of the VAT group had been cited in the four claims was not considered material.

It follows, therefore, that the taxpayer was not entitled to repayment of the overpaid VAT in question.

The taxpayer applied to refer the case to the European Court of Justice, but the Supreme Court declined on the basis that such referral was neither necessary nor appropriate. This was because the referral would have focussed on whether it was the VAT group or the representative member of the group that was the single taxable person, and the court's opinion was that, irrespective of how that question was resolved, the outcome of the appeal would be the same—Carlton made the four

claims under VATA 1994, s 80, in its own right and not on behalf of either the VAT group or the representative member of the group, and no ruling by the Court of Justice on the referral would change that conclusion.

Etienne Wong qualified as a solicitor in 1990, and was a partner and head of the international VAT unit at Clifford Chance LLP from 1999 to 2014. Etienne was called to the Bar in 2014 and advises on all aspects of VAT. He also advises on tax matters generally and on disputes with HMRC.

Interviewed by Kate Beaumont.

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