

Total Limited –v- The Commissioners for Her Majesty's Revenue & Customs

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VAT – input tax – suspected carousel fraud – repayment withheld pending ECJ judgment in Bond House and Optigen – input tax paid with repayment supplement post-Bond House and Optigen – whether interest payable in addition – yes - appropriate rate – borrower's rate adopted – whether simple or compounded – compounded – VATA 1994, ss. 78, 79 and 84 – s.35A SCA 1981 inapplicable (VAT & Duties Tribunal, Manchester; Decision, 19th May 2006)

Total had originally appealed against HMRC's refusal to pay the sum of £217,525 which it had claimed as recoverable input tax. HMRC's reason for its refusal was that the input tax had been incurred (albeit without Total's knowledge) in the perpetration of a carousel fraud. At the time, HMRC relied on the Tribunal decision in *Bond House Systems Ltd. v Customs and Excise Commissioners* [2003] V&DR 210. *Bond House* was referred to the ECJ (together with others, including *Optigen*: Joined Cases C-354/03, C-355/03 and C-484/03; judgment 12th January 2006: [2006] STC 419), which found in favour of the traders and against HMRC. Consequently, shortly after the ECJ's ruling, HMRC agreed to make payment to Total and others in a similar position. The payment to Total was the total claimed plus repayment supplement, but without interest.

Total now claimed interest, and the Tribunal was asked to decide whether (a) interest was payable; and if so: (b) from what date; (c) whether compound or simple, and (d) at what rate.

The Tribunal was made aware of the fact that a number of similar cases were pending, including one or more in the High Court, but thought it appropriate to reach a decision.

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- (a) *Is interest payable?* Total submitted interest was payable pursuant to the mandatory provisions of s.84(8) VATA 1994 and that the repayment supplement was irrelevant. HMRC accepted the mandatory nature of s.84(8), but submitted interest should be assessed at nil, as the repayment supplement was sufficient compensation and (particularly since Total had not borrowed money) additional interest was unnecessary. The Tribunal affirmed that where s.84(8) applied, s.78 (interest in cases of official error) could not apply. Similarly, that s.79 (repayment supplement) did not affect the operation of s.84(8). Total was entitled to s.84(8) interest.
- (b) *From what date does interest run?* It was common ground that interest should stop at the date of repayment. Total submitted that it should start 10 working days after receipt of the return, which would be the payment date in the ordinary case. HMRC submitted that it should be 30 calendar days after receipt, given that HMRC needed reasonable time to investigate whether or not a trader had had the requisite knowledge of the fraud (and given the ECJ's finding in *Bond House and Optigen* that "the means of knowledge" were the determining factor). The Tribunal held that the start date was entirely within its discretion and applied *R(on the application of Mobile Export 365 Ltd. and another) v HMRC* [2006] EWHC 311, where 30 days had been found to be an appropriate period. Accordingly the start date was set at 30 calendar days after receipt of the return.
- (c) *Compound or simple?* The Tribunal found that it was bound by the case of *Sempra Metals Ltd v Commissioners of Inland Revenue* [2006] QB 37, which it held could not be distinguished on the facts. Following *Sempra*, the Tribunal held that this case too concerned an incorrect application of European law and that the "European law concept of full restitution" favoured compound rather than simple interest.
- (d) *At what rate?* Despite expressing misgivings about an award of full interest, said to run counter to the rule against double recovery, the Tribunal considered itself bound by *Mobile Export*, which had decided that interest should not be reduced even if there had been a repayment supplement. Further considering itself bound by *Sempra*, the Tribunal ruled (i) that s.35A of the Supreme Court Act 1981 was inapplicable, and (ii) that interest should be at a commercial, borrower's rate. Compound interest was awarded at 3 per cent above Barclay's base rate from time to time, with rests at six-monthly intervals.

Comment

This case is notable for deciding an issue that is currently being argued in a number of similar cases dealing with the question of interest following payments made by HMRC in the wake of *Bond House and Optigen*. An appeal raising some of the same issues (in *RSPCA and RSPCA Properties Ltd v HMRC* (2006, VAT Decision 19440)) is currently pending in the High Court. It will be interesting to see whether the High Court will follow the same line as the Tribunal, in particular whether it will take a different approach to *Sempra* and *Mobile Export*. The Tribunal clearly had misgivings about the decisions in other cases that no account should be taken of any repayment supplement paid under s.79 in determining interest under s.84(8). S.84(8) also only applies to appeals, so that the present situation seems to be that traders qualify for interest if they appeal, but do not qualify if they do not appeal. Given the position of HMRC on compound interest and its appeal to the House of Lords in *Sempra*, it seems unlikely that *Total* will represent the final word on the subject (indeed, the time has not yet expired for a potential appeal in *Total* itself).

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