[2016] UKFTT 290 (TC)

TC05063

Appeal number: TC/2015/02242

VAT – Request to change effective date of registration for VAT – Whether refusal reasonable – No – Whether there was a genuine error/misunderstanding – Yes – Whether decision would have inevitably have been the same had it been taken into account – Yes – John Dee Ltd v Customs & Excise Commissioners applied – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAX INVESTMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
CAROL DEBELL

Sitting in public at Fox Court, Brooke Street, London EC1 on 23 February 2016

Richard Staunton, VAT Director of Francis Clark Tax Consultancy, for the Appellant

Bruce Robinson of HM Revenue and Customs, for the Respondents

DECISION

1. Max Investments Limited (the "Company") appeals against a decision of HM Revenue and Customs ("HMRC") which was confirmed on 10 December 2014 following a review, refusing to backdate the effective date of its VAT registration. The effect of HMRC's decision is that the Company is unable to recover VAT of £120,255.44 that it incurred before it became VAT registered.

2. On 23 February 2016, having heard the oral evidence of Mr George Lim and submissions from Mr Richard Staunton, of Francis Clark Tax Consultancy, on behalf of the Company and Mr Bruce Robinson of HMRC and having read the documentary evidence with which we were provided, we dismissed the Company's appeal giving oral reasons for our decision. The parties then agreed, pursuant to Rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Procedure Rules"), that it was not necessary for the decision notice issued to them on 25 February 2016 (under Rule 35(2) of the Procedure Rules) to include full or summary findings of facts and reasons for that decision.

3. However, on 20 March 2016 Mr Staunton, who had represented the Company before the Tribunal, formally applied for full written reasons, as is necessary (under Rule 35(4) of the Procedure Rules) before any application for permission to appeal against the decision of the Tribunal can be made, to enable the company to consider its options.

4. This decision has therefore been provided to enable the Company to decide whether to apply for permission to appeal and to assist it in formulating any such appeal.

5. Before setting out the agreed factual background giving rise to this appeal it is necessary to first explain that until such time as a person is registered, or required to be registered, for VAT there is no entitlement to a credit for input tax on supplies received. However, Regulation 111 of the Value Added Tax Regulations 1995 provides for an exception to this general rule and allows for VAT on the supply of goods and services provided to a person, within 4 years in the case of goods and within six months in the case of services, before the date from which he was registered, or required to be registered, for VAT to be treated "*as if it were input tax*" and reclaimed in that person's first VAT return.

6. On 1 April 2007 the Company, of which Mr Lim was director, commenced work, financed by a loan from Barclays Bank, demolishing a small commercial property which it had acquired in 2003 and constructing another, larger, building on the same site. However, despite starting smoothly problems arose requiring extra funding; first the builder wanted more money and then the architect was replaced. As a result the work was delayed until in 2008 when, as a result of the effects of the global recession, the bank demanded immediate repayment of the loans.

7. As it could not find another lender the property, then about 90% completed, was put up for auction by the Company on 1 December 2011. The sale was completed on 6 January 2012. Because it was a sale of a commercial property which was subject to

VAT, Mr Lim was advised by the Company's solicitors that the Company should register for VAT.

8. On 8 December 2011 Mr Lim completed an application for registration for VAT (on form VAT1) on behalf of the Company and submitted it to HMRC. Registration was requested from 31 March 2011 as the Company expected its taxable turnover to exceed the then registration threshold within the next 30 days. HMRC requested further information on 22 December 2011 which was supplied to them by George Lim & Co accountants on 4 January 2012. The effective date of (VAT) registration ("EDR") of the Company was subsequently confirmed as 31 March 2011.

9. The Company's first VAT return, which was for the period ending 29 February 2012 (05/12) was received by HMRC on 27 August 2013. As a repayment of £121,833.44 was claimed in that return HMRC, in a letter dated 11 September 2013, requested further documentation before any payment could be authorised.

10. HMRC wrote again to the Company on 17 September 2013 stating that it appeared from the VAT returns that had been submitted for the 05/12 to 05/13 VAT accounting periods that the Company had ceased to be liable for VAT and that its registration would therefore be cancelled unless evidence that the taxable turnover remained above the threshold was provided.

11. In the absence of any response from the Company HMRC informed it, in a letter dated 23 October 2013, that its VAT registration had been cancelled with effect from 31 May 2013. In a further letter to the Company, dated 16 December 2013, HMRC confirmed that the input tax claimed had been reduced from £121,883.44 to £0.00.

12. On 8 January 2014 HMRC received a letter from George Lim & Co responding to their letter of 11 September 2013 enclosing supporting purchase invoices and requesting a repayment. In their reply, of 3 March 2014, HMRC explained that the majority of invoices, on which the VAT element was £120,255.44, were for services and outside the time limit for claiming pre-registration VAT. However, four invoices from 2011 and 2012, on which the VAT element totalled £1,578, were not.

13. In August 2014 the Company appointed Francis Clark Tax Consultancy to act on its behalf. On 5 September 2014, it wrote to HMRC requesting a review of the decision to deny the Company's input tax claim. It accepted that the invoices were out of time but requested that the Company's EDR be amended to 8 July 2007 so as to bring those invoices within the time limit and to enable the Company to recover the VAT. The request for an EDR of 8 July 2007 was subsequently amended to either 8 December 2007 (on the grounds that it was the earliest date allowable had a backdated EDR been requested when the Company applied to be VAT registered) or 31 March 2008 (three years before the agreed EDR in accordance with HMRC guidance).

14. Although HMRC accepted the late review they did not accede to the request to change the EDR and confirmed the decision not to repay the VAT. On 17 February 2015 the Company appealed to the Tribunal.

15. Mr Lim, who we found to be an honest and credible witness that sought to assist the Tribunal, explained that the reason for the delay in responding to HMRC's letter of 11 September 2013 was because he needed to obtain all of the invoices before he

could do so. Although Mr Lim is an accountant and is aware of the general VAT registration requirements he told us that he was a sole practitioner whose clients include catering, hotel and similar businesses but did not include any that are involved in the construction industry. As a result he had misunderstood the difference between goods and services supplied in relation to the construction of a building saying he thought that expenditure incurred in relation to the property, which had been capitalised as freehold properties in the accounts, was treated as goods not services for VAT purposes.

16. Although, as Sir Stephen Oliver QC (a former President of this Tribunal) observed at [10] in *Middleton t/a Freshfields v HMRC* [2011] UKFTT 316 (TC), other than the "general collection and management" powers under paragraph 1 of schedule 11 to the Value Added Tax Act 1994 there is no specific statutory provision for the amendment to an EDR HMRC are prepared in certain circumstances to do so.

17. Their policy guidance on this is contained in the Manual VATREG25400 which, insofar as applicable to the present case, provides:

> The eligibility criteria which we would usually apply when we are considering a request to change an EDR are:
>
> - the EDR given must, at the time of registration, have been a backdated EDR. In other words, at the time of application, the trader voluntarily applied for an earlier EDR
> - the trader must demonstrate that there was a genuine misunderstanding or error in completing the application form. That does not include an error of judgement, for example, he thought he would be in repayment but found in fact he was a payment trader
> - the request must be made before the due date of the first VAT return (that is, one month after the end of the first period), which must not have been rendered.
> - the trader must return the original VAT 4 certificate.
>
> You are not expected to work on the mechanistic basis that every business which does not meet **all four** of the change eligibility criteria must automatically have its change request refused. You should consider each trader's circumstances separately and think about how a First Tier Tribunal judge might regard those circumstances should the trader appeal against your decision to refuse the request.
>
> The test of any decision is that it is reasonable and proportionate in all the circumstances of the case.
>
> …
>
> If you do grant the trader's request, the new EDR date must not be more than three years earlier than the current date.

It is common ground that the first and fourth of the above conditions have been satisfied but that the third has not.

18. It is also accepted that our jurisdiction in this appeal is, as set out by the Tribunal (Judge Berner and Mrs E R Adams FCA ATII) in *Lead Asset Strategies Liverpool Ltd v HMRC* [2009] UKFTT 122 (TC) at [29]:

> "… to review the rationality of HMRC's decision on the principles set out in *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 265. Accordingly it is for us to consider whether HMRC have acted in a way in which no reasonable panel of Commissioners could have acted or whether they have taken into account some irrelevant matter or have disregarded something to which they should have given weight. The Tribunal cannot substitute its own decision for that of HMRC, and cannot therefore itself amend the effective date of registration."

19. Mr Staunton on behalf of the Company submits, as HMRC guidance states, that it is not necessary to meet all four conditions in order for the EDR to be amended. He says that Mr Lim did make a genuine error and therefore, having regard to the circumstances especially the fact that it is accepted that the input tax would have been allowable if the correct date had been entered on the VAT1 the appeal should be allowed.

20. Mr Bruce Robinson, representing HMRC, contends in addition to the third condition the second condition (genuine error or misunderstanding) has not been satisfied. In relation to this he refers to the following paragraph from HMRC's letter of 10 December 2014 that:

> In fact it appears … that the application [form VAT1] was completed professionally, on behalf of the company, by the accountant. Given this, it is reasonable to assume that the accountant would have been aware of the time limit implications in Regulation 111 concerning the pre-registration VAT incurred.
>
> Consequently, I cannot accept the contention that there was a genuine misunderstanding in completing the VAT1 application.

21. Mr Robinson also relies on the comments of Sir Stephen Oliver QC at [27] in *Freshfields*, that:

> "It is reasonable to assume that the applicant for an effective date of registration, such as IJM [the appellant], knew what she was doing. And where the applicant has left things to professional advisers, her position vis-à-vis HMRC is not changed in someway deserving of preferential treatment from HMRC"

22. However, the present case can be distinguished from *Freshfields* in which the EDR had been chosen by a firm of accountants who were not concerned with the operation of the company but instructed on behalf of the appellant whereas in the present case Mr Lim, a director of the Company, is closely involved in its control and management. Although an accountant, it is clear that Mr Lim made an error or had misunderstood the difference between goods and services in a construction context at the time he completed the VAT1.

23. The question is not whether that error or misunderstanding was reasonable but whether it was genuine. In our view it clearly was. Accordingly we find that the second condition, genuine error or misunderstanding has been satisfied.

24. Having reviewed HMRC's decision we find that by failing to recognise that there had been a genuine error or misunderstanding they have not taken into account something to which they should have given weight and, as such, cannot have reasonably arrived at their decision. However, it does not necessarily follow that the appeal succeeds because of this. As is clear from the decision of the Court of Appeal in John Dee *Ltd v Customs & Excise Commissioners* in cases, such as the present, where the Tribunal has to consider whether HMRC has reasonably arrived at a decision but had not, because of a failure to take some relevant material into account, the Tribunal can, nevertheless, dismiss the appeal if the decision would *inevitably* have been the same had account been taken of the additional material.

25. Although there was a genuine error or misunderstanding in this case we consider that, even if it had been taken it into account, HMRC's decision to refuse to backdate the Company's EDR would nevertheless have *inevitably* been the same. This is because:

(1) there was a delay in making the application to backdate the EDR (which was not made until 5 September 2014 nearly three years after the application for registration was made);

(2) it is not disputed that the third condition (which requires the request to backdate the EDR to be made before the due date of the first VAT return) has not been satisfied; and

(3) the date, 31 March 2011, had been deliberately entered in form VAT1 (the only error or misunderstanding was as to its effect).

26. Accordingly we dismiss the appeal.

27. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 27 April 2016