



TC01419

Appeal number: TC2010/06974

REPAYMENT OF VAT – 13th Directive – Application for repayment – Failure to include required documentation – FACEVET Procedures – Application returned to claimant – Claim re-made with full documentation out of time – Whether repayment should be made – No – Directive 85/560/EEC (13th Directive)

FIRST-TIER TRIBUNAL

TAX

ROBERT H SMITH INVESTMENTS & CONSULTING Applicant

- and -

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

**TRIBUNAL: SIR STEPHEN OLIVER QC (Judge)
CAROLINE de ALBUQUERQUE**

Sitting in public in London on 18 July 2011

No appearance for the Appellant

Jonathan Holl, for the Respondents

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DECISION

1. Robert H Smith Investments and Consulting (“the Applicant”) appeals against
5 the decision released on 6 August 2010 rejecting his application for refund of VAT
under the provisions of the VAT Regulations Part XXI, Regulations 185-196. The
application had been defective because the claim form had not been signed and no
“Certificate of Status” had been included with the application.

10 **The background**

2. The Applicant carries on business in the USA and is not registered for VAT in
the UK. The Applicant submitted Form VAT 65A applying for repayment of £2,085.
It was completed as relating to the period October and November 2009.

15 3. The form was subject to the FACEVET procedures, as soon as received, to
check its completeness. It was found to be incomplete because there was no signature
on the form and it was not accompanied by a Certificate of Status. On 10 November
2009 HMRC wrote to the Applicant rejecting the application and explaining that the
20 deadline for the receipt of claims relating to invoices with tax points from 1 July 2008
to 30 June 2009 was 31 December 2009.

4. By letter dated 22 February 2009 the Applicant returned the VAT 65A form
and a Certificate of Status. The application for repayment was returned to him by
25 letter of 26 March 2010. It was stated to have been rejected as the VAT claim had
been incurred between 1 July 2008 and 30 June 2009. This was because the items
should have been claimed by submission of a fully documented claim by 31
December 2009. The amended claim was not received until 2 March 2009. It is
stated that additionally pages 2, 3 and 4 of the VAT 65A had not been submitted. The
invoice submitted was a copy and not the original.

30 5. In a letter of 15 April 2010 the Applicant submitted that there had been some
confusion in dealing with the application. The expenses had admittedly been billed in
an invoice dated 15 April 2009 but they were not due for payment until 15 August
2009. By letter of 7 June 2010 HMRC clarified the position explaining that the
35 application received on 16 November 2009 was incomplete and could not be accepted
as valid. The resubmitted claim had also been incomplete. The letter offered the
Applicant a review of the decision notified to reject the claim. In a letter of 14 June
2010 the Applicant explained that he had tried to be responsive to the errors in the
first submission but it had taken over 60 days to obtain the original Certificate of
40 Status.

6. By letter of 6 August 2010 the Applicant was notified of the review decision
which was to uphold the decision originally advised. The review conclusion set out
the grounds for reaching the decision. These were that the application as submitted
45 was incomplete because it had not been signed and because there had been no
Certificate of Status submitted within the prescribed period.

The appeal

7. The Applicant's appeal is dated 2 September 2010. HMRC's statement of case, due within 60 days of receipt of the Notice of Appeal was lodged on 13 December 2010. HMRC made an application to the Tribunal for the late appeal to be accepted. This was granted by direction of a judge of the First-tier Tribunal.

Conclusions

8. It is not in dispute that if the supply of services had been made in the twelve months to 30 June 2009 (referred to in Rule 185 as "the prescribed year") the claim for repayment under Regulation 192 should have been made by the end of 2009. This follows from the words of Regulation 192 which provides that a claim for repayment is to be made "not later than six months after the end of the prescribed year in which the tax claimed was charged"

9. For the purposes of VAT a supply is treated as taking place when the services are performed unless the person making the supply issues a VAT invoice in respect of the supply or payment is made in respect of the supply. And where, as here, the invoice was issued in April 2009, the taxable supply would have taken place in the prescribed year to 30 June 2009. Because the invoice was issued before payment was made, the date of the invoice marks the time of supply.

10. We can see how the Applicant might have thought otherwise. The Statement of Case, in reply to which he has presented his written arguments, misses out two key words in the citation of section 6(4) VAT Act 1994. These are "or if" and they belong in the second line. The full wording of section 6(4) is as follows:

"(4) If before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received."

With those words included, there can, we think, be no doubt that the issue of the invoice is to be taken as the time of supply.

11. The Applicant asks why the educational service supplied to him is not exempt from tax. This matter was not raised in his Notice of Appeal and so has not been addressed in HMRC's statement of case. Consequently we know nothing of the service provided by the Said Business School. Schedule 9 Group 1 confers the "education" exemption on the provision by an "eligible body" of "education". Is Said Business School an "eligible body"? We know only that it is a wholly owned subsidiary of Oxford University. It appears to have its own VAT registration. The service provided by Said Business School is said to have been admission to the "Oxford Advanced Management and Leadership Programme". Is that a supply of education? With these unknowns we cannot answer the Applicant's question. This question has, however, only a tangential bearing on the Applicant's case for

recovering VAT from HMRC. His real claim should be directed at Said Business School on the basis that it wrongly charged him with VAT.

5 12. The Applicant then contends that the claim was inappropriately rejected. We do not accept this.

10 13. The FACEVET Procedure is designed to give effect to regulation 191 of the 1995 Regulations which has been enacted to comply with the 13th Council Directive. The relevant provisions are set out in the statement of case. The FACEVET Procedure balances the need to provide a speedy and efficient service to the overseas claimant with the need to ensure that the claims are in all respects proper. Overseas claimants, will not have been subject to EU controls, they may only be making infrequent (and possibly one off) requests for refunds. Consequently such claimants are given a reasonably long time over which to make their claim.

15 14. In the present case there were two procedural errors in the form of the application for repayment when presented in November 2009. The unsigned claim was not accepted because the documentation required by the Regulations for examination under the FACEVET procedure had not been submitted. The regulations require submission of the Certificate of Status provided for in Article 3.1. of the 13th Directive. The claim was not therefore validly submitted within the time provided for under Article 3.1 of the Directive.

20 15. The final point taken by the Applicant is that his right to refund should be determined on the basis of his good intent rather than on the technicalities. We have already observed that the FACEVET procedures require strict application. Hence the strict approach. We recognise that the Applicant encountered some delay in the US when applying for a Certificate of Status. But, remembering that the supply took place in mid April, the Applicant should have had eight months in which to obtain a Certificate of Status.

25 30 16. For those reasons we reject the Applicant's claim. The appeal is dismissed.

35 17. 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.

45 **SIR STEPHEN OLIVER QC**
TRIBUNAL JUDGE
RELEASE DATE: 23 August 2011