TC01796

Appeal number TC/2011/05947

VAT – claim to recover input tax on purchase made in 1998 – Appellant ceasing to be registered for VAT in 1999 – No evidence that claim for recovery of input tax raised prior to 2004 – Tribunal appeal commenced in 2011 – Whether input tax recoverable retrospectively – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MR LEWIS JOHNSON
t/a THE POINT NIGHT CLUB **Appellant**

- and -

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

TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)
MR ANTHONY HUGHES (Tribunal Member)

Sitting in public in London on 27 January 2011

Mr Basil Howells, accountant, for the Appellant

Mr Bruce Robinson for the Respondents

DECISION

Introduction

1. At the hearing of this appeal, the Appellant was represented by Mr Basil Howells of Basil Howells & Co Accountants ("Howells"). The Appellant did not himself attend the hearing. HMRC were represented by Mr Bruce Robinson.

2. The Appellant's notice of appeal states that this is an appeal against an HMRC decision dated 16 March 2011. That letter in substance stated that the Appellant would not be permitted now to recover input tax of £13,493.90 on a purchase of equipment made in June 1998, given that the legal time limit for corrections to VAT returns is currently 4 years.

3. A curious feature of this case is that both parties were uncertain of certain material facts. Mr Howells said that his firm's file on this case was lost in a burglary of his firm's premises in 2007, and that having lost all the papers, he is no longer in a position to give details of certain facts. In response to some questions from the Tribunal, Mr Howells responded that he was as much in the dark as the Tribunal. Mr Robinson for HMRC explained that he had produced what relevant documents he could from the HMRC information systems, but that given that the case relates to matters going back to 1998, it is not possible to be certain that all relevant material is available.

The evidence

4. There was no witness evidence. The only material before the Tribunal was a modest amount of documentation.

5. It was not in dispute that the Appellant was registered for VAT from 23 January 1998 until 1 February 1999 as "Lewis Johnson trading as the Point Night Club". It was not in dispute that the Point Night Club ceased trading at some time, although it is uncertain when. The fact that the VAT registration ended in February 1999 may be indicative. In the papers is a letter from HM Customs and Excise dated 13 March 2001 which refers to it having ceased trading, so it would appear that it had ceased trading by then.

6. It was not in dispute that there was a genuine invoice relating to the purchase by the Appellant on 14 June 1998 of certain equipment (referred to below as the "equipment"). At the time of the purchase, the Appellant was VAT registered. The Appellant claims that at the time he was trading as the Point Night Club, and that the equipment was for use in the night club. The HMRC case has not been put on the basis that this is not the case.

7. It seems that in the period in which the Appellant was VAT registered, he submitted at least two VAT returns. A letter dated 13 March 2001 from HM Customs and Excise to Howells states that HM Customs and Excise accepted the figures in the Appellant's VAT return for period 05/98, but that "The accuracy of the return figures

must be regarded with some caution" and "I can not comment on the values boxes [f]or period 08/98".

8. It is noted that if the equipment was purchased on 14 June 1998, it would mean that any claim for input tax recovery in respect of that purchase should have been included in the Appellant's VAT return for period 08/98. However, neither party could produce the Appellant's VAT return for that period. Neither representative at the hearing was able to say whether or not the input tax for the equipment was included in the return for period 08/98. It is possible that it was. Howells' letter of 25 February 2004 referred to below states that "we are instructed that no VAT was ever claimed on those purchases". However, that is merely a statement of Howells' client's instructions. The Appellant himself did not appear to give evidence on the matter, and Mr Howells indicated that he personally could not say.

9. The fact that HM Customs and Excise took the view that the figures in the return for period 08/98 "must be regarded with some caution" might be consistent with the return for that period containing a higher than usual claim for input tax, which in turn might be consistent with the purchase of the equipment having been included in that return. However, whether or not it was simply cannot be known. Furthermore, if the purchase of the equipment was included in the 08/98 return, neither party at the hearing could tell the Tribunal whether that claim had been allowed or disallowed. All that can be said is that there is no evidence of any part of the claim for input tax for the period 08/98 being disallowed.

10. The documents indicate, however, that in October 2003 a claim for input tax in respect of the June 1998 purchase of the equipment was made by Bar Oasis Ltd ("Oasis"). It appears that the Appellant was at the time a director of Oasis. Mr Howells informed us at the hearing that title to the equipment was never transferred from the Appellant to Oasis, but that Oasis simply used the equipment.

11. By a letter to Oasis dated 19 January 2004, HM Customs and Excise queried Oasis's claim for recovery of input tax relating to the purchase of the equipment, and requested a response from Oasis.

12. By a letter dated 25 February 2004, Howells responded to the 19 January 2004 letter from HM Customs and Excise stating as follows. At the time that the equipment was purchased, the Appellant ran the Point Night Club in partnership with another person. Due to a disagreement between the Appellant and that other person, the equipment was put in storage. No VAT claim was ever made by the Appellant in respect of the equipment. In 2003, the equipment was taken from storage and installed in the Bar Oasis. The letter stated that "Since Bar Oasis Limited is registered for VAT and this is the first use of the Equipment and Furnishings previously held in storage, then Bar Oasis Limited has claimed back the VAT incurred on the expenditure items".

13. There is in the papers a copy of a letter dated 12 March 2004 from Howells to HM Customs and Excise. A copy of this letter was attached to Howells' letter dated 25 February 2011 (referred to in the next paragraph below). At the hearing, Mr

Robinson said that he could not find this 12 March 2004 letter in the HMRC systems, and it seems possible that HMRC never received it. The letter stated that the VAT refund should have been claimed in the name of the Appellant trading as the Point Night Club, that the Point Night Club subsequently declined and was closed, that the equipment was then used by Bar Oasis Ltd, and that no VAT had previously been reclaimed in respect of the equipment. The letter concluded with the request "Can you please send us the necessary Form to enable [the Appellant] to reclaim the VAT back of £13,493.90.

14. By a decision of 11 May 2004, HM Customs and Excise disallowed the input tax claim by Oasis in respect of the equipment.

15. Nothing further happened in relation to the matter between 2004 and 2011. By a letter dated 25 February 2011, Howells expressed regret for the long delay, explaining that one of its staff had been away working on major litigation, that the file had been put in storage, and that another of its members had left the firm's employ. This letter included a copy of the 12 March 2004 letter.

16. By a letter dated 4 March 2011, HMRC said that given that the Appellant had been deregistered for VAT a considerable period ago and given that the case dated from 7 years ago, HMRC were unable to take any further action in the matter.

17. By a letter dated 14 March 2011, Howells stated that the claim for a VAT refund was being made in the name of the Appellant and not in the name of Bar Oasis.

18. By a letter dated 16 March 2011, which is the decision against which the Appellant is seeking to appeal in the present proceedings, HMRC stated that the Appellant was seeking a correction to his VAT return for period 02/98 or 05/98, which was almost 13 years ago, and that the present 4 year time limit for corrections to VAT returns had long expired.

19. By a letter dated 31 March 2011, Mr Howells stated that the claim was initially made within the statutory time allowed.

20. By a letter dated 26 May 2011, Mr Howells stated that the reason for the delay in pursuing the claim for input tax was that the original file was stolen from his offices in a burglary on 13 September 2007. Evidence of the burglary was attached.

21. By a letter dated 15 June 2011, HMRC confirmed its position that a belated claim for input tax could not be made, and made some additional points.

The Tribunal's findings

22. The Tribunal finds that the appeal must fail for more than one reason.

23. The first reason is that the Appellant claims to be seeking to recover input tax in respect of the purchase of the equipment in June 1998. However, on the evidence, it is possible that the claim for input tax recovery in respect of this purchase was in fact made in his 08/98 VAT return, and was in fact allowed. The Appellant in any event

has not established that he has been denied input tax recovery in respect of this purchase.

24. The second reason is that any claim for input tax recovery is time barred. Pursuant to regulation 34(1A)(a) of the Value Added Tax Regulations 1995, corrections to VAT returns must be made within 4 years. Prior to 1 April 2009, the period was 3 years. The prescribing of such limitations periods has more than one reason. The first is that records cannot be kept indefinitely (as the experience of this case shows), and after a lapse of years it becomes difficult to reconstruct the detail of past event accurately. The second is that the Government could not have financial certainty if matters in the indefinite past could be reopened at any time. There must be a cut off point after which matters must be considered definitively settled. If the Appellant did not include the June 1998 purchase of the equipment in his return for 08/98, then there is no evidence that he ever subsequently sought to amend that return within the time limit.

25. The evidence suggests that Oasis tried to claim the input tax in 2003. However, Oasis is a separate legal person to the Appellant. Mr Howell was clear that the Appellant never transferred title of the equipment to the Appellant. In any event, even in 2003, the time limit had passed.

26. There is evidence that Howells sent a letter dated 12 March 2004 to HM Customs and Excise indicating that it intended to make a claim for recovery of the input tax in the name of the Appellant rather than Oasis. However, that letter also post-dated expiry of the limitation period.

27. There does not appear to be any provision for extending in exceptional cases the time limit for amending a VAT return. However, even if there was, the Tribunal sees no basis on which it could be said that the time limit should be extended in this case. The letter of 12 March 2004, even if it was sent (HMRC suggests that it may not have been received), merely requested that the relevant form be sent so that a claim could be made. There was no response to that letter. Howells never followed up until 2011. No adequate explanation has been given for this delay of 7 years in further pursuing the matter. Howells says that the case file was lost in a burglary in 2007. However, even that was 3 years after the 12 March 2004 letter. Even 3 years is an inexplicable period of delay. Howells refers to members of its firm, or the Appellant, being tied up in major litigation, and to one of its members leaving the firm. However, the Tribunal considers that this is wholly inadequate to explain the delay in following up after 12 March 2004. In any event, if there is no possibility of extending the time limit, this further delay is immaterial. The simple fact is that no amendment to the return was made within the time limit.

Conclusion

28. It follows that this appeal must be dismissed.

29. 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.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 1 February 2012