



TC01850

Appeal number : TC/2010/08121

VAT – Regulation 34 VAT Regulations 1995 – whether Appellant could recover VAT deliberately overpaid in earlier period by adjusting subsequent returns without making voluntary disclosure – no – HMRC’s assessment also subject to time limits under Schedule 39 Finance Act 2008 – overpaid tax not recoverable

**FIRST-TIER TRIBUNAL
TAX**

HUNG ON CHAN

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)
MS SUSAN STOTT (MEMBER)**

**Sitting in public at 4th Floor City Exchange 11 Albion Street Leeds LS1 5ES on 10
November 2011**

for the Appellant : Mr Patrick Mullen, Accountant

for the Respondents : Mr John Nicholson, Officer of HM Revenue and Customs

DECISION

The Appeal

- 5 1. This is an appeal by Mr Hung On Chan ('the Appellant') against a decision of the Commissioners of Her Majesty's Revenue and Customs (HMRC) to assess the Appellant pursuant to s73 of the Value Added Tax Act 1994 (VATA) in the sum of £4,268.00 representing Value Added Tax (VAT) due for the period 01.06.06 – 30.11.09 and reference under the accounting periods 08/06 – 11/09.
- 10 2. The Appellant had brought forward an overpayment of £5,648.83 VAT from 28.02.06 and then, in a series of VAT returns between 08/06 and 11/09, adjusted the output tax and VAT returns in order to recover the overpayment. HMRC say that the VAT deductions by the Appellant were unauthorised adjustments to his VAT returns and that he should have made a voluntary disclosure on 28.02.06 to HMRC in order to
15 recover the overpayment at that time. HMRC say that legislation restricts the time in which to make a disclosure and that the earliest which could be amended was for the period ending 31.08.06 so that, in consequence, any overpayment at 28.02.06 cannot be repaid.
- 20 3. The evidence before the Tribunal included a bundle prepared by the Appellant and a bundle prepared by HMRC, which collectively comprised schedules prepared by both HMRC and the Appellant of the Appellant's VAT under and over declaration for the period under appeal, a copy exchange of correspondence between the parties, the Appellant's notice of appeal, relevant legislation and oral evidence by Mr Stephen Tuck, the Officer of HMRC who had undertaken the inspection of the Appellant's
25 VAT records and the Appellant.

Factual Background

- 30 4. The Appellant runs a restaurant and licensed premises at The Station Inn, Tollerton, York and is registered for VAT. In January 2010 HMRC undertook an inspection of Mr Chan's VAT records and returns for the period from 28.02.06 – 30.11.09. The VAT returns had been prepared by Mr P Mullen, the Appellant's accountant, using a SAGE accounting system. HMRC accepted that the returns were correct but queried why the original VAT returns submitted by the Appellant to HMRC differed from those produced at the inspection. It was explained by the
35 Appellant that the original quarterly returns were produced fairly simply by the Appellant adding up takings and expenditure in each quarter and calculating the VAT payable. The Appellant said that, to avoid any risk of underpaying VAT, he had intentionally paid more VAT than he was obliged to pay so that, in the event of any inspection, he could be assured that there was no risk he had underpaid VAT. The Appellant's accountant, Mr Mullen, then carried out a reconciliation each year at the
40 time of preparation of accounts and adjustments were then made to later VAT periods to reflect the correct figures. The Appellant agreed that in some periods too much VAT had been declared and in others too little. He said that his financial accounts could only be prepared after the year end and therefore the SAGE printed VAT returns were only available some 12-18 months after the original quarterly returns had

5 been submitted to HMRC. The Appellant agreed that he had intentionally submitted incorrect VAT returns but only for the purpose of avoiding being penalised for underpaying VAT. The Appellant says that, as at 01.03.06, he was in credit for overpaid VAT in the amount of £5,648.83. He says that trading conditions in subsequent years became difficult and that he therefore began to reclaim some of the overpaid credit.

5. HMRC submit that the Appellant's returns should have been amended by way of a voluntary disclosure at the time the overpayment became apparent and that a voluntary disclosure as at 02/10 was out of time.

10 Relevant Legislation

6. Regulation 34 Statutory Instrument 1995/2518 - Value Added Tax Regulations 1995

34(3) Where, in relation to all such overstatements or understatements discovered by the taxable person during a prescribed accounting period, the difference between :

- 15 (a) under-declarations of liability, and
(b) over-declarations of liability,

does not exceed £50,000, the taxable person may correct his VAT account in accordance with this regulation ...

20 34(7) Where the conditions referred to in paragraph (3) above do not apply, the VAT account may not be corrected by virtue of this regulation.

7. Section 77, Value Added Tax Act 1994

Assessments : time limits and supplementary assessments

77(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76 shall not be made :

- 25 (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or
(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty.

30 8. Schedule 39 of the Finance Act 2008 stipulates the time limit in respect of assessments and claiming input tax. The provisions of Schedule 39 are explained in VAT Notice 700/45 Paragraph 4.7.

'4.7 What's the time limit for claiming input tax?

35 The time limit for making claims was increased with effect from 01 April 2009 from three years to four. However, in order to ensure that the

accounting periods that were out-of-time on 31 March 2009 are not brought back in-time by the change, the following transitional arrangements apply :

5 The transitional arrangements provide that no claim made between 01 April 2009 and 31 March 2010 can be made for any accounting period for which the VAT return was due before 01 April 2006.

Thus, on 31 March 2009, the earliest accounting period for which a claim may be made is that ending on 28 February 2006 (for which the due date of the return was 31 March 2006).

10 On 30 April 2009, the earliest accounting period for which a claim may be made under regulation 29 would be that ending on 31 March 2006 (the due date of the return for the period being 30 April 2006).

15 Similarly, on 31 October 2009, the earliest accounting period that can be claimed for will also be that ending on 31 March 2006. However, by 30 April 2010, the four-year time limit will have come fully into effect so that a claim made on that date can go back to the quarter ending 31 March 2006.'

The Appellant's submissions

9. The Appellant accepts that, at 28.02.06, he had made intentional overpayments of VAT totalling £5,648.83 and then submitted a series of incorrect VAT returns in order to recover this overpayment. He submits that the whole of the amount was taken into
20 account within the statutory 3-year period, that is before 28.02.09. He contends that the 3-year time limit is a 'rolling period' and that the overpayment made as at 28.02.06 was correctly taken into account before 28.02.09 by overclaiming input tax. He argues that regulation 34 of the 1994 Regulations is framed primarily to allow a taxpayer to correct 'minor' adjustments without reference to HMRC and that the
25 adjustments he made were within the tolerances referred to in regulation 34. He argues that it is common practise for adjustments to be made to VAT returns without reference to HMRC.

10. The Appellant produced a schedule of underpayments and overpayments for the period in question, which was broadly similar to the schedule prepared by HMRC.
30 The only point of contention was whether the overpayment at 28.02.06 had been legitimately reclaimed and extinguished within the statutory 3-year period. The Appellant argued that it had and that it would be wrong in equity for HMRC to unfairly claim to recover VAT which had already been paid in full.

11. HMRC say that, under Regulation 34(3) of the 1995 Regulations, only
35 overstatements or understatements which are *discovered* by the taxable person may be corrected in VAT returns and that, because the Appellant had intentionally overpaid VAT and failed to account for VAT at the correct time due to unauthorised adjustments, he was now time-barred from doing so. HMRC argue that it is not possible to use the provisions set out in Regulation 34 of the 1995 Regulations to
40 adjust deliberate errors. They contend that under and over declarations, if deliberate, cannot be considered as being 'discovered'. HMRC argued that the assessment raised under s73 VATA was issued on 01.07.10. They say that the earliest return that was

assessable by HMRC at that date under s77 VATA was the Appellant's return for the quarter ending 31.08.06 and was determined correctly, having been made to the 'best judgement' of the assessing officer, Mr Stephen Tuck.

5 12. The Appellant, by his own admission, knowingly submitted false VAT returns. He signed the declaration on the VAT return certifying that 'information given' was 'true and complete' when quite clearly he knew it was not. The deliberate manipulation of figures on a VAT return in order to under or over declare VAT as a method of managing the business' cash flow has no basis in law. The provisions of Regulation 34(3) of the 1995 Regulations are quite clear. Only overstatements or
10 understatements 'discovered' by a taxable person may be corrected. Deliberate errors cannot be corrected save by way of voluntary disclosure and the 3-year time period for doing so means that the Appellant was out of time after 28.02.09. Accordingly, HMRC were correct to issue an assessment to recover the £4,268.00 tax which the Appellant had purported to deduct by adjustments to his returns. The Tribunal
15 accordingly determines that the assessment raised on 05.07.10 was correctly raised under Section 73 VAT.

13. The appeal is accordingly dismissed.

14. 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
20 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.

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MICHAEL S CONNELL

TRIBUNAL JUDGE

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RELEASE DATE: 22 February 2012