



TC02032

Reference no: TC/2010/08760

Value Added Tax - Claim for input tax that was out of time - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MR. SHIRAZ JANMOHAMED
T/a SAUF ENTERPRISES**

Appellant

-and-

**THE COMMISSIONERS OF HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

Tribunal: JUDGE HOWARD M NOWLAN

Sitting in public at 45 Bedford Square, London, on 9 January 2012

Mr. Sharaz Janmohamed in person on behalf of the Appellant

Mr. Philip Shepherd of HMRC's Local Compliance office for small and medium enterprises on behalf of the Respondents

DECISION

1. This was a case where the Appellant was claiming deductions for input tax that had been incurred before the 3-year cut off date that applied for input tax incurred in the year 2005. The Appellant based his claim largely on certain factors related to two burglaries and a fire that had either led to the loss or destruction of invoices or to invoices being misplaced, all of which was said to account for why the invoices were being claimed beyond the permitted period. In addition the Appellant contended that the relevant VAT officer had intimated that on this occasion it would be in order for the input tax to be claimed late, though such latitude would not be allowed in future, and that it was most unfair, when the claimed input tax had been accounted for by suppliers, that the Appellant's claim should be time-barred.
2. Whilst at one of the meetings between HMRC's officer and the Appellant, other grounds for denying the input tax had been touched on, though not pursued, the reason why I must dismiss this appeal is that it was clear that the relevant input tax was time-barred, and clear that neither HMRC officers nor I had any discretion or jurisdiction to allow deductions out of time. The input tax in question had in fact been deducted, and granted without verification, in the various monthly VAT periods from 12/08 to 10/09. The recovery assessments for each of those periods, now being made, to recover the wrongly credited input tax, are for £67,724.00, with interest of £2367.85. A penalty, at the rate of 15% had also been charged, though HMRC was ready to suspend this penalty on conditions.

The facts

3. The Appellant's trade in the year 2005 involved the sale of shampoos and cosmetics. The Appellant had a shop through which retail sales were made, but the majority of the business involves wholesale sales to Nigeria, with the product being despatched from the Appellant's warehouse. It seems that the Appellant had traded for a considerable time, without VAT dispute. The business made monthly returns for VAT purposes, presumably because much of the trade involved the making of exports, with resultant VAT reclaims being made.
4. There were two burglaries at the Appellant's retail shop, one in about March or April 2005 and one in 2006. In one or other of these burglaries, invoices or possibly useful business records in relation to invoices were said to have been taken by the burglars, when they removed various drawers in which some cash was held. Following these burglaries, the Appellant removed some documents to his house, but in 2007 there was a fire at the house, and documents were again said to have been destroyed. In addition the fire obviously caused great distress to Mr. Janmohamed and his family, and it meant that for a period they had to live in rented accommodation.
5. In December 2008, the deterioration in the Appellant's trading led to the landlord of the shop premises terminating the Appellant's lease. When Mr. Janmohamed was then clearing up the shop he found a considerable number of invoices dating from March to December 2005 which he believed had not previously been claimed for VAT purposes. A reasonable number of these invoices were dated either March or

April 2005, but the majority were dated between May and July 2005, with one or two being dated later in that year.

6. In the VAT period, 12/08, the Appellant claimed input deductions for some of the early invoices simply by including the amounts of those invoices and the related input tax in his overall claim for input tax. He did the same in every month from January to October 2009. None of these claims were queried at the time, and the Appellant therefore received VAT reclaims for the relevant periods.

7. When an HMRC officer made a visit to the Appellant's premises on 1 July 2010 he noted that then current VAT returns periodically involved late claims for input tax, in that the claims were made well after the period in which the supplies had been made, and there was no suggestion that the actual invoices had not been rendered roughly when the supplies had been made. Whilst such claims were being made well after the VAT period for which the claims should ordinarily have been made, the claims that the officer initially saw were not out of time. In August 2010 the same officer made a further visit, and then noted that some of the claims that had been made for most of the months of 2009 had been for input tax incurred in the year 2005, which input tax was "out of time" under the 3-year cap rule then in force for claiming input deductions.

8. Mr. Janmohamed explained to the officer the manner in which the burglaries and the fire had led to the loss, or assumed loss of invoices and the way in which various invoices had been found when the shop premises were vacated in December 2008. He also explained that the reason why he made relatively small claims for the late invoices from December 2008 to October 2009 was that he thought that it would excite attention if he made all the claims immediately he discovered the hitherto lost invoices, so that it was prudent to make the claims in small amounts over the period of 10 months.

9. Although I was shown the officer's meeting note, ostensibly for the first meeting on 1 July 2010, I noted that the meeting note had not in fact been written up until around the time of the second meeting. It was accordingly not quite clear whether the statement that Mr. Janmohamed attributed to the officer, namely that on this occasion he would accept, and give credit for, late invoices referred just to the late presentation of invoices that were still within the relevant 3- or 4-year capping period, or whether oddly the officer was suggesting that he would even ignore the capping rule when invoices were plainly out of time. The meeting note seems to indicate that the latitude was offered just in relation to the late presentation of invoices that were still in time, and that as soon as the officer noted that other invoices were indeed out of time, these were rejected on that ground.

10. The officer in question no longer worked for HMRC, and gave no evidence. The Respondents suggested that it was unnecessary for the officer to give evidence, and having regard to the basis on which I consider that I must reject this appeal, I agree.

11. I might add, though it is not relevant to the basis on which I decide this appeal, that the officer was somewhat dubious about the claim being made by the Appellant, quite apart from the feature that the 2005 invoices were out of time. The officer appeared to be broadly satisfied that the invoices had not been claimed already in earlier periods, and he appeared to be satisfied that suppliers had paid the relevant VAT, reflected in the late-claimed invoices. He did however note that if he added

back the late invoices into the returns for the appropriate periods, the additional deductions would have suggested that the Appellant was consistently making losses.

12. I might also add, though again this is not material to my decision, that there were some features to the late claims that I would have wished to understand more clearly but for the fact that the Appeal appeared to me to have to be dismissed for the simple reason that the invoices that had been claimed between December 2008 and October 2009 were simply out of time. The first point that occurred to me was that the first burglary in March or April 2005 could certainly not have led to the loss of invoices related to the later periods of trading in and after May 2005, to which many of the late-claimed invoices related. Furthermore, when those invoices would ordinarily have been claimed in the relevant periods, so that they should have been claimed well before the 2006 burglary, it is not particularly obvious why that second burglary should have had much relevance to the claims for those invoices. Secondly, I can well appreciate that the house fire would have caused Mr. Janmohamed and his family very considerable distress, but it seems unlikely that it would have occasioned the loss of that many relevant invoices and records. I say this because the quantity of invoices found for the year 2005 already led the officer to suggest that adding those invoices to the details given in the initial returns for those 2005 periods indicated that considerable losses were then being made.

13. The relevant point in this Appeal, however, is simply that having considered Regulation 29 of the VAT Regulations 1995, 1995/2518, and in particular having clarified that there is no power or discretion for HMRC, or jurisdiction to me, to grant credit for plainly out of time invoices, the Appeal must be dismissed.

14. I will deal shortly with the Appellant's suggestion that the relevant officer gave some sort of representation in a meeting that he would accept, and give credit for "out of time" invoices. It seems to me that the relevant responses to this suggestion are that:

1. it is not clear to me that the officer indicated anything other than that he would give credit for late presented invoices that were not strictly "out of time";
2. if, contrary to the inference that I derive from the one meeting note, the officer gave an oral representation that he would give credit for invoices that he was not empowered to give, this does not change the fact that credit cannot be given for the relevant invoices;
3. any representation that the officer gave cannot have been given before July 2010, well after every period when the credits were claimed;
4. indeed, even if every late invoice had been claimed as soon as it was alleged to have been discovered (i.e. in December 2008), every single invoice for which a claim would then have been made would still have been out of time, and
5. it therefore follows that even if the officer made a representation about accepting "out of time" invoices, which I very much doubt, that representation could not have adversely affected the Appellant's conduct, since the invoices were all out of time at the very point they were found.

15. It follows that HMRC is in time to make recovery assessments for the over-refunded VAT in all the periods December 2008 to October 2009, and because the 2005 invoices that had originally been claimed and allowed in those periods should not have been allowed, this Appeal is dismissed, and HMRC's assessments to recover the over-refunded VAT are now confirmed.

16. As regards the penalty imposed by HMRC, I record that because of the cooperation given by the Appellant, HMRC has already reduced the penalty from 30% to 15%, the maximum amount for which the penalty can be reduced where the Appellant has been careless. HMRC also offered to suspend the penalty for two years on the basis that if the Appellant complied with all VAT requirements for the next two years then the penalty would not be charged. The Appellant has not yet confirmed his acceptance of that suspension condition, since he naturally hoped that this Appeal would be allowed, whereupon the penalty would immediately have been vacated. HMRC has however confirmed that if the Appellant does now agree to the suspension conditions, the penalty will be suspended. How that condition inter-relates with the proposition that the Appellant should now discharge the assessment now confirmed, which the Appellant may or may not be financially able to do, is not for me to determine.

Right of Appeal

17. This document contains full findings of fact and the reasons for my 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.

**HOWARD M. NOWLAN
TRIBUNAL JUDGE**

Released: 17 May 2012