



TC02423

Appeal number: TC/2012/03274

VAT – effective date of registration – request to backdate – statutory power – HMRC administrative procedure – genuine error on part of applicant – error unknown to HMRC – whether HMRC acted reasonably – matter sent back for further decision

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAMBRIAN HYDRO POWER LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC
RICHARD THOMAS**

Sitting in public in London on 13 November 2012

Stephen Cox, Director, for the Appellant

L Bingham, of HM Revenue and Customs, for the Respondents

DECISION

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1. Cambrian Hydro Power Limited (“CAP”) appeals against the decision of HMRC refusing its application to be registered for VAT under Schedule 1 to VAT Act 1994 with effect from 1 April 2009.

The circumstances leading to the Decision appealed against

10 2. CHP is a family controlled company. Its business, which commenced before April 2009, is to create hydro electric power. It has been working on a hydro electric power project. Construction work has not yet started. A large part of its activity has been directed at planning issues. For the purpose, CHP has incurred expenditure plus VAT in the course of obtaining supplies of services in the form of reports. That VAT
15 was incurred over the years from April 2009.

3. On 20 November 2011, CHP submitted an on-line application for registration. The “registration details” state as follows;

- (i) an intention to make taxable supplies;
 - (ii) “not currently making taxable supplies but intend to in the future”;
 - 20 (iii) CHP would like its registration to commence on 1 January 2012;
- and
- (iv) CHP estimates the value of supplies in year 1 to be £100.00.

4. On or about 5 January 2012, HMRC notified CHP by letter that its effective date of registration (“EDR”) was 1 January 2012.

25 5. On 1 February 2012, CHP wrote to HMRC applying for its registration to be backdated to 1 April 2009. The letter reads as follows:

30 “I would like to apply for a backdating of registration. When I registered, I had been informed that both goods and services were claimable from prior to registration by four years. I have since found that, for an unknown reason, services cannot be claimed before six months prior to registration. This means that there are many service related VAT payments that our small company will not be able to process. At no point during the registration process was my attention drawn to this anomaly, and if it had been, I would have undoubtedly requested backdating.

35 I would be very grateful if consideration could be given to backdating registration to 1 April 2009, as we have kept full VAT records since that date”.

6. HMRC responded on 15 February 2011 refusing the application. So far as is relevant, the letter reads:

“I regret to inform you that your request has been refused. Under the provisions of paragraphs 5, 6, 9 and 10 of Schedule 1 to the VAT Act 1994 we are not obliged to amend the effective date of registration which was based on the information you supplied on Form VAT 1 *Application for VAT Registration*.
5 The only circumstances where we may vary your date of registration is if:

- there has been a Departmental error during the registration process;
- information comes to light to indicate that you are liable to be registered from an earlier date.

10 There is no evidence to suggest this and no other sufficient grounds had been supplied to support the request to change this date. Therefore on the basis of the information supplied on your application received 28 November 2011 your effective date of registration as 01/01/12. If you have any further information that you want me to consider, please send it to me now.”

15 7. On 18 February 2012 CHP appealed to the Tribunal. So far as is relevant, the grounds of appeal are as follows:

20 “CHP has been trading for three years and has recently registered for VAT (start date 1/1/12). CHP has incurred legitimate VAT costs for both goods and services purchased from VAT registered suppliers during the three year period of operation prior to registration. CHP would have requested backdating of the date of registration during the registration process if it had been made aware that VAT claims could only be backdated for 6 months for services VAT. The distinction between goods and services VAT was not made clear to CHP during the online registration process. This was an error on the part of the VAT registration administration, and has not been taken into account in the refusal
25 made on 15 February 2012. CHP wish for backdating of VAT registration from 1 January 2012 to the date when VAT costs from supplies of services to CHP were incurred (9 March 2009), or within 6 months of this date.”

The relevant statutory provisions and their effect here

8. Schedule 1 to the VAT Act 1994 provides, so far as is relevant, as follows:

30 “9. Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he –

- a) makes taxable supplies; or
- b) is carrying on a business and intends to make such supplies in the course of furtherance of that business,

35 they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.”

9. Regulation 111, Value Added Tax Regulations 1995, provides:

“(1) Subject to paragraphs (2) and (4) below, on a claim made in accordance with paragraph (3) below, the Commissioners may authorise a taxable person to treat as if it were input tax –

5 (a) VAT on the supply of goods or services to the taxable person before the date with effect from which he was, or was required to be, registered.... for the purpose of a business which either was carried on or was carried on by him at the time of such supply....”

“(2) No VAT may be treated as if it were input tax under paragraph (1) above-

10 (d) in respect of services which had been supplied to the relevant person more than six months before the date with effect from which the taxable person was, or was required to be, registered”

10. Paragraph 9 of Schedule 1 has limited scope. It applies only in a situation where a person is neither liable to be registered nor is already registered. Here CHP
15 was registered as from the date specified in its application (i.e. with effect from 1 January 2012). The result is that CHP will never have become qualified to apply to make a request under paragraph 9 for an earlier EDR. That follows from the clear wording of paragraph 9. In this respect our decision is in line with that of Judge Berner in *Lead Asset Strategies (Liverpool) Ltd* [2009] UK FTT 122 (TC), as
20 expressed in paragraph 32 of that decision.

11. We turn now to the contentions advanced by Mr S Cox, Director of CHP. He was the director who submitted the form applying for registration.

12. Prior to sending off the application form, Mr Cox had understood (wrongly) that input VAT would be recoverable if it had been incurred at any time within two years
25 before registration. He evidently had not read Regulation 111 of the VAT Regulations, set out above, which states that, as regards VAT on supplies of services, there is only a six month period within which to make a claim for repayment: whereas the Regulation gives four years in which to make a claim in respect of VAT on supplies of goods.

30 13. Mr Cox noted from the “online” explanation of “How and when to Register for VAT” that it dealt with “Purchases made before VAT registration: reclaiming the VAT” with the following statement –

“You may be able to reclaim VAT on goods and services you paid for before you were registered”

35 The online explanation continues with the heading – “Purchases made before VAT registration: reclaiming the VAT. This is followed by the following explanation:

“If you buy goods or services before you registered for VAT, you may be able to reclaim the VAT you paid on them. You can generally reclaim VAT on goods you

bought up to four years before you registered for VAT, and services you bought up to six months before you registered. Remember too that you may be able to backdate your VAT registration by up to four years although once your date of registration has been agreed with HMRC, it cannot normally be changed.”

5 14. We have already observed that Mr Cox was wrong in thinking that he had four
years in which to reclaim VAT charged on the supply of reports. He would, we infer,
never have put 1 January 2012 in the box adjacent to the box which reads - “*You*
would like your registration to commence on...”, had he known that he was thereby
10 destroying CHP’s right to seek an agreement for an earlier EDR. By entering
01/01.2012 in the empty box he was, according to the strict reading of the law,
disabling CHP from the opportunity to recover the (potentially recoverable) input tax
that it had borne since April 2009. Had CHP been properly advised, it would have
never have disadvantaged itself by entering 1 January 2012 in the box. It would have
sought an agreement with HMRC to have an earlier EDR in the manner contemplated
15 in Schedule 1 Paragraph 9 (b).

Can the unintended consequence be put right?

15. For reasons we have given, Schedule 1 paragraph 9 (b) is of no help to CHP.

16. HMRC’s letter of 15 February 2012 states that they may vary the date of
20 registration if there has been a *Departmental Error* during the registration process.
That is not suggested here.

17. We left the hearing with the uncomfortable feeling that the apparent position of
CHP was unfair and unjust. Had Mr Cox understood the implications of entering 1
January 2012 in the online registration box, he would have not have entered that date.
He unintentionally deprived CHP of the opportunity of recovering the whole of the
25 input tax which had been paid at the expense of the shareholders in this small family
company. Our attention was caught by a passage in the decision of Judge Berner in
Lead Asset Strategies (Liverpool) Ltd, supra. Paragraphs 34 to 41 cover the topic of
“*Genuine Error*” in a context similar to the present.

18. The *Lead Asset* decision observes, in paragraph 34, that HMRC operate an
30 administrative policy of permitting retrospective changes to the EDR in certain cases.
This policy derives from the general power of care and management of VAT provided
by Section 6 of the current Customs & Excise Management Act..

19. The policy as set out in HMRC’s internal policy and guidance in Manual V1-28,
Volume 1: Registration. Para 8.8, so far as material to cases of *Genuine Error*, is
35 reproduced below:

“8.8 Change the EDR date. You may receive requests from registered
traders to amend their EDR to an earlier date than is already allocated.
Commonly this is where they belatedly find that input tax incurred prior to the
EDR can’t be claimed as it is out of time. In limited circumstances we may
40 permit a retrospective change to the EDR if there has been a genuine error in
completing the VAT 1 by the person registering. Section 33 deals with the
circumstances and procedures to follow. Otherwise refuse requests of this
nature. VAT Act 1994, Schedule 1 paragraphs 5 and 6 and paragraphs 9 and 10

of the (*sic*) do not allow an EDR to be varied after a trader is registered. When the trader applied for registration he had the opportunity to negotiate his EDR then and the legislation does not allow this date to be changed retrospectively.”

5 20. Section 33.1 of V1/28 reads as follows:

“**Criteria for changing an EDR (trader request).** The EDR given must, at the time of registration, have been a backdated EDR, i.e. at the time of application the trader must have voluntarily applied for an earlier EDR. The trader must demonstrate that there was a genuine misunderstanding or error in
10 completing the application form. That does not include an error of judgment, e.g. he thought he would be in repayment but in fact he was a payment trader. The request must be made before the end of the due date of first VAT return (i.e. one month after the end of the first period), which must not have been rendered. They must return an original VAT 4 Certificate”.

15 Even if this had been a case of genuine taxpayer error, the policy set out above would not operate because CHP’s circumstances fail to satisfy the first main sentence of the above extract from Section 33.1. This is a case where, at the time of the original application, there had been no voluntary application for a backdated EDR. But, even were the criteria in Section 33.1 are not met, the policy also includes (at section
20 33.1.2) additional criteria that may be used to allow an EDR to be pushed back. This applies if “an officer feels there may be mitigating circumstances”. The present situation may be one where the officer making the decision appealed against ought, as a matter of principle, to have taken account of mitigating circumstances.

21. The question that arises is whether, when making the decision communicated to
25 CHP by letter of 15 February 2012, the VAT registration officer took account of “mitigating circumstances” as a consideration relevant to the decision.

22. We know that CHP had reacted quickly to the notification of its registration with effect from 1 January 2012. That notification reached it some date after 6
30 January 2012; and on 1 February 2012 Mr Cox applied for “backdating” to 1 April 2009. We know from HMRC’s letter of 15 February 2012 that it regarded itself as unable to vary a date of registration save in a situation of Departmental error (or which is not applicable here, when information has come to light to indicate liability to be registered from an earlier date). We are satisfied that this was a case of genuine error on Mr Cox’s part. What we do not know is whether the registration officer took
35 account of the criteria in Section 33.1.2 of V1-28.

23. The hearing of the present appeal enabled us to examine the circumstances surrounding CHP’s application for registration. We ascertained that Mr Cox plainly had not understood the adverse implications of what he was doing. He used, as he was bound to, the online form and he found nothing online that warned him that he
40 could be disadvantaging CHP by not choosing an earlier date. We note from Notice 700/1 the following passage:

5 “To facilitate recovery of earlier input tax, from the 1 April 2009, we may allow you to voluntarily backdate your date of registration by up to four years at the time of application. You should give this careful consideration as, once we agree a registration date with you, we will not normally allow you to then change the date of registration.”

10 Nonetheless, backdating anything is counterintuitive. It raises in the mind of the “back-dater” a sense of deceit; the online box leaves no room for explanation. Had the registration officer been given even the briefest explanation, there would have been the opportunity to draw the attention of Mr Cox and CHP to the fact that CHP was being deprived of the opportunity of recovering the input tax incurred more than six months back. Mr Cox, as the agent of CHP, would have been able to question whether he meant what he had written in the relevant box. In other words, through no fault on the part of the registration officer, knowledge of the applicant’s genuine error never came to the attention of the registration officer and, in that respect, he or she failed to take account of what we see to be a relevant consideration in determining whether there were mitigating circumstances.

24. We acknowledge that this point about genuine error and the impact of section 33.1.2 of V1.28 is of our own making. Our reaction is that the fairness and justice of the situation calls for a fresh decision in the light of what we now know.

20 25. For the reasons given above, we direct that the present appeal be allowed. We further direct that the matter be referred back to HMRC for a reconsideration of the decision to refuse CHP’s application for backdated registration to 1 April 2009 and to substitute a new decision.

25 26. 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.

35 **SIR STEPHEN OLIVER QC**
TRIBUNAL JUDGE

RELEASE DATE: 8 December 2012