[2016] UKFTT 0274 (TC)

TC05047

Appeal number: TC/2015/04027

Value Added Tax – application for strike-out – whether excess VAT paid on estimated assessments is recoverable – time-bar – Section 80(4), VATA 1994 – Rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 – Appeal struck-out

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER WALLS T/A CHARLIES ACCESSORIES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC

Sitting in public at George House, 126 George Street, Edinburgh, EH2 4HH on Friday 18 March 2016

Mr P Walls, the Appellant

Mrs E McIntyre, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a re-payment claim by the appellant, Mr Walls, for excess VAT of £7,045.44 paid on estimated assessments for the periods 02/08 – 11/09. Mr Walls has traded selling women's shoes and handbags for many years. His VAT registration number is 856 9499 50. In July 2007 he set up a company, Charlies Accessories Ltd, with a view to its taking over the business. That company was dissolved in about January 2011. Since 2010 Mr Walls reverted to trading as an individual. The company acquired its own separate VAT registration number 915 9032 27. At Mr Wall's request his personal VAT number was not transferred to the company and he did not as an individual de-register. For a period, therefore, there were two registration numbers, one personal and the other relating to the company. The claim for repayment is made by way of *nil* Returns for the relevant periods submitted in September 2014.

Evidence

2. In her introductory remarks Mrs McIntyre for HMRC referred to the contents of their VAT records relating to the appellant and relative correspondence.

3. Tab 3/46 shows the respondents' VAT ledger account relating to the appellant personally. There was a series of failures to submit quarterly Returns, which was followed by the issuing of estimated assessments and surcharges by the respondents. These were duly paid by the appellant. While the surcharges were credited to the appellant's liability, the excess duty paid was subject to the four year "cap" and was not repayable accordingly. The claim for possible repayment arose too late ie only when the *nil* Returns were submitted in September 2014. It is agreed by parties that £7,045.44 is the total of the excess payments and the sum at issue in this appeal.

4. In the correspondence produced Mrs McIntyre noted HMRC's querying with the appellant (tab 2, p1) the failure to lodge Returns for the periods 02/08 to 08/10. (The first eight of these eleven periods are relevant to the appeal.) Next, at p2 HMRC explains that while *nil* Returns have been submitted, the relevant payments totalling £7,045.44 were not recoverable by virtue of Section 80(4) VATA: the Returns were received over four years after the end of the end of the relevant accounting period. Mrs McIntyre noted the letter of review (tab 2, p7-8) in which the decision to disallow repayment was upheld. The appellant's personal registration for VAT was cancelled as at 26 June 2015 (tab 2, p9).

5. At tab 3, p1, Mrs McIntyre noted HMRC's record that the appellant was registered as a "sole proprietor" with effect from 1 February 2005 to 27 June 2015. She observed that there had been no direction from the appellant about the allocation of the payments in respect of the estimated assessments to the personal or the company registration number. HMRC, she explained, would allocate to the VAT registration number written on the back of the cheque, failing which, to the name on the cheque.

6. Mrs McIntyre noted an additional document submitted by the appellant at the hearing (X/1) which states that his trading as an individual stopped in July 2007 (this was subject of cross-examination, noted *infra*).

7. We then heard the appellant's account of the matter. He explained that he was confused about the allocation of monies by HMRC. While he accepted that he did not de-register, he ceased trading as a sole trader in July 2007. The limited company was trading thereafter although the estimated assessments had been raised against him as an individual. The late Returns, recording *nil* liability, were submitted by him in his capacity as an individual. The dispute with HMRC, as he saw it, was the proper allocation of the tax paid. During the periods covered by the Returns it was the limited company that was trading. An accountant was then acting for it, and the appellant understood that he was dealing with its registration for VAT purposes and its submission of Returns. The appellant assumed that his accountant would have de-registered him as an individual for VAT when he registered the limited company.

8. The appellant produced four extra documents (received as nos X/1-4). X/1 is a copy letter to "VAT Southend" indicating that he had ceased trading as an individual in July 2007. X/2 and 3 are copy Returns for the company for 05/08 and 08/08. Significantly X/4 is a receipt of the VAT registration for the company, noting the business transfer but recording that the appellant did not wish to transfer the existing VAT registration number to the new business.

9. The appellant then referred to various personal difficulties which had affected his administration of the business at the relevant time. He had separated from his domestic partner and she had made allegations of assault by him which proved to be unjustified. Stock of considerable value and cash had been stolen by her daughters from the business, he claimed. There had also been a flood there. The company traded until 2010 when the appellant re-commenced trading as an individual (this corresponds with the terms of X/1.) The company was dissolved in January 2011.

10. The appellant accepted that the late Returns submitted were for him as a sole trader. On the cheques, he indicated, the sole trader registration number was written on the reverse. The cheques were drawn on his own personal bank account.

11. In a brief cross-examination Mrs McIntyre queried whether the appellant ever received an acknowledgment for X/1 from the VAT authorities. (That refers to him ceasing to trade as an individual in July 2007.) He thought that he had not, but he had not pursued the matter because of seasonal business commitments. The appellant agreed that according to X/4, the VAT registration receipt relating to the company, he had indicated that he did not wish his personal VAT number to be transferred to the company. Finally, the appellant acknowledged that he had not considered responding to the queries raised by HMRC about the absence of the Returns in their letter of 8 November 2010 (tab 2, p1).

Submissions

12. Both the appellant and Mrs McIntyre addressed me on the evidence and the relevant law. There is an issue about whether X/1 was received by the respondents. Otherwise, there was no challenge by Mrs McIntyre to the credibility or reliability of the appellant's evidence, and, indeed, her cross examination related to additional factual aspects. The factual narrative *supra* should accordingly be read as forming the *findings in fact* in the appeal.

13. It was common ground that a four year time-limit applied under Section 80(4) VATA in respect of excess VAT paid. The point of controversy was determining the appropriate commencement date.

14. Mrs McIntyre referred firstly to taxable status arising from VAT Registration (Section 3 VATA). She noted HMRC's powers to correct registration records (sub section (4)). The document X/1 produced by the appellant, purporting to notify de-registration, could not be traced by HMRC. A registered person was under a duty to submit VAT Returns. In the absence of a Return HMRC was empowered to make an estimated assessment (Section 73). In the event of the Return being smaller, the balance would be credited under Section 80(1A). There is, however, a four time-limit applicable under sub-section (4). The "relevant date" for its commencement is determined by sub-section (4ZA). Paras (c) and (d) apply to re-payment claims for sums paid in excess of estimated assessments issued in terms of sub-section (1A), *ie* where there has been no return and estimated assessment made by HMRC. The circumstances here did not represent "erroneous voluntary disclosure" for purposes of para (c) and, therefore, para (d) applied *viz* the commencement date was the end of the accounting period in which the assessment was made.

15. Mrs McIntyre referred to certain case-law in support of her argument. In *A Russell Heating* (MAN/07/0754) the time-limit was upheld in spite of tragic personal circumstances affecting the taxpayer. This followed another Tribunal decision in *I & CJ Van Colle* (LON/06/0991). Individual circumstances had been disregarded also in *A&B Corvi* (TC/10/04577). The tenor of these other decisions is that there is no flexibility in the application of these provisions.

16. The appellant's stance was that Section 80(4ZB) applied *ie* there had been "erroneous voluntary disclosure". The appellant argued that he had been encouraged to make an erroneous Return after trading had ceased. The relevant date, *ie* commencement of the four year period, started on the date when payment was made, he submitted. Thus, the appellant continued, the claim was not time-barred. Otherwise, he added, if repayment were not made, then HMRC would be "unjustly enriched". Such considerations applied against the taxpayer in favour of HMRC, and it was inequitable that he should not be allowed to recover the excess VAT paid.

Conclusion

17. I consider that Mrs McIntyre's arguments are well-founded. This is a repayment claim under sub-section (1A) *ie* where an estimated assessment has been

made. There is a four year time limit applicable under sub-section (4). Further, having regard to sub-section (4ZA) the "relevant date" *ie* commencement, falls to be made by reference to paras (c) and (d). As there was not "erroneous voluntary disclosure", para (d) applies, and the four year limit runs from the end of the accounting period in which the assessment was made.

18. I appreciate the harsh effect which this has, but I agree with the interpretation made in the cases noted by Mrs McIntyre. The terms of the legislation are prescriptive and do not allow a discretion on my reading. For these reasons the appeal falls to be struck out under Rule 8(3)(c) of First-tier Tribunal (Tax Chamber) Rules 2009. In view of the time-bar, I consider that there is no reasonable prospect of the appeal succeeding.

19. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

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RELEASE DATE: 21 APRIL 2016