[2015] UKFTT 0515 (TC)

TC04673

Appeal number: TC/2014/06041

VALUE ADDED TAX – repayment of VAT – Directive 2008/9/ EC – Community Traders – EU Refund Scheme – indication in correspondence on previous claims that EU trader liable to register as taxable person in UK – further claim for same period not made until after expiry of time limit – claim refused – whether discretion available to accept application after due date – no – appeal dismissed but suggestion made concerning wording to be used by HMRC in correspondence and Notices

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAS SVS LA MARTINIQUAISE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
DAVID BATTEN

Sitting in public at Fox Court, 30 Brooke Street, London EC1 7RS on 19 August 2015

David Sims, NDS Accountancy Limited, for the Appellant

Rita Pavely, Officer, Appeals and Reviews, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("LM") appeals against a decision of the Respondents ("HMRC") dated 28 May 2014, upheld on review, to refuse a claim made to HMRC's Overseas Repayment Unit ("ORU") for refund of VAT incurred in the UK by LM as a Community Trader.

The background facts

2. The evidence consisted of a bundle of documents. From the evidence we find the following background facts.

3. LM is a non-UK company, resident in France. It is not registered as a taxable person in the UK for VAT purposes. Its business is described as being the distilling, rectifying and blending of spirits.

4. Before the claim which is the subject of this appeal, LM had made claims for earlier years to the ORU for the repayment of VAT to it as a person in business in an overseas member State. No mention was made in the evidence of any claim earlier than that for the period from 01/10 to 12/10, and therefore we make no findings in relation to claims for periods before 2010.

5. By a claim received by the ORU on 28 December 2011, LM claimed a refund in respect of the period 01/10 to 12/10 in the sum of £25,486.61. On 2 May 2012, the ORU wrote to LM informing it that its claim had been refused because it had not been received within the legislative deadline. The ORU explained that a claim in respect of the period 01/10 to 12/10 should have been made by 30 September 2011. LM responded on 21 May 2012, asking whether there was any way in which ORU's decision could be changed. LM explained that it was a French firm and did not know that the deadline was 30 September of the calendar year following the refund period; it had thought that the time limit for claims was one year.

6. The ORU replied on 12 June 2012, and explained that the legislative deadlines were strictly adhered to. Claims had to be submitted to the member State of establishment at the latest on 30 September of the calendar year following the refund period. In LM's case the claim should have been received on or before 30 September 2011; the date of receipt of the claim had been 28 December 2011.

7. LM did not seek to challenge the ORU's decision in respect of that claim.

8. In March 2013 LM made two claims for refund in respect of the period 01/12 to 12/12 in the respective sums of £36,001.85 and £15,574.12. (These claims were numbered 741964 and 741965.) The ORU requested confirmation that LM's business activities remained the same as in previous years. From the reply received by the ORU from LM, the ORU concluded that LM was now making taxable supplies in the UK and therefore was no longer eligible for a refund under the EU Refund Scheme

("EURS"). In a letter to LM dated 16 July 2013 the ORU indicated that no refund could be made as LM appeared to be making supplies in the UK.

9. Through its advisers NDS Accountancy Limited (who had not been involved in advising LM at the time of the correspondence concerning the claim for the period 01/10 to 12/10), LM appealed against that decision. The ORU subsequently accepted on review, in the light of further information provided by LM, that LM was not making taxable supplies in the UK. The reason for this was that the sales concerned took place under the warehousing regime in which goods are transferred between warehouses under bond, which does not constitute the making of taxable supplies.

10. As a result of the ORU's letter dated 16 July 2013, LM believed that it was no longer eligible to submit further claims under the EURS, and as a result it did not submit further claims. However, in a telephone conversation at some point after 30 September 2013 (ie after the deadline for making any further claims for the period 01/12 to 12/12), the ORU confirmed that LM was eligible to continue using the EURS. The precise date of this conversation could not be established, but the notification was in the course of a telephone conversation which Mr Sims believed to have been in early December 2013. In the absence of specific evidence, we make no specific finding as to the exact date, nor as to the date on which the refunds were made.

11. As soon as it became aware of the latter confirmation, LM submitted claim number 778571 to the ORU, which received it on 6 December 2013. (This claim related to other VAT incurred during the period 01/12 to 12/12.)

12. The claim number was subsequently amended by the ORU to 781746.

13. The ORU wrote to LM on 28 May 2014, referring to the claim 778571 received by the ORU on 6 December 2013. The ORU explained that LM's claim had been refused in full because it had not been received within the legislative deadline. The ORU also informed LM that the Swift code provided was invalid.

14. In an email dated 16 June 2014, followed by a largely similar letter dated 18 June 2014, Mr Sims of NDS Accountancy Limited wrote to the ORU setting out further information explaining why LM and NDS Accountancy Limited considered that the ORU's decision was wrong. Mr Sims referred to the history of claims 741964 and 741965, and emphasised that it had only been some time after the deadline for claims for the period 012/12 to 12/12, ie 30 September 2013, that the ORU had confirmed, following a telephone conversation, that LM could continue to use the EURS because it was not making taxable supplies in the UK. At that point in time LM had submitted claim number 778571, which explained why the ORU had only received it on 6 December 2013. Given the circumstances, LM and its advisers believed that the refusal of claim number 778571 was unreasonable and would ask the ORU to reconsider its decision.

15. On 11 July 2014, the ORU wrote again to LM, using the claim number 781746 and referring to "your above claim received at this office on 19/06/14". The letter continued:

> "I regret to inform you that your application for refund of UK VAT has been refused again on this occasion for the reasons outlined below.
>
> I have considered the information provided in your agent's letter dated the 19/06/2014. However I regret as the claim was not received at this office within the legislative time limits my initial decision has not changed and payment could not be made on this occasion.
>
> . . ."

16. Mr Sims replied by email on 3 August 2013, requesting a review of the ORU's decision. In subsequent exchanges with the Review Officer, Mr Sims requested an extension of time for the provision of additional information considered relevant to the claim. He wrote to the ORU on 3 September 2014 setting out the further information. (On the same date he sent the ORU an email in broadly similar terms.) He explained that it had not been until early December 2013 that the ORU had confirmed to his firm in a telephone call that the ORU's decision on the earlier claims had been overturned and that LM could continue to use the EURS. He continued:

> "Our client inevitably required time to engage our services to look into this matter on our behalf and we would argue that they could not have been expected to know on 30 September 2013 that they were in fact entitled to continue using the EC Refund Scheme. We would also make the point that neither we nor our client received any written confirmation of your decision to refund claims 741964 and 741965 and thereby your agreement that our client could continue to use the EC Refund Scheme. We think it would have been reasonable to expect a written confirmation on a matter of principle such as this."

17. On 10 October 2014 the Review Officer wrote to LM to set out the conclusions of his review. His conclusion was that that the decision to reject the claim should be upheld. The claim had been rejected as the claim had been made late; it should have been made by 30 September 2013, and was not received until 6 December 2013. He had read through the correspondence from LM's representative and understood the reasons why the claim was made late. However there was no mechanism in either EU law or UK law to allow a late claim to be accepted for consideration. He commented:

> "A request could have been made to HMRC to allow a claim to be submitted by 30 September 2013 and to delay the examination of that claim until the questions regarding the previous claims had been resolved. This would have ensured that a claim was submitted on time and the claim could have been withdrawn if it were deemed that the business was not entitled to make a claim.
>
> However as HMRC did not receive the claim until 06 December 2013 the claim was not made on time and cannot be considered by HMRC."

18. On 7 November 2014 NDS Accountancy Limited gave Notice of Appeal on LM's behalf to HM Courts and Tribunals Service.

Arguments for LM

19. LM's Grounds of Appeal were the following:

(1) HMRC based its decision to refuse LM continued eligibility to use the EURS on the basis of their assumption that taxable supplies were being made in the UK when in fact they were not.

(2) By their refusal in their letter dated 16 July 2013 to refund LM's claims 741964 and 741965, HMRC informed LM that it was no longer entitled to use the EURS.

(3) HMRC had later confirmed that LM was entitled to continue using the EURS. LM would have filed the refund claim under appeal before the legislative deadline had it known that it was eligible to continue using the EURS.

(4) HMRC had reversed their decision regarding previous claims and it was unreasonable that LM should suffer a loss of refund of VAT as a result of this. For this reason, claims 741964 and 741965 were considered by LM to be relevant to this appeal and reference had been made to them in the context of its Grounds of Appeal.

(5) The only reason given by HMRC for refusing to refund the claim under appeal in all correspondence which LM had received from them was that LM filed the claim outside the legislative time limit. Given the circumstances of LM's case, it considered that withholding the amount of VAT reclaimed was unreasonable.

20. Mr Sims referred to the facts concerning LM's claims. He indicated that neither he nor LM disputed the account of the facts as set out by HMRC. He explained that LM had taken the 2013 correspondence from HMRC as notification that it was not entitled to use the refund system. For this reason, it had not applied for the refund for the period 01/12 to 12/12 until after HMRC had confirmed by telephone that the March 2013 claims were being accepted.

21. He had not known that, as indicated in the Review Officer's letter dated 10 October 2014, a "provisional" claim could have been made with a request to delay consideration of that claim pending resolution of the questions concerning that claim. Nor could LM have been expected to know this.

22. He suggested that it might be useful for a paragraph to be inserted in refusal letters sent out by HMRC to make the position clear. A corresponding amendment could also be made in HMRC's VAT Notice 723A at paragraph 4.13.

23. He pointed out that he had not been acting for LM at the time of its 2011 claim under the EURS. LM had believed that it had until December 2011 to lodge that claim. Following HMRC's refusal of that claim, LM had not appealed further. Although he had not been involved, he accepted that this had been a correct decision.

24. He submitted that HMRC's decision in respect of the claim under appeal appeared harsh. He and LM had thought that the position concerning that claim could

be rectified after the questions concerning the earlier claims for 01/12 to 12/12 had been resolved.

Arguments for HMRC

25. Mrs Pavely referred to the legislative background. The UK rules for the repayment of VAT to persons in business overseas were set out in s 39 of the Value Added Tax Act 1994 ("VATA 1994"). The terms of the EURS were prescribed by the VAT Regulations 1995 (SI 1995/2518) in regs 173-184. The deadline for a claim to be submitted was set out in reg 173P(1):

> ". . . the day before which a repayment application in respect of a repayment period must be submitted in accordance with regulation 173I(c) is 1st October of the repayment year immediately following the repayment year in which the repayment period covered by the repayment application falls."

26. The time limit was also mention in VAT Notice 723A at para 2.8. The time limits applying to HMRC for the processing of an application were set out in para 2.18, and the time limit for applications by EU businesses was also set out in para 4.3. The information required to be shown on an application was set out at para 4.7.

27. On the facts of LM's case, the application was made late. The Swift code was invalid, but this did not on its own result in the claim being invalidated.

28. HMRC submitted that whilst they could understand why the claim was made late, there was no mechanism within the law to allow a late claim to be accepted for consideration. There was no discretion allowed under UK or European law for acceptance of claims made outside the statutory time limits for making a claim.

29. Regulation 173 was the UK interpretation of Article 15(1) of European Council Directive 2008/9/EC; this was the Directive setting out the requirements for making a claim for refund of VAT in another member State. The language of Article 15(1) allowed no discretion for making a late claim.

30. HMRC argued that a protective claim could have been made by 31 September 2013, with a request for it not to be considered until the question of LM's eligibility and the previous claims had been resolved. The protective claim could have been withdrawn if it had been agreed at a later stage that LM was no longer entitled to make a claim under the EURS. If a claim was submitted by the 30 September deadline, HMRC were duty bound to examine it. This check of any claim could have been delayed until the query was resolved. There was no record of any enquiries having been made as to whether this would be possible for LM, even though Mr Sims had been in contact with HMRC prior to 30 September 2013.

31. Mrs Pavely referred to LM's previous claims history; previous claims had been submitted in time, and HMRC had written to LM in May 2012 setting out the deadline date, as the claim for period 01/10 to 12/10 had been made late.

32. As Mr Sims had questioned whether the authorities referred to by Mrs Pavely were relevant to LM's appeal, we asked her to refer to them.

33. The first was *Nova Stamps AB v Customs and Excise Commissioners* (1997) VAT Decision 15304. This related to Article 7.1 of the Eighth Directive, which was subsequently re-enacted as Article 15 of Directive 2008/9. The VAT Tribunal commented at [11] that both Article 7.1 and the corresponding UK Regulation were mandatory and did not contain any provision for the exercise of a discretion to extend them.

34. In *Megaink S.R.O. v Revenue and Customs Commissioners* [2010] UKFTT 257(TC), TC00551, the Tribunal had emphasised the need for the requirements to be properly fulfilled at the time when a claim was made; if they were not, the application did not amount to a valid claim. Mrs Pavely commented that LM's claim had been valid in terms of fulfilling the requirements. In *Megaink* at [34] the Tribunal had set out the five reasons why Megaink's claim had failed. At [37] the Tribunal had stated that where an application was rejected on the grounds that it was out of time, this was a defect that could not be rectified; any application made after the final date could not constitute a valid claim.

35. In *Digi Systems (Ireland) Limited v Revenue and Customs Commissioners* [2009] UKFTT 183 (TC), TC00138, the Tribunal held that the appellant in that case had not met the time limit in accordance with the relevant provisions of the VAT Regulations 1995 as they then stood. The Tribunal in *Oceanteam Power & Umbilical ASA v Revenue and Customs Commissioners* [2009] UKFTT 361 (TC), TC00299, had also confirmed the refusal of a VAT refund claim on the grounds that it had not been made within the time limit. In *Robert H Smith Investments and Consulting* [2011] UKFTT 576 (TC), the Tribunal indicated at [14] that the claim under the Thirteenth Directive had not been validly submitted within the time limit set out in Article 3.1 of that Directive.

36. Mrs Pavely submitted that all these decisions confirmed that there was nothing within the legislation that allowed HMRC to extend the deadline for receiving applications for claims of this nature.

37. In summary, LM had failed to make its claim within the time limit specified in both UK and EU legislation and so the claim could not be considered for repayment by HMRC. There was no mechanism or discretion allowed in either EU or UK law to consider a late claim.

38. HMRC further commented that the concerns expressed regarding HMRC's conduct were outside the jurisdiction of the Tribunal, and were a matter for formal complaint to HMRC.

39. HMRC requested a finding that their decision to refuse the refund of VAT claimed in the amount of £4,635.80 was correct, as the claim had been made after the legislative deadline date, and asked that the appeal should be dismissed.

Discussion and conclusions

40. The parties accepted that there was no dispute as to the facts. The only respect in which we need to make a further finding of fact is as to the claim. We find that, with the exception of the question of the time limit, the claim fulfilled all the legislative requirements.

41. In relation to one factual issue, we are unable to make any finding. Regulation 173P(4) provides that HMRC must by electronic means notify a claimant of the day on which the claimant's repayment application is received by HMRC. (This reflects the terms of Article 15(1) of Directive 2008/9.) No evidence as to this was provided in the papers before us. It would be preferable to have evidence in such cases that this requirement has been satisfied.

42. We accept Mrs Pavely's analysis of the relationship between the applicable UK legislation and the Directive. We also accept that the making of a claim after the due date has the effect of rendering that claim invalid, as found in *Megaink* and the cases referred to in that decision. The other cases cited by Mrs Pavely reinforce the conclusion that there is no basis on which HMRC can accept and consider claims which are made after the expiry of the relevant time limit.

43. The Tribunals in *Nova Stamps* and *Oceanteam* made comments to the effect that there may be a residual discretion on the part of HMRC. The difficulty in relation to this suggestion is that it does not take account of the nature of the legislation as implementing the Directive. There is nothing in the Directive that can be regarded as making any provision for the introduction of any discretion. In the absence either of any specific provision, or of anything that could be construed as implying the existence of such a discretion, the requirement to submit a claim before the expiry of the time limit must be regarded as absolute.

44. Mr Sims argued that the basis on which HMRC had conducted the processing of LM's previous claims 741964 and 741965 had led to the late submission of the claim under appeal. We accept that HMRC's indication in July 2013 that LM appeared to have been making supplies in the UK led LM and Mr Sims to assume that no further claim would be accepted by the ORU. It appears to us that other overseas businesses in a similar position to that of LM would be likely to feel drawn to a similar conclusion.

45. Thus in our view the approach taken by LM is entirely understandable. In their Statement of Case, HMRC argued that as LM clearly disagreed with the decision that it had a liability to register for VAT in the UK, there was no reason why it should not continue to submit claims by the due date; it was aware of the deadline for claims. We do not accept that argument; if a taxable person established in another member State is informed by HMRC that it has a liability to register in the UK, this amounts to an indication that the person does not qualify for the use of the EURS.

46. Although we entirely understand why LM did not submit the claim until December 2013, the result of the delay is that it is not able to recover the input tax claimed. For the reasons given above, we are unable to take any form of action either

to reverse HMRC's decision to refuse the claim or to require them to reconsider that decision. Mr Sims described the decision as appearing to be harsh; we do not disagree with that impression. However, in the absence of any provision in Directive 2008/9 to permit consideration of claims submitted after the expiry of the time limit, the harshness of the treatment derives from the EU and corresponding UK legislation, rather than the conduct of HMRC.

47. We very much support Mr Sims' suggestion that the wording of HMRC's decision letters and the wording of relevant HMRC Notices such as VAT Notice 723A needs to be amended to show that a person in LM's position who has been notified of the refusal of a claim should still continue to submit further claims within the time limit pending resolution of the dispute. As Mrs Paveley argued, those later claims could be withdrawn if at a later stage it were to be agreed that the person in question was no longer entitled to make claims under the EURS.

48. The only course available to us is to find that HMRC's decision to refuse LM's claim for refund of input VAT in the sum of £4,635.80 is correct, and accordingly to dismiss LM's appeal. We note Mrs Pavely's reference in her skeleton argument to the question of a possible formal complaint to HMRC; it is for LM and its adviser Mr Sims to decide whether it wishes to pursue this.

Right to apply for permission to appeal

49. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 5 OCTOBER 2015