[2019] UKFTT 73 (TC)

TC06957

Appeal number: TC/2017/01021

VAT – application to amend the effective date of registration – whether genuine misunderstanding or error – no – the date was the intended date – if there was an error, it was as to the implications of the date chosen - whether unreasonable for HMRC to refuse in the circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

S P HENSON ENGINEERING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MISS SUSAN STOTT

Sitting in public at Leeds Employment Tribunal, 4th Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES on 30 October 2018

Mr Forde, Business Consultant (assisted by Mr Webster, Accountant) for the Appellant

Mr Bernard Haley, Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal by S P Henson Engineering Limited ("SPHEL") against HMRC's decision dated 27 October 2016 ("the Decision") refusing to amend SPHEL's effective date of registration. The Decision was upheld by a review dated 23 December 2016.

2. The appeal was received by the Tribunal on 1 February 2017 and was therefore out of time. However, HMRC have consented to the appeal being made late and so we give our permission for the appeal to be heard and, insofar as is necessary, grant an extension of time accordingly.

The Facts

3. We have read witness statements adduced on behalf of SPHEL from Mr Steven Henson (a director of SPHEL) and Mrs Michelle Leveridge (an employee of SPHEL's accountants). Mr Henson did not attend the hearing. Mrs Leveridge was present but SPHEL did not call her to give oral evidence. HMRC did not take issue with this and instead accepted the factual evidence set out in these statements (albeit not the conclusions drawn by SPHEL from them). There was no evidence on behalf of HMRC.

4. As such, we make the following findings of fact based upon these witness statements. We do so bearing in mind that the burden of proof is upon SPHEL and that the standard of proof is that of the balance of probabilities.

5. SPHEL was incorporated on 19 April 1995 and carries on business in the manufacture of fabricated metal products. In or about September 2016, Mr Henson reached the view that SPHEL should register for VAT. It appears that this was upon the advice of SPHEL's accountants, whom SPHEL engaged to attend to the application process. This was with a view to SPHEL applying for authorisation to use the flat rate scheme.

6. On 6 September 2016, Mr Henson called SPHEL's accountants to chase up the progress in registering for VAT. Only Mrs Leveridge was available, who agreed to fill out the online registration form for him. It appears that Mrs Leveridge was reluctant to do this as she was not experienced in this process and nobody else was available to complete the form instead of her or to oversee the process. However, Mr Henson was insistent that she complete and submit the application with information provided by him. She therefore agreed to log onto the online registration site, to ask Mr Henson the questions required by the form and to input his answers.

7. In the course of completing the form, Mr Henson began to discuss with Mrs Leveridge the reasons for registering for VAT. She said that she could not comment

and was unable to assist him. As such, Mrs Leveridge simply keyed in his answers, including the date requested for the effective date of registration.

8. Mr Henson's evidence (which HMRC did not dispute) was that he had no knowledge or experience of his own in registering for VAT. Further, his understanding was that input tax incurred in the four years prior to registration could be reclaimed on the first return following registration.

9. The form included the following information, as provided by Mr Henson and input by Mrs Leveridge:

> "14. Compulsory registration as taxable turnover has exceeded threshold in:
>
> Previous 12 months or less? No.
>
> 15. Next 30 days alone? Yes.
>
> Date: 01/08/2016
>
> …
>
> 18. Earlier registration date 01/08/2016.
>
> …
>
> 20. Estimate of turnover in the next 12 months. £85,000."

10. Mr Henson's evidence (again which HMRC did not dispute) is that he did not appreciate the implications that the choice of the effective date of registration would have upon SPHEL's ability to claim this input tax. Insofar as he should have chosen a different effective date of registration in order to claim this input tax, this was a misunderstanding and genuine error. However, by this we find that he did intend that the date on the form should be 1 August 2016 and that this was deliberately (as distinct from accidentally) included on the form at his instigation. Any error or mistake was instead only as to the ramifications of choosing such a date.

11. At the end of the process of completing the form, Mr Henson asked Mrs Leveridge to submit the application. Mrs Leveridge said that she was not authorised to do this. However, Mr Henson insisted that she do so as it was important to SPHEL and he would take full responsibility. After some resistance and discussions, Mrs Leveridge agreed to submit the application form, saying to Mr Henson that, to use her wording, "be it on your own head." The form was duly submitted.

12. The application was accepted and SPHEL was given an effective date of registration of 1 August 2016. In turn, by a letter dated 20 September 2016, SPHEL was authorised to use the flat rate scheme with effect from 1 August 2016.

13. On 6 October 2016, SPHEL's accountants wrote to HMRC and requested that the effective date of registration be changed from 1 August 2016 to 14 February 2011. No reason was given for this request at that time.

14. By a letter dated 14 October 2016, HMRC refused the request to amend the effective date of registration because insufficient information had been provided to allow such a change. By a letter dated 20 October 2016, SPHEL's accountants provided further information. The substantive parts of the letter read as follows:

> "Please be advised that we registered our Client Company for VAT and entered the EDR date of 1 August 2016 in error, unfortunately the person undertaking the task was mistaken in her understanding of the date she was instructed to enter and took it upon herself to amend it without consulting her superior.
>
> Albeit that has no effect on the application for the change of the EDR. Under the VAT Act 1994, Schedule 1, paragraph 9 and 10 our client company is entitled to be registered. The Company is making taxable supplies.
>
> We have explained the reason for the EDR [being] incorrect, as you will no doubt agree there are no documents to evidence how this date was arrived at, nor any documents in evidence for the amended date. As stated the Company is entitled to be registered."

15. We find that the contents of this letter were in fact incorrect. As set out in Mrs Leveridge's witness statement, she inputted into the form the precise date she was instructed by Mr Henson to enter and did not amend it.

16. By virtue of the Decision on 27 October 2016, this renewed request was refused. The reasons given were that, "the date you want is more than four years before the date we received your request to change your EDR on 6 October 2016," and, "you are not liable to be registered from an earlier date."

17. By a letter dated 1 November 2016, SPHEL's accountants amended the request to be backdated to 7 September 2012 on the contention that, "our client is entitled to backdate its registration date going back four years." By a letter dated 16 November 2016, SPHEL's accountants requested a review of the Decision upon the basis of a purported legal entitlement to backdate the effective date of registration by four years.

18. HMRC's review of the Decision was completed and notified to SPHEL by a letter dated 23 December 2016. The review upheld the Decision. The letter included the following:

> "In certain cases HMRC are prepared to change a date of registration to an earlier date. There is no specific provision for [t]his, but our guidance on this point is contained in VATREG25400 (https://www.gov.uk/hmrc-internal-manuals/vat-registration-manual/vatreg25400)
>
> HMRC will consider amending the date of registration to an earlier date if it can be shown that there was a genuine error or misunderstanding when completing the VAT1.
>
> I have looked at the letters received from your agent and no reason has been given in these letters as to why you want to amend the date of

> registration. They have advised that one of their staff entered the wrong date on the application form, but no details have been given as to why you consider the date of 01 August 2016 to be incorrect. The initial date that the registration was to be amended to was 14 February 2011. When your agent was advised that this date was outside the 4 year time frame that would be considered they changed the date to 07 September 2012. They have advised that they can provide no documentary evidence as to why these dates have been chosen.
>
> In their grounds for review, your agent has stated that you are legally entitled to request that the date of registration is backdated by four years. As advised above, there is no provision in the legislation to retrospectively change the date of VAT registration. HMRC will under certain circumstance consider such a request and will limit any alteration to the registration date to 4 years, but this is not an entitlement that is set in legislation.
>
> From the information that has been supplied in this case, it can be seen that the date of registration that was entered on the VAT 1 was that as completed by your agent. No information has been provided as to why this is not the correct date or why this date should be backdated by four years. I do not believe that HMRC has acted unreasonably in deciding not to amend the date of registration and I uphold the decision of the registration service that this date should not be amended."

The Parties' Submissions

SPHEL

19. The starting point for Mr Forde's submissions was the Notice of Appeal itself. The grounds for appeal provide as follows:

> "The decision of HMRC is wrong because the persons completing the application have demonstrated that when they were completing the application form they had genuinely not understood the implications of their choice of EDR and that they had filled the form in wrongly by mistake.
>
> Enclosed are statements signed and dated by the persons who jointly completed the application and entered the EDR wrongly by mistake in support of this appeal."

20. The essence of Mr Forde's submission was that Mr Henson wished to claim input tax prior to 1 August 2016 and thought that he could do so if the effective date of registration was 1 August 2016. This was compounded by Mrs Loveridge not realising that input tax could not be claimed prior to the effective date of registration.

21. Mr Forde also argued that HMRC had the power to change the effective date of registration by virtue of Schedule 11 of VATA 1994 ("Schedule 11") and should have done so. He said it was unreasonable for HMRC not to change the date because they accepted that Mr Henson had been genuinely mistaken as to the appropriate date. He said it was blatantly obvious that there was a mistake.

22. Mr Forde made the point that SPHEL should not have been compulsorily registered any earlier. He also noted that the first return had not been filed or was even due for submission at the time that the error was noticed and corrected.

23. Mr Forde (with Mr Webster) explained the flat rate scheme and said that if the registration was backdated four years then SPHEL would reinvoice clients and therefore benefit from the scheme.

HMRC

24. Mr Haley agreed that HMRC's power to amend the effective date of registration was by virtue of Schedule 11. He submitted that this was a matter of discretion for HMRC and so turned upon *Wednesbury* reasonableness. In setting out this test, he relied upon the decision of Sir Stephen Oliver QC of *Middleton t/a Freshfields v HMRC* [2011] UKFTT 316 (TC) ("*Middleton*"). In particular, Sir Stephen Oliver QC stated as follows at [13] and [23] to part of [26]:

> "[13] The amendment of a trader's effective date of registration is, as noted, a matter for the discretion of HMRC. The Tribunal has on past occasions accepted jurisdiction as falling within section 83(a). There being no statutory provision (other than "care and management") that applies as the foundation of HMRC's assumed discretion, the Tribunal's role must be "supervisory" rather than appellate. The Tribunal must therefore examine the circumstances and determine whether the decision in question was one that no reasonable decision-maker could have reached. I refer for example to *Lead Asset Strategies (Liverpool) Ltd* [2009] UK FTT 115 (a decision of Judge Berner). For that purpose we take the route prescribed in *John Dee Ltd* [1995] STC 941, Court of Appeal. Hence, in deciding whether HMRC have rightly or wrongly exercised their discretion to refuse retrospective registration we have to consider whether they have acted in a way in which no reasonable panel of "commissioners" could have acted or whether they had taken into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal might also have to consider whether the commissioners had erred on a point of law. The Tribunal cannot exercise a fresh discretion or substitute its own decision. That is the statutory responsibility of the commissioners (HMRC).
>
> …
>
> [23] I accept that IJM had always expected to recover the VAT that she had incurred on the relevant supplies of goods and services used in the construction of the two dwellings. To that end she had registered for VAT. The date of 1 August 2008 had been deliberately entered in the application form (VAT1) as the intended registration date. IJM had the opportunity, which she did not take, of requesting that an earlier date be agreed. By the time she realised that "input tax" incurred by her prior to 1 August 2008 (by then the effective date of registration) could not be reclaimed, the only course open to her was to rely on paragraph 8.8 of the Policy and Guidance part of HMRC's Manual and ask HMRC to exercise their published discretion and permit a retrospective change of the effective date of registration in her favour. This raises the critical

> question. Was the decision to refuse the request to permit a retrospective change a decision that HMRC could not reasonably have taken?
>
> [24] HMRC have set out the criteria on which that decision is to be based and have acknowledged there could be other situations where mitigating circumstances are to be taken into account. I cannot fault the guidelines.
>
> [25] The first of the relevant criteria is that IJM should have demonstrated "a genuine misunderstanding or error in completing the application form". Apart from the making of typographic errors (which are not suggested here) there has been no evident genuine error in completing the VAT1 form with 1 August 2008 as the answer to the question – "From what date would you like to be registered?" A person seeking voluntary registration might, of course, have misunderstood the implications of choosing a prospective date rather than going for retrospective registration. Paragraph 9 above contains the notes to the Application Form that apply, as here, to a person requesting voluntary registration; these emphasise that, once an effective date of registration has been agreed, the person in question cannot have a change of mind and ask for a change of registration to an earlier date save "in exceptional circumstances". IJM acknowledged she had not read the notes to the VAT1 Form. She had left that to C & Co.
>
> [26] Reverting to *John Dee*, I cannot see that the decision to refuse the application to change the effective date of registration was a course that no reasonable panel of commissioners could have adopted. Moving to the next step in the *John Dee* exercise – did HMRC disregard something to which they should have given weight or taken into account some irrelevant matter? …"

25. This is a supervisory appeal and so the relevant evidence is that available to HMRC at the time of the Decision. However, Mr Haley's position was that HMRC had reconsidered the Decision in the light of the evidence provided in this appeal and had not changed their view. He therefore took the position that such evidence could be taken into account.

26. Mr Haley submitted, however, that even the evidence as presented at the hearing did not provide an explanation as to why an earlier effective date of registration would be appropriate. It is not the case, Mr Haley submitted, that a backdated registration must be granted when requested. He notes that paragraph 9 of Schedule 1 of VATA 1994 ("Schedule 1") provides for backdating only where agreed with HMRC. Paragraph 9 of Schedule 1 provides as follows:

> "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 or furtherance of that business,
>
> 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."

27. Mr Haley made the point that previous input tax could not be reclaimed under the Flat Rate Scheme in any event. However, he does acknowledge that some previous input tax would be recoverable under regulation 111 of the Value Added Tax Regulations 1995.

28. Most fundamentally, Mr Haley maintains that the error went to the judgment as to what date to include and the outcome of doing so rather than an error as to the date actually included.

Decision

29. We find that the Decision was not unreasonable in the sense of being one that no reasonable decision maker could have reached. We also find that HMRC did not take into account some irrelevant matter or fail to take into account something that they should have given weight to. This is for the following reasons.

30. First, Mr Henson's choice of the effective date of registration was not an error in the sense of him not intending 1 August 2016 to be inserted. His and Mrs Loveridge's uncontested evidence was that that was exactly what was intended.

31. Secondly, Mr Henson's witness statement makes it clear that his error was instead that he thought choosing 1 August 2016 would enable SPHEL to claim historic input tax. This goes to the implications of the choice of effective date of registration not an error as to the actual date. We are fortified in this view by that fact that this is consistent with the comments of Sir Stephen Oliver QC in *Middleton* at [25] set out above at paragraph 24 above. We pause here to note that Mr Forde tried to distinguish *Middleton* upon the basis that in the present case SPHEL had applied to backdate the effective date of registration whereas in *Middleton* the trader had not. However, we do not accept that this makes any difference to the outcome as SPHEL is still seeking to amend the effective date of registration to a date before the one requested in the VAT1 and granted by HMRC.

32. Thirdly, the review letter referred to HMRC guidance VATREG25400. This includes the following relevant passages:

> "… When the business applied to register, it had the opportunity to negotiate its EDR: in the absence of a provision in Schedule 1 of the VAT Act 1994 explicitly permitting retrospective amendment of the EDR, our policy is generally to refuse such requests.
>
> Exceptionally, however, we can use our discretionary care and management powers in Schedule 11(1) to agree to an EDR change request where it would be unreasonable for us not to do so.

> The eligibility criteria we usually apply when we are considering exercising that that [sic] discretion are:
>
> - the existing EDR must have been backdated. In other words, when it applied to register for VAT, the business must have chosen an earlier EDR.
>
> - The registered person must be able to demonstrate that, when they were filling in the application form, they had genuinely not understood the implications of their choice of EDR, or they had filled the form in wrongly by mistake. This criterion does not extend to registered persons who made an error of judgement by, for example, miscalculating their expected liability. If the application to register was completed on the business's behalf by an accountant, or other professional representative, this criterion does not apply. If a business has lost out on pre-registration input tax which it would otherwise have been able to reclaim because its representative made a mistake, it should pursue the representative, not HMRC, for financial redress.
>
> - the request must be made before the due date of the first VAT return (that is, one month after the end of the first period), and the return must not yet have been rendered.
>
> You are not expected to work on the mechanistic basis that every business which does not meet all three of the change eligibility criteria must automatically have its change request refused. You should consider each trader's circumstances separately and think about how a First Tier Tribunal judge might regard those circumstances should the trader appeal against your decision to refuse the request."

33. Although this does not have the force of law, it sets out what in the context of the present case constitute reasonable guidelines for considering the amendment to the effective date of registration. The Decision is in keeping with those guidelines.

34. Fourthly, this is not an appeal against any refusal (if there even has been a refusal) to reclaim input tax prior to the effective date of registration. Regulation 111 of VATR 1995 provides time limits for exceptional claims for VAT relief (being four years in respect of goods and six months in respect of services). We make no findings as to the extent to which SPHEL could make claims to input tax relief prior to 1 August 2016 or would be in any better position to do so if the effective date of registration was to be amended. This is because we have no evidence to consider this. Indeed, we were not even given any assertions or submissions as to what this input tax would be or the extent to which it could be evidenced or would be recoverable. It follows that HMRC did not have any evidence to consider this and so we find that they acted reasonably in not amending the effective date of registration on that basis.

35. Fifthly, we note that in submissions the relevance of the Flat Rate Scheme appeared to be reinvoicing rather than input tax. However, this would depend upon whether the membership of the Flat Rate Scheme could be backdated; again, we can make no findings on this as no evidence was given in this regard. In any event, the witness evidence was that the purpose of backdating the effective date of registration

was in order to reclaim input tax, not in order to backdate the membership of the Flat Rate Scheme.

36. Sixthly, it cannot be unreasonable to refuse to amend the effective date of registration to either 14 December 2011 or 7 September 2012 if it would not have been unreasonable to refuse to backdate the effective date of registration if either of those dates had been requested in the original application for registration. We find that it would not have been unreasonable to refuse to backdate registration to such dates because, for the reasons set out above, there was no evidence as to the reasons for, the need of or the effects of such backdating. We do not agree that SPHEL was entitled to backdate the effective date of registration to 14 December 2011 or 7 September 2012 as of right; at best this requires the agreement of HMRC.

37. Indeed, although HMRC did not approach their submissions in this way, we are of the view that any agreement by HMRC to backdate the effective date of registration in the circumstances of the present case is by way of the exercise of their powers of care and management rather than by reference to paragraph 9 of Schedule 1. It is of note that SPHEL's application was for compulsory registration upon the basis of the next 30 days' taxable turnover exceeding £85,000. Paragraph 1(1)(b) of Schedule 1 provides as follows in respect of the liability to register (£85,000 being the relevant threshold in the current case and so inserted below for convenience):

> "1(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule –
>
> …
>
> (b) at any time if the person is UK-established and there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £85,000."

38. The date of registration in such circumstances is set out in paragraph 6(1) as follows, and does not include the "or from such earlier date as may be agreed between them and him" which is included in provisions relevant to other circumstances:

> "6(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(b) above shall notify the Commissioners of the liability before the end of the period by reference to which the liability arises.
>
> (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the beginning of the period by reference to which the liability arises."

39. Although paragraph 9 appears to provide a general power to register upon the request of an applicant for registration (with the ability to backdate with HMRC's agreement), this relates to "a person who is not liable to be registered under this Act, and is not already so registered". In the present case, SPHEL was already liable to be registered by virtue of paragraph 1(1)(b) of Schedule 1.

40. In any event, even if HMRC does have a statutory power to backdate in addition to their powers of care and management, it would still not be unreasonable for them to

refuse to do so for the reasons set out above. Again, if this is the case for the purposes of an original application to backdate it is also true of the Decision not to amend the date.

Disposition

41. It follows that we find that the Decision was not unreasonable and we dismiss the appeal.

42. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 01 FEBRUARY 2019