TC01930

Appeal number: TC/2010/01953

VAT – Deregistration – was Commissioners' decision not to de-register reasonable – Yes – Appeal dismissed.

VAT – Assessment – Appellant not having charged or accounted for VAT whilst being a registered person – Commissioners' Assessment – Was it to best judgment – Yes – Appeal dismissed.

Penalty – Schedule 24 Finance Act 2008 – Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEAN ALAN PERKS **Appellant**

- and -

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

TRIBUNAL: LADY MITTING (JUDGE)
PETER WHITEHEAD (MEMBER)

Sitting in Birmingham on 20 March 2012.

The Appellant appeared in person.

Mr W Brooke, advocate on behalf of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Perks was appealing against the following:-

(i) The decision of the Commissioners to refuse his application to be deregistered with effect from 31 May 2008.

(ii) An amended assessment to VAT in the sum of £10,341 plus interest, the original assessments having been notified on 10 August 2009 and amended to the figure currently under appeal on 5 October 2011.

(iii) A penalty assessment issued pursuant to Schedule 24 Finance Act 2008 for the quarter 03/09 and issued on 19 January 2010. The penalty was raised in the original sum of £445 but to reflect the reduction in the tax assessment for that period will be proportionately reduced.

2. The Commissioners had originally raised misdeclaration penalties pursuant to Section 63 VAT Act 1994 for periods 09/07, 06/08, 09/08 and 12/08 but these were withdrawn during the hearing when the Commissioners accepted that the statutory criteria for raising penalties had not been met.

3. Default surcharges have, over the periods, also been raised against Mr Perks. We understand that Mr Perks has intimated that these are to be appealed but this appeal was not before us and we heard no evidence and make no adjudication on them.

4. We heard oral evidence from the assessing officer, Mr Edward Bowater and from Mr Perks.

5. We have no reason to doubt the truthfulness of the evidence which we heard and on the basis of Mr Bowater's and Mr Perks' evidence and the documents before us, we find the following facts:

The facts

6. Mr Perks is a plumber/plasterer and specialises in property maintenance and the supply and fitting of bathrooms. He originally registered for VAT as a sole trader on 1 December 2006. In circumstances which we set out below, this registration remained extant until 1 April 2009 from which date Mr Perks was deregistered pursuant to an application received by the Commissioners' on 15 January 2010. Mr Perks had in the meantime set up a limited company which was incorporated on 26 November 2008 and registered for VAT with effect from 1 March 2009.

7. On 29 April 2009, in relation to the sole proprietorship, Mr Bowater paid a routine control visit to Mr Perks' offices where he met with Mr Perks and Mr Perks' accountant, Mr Summerfield. At the time of the visit, Mr Perks had submitted only two VAT Returns – for periods 12/06 and 03/08. No Returns had been submitted for periods 03/07 to 12/07 inclusive but Mr Perks told Mr Bowater that the 03/08 Return had in fact included the figures for those quarters although this had not been apparent

on the face of the Return. Centrally issued assessments had been issued in respect of all periods for which Returns had not been made except 03/09 as the time for lodging that Return had not yet arrived. Some, but not all, of the centrally issued assessments had been paid. Mr Perks informed Mr Bowater that he had ceased charging VAT on his sales in April 2008 as Mr Summerfield had submitted an application for him to de-register. Mr Bowater knew nothing of this application and advised Mr Perks that as far as the Commissioners were concerned, Mr Perks remained registered and that VAT therefore was due on his sales.

8. Mr Bowater was informed by Mr Perks that all trading receipts were by cheque and were all paid into the same single bank account into which no other income was paid. Mr Summerfield confirmed that he had always calculated Mr Perks' sales from the bank statements and purchases were calculated from purchase invoices supplied by Mr Perks. Mr Summerfield had completed VAT summaries for all periods up to 03/08 and to calculate sales Mr Bowater was therefore able to carry out a reconciliation exercise between the summaries and the bank statements. From 06/08 to 03/09, Mr Bowater was able to calculate sales direct from the bank statements. For all periods, the bank statements enabled him to allocate the income entries into specific VAT periods.

9. In respect of purchases, Mr Bowater analysed the purchase listings showing the input tax claimed for quarters 12/07 and 03/08. These listings, some of which had apparently been compiled by Mr Perks' son, contained a number of errors, for example some of the centrally issued assessments issued to Mr Perks had been included as VAT to be reclaimed as input tax.

10. Mr Bowater wrote to Mr Perks on 6 May 2009 a post visit letter, confirming that no trace could be found of any application to deregister and that as he remained registered, assessments would be raised for the periods 06/08 to 03/09 inclusive. Mr Bowater pointed out Mr Perks' entitlement to reclaim deductible input tax and asked for a schedule which he would then include. In the same letter, he pointed out the discrepancies which he had found in his attempt to reconcile the sales summaries and the bank statements for periods pre 03/08 and sought further evidence. No response was received to this letter and on 29 July 2009 Mr Bowater raised assessments in respect of all periods. Sales were assessed on the basis of the income disclosed by the bank statements. Errors in the previous Returns and the VAT summaries were corrected and for the periods in which centrally issued assessments had been raised, the assessment raised by Mr Bowater were net of those central assessments. Mr Bowater treated the income in the bank statements as VAT inclusive and applied a $7/47ths$ VAT fraction. He also allowed an across the board 10% allowance for input tax. In December 2009, minor amendments were made to the assessments to reflect the change of VAT rate in period 12/08 and 03/09 which would alter the VAT fraction to be applied. Mr Bowater carried out a further review of his assessment in October 2011 when he realised he could have used a more accurate figure for input tax in respect of periods 06/08 to 03/09 by applying the ratio which input tax had borne to output tax in the periods up to 03/08. This resulted in a 49% allowance for input tax, replacing the 10% originally given.

11. Despite several requests by Mr Bowater it was not until a letter from Mr Summerfield dated 17 September 2009 that Mr Bowater received a copy of the letter which he had been told requested deregistration. The letter was dated 2 June 2008 and was in the following terms.

> "Our above named client wishes to de-register from VAT on 31 May 2008, on the grounds that turnover is below the limit.
>
> Could you please forward the necessary paperwork?
>
> If you require any further information please do not hesitate in contacting us."

As the Commissioners had never received this letter they had treated Mr Perks throughout as remaining registered. They had therefore sent him throughout his quarterly returns and he would also have received the centrally issued assessments.

12. Mr Perks told us that his sales had been falling which he'd put down to the fact that he had had to charge VAT on his invoices, thus making himself uncompetitive. His annual accounts were available for the years ending 4 April 2006 and 4 April 2007 which revealed income figures of £108,538 and £98,632 respectively. Mr Perks had thought that his annual accounts had been completed for the Year to 4 April 2008 but these were never produced to the Commissioners or indeed to us but we understand that the bank statements reflect trading receipts of approximately £90,000 for this period. Mr Perks sought the advice of Mr Summerfield in May 2008 asking if he could stop charging VAT. Mr Summerfield told Mr Perks that he would have him (Mr Perks) deregistered and that Mr Perks should cease charging VAT on his sales from May 2008 onwards. Mr Perks acted upon this advice. Mr Perks accepted that post May 2008, he continued to receive quarterly returns and that he also received centrally issued assessments. We were told that every time he received anything from the Commissioners, he rang Mr Summerfield who told him that the Commissioners always continued to send out Returns long after people had been de-registered and that Mr Perks should 'bin' them, which he did.

Legislation

13. Section 3(1) VAT Act 1994 ("The Act") provides that a person is a taxable person for the purposes of The Act while he is required to be registered under The Act.

Paragraphs 1, 3 and 4 of Schedule I, in summary, provide that a person remains liable to be registered until such time as the Commissioners are satisfied that the value of his taxable supplies in the forthcoming year will fall below the deregistration threshold. At the time we are talking about, the deregistration threshold was £65,000.

Submissions

14. Mr Brooke submitted that even had the Commissioners received Mr Summerfield's letter requesting deregistration, they would not have acted on it without more. They would have sought further information as they would need to be satisfied as to the value of future supplies. The only information which they would

have had would have been the two sets of annual accounts for the years to 4 April 06 and 4 April 07, both of which showed income considerably in excess of the deregistration threshold. They were later to have evidence, we were told, that the amounts banked in the twelve months following the requested date of deregistration totalled £125,596. Mr Brooke stressed the fact that Returns and centrally issued assessments had continued to be sent to Mr Perks which had to have been very strong indicators that he was still registered. Given Mr Perks remained a taxable person, he was liable to account for VAT on his supplies until actual deregistration and it was therefore correct for the Commissioners to assess him. The assessments had been based on Mr Perks own records and had been raised to best judgment.

15. Mr Perks in his submission to us pointed out that his takings post May 2008 would inevitably have shown a healthy increase because he was trading without having to charge VAT and he was therefore once again competitive and business was good. Had he continued to have charged VAT, he would have remained uncompetitive, business would have declined, he would have continued to struggle and he would probably have had to cease trading. He contended that his takings would have continued to drop, and would have fallen considerably below the deregistration threshold. Mr Perks approach was that he was a plumber not an accountant. He had taken professional advice from Mr Summerfield in good faith and had accepted his advice at all stages without question. We were told by Mr Perks that Mr Summerfield had been arrested for money laundering and that a number of his records had been seized by the police, including, we understand, some of Mr Perks'. Mr Perks was also highly critical of what he saw as the misleading demands which he had received from the Respondents for payment. These would show the total figures due without, in his view, any proper explanation leaving him confused, angry and stressed.

Conclusions

16. Deregistration

We take this issue first as it is the central issue from which all else follows. Two matters require to be considered. First, did Mr Perks in fact remain registered after 31 May 2008 and secondly did the Commissioners act reasonably in refusing to de-register him. We were not entirely certain whether the Commissioners accepted that the letter of 2008 had been genuinely sent in the first place. We got the impression, although it was no more than an impression and certainly was not contended before us, that by the end of the hearing both Mr Brooke and Mr Perks had their doubts but in fact, it is immaterial as we have no hesitation in accepting that that letter was never received and it is that point which is critical. As it was never received, no deregistration process took place and Mr Perks accordingly remained registered throughout and liable to charge VAT and to account for it. He was not entitled to merely stop charging it. We accept that he was following professional advice and that, as he now fully appreciates, he was appallingly let down but that does not displace his legal responsibility as a registered trader. Despite what he was told by Mr Summerfield, the fact remains that Mr Perks remained registered post 31 May 2008 and remained liable to collect in and to account for VAT.

17. The Commissioners received a copy of the letter of 2 June 2008 in September 2009. It would have been open to them to treat this as an application for deregistration, to process it and to deregister Mr Perks if they considered it appropriate. They did neither and the issue before us is whether or not this approach was unreasonable. The problem in this case is that by September 2009, the Commissioners had a great deal more information than they would have had had they received the letter timeously. It is quite clear that, despite Mr Perks' criticisms of this approach, the Commissioners are not allowed to take into account any information which they would not have known at the time. They have to look at the position as at May-June 2008 and make a forward projection on the basis of the evidence which would then have been before them. That evidence would consist, in effect, only of the two sets of accounts to 4 April 2006 and 4 April 2007, although had they asked for they could quite possibly have been given the figures for the year to 4 April 2008 which could quite easily be taken from the bank statements. All of these three sets of figures would have shown receipts very considerably in excess of the deregistration threshold. Mr Perks would have asserted that his income would fall quite considerably but there was no satisfactory evidence that it would or indeed why it should. We think it inconceivable that the Commissioners would have been satisfied that his post 31 May 2008 takings would fall beneath the threshold and that view cannot in any way be considered to be an unreasonable view.

18. We conclude that the Commissioners acted entirely reasonably in refusing to deregister Mr Perks and that he remained registered throughout.

The Assessment

19. It follows from this finding that Mr Perks was liable for VAT and Mr Bowater was faced with the task of ascertaining how much and calculating and raising the necessary assessments. In relation to sales, he worked entirely from Mr Perks' bank statements. These bank statements contained all Mr Perks' trading income and nothing else. The sales figures used by Mr Bowater therefore have to be correct and cannot seriously be challenged by Mr Perks, as indeed he did not seek to do so. With regard to purchases, no evidence was put before Mr Bowater despite request. It is possible that the purchase invoices which Mr Perks could have presented were amongst the papers seized from Mr Summerfield which would be unfortunate but Mr Bowater could only assess on the basis of the evidence in front of him. By his final amendment, Mr Bowater allowed input tax in precisely the proportion that it had been claimed in the quarters for which Returns had been submitted. This, in our view, is a generous, realistic and practical approach which we cannot fault.

20. We conclude and find that the assessments for all periods were raised to best judgment and the appeals against them are dismissed.

The Penalty

21. The remaining penalty was in respect of period 03/09 and was raised under Schedule 24 Finance Act 2007. The penalty notification notice does not refer any more specifically to the precise section under which the penalty was raised but we were told by Mr Brooke that it was raised under Section 2(1) in that the

Commissioners had raised a centrally issued assessment against Mr Perks which understated his true liability and he failed to notify them of this. The Commissioners took the view that Mr Perks had acted without reasonable care giving rise to a maximum penalty of 30% of the tax loss. Abatement was allowed of 25% for telling the Commissioners, 10% for helping them to understand the problem and 30% for giving access to records. The final penalty stands at 20%. Mr Perks did not specifically address the question of the penalty. Subject to the amount being reduced to reflect the reduced assessment, we find both the decision to raise the penalty and its calculation to be fair and reasonable and the appeal in relation to the penalty is dismissed.

Conclusions

22. The appeal is dismissed in its entirety.

23. We took careful note of and had some sympathy with Mr Perks' confusion over his understanding of the Demand Notices. No doubt the Commissioners' formal procedures and processes will lead to the issue of a further demand notice against Mr Perks which will be a composite demand detailing assessments, interest, surcharges and penalty but we would direct that in addition thereto, the Commissioners write to Mr Perks setting out in detail and period by period both the nature of and the amounts outstanding and due for payment by Mr Perks. The method of payment is not within our remit but if Mr Perks were to experience difficulty in raising the required sum, we suggest that he put to the Commissioners a fully reasoned and documented request for time to pay and if there is merit in this we would urge the Commissioners and Mr Perks to reach some form of agreement.

24. 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.

TRIBUNAL JUDGE

RELEASE DATE: 4 April 2012