TC02125

Appeal number TC/2010/7893

VAT –Registration – Sch 1 para 1(3) forward looking test – consideration of irrelevant information – voluntary registration

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK MILLS-HENNING **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
DAVID EARLE

Sitting in public in Plymouth on 5 December 2011

George Williams, accountant, for the Appellant

Lynne Ratnett for the Respondents

DECISION

1. This appeal concerns liability for VAT registration. A person becomes liable to be registered for VAT if his turnover exceeds a threshold. The appellant's turnover was normally well below the threshold but in 2007 he was particularly busy and it exceeded the threshold. Because his turnover was normally below the threshold he did not have a mechanism in place to monitor it. He became liable to pay VAT which he was in the event unable to recover from those whom he had supplied.

2. We start with the relevant law.

The law.

3. At times relevant to this appeal the applicable parts of schedule 1 VATA 1994 provided that a person who was not registered for VAT became liable to register if (paragraph 1(1)(a)):

> "at the end of any month, ... the value of his taxable supplies in the period of one year then ending exceeded £64,000."

4. But it was provided that that person would not become so liable if (paragraph 1 (3)):

> "the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which [he would otherwise] become liable to be registered will not exceed £62,000."

5. Paragraph 5(2) requires the Commissioners to register a person who thus becomes liable to be registered "with effect from the end of the month following" the month at the end of which he becomes liable to be registered.

6. Thus, at the end of every month - take October as an example - a backwards looking test is performed: did his supplies in the year to 31 October exceed £64,000? If the answer to that question is "yes", then potentially he becomes liable to be registered with effect from the end of 30 November i.e. on 1 December. But if on 1 December, looking forward, the value of his suppliers in the next 12 months will not exceed £62,000 he may not be registrable.

7. We say "may" because the test to be applied by paragraph 1(3) is not whether the next 12 months' supplies will be less than £62,000, or whether they were, or whether the taxpayer knows or believes that they will be, but instead whether HMRC are satisfied that they will be.

8. That raises the question of when and by reference to what facts HMRC are to conduct the forward-looking test. That question was answered by Ferris J in *Gray trading as William Gray & Son v Commissioners of Customs and Excise* [2000] STC 880 at [23]:

> "I conclude ... that ... the Commissioners must give effect to paragraph 1(3) by considering the case as at the date from which the registration would

otherwise take effect and, by looking forward, ask themselves whether they are or are not satisfied that the turnover will not exceed the threshold amount."

9. Ferris J went on to say at [24]:

> "it must follow in my view, that the only information which [HMRC] can or should act upon is the information which is available to them at that time."

10. Thus the forward-looking exception from registration has effect only if by reference to material available to the Commissioners on 1 December they were satisfied on that date that the next 12 months' turnover would be less than £62,000.

11. But how can a taxpayer appeal against the operation of these provisions? He can deal with the backward looking test quite simply by producing evidence, if he can, that his turnover in the preceding 12 months (in our example to 31 October) was less than £64,000. But how can he address whether HMRC were or were not satisfied on the basis of information available to them on 1 December, that the next 12 months' turnover would be less than £62,000?

12. The legislation does not impose a wholly objective test: it asks whether the Commissioners were satisfied. Thus the tribunal cannot simply say "well we think it would have been less than £62,000, and thus allow the appeal", because the question is whether the Commissioners were satisfied. But the law does not permit the Commissioners to make an arbitrary decision. If HMRC make a decision on the information available to them at 1 December that no reasonable body in their position could have made, this tribunal may set it aside; but as Ferris J said that [23], "if they reach a conclusion which would be open to a reasonable body of commissioners considering the relevant evidence, an appellate tribunal cannot interfere with their decision.". Conversely a decision made by reference to irrelevant factors cannot be a reasonable one.

13. This legislative mechanism imposes burdens on a trader who is not registered, for it requires (in paragraph 5(1)) him to notify HMRC within 30 days after the end of any month if he has become liable to be registered because his turnover has exceeded the threshold. Thus at the end of each month (say again 31 October) he needs to look back over the last 12 months to see if his turnover is more than £64,000. If it is he then needs to think about the 12 months starting on 1 December and ask what the situation is likely to be for that period. If he concludes that it is likely that his turnover will be less than £62,000 he then needs to acquaint HMRC with the position and to make sure that by 1 December HMRC have all the information necessary for them to share his view if he wishes to escape registration from 1 December. It is no use telling HMRC relevant facts on 2 December or any later date; he has to get the information to them by 1 December; and even if he does he will be to some extent in their hands if the information he provides is not such as to lead unequivocally to the conclusion that the turnover for the 12 months beginning on 1 December will be less than £62,000.

14. If the appellant was in fact an employee his supplies would not have been liable to VAT. He would not have been registrable and would not have satisfied the conditions in paragraph 1 or 9 of Sch 1. An employee for these purposes is a person "bound by a contract of employment or by any other legal ties creating a relationship of employer and employee as regards working conditions, remuneration and the employer's liability" (see article 4(4) of the Sixth Directive, which was applicable at the relevant time). Inter alia this requires consideration of: (1) what terms regulated his working conditions; (2) the extent to which he had any economic risk in relation to his activities; (3) his liability for damage caused in the course of, or as a result of, his work, and (4) the degree of control he could exercise over his work (see eg *Ayuntamiento de Sevilla v Recaudadores* 1993 STC 659).

The Facts

15. The appellant worked as a contractor for John Richards Shopfitters, and was paid on a weekly basis by reference to invoices he provided. He was treated as being self-employed and payments to him were made under the provisions of the Construction Industry Scheme.

16. There was no discussion before us as to whether or not the appellant was in fact an employee. Evidence in relation to the matters at para 14 above was not put before us. We note that the fact that the CIS scheme was as matter of fact applied to payments made to the appellant does not necessarily mean that the Appellant was not an employee. Both parties proceeded on the basis that the appellant was not an employee: we do the same.

17. The appellant arranged for his accountant, Mr. Williams, to prepare accounts and submit tax returns. Accounts were prepared to 31 March in each year. In the September or October following each 31 March, Mr. Williams set to work. He would prepare the accounts. He would submit the tax returns.

18. At that time Mr Williams would also review the position to see if the VAT threshold had been breached. In the years before 2008 Mr. Williams had concluded that this was unlikely because the appellant was paid on a hourly basis and for the year to 31 March 2007 his turnover was only £49,364. Mr. Williams told us that in those years he considered that it would not have been sensible to conduct a monthly check because the turnover was so low.

19. The year to 31 March 2008 was however different. The appellant had been very busy between June and September 2007. He had been working for over 100 hours per week and in some weeks had done the work of two people. He was working away from home and his accommodation expenses formed part of the invoiced turnover. For the year to 31 March 2008 his turnover was £77,825. That exceeded the threshold.

20. After preparing the accounts for this year in the following September Mr. Williams considered whether the appellant should register for VAT. He came to the view that this level of turnover was unlikely to continue and that there was no need

for the appellant to register for VAT. He thus ignored the obligation to notify in para 5(1) and substituted his own conclusion for the conclusion that only HMRC were given the power to make under para1(3).

21. But when his tax return was submitted HMRC saw the turnover figure. On 4 June 2010 they wrote to the appellant to ask whether he was VAT registered and if he was not sought details of his monthly turnover from April 2006 onwards. This the appellant supplied.

22. This information showed that for the 12 months ended 31 October 2007 the appellant's turnover was £66,358. This meant that he was registrable under paragraph 1(1) unless the forward-looking exemption applied.

23. After some other correspondence HMRC wrote to the appellant on 8 July 2010 saying that they considered him VAT registrable from 1 December and that the forward-looking exemption did not apply. In their letter they said:

> "the Commissioners can only consider [your request that the exemption under paragraph 1 (3) should apply] in the light of the facts that were available at the time you were first required to notify. Namely that you in fact exceeded the VAT threshold during October 2007 and based on turnover figures provided are still above the deregistration limit of £62,000 in the following 12 months. (Please note that turnover is calculated on a rolling 12 month basis).
>
> On the basis of those facts the Commissioners therefore consider that you should be correctly registered with effect from 01 December 2007.
>
> However your case could be considered for Liable No Longer liable action ..."

24. This passage contained an error. That was because on 1 December 2007 HMRC did not have the information there described about the appellant's turnover for the 12 months to 31 October 2007.

25. Following receipt of these letters the appellant, with Mr. Williams' advice, was keen to settle matters and discussed the issue with HMRC's Liable No Longer Liable department. They were advised to seek registration from 1 December, submit VAT invoices to John Richards and recover from them the VAT which had become due to HMRC. Accordingly the appellant sought registration and was registered. VAT invoices were produced and sent to the company but it went into liquidation. The appellant was left with a VAT bill due to HMRC and an unsatisfied claim against John Richards. Since it was only the VAT element of the consideration in the invoices to John Richards that had not been paid to the appellant he could not claim sufficient VAT debt relief to absolve him from the VAT due to HMRC. Mr. Williams described it as a doomsday scenario.

Discussion.

26. In this case it appears that the appellant fell foul of the requirements in the legislation because there was no mechanism in place to monitor his turnover for the 12 months to the end of every month. Thus at the end of October 2007 no red light flashed to warn him; and he was not prompted to think about the 12 months from 1 Decembber 2007 and ask himself whether his turnover in those months would be less than £62,000. There was no voice which told him quickly (and in any event by 1 December 2007) to tell HMRC why it would be less than £62,000.

27. There was no dispute before us that in the 12 months to 31 October 2007 the appellant's turnover had exceeded £64,000, therefore the only question for us was whether on 1 December having regard to the information HMRC held on that date it would have been "unreasonable" (in the sense described in para 12 above) for HMRC not to have concluded that his turnover in the next 12 months would have been less than £62,000.

28. On 1 December 2007 the only information on which HMRC could make a decision was that they already held. And that was the records of his trading turnover in prior years from his tax return for years ending April 2007 and any information they could glean from any CIS returns made by those who engaged his services.

29. The evidence from the Appellant's tax returns which HMRC held at 1 December was that in the earlier years his turnover did not exceed the threshold. Any evidence from CIS returns would indicate an increased level of activity but we had no evidence of what information from this source HMRC had at that time.

30. A decision made on the basis of irrelevant facts is an unreasonable one. The decision made by HMRC took account of the information about the turnover in the 2008 accounts and for the period to 31 October 2007, which was information not available to them at 1 December: it was therefore irrelevant to their decision at 1 December 2007. Their decision was therefore unreasonable.

31. As a result unless we were satisfied that HMRC would *inevitably* have made the same decision on 1 December 2007 by reference only to the facts which were then in their possession, we should set aside the decision compulsorily to register the appellant.

32. However, the question posed by the statute for HMRC is whether they are satisfied that the future turnover "will not" exceed the threshold: a conclusion that it might not exceed it is not enough to pass the test, and a conclusion that it might exceed it is sufficient for the test to be failed. We considered that the historic information permitted only the conclusion that the future turnover might not exceed the threshold and that it was insufficient for any reasonable body to be able to conclude that the turnover *would* not exceed the threshold. Accordingly HMRC would inevitably have come to the same conclusion by reference to the relevant facts.

33. However, it seems to us that even if we had allowed an appeal against a decision compulsorily to register the Appellant it would not avail him since the Appellant had requested registration. Paragraph 9 of Sch 1 provides that if a person who is not liable

to register requests registration and the Commissioners are satisfied that he is carrying on a business and makes taxable supplies, they must register him. The Appellant has not argued that the registration effected pursuant to that request was the subject of this appeal, although Mr Williams did submit that it was not truly voluntary. But paragraph 9 does not speak of voluntary registration but registration which the taxpayer "requests", and we cannot see that there is any sustainable argument that the appellant did not make a request to be registered.

34. As a result, even if HMRC remade its decision under para 1(3) and decided that the Appellant was not liable to register, he would be registrable by reason of para 9; and if HMRC decided that he was not within para 1(3), a decision which they would in our view inevitably make, he would be registrable under para1(1). Either way he would remain registrable.

35. We therefore dismiss the appeal.

36. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 9 July 2012