TC02419

Appeal number: TC/2012/00450

Value Added Tax –exceeding the registration threshold –failure to register and account for tax-plea in mitigation accepted –appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STUART HOGBEN **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
MR DUNCAN MCBRIDE

Sitting in public in London at Bedford Square on 5 November 2012

The Appellant appeared in person

Mt Bruce Robinson, Higher Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The decision appealed against is contained in a letter dated 13 June 2008. In that letter Her Majesty's Revenue and Customs ("HMRC") explained that since the Appellant was trading in excess of the VAT registration threshold, he should have been registered for VAT in the period 1 May 2005 to 30 June 2006.

2. Further, by letter on 19 February 2009, it was explained that there was an assessment for unpaid VAT in the sum of £8,243.10 for the period 1 July 2005 to 30 June 2006. By failing to notify HMRC of this liability at the proper time has rendered the Appellant also liable to a penalty at the rate of 15% of the net tax liability for the periods from 1 July 2005 to 30 June 2006.

3. The Tribunal is therefore asked to determine whether the Appellant should have been registered for VAT and whether the liability to VAT of £8,243.10 and a further liability to pay a belated notification penalty of £1,236.

4. HMRC made the decision on the basis of income returned on a Construction Industry Scheme ("CIS") voucher made by the Appellant and income declared in his Income Tax Self-Assessment returns.

Relevant Facts

5. For the years 2004/2005 and 2005/2006 the Appellants self-assessment returns showed the amount of £99,013 and £81,588 respectively. The VAT threshold limits for 2005/2006 and 2006/2007 are £60,000 and £61,000 respectively. The turnover for VAT purposes therefore exceeded the VAT registration threshold during the period in question

6. The Appellant possessed a CIS registration card which is issued to a sub-contractor for personal use. The card entitles the holder to receive payment for work undertaken by him and not for work undertaken by a third party. The relevant payments were made to the Appellant under CIS vouchers. The vouchers, which are no longer in in use are the equivalent to payslips as prove of income. The vouchers were made out in the name of the Appellant.

7. The Appellant in his Income Tax Self -Assessment Returns showed amounts which were commensurate with the CIS voucher income. He claimed substantial deductions for costs of sales or in the 2005/2006 year employee costs. The amount of the deduction for this payment was £32,288 for the year ending 5 April 2006. He was therefore assessed to income tax and National Insurance on the resulting reduced profit and received a tax refund of £5,012. This was paid into his own bank account on 13 November 2006.

8. The Appellant says that he worked in a team of three people; he was paid on behalf of Mr Pearce and possibly Mr McGrath to some extent. He was doing a friend a favour and was including the income of his co-workers CIS card.

9. There was no written contract, agreement, correspondence or other business records which evidenced the agreement between the parties that the Appellant would receive all of the payment for the work and then split that between the parties.

Relevant Legislation

Indirect Taxes Legislation

VALUE ADDED TAX ACT 1994 (VATA 1994)

- Section 1 – Value added tax
- Section 3 – Taxable persons and registration
- Section 26B – Flat-rate scheme and regulations
- Section 67 – Failure to notify and unauthorised issue of invoices
- Section 70 – Failure to make returns
- Section 76 – Assessments of amounts due by way of penalty, interest and surcharge
- Section 83 – Appeals
- Section 84 – Further Provisions relating to appeals

SCHEDULE 1 – registration in respect of taxable supplies:

- Paragraph 1 of Schedule 1 - Liability to be registered
- Paragraph 5 of Schedule 1 – Notification of Liability and registration

Direct Taxes Legislation

Income Tax (Construction Industry Scheme) Regulations 2005

Onus of Proof

10. The onus of proof is on the Appellant to demonstrate that he should not have been registered for VAT.

11. The onus is on the Respondents to show that a penalty is due. If that burden is satisfied then the Appellant must demonstrate that he has a reasonable excuse for the failure.

Standard of Proof

12. The standard of proof is the civil standard of the balance of probabilities.

Appellant's submissions

Background

13. By letter of 25 February 2008 HMRC notified the Appellant that he had exceeded the threshold of VAT registration.

14. On 13 June 2008, HMRC wrote to the Appellant explaining that he was liable to be registered for VAT for the period 1 July 2005 to 30 June 2006. They included a schedule of the Appellant's CIS vouchers showing that the threshold for VAT had been exceeded. On 19 February 2009, HMRC issued confirmation that the Appellant was liable to be registered and was being assessed for unpaid VAT and a belated notification penalty. It was explained that instead of accepting the assessment, the Appellant could submit a VAT return and pay the tax due on it and could submit a statement of relevant VAT covering the period of liability. In other words, the Appellant could be registered for VAT and reclaim any input tax. He was offered a review of the decision taken by the officer.

15. On16 March 2009 the Appellant requested a time to pay arrangement.

16. On 4 April 2009, the Appellant wrote to HMRC explaining that he had in fact received the payment for Mr Pearce and the earnings that he received was meant to be split in two ways. Mr Pearce had not set up a bank account nor registered for CIS at this particular employer therefore it was convenient to have the payment for both of them made to him.

17. If the money due to his colleagues (Andrew Pearce) had been deducted from the amounts which he received then he would not be above the threshold for VAT.

18. On 28 November 2005, the Appellant provided a letter signed by Mr Pearce confirm that he was responsible for his income tax and National Insurance contributions incurred during the whole of that contract

19. In the year end 5 April 2006, Mr Hogben's income is shown as £81,588 with net profits of £38,570 and significant deductions for employee costs (£32,288).

20. On 14 May 2009, HMRC wrote to the Appellant explaining that under CIS rules the CIS registration card is for individual use only and not transferable. All money attributable to the card will be regarded as having being earned by the registered owner. Therefore Mr Hogben was responsible for paying the VAT as the CIS

registered person. It was suggested to him that since payment went through his account, his colleagues may wish to make a contribution to the tax.

21. On 28 May 2009, the Appellant wrote to HMRC and requested a meeting and suggested that the tax bill in total with penalty be split between the parties. This proposal was rejected by HMRC who suggested that such an arrangement would have to be a private one between the parties.

22. On 19 December 2010, the Appellant appealed the decision and the letter was treated as a request for a review. The review upheld the decision of the officer and this was communicated to the Appellant on 18 November 2011. The Appellant made an appeal to the Tribunal on 14 December 2011.

The Appellants submission

23. The Appellant's core submission is that all of the income received was not entirely his and therefore he had not exceeded the VAT threshold. He therefore should have received his share of the total income received. If he had received one half then he would have no obligation to be registered for VAT.

24. In his correspondence dated 4 April 2009 he states:

> "I would like to explain that during the time of the said tax bill, myself, Mr Paul McGrath and Mr Andrew Pearce was working together sub-contracting for a flooring firm. As we had never set up a business or a business account, the money we were earning was meant to be split three ways through our respective bank accounts. Mr Paul McGrath had some money go through his but Mr Andrew Pearce had failed to get himself a bank account so the rest of the money that us three jointly earned all went through my account so it looks like I earned considerably more than I actually did"

25. On 28 May 2009, he stated

> "As I explained I had Andrew Pearce's wages go through my account as he at that time had no bank account. I thought I was doing him a favour. But it has landed me in trouble with you instead. So after being back in touch with Andrew Pearce and having explained the situation to him, he and I agreed to meet with you to try and get this tax bill split 50/50 between he and I to which he has fully agreed to do and he wants to accept liability to half of the bill, which means we are asking you if it is possible to send out two separate bills at £4,739.05 to each of us which is exactly half of the £9,479.10 bill which was sent to me".

26. The Appellant explained that he has no means of settling the bill since he has no assets or savings.

27. In his oral evidence, the Appellant explained that he was advised by his accountants to take this approach and then to draw out the wages for Mr Pearce and

pay directly to him. It was his understanding that the money would already have been taxed. The figure of £32,000 to be paid to Mr Pearce was arrived at by his accountant. Mr Pearce was registered under the CIS scheme but was not registered with the particular firm for which the work was done.

28. The Appellant explained that he had made a genuinely innocent mistake and he was doing a friend a favour.

Respondents submissions

29. The Respondents say that there is an obligation to be registered for VAT if the threshold is exceeded. The Appellant has exceeded the threshold in this case. He is therefore liable to be registered for VAT.

30. The CIS registration card which is issued to a sub-contractor is for his personal use. All monies attributable to that card are to be treated as earned by the particular sub-contractor and not anyone else. The evidence on the CIS clearly shows the Appellant submitted vouchers in his own name and not in the name of anyone else. Further the Appellant claimed the deduction of £32,288 for employee costs in his self-assessment return ending 5 April 2006. The Appellant was assessed on income tax and national insurance and received a tax refund of £5,012. All monies were paid into his bank account.

31. There was no partnership agreement between the parties and it is acknowledged by the Appellant that there was no partnership. They were just individual sole traders working together.

32. While the Appellant initially maintained in correspondence that the payment for the work (which was being done by three people including him) had all gone through his account. Later on he explained that only the payments for one other person, Mr Pearce had gone through his account. The Respondents see this as an inconsistency in the correspondence.

33. The Respondents say that in the absence of any record supplied by the Appellant the only information available is that the Appellant's self-assessment returns. In the circumstances, VAT and income tax are to be treated differently.

34. There is no provision in the legislation for the assessment to be set aside due to an innocent mistake. Where a tax payer has insufficient funds he can negotiate a tax payment arrangement.

35. With regard to the penalty, the respondents contend this is chargeable under the legislation since the Appellant was liable to be registered for VAT since 1 July 2005. The Appellant does not have a reasonable excuse and the penalty should not therefore be set aside.

Discussion

36. This is a case listed for one day but which only required two hours of hearing. Let us look at the details from the binder of evidence presented.

37. The Appellant kept records which showed on a month by month basis his CIS voucher payments. The income derived from the CIS vouchers for the tax year ended 5 April 2006 agrees with the income declared on his Self-Assessment Tax ("SA") return for the same period. For the year ending April 2006 the SA returns showed earnings of £81,588 and for the year end April 2005 earnings of £99,013. From those figures it was clear that the Appellant had exceeded the VAT registration threshold and therefore had to be registered for VAT. It is also clear from the SA return that the Appellant had claimed a deduction of £32,288 for employee costs and was assessed income tax and national insurance on reduced profits and received a tax refund of £5,0212 as a result. There is no dispute that the appellant has exceeded the threshold limit for VAT registration and he accepts that position.

38. The question which the Tribunal has to answer is whether part of the profits which were declared on the Appellants self-assessment return belongs to his co-worker Mr Pearce and therefore should not have been counted as part of the Appellant's income in determining whether the VAT threshold had been exceeded. He explained that he acted in a sort of trust or nominee position with regard to part of the money received whilst they were working as tiling contractors for a company. They were not in a partnership and did not have a company but rather were two sole traders operating independently. There is a third party, Mr McGrath, who seems to have been paid directly though there is some correspondence indicating that part of the income paid to the Appellant belonged to Mr McGrath. The Tribunal will not take that point since in the evidence presented at the hearing, the Appellant explained that only Mr Pearce's income was held in bank account. The Appellant made his SA returns and paid the resulting income tax and so by his own admission in making and filing those returns he acknowledges that the income belonged to him. He discussed this matter with his accountant, as he explained at the hearing, and the accountant's advice was that the money should be paid to him and he should account for the tax on the entire contract price. Ordinarily, if he had received the money as payment for himself and another party, he should have handed over part of that money to the other party and only accounted for the tax on his share. This was not possible since he was paid via a CIS voucher system which deducted tax at source which meant that he received a net sum from the paying company. The circumstances did not lend themselves to income splitting before tax.

39. Given the circumstances, the Tribunal finds it unfortunate that there was not some written or other agreement between the parties which treated the payment made to the Appellant as belonging to both the Appellant and the other party. He presented no evidence, other than a letter and a confirmation by Mr Pearce that this was the case. Mr Pearce seems to have made no contribution to the income tax payments and therefore received from the Appellant a net sum. In looking at the matter, it seems that the arrangements between the parties were very ad hoc and not documented in any way. The accountant who gave advice on how the payments be reported for IT in

this way had not assisted the Appellant that there would be a VAT liability as the threshold had been exceeded.

40. The Respondents make the point that the CIS card is to be used by Mr Hogben only to be paid sums due to him. It cannot be used by another party. As the registered owner of the CIS card all monies attributed to that card are to be treated as earned by the Appellant. The evidence in the CIS records held by HMRC shows that the Appellant submitted vouchers in his own name. The figures on which the Appellant relies, are amounts in the vouchers which match the amount on his SA returns with substantial deductions for employee cost. They were treated at all times as the Appellant's own records of earnings. The Tribunal also had no evidence of invoices which were issued to Mr Pearce. It is unclear whether any such invoices were issued at all. There is also some inconsistency in the Appellant's evidence where he maintained in correspondence that the work was done by three people including him and later on said it was only done by one other person which is Mr Pearce.

41. It should be borne in mind that given the Appellant can be registered for VAT it is possible for him to recover his input tax on supplies which have been made. However it was made clear in evidence that no records of relevant expenses had been kept for the period in question. The Revenue may wish to be sympathetic to a case of genuine mistake and given the Appellant's financial position, should consider time to pay arrangements for the Appellant.

Penalty

42. HMRC contend that the penalty is chargeable under Section 67 (1) of the Value Added Tax Act ("VATA") 1994 as the Appellant has become liable to be registered for VAT and did not notify HMRC within the time limits prescribed by the legislation. As the Appellant did not register within 18 months from the date he was required to be registered there is a penalty which is chargeable at the rate of 15% of the tax being £1,236.

43. The Appellant conduct does not appear to be dishonest. He has made full disclosure of his files and records and co –operated with HMRC. He made efforts to meet with the officers to explain the circumstances of his predicament. Accordingly, the penalty is reduced by 40%. Further, given that the Appellant relied on advice from his accountant, therefore the penalty is further reduced by 20 %.

Mitigation

44. The Tribunal would ask HMRC before proceeding to collect tax and penalty to consider the following matters:

i) The Appellant appeared to have made a genuine mistake through his actions in taking his and Mr Pearce's income on his CIS card. Secondly the Appellant indicated he has no assets or savings and his ability to pay tax and penalty is limited and would

place undue financial hardship on him. The Tribunal would imagine that HMRC would enquire into his means and his ability to pay the tax assessed but it appears to the Tribunal as though the Appellant would experience great difficulties in meeting any short time limits for payment.

Conclusion

The Tribunal can only come to one conclusion which is to dismiss the Appeal. The Tribunal has taken into account the Appellant's points in mitigation.

45. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2012