TC03534

Appeal number: TC/2013/06497

Value Added Tax - Claim that the Appellant should have been excluded from liability to register for VAT purposes because at the date when his turnover in the rolling 12 - month calculation exceeded the registration threshold (on account of one exceptional engagement) it could be foreseen that in the following 12 months his turnover would fall below the registration level - Claim marginally undermined by the later figures - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

REGINALD WAYMENT

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M NOWLAN
MRS SHAMEEM AKHTAR

Sitting in public at 45 Bedford Square in London on 28 April 2014

Mark Longley of Clayton Longley Limited on behalf of the Appellant
Femi Ojo of HMRC on behalf of the Respondents

DECISION

Introduction

1. This was a somewhat unfortunate Appeal in which the Appellant's cumulative taxable supplies had exceeded the registration threshold at the end of November 2010. This was claimed to be entirely because the Appellant, as a professional stuntman, had very unusually had a particularly long and profitable contract in relation to one particular film. The Appellant and his accountant had not initially noted that the threshold had been exceeded, which was understandable since looking at his turnover revealed in his accounts to the end of April of every year, there was no occasion when the turnover calculated for the 12-month period ending on the accounting date exceeded the threshold. When in 2013 it was appreciated that the threshold had indeed been exceeded, HMRC was requested to sanction the permissible exception to the obligation to register, available when it is anticipated that the turnover in the next 12 months will drop back again and fall below the threshold.

2. HMRC conceded that they are able retrospectively to grant the benefit of the exclusion from the liability to register, but they claimed (correctly we accept) that they still had to decide on the facts prevailing at the time the Appellant strictly became liable to be registered, that the conditions for conceding the exception prevailed. HMRC contended that at that time, it could not be established that it was anticipated that the turnover for the next 12 months would fall below the threshold, and accordingly HMRC declined to apply the exception retrospectively.

3. The outcome, assuming that we sustain this decision, is in fact fairly unfortunate to both the Appellant and HMRC. So far as the Appellant is concerned, it is hoped that the major VAT registered film companies for which he worked will be prepared to pay the additional amounts, when re-invoiced to cover the cost of the VAT charged on the Appellant, along with being furnished with VAT invoices. Moreover since, when not registered, the Appellant had been unable to pass on the cost of some VAT incurred by him, such that there had been some stranded VAT, it may follow (should all the film companies accept the adjusted charging) that this hitherto stranded VAT will become recoverable and HMRC will end up not only with considerable administration, but with a marginally reduced overall VAT receipt. The Appellant and his accountant of course face the costs of considerable administration.

The facts

4. In the Introduction we slightly simplified the facts because, having been given the monthly turnover figures for all months down to March 2013, we can see that the Appellant has had 12-month cumulative turnover above the registration threshold on four different occasions. Moreover, when the Appellant's cumulative turnover first just exceeded the threshold (in the three months of November 2010 to January 2011), this blip in turnover seems unlikely to have resulted from the work on the particularly major film contract, because we were told that the work on that contract was undertaken and billed in the period May to July 2011.

5. As just indicated, the registration threshold was only exceeded for the three months ending at the end of January 2011, so that very shortly after the point at which the Appellant should have been registered, i.e. on 1 January 2011, the figures by the end of February were back below the registration threshold.

6. The claim in relation to the work on the film mentioned in paragraph 1 above was obviously true because, having been told that most of the work on that film was in the months May to July 2011, we see that whilst from February to May 2011 the Appellant's cumulative 12-monthly turnover was below, or indeed quite well below, the threshold, the large receipts in June and July put the Appellant back above the registration threshold from June 2011 to January 2012.

7. The Appellant was then:

- under the threshold at the end of each of the three months, February to April 2012;
- above it then for the one month of May 2012;
- below it from June to November 2012; and
- above it from December 2012 for that and the next 2 months, and thereafter we have no available figures to continue the calculations.

8. Whilst the following point has no bearing on this Appeal we were told that it was now likely that the Appellant would emigrate to America where there is naturally more film work, and that while he would do some work still in the UK, his UK supplies would almost certainly then fall well below the threshold.

Our decision

9. The issue for us to decide is naturally whether we can overturn the decision by HMRC that viewing matters when the Appellant technically became liable to be registered, it was then clear that the terms of the exemption from liability to be registered were satisfied, in other words that it was then clear that his turnover in the next 12 months was going to fall below the threshold.

10. We decide that we cannot possibly support that claim, because we now see that there were four occasions when the exception would have had to be claimed. Moreover, looking at matters from the date on which there was the greatest focus, namely the first date of November 2010, with the benefit of hindsight we actually see that in 8 of the ensuing months the Appellant's turnover was actually at higher levels than at the November 2010 date, and indeed it was in the middle of that "next 12 month period" that the Appellant would be working on the major contract that was initially blamed for putting him above the threshold.

11. When the conclusion is, more generally, that from November 2010 to March 2013 the Appellant's 12-month cumulative turnover has been above the threshold in more months than it has been below it (on a rough calculation 12 versus 11), and when particularly looking at the issue back in November 2010, it transpires that the turnover in the ensuing 12 months was at an unusually high level, it would have been somewhat perverse for us to decide that the reverse could obviously have been anticipated in November 2010.

12. We accept that we ourselves have been applying hindsight by looking at the eventual figures for the later months, rather than considering what might have been anticipated at the first relevant date of November 2010. When, however, the overall picture is of the Appellant's turnover fluctuating above and below the threshold, and when the actual figures for the 12 months following November 2010 were markedly higher than for earlier figures, we still say that there is no evidence to support an anticipated decline in turnover, when viewed at the first relevant date, namely the end of November 2010.

13. We regret the outcome of this case because when the Appellant is obviously fluctuating above and below the registration threshold, the Appellant and his accountant have difficult

questions as to which chosen route (none of which we will record because they are irrelevant to our decision) will involve less administration and less inconvenience. On the hoped-for assumption that all the Appellant's customers will pay the additional amounts for which they will presumably be re-invoiced, thereby recovering not only the VAT on the Appellant's "value added", but also recovering the presently stranded VAT that the Appellant suffered as a non-registered trader, it is difficult to feel confident that we have been able to produce a decision that achieves a pragmatic result for either party.

Right of Appeal

14. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M NOWLAN
TRIBUNAL JUDGE

RELEASE DATE: 2 May 2014