TC04077

Appeal number: TC/2013/07203

VAT – Assessments under S73 VATA 1994 – incorporation and checking of valid VAT number for zero rating of export goods – S30 VATA 1994 Regulation 34 VAT Regulations 1995 and PBN725 – Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FLEMING AGRI-PRODUCTS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN W. HUDDLESTON

Sitting in public at Bedford House, Bedford Street, Belfast on 24 July 2014

Mrs Sharon Spence, Officer, appeared on behalf of HMRC

Mr A. McCartney of McCartney & Co, Accountant, appeared on behalf of the Appellant

DECISION

Appeal

1. The Appeal relates to assessments (reviewed and reissued on a number of occasions) but all of which were made pursuant to Section 73 of the Value Added Tax Act 1994 ("VATA") in the final sum of £28,042 plus interest in relation to the VAT periods 03/11 to 06/12 inclusive. The final notice of amended assessment was dated 25 July 2013.

The Facts

2. The Appellant ("the Appellant"), Fleming Agri-Products Limited, is a limited company who is involved in the manufacture and supply of agricultural equipment. The Appellant is registered for VAT under registration number 349 7850 06 with an effective date of registration of 1 April 1983 and trades from premises at Victoria Road, New Buildings, Londonderry, Northern Ireland, BT47 2SE but, given the limited market for its products in NI, exports a large proportion of its agricultural vehicles to the Republic of Ireland and, indeed, all over the world.

3. The issue under appeal, however, relates to a single supply to a Republic of Ireland registered trader, Joe Farrell who was formerly registered for VAT in the Republic of Ireland under number IE38526130 but who had been de-registered for VAT with effect from the 30 April 2009. It makes sense at this point to highlight that in the course of the appeal it became apparent that "Joe Farrell" is a trading name for a Mr T. Cassidy – a point that HMRC were not aware of and which will be dealt with further below.

4. Although 30 April 2009 was the effective date of Mr Farrell's deregistration the date of cancellation was, infact, the 22 September 2010 and the de-registration itself was not processed by the Irish Revenue Commissioners, until the 12 October 2010. Given the nature of the back dating HMRC, in one of the amended (and later) assessments, therefore removed the earlier periods (06/09 to 12/10) from the proposed assessment to make an allowance for this fact. In the final instance, they have taken 12 October 2010 as the effective date of de-registration for the purposes of the assessment which they have issued.

5. The Tribunal were not made aware of the reason for the deregistration but it did prompt a visit from HMRC to the Appellant on the 2 October 2012. During that visit HMRC advised the Appellant that there were a number of the Appellant's Republic of Ireland customers who appeared to be no longer registered for VAT. At a subsequent meeting (on the 9 October 2012) the Appellant was able to clarify the issues in relation to the other traders but not in respect of Mr Farrell.

6. HMRC in turn advised the Appellant that they did not consider the checks carried out to be adequate and that the Appellant was not, therefore, entitled to zero rate supplies which had been invoiced to Mr Farrell and that, as a result, VAT was due on the supplies that had been made to him post his de-registration. As a consequence

and, by letter dated 24 October 2012, HMRC advised the Appellant that they intended to make an assessment for under declared output tax amounting to £87,158 in respect of the periods 09/09 to 09/12.

7. The Appellant's representative, Mr McCartney, wrote to HMRC on the 24 November 2012 advising that:-

- the Appellant had originally obtained Mr Farrell's VAT number when trading commenced;
- that that number was checked on the Europa Website;
- that the Appellant made regular checks to ensure the number was still valid at intervals of approximately every two to three years;
- that due to the level of on-going trade between the Appellant and Mr Farrell and, because this exceeded normal VAT thresholds, it had not been put on notice of any irregularity until the HMRC visit itself and therefore had properly zero rated the supplies that had been made.

8. As indicated above once the retrospective effect of Mr Farrell's deregistration was taken into account HMRC removed the periods 06/09 to 12/10 from the proposed assessment. There then followed further correspondence between the parties which ultimately led to a further reduction in the assessment to the figure now in appeal ie. £28,042 as notified to the Appellant by letter dated 27 June 2013 with a notice of amendment of assessment itself being issued on the 23 July 2013.

9. At the request of the Appellant a review was carried out and the decision regarding the assessment was upheld. That review letter was dated 26 September 2013 and will be referred to below.

The Appellant's Grounds of Appeal

10. The Appellant has cited as its grounds of appeal basically two issues:-

- that it has taken sufficient and reasonable steps in relation to its trade with Mr Farrell and the inclusion of a valid VAT number such as should entitle it to avail of the "defence" which arises under PBN 725;
- that for HMRC to demand that the VAT in dispute (if paid) would amount to unjust enrichment - on the basis that the onward made trades by Mr Farrell would either themselves have been subject to zero rating or, alternatively, would have been to VAT registered farmers who in due course would have paid and reclaimed VAT on the supplies made. To be clear, however, neither in the correspondence between the parties nor in the Appeal was any evidence adduced to confirm that VAT had, in fact, been charged on those onward supplies.

Legislation

11. I will set out in summary the detail of the legislation which provides for zero rating of goods which are removed from one member state to another. This primarily is contained in Section 30 of the Value Added Tax Act 1994. Section 30(8) provides as follows:-

"(8) Regulations may provide for the zero-rating supplies of goods, or of such goods as may be specified in the regulation, in cases where –
(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member state or that the supply in question involves both:-
(i) the removal of the goods from the United Kingdom; and
(ii) their acquisition in another member state by a person who is liable for VAT on the acquisition…;
(b) such other conditions, if any, as may be specified in regulation or the Commissioners may impose are fulfilled."

12. The regulations themselves which are in point are contained in Regulation 34 of the VAT Regulations 1995 ("the Regulations") which provide as follows:-

"Where the Commissioners are satisfied that –
(a) a supply of goods by a taxable person involves their removal from the United Kingdom;
(b) the supplies are to a person taxable in another member state;
(c) the goods have been removed to another member state....
subject to such conditions as they oppose shall be zero rated."

13. The tertiary legislation which is in point exists pursuant to Public Notice 725 (which has force of law) which provides as follows:-

"*A supply from the UK to a customer in another EC member state is liable to the zero rate where:-*

- *you obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the two letter country prefix code; and*
- *the goods are sent or transported out of the UK to a destination in another EC member state; and*
- *you obtain and keep valid commercial evidence that the goods have been removed from the UK within [certain] time limits (in this case 3 months)."*

Paragraph 4.6 of PBN 725 indicates to tax payers that *"if you cannot obtain and ensure valid EC VAT registration number on your sales invoice you must charge and account for tax in the UK at the appropriate UK tax rate."*
Paragraph 4.10 of the Notice explains that tax payers will not have to account for VAT if a customer's VAT number turns out to be invalid –
"but only if you:-

- *have taken all **reasonable steps** to ensure that your customer is registered for VAT in the EC [emphasis added];*
- *have obtained and shown your customer's EC VAT number on your VAT sales invoice; and*
- *hold valid documentary evidence that the goods have left the UK"*

14. Paragraph 4.12 of the Notice then confirms that VAT will be chargeable if reasonable steps are not considered to have been taken.

15. In essence that is the crux of this appeal ie. whether or not the Appellant has taken reasonable steps sufficient to meet the conditions set out above when viewed against the primary, secondary and tertiary legislation cited.

HMRC's Case

16. HMRC's case is that against this legislative background the onus is upon the Appellant to obtain a valid EC customer VAT registration number and to obtain and retain satisfactory commercial documentary evidence that the goods have been removed from the United Kingdom.

17. In the present case they say that the Appellant has not obtained or provided to HMRC a valid ROI VAT registration number for Mr Farrell in relation to a number of supplies on the grounds that his VAT number was deregistered in the Republic of Ireland with effect from the 30 April 2009 and further that had the Appellant undertaken checks from any date after the 12 October 2010 it would have immediately discovered that the VAT number quoted was not valid. On that basis HMRC states that the Appellant has not taken all reasonable steps to ensure that its customer is registered for VAT in the European Union and that as a consequence it must account for the tax for the supplies that were made post 12 October 2010.

The Appellant's Case

18. The Appellant, very simply, makes the contention that it checked Mr Farrell's VAT number on the Europa website when trading commenced; that it made regular checks to ensure this number was still valid at (broadly) intervals of two to three years; that because of the level of trade which was carried on with the ROI trader that it was not put on enquiry largely because the level of trade with the Appellant alone exceeded the registration threshold and, therefore, was (in essence) entitled to rely upon that as evidence that the registration ought to have continued.

19. The Appellant further pointed out that HMRC did not notify the deregistration to the Appellant until the visits referred to in October 2010 and that in earlier analogous correspondence (in particular a letter of the 26 January 2010) where similar issues with inregularities over VAT numbers with ROI traders had been raised that HMRC had not drawn any issues to the attention of the Appellant in respect of Mr Farrell. Finally, the Appellant suggests that to dismiss the Appeal and allow the tax to be collected would result in unjust enrichment to HMRC.

The Case before the Tribunal

20. The case for HMRC was presented by Mrs Spence who called Mr Adrian Thompson, a Higher Officer, within HMRC, who is the person who had initially attended the Appellant's premises and was involved in the correspondence between the parties leading to the instant appeal.

21. The Appellant was represented by Mr McCartney of McCartney & Co, Accountants, who called Mr George Fleming, managing director of the Appellant, who gave evidence on behalf of the company.

22. There are a number of preliminary points which can easily be dealt with. The first point is that during the correspondence and at the Tribunal HMRC accepted that the agricultural machinery in question had, in fact, been exported to the ROI. During the hearing of the case it became clear that the yard to which the goods were supplied was immediately adjacent to a petrol filling station owned by Mr T Cassidy and at that point there was some doubt expressed as to what extent this yard lay within the Republic of Ireland as opposed to Northern Ireland. It became apparent, however, from a review of photographs of the actual location that both the access to the filling station and the yard itself did appear to be located in the Republic of Ireland. To that extent therefore there does not seem to be an issue as between the parties that the goods which are the subject of this appeal were in fact exported. As a preliminary point, therefore, there was acceptance that the goods had left the UK.

23. HMRC did raise during the examination and cross examination of Mr Fleming the extent to which documentation was available to evidence the actual delivery. On that point it seems to have been the case from the evidence given to the Tribunal that goods were in the main supplied and paid for on delivery - usually in cash. In those cases then the delivery docket was not countersigned – Mr Fleming taking payment as evidence of the delivery for the purposes of his own internal records. Where goods were delivered (but not paid for) then it appears that the delivery docket would have been initialled by an employee on site – simply to evidence the fact of delivery – with a payment in cash being collected on the next delivery.

24. In relation to those conditions within the legislation which relate to the removal and/or delivery of goods there does not appear, in substance, to be an issue between the parties and we find that both conditions were satisfied on the facts.

25. What, however, is a very real issue is the extent to which there was a valid VAT number at the point that those supplies were made.

26. The evidence on this point was quite interesting. Mr Fleming in his evidence to the Tribunal explained that in fact whilst the supplies were made and invoices addressed to "Joe Farrell" in reality that was a trading name of Mr Cassidy (ie. the owner of the adjacent petrol filling station) and that any transactions which had been carried out with the Appellant were in fact carried out with Mr Cassidy. HMRC were not aware of that nuance until the Hearing itself.

27. The evidence to the Tribunal was that that trade commenced in or around the year 2000. We were told in evidence that Mr Brattin, the Appellant's then employee, who was responsible for the initial instigation of Mr Farrell as a trader, checked Mr Farrell's VAT registration number against the Europa website before trade commenced.

28. According to Mr Fleming's evidence sales then started on a "cash on delivery" basis. The level of trade developed quickly from there and within the Appellant's business it became the responsibility of Mr Desmond Shields (the Appellant's Despatch Manager) to check on the VAT status of customers of the Appellant on a "frequent basis" (Mr Fleming's words). When questioned on this point Mr Fleming

indicated (as his representatives had in correspondence) that there was "no magic" to the frequency of the review but that it would have happened in most cases once every two to three years.

29. In the case of the trades with Mr Farrell (or in point of fact with Mr Cassidy trading as Mr Farrell) Mr Fleming gave evidence that they received a weekly order. That weekly order was fulfilled and delivered by the Appellant or his contractors to the yard premises at the side of the petrol filling station and was usually paid for cash on delivery. The turnover of the business with Mr Farrell/Mr Cassidy was approximately £100,000 per annum and that for the purposes of Mr Fleming's trade he had assessed that as "low risk" - primarily because Mr Fleming had:-

- undertaken preliminary due diligence both on VAT registration and in terms of the credit risk with other similar trade suppliers who traded with him in the Republic of Ireland;
- that broadly speaking he was being paid "cash on delivery";
- that the level of trade as between Mr Farrell/Mr Cassidy in itself was at a sufficient level that well exceeded the turnover requirements for VAT registration in the Republic of Ireland (approximately circa €44,000);
- that the details of the trades were included on a monthly basis on the EC sales list submitted to HMRC throughout the entire period from the year 2000 until the inspection in 2012 – approximately 120 times without issue being raised.

It was Mr Fleming's evidence to the Tribunal that once he became aware of the discrepancy – ie. post October 2012 he immediately stopped supplying "J. Farrell" under the deregistered VAT number but continued to supply Mr Tom Cassidy under a separate VAT number. Mr Cassidy subsequently relocated his business premises to within Northern Ireland and Mr Fleming gave evidence that that trade continues - with the Appellant charging UK VAT on the trade supplies which it continues to make.

30. It was surprising perhaps, that HMRC were not aware that the name "J Farrell" was simply a trading name for Mr Cassidy prior to the Hearing. In the evidence which Mr Thompson gave it would seem that he simply received notification from a counterpart in the Republic of Ireland once the deregistration became known. The ROI authorities didn't explain the circumstances around the deregistration but simply described (in an email dated 21 February 2013) that "IE. 38526130, deregistered 30/4/09, cancelled on 22/9/2010 due to ceased trading. Processed on 12/10/10".

31. Mr Thompson explained that this deregistration led to the visits to which I have referred above and, more particularly, the assessments which are now in dispute.

32. It did transpire at the Hearing that in fact the registration number itself has been reactivated (again in the name of Mr Joe Farrell) again trading from the address at Ballyconnell, County Cavan. The Appellant furnished the Tribunal with two printouts from the European Commission website which confirmed that as of the 3 July 2014 and 23 July 2014 that the registration number had been reinstated and was valid. HMRC could not explain the circumstances around this other than Mr Thompson was able to say that it had happened previously in that he had experience

of where a former deregistered number had been reactivated in respect of a particular trader. There was no information, however, provided to the Tribunal as to when that reactivation might have occurred. What was confirmed, however, in evidence was that the VAT number had not been reinstated during the periods in respect of which the VAT assessment and appeal now relates.

The Issue

33. As I have said above, the only real issue between the parties is as to whether or not sufficient and/or "reasonable steps" (to use the language of PBN 725) were taken by the Appellant to entitle it, pursuant to the cumulative effect of the legislation set out at paragraph 10 onwards, to zero rate the supplies made to the trading name Mr Farrell under VAT number IE38526130.

34. HMRC have already replied to that question in the negative and have issued an assessment on the back of it.

35. The Appellant's contrary case is that:-

- there were initial enquiries undertaken both as to the VAT status and to the credit solvency of the Irish trader before trade commenced;
- the trades in question had built up over a period of 10 years without issue – the Appellant being paid largely cash on delivery;
- the turnover in trade was significant (at circa £100,000 per annum) – a figure well in excess of the Irish threshold (of €44,000) for the requirement to register for VAT;
- periodic checks – on a frequent basis but no less than 2 – 3 years would have been undertaken by the dispatch manager simply to verify the continued VAT status of customers like "Mr Farrell" who otherwise were exemplary trading partners;
- neither HMRC nor the trader could or would have been put on notice until the communication with the Irish Revenue Commissioners which highlighted the fact of deregistration;
- in those circumstances all reasonable steps had been taken and that any attempt by HMRC to enforce the collection of the VAT now assessed would constitute unjust enrichment.

Decision

36. The issue for this Tribunal, as I have mentioned, is whether "reasonable steps" were taken by the Appellant to satisfy the requirements of paragraph 4.10 of PBN725 to ensure that on the exportation of its products the Appellant was entitled to zero rate its supplies. That question must be answered in relation to the facts of the case - and in this instance we find that the Appellant has discharged the burden on it and so dismiss the Appeal.

37. The Tribunal has come to that conclusion on the following basis.

38. In the first place there was a considerable period of trading (almost 9 years) before any issues came to light. The nature and extent of that trade has been described in earlier paragraphs.

39. HMRC say that, notwithstanding that pattern of trade, in the period post 12 October 2010 the Appellant ought to have been checking the VAT status of the Appellant "frequently" and it is as to the meaning of that word where the parties differ. There is clearly no definition of what constitutes "frequently" or indeed "reasonable steps" as that phrase is adopted within PBN725 but we take the view it logically must be looked at in the context of the trade. The Appellant's evidence was that the checks were carried out every "2 – 3 years". Is that sufficiently "frequent" or "reasonable" on the facts? We consider that in this case it is and in coming to our answer on this question we have looked at the issue objectively:-

- as we have said, the Appellant was not on notice of any trading issues – indeed was in the fortunate position of being paid (mainly) cash on delivery;

- more persuasively for the Tribunal was the fact that trade as between the Appellant and the trader continued at a turnover well in excess of the VAT registration threshold in the Republic of Ireland throughout the relevant period and that the Appellant continued to declare such trades directly to HMRC on its EC sales list - a practice it had carried out consistently for in excess of 9 years without issue.

- for such traders the Appellant's evidence was that unless there was a reason to suspect an issue, a trader's status was checked "every 2 - 3 years" - precisely because there was a consistent trade.

40. Taking all of that into account, there was essentially nothing to put the Appellant on notice of there being any issue with the trader's VAT registration. In the context of that consistent level of trade in excess of the VAT Turnover threshold we therefore find that the Appellant's checks were "reasonable".

41. We would also say that given that neither HMRC nor the IRC in the Republic of Ireland seemed entirely clear as to why the deregistration occurred, nor be able to give a reason why it was not processed for a full 18 months after the deregistration and then, subsequently at some unknown date, was then reinstated it seems unduly harsh to impose the consequences that deregistration on the Appellant.

42. For all of these reasons we therefore dismiss the Appeal.

43. 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.

IAN HUDDLESTON

TRIBUNAL JUDGE

RELEASE DATE: 16 October 2014