[2019] UKFTT 229 (TC)

TC07076

Appeal number: TC/2017/07406

VALUE ADDED TAX – registration – failure to register in time – whether effective date of registration proposed by HMRC correct – whether paragraph 1(3) Schedule 1 VATA (exception where forward look over 12 months shows turnover would be below deregistration limit) applied – whether penalties under Schedule 41 FA 2008 due – conduct of appellant's accountant considered – appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DANIEL POTTS **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
JOHN ADRAIN

Sitting in public at Alexandra House, Manchester on 8 February 2019

Mr Edward Bridge FCA for the Appellant

Mr Bernard Haley, litigator HM Revenue and Customs, for the Respondent

DECISION

1. This was an appeal by Mr Daniel Potts ("the appellant") against a decision by the Respondents ("HMRC") that he was liable to be registered for VAT and a decision that he was not granted exception from being registered.

To Mr and Mrs Potts

2. We say this straightaway to Mr and Mrs Potts. We have decided that Mr Potts should have been registered for VAT from 1 October 2014 rather than 1 July 2014, so that there will be less VAT to pay. We have also cancelled the penalty. This still leaves some tax to pay, and if this amount is too big a sum for you to pay now, you should make urgent contact with the debt management part of HMRC to see if you can negotiate some form of instalment arrangement.

3. This tribunal is aware that late registration for VAT for a person whose customers are private individuals and not VAT registered can produce very harsh consequences for the reason Mr Bridge has told us, that you would have been unable to collect the VAT you should have charged. In the light of this we have, where we can within the bounds of the law, made a number of assumptions favourable to you about things being done in time, or at all, by Mr Bridge which have led to the VAT being charged on you being reduced and the penalty being cancelled.

4. We also wish to say this to Mrs Potts. We understand that Mr Bridge gave you a form, a VAT1, to send to HMRC to register your husband, and that you overlooked the need to send this to them. Whatever impression Mr Bridge may have given you about this, your failure to send the form made no difference whatsoever to either the amount of VAT or the amount of penalties that your husband had to pay. In other words it didn't matter.

5. In the rest of this decision we explain why we came to the conclusion we did.

Evidence

6. We had a bundle of documents prepared by HMRC containing the appeal, the correspondence between Mr Bridge and HMRC and various other documents. There were no witnesses although Miss Fairhurst, the officer in the case, supplied some information which we had asked Mr Haley to give us.

Chronology of events

7. We set out here a chronology of events by reference to the correspondence and other papers. We narrate a summary of what was said and done and so far as not otherwise indicated they are part of our findings of fact: later in this decision we make some further findings of fact.

8. The appellant delivered a tax return for the year 2014-15 to HMRC, prepared by Mr Bridge, in January 2016. This contained self-employment pages and in those the appellant's turnover was shown as £93,274. Mr Bridge has stated that on the self-employment pages in that return the appellant informed HMRC that he should be registered.

9. On 15 December 2016 Miss Jodie Fairhurst, an officer in HMRC's Individual and Small Business Compliance ("ISBC") Unit wrote to the appellant forewarning him of a visit she intended to make to his address in Nantwich, Cheshire, which we assume is his home address and from which he carried on his trade as a plumber. Miss Fairhurst's letter asked for books and records to be available and listed those that should be included. She said she "reminded" the appellant that the powers of an officer of Revenue and Customs include a power to inspect records under Schedule 36 Finance Act ("FA") 2008. She informed him that if he had an agent he should produce a signed 64-8 authorisation form. She also enclosed helpsheets about compliance checks and about visits by agreement or with advance notice.

10. On 21 December 2016 Mr Bridge responded sending in a form 64-8 (authorising him to correspond with HMRC as the appellant's agent) and adding that Miss Fairhurst had not in fact sent the appellant one as she had said. At the foot of the 64-8 was a box about VAT with the rubric "If not yet registered tick here" which had been ticked.

11. He said that all the appellant's books and records, including a copy of form VAT1, together with his working papers would be made available to Miss Fairhurst at his own premises.

12. On 26 February 2017 Mr Bridge wrote to Miss Fairhurst referring to her visit and their subsequent telephone conversation. He enclosed a "cash flow schedule" setting out the receipts of the business at monthly intervals in the two years ended 5 April 2016, and added the observations that the receipts listed were the amounts of takings banked and that all cash receipts had been paid into the bank.

13. The schedule for the year ended 5 April 2015 showed takings totalling £93,849. The letter asked "the Commissioners" to take into account the mitigating circumstances (which he had set out) and to exercise leniency when the Commissioners were applying penalties and were considering "Schedule 1, 1(3)" to the Value Added Tax Act 1994 ("VATA").

14. On 16 March 2017 Mr Bridge asked for an early reply to his letter of 26 February 2017.

15. On 24 March 2017 Miss Fairhurst wrote to the appellant. She said she had been able to update her calculations from the monthly information given to her by Mr Bridge. From the documents in the bundle we can see a set of rolling turnover calculations which had been annotated by Mr Bridge to the effect that they were the calculations which Miss Fairhurst had produced at the visit in December 2016 and a second set, those which were attached to the letter of 24 March 2017. These showed respectively that:

(1) on the basis of Miss Fairhurst's calculations which had taken the annual turnover as shown on the income tax returns and divided it by 12 to give equal monthly figures, the appellant had gone over the VAT registration threshold in August 2014 so as to give an effective date for registration ("EDR") of 1 October 2014.

(2) by using the actual monthly figures supplied by Mr Bridge for the year the EDR was 1 July 2014. It is clear that this earlier date was caused by the receipt

in May 2014 of £17,840, whereas in the first set the constant monthly amount was £7,772.

16. Miss Fairhurst's letter went on to say that the appellant's turnover remained above the threshold until February 2016, and that she intended to deal with the case by issuing a "liable no longer liable" assessment, so that the appellant would not receive a "live" VAT number unless he requested one.

17. In the letter she informed the appellant of his right to claim input tax on purchases and about the evidence he would need to support such a claim. She said alternatively she would allow a 15% deduction if he could not find the evidence.

18. She also informed him that he might want to consider the Flat Rate Scheme ("FRS") and told him how to apply. In the absence of a reply to both points she would arrange for the assessment to be issued with a 15% deduction.

19. She said that Mr Bridge had said at the meeting that he had wanted to apply for exemption when he was trying to register the appellant for VAT in February 2016. Miss Fairhurst said that the circumstances of the appellant's business did not allow for exemption which is for businesses wholly or mainly making zero-rated supplies.

20. As to penalties she said that the appellant may be liable under Schedule 41 FA 2008 for failure to notify liability to VAT and she sent him various factsheets including one about the Human Rights Act and penalties. She referred to Mr Bridge's having told her of the timeline and the reason why the VAT1 was not sent at the appropriate time. The letter was copied to Mr Bridge.

21. On 30 March 2017 Miss Fairhurst wrote to Mr Bridge sending a schedule of figures for the FRS. The rate used, 9.5%, was the one that applied given the level of purchases. She said that if the appellant changed his purchasing arrangements as they had discussed, eg if he only billed for labour with customers buying the products, his turnover might drop below the threshold, but, if not, the FRS amount would need to go up 14.5%[1] for 2017.

22. Miss Fairhurst asked for details of actual input tax, if that was being claimed, to be with her by 30 April 2017 and informed Mr Bridge that she was back in the office on 11 April 2017 if he had any other queries.

23. On 11 April 2017 Mr Bridge sent a letter to Miss Fairhurst. He said that he had drafted a letter on 5 April which he attached. In that draft he agreed Miss Fairhurst's figures for VAT on an FRS basis, but said that he had analysed purchases attracting VAT and that it was more beneficial not to use the FRS, and he also attached his figures to show this.

[1] This is we assume the result of the "limited-cost trader" provisions in regulation 55KA of the Value Added Tax Regulations 1995 (SI 1995/2518) inserted into those regulations by regulation 7 of Value Added Tax (Amendment) Regulations 2017 (SI 2017/295) with effect for accounting periods beginning on or after 1 April 2017. But the percentage in those regulations is 16.5% for a trader more than a year into business.

24. The rest of this letter contained matters which he asked Miss Fairhurst to put before "the Commissioners" for their kind consideration. Included in these matters was the statement that when the books were handed to him to prepare the 2014-15 return and accounts, he had advised the appellant that he was liable to be registered for VAT and completed a VAT1 for him, but unfortunately the appellant's wife (and bookkeeper) had mislaid the letter and never filed it.

25. In the letter of 11 April enclosing the 5 April draft (with "5" on it crossed out and "11" substituted by hand) he asked Miss Fairhurst and the Commissioners to give priority to this correspondence for the sake of the appellant's family and that she keep him advised of progress, and "your early attention would be appreciated."

26. On 23 May 2017 Mr Bridge wrote to Miss Fairhurst referring to two reminder phone calls and her undertaking on each occasion that she would respond forthwith to the letter of 11 April and saying he had heard nothing from her. He referred to the fact that he had given her all the information she required by return and had done all the work for her without her taking away the records, so he asked her for her proposals for settlement.

27. On 2 June 2017 Miss Fairhurst replied to the appellant with a decision letter. In this she stated that the appellant should have been registered on 1 July 2014 and she attached a schedule of figures for assessment of £9,232, £1 greater than Mr Bridge's (§23). She explained that the appellant had a right to have a review or to notify the tribunal if he disagreed with the decision. There would also, she said, be a failure to notify penalty.

28. On 5 June 2017 Mr Bridge wrote to "the District Inspector, VAT Office, HMRC" at a PO Box number in Bootle headed in very large bold capitals "Complaint" and ending also in capitals "Action is required now please".

29. On 8 June 2017 Mr Bridge wrote to "Colin Barclay, Esq., Assistant Director, Small Business Compliance" setting out the "facts" of the case and seeking Mr Barclay's help in bringing the matter to a "swift amicable conclusion".

30. On 16 June 2017 Miss Fairhurst replied in detail to the points made by Mr Bridge in his letter of 8 June 2017 to Mr Barclay.

31. On 23 June 2017 Mr Bridge responded and said he was making an application for Alternative Dispute Resolution ("ADR").

32. On 13 July 2017 Mr Hitendra Patel in "ISBC Complaints" wrote to Mr Bridge about his letter of 5 June, upholding Miss Fairhurst's conduct of the case, save that he apologised if HMRC had verbally agreed to respond by a certain date but failed to do so.

33. On 20 July 2017 Mr Bridge wrote to Mr Patel to express his dissatisfaction with the response to the complaint.

34. On 24 July 2017 the Business Tax Operations Unit in Grimsby (dealing with registration issues) wrote to the appellant, enclosing a notice of assessment for £9,232

covering the period from 1 July 2014 to 29 February 2016. He was told of his right to have a review or to appeal to the tribunal, and he was also told that HMRC would not take any action to collect the disputed tax while a review, if requested, was being carried out.

35. On 10 August 2017 Mrs Black of the ISBC Complaints team wrote to Mr Bridge and said she agreed with Mr Patel's assessment of his complaint (see §32).

36. On 14 August 2017 Mr Bridge wrote to Colin Barclay again, asking for the tax charged by the assessment to be held over pending the resolution of the appeal process.

37. On 15 August 2017 Mr Bridge wrote to Mrs Black, the second line complaints officer, also asking for the tax to be held over pending the resolution of the appeal process.

38. On 21 September 2017 the appellant notified his appeal to the Tribunal, in which:

(1) at Question 4 "Did you have a review of the original decision?" Mr Bridge, who had completed the form, ticked the box which says "No. I am applying to be able to request a late review (for restoration of seized goods)".

(2) against Question 6 "What is your dispute about" he ticked the box "The amount HMRC claim I owe" in which he put "£9232" and the box "Penalty or surcharge of" in which he put "yet to be determined".

(3) he said "no" to question 7 "Have you paid the amount HMRC claim you owe?", but put nothing in question 8 from which the form directs the appellant to question 9 about hardship.

(4) as to question 11 "Are you in time to appeal to the Tribunal?" he said "I am not sure" and explained that he was elderly and not conversant with the new appeal system.

39. Following conclusion of the ADR process, Mrs Bowman in the Grimsby unit wrote to the appellant on the 13 October 2017 saying they had withdrawn the assessment to VAT and would not take any further action "with it". No explanation was given.

40. On the same day Mrs Bowman wrote to the appellant with another assessment replacing the one issued on 24 July. This one was in the sum of £8,382, but no explanation for using that figure compared with the £9,232 in the original was given. Appeal rights were again specified.

41. On 22 October 2017 Mr Bridge responded to a letter (which is not in the bundle) from HMRC's Individual and Small Business Compliance, Complex and Agents unit in Glasgow. The response was about penalties and in it Mr Bridge denied that the appellant did not tell HMRC of his liability. Mr Bridge said that he had completed the appellant's tax return and had clearly stated on it that the appellant's turnover was over the limit and that registration was requested. He also said that there was a tacit agreement with "the Inspector" (ie Miss Fairhurst) about penalties and that 10% would be agreed.

42. On 24 October 2017 Mr Bridge wrote to Jon Thompson, Esq. (now Sir Jonathan, the First Permanent Secretary and Chief Executive of HMRC) about the case. He enclosed an Invoice (no 182):

> "TO MY CHARGES taking instructions from Miss Fairhurst, HM Inspector, inspecting my clients (*sic*) records and preparing therefrom detailed schedules sufficient for her to set out the amount of VAT lost to HMRC by the failure of Mr Potts to register ….
>
> 14 hours at £100 per hour £1400.00
>
> Note: I am not VAT registered"

43. On 15 November 2017 the Glasgow office issued an assessment to a penalty of £1,664.60 for failing to register for VAT at the correct time. The accompanying schedule said that the disclosure was prompted. The total reduction made for the disclosure was 100% and the penalty 20% of the tax lost, which was stated to be £8,323[2].

44. On 16 November 2017 a Mrs Jarman of ISBC Complaints responded on behalf of Jon Thompson. She came to the same conclusion as Mr Patel and Mrs Black about HMRC's conduct and declined to reimburse Mr Bridge or pay his invoice. She said that the ADR exit "agreement" shows a VAT liability of £8,382 and a 20% penalty. He was free to take the case to the tribunal.

45. On 26 November 2017 Mr Bridge replied expressing dissatisfaction with the reply and sending Mrs Jarman a questionnaire for her specific responses. He asked Jon Thompson to personally review the files and let common sense prevail.

46. On 8 December 2017 Mrs Jarman answered the questionnaire.

47. On 14 December 2017 Miss Fairhurst wrote to explain the process under which she had issued the penalty.

48. On 3 January 2018 Mr Bridge replied expressing dissatisfaction with Mrs Jarman's replies on the questionnaire. He copied his reply to Jon Thompson and the head of the ICAEW Tax Faculty.

49. On 10 January 2018 Mrs Jarman said that on behalf of Jon Thompson she had nothing further to add.

50. On 17 May 2018 Miss Fairhurst wrote to the appellant to explain why he could not be considered for exception, with a copy to Mr Bridge.

51. On 24 May 2018 Mr Bridge responded asking 6 questions.

[2] £1664.60 is 20% of £8,323 but the letter of 13 October 2017 (see §39) clearly says the VAT lost is £8,382, which is £9,232 as agreed originally less £850 input tax, evidence for which came to light during the ADR process.

52. On 18 June 2018 Miss Fairhurst wrote again to the appellant explaining that the litigation team had asked her to clarify why she had said that the exception did not apply and answering Mr Bridge's 6 questions.

53. On 10 August 2018 Mr Bridge wrote to the Revenue Adjudicator in response to a letter from her of 25 July which is not in the bundle.

Law

54. In relation to the arguments in this appeal the relevant law at the relevant time is found in VATA 1994 as follows:

> "**1** (1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—
>
> (a) at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £81,000; or
>
> …
>
> …
>
> (3) A person does not become liable to be registered by virtue of sub-paragraph (1)(a) … if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed £79,000.
>
> ...
>
> (6) A person shall not cease to be liable to be registered under this Schedule except in accordance with paragraph 2(5), 3 or 4 below.
>
> …
>
> (10) A person is "UK-established" if the person has a business establishment, or some other fixed establishment, in the United Kingdom in relation to a business carried on by the person.
>
> **3** A person who has become liable to be registered under this Schedule shall cease to be so liable at any time if the Commissioners are satisfied in relation to that time that he—
>
> (a) has ceased to make taxable supplies; or
>
> (b) is not at that time a person in relation to whom any of the conditions specified in paragraphs 1(1)(a) and (b) … is satisfied …
>
> *Notification of liability and registration*
>
> **5**(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.
>
> (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

(3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered.

Exemption from registration

14(1) Notwithstanding the preceding provisions of this Schedule, where a person who makes or intends to make taxable supplies satisfies the Commissioners that any such supply is zero-rated or would be zero-rated if he were a taxable person, they may, if he so requests and they think fit, exempt him from registration under this Schedule until it appears to them that the request should no longer be acted upon or is withdrawn."

Grounds of appeal and the appellant's submissions

55. In the appellant's notice of appeal to the tribunal Mr Bridge states that the outcome he would like is:

"No payment whatsoever because of:

1) Paragraph 3 Sch 1 VATA 1994 – spirit of Act

2) Ignorance – though professional advice taken

3) No records inspected

4) No clear advice by HMRC as to full legislation

5) Blame culture

6) Hardship

7) Beyond excuses"

56. Mr Bridge attached a paper of "contentious issues" prepared for the purposes of the ADR proceedings as the grounds of appeal in support of these desired outcomes

57. These include:

(1) As to item 1) in §55 he said paragraph 3 Schedule 1 VATA 1994 endeavours, inter alia, to give relief if a person breaches the "exemption[3]" limit by virtue of one large sales figure, and that is what he meant by "the spirit of the Act". The appellant's total turnover in the year ended 31 March 2015, excluding one large sale in May 2014, was £78,928. The turnover for the following year was only £79,186.

(2) As to item 2) the appellant was not aware of the procedure for registration nor did he have any indication he had exceeded the registration limit. But as soon as Mr Bridge had completed his accounts and discovered the exact turnover, the appellant took his advice to register and Mr Bridge completed a VAT1 for him

[3] His actual word.

and told him that he would have to restrict his turnover or apply for registration. Regrettably, he said, the form was never posted. Mr Bridge accepted that ignorance was no defence in law and this was a classic case of "ignorance and lack of academic prowess".

(3) As to item 3) Mr Bridge said that this was the first "Enquiry[4] case" he had ever dealt with where records had never been inspected. Mr Bridge's view was that the judge in any tribunal would take issue with this fact[5] and question the accuracy of the figures produced, "having never emanated from HMRC and yet being used as the basis of a claim". How, he asked, could penalties be levied when no records have been inspected.

(4) In relation to 4) Mr Bridge complained that in two letters describing the law supporting registration Miss Fairhurst mentioned only paragraph 1(1) and paragraph 5 Schedule 1 VATA. Mr Bridge pointed out that she had said that she had not referred to paragraph 3 as she had not deemed it appropriate to the appellant.

(5) In support of item 5) Mr Bridge said "There is a situation here where there had been a totally botched Enquiry. Blame Culture – The ICAEW say 'in other cases[6] the Tribunal has also established that reasonable excuse can exist when HMRC are partly to blame".

(6) On 6) Mr Bridge cited a passage from what he called *Elbrook v HMRC*, though he did not say from which Tribunal's decision[7]. The quotation is to the effect that the Tribunal can only entertain an appeal if either the tax had been paid or HMRC or, on appeal, the FTT is satisfied that to pay the tax would cause hardship. Mr Bridge then set out the evidence that to pay the tax in this case would cause Mr Potts hardship.

(7) Item 7) "Beyond excuses" turns out be about proportionality, and Mr Bridge said he was informed by the ICAEW that the concept had appeared in some recent decisions, *Enersys*[8] and *Total Technology*[9]. He said that the appellant now only had subsistence income because of the Enquiry and to pay tax that he never had was manifestly unfair. He accepted that a penalty should be paid if there was a misdemeanour but the appellant should not be expected to pay the Government money he did not have. In any event he, Mr Bridge, had produced the figures that form the basis of the Enquiry, saving the Exchequer a large amount of money.

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[4] Mr Bridge's capitalisation here, and throughout his correspondence.

[5] For the judge's actual reaction see §xxx

[6] The cases are *NA Dudley Electrical Contractors v HMRC* [2011] UKFTT 260 (TC) (Judge Geraint Jones QC) and *TJ Fisher (t/a The Crispin v HMRC* [2011] UKFTT 235 (TC) (Judge Geraint Jones QC). The latter case establishes no more than that a person may have a reasonable excuse so as not to be liable to a penalty for failure to do something if HMRC gave the person misleading information about his obligation *before it became due*. The former is quite irrelevant and depends on HMRC issuing a notice to file.

[7] It is in fact at [10] in the decision of the Upper Tribunal in *HMRC v Elbrook (Cash & Carry) Ltd*) [2017] UKUT 181 (TCC) (Marcus Smith J and Judge Roger Berner).

[8] *Enersys Holdings UK Ltd v HMRC* [2010] UKFTT 20 (TC) (Judge Colin Bishopp).

[9] *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) (Warren J and Judge Colin Bishopp).

HMRC's submissions

58. HMRC pointed out first that the appeal was against the decision that the appellant was required to be registered for VAT from 1 July 2014 and the decision not to grant exception from VAT registration to the appellant.

59. On the question of liability to register, HMRC said that appellant's own figures showed that he became liable to be registered on 31 May 2014 in accordance with paragraph 1(1) Schedule 1 VATA because the value of his taxable supplies in the period of one year ending on that date exceeded the registration threshold of £81,000.

60. As to the exception from liability to register in paragraph 1(3) Schedule 1 VATA, HMRC said that they had acted reasonably in not granting exception, as the appellant would not have been able in May 2014 to demonstrate to HMRC's satisfaction that his turnover would be below the deregistration limit in the following 12 months. The "one-off job" that the appellant contended was material to his becoming liable to be registered may have reoccurred given the nature of his business.

61. HMRC's position on the penalty, as can be seen from the letters and explanation schedules, was that the admitted failure to notify liability to register was not deliberate but was prompted, and made more than 12 months after the tax became unpaid and so with 100% mitigation available the penalty was reduced from the maximum of 30% to the minimum of 20%. No mention was made of whether the appellant had put forward a reasonable excuse, but special circumstances had been considered and found to be lacking.

What appeals can we deal with?

Introduction

62. This tribunal can only hear and adjudicate on appeals against appealable decisions (see rule 20(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009). And if appeals are notified late to it, then permission is required from the tribunal before the appeal may be entertained.

Assessment to VAT

63. The only notice of appeal in the papers is that of 21 September 2017. The entries say that what the appellant was seeking was the opportunity to have *a late review in a restoration case* [our emphasis]. That makes no sense as this is not a restoration case, ie a case where goods have been seized under s 49 Customs and Excise Management Act 1979 and the owner seeks to have them restored under s 152(b) of that Act. We therefore assume that Mr Bridge's lack of familiarity with what he called the "new" system caused him to make a mistake. The difficulty we have is knowing what he did want. He may actually have wanted a review under sections 83A to 83G VATA in response to the Grimsby assessment of 24 July 2017, for which he was about a month late. Or he may have wanted to appeal against the assessment, which seems more likely given his reference to the sum of £9,232 as being in dispute and this is what we are taking the appeal to be about (in part at least).

64. But there are two difficulties about this. The first is that the 24 July 2017 assessment was withdrawn by Grimsby on 13 October 2017, and replaced by another

assessment for £8,382. We understand this was done because the appellant produced a further invoice with £850 VAT on it in the ADR proceedings which HMRC accepted as a valid claim for input tax. There is then in strictness no appeal to the tribunal against this October assessment.

65. We realise that in VAT and other indirect taxes it is possible for HMRC to withdraw an assessment and issue another one, without HMRC needing to seek the appellant's agreement, unlike the position for income tax and other direct taxes (see s 30A(4) Taxes Management Act 1970 ("TMA")). However it seems to us somewhat unfair and misleading to do what Grimsby actually did here: to say that they had withdrawn an assessment and would not take any further action "with it" (and we do not really understand what they meant by this choice of words – possibly collection proceedings) without explaining why and without referring to another letter of the same day notifying the new assessment. What would have happened if the withdrawal letter had arrived before the new assessment letter? The appellant would think that the matter had completely gone away. In these circumstances we are prepared to say that the appeal against the August assessment should be treated as an appeal against the October assessment.

66. The second difficulty for the appellant however is this. Because the appellant had appealed against the assessment to VAT made by Grimsby, we checked the position with Mr Haley, who confirmed our thinking that, by virtue of s 83(1)(p)(i) VATA, no appeal against an assessment may be validly made where no returns had been made. Mr Haley confirmed that should the Tribunal cancel or vary the decision about registration and the date, the assessment would be cancelled or amended accordingly.

67. Whatever Grimsby said to the appellant about appeal rights without mentioning that no appeal was possible unless a return had been made, such conduct cannot turn an unappealable decision into an appealable one.

68. Finally in relation to assessments to VAT, because the decisions were unappealable we do not have to decide whether to give permission to notify a late appeal. Had we had to we would have given permission.

Appeal against the decision that appellant liable to register

69. We now turn to the appealable decision by Miss Fairhurst that the appellant was liable to be registered from 1 July 2014. Given what Mr Bridge said in the "outcome" box of the Notice of Appeal and in the grounds of appeal, he seemed to assume that he was appealing against that decision as well as the assessment. Miss Fairhurst issued the notice of her decision on 2 June 2017, so the appellant had until 2 July to appeal or accept an offer of a review. So far as the documents in the bundle are concerned we cannot see that he did either. Mr Bridge wrote to a large number of people in HMRC after the decision but nothing that resembles an appeal or a request for a review. So the notice of appeal is nearly three months late, and our permission is required before the appeal can be said to be before us.

70. We therefore need to examine the delay and the reasons for it by reference to the three *Denton*[10] stages, as we are told to do by the Upper Tribunal in *Martland*[11] which we now do.

71. The first stage is to see whether the delay is serious and significant. The delay was nearly three months, a length of time which the Upper Tribunal said in *Romasave*[12] was serious and significant. We consider the delay in this case is also serious and significant.

72. The second stage is to ask the reason for the delay. No explanation has been given by Mr Bridge about his reasons for not appealing before 2 July 2017. We think that a possible reason is Mr Bridge's unfamiliarity with, or, as he put it in relation to his client's failures, his ignorance of, the post-2008 law about appeals and reviews for VAT matters.

73. The third *Denton* stage requires us to take into account all the circumstances, but giving special emphasis on the need for litigation to be conducted efficiently and for the need for time limits to be observed. The first of these is perhaps not so important in a case where litigation has not really started and there is no question of the appellant's conduct delaying a hearing.

74. The circumstances we take into account are that:

(1) the failure to appeal is clearly not the fault of the appellant, but of his accountant. Mr Bridge had though asked the tribunal to take into account his age, nearly 80, and his unfamiliarity with the tribunal system.

(2) the prejudice to the appellant will inevitably be that he has to pay the VAT arising after the EDR, a prejudice made all the greater by the particular circumstances of a trader who is supplying all his services to private, non-VAT registered, individuals from whom he would be very unlikely to recover VAT. Mr Bridge was quite right to say that the appellant is being asked to pay VAT that he has not received from his customers, and it is little comfort to him for it to be pointed out, as it was by HMRC, that he could still claim input tax. Mr Bridge has stressed the appellant's poor financial situation and the effect of the demands for tax on, in particular, Mrs Potts.

(3) The prejudice to HMRC is very limited. They prepared a statement of case and bundles on the basis that the appeal would be heard. They have not objected to the tribunal hearing the case.

(4) As far as the merits are concerned, we could see from the correspondence that there could be a reasonably strong case for the appellant to argue that the EDR should be a later date, ie the date proposed by Miss Fairhurst.

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[10] *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906 (The Master of the Rolls, Jackson and Vos LJJ) at [24] – [38].
[11] *William Martland v HMRC* [2018] UKUT 178 (TCC) (Judges Roger Berner and Kevin Poole).
[12] *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) (Judges Roger Berner and Sarah Falk (as she then was)).

75. Weighing all these matters up we think that those in the appellant's favour outweigh those against, leaving out the merits as not being overwhelming either way. We therefore give permission for the appeal to be made late.

Appeal against the decision on exception from registration

76. Mr Bridge's "outcome" points and the grounds of appeal also assume that there was an appeal against a decision not to allow the appellant to be excepted from registration on the basis of a "forward look" to the twelve months following the EDR.

77. In Mr Bridge's letter to Colin Barclay of 8 June 2017 he had said (in numbered paragraph 9 of 10 listing the "facts") that a large one off payment had distorted the figures of turnover and that the appellant's turnover in the twelve month period to 5 April 2016 was less than the threshold. In her letter of 16 June 2017 in a paragraph responding to that paragraph 9, Miss Fairhurst said that the rolling turnover schedules showed that liability to registration was not dependent on the one off job, as on a rolling basis the appellant was over the threshold for some twenty months, and that on a rolling basis the "one off criteria" did not fit the appellant's situation. It was, she said, apparent that the appellant should have been registered from 1 July 2014 and deregistered after February 2016.

78. Although it is not crystal clear, we accept that in this letter Miss Fairhurst was making a decision as to whether she was satisfied that the forward look provisions in paragraph 1(3) Schedule 1 VAT applied and that she was not so satisfied. We wish to make it clear at this stage that we think, for reasons which we explain later (see §§86 to 95), we are being charitable towards the appellant and that any lack of clarity in Miss Fairhurst's response is not her fault.

79. The time for appealing to the Tribunal against this decision expired on 15 July 2017. We have therefore again considered whether to grant permission to make a late appeal. By comparison with what we said about the registration decision the delay in appealing here is a couple of weeks shorter, but otherwise the same considerations apply, including about the merits where the position seems at first glance, and without us conducting a mini-trial, that Miss Fairhurst may not have taken into account all that she should have and may have taken into account matters she should not have. We therefore grant permission.

Appeal against the penalty

80. As to the penalty HMRC say that it was withdrawn by them and so is not before the Tribunal. But they also say that a revised penalty was issued on 22 June 2018 which carried a fresh right of appeal. At the time the statement of case was produced the time for an appeal had not expired, but HMRC offered to amend the statement of case and consolidate any penalty appeal with this case.

81. Although the appellant did not appear to have appealed against the second penalty, we considered it was in the interests of justice and of fairness to the appellant to treat the appeal against the first penalty as encompassing the second. A problem we face however is that there is nothing in the bundle to show when the first penalty

assessment was made. All we know is that the statement of case says it was made[13] and that the appeal on 21 September 2017 said the penalty was "yet to be ascertained". We are again being charitable to the appellant in assuming, in the absence of any concrete evidence from HMRC, that "yet to be ascertained" was Mr Bridge saying that a penalty that had been assessed was in dispute, not that no penalty had yet been assessed, and so we accept that the appeal was in time. For the same reasons as we gave in relation to the withdrawn and remade VAT assessment, we consider that any appeal against the first penalty assessment covers the second penalty assessment.

The registration decision

82. There is no dispute about the fact that the appellant had crossed the VAT threshold in May 2014 so that paragraph 1(1) Schedule 1 VATA made him liable to be registered, nor is there any dispute about the fact that by paragraph 5(1) Schedule 1 VATA he was required to notify the Commissioners for Her Majesty's Revenue and Customs of his liability no later than 30 June 2014, so that the Commissioners were correct to register him by virtue of paragraph 5(2) with effect from 1 July 2014.

83. We are entitled on an appeal from a decision such as this to cancel or vary the decision of the Commissioners, as we have a full review jurisdiction. Varying the decision would mean changing the date of effective registration under paragraph 5(2) Schedule 1 VATA. We mention this because of the somewhat perverse effect of Mr Bridge's intervention. Miss Fairhurst had prepared her initial schedule of rolling turnover by taking the turnover in the annual accounts and dividing it by 12 to represent the takings for each month in the year. That was the only course open to her given the information she had as a basis for demonstrating when the threshold may have been crossed. Mr Bridge produced actual monthly figures of turnover from the appellant's bank statements which, primarily on account of a large amount in May 2014, moved the month of crossing the threshold back by three months, thus increasing the number of months for which the appellant owed VAT.

84. We have therefore considered if there is any basis on which we could revert to Miss Fairhurst's initial figures. Had the appellant had another accountant who was not as scrupulously fair as Mr Bridge evidently was in connection with his clients' dealings with HMRC or if he had had no accountant at all, he might have said to HMRC on receipt of their figures that he accepted them and should be liable to be registered from 1 October 2014 as her initial figures showed.

85. Of course she, or any other HMRC officer, may not have accepted that agreement without further checks. Indeed she may have felt that in fairness to the appellant she should obtain the correct monthly figures in case they showed that the EDR should have been later than 1 October 2014. That would have been consistent with Miss Fairhurst's approach to this case which has been to give useful and helpful advice to the appellant, but it is also quite possible that a busy officer with many cases on the go would have accepted the appellant's agreement to the initial figures. In these particular

[13] We can only assume that because the first assessment was said to have been withdrawn before the statement of case was drawn up in June 2018 and no replacement assessment had been appealed it was assumed by the compiler (not Mr Haley) that the tribunal did not need to concern itself with the first penalty assessment or any documents referring to them.

circumstances we feel that we can and should vary the decision by saying that the effective date of registration was 1 October 2014.

The exception from registration – 12 month look forward

86. Before we consider the merits of the appeal we need to explain why we took the decision to regard Miss Fairhurst's letter of 16 June 2017 as an appealable decision.

87. In his letter of 26 February 2017 with which he supplied his turnover analysis he asked Miss Fairhurst that:

> "the Commissioners take into account the mitigating circumstances and exercise leniency when applying penalties and also be satisfied that Schedule 1, 1(3) of the Vat act 1994 applies."

Paragraph 1(3) Schedule 1 VATA is the "twelve month forward look" provision which allows for an exception from registration.

88. Miss Fairhurst's letter of 24 March 2017 did not mention paragraph 1(3) or the exception. She did however say that Mr Bridge had told her at the meeting that he had wanted to apply for "exemption" at the time that the appellant was originally intending to register on Mr Bridge's advice in February 2016. She added that the appellant's circumstances did not allow for exemption as it only applied where all or most supplies were zero-rated. This is clearly a reference to paragraph 3 Schedule 1, not sub-paragraph (3) of Schedule 1, and it is just as clear that paragraph 3 does not apply to the appellant.

89. In his letter of 5 April 2017 attached to his of 11 April, Mr Bridge asked Miss Fairhurst to put to the Commissioners, amongst other things, that the provisions of "Section 3, Schedule 1 of the VAT Act 1994" make for a one year test. This was clearly intended as a reference to, and should have said, paragraph 1(3) Schedule 1.

90. Miss Fairhurst's letter of 2 June 2017 is a decision about registration only and does not refer to the "forward look" test.

91. Mr Bridge's letter of 8 June to Colin Barclay said that Ms Fairhurst had made an "incomplete, incorrect and misleading" statement about the law supporting her decision about registration by omitting any reference to "paragraph 3" (as well, he said by implication, as omitting any reference to paragraphs 2 to 4, and 6 to 19 of Schedule 1, the whole of Schedules 1A to 3A, Part 11 of the VAT Regulations and s 123 FA 2016).

92. He also complained that Miss Fairhurst made no mention of "Paragraph 3 of the VAT Act 1994 Schedule 1" in her letter of 2 June, and that she had ignored his letter of 11 April in which he claimed that "the provisions of Paragraph 3 apply" and that "the whole idea of Paragraph 3 is to take account of a one off large job".

93. Then comes Miss Fairhurst's letter of 16 June 2017 which we have taken as her decision about the application of paragraph 1(3). She also said that she had not mentioned paragraph 3 as she deemed it inappropriate to the appellant's position.

94. We consider Mr Bridge's subsequent comments on that statement later, but say again that Miss Fairhurst was absolutely right about the applicability of paragraph 3 to the appellant.

95. What this narration of extracts from the correspondence reveals is Mr Bridge's confusion about the legislation he actually wished to refer to and the terms in which he had described it at the meeting. But we do not think that the appellant should be deprived of an appeal right because Miss Fairhurst did not clearly articulate her position on paragraph 1(3), any confusion in her mind being wholly explicable by Mr Bridge's referring to the "twelve month" look by a different, and usually wrong, statutory description from one letter to the next.

96. It is convenient at this point to answer a question that Mr Bridge asked HMRC at various levels without reply. In early letters to Miss Fairhurst, Mr Bridge asked her to forward his points to the Commissioners, as he had obviously noticed that under paragraph 1 Schedule 1 VATA it is the "Commissioners" who are charged with the power or duty to make decisions. In his grounds of appeal (ie his position paper for ADR) he said he had never understood who the Commissioners were and asked for their names.

97. If Mr Bridge were to have looked at s 96 VATA, the general interpretation section, he would have found that "the Commissioners" in the Act means "the Commissioners of Customs and Excise". However s 50(1) of the Commissioners for Revenue and Customs Act 2005 ("CRCA") makes a non-textual amendment to s 96 substituting "the Commissioners for Her Majesty's Revenue and Customs" for "the Commissioners of Customs and Excise". Who the individual commissioners are is irrelevant to Schedule 1 VATA because by virtue of s 13(1) CRCA "[a]n officer of Revenue and Customs may exercise any function of the Commissioners" except for matters which are not relevant here. So the answer to Mr Bridge[14] is that it was Miss Fairhurst, an officer of Revenue and Customs, who was exercising the function of the Commissioners for the purposes of Schedule 1 VATA.

98. At last we can turn to the decision made pursuant to paragraph 1(3), but we need to mention Miss Fairhurst's letter to the appellant of 17 May 2018, written at the suggestion of those in HMRC dealing with the appeal proceedings. This letter explained that "the Exception" (no statutory reference was given) only applied if a trader could show that the business would not be over the threshold in the next 12 months, and that this could be done either prospectively eg if the trader believed that, despite a large one off payment, normal trade would resume and they would be back below the deregistration threshold, or retrospectively if the trader could look at their records and identified one job that pushed them over and after that they dropped below the threshold.

99. And in a letter of 18 June 2018 in response to Mr Bridge's 6 questions about the previous letter, she said:

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[14] As to who the Commissioners are, there are as of the date of release of this decision, seven, Sir Jonathan Thompson, Jim Harra, Justin Holiday, Angela MacDonald, Penny Ciniewicz, Melissa Tatton and Ruth Stanier.

> "To clarify the exception.
>
> We can only grant exception if we are satisfied that the person will be below the deregistration threshold in the 12 months after becoming liable to be registered.
>
> We have to place ourselves back when you passed the VAT threshold looking forward to see if there is any evidence to show that the person would be below that deregistration threshold. There is no evidence to suggest that you held any evidence at the time that would have supported the decision."

100. We read the last sentence as meaning that on 1 July 2014 the appellant had no evidence that would show that his turnover would take him below the threshold by 30 June 2018.

101. Paragraph 1(3) is not without binding authority. In *Gray (trading as William Gray & Son) v Commissioners of Customs and Excise* [2000] STC 880, Ferris J said

> "**(i) At what date should the commissioners look at the position in making their decision under para 1(3)?**
>
> …
>
> 23. I conclude, therefore, that in cases of late registration as well as in cases where the trader notifies in due time, the commissioners must give effect to para 1(3) by considering the case as at the date from which registration would otherwise take effect and, by looking forward, asking themselves whether they are or are not satisfied that turnover will not exceed the threshold amount. Obviously they cannot do this otherwise than on the basis of what they consider to be likely. But 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. It is not enough that the appellate tribunal thinks that it would have reached a different conclusion on the same evidence.
>
> **(ii) What evidence is to be taken into account by the commissioners in making their decision under para 1(3)?**
>
> 24. In a case where the trader complies with his obligations in respect of notification the commissioners will not only consider whether they are satisfied as mentioned in para 1(3) as at the date from which registration would otherwise be effective but they will make their actual decision at about the same time. It must follow, in my view, that the only information which they can or should act upon is the information which is available to them at that time. There can be no unfairness or difficulty about this, because the trader will be able to draw to the attention of the commissioners, at the time when he notifies them of his liability to be registered, any facts which he wishes the commissioners to take into account for the purposes of making a decision under para 1(3).

102. The question then is whether it was unreasonable for Miss Fairhurst not to have been satisfied, on the basis of the information that could have been available to her on 1 July 2014, that the appellant's turnover would not fall below the deregistration threshold in the twelve months beginning on that date.

103. The statement of case puts it slightly differently when it says that the "one off job" that the appellant contended was material to his becoming liable to be registered may have reoccurred given the nature of his business.

104. Had HMRC relied solely on Miss Fairhurst's letter of 16 June 2017 then it would be reasonable to say that she, on behalf of the Commissioners, took into account matters that she should not have, that is the actual turnover for the 12 months following June 2014. The reason she did that is clearly that the letter was not intended to be a formal decision about paragraph 1(3) though we have, for the appellant's sake, taken it as such. Because of that we think HMRC are entitled to reformulate their case as they did in 2018 and we can see nothing wrong with what Miss Fairhurst said in the letter of 18 June 2018, as clarified in the statement of case.

105. For Mr Bridge's benefit we explain that our jurisdiction over a paragraph 1(3) decision by the Commissioners' delegate is supervisory, that is we do not look at the facts afresh and decide if the turnover did fall below the threshold in the next twelve months, as he seems at times to have assumed. That would not of course have helped the appellant as the turnover for the 12 months to 30 June 2015 was £92,920 (nor is it at all relevant what the turnover for the year ended 31 March 2016 was, as Mr Bridge seemed to think). Instead our jurisdiction is to decide whether Miss Fairhurst's decision was flawed in judicial review terms, that is whether she took into account matters she should not have or failed to take into account matters she should have or made an error of fact or law or otherwise reached a decision that no reasonable body of Commissioners (acting through their delegate) could have reached. And if we were to find that she had taken or not taken irrelevant or relevant matters into account we would still uphold her decision if putting aside those errors the decision would inevitably had been the same.

106. The only information that we can see that the appellant could have told the Commissioners on 1 July 2014 was that April 2014 was a low month of receipts by comparison with his average monthly turnover for the previous tax year (in which his turnover was £73,495), that May 2014 was substantially higher than that average and that June was about average. He has not supplied any evidence that would have shown that his future turnover would not have breached the limit eg by limiting his work to smaller projects or taking time off.

107. We recognise that anyone applying for the exception retrospectively is in a difficult position because they did not know at the relevant time that they would have to show evidence to convince HMRC of a fall in turnover. Mr Bridge did not put the appellant forward to give evidence to us about what he could have said at the time.

108. We are therefore unable to say that HMRC's decision is not one that they could reasonably have come to.

The penalty

109. Paragraph 1 Schedule 41 FA 2008 penalises a variety of failures. One of them is a failure to meet obligations:

> "… under paragraphs 5, 6, 7 and 14(2) and (3) of Schedule 1 to VATA 1994 (obligations to notify liability to register and notify material

> change in nature of supplies made by person exempted from registration)."

110. In this case it is the obligation under paragraph 5 which the appellant failed to comply with at the correct time.

111. Under paragraph 6 the maximum penalty for a failure which was not deliberate (as HMRC concede the appellant's failure was not) is 30% of the potential lost revenue ("PLR").

112. The meaning of PLR in a paragraph 1 case is in paragraph 7 Schedule 41 and for VAT is:

> "(6) … the amount of the value added tax (if any) for which [*the appellant*] is … liable for the relevant period (see sub-paragraph (7))….
>
> (7) "The relevant period" is—
>
> (b) … the period beginning on the date with effect from which [the appellant] is required … to be registered and ending on the date on which HMRC received notification of, or otherwise became fully aware of, [*the appellant's*] liability to be registered."

113. The PLR stated on the penalty explanation schedule was £8,323 covering a period from 1 July 2014 to 30 June 2015[15]. In view of our decision about the EDR this will have to be recalculated, subject to what we say below, but we are not in a position to do that.

114. A penalty may be mitigated from the maximum down to a minimum. In a case where the maximum penalty is 30% the minimum may be one of three amounts. It is 20% for a prompted disclosure where HMRC became aware of the failure 12 months or more *after* the time when the tax first became unpaid by reason of the failure, and 10% where HMRC became aware *less* than 12 months after that time.

115. It is 10% for a unprompted disclosure where HMRC became aware of the failure 12 months or more after the time when the tax first became unpaid by reason of the failure, and 0% where HMRC became aware less than 12 months after that time.

116. It is necessary then for HMRC to establish two things: was the disclosure prompted and when did they become aware of the failure?

117. HMRC say the disclosure was prompted because the appellant did not tell HMRC about the failure before they had reason to believe HMRC had discovered it. Mr Bridge denies that: in a letter to the Glasgow unit he said that he completed the appellant's tax return and clearly stated on this that the turnover was over the limit and registration was required, and that Miss Fairhurst "tacitly" accepted that 10% was correct.

[15] This is odd as the assessment with a figure only £59 different from this PLR covers all the periods to 29 February 2016. Had it mattered we might have held that the penalty was invalid on the basis of cases such as *Jacques v HMRC* [2005] SpC513 (Dr John Avery Jones).

118. HMRC have not produced that return or any attachments so we accept that HMRC were told of the failure before they had reason to be aware of it, and so the minima for unprompted penalties apply.

119. As to when HMRC were made aware then it must have been when the return was delivered which we assume was before the end of January 2016 (we assume it because HMRC did not produce any evidence and we would have expected Mr Bridge to have ensured that the return was delivered in time). The final issue is on what date did "the tax" first become unpaid by reason of the failure. Every person who is required to be registered for VAT (but who is not) is required to make a return for each quarter no later than the end of the month following the end of the quarter (says regulation 25 of the Value Added Tax Regulations 1995 SI 1995/2518 ("the VAT Regulations")). By regulation 40(2) of those regulations any person required to make a return must pay to the "Controller" the VAT payable by them in respect of the period to which the return relates not later than the last day on which they are required to make that return.

120. Thus in this case the appellant was required to pay VAT for Quarter ("Q") 4 2014 by 31 January 2015, for Q1 2015 by 31 March 2015 and for Q2 2015 by 31 July 2015. It follows then that as HMRC became aware of the failure within 12 months of the tax unpaid date for all periods, the penalty is a minimum of 0%. As HMRC have agreed a reduction of 100% from the maximum to the minimum, then 0% is the figure and so the penalty is 0% of the PLR and is £0.

121. As a result it is not necessary for us to consider whether the appellant had a reasonable excuse for his own failure or whether there were special circumstances. The grounds of appeal addressed the first point by referring to the appellant's ignorance of the law and his, or perhaps his wife's, lack of academic prowess, to use Mr Bridge's somewhat patronising phrase. We would not have accepted either as a reasonable excuse[16]. Mr Bridge also referred in this context to the appellant's having taken professional (ie his) advice, but having failed to act on it. Unfortunately taking professional advice many months after the failure cannot provide a reasonable excuse for the failure to notify in time. We do not know if Mr Bridge was acting for the appellant in May or August 2014 so as to give the appellant a possible reasonable excuse under paragraphs 20(2)(b) (reliance on a third party) or 21(1) (agent's failure). And we see no reason to disagree with HMRC's position that there were no special circumstances.

122. Mr Bridge did raise the issue of proportionality, mentioning *Enersys* and *Total Technology*. Even if we had upheld a penalty of 20% we could not possibly say that such a penalty was plainly unfair, as *Total Technology* says we must be able to do if we were to be able to hold the penalty regime in Schedule 41 FA 2008 or its application to this case to be disproportionate. *Enersys* is about a completely different system of penalties and a result which was by any standard very harsh and has no relevance here.

[16] Mr Bridge said that he realised that ignorance of the law was not an excuse. In *Perrin v HMRC* [2018] UKUT 156 (TCC) (Judges Tim Herrington and Kevin Poole) the Upper Tribunal held that it could be, but we do not think that it is in a basic area such as registration for VAT, particularly when the appellant's turnover for 2013-14 was so close to the limit.

Other grounds of appeal not otherwise covered

123. In his grounds of appeal Mr Bridge raised a number of matters which we have not so far considered.

124. One was "hardship". The quotation Mr Bridge gave from *Elbrook* applied in that case because there was an appeal against an assessment to VAT which in that case was an appealable decision because a return had been made for the relevant periods. Because of the provisions for VAT and other indirect taxes which require the tax to be paid upfront to be able to have an appeal against an assessment considered by the tribunal unless a successful application for staying payment on grounds of hardship is made, there are questions on the Notice of Appeal form about that subject (which Mr Bridge had ignored). But here because no return had been made, no appeal could be made against the assessments, and so hardship was not an issue.

125. With assessments to penalties under Schedule 41, the penalty is not payable pending the resolution of an appeal and so hardship is not an issue – paragraph 18(2)(a) Schedule 41 FA 2008.

126. The other two headings used by Mr Bridge that we have not so far considered are "No records inspected" and "Blame Culture". They are not relevant to any of the issues we have had to deal with but we do refer to what Mr Bridge said about them below.

Summary of decisions

127. We uphold HMRC's decision that the appellant should have registered for VAT before he did so, but vary the EDR to be 1 October 2014.

128. We uphold as reasonable HMRC's decision that they were not satisfied that the appellant would have been under the VAT deregistration threshold in the 12 months following EDR.

129. We cannot vary the assessment but accept Mr Haley's undertaking that the assessment will be amended in accordance with our decision on the EDR.

130. We vary the penalties to be at a rate of 0% of the PLR for the quarters 12/14, 03/15 and 06/15. The penalty for the quarter 09/14 is cancelled.

Postscript

131. In coming to the decisions, and the reasons for them, that we have set out above, have not considered in any depth all of the grounds of appeal or the outcomes that Mr Bridge has sought. This is primarily because the points we have not considered are not within the jurisdiction of this tribunal. This includes the conduct of officers of HMRC in relation to which the remedies available to a taxpayer are well established, including the complaints procedure set out by HMRC leading eventually to the Revenue Adjudicator and judicial review.

132. This tribunal, and Judge Thomas in particular, has, on occasion, been critical of the conduct of officers of HMRC, particularly in investigation cases and compliance checks. But the tribunal recognises that officers of HMRC carrying out these checks

are constrained by management edicts and the need to use standardised letters[17] and procedures. Miss Jodie Fairhurst is no exception. She would, we are sure, agree that not everything she did in this case was perfect. It is understandable in the circumstances, but perhaps rash, that she should undertake to reply within a given timeframe but fail to do so. This was the only matter about which three different officers of HMRC in the Complaints offices could find fault with her conduct and we fully agree with what they said.

133. But we go further. What we have seen from Miss Fairhurst showed a willingness to assist the appellant as far as possible, by for example advising him about the FRS and what the consequences of changing his method of operation might be.

134. This is not the way Mr Bridge saw Miss Fairhurst. At first all seemed to be sweetness and light. Mr Bridge was on "Dear Jodie" terms with her. Then something changed, or snapped. Mr Bridge revealed that he had a different side to him. We set out now what Mr Bridge did that has caused us a great deal of concern.

135. The first letter from Mr Bridge that evidenced his complaints about Miss Fairhurst's conduct of the case was his of 23 May 2017. In this he referred to his supplying her with the monthly receipts schedules by return of post in FEBRUARY (his capitalisation) saying he had done "all the work" for her:

> "so come on and set out your proposals for settlement 'hotfoot' so that we can make progress with the case and put my client and his wife out of their misery"

136. On 24 March 2017 Miss Fairhurst had explained how she was going to deal with the case, by a "liable not liable assessment" but before then she wanted to be sure whether there were input tax figures to be considered or a claim to use the FRS if that was more advantageous. She showed the figures of output tax that would be included in the assessment on the basis of Mr Bridge's monthly analysis of turnover. She also referred to penalties and gave the appellant factsheets about that.

137. On 30 March in a letter she referred to a phone call with Mr Bridge and gave further information about the FRS and explained about what might happen if his turnover changes. She asked for figures for actual input tax, rather than the FRS basis, to be sent to her by 30 April 2017.

138. On 11 April Mr Bridge attached his figures for an actual basis and showed the amount of VAT payable on that basis. He did ask for the appellant's case to be given priority, and in his letter of 23 May referred to two occasions after 11 April on which Miss Fairhurst promised a reply "forthwith".

139. But we do not understand what Mr Bridge meant by "proposals for settlement" that were still to be provided. He knew the amount of VAT, and from the factsheets he could work out the likely level of penalties and from the factsheets given about compliance checks and penalties he knew how HMRC carry out compliance checks.

[17] Such as Miss Fairhurst's opening letter which is unlikely to be relevant for the most part in a compliance check for failure to notify, where there is no suspicion of errors in the returns, a distinction which Mrs Jarman of ISBC Complaints, replying on behalf of Jon Thompson, recognised. The reference to Schedule 36 FA 2008 inspection powers is also misplaced in such a case.

What "amicable settlement" other than the appellant being required to pay the VAT and a modest penalty did he expect?

140. Miss Fairhurst's response on 2 June 2017 was to agree the figure of VAT and make a formal decision about registration in which she correctly set out the relevant legislation, and to ask for any further information Mr Bridge wanted her to consider in relation to penalties. She also set out appeal or review rights in relation to the decision on registration.

141. Mr Bridge's response to this reasonable and correct way of conducting a compliance check of this type was, to use a colloquialism, to "go ballistic". The first complaint was to a non-existent official, the "District Inspector" of the VAT Office, the second three days later to Colin Barclay, an assistant director in ISBC whose name was on Miss Fairhurst's letters. One difference between the circumstances surrounding the two letters that needs to be noted is that the first crossed with Miss Fairhurst's reply of 2 June.

142. In the letter to the "District Inspector" Mr Bridge said that never in his 50 year career as a chartered accountant had he ever dealt with a case where there was an Enquiry where he, the agent, had produced all the information for the HMRC office without his officers inspecting any documentation and thereby saving the Exchequer a vast sum of money.

143. Nor had he known an Enquiry where there was a complete disregard for the feelings of his client and in particular Mrs Potts, who was, he said, beside herself with worry.

144. Mr Bridge then set out his own experience with "Back Duty" cases dealing with "all shades of individuals who had little or no regard for the law", contrasting this with the Potts "who are a law abiding and kind couple". He ended by referring to the "truly appalling" way the case had been handled

145. The letter to Mr Barclay, who was undoubtedly several grades superior to Miss Fairhurst and several tiers of management above her, began by acknowledging that he had received a rely from Miss Fairhurst to his letters but still maintained that it was the "most badly managed" enquiry he had become involved in since becoming a Chartered Accountant 50 years earlier. He then set out what he saw as the facts. These included:

(1) "Unacceptable delay", particularly in the light of the matters referred to in §138.

(2) The information was provided by him following instructions from Miss Fairhurst, and he reserved the right to invoice HMRC for his services depending on the outcome of the enquiry

(3) No documentation had been checked or taken away by HMRC, a procedure which is fundamental to any Enquiry

(4) The work carried out by him resulted in a considerable saving to the exchequer and is a material mitigating factor.

(5) HMRC made no mention of the position of Mrs Potts who was distraught about the couple's inability to find the money needed to pay the tax and whose mother had just died, despite him setting out the facts in his letter of 11 April.

(6) He would be seeking compensation for his client, depending on the outcome of the enquiry

(7) In her letter of 2 June 2017 Miss Fairhurst referred to the law supporting her decision. This statement was "incomplete, incorrect and misleading" as no mention was made of "paragraph 3" Schedule 1 VATA. He then stated what he believed she should have set out. Nor had she in her letter referred to a "one off" job and that "paragraph 3" might apply.

(8) He also referred to Mr Potts' serious financial situation, and ended with a plea for compassion.

146. His next letter in this vein was a response to Miss Fairhurst's subsequent letter of 16 June which was her response to the letters of 5 and 8 June.

147. In this letter Mr Bridge said that:

(1) he had headed the letter "PRIORITY" to attract the correct response rate. He said that because of the failure by Miss Fairhurst twice to keep an undertaking to reply and because she was then written to with two reminders, she deserved being reported to her superiors. He remarked that to "go on and say that you 'both'[18] (I do not know who this is) were on leave is extraordinary. If you were in private practice you would be out of business".

(2) Miss Fairhurst's statement that "you offered me information you had collated prior to my enquiry" was "totally and utterly untrue".

(3) She did not give a damn about Mrs Potts.

(4) "So who are you not to refer to parts of the Act that 'I do not deem it appropriate to your trader'. … You are the HMRC officer in charge setting out the law and not there to offer your opinion on what parts of the law apply or don't apply".

148. Taken together these three letters set out all the matters about which Mr Bridge complained in relation to Miss Fairhurst's conduct of the case. It would be tedious and pointless to consider each subsequent letter by Mr Bridge to Complaints officers (four times), to Mr Barclay again (twice), to the ADR Team Leader, to the Glasgow penalty office, and to Jon Thompson (twice) and to the Revenue Adjudicator, except to note that Mr Bridge also considered that the Complaints officers were seriously at fault.

149. It suffices for this purpose to note some things Mr Bridge said about Miss Fairhurst and her investigation in these letters:

(1) Miss Fairhurst's failure to respond despite her undertakings indicated "poor training and arrogance".

[18] Despite Mr Bridge's use of quotation marks, the word "both" in not in Miss Fairhurst's letter. She referred to the "parties". She had clearly informed him that she was on leave from 30 March until 11 April, the precise date on which he chose to reply with two letters.

(2) There was total disregard for his client's wife's feelings, particularly as she had just lost her mother.

(3) This case was by far the worst conducted he had ever encountered in his career.

(4) Miss Fairhurst did not give the acknowledgement he had requested in his letter of 15 December 2016 about her visit. This was "bad manners and no professional etiquette".

(5) "This was a totally botched enquiry, with delays, lack of correct procedures, incorrect statements about information provided. How on earth would my client have fared without professional help? How on earth would HMRC VAT have prepared any calculations without the Agent reducing the figures and HMRC not inspecting any documentation? I may be a lot of things but I am honest and professional in my work and have standards – your former boss Sir Nicholas Montagu knows me and will vouch for this".

(6) "[N]either Miss Fairhurst nor Mrs Black (a complaints officer) have been held to account by anyone. If they worked for me they would have some explaining to do" [this to Jon Thompson]

(7) "Not only did [Miss Fairhurst] produce initial figures that were incorrect it needed myself to furnish her with figures that showed a larger liability to tax for the benefit of HMRC. You [Mrs Jarman, writing on behalf of Jon Thompson] have made no mention of this and this is negligence of the worst order."

150. The members of the Tribunal have debated at some length about the adjectives we should use to describe our view of Mr Bridge's conduct. We say that we think it was wholly unnecessary and grossly disproportionate to any fault, such as an alleged lack of bad manners, on Miss Fairhurst's part. Other adjectives were used in discussion but we have decided on these rather than using stronger terms for two main reasons.

151. In many of his letters Mr Bridge has recounted his experience in a major practice as a chartered accountant in Blackpool and told the recipients of his letters that he was highly experienced in dealing with the Inland Revenue in Back Duty[19] cases including

[19] "Back Duty" is a term used in the Inland Revenue and by practitioners to refer to investigation into losses of tax from omissions in, and fraudulent practice in relation to, returns and accounts. The term refers to the taxes and duties, particularly Excess Profits Duty ("EPD"), which was the first tax to be seriously evaded by more sophisticated means than just omitting income from a tax return. It was evasion of EPD in particular which led to the setting up in 1920 of the Inland Revenue's Enquiry Branch (see fn 17).

Hansard[20] cases, and taking such cases before the General Commissioners[21]. He also said that he had retired from that practice, but while living in Nantwich in his retirement he had picked up a few clients with simple tax return issues.

152. We think that he began to understand that the world of tax had passed him by in his retirement, and that he was indeed out of touch with what happens in tax and in the government department responsible in this decade rather than say the 1970s or 1980s. His use of out of date terms such as "Back Duty", "District Inspector[22]", "Hansard", "General Commissioners" and even "Enquiry" show this. We think this goes someway to explaining why Mr Bridge felt it appropriate to refer what he was perturbed by in Miss Fairhurst's conduct to the most senior level in HMRC in an effort to bring Miss Fairhurst to account. He did not understand that he was not dealing with a hard bitten, experienced Enquiry Branch investigator in Grade 6 (Senior Inspector to him) but a much more junior officer who was not, despite what he seems to have thought, conducting an enquiry into possible fraudulent conduct in his client's tax affairs.

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[20] This is a shorthand term for the practice of, particularly, the Enquiry Branch of the Inland Revenue (which was the part of that organisation which investigated fraud in tax returns and accounts) when opening a civil enquiry to read out a written statement that had been published in the account of proceedings in Parliament in Hansard when first made in 1923. It had been the subject of subsequent statements most recently on 7 November 2002 [HC Deb vol 392 c784W]:

> **Mrs. Lawrence**
> To ask the Chancellor of the Exchequer what the present practice of the Board of Inland Revenue is with regard to instituting criminal proceedings in cases of suspected serious tax fraud. [80100]
> **Mr. Gordon Brown**
> Further to the statement made on 18 October 1990 at column 882 by the then Chancellor, the right hon. John Major, the practice of the Board of Inland Revenue in cases of suspected serious tax fraud is as follows. The Board reserves complete discretion to pursue prosecutions in the circumstances it considers appropriate. Where serious tax fraud has been committed, the Board may accept a money settlement instead of pursuing a criminal prosecution. The Board will accept a money settlement and will not pursue a criminal prosecution, if the taxpayer, in response to being given a copy of this Statement by an authorised officer, makes a full and complete confession of all tax irregularities.

This, and the questions asked after its being read out, is now part of the Code of Practice (COP) 9 procedure started in 2005.

[21] This is a reference to the "Commissioners for the general purposes of the income tax" as they are properly called in eg s 2 TMA (as originally enacted). These Commissioners were a lay body (with a property qualification for many years) covering a "division", an area which was often the hundred or other similar named area (eg wapentake or lathe) of a county used for the purposes of the land tax. For example, the division covering where Mr Bridge's practice was based was known historically as the Division of the Hundred of Amounderness, but which came to be more prosaically named the Division of Blackpool (much to the chagrin of the late Paul de Voil, a former Special Commissioner, who wrote a book on tax appeals. General Commissioners sat as a bench with (usually) a legally qualified clerk and they heard long lists of tax appeals often on a monthly basis and they were encouraged to apply their own local knowledge. They were replaced by this Tribunal in 2009.

[22] The "District Inspector" ("DI") was the Inspector of Taxes in charge of a local district office in the Inland Revenue. Nearly all Inland Revenue work was carried out by local offices dividing up the country and situated in or near the town or city they were named after. A DI had considerable autonomy and it was the DI whose name was on the notices to make and deliver a tax return and on assessments and whose name was used in the reports of tax cases in the HMSO volumes and elsewhere. This practice seems to have died out in England and Northern Ireland in 2005. It was not followed in Scotland from a much earlier date (in Scottish cases it was the Commissioners of Inland Revenue who were named).

153. The second reason we have characterised Mr Bridge's conduct in the terms we have is that we think that he was too closely involved and emotionally engaged with his client. He admitted that not only was the appellant, for whom he was acting *pro bono*, his client, but also his own plumber and a friend from his common interest in rugby. This attachment is obvious from his repeated requests to officers of HMRC up to and including Jon Thompson to take account of the fact the appellant was one of the most honest and decent people one could meet and were extremely hardworking, that the appellant's wife was a "lovely young mother" and that his children were delightful and extremely well mannered, as well as the distress that the investigation and the amount of money demanded had caused them.

154. But while these factors may explain Mr Bridge's conduct they do not excuse it. So we fully understand why Mr Haley, having seen that Miss Fairhurst was indicated to the tribunal as a witness, did not put Miss Fairhurst forward to give evidence and be exposed to cross-examination by Mr Bridge. This was a wise decision, as we would expect from Mr Haley, who this panel of the Tribunal in particular greatly respects.

155. What we find particularly unappealing about Mr Bridge's conduct is his splenetic complaints about Miss Fairhurst's own statements where he is completely wrong. We have mentioned his complaints about Miss Fairhurst's alleged inadequate citing of the VAT legislation relevant to her decision on registration. There is an even worse example – in a letter to Mr Patel of ISBC Complaints, Mr Bridge complains that Miss Fairhurst did not quote sufficient legislation adding (verbatim) that "There is the whole of VATA 1994, SI1995/2518Pt 11;FA 2016,s123". There are several points to be made about this – either he meant the whole of Part 11 of those Regulations and s 123 FA 2016 or he meant the whole of Schedules 1 to 3A VATA 1994 and that part of the Regulations. He cannot have literally meant the whole of VATA. We cannot decide, but in either case what he said is plainly wrong. We can say that even after ignoring that s 123 FA 2016 has nothing to do with registration. We can also say that part 11 (eleven) of the VAT Regulations has nothing to do with registration: Part II (roman 2) does. This is negligent of him. It is the opposite of cherry picking, which he falsely accused Miss Fairhurst of – he wanted a whole orchard (about 20 pages in the current commercial publications) referred to for no good reason whatsoever.

156. He had said to Miss Fairhurst (see §57(4)) that it was not the duty of HMRC Officers to tell taxpayers their own opinion – it was their duty to set out the full legislation relation to registration, "not cherry pick". An officer of HMRC is entitled to give their opinion, based on the law and HMRC guidance, of what legislation is relevant to the issue they are dealing with. What Miss Fairhurst did was what she should have done, as what she said was entirely relevant to the issue she was dealing with and she did not ignore any other relevant law. Mr Bridge on the other hand could not properly specify what law he was talking about, but was content to make misleading accusations about Miss Fairhurst.

157. We also find Mr Bridge's repeated complaints about Miss Fairhurst's approach to her compliance check wholly misguided. He must know what is an elementary proposition in VAT, that HMRC are entitled to reach a decision so long as they do it honestly and fairly and it is for the subject of that decision to appeal and show it is wrong and how. Miss Fairhurst cannot be blamed in the slightest for taking the appellant at his word, words actually supplied by Mr Bridge, that he had breached the

VAT threshold as his income tax return for 2014-15 demonstrated. A person who breached the threshold is required to register within a month after the month in which they breach it – this is elementary VAT law and is in paragraph 5 Schedule 1 VATA. The appellant had not given the information about turnover that he should have given in a VAT1 application submitted at the appropriate time. Miss Fairhurst did the only thing she could and divided the annual turnover by twelve. She was not obliged to do anything else but wait for the appellant to give such information as he wished, which might, as we have said, have shown that the EDR was in fact later.

158. We agree with Mrs Jarman, writing on behalf of Jon Thompson, that a failure to notify compliance check is not the same as what Mr Bridge knows as a "Back Duty Enquiry", ie an enquiry into suspected incorrect accounts and returns. There may be, and often will be, in a failure to notify enquiry no need to investigate records: Miss Fairhurst was not suggesting that the appellant's accounts were wrong, and we have no evidence that any income tax enquiry was started under s 9A TMA into them. Had it been a check into the contents of the returns, a back duty enquiry, then Mr Bridge's complaints about her not investigating the records would have had some force, but here they have none and are wrong and misguided. He did not therefore save the exchequer any costs and his invoice was a petty stunt, a further effort to demean Miss Fairhurst in the eyes of her superiors.

159. We can find nothing in the papers that shows that the appellant informed Miss Fairhurst about the death of Mrs Potts' mother, even though he berates her for lack of feeling about the appellant and his family. We do not understand what Mr Bridge was trying to achieve by his constant references to the Potts' virtues and their lack of academic (or "academical" as he also says) prowess. He should have known that HMRC have no discretion about when to register a trader exceeding the threshold, and that paragraph 1(3) Schedule 1 VATA, the elusive sub-paragraph that deals with the "exception" from VAT (the forward look) does not depend on the appellant's character but his ability to produce convincing evidence. Such matters as a person's ignorance and even hardship may be relevant to a penalty, but Mr Bridge has said that he understood that a penalty was due where there was a misdemeanour such as a failure to register. He says he suggested to Miss Fairhurst that 10% was appropriate, not 30%. Was the use of the Potts' character and Mrs Potts' distraught reaction which he graphically described aimed solely at reducing the penalty to 10%? If it was relevant at all it would have gone to reduce the penalty to nil, not 10%. Our conclusion is that Mr Bridge was brandishing his remarks about the Potts as a weapon, as emotional blackmail, to try to get Miss Fairhurst and then those above her in the hierarchy and in the complaints unit, to completely remove the VAT that was eventually assessed on the appellant, as Mr Bridge says in his Notice of Appeal was his desired outcome.

160. We mention one more matter. Mr Bridge said (see §147(1)) that for Miss Fairhurst to "go on and say that you were on leave is extraordinary". It was nothing of the kind. Miss Fairhurst clearly told Mr Bridge on 30 March that she would be back in the office on 11 April. Knowing that, he decided to send letters on 11 April and then immediately complained that Miss Fairhurst had done nothing.

161. We will not burden this decision further by analysing the unpleasant remarks Mr Bridge made to Mrs Jarman, save to say that we can find nothing in what she said that was in any way incorrect or inappropriate.

162. Finally to Mr Bridge we say that knowing him to be an honourable man we do not doubt than when he reads this decision and reflects on it he will apologise to Miss Fairhurst for what he has said. We suggest that after that reflection he should consider, should any contentious issues of this sort arise in relation to any of his clients, whether it would be better to pass them on to someone closer in touch with current practice in that field.

Rights of appeal

163. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 08 APRIL 2019