TC02815

Appeal number: TC/2012/09192

VALUE ADDED TAX – Flat Rate Scheme – Part VIIA VAT Regulations 1995 - Appellant exceeded upper thresholds – whether decision of HMRC to withdraw scheme was unreasonable – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK SAGGERS MEDIA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
ELIZABETH BRIDGE

Sitting in public at Norwich on 2 July 2013

Jane Saggers, Company Secretary, for the Appellant

Patricia Checkley, Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of HMRC notified to the Appellant in a letter dated 19 September 2012 to remove the Appellant from the Flat Rate Scheme ("FRS") with effect from 3 March 2011.

2. The FRS is a scheme designed to simplify VAT compliance and administration for small businesses. Instead of accounting for VAT on the conventional basis of output tax minus input tax, the FRS allows a trader authorised to use the scheme to account for a flat rate of VAT on its output supplies. The trader is allowed no deduction for input tax. The flat rate used varies according to the business sector of the trader concerned. Obviously enough, the flat rate percentage use is designed to produce only an approximation of the true liability for the relevant period.

3. The FRS is designed only for small traders. There are limits on the amount of supplies which a trader can make. If the trader exceeds these limits then, in broad terms, HMRC can remove the trader from the FRS, unless it appears that the amount of supplies to be made in the next period is likely to fall within the relevant limits.

4. In this appeal, the Appellant has exceeded the limits and HMRC has removed it from the FRS. The Appellant wishes to remain in the FRS and appeals against HMRC's decision.

The legislation

5. The relevant provisions in relation to the FRS are contained in Part VIIA Value Added Tax Regulations 1995 SI 2518 ("the Regulations").

6. Regulation 55B (2) provides that the date on which a trader is authorised to use the scheme is known as the "start date."

7. Regulation 55B provides that a trader is eligible for admission to the FRS if the value of taxable supplies to be made in the year then beginning will not exceed £150,000.

8. Regulation 55M contains provisions relating to the withdrawal of a trader from the FRS as follows:

> (1) Subject to paragraph (2) below, a flat-rate trader ceases to be eligible to be authorised to account for VAT in accordance with the scheme where—
>
> (a) at any anniversary of his start date, the total value of his income in the period of one year then ending is more than £230,000 [£225,000 prior to 4 January 2011],

(b) there are reasonable grounds to believe that the total value of his income in the period of 30 days then beginning will exceed £230,000 [£225,000 prior to 4 January 2011],

(c) …

(d) …

(e) …

(f) …

(g) …

(h) his authorisation is terminated in accordance with regulation 55P below.

(2) A flat-rate trader does not cease to be eligible to be authorised by virtue of paragraph (1)(a) above if the Commissioners are satisfied that the total value of his income in the period of one year then beginning will not exceed £191,500 [£187,500 prior to 4 January 2011].

(3) In determining the value of a flat-rate trader's income for the purposes of paragraphs (1)(a) and (b) and (2) above, any supply of goods or services that are capital assets of the business in the course or furtherance of which they are supplied, shall be disregarded.

(4) For the purposes of this regulation, "income" shall be calculated in accordance with the method specified in regulation 55G(1) (determining relevant turnover) used by the business to determine the value of its turnover whilst accounting for VAT under the scheme.

(5) …

9. Regulation 55N requires a trader to notify HMRC in writing within 30 days where any of the sub-paragraphs (a) to (g) of Regulation 55M (1) apply.

10. Regulation 55P allows the Commissioners to terminate the authorisation of a flat-rate trader at any time if:

(a) they consider it necessary to do so for the protection of the revenue, or

(b) a false statement was made by, or on behalf of, him in relation to his application for authorisation

11. Regulation 55Q provides for the date of withdrawal from the FRS, as follows:

The date on which a flat-rate trader ceases to be authorised to account for VAT in accordance with the scheme shall be—

(a) where regulation 55M(1)(a) applies—

(i) …

(ii) in all other cases, the end of the prescribed accounting period in which the relevant anniversary occurred,

(b) where regulation 55M(1)(b) applies, the beginning of the period of 30 days in question,

(c) …

(d) …

(e) …

(f) …

(2) The date with effect from which a person ceases to be so authorised shall be known as his end date.

12. Finally, it is important to note that the jurisdiction of this Tribunal, in relation to an appeal concerning the withdrawal of a trader from the FRS by HMRC, is limited. In such cases section 84 (4ZA) Value Added Tax Act 1994 provides:

> "… the tribunal shall not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied that there were grounds for the decision."

The facts

13. The Appellant's company secretary, Jane Saggers, appeared for the Appellant at the hearing. Her evidence was not challenged by HMRC and we therefore find her evidence as fact.

14. The Appellant was owned by Mark Saggers, the well-known TV and radio sports presenter, and his wife Jane Saggers, who worked in TV news as a reporter and presenter. The Appellant's business is a supply of services by Mr and Mrs Saggers to media companies and to other institutions requiring journalism or media services.

15. Originally, Mr and Mrs Saggers carried on business as sole traders and then, from the mid-1980s, in partnership.

16. Mr Saggers worked for the BBC as a sports presenter for Radio Five (now known as Five Live). In 2005 the BBC informed Mr Saggers that if he wished to continue having contracts with the BBC it would be necessary for him to form a limited company. At the time Mr Saggers had a valuable rolling annual contract with the BBC.

17. Accordingly, Mr and Mrs Saggers formed the Appellant. Mr Saggers' contract with the BBC was the largest contract that the Appellant had at that stage, although it also had other contracts (mainly involving Mrs Saggers) for freelance news work at other national news organisations. In addition, the Appellant also undertook work involving Mrs Saggers in relation to conference presentation, media training, public relations and some crisis management (for clients who found themselves in an unwanted media spotlight). It was fair to say, however, that Mr Saggers' contract with the BBC was the mainstay of the Appellant's business.

18. The Appellant was registered for VAT with effect from 1 April 2005 and estimated its turnover to be £120,000 over the next 12 months. The Appellant applied to join the FRS on 1 April 2005 and its main business activity was described as "journalism". HMRC authorised the use of the FRS on 12 May 2005. The FRS was

operative from the first VAT period to 31 May 2005 with the anniversary date being 31 March each year.

19. Authorisation to use the FRS simplified the Appellant's accounts and eased the administrative burden on Mrs Saggers.

20. The turnover of the Appellant and the thresholds provided for by the Regulations for the years to 31 March were agreed by the parties to be as follows:

QTR Ended Tax Year	**June**	**Sept**	**Dec**	**March**	**Total to March**	**Lower threshold**	**Upper threshold**
2005/06	10,939	50,864	49,386	49,502	**160,691**	150,000	225,000
2006/07	44,618	54,745	47,580	42,910	**189,853**	150,000	225,000
2007/08	45,041	47,388	44,847	45,350	**182,626**	150,000	225,000
2008/09	47,016	58,577	49,988	47,846	**203,427**	150,000	225,000
2009/10	63,875	53,761	65,923	52,816	**236,375**	150,000	225,000
2010/11	60,377	68,365	68,814	57,123	**254,679**	150,000	225,000
2011/12	65,404	59,120	59,328	75,292	**259,144**	150,000	230,000
2012/13*	74,427	33,524				150,000	230,000

*The figures for 2012/13 were incomplete but Mrs Saggers thought it likely that the total turnover for the year would be in excess of £230,000.

21. As will be plain from the above Table, the Appellant was authorised to use the FRS for several years. The disputed year is 2011/12.

22. In 2009 Mr Saggers' contract was unexpectedly not renewed by the BBC. Mr and Mrs Saggers were concerned whether Mr Saggers which easily be able to replace that contract. Mr Saggers was then 50 years of age. Both Mr and Mrs Saggers redoubled their efforts to find additional work for the Appellant.

23. Later in 2005 Mr Saggers started working for a London-based 24-hour sports news radio station called talkSPORT, although without any formal contract and with no guarantee of future work.

24. Mrs Saggers, through a chance meeting, was working as a freelance (i.e. with no contract) in a news executive role at ITV in Birmingham. Large-scale redundancies were being made across ITV News and Mrs Saggers was brought in whilst managers were involved in the redundancy process.

25. Mrs Saggers emphasised the precarious nature of the working environments of both herself and her husband. They were each working without contracts and neither was guaranteed future work. They were working long and unsocial hours in different cities.

26. Moreover, as the downturn in the economy continued, the Appellant's business was impacted. Mrs Saggers explained that conference work was arranged but then cancelled by clients as "unnecessary spending." The same was true as regards public relations work.

27. Mrs Saggers' evidence was that her role in media crisis management was very unpredictable and no reasonable estimate of the turnover from that activity could be made. For example, one assignment in relation to media crisis management for a high-profile institution in 2010/11 produced sales of £8,749.93. However, during 2011/12 sales from this activity halved to £4,403.96 and since 6 October 2011 there had been no media crisis management work at all.

28. In addition, one of the Appellant's clients unexpectedly rejected invoices for £44,000 worth of work – the agreed price – and only paid £36,000.

29. Mrs Saggers appreciated that a turnover forecast was a prediction and not an exact science but the precariousness of the Appellant's business made it difficult to estimate with projected turnover with confidence.

30. In 2012 events such as the London Olympics brought opportunities but no guarantee of work. Mrs Saggers noted that in relation to major sporting events the Appellant's business was reliant on which company held the media rights licence to cover the events.

31. On 19 May 2010, HMRC notified the Appellant that it was no longer eligible to use the FRS as the value of its supplies in the previous 12 months had exceeded £225,000. The Appellant was instructed to follow normal VAT record-keeping and accounting rules.

32. Mrs Saggers wrote to HMRC on 27 October 2010 and explained that there had been a one-off piece of work which had boosted the Appellant's turnover. Moreover, Mrs Saggers explained that she expected the Appellant's income would fall back below £191,500 in the following year.

33. Mrs Saggers told us that in 2010, as a result of a chance contact, the Appellant was engaged in a project for a school to produce DVDs. This required hiring subcontractors e.g. cameraman and digital craft editors. This project produced sales of £27,831. However, there was no reason to expect that that work would be repeated. This was the one-off piece of work to which she referred in her letter of 27 October 2010. Nonetheless, Mrs Saggers' work was seen by another client in the education sector and the Appellant was asked to supply that business with a DVD video production. Mrs Saggers emphasised, however, that the work in that sector never matched the first project in terms of billings.

34. HMRC responded on 2 November 2010 agreeing that the Appellant could remain within the FRS on the basis that the Appellant's turnover in the following year was estimated not to exceed £187,500 (in fact, Mrs Saggers had estimated to be £191,500) and that the increase arose from genuine commercial activity.

35. On 6 January 2011, Mrs Saggers contacted HMRC to confirm the new FRS rate (12.5% from 4 January 2011).

36. On 15 August 2012, Mrs Saggers wrote to HMRC noting that the Appellant's turnover had exceeded the threshold in 2011/12. She noted, however, that although turnover had increased profits were lower than in the previous year. She asked that the Appellant should remain within the FRS noting:

(a) turnover was expected to drop below £230,000;

(b) the Appellant was working entirely on a freelance basis with no contracts or guaranteed income;

(c) an informal working arrangement with ITV was due to come to an end at 31 August 2012; and

(d) Euro 2012 and the London Olympics provide good earning opportunities in Q1 and Q2 of the Appellant's financial year but were not expected to be matched by any other special events in Q3 or Q4.

37. In a letter dated 22 August 2012, HMRC replied stating that the Appellant had been taken out of the FRS because the turnover had exceeded the £230,000 threshold limit. HMRC considered that it was unable to reinstate authorisation for the FRS because the Appellant had not met the required criteria. The letter gave the following reasons:

(a) the Appellant had previously been taken out of the FRS for breaching the upper limit (18 May 2010) but HMRC considered that such an event had to be a "one-off."

(b) The Appellant had been reinstated from 19 May 2010 after stating that the business plan forecasted a turnover for 2010/11 of £168,000. Instead, the turnover was by the anniversary date of entering the FRS £254,679.

38. HMRC stated that the Appellant's eligibility to remain on the FRS would be considered to end on 31 December 2010. It directed the Appellant to resubmit returns for subsequent periods using the standard method of accounting.

39. Mrs Saggers wrote to HMRC on 27 August 2012 requesting an independent review. Mrs Saggers wrote:

> "I am seeking an impartial review on the following grounds:
>
> - Your Notice 733, paragraph 3.4, states that if our forecast turns out to be too low, you will not penalised provided there were reasonable grounds for the forecast. I do believe I had reasonable grounds for the forecast because the company has

had no reason to believe turnover would have breached the upper limit. Our basis for this was and still is:

1. The precarious nature of our business where jobs are being lost. No business confidence re turnover.

2. The company had no formal contracts for the first time in the company's history – an unprecedented way of working reflecting the uncertainty and nervousness in the market.

3. Challenging times in the workplace where the personnel involved have to work much harder to obtain work with no guarantee or security of retaining it. All on ad hoc basis with uncertainty amongst clients.

4. The anticipated turnover for 2010/11 was based on an average monthly sales of £14,000, taking into account that the company's biggest contract with BBC Radio Five Live had not been renewed. There was no anticipation of a one-off piece of work [the DVD project] which brought in sales of £27,831 (exclusive of VAT) being repeated.

5. The annual forecast was put at £168,000 and company records show this projection was based on a forecast of Mark Saggers selling £12,500 services per month and Jane Saggers selling £1,500 services.

- We had your letter dated 2 November 2010 which we assumed we were entitled to rely on until you notified us to the contrary. My records show that I called your offices on 4 January 2011 to discuss the flat rate scheme. I was advised that the business should be charging 12.5% VAT…. [we take this to mean that the Appellant should be accounting on a 12.5% flat rate]

- All VAT has been paid in full and on time and has been treated seriously and importantly by the company. HMRC have therefore had full information on the level of our actual turnover and did not write to inform me that we were being expelled from the flat rate scheme. Surely it is reasonable for me to believe you would do so, having previously done so in your letter of 18 May 2010.

- I carried out our annual check on turnover for the year ended 31st of March 2012 as required at point 12 .3 of your Notice 733 and that this point, without prompting, I wrote to you. This dispute has therefore arisen from the company letter to HMRC, not the other way round."

40. HMRC wrote to the Appellant on 19 September 2012 with the results of the independent review. It is worth setting out this letter in detail, as follows:

"I have looked at our records and noted that you were first accepted onto the Flat Rate Scheme as of 1 April 2004. You breached the limit of £225,000 as of 31 March 2010 and we wrote to you informing you of this 19 May 2010. You wrote to us on the 27 October 2010 telling the reason for the breach and gave us an estimated turnover of

£168,000. We accepted this and reinstated you back on the scheme as of 19 May 2010. In order to reinstate you we have to set a signal to override the automatic withdrawal system which removed [sic] as you had not informed us of your breach. This means our automatic system does not continue to check your returns and we have to rely on you to check your returns each year on your anniversary of joining the scheme as per 12.2 of 'Notice 733 flat rate scheme for small businesses', a copy of which can be found on our website www.hmrc.gov.uk.

When you sent in the letter of 14 August 2012 requesting to remain on the scheme, my colleague totalled your returns for the period 1 April 2010 to 31 March 2011 which was still the Flat Rate anniversary year and noted they totalled £254,679. He also totalled your returns for the period 01/04/12 to 31 March 2012 and they totalled £259,144. I have enclosed a spread sheet showing your returns [not included in the papers before the Tribunal].

At that point he took the course of action of retrospectively removing you from the scheme as he believed your estimated turnover figure had no reasonable basis and removed you as of 31 December 2010 as this was the first date your turnover went over the £191,500.

I have read your letter and your reasons for believing the estimated turnover would be fairly correct and I am prepared to accept that at the time you wrote the letter of 27 October 2010 you believe the figure given would be correct.

However at your anniversary of 31 March 2011 you had once again breached the upper threshold of £230,000. Unfortunately you did not inform us of this as you should have done and carried on using the scheme and as of 31 March 2012 you again breached the upper limit.

Therefore I am sorry but I have no alternative than to remove you from the Flat Rate Steam as at your anniversary date of 31 March 2011, this being the second breach of being on the scheme. Therefore all returns on the state need to be resubmitted under standard rate."

41. In other words, the reviewer accepted that the Appellant could remain in the FRS until 31 March 2011, but from that date the Appellant had to account for VAT on the conventional basis and was no longer authorised to use the FRS. Thus, from that date the Appellant had to re-compute its VAT and submit its returns on a conventional basis. The chorus this appeal is the Appellant's belief that it should not be required to come out of the FRS for the period 1 April 2011 to 31 March 2012.

42. Also on 19 September 2012, HMRC wrote to the Appellant formally removing it from the FRS.

43. The Appellant filed its appeal on 25 September 2012. The Grounds of Appeal stated as follows:

(1) HMRC did not inform the Appellant in his letter of 2 November 2010 about future exclusions from the scheme.

(2) It was entirely reasonable for the Appellant to expect HMRC would write again if it was to be excluded from the FRS as HMRC had done on 19 May 2010.

(3) It is unreasonable and impossible for a small company which HMRC authorised to remain on the FRS to work out exact input tax and make accurate back payments of VAT.

(4) It was impossible for the Appellant to know that HMRC's systems would not continue to check the Appellant's returns as detailed in HMRC's letter of 19 September 2012.

(5) The Appellant wrote to HMRC in good faith on 14 August 2012.

(6) The Appellant had used the FRS as a means of simplified accounting, not trying to evade any VAT payment due.

(7) The FRS was introduced by HMRC to help small businesses pay VAT on time and in full by simplifying accounting, specifically for input taxes. It was unreasonable for HMRC to expect the Appellant to embark 18 months later on that accounting process for 2011/12 when the Appellant had paid its flat rate VAT on time and in full each quarter.

(8) The Appellant referred to the Grounds put forward in its letter of 28 August 2012 in which it sought an independent review.

(9) The Appellant also referred to HMRC's letter of 19 September 2012 which accepted that the estimated turnover of the Appellant contained in the letter of 27 October 2012 was "fairly correct."

Submissions

44. Mrs Saggers presented the Appellant's case clearly and skilfully. Essentially, in addition to giving evidence, she repeated as submissions the points made in the Grounds of Appeal. She submitted that the forecast for the period 2011/12 was reasonable given the uncertainties surrounding the Appellant's business.

45. Mrs Checkley for HMRC accepted that the FRS was introduced to help small businesses by using the administrative burden of conventional VAT compliance, but within the specific turnover limits specified in the Regulations.

46. Mrs Checkley noted that it was not disputed that the Appellant had exceeded the turnover upper threshold for the periods 31 March 2010, 31 March 2011 and 31 March 2012. She submitted that HMRC had to be satisfied that the turnover for the year to 31 March 2012 would not exceed £191,500 if the Appellant was to be authorised to use the FRS beyond 31 March 2011.

47. Mrs Checkley also pointed out that if the Appellant did exceed the limit it should have notified HMRC in accordance with Regulation 55N (3) within 30 days. On that basis, notification should have been made not later than 30 April 2011 but was not in fact made until 14 August 2012. Thus notifications for the years 31 March 2011 and 2012 were both made late with the result that HMRC was not able to make a

judgement concerning the turnover to 31 March 2011 – the Appellant had already exceeded the threshold and any estimate to the effect that it might not had already been overtaken by events.

48. Mrs Checkley submitted that the Appellant had not explained why the turnover figures in the year to 31 March 2011 were said to be exceptional.

49. Mrs Checkley submitted that the independent reviewer in her letter of 19 September 2012 had considered all relevant circumstances, had not taken account of irrelevant circumstances and had made no error of law. Therefore, HMRC's decision withdrawing the FRS from the Appellant could not be said to be unreasonable.

50. The Appellant had failed to notify HMRC that it had exceeded the threshold as required by Regulation 55N (3). Notice 733 (paragraph 12.3) explained that traders needed to check turnover every year on the anniversary of joining the scheme.

51. Section 84 (4ZA) VATA 1994 provided that the Tribunal must not allow the appeal unless it considered that the Commissioners could not reasonably have been satisfied that there were grounds for the decision. In this case, HMRC's decision was reasonable.

52. Mrs Checkley referred to the decision of this Tribunal in *Cannon Express & Logistics Limited v HMRC* [2009] UKFTT 116 (TC). In this case the taxpayer had been unaware of the change in the flat rate applicable under the FRS. The Appellant drew attention to the fact that VAT was a self-assessed tax and the Appellant had the ultimate responsibility to keep up to date with changes in VAT. Mrs Checkley submitted that the same was true in respect of the duty of the Appellant to monitor the level of its turnover to ensure that it remained within the limits provided by the Regulations.

53. Mrs Checkley therefore submitted that the appeal should be dismissed.

Discussion

54. There was no suggestion that the Appellant had attempted to avoid or evade the payment of VAT. Indeed, we considered that the Appellant had acted in good faith throughout.

55. However, it is important to note the limitations on the jurisdiction of this Tribunal in an appeal of this type.

56. Section 84 (4ZA) VATA 1994 provides that we can only interfere with HMRC's decision if the Commissioners could not reasonably have been satisfied that there were grounds for the decision. It is not a question whether we agree with HMRC's decision or whether we would have reached the same decision if we had been in their shoes. The question for us is whether HMRC's decision was unreasonable.

57. In this context, unreasonableness means a decision which HMRC reached either failing to take account of all relevant facts and circumstances or taking account of

irrelevant facts and circumstances. A decision will also be unreasonable if it was one which no body of Commissioners acting reasonably could have reached or if the Commissioners made an error of law in reaching their decision.

58. We are satisfied that HMRC acted reasonably in reaching their decision. The independent review of 19 September 2012 in our view took account of the relevant circumstances and did not take account of the relevant circumstances. We detected no error of law nor did we consider that the decision was one which was perverse.

59. We accept that the Appellant could not have known that HMRC's internal systems were such that HMRC would not notify the Appellant that its turnover had exceeded the upper threshold after its letter of 2 November 2010. However, as the Tribunal in the *Cannon Express* case stated, VAT is a self-assessed tax. Regulation 55N (3) places a duty on the trader to notify HMRC if it breaches the upper threshold. The Appellant failed to do this until August 2012. Notice 733 also advises the taxpayer to monitor its turnover.

60. We also accept that the purpose of the FRS is to assist small businesses by simplifying the burden of VAT administration. The use of a flat rate to calculate VAT leads to an approximate result. The taxpayer or HMRC may end up better off depending on how closely the flat rate for the taxpayer's business sector correlates to the actual VAT that would have been payable had the taxpayer accounted for VAT on a conventional basis. Parliament has decided that within the turnover limit specified in the Regulations that it is prepared to take the risk that it may be worse off by using the FRS but within the limits represented by the turnover thresholds.

61. In this case, the Appellant breached the upper limit in three consecutive years. HMRC had accepted that in the first two years the Appellant's estimate of turnover was reasonable or that the out-turn was a result of "one-off" factors. However, we do not think that the fact that HMRC had not been prepared to authorise the Appellant to use the FRS for the third year in which it breached the upper limit can be described as unreasonable.

Decision

62. For the reasons given above, we dismiss this appeal.

63. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 2 August 2013