TC3343

Appeal number: TC/2011/06037

Value Added Tax – Flat Rate Scheme – whether registration can be backdated - whether exceptional circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

C & N HOLLINRAKE LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
MR DAVID BATTEN

Sitting in Bristol on 17 October 2013.

The Appellants were represented Nancy Hollinrake.

Jane Ashworth, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Appeal

1. The matter under appeal is the refusal by the Respondents to allow the Appellants retrospective entry into the Flat-Rate Scheme ("FRS") under s.26B(8) of the Value Added Tax Act 1994 ("VATA 1994").

2. The Appellant sought to join the FRS retrospectively from the date of their registration. Their entry could not be backdated. However, HMRC were prepared to accept the Appellant into the scheme with effect from 1 January 2011 subject to prompt submission of an application form. The Appellant was already registered for VAT and had submitted their Return for the period 1 September 2004 to 31 December 2010 using the normal accounting method.

The Law and Guidance

(1) The relevant legislation relating to the FRS is contained in Part VIIA Value Added Tax Regulations 1994 SI 2518 ("the Regulations")

(2) HMRC has the power under Regulation 55B(1)(b) to allow a retrospective start date for the FRS.

(3) HMRC has produced guidelines dealing with applications for retrospective application of the FRS. FRS 3200 provides that the power to allow retrospective applications is one that HMRC must "use reasonably in the circumstances of each case", that the decision-maker must "consider all the relevant facts" and must explain the main reasons and indicate the main factors taken into account if the decision is to refuse.

(4) FRS 3300 explains the factors which are taken into account by the decision-maker. There are four main factors. The first is that each case should be considered on its own merit. The fact that less tax would be paid under the FRS is not "sufficient" reason to authorise use of the scheme retrospectively. It is however a consideration. The second is that authorisation may be refused if this would present a revenue risk. The third is that the purpose of FRS is to simplify VAT accounting and the policy "is to refuse retrospection where the business has already calculated its VAT liability … using a different accounting method". The final point explains that there may be "exceptional circumstances" where this policy should not apply. These are cases that are "likely to involve compassionate circumstances or the survival of the business". HMRC do not provide guidance on the meaning of exceptional circumstances and there appears to be no case where such circumstances have arisen. HMRC's approach is to refuse retrospection where the business has already accounted for VAT using another accounting method.

(5) Section 83(1) (fza) VATA 1994 provides for an appeal to the Tribunal against a decision of HMRC refusing or withdrawing authorising to use the FRS. Section 84(4)(za) VATA 1994 provides that –

> "The Tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for their decision."

Background Facts

(1) The Appellant is a private limited company (Reference 5210275) which registered for VAT on 1 September 2004. Its main business is that of archaeological consultants advising on historic sights and buildings.

(2) On 31 March 2011, the Appellant wrote to the Respondents stating that they had become aware of the FRS and queried whether membership could be backdated. They explained that the business had difficulties meeting their VAT payment obligations.

(3) On 12 April 2011, the Respondents wrote to the Appellant refusing retrospective entry into the FRS on the ground that the scheme exists to simplify VAT accounting and record keeping and the Appellant had already calculated their VAT liability using normal accounting. In the circumstances retrospective entry into the scheme could be considered only if there were exceptional circumstances. The phrase was not explained. The Appellant made the appropriate application on 26 April 2011 and were allowed to join the FRS from 1 January 2012.

(4) On 20 April 2011 the Appellants wrote requesting a reconsideration of the refusal on the grounds of exceptional circumstances which they identified as follows:

(a) They had only recently become aware of FRS through the Radio 4 Moneybox programme.

(b) Since registering for VAT they had employed the services of the same accountants, who had failed to bring FRS to their attention.

(c) They had been in contact with various HMRC officers who had failed to explain FRS;

(d) Neither the accountants nor HMRC, who they expected to act in their best interest, had brought the scheme to their attention.

(5) On 10 May 2011 the Respondents advised the Appellants that VAT is a self assessing tax and the primary duty upon the trader is to ensure that they are accounting for the correct amount of VAT. The fact that the Appellant was not aware of FRS does not constitute an exceptional circumstance.

(6) On 9 June 2011 the Respondents wrote to the Appellant stating that there were no exceptional circumstances. On 20 June 2011 a review upheld that decision. On 3 August 2011 the Appellants appealed to the Tribunal.

The Evidence

3. The Tribunal was presented with correspondence and financial information which passed between the parties. There was a ring binder of relevant legislation and authorities. Particular reference was made to the case of *DL Skinner (T/A DLS Packaging) TC00376* (11 February 2010) and the case of *Revenue and Customers Commissioners v. Burke* [2011] STC 625.

Appellant's submissions

(1) The Appellant explained that they had kept themselves informed of business matters through the newspaper, radio and from attendance at a Business Link course called "Finance for the Non-Financial Managers".

(2) They had involved a reputable firm of accountants to prepare their accounts from 1985 when they were sole traders to the present time. Despite the fact that their annual turnover was below £150,000 it was never explained to them that they could have joined the FRS.

(3) HMRC did not explain that they could have joined the FRS even when they were struggling to meet their VAT liability. The VAT office explained on 10 May that VAT is a self assessing tax "with the primary duty upon the trader to ensure they are accounting for the correct amount of VAT due". They said that since 2004, they had overpaid VAT and were unwilling to accept the position that they were now responsible for paying VAT under normal accounting rules.

(4) They explained that if the firm of accountants or the tax inspector with whom they have been in discussion over the tax affairs had noticed their overpayment of VAT, they should have advised that the FRS was available to be joined. They said that they were tax specialists and it was "unjust to force us to pay the penalty for their mistakes while they get away Scot free, especially when this penalty would render our small business defunct".

(5) The said that it was against natural justice and that public interest will not be served by "bankrupting a small business and making the employees jobless for payment of taxes which, strictly speaking, they do not owe".

The Respondents' Submissions

(1) VAT is a self-assessed tax and it is for individual taxpayers to make themselves aware of how it will affect their particular business activity.

(2) Information on VAT, schemes and other relevant information to a taxpayer are available on the HMRC website and information issued publicly. The various VAT schemes available to traders are explained in information provided with the Certificate of Registration.

(3) The Appellant was contacted by telephone on 15 July 2005 by HMRC New Business Team who provided relevant information. The Appellant agreed to discuss the matter with her accountant.

(4) Section FRS3300 of the FRS Guidance states that:

> "The policy is to refuse retrospection where the business has already calculated its VAT liability for the period using different accounting methods. The reason is for this is that FRS exists to simplify VAT accounting and record keeping for small businesses, so that they would be able to spend less time on VAT."

(5) Section FRS 3300 of the Guidance also states:

> "In line with the rationale of the scheme, the fact that a business will pay, or would have paid, less tax, is not sufficient reason to authorise retrospective use of the FRS."

(6) The Appellant considered their financial difficulties are "exceptional circumstances" which would justify their entry into the Scheme from an earlier date, in accordance with FRS3300, which states:

> "… We (HMRC) should be prepared to recognise that there may be exceptional circumstances where the policy described (to refuse retrospective admission to the Scheme) should be set aside."

(7) The Respondents say that the circumstances outlined with the Appellant are not exceptional and retrospective entry into the Scheme should not be authorised.

Discussion and Conclusion

(1) The role of the Tribunal is limited to deciding whether the Commissioner's exercise of their discretion was reasonable and if it was not reasonable then it may be set aside. The facts are largely agreed and not disputed.

(2) The Commissioners do not have a duty to advise traders beyond making available information on various VAT schemes and in any event it is not a question for the Tribunal to decide on whether HMRC should have provided the relevant advice. The Appellant has professional advisers and they should have given the relevant advice on the Scheme. HMRC are not in the business of providing tax advice to taxpayers.

(3) The Appellant says that HMRC should have brought the Scheme to their knowledge and attention. HMRC do not tell taxpayers how to save tax but will offer assistance. The Appellant's lack of knowledge of the FRS is not the fault of HMRC. VAT is largely a self-administering tax for taxpayers.

(4) From HMRC's guidelines, it is only in exceptional circumstances that a trader would be admitted to the FRS in respect of periods for which they have already accounted for tax. Exceptional circumstances are not defined. The fact that the Appellant came to find out about the FRS late is not an exceptional circumstance nor is the fact that their professional advisers did not advise them of the scheme.

(5) In the case of *HMRC v Burke* [2009] EWHC (Ch.) 2587 Henderson J noted that if a taxpayer has already accounted for VAT in the past on a normal basis and in accordance with the law in force, there is no way in which a retrospective admission to the scheme would simplify the accounting exercise which has already been carried out.

(6) It is understandable that the taxpayer would feel aggrieved but the fact that they have paid more tax using the standard method than would have been paid had they used the FRS does not give rise to an exceptional circumstance. The FRS is not designed to minimise a taxable person's liability to tax, it is designed to relieve small traders from the burden of detailed accounting for VAT. This is explained in the Revenue's Manual. The Tribunal found, as the Appellant stated, that the main reason for seeking the retrospective admission to the FRS was a financial one and a financial advantage was not an acceptable reason for retrospective admission to the FRS. This is clearly stated in the case of *HMRC v Burke*.

(7) In looking at the decision of HMRC the Tribunal must to look to see whether they took into account anything which they should not have done or failed to take into account anything which they should have done. The Tribunal found the decision not to offer retrospective registration to be validly made.

(8) While the taxpayer may feel understandably aggrieved, the decision of HMRC not to allow the Appellant to join the FRS retrospectively from the date of registration was not an unreasonable decision. It followed the guidelines set out in their public documents and the decision was made on the facts of the particular case. HMRC in considering the Appellant's circumstances did offer an earlier start date for the FRS, which is 1 January 2011, which was a reasonable offer.

(9) The circumstances outlined by the Appellant are not exceptional and retrospective entry into the Scheme was not allowed for that reason. There is nothing to suggest that this decision was unreasonable.

4. The appeal is accordingly dismissed.

5. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 30 January 14