TC04057

Appeal number: TC/2013/00624

VAT: ***Agricultural Flat-rate Scheme – whether the Appellant's certificate to use the scheme can lawfully be withdrawn on the basis of protection of the revenue – yes; Regulation 206(1)(i) VAT Regulations 1995 and Articles 295 to 302 of Council Directive 2006/112/EC***

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHIELDS & SONS PARTNERSHIP **Appellant**

- and -

THE COMMISSIONERS FOR HERMAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER HACKING
MS CELINE CORRIGAN

Sitting in Belfast on 11 and 12 June 2014

Michael Thomas, counsel for the Appellant

Richard Chapman, counsel for the Respondents

DECISION

The Appeal

1. This appeal concerns a question associated with the operation of the Agricultural Flat Rate Scheme (the Scheme), an alternative for certain agricultural enterprises to the more usual VAT system.

2. In particular this is an appeal against a decision of the Respondents to cancel the registration of the Appellant partnership to use the Scheme on grounds relating to the protection of the revenue.

3. In brief the Appellant says that the Respondents have no power to cancel on these grounds and that there are alternative lawful courses of action open to the Respondents to deal with their concerns. The course which they have chosen to follow is one, say the Appellants, which is contrary to the rules governing the application of the Scheme which are set out in the relevant European directive. UK domestic legislation must be interpreted in accordance with the EU directive. If the UK legislation is in conflict with the directive then the Commissioners' decision is wrong in law.

4. The Respondents position is that the action taken by it in cancelling the Appellant's certificate is lawful and is not in conflict with the EU directive concerning the Scheme.

The Appellant's business

5. The Appellant is a family farming partnership started in 1920 by Mr Charles Shields, the father of Cathal, Colm, Michael and Kieran. In due course Aidan, the son of Colm and Gary, the son of Cathal, also joined the enterprise and became partners.

6. The partnership deals only in beef livestock, buying cattle from between six months to two years old, fattening them and selling them on.

7. The majority of the cattle purchased is sourced from local markets around Downpatrick but cattle is also purchased by an associated company, Shield Livestock Limited from markets in the Republic of Ireland which the company then sells to the partnership.

8. The partnership holds livestock for between 60 to 120 days and then sells on to Anglo Beef Processors (ABP) in Newry at pre-agreed prices. In the earlier days of the partnership sales were to other farmers in the locality of the partnership but more recently the system described above has been found to be advantageous.

9. The success of the business relies on ensuring that the cattle are purchased at the right price, the cost of feed during the fattening process is maintained at an economical level and the sale price is the best that can be achieved. The Appellants have been successful in this over many years.

10. The tribunal was told that the partnership first became aware of the Scheme through ABP who recommended that they investigated whether they might apply for participation in the Scheme. Application was made to join in May 2004 with the assistance of the Appellant's accountants, Malone Lynchehaun. The application was accepted and from that point onwards the partnership issued invoices to ABP for the price of cattle sold and were paid a flat rate addition of 4% on all such sales.

The Scheme

11. The Scheme was introduced by European legislation to ease the administrative burden of farmers who found that the requirement to maintain full VAT records had become disproportionally burdensome, usually by reason of the relatively small size of their businesses.

12. It is of the essence of the Scheme that those within it are exempted from the need to account for VAT in the normal way; that is to say – calculating output tax, deducting input tax and accounting to the Revenue for the balance. Instead, the farming enterprise is permitted to charge a flat rate of VAT on its sales (the present rate is 4%) which it may then retain in lieu of claiming input tax on its purchases.

13. The European directive requires member states intending to implement the Scheme to undertake a macro-economic study of the sector to which the flat rate scheme is to apply so as to arrive at a rate which, as nearly as possible, equates to the average input tax which those within the sector would, under the normal arrangements, be able to claim

14. At this point it is necessary to look more closely at the legislation both European and national regulating the Scheme.

The law

15. The "Common Flat-Rate Scheme for Farmers" as the Scheme is more properly known, was introduced by Article 295 of Council Directive 2006/112/EC Title XII (the Principal Directive/the Directive))

16. Article 296 provides:

> 1. Where the application to farmers of the normal VAT arrangements or the special scheme provided for in Chapter 1, is likely to give rise to difficulties, Member States may apply to farmers in accordance with this chapter, a flat-rate scheme

"

designed to offset the VAT charged on purchases of goods and services made by the flat-rate farmers.

2. Each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application of the normal VAT arrangements, or the simplified procedures provided for in Article 281, is not likely to give rise to administrative difficulties.
3. Every flat-rate farmer may opt, subject to the rules and conditions laid down by each Member State, for application of the normal VAT arrangements, or as the case may be, the simplified procedures provided for in Article 281.

17. Article 297 provides that :

"Member States shall, where necessary, fix the flat-rate compensation percentages. They may fix varying percentages for forestry, for the different sub-divisions of agriculture and fisheries."

18. The flat-rate compensation percentages are , by Article 298, to be:

"……calculated on the basis of macro-economic statistics for flat-rate farmers alone for the preceding three years."

19. Article 299 states:

"The flat-rate compensation percentages may not have the effect of obtaining for flat-rate farmers refunds greater than the input tax charged"

20. The position in the United Kingdom is regulated by the Value Added Tax Act 1994 Part III (VATA) and by regulations made under that act and, in particular the Value Added Tax Regulations 1995 Part XXIV (the Regulations) which deals specifically with the "Flat-Rate Scheme for Farmers" (regulations 202 to 211)

21. Regulation 204 deals with the matter of admission to the Scheme. The conditions for admission are that the person concerned is carrying out one or more of the designated activities *[eligible for the flat-rate scheme];* that he has not been convicted of VAT related offences or has had to compound proceedings related to VAT and that he has not been assessed to a penalty under section 60 VATA. He must apply for certification on the appropriate form and must satisfy the Commissioners that:

"…..he is a person in respect of whom the total of the amounts as are mentioned in regulation 209 relating to supplies made in the year following the date of his certification will not exceed by £3,000 or more the input tax to which he would otherwise be entitled to credit that year"

22. Relevantly regulation 206 deals with cancellation of certificates as follows:

206 – (1) The Commissioners may cancel a person's certificate in any case where –

"

(a) – (h) Not relevant for the purpose of this appeal
(i) "They consider it necessary to do so for the protection of the revenue"

23. The Respondents say that they have cancelled the Appellant's certificate under the power conferred on them under sub-paragraph (1)(i) of Regulation 206 above as it had become apparent that receipts of VAT under the Scheme had for the previous three years exceeded by some measure the input VAT which would have been charged under the usual arrangements, this being in accordance with the limitation on the Scheme mentioned in Article 299. It is contended by the Respondents that it is entitled to cancel the Appellants' certificate if it considers that the Appellant is benefitting from the Scheme in a way which the Directive did not intend.

24. The Appellant contends that the power to cancel on this basis is contrary to and incompatible with the provisions of the Principal Directive concerning the Scheme. The Directive has direct effect and it is open, says the Appellant, to it to assert its right to continue to trade under the Scheme unless and until its certificate is lawfully cancelled. It is, says the Appellant, open to the Respondents to take other action within the provisions of the Principal Directive to achieve its aims.

The evidence

25. The tribunal heard from Siobhan Davidson, a Higher Officer of HMRC who had visited the partnership and had obtained copies of the accounts and other financial information on which the Respondent's decision was based. On behalf of the Appellants there were two witnesses: Kieran Shields, a partner in the Appellant and Aidan Malone, the Appellant's accountant. All witnesses had provided signed witness statements.

Kieran Shields

26. The essential facts underlying this appeal are agreed between the parties.

27. Mr Shields outlined the history of the partnership and explained its business as stated above. He confirmed that the turnover of the business in 2010 was around £3,500,000. Entry into the Scheme had initially resulted in simplification of the paperwork which the business required. Over the years as the business grew the burden of paperwork generally had increased. It was put to Mr Shields in cross examination that if the business had now to revert to the normal VAT arrangements it was of a size such that this should not impose a burden. Mr Shields said that he did not agree.

28. Mr Shields was further pressed about this matter. It was pointed out to him that as the business effectively had only one customer (ABP) there could not be a great difficulty in dealing with VAT on the normal basis.

29. It was pointed out by Mr Shields, however, that the partnership had foregone some £490,000 of input tax in 2007 and 2008 in respect of the capital works carried out at the farm. He said that he did not think that this had been properly taken into account in arriving at the decision to withdraw the flat-rate certificate.

30. Mr Shields also spoke of the unpredictability of the beef market which meant that whilst there had been benefit from the Scheme in recent years this was not certain for the future. There had in fact been a marked reduction in beef prices recently.

Aidan Malone

31. Mr Malone confirmed the evidence given in his witness statement and referred to the table in that statement which provided a comparison between the flat-rate VAT charged by the partnership to its customers under the Scheme with the input tax which would have been claimed under the normal VAT arrangements. The figures were :

	Input VAT estimated to be claimed	4% VAT claimed on the flat-rate scheme	Difference
30/06/2005	£23,512.26	£24,056.75	£544.49
30/06/2006	£27,121.43	£57,167.70	£30,046.28
30/06/2007	£78,645.89	£52,506.23	(£26,139.66)
30/06/2008	£138,861.49	£91,607.08	(£47,254.41)
30/06/2009	£43,705.91	£155,175.32	£111,389,41
30/06/2010	£49,704.97	£125,088.47	£75,383.50
30/06/2011	£54,982.50	£148,905.45	£93,932.95
30/06/2012	£73,290.33	£210,272.00	£136,981.67

32. The above figures whilst not precisely the same as those reported by Officer Davidson on behalf of the Respondents were accepted by the Respondents for the purposes of this appeal. The tribunal was not being asked to make a decision in relation to precise figures but to determine the essential matter of legal principle involved in this appeal namely the lawfulness or otherwise of the cancellation of the Appellant's certificate under the Scheme.

33. Mr Malone, confirming what Mr Shields had said, pointed to the fact that the Scheme had in fact a negative effect on the partnership's finances in the years to June 2007 and 2008. The reason for this was that considerable capital investments had been made in those years which would have attracted significantly increased VAT input tax had the partnership retained its former VAT status. Nevertheless it continued with the Scheme.

34. It was stated by Mr Malone that the way in which beef prices rose or fell would also affect the operation of the Scheme and the comparison with the situation had the partnership continued with the normal VAT arrangements. A table was presented showing the increase in beef prices over the years 2006 to 2012 and the extent to which these had contributed to the gain realised by the partnership.

35. Of a total gain of £374,339.74 realised under the Scheme £203,900.61 was shown to be attributable to increased beef prices.

36. Mr Malone had also done an exercise in which he looked at the way in which the Appellant's liability for flat-rate tax would have been affected if the flat-rate had been 1%, 2% and 3% instead of the 4% rate actually applied. This was a useful exercise in light of the submissions made by Mr Thomas on behalf of the Appellants

Siobhan Davidson

37. Officer Davidson's evidence, as set out in her witness statement, was confirmed on oath as was the evidence of the other witnesses. She accepted that the figures she had produced were substantially similar to but not exactly the same as those prepared by Mr Malone. They were however accepted by the Respondents for the purposes of this appeal which had as its focus the lawfulness of the decision to cancel the Appellant's certificate. The Appellant had sought and been granted a review of HMRC's decision but the decision had been confirmed.

Legal argument

38. Counsel for each party had helpfully prepared and submitted to the tribunal skeleton arguments.

For the Appellant

39. In its original Notice of Appeal the Appellant had argued that:

- it was not recovering "substantially more" as a flat-rate farmer than it would have recovered had it been registered in the normal way.

- HMRC had, in its comparison of the figures, failed to take account of the substantial input tax which would have been available to the Appellant for the capital works undertaken in 2007 and 2008
- The possibility of future reductions in the price of beef had not been taken into account.
- HMRC's Notice 700/46 concerning the Agricultural Flat-rate Scheme whilst advising that a business certified to use the scheme must leave where it is "found to be recovering substantially more as a flat-rate farmer than you would if you were registered for VAT in the normal way" was unclear as it gave no indication of what "substantially more" meant.
- The decision made by HMRC was arbitrary and unfair being entirely at the discretion of HMRC with no stated limits as to the amount of VAT recoverable under the scheme. It took no account of the growth of a business over the years.
- As the business was in any event subject to tax and National Insurance contributions the revenue was protected for the additional income the business receives from the scheme

40. By the time this appeal came to the tribunal the Appellant had taken further advice and as a result the grounds of appeal had been amended so that the only issue which was in dispute was the question of the lawfulness of the cancellation of the certificate as briefly summarised above. There had been a question as to the proper exercise by HMRC of its discretion but Mr Thomas agreed that this was not now a matter which the tribunal was being asked to consider.

41. The relevant ground of appeal was thus restated:

"The Respondents have withdrawn use of the agricultural flat-rate scheme from the appellants on the grounds that they recover substantially more from the flat-rate addition than the input tax that would have been claimable under normal VAT accounting.

The EU Directive 2006/112 articles 296-299 do not allow member states to withdraw the use of the scheme from individual farmers on that basis' Individual farmers may only be excluded from the scheme:

> *" if application of the normal VAT arrangements…….is not likely to give rise to administrative difficulties* (Article 296(2*). (sic)*

Where the flat-rate percentage have the effect of obtaining for farmers refunds greater than the input tax foregone, member states only permissible remedy is to vary the flat-rate percentage (Article 299) which can be varied for different sub-divisions of agriculture (Article 297)".

42. It was accepted by Mr Thomas that HMRC could have lawfully sought to cancel the Appellant's flat-rate certificate had it made out a case based on the fact that reversion to normal VAT accounting would not involve administrative difficulties. The Respondents had not put their case on this basis however, electing to cite the recovery of substantially greater flat rate receipts when compared with what normal VAT accounting would have revealed as allowable input tax.

43. Mr Thomas argued that it was also possible for a member state to exclude from the flat-rate scheme "certain categories of farmers". What it could not do was to cancel the certificate of a single farming enterprise such as that of the Appellant on essentially financial grounds.

44. If the member state had formed the view that farmers in a particular sector of agriculture were recovering more by way of the flat-rate than they would under normal VAT arrangements then the member state should look at that sector with a view to conducting appropriate macro-economic studies aimed at fixing a flat-rate which more closely reflect the input tax which was likely recoverable under those more normal VAT arrangements.

45. This was in accordance with Article 297 which gave member states the power to fix the compensation percentages and states that they "may fix varying percentages for forestry, for the different sub-divisions of agriculture and for fisheries"

46. It would be possible therefore for the UK to apply different rates for farmers in the cattle farming sector if it found that farmers in this sector were recovering more under the flat-rate scheme than they would in respect of input tax under normal VAT accounting.

47. Regulation 206(1) must, said Mr Thomas, be interpreted to give effect to Article 296 of the Principal Directive which would have the effect of limiting the right of cancellation to only categories of farmers where this was necessary to protect the revenue and make sure that the scheme was not available to those categories which "might use it to turn a profit".

48. Articles 295 to 305 of the Principal Directive are, said Mr Thomas, clear and unconditional and therefore have direct effect so that they can be relied upon by a taxpayer if the member state fails to correctly implement them. In this regard Mr Thomas sought to rely on *Becker v Finanzampt Munster-Innenstadt* [1982] ECR 53, [1982] 1 CMLR 499 ECJ

49. It was open to the UK to fix a flat rate of less than 4%, even one of 0% if that was considered to be appropriate to meet the requirement of the flat-rate scheme that it should be fiscally neutral in its effect. In Mr Thomas's submission the UK had made the mistake of fixing a rate for the whole of the agriculture sector whereas it ought to have looked more closely at what

this sector comprised and fixed rates for sub-divisions of the sector which more properly reflected the economics of the various kinds of agriculture practised in the UK.

50. Singling out an individual farming concern and removing it from the scheme was a crude and inappropriate way to deal with the failure to set rates correctly at the outset.

For the Respondents

51. Mr Chapman says that Mr Thomas has misread misconstrued Article 296(2) of the Principal Directive.

52. Properly construed it does not, as Mr Thomas has suggested, link the limitation of exclusion of "certain farmers" to the likelihood of administrative difficulties. The word "if" linking the two in Ground 9 of the amended Notice of Appeal does not appear in Article 296(2) as Mr Thomas seeks to contend.

53. On a proper construction of the sub-clause a member state could exclude certain categories of farmers from the scheme and, as a quite separate matter, it could also exclude farmers for whom the application of the normal VAT rules give rise to administrative difficulties.

54. It is open therefore to HMRC to exclude as a category those farmers who recover substantially more by way of the flat-rate addition than would have been recoverable as input tax under normal VAT accounting. It was, says Mr Chapman, for this reason that Regulation 204(iii)(d) of the 1995 VAT Regulations provided for a £3,000 limit on such benefit as a condition of certification and why Regulation 206(1)(i) conferred the right to cancel a farmer's certificate for the "protection of the revenue".

55. Mr Chapman adds that the intention of the flat-rate scheme at the European level has to be looked at in context. The objectives are both simplification and offsetting of input VAT and the scheme must be applied only to the extent necessary to achieve those objectives. VAT neutrality is to be preserved. (see *Finanzampt Rendsburg v Harbs* [2006] STC 340 and *Finanzampt Arnsbberg v Stadt Sundern,* Case C-43/04).

56. Mr Chapman also took the tribunal to a summary of the position appearing at paragraphs 48 to 53 of the judgment of the CJEU in *European Commission v Portuguese Republic* Case C-524/10. Importantly this judgment emphasises the fact that as a derogation from the Principal VAT Directive (the Sixth Directive) it must be construed strictly as the flat-rate farmer's scheme was not designed as an exemption provision. The result should be VAT neutrality.

57. References in the judgment to "offsetting" and "compensation" were directed to the equalisation of loss made on being unable to claim input tax rather than to making a profit from the scheme. This made clear in *Harbs* (above) thus:

> "29. According to Article 25 of the Sixth Directive, the common flat-rate scheme aims to offset the tax charged on purchases of goods and services made by farmers by way of a flat-rate compensation payment to farmers who carry on their activity in agriculture, forestry or fisheries undertaking when they supply agricultural products or provide agricultural services. That compensation is calculated by applying a percentage, which has been fixed by the member states, to the price excusing tax, of the goods or services supplied by the flat-rate farmer to a taxable purchaser of goods or recipient of services other than a flat-rate farmer. It is paid either by the public authorities or by the taxable purchaser or recipient and excludes any other form of deduction of input VAT"

58. The Appellant's contention that the only ground for cancellation of its certificate could be that of administrative burden is, says Mr Chapman, illogical, in light of the several conditions for entry into the scheme. The risk would clearly exist if this were so that the objective of neutrality would be at risk

59. Mr Chapman also argues that the suggestion that the only way in which HMRC might address the issue of an over-recovery of flat-rate VAT when compared with what the input tax might otherwise have been is to set a new flat-rate. In fact, says Mr Chapman, the Article entitles HMRC to withdraw use of the scheme.

60. Mr Thomas, has it is suggested, misread the intent and purpose of Article 299. In support of this Mr Chapman draws attention to the former provisions of Article 25 (3) of the Sixth Directive as follows:

> (3) Member States shall fix the flat-rate compensation percentages, where necessary, and shall notify the Commission before applying them. Such percentages shall be based on macro-economic statistics for flat-rate farmers alone for the preceding 3 years. They may not be used to obtain for flat-rate farmers refunds greater than the value of the value added tax charges on inputs. Member States shall have the option of reducing such percentages to a nil rate. The percentage may be rounded up or down to the nearest half point

61. Mr Chapman contends that the emphasis of the above is on the use of the scheme rather than the setting of the percentage rate, there being nothing to suggest that the language of the current Article 299 has any different effect. He also says that Article 298 requires any change in the percentage rate to apply to the sector as a whole and not to a single farming enterprise. Member states may not seek to differentiate between different sizes or

types of farm within the same sector as this would not take place on a macro-economic level and would in any event not be a practical or viable process.

62. The words "protection of the revenue" are apt says Mr Chapman to ensure that flat-rate farmers do not recover greater refunds than the input VAT. This provision is, he argues, consistent with Article 299. The words are not limited to the prevention of evasion (*Direct Cosmetics Ltd and Laughtons Photographs Ltd and Excise Commissioners* [1988] STC 540, the Court of Justice at paragraphs 20 to 24).

The tribunal's consideration of the appeal

63. The tribunal was taken to a number of cases which demonstrated the principles followed when interpreting European law.

64. In particular;

"…..every provision of Community law must be placed in its context and interpreted In the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied" (*CILFIT Srl and Lanificio di Gavardo v Ministry of Health,* Case 283/81 [1982] ECR 3415)

65. Under Article 249 of the EC Treaty a directive is binding as to the result to be achieved but needs to be implemented in a member state to have effect
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66. National courts are bound to interpret national law enacted to give effect to a Community directive so far as possible in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and to comply with Article 249 of the treaty. (see for example *Von Colson and Kamann v Land Nordrhein-Westfalen Case* 14/83 [1984] ECR 1891 at paragraph 26 and *Marleasing SA v La Commercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECRI-4135paragraph 8)

67. A provision of a directive which is unconditional and of sufficient precision may be relied upon by an individual against a member state which has failed to transpose the directive into national law within the prescribed period (see *Marleasing* above at paragraph 5).

68. In this appeal the Appellant seeks to rely on the direct effect of the Directive in resisting the Respondents withdrawal of its flat-rate certificate.

69. However there is no specifically precise provision of any of Articles 295 to 300 which deals with the question of the cancellation of such a certificate. In fact nothing is said in the Directive at all about the termination of consent by a member state for farmers to use the agricultural flat-rate

scheme. This is a matter for national law to deal with in the context of its development of a scheme which is compliant with and gives effect to the Directive.

70. What the Appellant contends is that Regulation 206(1)(i), a provision of national law particularly having the object of ensuring compliance with Article 299 of the Treaty, is in some way incompatible with the Directive.

71. The argument advanced in support of this is that the Directive provides a mechanism for changing the flat-rate scheme if it is found that the rate is inappropriate in that it affords to participants in the scheme a return which exceeds by a margin the input VAT otherwise chargeable under the usual arrangements.

72. The tribunal does not doubt that it is within the competence of the national legislature to revisit the question of the proper rate for the agricultural flat-rate scheme but in doing so it needs to be mindful of the principle of fiscal neutrality and may not purport to set different rates for individuals or groups within a defined sector.

73. The Directive does not devolve to the particulars of a scheme but allows member states to design their own schemes compliant with the objectives and purpose of the Directive. The purpose of the Scheme is the simplification of VAT for hard pressed farmers for whom the administration of the normal VAT regime creates difficulties. A further objective is the matching, so far as possible, of the flat-rate with the input tax otherwise payable by farmers in their various enterprises so as to achieve fiscal neutrality.

74. Article 299 requires that the flat-rate percentages may not have the effect of obtaining for flat-rate farmers refunds greater than the input tax charged.

75. That a member state should not be competent to include provisions designed to guard against abuse of the Scheme by reference to the possibility of over-recovery of flat-rate tax when compared to the input tax otherwise chargeable does seem to the tribunal to be an extraordinary proposition.

76. On behalf of the Respondents Mr Chapman contends that on a proper construction of Article 296(2) farmers for whom the flat-rate provides a benefit beyond the input tax chargeable represent a category of farmer to which regulation 206(1)(i) can properly be applied. The tribunal agrees.

77. Officer Davidson was asked whether HMRC had removed other farmers' certificates in similar situations. The tribunal was told that they had. In two other cases there had been an initial indication that the parties concerned would appeal but apparently they had not in fact persisted in this. HMRC

is, we were told, looking more generally at those within the agricultural sector who may similarly be obtaining an advantage by operating under the scheme which was not intended by the directive. This tribunal sees no reason why it should not do this as this is entirely consistent with Article 299 of the Directive.

78. The conditions for applying for and admission to the flat-rate scheme include a requirement that the amount recovered under the scheme should not exceed by more than £3,000 the input tax which the applicant would otherwise be entitled to credit in the year following certification. Whilst this may not be expressed as a continuing condition it suggests that this does at least indicate the likely parameter of tolerance in respect of recovery of flat-rate tax which exceeds input tax otherwise chargeable.

79. Following the exercise conducted by HMRC into the accounts of the Appellant it was found that for the three preceding years a substantial benefit had accrued to the partnership much in excess of the £3,000 referred to in the provisions of Regulation 204 which address admission to the Scheme.

80. It is perfectly true that this may have been the result of increased beef prices. It is also true that a lower rate of flat-rate tax would provide a reduced benefit but these are not considerations which the Respondent can entertain. To do so would be in conflict with the clear objectives and purpose of the Directive and in particular would put at risk the principal of fiscal neutrality.

81. As indicated above the tribunal is not persuaded either that the Appellant is entitled to invoke the direct effect of the Directive. There is no clear and precise provision in the Directive to which it can point dealing with the matter of the circumstances in which participation in the scheme might be terminated.

82. It must have been within the contemplation of those considering the scheme at the European level that there might come a time when a member of the scheme at a national level was recovering more in flat-rate tax than it would in respect of its input VAT. By wholly failing to address this issue other than in the broad terms of Article 299 the national legislatures were left to devise suitable rules which, so far as they were consistent with the Directive, would be expected to be upheld.

83. The arguments advanced by Mr Thomas on behalf of the Appellant are, in the view of the tribunal flawed for at least the reasons expressed above.

84. It was suggested by both parties that if the tribunal was to find against them, a course which was open to the tribunal would be to refer a question to the ECJ. That is not a course which this tribunal choses to follow. The

question, if it was to be referred as suggested, would presumably be in the nature of an enquiry as to whether a member state was entitled to include legislative provisions entitling it to withdraw a farmer's certificate in circumstances in which it was recovering significantly greater flat-rate tax than the input VAT it would otherwise have incurred. Having regard to Article 299 and to a proper construction of Article 296(2) the answer is, it is suggested, obvious. The Appellant is within a category of farmers whose continued participation in the scheme is inappropriate by reason of its recovery of excess flat-rate tax in breach of the principle of fiscal neutrality.

85. Accordingly this appeal is dismissed.

86. 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.

CHRISTOPHER HACKING
TRIBUNAL JUDGE

RELEASE DATE: 8 October 2014