[2015] UKFTT 0506 (TC)

TC04664

Appeal number: TC/2014/05239

***VALUE ADDED TAX* – decision of HMRC to cancel the Appellant's VAT registration – extent of Tribunal's jurisdiction – whether Appellant had ceased to be a registrable person on the date in question – held no – whether HMRC entitled to cancel a person's VAT registration compulsorily with effect from a date other than the date on which that person ceased to be registrable – held no – paragraphs 9 and 13 of Schedule 1 of VATA 1994 – whether HMRC entitled to assess VAT claimed as recoverable input tax as a result of the incorrect cancellation of the Appellant's VAT registration – held no – appeal allowed**

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID LOVE MARKETING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ROBIN VOS
JULIAN SIMS FCA, CTA

Sitting in public at Barrack Block, 83-85 London Road, Southampton on Tuesday 15 September 2015

The Appellant did not appear and was not represented

Martin Priest, Tribunal Caseworker, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, David Love Marketing Limited has been involved in the yacht business for over 40 years. It registered for VAT when the tax was first introduced. In December 2013, HMRC decided to cancel the appellant's VAT registration with effect from 23 June 2010 on the basis that the company was no longer carrying on any business activities.

2. As a result of the cancellation of the appellant's VAT registration, HMRC issued an assessment on 30 July 2014 (based on a calculation as at 16 July 2014) in order to recover input tax which the appellant had reclaimed for the 07/10 – 04/13 VAT periods. The amount in question totals £2,305 plus interest of £93.58 making a grand total of £2,398.58. The statement of account issued by HMRC on 30 July 2014 with the VAT assessment in fact calculated interest up to 17 July 2014 totalling £94.91 and so the total amount paid by the appellant was £2,399.91. The liability for interest however stands or falls with the appeal against the VAT assessment and we have no jurisdiction to consider it separately.

3. On 22 August 2014, HMRC charged the appellant a penalty of £345.75 in respect of careless inaccuracies in the appellant's VAT returns for the relevant periods. This was based on a notice dated 23 July 2014 to the appellant of the proposed penalties.

4. On 19 September 2014, the appellant appealed against the cancellation of its VAT registration, the subsequent VAT assessment and the penalty.

5. Prior to the hearing, HMRC agreed to cancel the penalty.

Late appeal?

6. The appellant's notice of appeal is dated 19 September 2014. The decisions appealed against are HMRC's cancellation of the appellant's VAT registration which was notified to the appellant on 13 December 2013, the assessment to tax dated 16 July 2014 and the penalty assessment which was notified to the appellant on 22 August 2014.

7. HMRC did not suggest that the appeal was late since it was lodged within 30 days of the notice of the penalty assessment. It does however appear to us that the appeals against the cancellation of the appellant's VAT registration and the assessment to tax were both out of time. However, as we do not believe that there is any material prejudice to HMRC and given that HMRC does not object, we allow these late appeals.

Non-attendance of the appellant

8. The driving force behind the appellant's business is Mr David Love. Mr Love is over 80 and is undergoing medical treatment. He has acknowledged receipt of the notice of the hearing and has requested that it should go ahead in his absence. He is satisfied that the evidence he has already submitted is sufficient to support his appeal and for the Tribunal to make a decision.

9. Although there are aspects of the evidence on which it might have been helpful to hear oral evidence from Mr Love, we believe that we have sufficient information before us in order to reach a decision and, bearing in mind Mr Love's request that we should proceed in his absence, we find that it is in the interests of justice to proceed with the hearing without the appellant being in attendance.

The evidence and the facts

10. The evidence consisted of a bundle of documents and correspondence. Although there is some uncertainty as to some of the facts, on the basis of the information we do have, we find the following facts.

11. The appellant's business had for many years prior to 2010 consisted of various activities in the yachting world including in particular sales of new and used yachts, sales of parts and equipment, designing and building of yachts and brokerage in relation to the sale of used yachts.

12. In particular, the appellant had sold a type of yacht designed by LM Glasfiber in Denmark known as the LM27. When LM Glasfiber closed down their boat building operations in 1993, the appellant acquired the mould tools for the LM27. The appellant redesigned the LM27 and marketed it as the Scanyacht 290. The yachts were originally built in Fareham and then in Cornwall.

13. At the end of 2006, the appellant decided to transfer production of the Scanyacht 290 to a shipyard (Valent) in the Netherlands. It agreed to sell the mould tools to Valant for £40,000 with payment being made in instalments.

14. The appellant subsequently agreed to reduce the original sale price of £40,000 to £32,500. By December 2009, there was £7,500 still to pay. An invoice for this amount was issued on 1 December 2009. The narrative on that invoice reads "final payment for the purchase of the Scanyacht 290 project".

15. Payment of £3,743 (£3,750 less bank charges) was received by the appellant on 22 June 2010. A further £493 (£500 less bank charges) was received on 13 May 2011. The outstanding balance of £3,250 remains unpaid.

16. At some point between 2007-2010, the appellant sold its brokerage business in Hamble following which Mr Love moved from Hamble to Gosport as the appellant had agreed not to re-start a brokerage yacht agency within ten miles of Hamble.

17. The evidence includes letters written to the appellant in Gosport in September 2008 and so we infer that the sale of the Hamble brokerage business and the move to Gosport took place sometime before this.

18. Following the sale of the Hamble brokerage business, Mr Love and his wife entered the holiday villa market in Florida. This had nothing to do with David Love Marketing Limited and was an activity carried on by Mr Love and his wife personally. It required them to spend significant amounts of time in Florida.

19. The holiday villa venture was not a success and Mr and Mrs Love were only able to finally extricate themselves from the business in September 2013. Mr Love estimates that in 2013 he spent about 40% of his time in the US.

20. According to HMRC records, the appellant had not made any taxable supplies since the 10/07 VAT period. All subsequent VAT returns showed a VAT credit representing input tax paid by the appellant.

21. As a result of this, HMRC arranged to visit the appellant to check its VAT records. This visit took place on 13 November 2013.

22. The three points arising from that visit were as follows:

(1) It was accepted that the appellant received a commission payment of £1,449 on 25 February 2010 which had been inadvertently omitted from the appellant's VAT return for the relevant period. An assessment for the VAT of £215 was raised and paid.

(2) HMRC noticed the receipt of £3,743 on 22 June 2010 from the shipyard in the Netherlands mentioned above. It was subsequently agreed that the relevant supply was zero rated and so this did not give rise to any VAT for which the appellant was liable to account.

(3) HMRC concluded that the appellant should be de-registered for VAT. Mr Colin Cromar, one of the HMRC officers who conducted the visit, wrote to the appellant on 15 November 2013. In his letter, he said:

> "Having reviewed your company records and spoken to you and your wife the last verifiable indications of any business activity, applying the rules as determined by Gibson J in the *Lord Fisher* case (*Commissioner of Customs & Excise v Lord Fisher* [1981] STC 238) is the consideration (payment) received on 22/6/2010 from the Danish company for the mould rights to build Scanyachts".

Mr Cromar went on to explain that he intended to recover any input tax which had been reclaimed from the following quarter (October 2010) onwards.

23. In 2008/09, the appellant had two Scanyacht 290 yachts for brokerage. One of them was sold generating the commission paid in February 2010 referred to above. The sale of the other yacht fell through.

24. There is no evidence of any sales of new yachts after the transfer of the production to the Netherlands in 2007 – or at least no sales in respect of which the appellant received a commission. On the basis that the appellant's VAT returns disclosed no sales of any kind after the 10/07 VAT period, we find that there were no sales of either new or used yachts by the appellant since October 2007 other than the sale of the second-hand yacht in 2009/10 which generated the commission of £1,449 received by the appellant in February 2010.

25. In May 2011, Mr Love wrote on at least two occasions on behalf of the appellant to the editor of Yachting Monthly extolling the virtues of the LM27/Scanyacht 290. His objective was to try to get an editorial about the boat placed in Yachting Monthly. Mr Love offered to take the editor of Yachting Monthly out on the boat. We do not know what response Mr Love received but, having attended a boat show in the meantime, he wrote again to the editor in October 2011 offering him a sailing test on a different Scanyacht 290, the original one he had lined up having been sold in the meantime. As far as we are aware, the editor did not accept his offer.

26. Mr Love himself owns an LM27 yacht. Although he owns this personally, it is used by the appellant as a demonstration boat where there are prospective purchasers. Until the beginning of 2014, this boat was moored at Hamble. In January 2014, it was moved to Gosport. Mr Love says that this was for business purposes. The company also had access to a Scanyacht 290 owned by a previous customer and moored in Gosport. Moving the LM27 to Gosport would allow customers to see both vessels in one visit to Gosport. We accept that the boat was not moved wholly for private purposes.

27. Shortly before the hearing the appellant provided copies of its 2013 and 2014 financial statements. The financial statements for the year to 31 October 2013 show sales of £29,250. The appellant had referred in its correspondence with HMRC to making arrangements for the payments in respect of the mould tools to be shown as sales in the company's next accounts. The figure of £29,250 is, on the basis of the appellant's evidence, the total that has been paid to date by the shipyard in the Netherlands in respect of the mould tools and we therefore infer that the sales shown in the 2013 accounts represent the payments for these mould tools and not new sales made by the appellant in 2013.

Law

28. Schedule 1 of the Value Added Tax Act 1994 (VATA 1994) contains the provisions relating to registration for VAT and cancellation of a VAT registration. Paragraph 1 requires a person to be registered if he makes taxable supplies over a set threshold in the previous year. It is common ground that the appellant did not meet this threshold. A person however is entitled to be registered for VAT if that person makes taxable supplies or is carrying on a business and intends to make taxable supplies in the course of that business (paragraph 9 of schedule 1 to VATA 1994).

29. Paragraph 13 of schedule 1 to VATA 1994 contains provisions which allow a person's VAT registration to be cancelled. The relevant parts of paragraph 13 read as follows:

> "13(1) ….
>
> (2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him.
>
> (3) …
>
> (4) …
>
> (5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act.
>
> (6) …
>
> (7) …
>
> (8) …"

30. The appellant and HMRC did not agree any date on which the appellant's VAT registration should be cancelled and so HMRC may only cancel the appellant's VAT registration "with effect from the day on which" it ceased to be registrable.

31. As described above, the effect of paragraph 9 of schedule 1 to VATA 1994 is that the appellant would cease to be registrable if it was no longer making taxable supplies nor was carrying on a business with the intention of making such supplies in the course of that business.

32. We were referred to the First Tier Tribunal case of *Gardner & Co v HMRC* [2011] UK FTT 470. In that case, the Tribunal found that Gardner & Co was carrying on a business at the date with effect from which his registration was purportedly cancelled. The Tribunal did however make the point that:

> "The power provided by paragraph 13(2) of schedule 1 VATA to cancel a registration with effect from a date not agreed between HMRC and the registered person concerned is limited to a power to cancel the registration with effect from the day on which [the person] … ceased [to be registrable]".

33. What the Tribunal was saying is that it is necessary to identify the precise date on which the registered person ceased to be registrable. HMRC does not have power to cancel the registration with effect from an earlier or later date although can cancel the registration with effect from a later date if the registered person agrees.

34. Mr Priest on behalf of HMRC accepted that the Tribunal's comments in *Gardner & Co* reflect the law and that, in the absence of agreement, registration cannot be cancelled except with effect from the date on which that person ceased to be registrable.

35. The appellant's appeal against the assessment to recover the input tax which has been repaid is of course dependent on the success of its appeal against the cancellation of its VAT registration. If that appeal succeeds, it follows that it has correctly reclaimed the input tax and so the assessment would be discharged. On the other hand, if the appeal against the cancellation of the VAT registration fails, the assessment will stand.

36. HMRC has not considered whether the expenditure in respect of which the input tax has been reclaimed relates in its entirety to the appellant's business. There is some suggestion that part of it may be for private purposes as a large part of the expenditure relates to the berthing of Mr Love's boat which, as mentioned above, is privately owned, albeit that it is also used for the purposes of the appellant's business.

The Tribunal's jurisdiction

37. The appellant's right to appeal against a cancellation of its VAT registration and the resulting assessments arises under s 83 VATA 1994. This provides as follows:

> "83 Appeals
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the Tribunal with respect to any of the following matters –
>
> (a) the registration or cancellation of registration of any person under this Act;
>
> …
>
> (p) an assessment –
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or
>
> (ii) …
>
> (iii) …
>
> or the amount of such an assessment;"

38. Section 84 VATA 1994 gives certain limited guidance in relation to the Tribunal's role in respect of an appeal concerning some of the matters mentioned in s 83(1). However, this guidance does not extend to appeals under s 83(1)(a) or (p).

39. According to Neill LJ in *John Dee Limited v Customs & Excise Commissioners* [1995] STC 941 at 952:

> "The function and powers of a Tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions."

40. Neil LJ also noted that account should be taken of the fact that, by virtue of what is now paragraph 1 of schedule 11 to VATA 1994, responsibility for the management of VAT rests with the HMRC Commissioners (and not the Tribunal).

41. In this case, the appeal against the assessments is straightforward. The only reason the assessments could be challenged is if HMRC were wrong in cancelling the appellant's VAT registration. That question is however the subject of a separate appeal under s 83(1)(a) and is not itself part of the appeal against the assessments.

42. The extent of the Tribunal's jurisdiction in respect of the appeal against HMRC's cancellation of the appellant's VAT registration is the more difficult question. It is perhaps surprising that this does not appear to be an issue in respect of which there is clear authority. The possible alternatives are as follows:

(1) Full appellate jurisdiction – this would involve the Tribunal in reviewing the facts and the law, deciding whether HMRC had reached the right decision and, in appropriate circumstances, substituting its own decision for that of HMRC.

(2) Limited appellate jurisdiction – again, the Tribunal would analyse the law and the facts and decide whether it agreed with HMRC's decision. If it did not, it would set the decision aside – i.e. allow the appeal. There would however be no power to substitute its own decision for that of HMRC.

(3) Supervisory jurisdiction – this is relevant where the appeal is against the exercise by HMRC of a discretion. The term is to some extent misleading as the Tribunal still has to decide whether or not the appeal should be allowed and so is, in some sense, an appellate jurisdiction. However, the Tribunal can only allow the appeal if it were shown that HMRC had acted in a way which no reasonable HMRC Commissioner could have acted or if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight (*Customs & Excise Commissioners v J H Corbitt (Numismatists) Limited* [1980] STC 231 at 239.

43. Mr Priest did not argue the point fully but helpfully referred us to two cases. The first case is *Anne Brookes v Commissioners of Customs & Excise* (VAT Decision 11752). In that case, the Commissioners decided to cancel Anne Brookes' VAT registration on the basis that she was not carrying on a business. She appealed on two grounds:

(a) she was carrying on a business; and

(b) the Commissioners had acted unreasonably as, following previous visits and correspondence, they had accepted that she was carrying on a business.

The particular hearing was to decide an application made by the Commissioners to strike out the second ground for Anne Brookes' appeal – i.e. that they had acted unreasonably.

44. Interestingly the Tribunal took the view in that case that a supervisory jurisdiction was wider than an appellate jurisdiction. It said (at 20):

> "The primary question to be answered was whether this Tribunal's function, as regards its jurisdiction in relation to those two decisions, is limited to a purely appellate jurisdiction or whether it has a supervisory or review jurisdiction. By 'purely appellate' jurisdiction I mean a jurisdiction which is confined to deciding whether the decision appealed against is wrong in law or is based on inferences from the facts that cannot be sustained. The answer will depend on the proper construction of the VAT statutes because this Tribunal is a creature of and draws its jurisdictions exclusively from statute. … The answer may however depend on the nature of the decision appealed against; there may be a necessary implication to be found from the statutory provision governing the decision that parliament intends the jurisdiction on appeal to be supervisory as well as or instead of appellate."

45. The reason why the Tribunal in that case took the view that a supervisory jurisdiction was wider was that the point in issue was whether the Commissioners' decision could be challenged on the basis that it was unreasonable. The Tribunal decided that it did have such a jurisdiction, relying on the decision of the High Court in *Mr Wishmore Limited v Commissioners of Customs & Excise* [1988] STC 723.

46. The Tribunal in *Anne Brookes* also noted the comment of Lord Simon in *J H Corbitt* (at 233) that the Tribunal's jurisdiction does not go so far as to allow it to substitute its own discretion or decision for that of Customs & Excise. Lord Simon describes this as "a delimited, not a general, appellate jurisdiction" rather than a "supervisory" jurisdiction.

47. The second case referred to by Mr Priest is *Gardener & Co v HMRC* [2011] UK FTT 470. Again, this case concerned the cancellation of a person's VAT registration on the basis that he was not carrying on a business. The Tribunal confidently stated (at 33) that:

> "The Tribunal's jurisdiction is a full appellate jurisdiction".

Unfortunately, the Tribunal did not explain what it meant by a "full appellate jurisdiction" nor how it had come to that conclusion.

48. The *John Dee* case concerned an appeal by John Dee Limited against the Commissioners' decision to require it to provide security for the payment of VAT as a condition of making taxable supplies. The relevant provision was at the time

contained in paragraph 5(2) of schedule 7 to the Value Added Tax Act 1983 which read as follows:

> "Where it appears to the Commissioners' requisite to do so for the protection of the Revenue they may require a taxable person, as a condition of his supplying goods or services under a taxable supply, to give security, or further security, of such amount and in such manner as they may determine, for the payment of any tax which is or may become due from him."

49. Whilst describing the Tribunal's jurisdiction as "appellate", the Court of Appeal considered (at 952) that, in deciding whether to allow the appeal:

> "The Tribunal will, to adopt the language of Lord Lane [in the *J H Corbitt* case], consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal may also have to consider whether the Commissioners have erred on a point of law."

50. The Tribunal in *BMW (GB) Limited* (1997 VAT Decision 14823) concerned a decision by Customs & Excise to direct a particular method of attributing input tax. BMW (GB) Limited appealed against Customs & Excise's direction. The Tribunal referred to the *Anne Brookes* and *John Dee* cases and also to *Peachtree Enterprises Limited v Commissioners of Customs & Excise* [1994] STC 947 which, like the *John Dee* case was an appeal against a decision by Customs & Excise to require security for the payment of VAT. The Tribunal identified a number of principles derived from those cases (at 62):

> "First, there is no right of appeal to the Tribunal unless that right is given by statute. Secondly, in considering the extent of the right of appeal it is necessary to look at the statutory provisions which apply to the specific decision being appealed. Thirdly, if the statutory provisions relating to the specific decision being appealed confer a discretionary power on Customs & Excise, then the jurisdiction of the Tribunal is limited to determining whether the discretionary power was properly exercised. Fourthly, to decide whether the discretionary power was properly exercised, the Tribunal must look at the 'statutory condition' (if any) for the exercise of the discretionary power. Fifthly, in examining whether the statutory condition was satisfied, the Tribunal must consider whether Customs & Excise acted in a way in which no reasonable panel of commissioners could have acted, or whether they took into account some irrelevant matter, or disregarded something to which they should have given weight, or whether they erred in law. Sixthly, in considering these matters the Tribunal should limit itself to considering facts and matters which were known when the disputed decision was

made. And finally, the Tribunal cannot exercise a fresh discretion."

51. These principles were approved by the Tribunal in *Banbury Visionplus Limited & Others v H M Revenue & Customs* [2006] STI 283. However, on appeal to the High Court ([2006] STC 1568), Etherton J (as he then was) took a contrary view and held that the Tribunal had a full appellate jurisdiction in relation to the particular appeal in question.

52. In that case, the Commissioners decided to terminate the use of a particular partial exemption special method in exercise of a power conferred on them by regulation 102 of the Value Added Tax Regulations 1995 SI 1995 No. 2518. The regulations were made under s 26 VATA 1994 which requires the commissioners to "make regulations for securing a fair and reasonable attribution of input tax".

53. Etherton J based his decision on a number of factors:

(1) No limitation is apparent from the wording of s 83(e) VATA 1994 (the relevant provision in that case) which, in the words of Etherton J "confers a perfectly general appellate jurisdiction".

(2) Any limitation must be found by examination of the nature of the decision from which the appeals were brought and the legislative context in which that decision was made.

(3) Although the Commissioners had discretion, it had to be used to achieve a statutory objective – i.e. to secure a fair and reasonable attribution of input tax to taxable supplies. The difference between this and the statutory pre-condition in *John Dee* that "it appears to the Commissioners' requisite to do so for the protection of the Revenue" is that the condition in *John Dee* is expressly conferred on the Commissioners alone whilst the requirement that the new method of partial exemption must secure a fair and reasonable attribution of input tax to taxable supplies is a more objective test.

(4) Etherton J placed emphasis on the comment of Neill LJ in *John Dee* (at 952) that:

> "I do not consider that it is necessary or would be appropriate in this case to give guidance as to other categories of appeal under section 40(1), other than to say that in my view the function and powers of a Tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions."

54. Etherton J does not expressly decide whether the Tribunal could, if it disagreed with the Commissioners' decision, make a different direction as to what partial exemption method should apply as, in the event, he upheld the Commissioners' original decision to withdraw the special method. However, the implication of describing the Tribunal's jurisdiction as a "full appellate" jurisdiction is that the Tribunal does in fact have power to do so in the context of this particular issue.

55. There have been two more recent cases in the Upper Tribunal. The first is *Best Buys Supplies Limited v HMRC* [2011] UKUT 497. That case concerned an appeal against HMRC's refusal to exercise its discretion to allow the deduction of input tax. The Upper Tribunal (at 49) held that the jurisdiction of the Tribunal in respect of this decision was supervisory in that the First Tier Tribunal could not substitute its own decision but could only decide whether the discretion had been exercised reasonably. Although the *John Dee* case was referred to, there was no mention of *Banbury Visionplus*.

56. The second case, *HMRC v G B Housley Limited* [2015] UKUT 0071 also dealt with HMRC's refusal to exercise its discretion to allow deductions for input tax. The decision needs to be read in conjunction with an earlier decision in the same appeal, [2014] UKUT 0320. The 2015 decision however contains a more detailed analysis of the First Tier Tribunal's jurisdiction in relation to the appeal.

57. The appeal was against an assessment to tax. The assessment resulted from HMRC's refusal to exercise its discretion to allow a deduction for the input tax in question. Warren J decided (at 11) that:

> "In relation to the statutory appeal against the assessment, the F-tT has a truly appellate function. It (and, on appeal, the Upper Tribunal) will either uphold the assessment or discharge it. But in relation to the decision in relation to the proviso [i.e. HMRC's refusal to exercise its discretion to allow a deduction for the input tax], the F-tT's function and jurisdiction are purely supervisory. In other words, the F-tT is to examine whether the discretion has been properly exercised … If, as in the present case, it decides that it has not been, then it will identify why that is so; but it is not for the F-tT to substitute its own view for that of HMRC."

58. Warren J also placed some reliance on the *John Dee* decision and agreed with the conclusions of the Upper Tribunal in *Best Buys* in relation to the jurisdiction of the First Tier Tribunal in respect of the decision by HMRC not to allow the input tax deduction. Again, the decision of Etherton J in *Banbury Visionplus* is not mentioned.

59. Whilst all of these cases are helpful, the one principle which is clear is that, as Neill LJ said in *John Dee*:

> "The function and powers of a Tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions."

60. The matters which are subject to an appeal to the Tribunal under s 83 VATA 1994 are many and varied and it is clear that it is not correct just to categorise each one into those appeals which are against an exercise by HMRC of its discretion and those which are not. *Banbury Visionplus* shows that it is possible for the First Tier Tribunal to have a full appellate function even in relation to an appeal against an exercise by HMRC of its discretion.

61. We therefore turn to look at the specific appeal in this case against HMRC's decision to cancel the appellant's VAT registration.

62. As described above, the threshold condition in this case is that the Commissioners must be satisfied that a registered person has ceased to be registrable. If so, they have a discretion to cancel his registration with effect from the day on which he ceased to be registrable.

63. At first sight, it looks as if the requirement that the Commissioners must be satisfied that the person in question has ceased to be registrable is similar to the condition in *John Dee* that "it appears to the Commissioners requisite to do so for the protection of the Revenue". The fact that the Commissioners have to be satisfied as to a state of affairs might indicate that parliament intended that the question as to whether the appellant has ceased to be registrable should be assessed by the Commissioners alone and not by the Tribunal.

64. However, the objective and factual analysis as to whether the appellant had ceased to carry on business is a very different question to the rather more vague and subjective assessment as to whether a person should be required to give security for the payment of VAT in order to protect the Revenue. In our view, the question as to whether a person is making taxable supplies or is carrying on a business with the intention of making taxable supplies (and is therefore entitled to be registered for VAT) is exactly the sort of question that parliament would have intended the Tribunal to decide on an appeal rather than its jurisdiction being implicitly limited to deciding whether HMRC's decision on this question was a reasonable one.

65. There is indirect support for this conclusion when examining other possible matters which may be appealed under s 83(1). For example, under s 83(1)(u), an appeal may be brought against a direction made by HMRC under paragraph 2 of schedule 1 VATA 1994 that two or more persons should be treated as a single person for VAT purposes. The threshold condition for making such a direction is contained in paragraph 2(2) of schedule 1 which reads as follows:

> "(2) The Commissioners shall not make a direction under this paragraph naming any person unless they are satisfied -
>
> (a) that he has made taxable supplies; and
>
> (b) that the activities in the course of which he makes or made those taxable supplies form only part of certain activities, the other activities being carried on concurrently or previously (or both) by one or more other persons; and
>
> (c) that if all the taxable supplies of the business described in the direction were taken into account, a person carrying on that business would at the time of the direction be liable to be registered by virtue of paragraph 1 above."

66. This is very similar to the requirements for cancellation of a person's VAT registration in that HMRC can only exercise its discretion to make a direction if it is "satisfied" about certain matters. However, s 84(7) VATA 1994 provides:

> "(7) Where there is an appeal against a decision to make such a direction as is mentioned in section 83(1)(u), the Tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for making the direction."

67. The Tribunal's jurisdiction is therefore expressly limited to an assessment as to whether HMRC was reasonable in taking the view that the state of affairs set out in paragraph 2(a) – (c) of schedule 1 (as to which it has to be satisfied) exists. There is no such restriction in relation to an appeal under s 83(1)(a) and this provides a very strong indication that the job of the First Tier Tribunal in respect of an appeal under that sub-section is not simply to come to a view as to whether it is reasonable for HMRC to be satisfied that a person has ceased to be registrable but instead is to come to its own decision on the basis of the facts and the law as to whether the person has in fact ceased to be registrable. Section 84(7) would otherwise be unnecessary.

68. We do not draw any great comfort from the fact that this is consistent with the decision in *Gardener & Co* given that the judge in that case does not appear to have considered any of the authorities.

69. At first glance, it might appear that our conclusion is contrary to the decision in *Anne Brookes*. However, it should be remembered that that decision was only in respect of the question as to whether it was possible to appeal against HMRC's decision to cancel Anne Brookes' VAT registration on the grounds that the decision was unreasonable. It did not deal with the question of the Tribunal's jurisdiction in respect of the first ground of appeal which was that Anne Brookes was in fact carrying on a business. It is not therefore authority for the proposition that the First Tier Tribunal only has a supervisory jurisdiction in relation to that question.

70. The more recent decisions of the Upper Tribunal in *Best Buys* and *G B Housley* are dealing with a rather different sort of decision. In those cases, there was no threshold condition to be satisfied in the same way as for deregistration. Instead, HMRC simply had an unfettered discretion to allow a claim for input tax to be deducted on providing alternative evidence of the VAT charge incurred other than a VAT invoice.

71. That discretion is similar to the second part of the procedure for cancelling a person's VAT registration. Once it is demonstrated that a person has ceased to be registrable, HMRC then has a discretion to cancel that person's registration. Assuming HMRC decide to cancel the registration with effect from the correct date (the date on which the person ceased to be registrable), the decision could then only be challenged on the basis that it was unreasonable. We would accept that the principles explained in *Best Buys* and *G B Housley* would apply in those circumstances.

72. Having decided that we have an appellate jurisdiction in relation to the question as to whether the appellant has ceased to be registrable and not merely a supervisory jurisdiction, there is a supplementary question as to what the Tribunal's powers are if we were to conclude that the appellant remained registrable at the date with effect from which HMRC purported to cancel its registration but, at some later date, ceased to be registrable. In those circumstances, can the Tribunal direct that the appellant's VAT registration should be cancelled from that later date?

73. We think it is clear from the decisions in *John Dee*, *Best Buys* and *G B Housley* that, where the appeal relates to the exercise of a discretion conferred on HMRC, the Tribunal does not have such a power unless it is expressly given it by statute (as, for example, is the case in relation to penalties under paragraph 22(2)(b) of schedule 55 to Finance Act 2009). The House of Lords in *J H Corbitt* was also clear that, on an appeal against an exercise of HMRC's discretion, the Tribunal did not have power to substitute its own decision for that of HMRC.

74. As mentioned above, it might be argued that Etherton J's decision in *Banbury Visionplus* provides some support for an argument that the First Tier Tribunal is not limited to simply setting aside a decision of HMRC but that it can re-take the decision in any way that HMRC could itself have taken the decision. However, this is not explicitly stated in the case and is not something which it was necessary for the judge to decide in reaching his conclusion. Given the weight of authority to the contrary, including decisions in the House of Lords and the Court of Appeal, our view is that the First Tier Tribunal is not entitled to take its own decision and that, in such circumstances, its power is limited to allowing the appeal. HMRC would then be free to take a new decision of its own should it feel it appropriate to do so.

75. The main issue for us to decide then is whether the appellant was, at the relevant time, carrying on a business in the course of which it was either making taxable supplies or intended to make taxable supplies.

The appellant's submissions

76. The appellant referred to the six indicia of business put forward by Counsel for HMRC in *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238. These indicia are largely drawn from the decision in *Customs & Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1. The six indicia have had been adopted by HMRC as being the questions which need to be asked in determining whether an activity constitutes a business for VAT purposes – see VBNB 22000.

77. The six questions are:

(1) Is the activity a serious undertaking and earnestly pursued? This is intended to distinguish between activities carried on for business or work rather than for pleasure or daily enjoyment.

(2) Is the activity an occupation or function actively pursued with reasonable or recognisable continuity?

(3) Does the activity have a certain measure of substance as measured by the quarterly or annual value of taxable supplies made?

(4) Is the activity conducted in a regular manner and on sound and recognised business principles?

(5) Is the activity predominantly concerned with the making of taxable supplies to consumers for a consideration?

(6) Are the taxable supplies of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them?

78. Gibson J in the Lord Fisher case however warned (at 246) that these indicia should not be looked at in isolation in answering the question as to whether an activity constitutes a business. He said:

> "As I understand their judgments, the learned judges in the Court of Session did not thereafter set out to lay down principles which, if satisfied, would in all cases demonstrate that an activity must be regarded as a 'business' within those provisions. Those aspects of an activity, to which their Lordships drew attention, and on which Counsel for the Crown has relied in formulating the indicia listed above, plainly describe the main attributes of any activity which will be regarded as falling within the concepts of 'business' and 'trade, profession or vocation', and clearly they are useful tools, some perhaps more useful than others, for the analysis of an activity and for the comparing of it with other activities which are unarguably 'businesses'. The courts, however, cannot, by the formulation of tests and by the expounding of indicia, substitute any test or phrase different from that set out in the statutory provision and I am sure that their Lordships had no intention of doing so."

79. Having said that, these indicia have been adopted by the courts as a helpful starting point, including by the House of Lords in *Institute of Chartered Accountants England & Wales v Customs & Excise Commissioners* [1999] STC 398.

80. Mr Love, on behalf of the appellant, made the following points in relation to these indicia:

(1) The appellant's long trading history shows that it is experienced in earnestly pursuing a serious activity.

(2) As well as the second-hand brokerage sales, the potential for sales of new boats which have relatively high values show that there is potential for meeting the substance test. Mr Love made the point that because these boats are high value items, it should be expected that there would be infrequent sales albeit that when a sale did take place the value would be significant. Mr Love explained that, in the period leading up to the de-registration date of June 2010, the business had been hit hard by the recession. In addition, the fact that there were two potential second-hand boat sales in 2008/09 affected the prospects for

new boat sales. On top of this, the time Mr Love was spending in the US inevitably affected how much time he could devote to the marine activities of the appellant.

(3) Mr Love observes that the activity of the appellant is predominantly concerned with the making of taxable supplies for a consideration, so satisfying the fifth test.

(4) Mr Love also submits that the conduct of the appellant's activities will be in a regular manner on the sound and recognised business principles controlled by the Association of Brokers and Yachting Agents (addressing the second and fourth tests).

81. Mr Love explains that, having sorted out their issues in the US, they were, at the time of HMRC's visit in November 2013, starting to gear up for the 2014 season. The intended activities of the appellant were:

(1) new boat sales;

(2) brokerage;

(3) component replacements;

(4) specialist equipment;

(5) modification kits.

82. We were not given any information about the nature of any agreement between the appellant and Valent Shipyard in the Netherlands as far as new boat sales are concerned. For example, we do not know whether the appellant would just be acting as a middle man, taking a commission or whether the appellant would itself sell the boat to the customer and then arrange for it to be manufactured by the shipyard in the Netherlands, hoping to make a profit on the difference between the price for which it sells the boat and the price for which the shipyard is able to build it. The only additional evidence referred to by the appellant in support of the new boat sales was a schedule of website enquiries which total 193 enquiries from 26 countries. However, we were not told what period this covered. It appears that the schedule relates to enquiries received before the website was passed over to the Dutch shipyard which we assume was at the same time as the shipyard took over the manufacturing in 2007. We had no evidence as to what enquiries might have been made after that date.

83. As far as brokerage is concerned, Mr Love drew attention to the fact that the appellant had entered into a brokerage agreement with another company, Sea Ventures in Hamble in 2008. It is this agreement which produced the commission for the boat sale which was received in February 2010. Mr Love confirmed that that agreement is still in place and that the appellant is in a position to derive further commission from this source.

84. We were given correspondence with a number of companies indicating that the appellant would receive a discount on the supply of certain components. Mr Love explained that the appellant's intention would then be to sell these components to the end user at their recommended retail price, thus making a profit.

85. One specific example is given of specialist equipment which is an "in boom reefing system". This would provide the appellant with a commission in respect of customers introduced to the companies which provide these systems.

86. In addition to this, there was an example given of a modification kit which had been developed by the appellant in partnership with a local company. This was a sliding door package which would increase cockpit storage. Again, we infer that the appellant would receive a commission for introducing potential customers to the local company in question.

87. Mr Love also argues that the receipts from the mould sales in June 2010 and May 2011 evidence continuing economic activity.

88. He refers to the correspondence with the editor of Yachting Monthly as additional support for the continuing activities of the appellant.

89. Finally, Mr Love mentioned one further activity which the appellant was considering carrying out which is the purchase of used boats for re-fitting with a local company which he said would be "a new activity that holds promise of a good shared profit". We were provided with an email dated 20 March 2013 from a Mr John Turner apparently offering his boat for such a project. Mr Love tells us that this project is still ongoing.

90. In summary, the appellant's case is that although, as a result of the recession and Mr Love's involvement with the holiday villa project in the US, the appellant's business has suffered a downturn, it is still very much carrying on a business with the intention of making taxable supplies, even though it has failed to make any taxable supplies since October 2007 with the exception of the commission received in February 2010 and the (zero rated) sale of the mould tools between 2006 – 2011. It follows that the appellant has remained eligible to be registered for VAT and that its VAT registration should not therefore have been cancelled and that, as a result, no assessment should have been raised for the recovery of the input tax which has been reclaimed.

91. Mr Love made the final point on behalf of the appellant that the company's accountants had expressed the view that there would be an ongoing obligation on the company to remain VAT registered until such time as a definite recorded decision was made by the directors to cease trading. No such decision had ever been taken.

HMRC's submissions

92. Mr Priest, on behalf of HMRC, acknowledged that the appellant had a long history of carrying on business activities. However, he said, there may come a point in the life of any business where the activities which are being carried on are no longer sufficient to constitute a business for VAT purposes. This, he submits, is what has happened in the case of the appellant. Whilst there is some suggestion that the appellant may in the future undertake activities which give rise to taxable supplies, in

his view this is no more than a possibility rather than a firm intention. In support of these submissions, he made the following points:

(1) The appellant has made no taxable supply since October 2007 other than the commission payment received in February 2010 and the receipts relating to the sale of the mould tools in 2010 and 2011. The receipts from the sale of the mould tools do not however indicate any ongoing economic activities. They are simply instalments of the original sale price which was agreed in 2006.

(2) There was no documentary evidence to show that the appellant was actively pursuing a business by advertising its services in telephone calls, a website, trade press advertisements, boat show trade stands or advertisements or by any other means.

(3) At a meeting between HMRC and Mr Love on 18 March 2014, Mr Love was unable to confirm whether any LM27/Scanyacht 290 boats were currently in production in the Netherlands nor how the precise mechanics of any sale would work as between the UK customer and the manufacturer. He was unable to provide any specific detail about pricing for the in boom reefing systems. Mr Love confirmed at that meeting that he had undertaken no research into second-hand boat renovation.

(4) The appellant relied entirely on word of mouth for second-hand yacht brokerage.

(5) The evidence of discounts available for the purchase of components was all dated in May 2014 and does not provide evidence of any intention to carry out this activity in 2010-2013.

(6) Whilst Mr Love moved his boat to Gosport in early 2014 and whilst this could have been for business purposes, this does not again provide any evidence of continuing economic activities in 2010-2013.

93. Based on the evidence referred to above, Mr Priest submits that HMRC were correct to take the view that the appellant had ceased to be registrable for VAT and that it was therefore entitled to cancel the appellant's VAT registration.

94. 23 June 2010 was chosen as the date from which the registration should be cancelled as the payment of £3,743 received on 22 June 2010 was, at the time the decision was made, the last evidence HMRC had of any economic activity being carried on by the appellant. HMRC did not at that time have full details of the nature of this payment, nor were they aware of the subsequent payment received in May 2011 which only came to light at a later stage in the correspondence.

95. Mr Priest does however concede that, had HMRC known all of the information when it made its decision to cancel the appellant's VAT registration, it might have reached a different view as to the date on which the appellant ceased to be registrable. However, this would have been an earlier date rather than a later date. The reason for this is that the payment on 22 June 2010 and the subsequent payment in May 2011 are simply instalments of the purchase price for the sale of the mould tools which took place in December 2006. They do not represent any new supply. On this basis,

HMRC might have taken 26 February 2010 as the date from which the appellant's registration should have been cancelled, being the day after the receipt of the commission payment for the brokerage of the second-hand yacht which had been sold.

96. Mr Priest however submits that, giving the appellant what is in effect four months' grace to allow for the possibility of further activity, despite there being no further sales, is not unreasonable and that the decision to cancel the registration with effect from 23 June 2010 should still stand.

Discussion and decision

97. The first question we have to decide is whether the appellant has ceased to be registrable for VAT. If it has, the second question we must answer is when the appellant ceased to be so registrable.

98. It is clear that the appellant carried on a yachting business for many years prior to 2007. It was making taxable supplies in the course of that business and was correctly registered for VAT.

99. In 2007, the mould tools for the LM27/Scanyacht 290 were transferred to Valent in the Netherlands. At that time, or shortly afterwards, the yacht brokerage business in Hamble was sold. It seems clear that there was a significant contraction in the business after these events had taken place, no doubt partly as a result of the recession.

100. It is however equally clear that between 2008 and early 2010, the appellant continued to carry on its yacht brokerage business. It entered into agreements with other yacht brokers, achieved one sale (which resulted in the February 2010 commission) and narrowly missed another sale.

101. After that, the position is more finely balanced. We are however influenced by the fact that Mr Love tells us that the appellant's main activity is the supply of new boats and yacht brokerage coupled with his correspondence with the editor of Yachting Monthly in 2011. It is clear from that correspondence that he was trying to get Yachting Monthly to run an editorial on the LM27/Scanyacht 290 in order to generate interest for the boat with a view either to drum up second-hand sales or new orders. After Mr Love's letter to the editor of Yachting Monthly on 6 October 2011, we do not however have any further evidence of activity on the part of the appellant designed to generate further sales of either new or second-hand boats.

102. Indeed, we have nothing at all until the email of 20 March 2013 from Mr Turner. Mr Love tells us that this related to the possibility of purchasing the boat and arranging for it to be re-fitted by a local company in the hope of "a good shared profit". However, we are not told (and it is not clear from Mr Turner's email) who generated the proposal. This may have been a speculative enquiry from Mr Turner himself rather than something prompted in any way by the activities of the appellant. Bearing in mind Mr Love's confirmation to HMRC at the meeting on 18 March 2014

that he had undertaken no research into second-hand boat renovation, this is not on its own sufficient to persuade us that, at that time, the appellant was carrying on a business with the intention of making taxable supplies.

103. There is also no evidence that the additional activities, namely component replacements, specialist equipment and modification kits which the appellant had in mind when gearing up for the 2014 season were activities which, before then, it had contemplated undertaking. The correspondence for example relating to possible discounts on components all took place in 2014. Whilst it is possible that the appellant, following Mr Love's return from the US in September 2013, did genuinely intend to carry on those activities, the appellant does not seek to argue that it intended to make taxable supplies of that nature before that date.

104. Looking at the six indicia referred to in the *Lord Fisher* case, it seems to us that the question is whether there came a point when the appellant's activities ceased to be actively pursued with reasonable or recognisable continuity. This is the thrust of Mr Priest's submissions.

105. Mr Priest told us that, in these sorts of cases, it is HMRC's practice to look at the time at which the registered person ceased to make taxable supplies. Whilst this may be appropriate in some situations, we do not think it can provide a universal answer to the question as to when a person ceases to be registrable. It is perfectly possible for a person to be carrying on an activity with reasonable or recognisable continuity and with the intention of making taxable supplies for a substantial consideration but not be successful in achieving any sales.

106. In the *Lord Fisher* case, Gibson J said at 247:

> "The primary meaning of all these words 'business, trade, profession and vocation', is an occupation by which a person earns a living. It is clear that ordinary businesses, trades, professions and vocations can be carried on with differences from this standard and norm in regularity or seriousness of application, in the pursuit or disregard of profits or earnings and in the use or neglect of ordinary commercial principles of organisation. As the decision in the *Morrison's Academy* case has shown, the absence of one common attribute of ordinary businesses, trades, professions or vocations, such as the pursuit of profit or earnings, does not necessarily mean that the activity is not a business or trading, etc if in other respects the activity is plainly a 'business'".

107. In this case, the appellant's activity is plainly a "business" in all respects other than the regularity or continuity of its activities.

108. In our view, there is sufficient evidence that the appellant continued (albeit at a reduced level) to carry on activities with a view to making taxable supplies until October 2011 when it made what appears to be its final attempt to persuade the editor

of Yachting Monthly to carry out a sailing test on the LM27/Scanyacht 290 in order to gain publicity for the boat in that magazine.

109. We do not have any evidence of continued activities after that date other than the email from Mr Turner of 20 March 2013 (which, for the reasons above, we have discounted) until Mr Love returned from the US in September 2013. We therefore find that the appellant continued to be registrable until at least 6 October 2011. We express no view as to whether, with its new plans, the appellant may have become entitled to be registered for VAT again at some later date after September 2013.

110. It follows from this that HMRC was not entitled to cancel the appellant's VAT registration from 23 June 2010.

Conclusion

111. We allow the appellant's appeal against the cancellation of its VAT registration with effect from 23 June 2010.

112. We must therefore also allow the appellant's appeal against the VAT assessment dated 30 July 2014.

113. 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.

ROBIN VOS

TRIBUNAL JUDGE
RELEASE DATE: 15th October 2015