TC05102

Appeal number: TC/2014/04436

VAT – exception from registration, VATA 1994 Schedule 1, paragraph 1; appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DOOGS GARDEN SERVICES **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC FCIArb
CHARLOTTE BARBOUR, CA, CTA

Sitting in public at George House, 126 George Street, Edinburgh on 21 January 2016

Dougie Teviotdale for the Appellant

Mrs E J McIntyre, Officer of HMRC, for the Respondents,

DECISION

Introduction

1. This appeal is against the refusal by the respondents (HMRC) to accept a request to be excepted from registration for the purposes of VAT. There is also, in the background, an assessment in the sum of £14,888.03 issued in consequence of that refusal.

2. Mr Douglas Teviotdale, a partner of the appellant, appeared on its behalf at the hearing at Edinburgh on 21 January 2016. He referred to a number of documents which he had produced. Mrs E J McIntyre (appeals unit) appeared on behalf of HMRC. She led no evidence but provided a skeleton argument and addressed us on the bundles of documents produced.

Statutory Background

3. In summary, a person making taxable supplies becomes liable to be registered at the end of any month, if the value of his taxable supplies *in the period of one year then ending has exceeded* the relevant registration threshold.[1]

4. In September 2012, the registration threshold was £77,000. The threshold became £79,000 on 1 April 2013, and £81,000 on 1 April 2014.

5. In September 2012, the deregistration threshold was £75,000. It became £77,000 on 1 April 2013 and £79,000 on 1 April 2014.

6. Thus, if a trader's taxable supplies in the year to September 2012, exceed the registration threshold, he is liable to be registered with effect from 1 November 2012.

7. However, under paragraph 1(3)[2] the trader is not liable to be registered if HMRC are satisfied that the value of taxable supplies, *in the period of one year beginning at the time at which, apart from* that sub-paragraph, *he would become liable to be registered, will not exceed* the relevant threshold. This provision is an exception to the rule requiring registration. HMRC's decision, whether to be satisfied, must not be arbitrary. It must be reasonable and made in accordance with well settled principles relating to statutory decision making.

8. Thus, if HMRC are satisfied that the value of the same trader's taxable supplies in the year beginning 1 November 2012 will not (not *might not*) exceed the relevant threshold, the trader will not be registered. The rationale for this exception is that where the trader has exceeded the turnover threshold for registration but is then likely to fall below the deregistration threshold for the following year, he should not have to

[1] VAT Schedule 1 paragraph 1(a)

[2] of Schedule 1

go through the registration process, which would only take effect at a time when his level of turnover would entitle him to apply for deregistration.

9. It is also settled law that the point in time at which HMRC must be satisfied on the question of reduced turnover is the date on which the trader would otherwise be liable to be registered. HMRC must therefore consider and only consider the evidence which would have been available to them at that time, even if they are enquiring into the matter at a later date. Evidence of actual subsequent events is therefore irrelevant.

10. The path of seeking exception to registration has pitfalls if it is refused, particularly where the matter is raised (whether by HMRC or the trader) long after what may become the effective date of registration. Reaching a decision on that question can take several months or even longer. During that period the trader cannot charge VAT on his supplies as he is not yet registered. However, when subsequently registered (retrospectively), he becomes liable to account for VAT on those same supplies.[3]

11. Finally, we note HMRC's *Liable/No Longer Liable* Policy. Under that policy, HMRC do not seek to recover from a trader VAT for periods when he was not liable for VAT (because of reduced turnover) even although he ought to have been registered by reason of having previously exceeded the rolling turnover threshold.

Facts

12. The appellant has operated a garden maintenance business for many years. The partners were Mr Teviotdale and his wife. The appellant was not registered for VAT.

13. By letter to HMRC dated 19 September 2013, the appellant's accountant intimated that the appellant had *gone over the VAT threshold on the last day of November 2012.* This was said to be due to an unusually high sale of £3,500 relating to landscaping work. The letter requested a *registration exception* as there was no intention to carry out further landscape work in the future.

14. HMRC responded seeking information pointing out that they could only consider the request in the light of facts which were available at the time the appellant's liability to be registered first arose.

15. No information was forthcoming. Accordingly, by letter to the appellant's accountant dated 30 October 2013, HMRC intimated that they considered that the appellant should be registered with effect from 1 January 2013 and required him to complete and submit the usual registration form.

16. By letter to HMRC dated 28 December 2013, Mr Teviotdale explained that he would *not be going over the VAT threshold again due to ill health,* details of which he

[3] See *Drury v HMRC* [2009] UKFTT 50 (TC) paragraphs 28 and 29

set forth. He also stated that his wife was retiring from the firm with effect from 31 December 2013.

17. In January 2014, HMRC sought details of the appellant's monthly turnover from October 2013, and information available to him when the threshold was exceeded that could satisfy HMRC that the turnover in the following 12 months would have fallen below and remained below the de-registration threshold.

18. In February 2014, Mr Teviotdale provided HMRC with turnover details and intimated that he had reduced working to three days a week, and that he intended to reduce the volume of business due to his wife's retirement. He subsequently informed HMRC that his decision to reduce working and business, and his wife's decision to retire were all made in December 2013.

19. These details disclosed *inter alia* that by September 2012, the appellant's rolling annual turnover was £80,685, and thus in excess of the annual threshold of £77,000. Those details also showed that its rolling annual turnover exceeded £80,000 (and thus the registration threshold) in each subsequent month until December 2013. In January 2014, its rolling annual turnover exceeded the de-registration threshold of £77,000.

20. There was therefore no material placed before HMRC at all far less material which was or would have been available in or about September 2012 from which they should have concluded that there was a clear expectation following the breach of the registration threshold in September 2012 that its turnover would have fallen below the deregistration limit in the ensuing 12 months in accordance with paragraph 1(3) of Schedule 1 to VATA.

21. Thereafter, by letter dated 8 April 2014, HMRC informed the appellant that they considered that he should be registered with effect from 1 November 2012. The reason for their decision was, they said, that they could not have been satisfied at the time the threshold was exceeded (September 2012) that the turnover in the following 12 months would have fallen below the deregistration threshold. The appellant was therefore registered with effect from 1 November 2012.

22. HMRC also pointed out that as the turnover had recently fallen below the deregistration threshold, the period over which the appellant required to be registered could be restricted. It was subsequently de-registered with effect from 31 January 2014.

23. The appellant sought a statutory review of HMRC's decision. By letter dated 4 July 2014, the decision was upheld. The basis was that liability to register arose in September 2012. There was no clear expectation that turnover would fall below the deregistration limit in the ensuing twelve months. The decisions made in December 2013 were not relevant. The appellant appealed to the Tribunal on or about 4 August 2014.

24. By letter to the appellant dated 6 August 2014, HMRC intimated that the appellant only required to be registered for the period 1 November 2012 to 31 January 2014. Over that period the appellant's turnover was £105,092. The total

amount of VAT said to be due in the letter was £2,627.30. The appellant was asked to advise whether the figures were *acceptable*. He was informed that if no response was received within 30 days an assessment would be issued.

25. By letter dated 11 August 2014 in reply, Mr Teviotdale intimated that he was to appeal and requested that any action be delayed pending such appeal. HMRC sent an acknowledgement by letter dated 20 August 2014. However, by further letter to HMRC dated 23 August 2014, Mr Teviotdale, after referring to HMRC's letter dated 6 August 2014, stated *Having considered the offer made by you and your department and I have decided to accept the settlement.* He asked for a written acknowledgement.

26. On or about 5 September 2014, HMRC issued an assessment in the sum of £14,888.03. This covered the period between 1 November 2012 and 31 January 2014 Mr Teviotdale responded by letter dated 27 September pointing out that settlement in the sum of £2,627.34 had been agreed.

27. By letter to the appellant dated 21 November 2014, HMRC asserted that the assessment of £14,888.03 was valid and enforceable; that the correspondence did not create an enforceable agreement that only £2,627.30 was due. HMRC pointed out that there was no reference to the contract being *in full and final settlement.* Therefore, HMRC could pursue the appellant for the balance of £14,888.03. They also alluded to the question of *patent mistake* and referred to *Wilkie v Hamilton Lodging House- Company Ltd*[4].

Grounds of Appeal

28. Mr Teviotdale relied on the view that the turnover of his business exceeded the threshold because of a spike in turnover caused by the appellant purchasing materials for a client and charging for them thus increasing the turnover of the business, whereas, in other circumstances, the customer would have purchased them himself and that would have had no effect on turnover. It was also asserted that the business was winding down, Mrs Teviot had retired and Mr Teviot was reducing his own working hours.

Discussion

Further procedure

29. By the end of the hearing on 21 January 2016, it became clear, and Mr Teviotdale accepted that his original grounds of appeal were unsound. However, he maintained that his VAT liability had been agreed with HMRC at the sum of £2,627.30 (see paragraphs 24-27 above). Accordingly, that was the sum the appellant should be required to pay, and no more. This became the only issue left for discussion.

[4] (1902) 4F 951

30. After discussion and in the hope that parties would reach agreement which would resolve all matters, we adjourned the hearing. HMRC were authorised to lodge submissions on the question of the existence and effect of any agreement settling the sum in dispute between the parties. The appellant was authorised to lodge further submissions in response. This was reflected in the Tribunal's letter to the parties dated 25 January 2016.

31. HMRC submitted, in a letter dated 29 February 2016, that what was under appeal was the period for which the appellant required to be registered (under VAT s83(1)(a)), and not the quantum of the assessment subsequently issued (under VATA s73(1)). They argued further that the letter dated 6 August 2014 did not constitute *a potential contract.* HMRC were offering the appellant the opportunity to provide an alternative basis for calculation. The amount of output tax stated in the letter was based on the appellant's figures; an allowance of 15% was given for purchases producing input tax of £2,627.30. This led to the assessment which was made to best judgment as the appellant had not provided any further details. The assessment carries no right of appeal under s83(1)(p) as no return has been submitted for the period to which the assessment relates.

32. Finally, HMRC submitted that they did not enter into a contract with the appellant in relation to the proposals of how to calculate the amount of VAT due. The VAT legislation does not allow for *a "Contract settlement" of the kind found within those taxes which fall out with VAT.*

33. By letter dated 27 March 2016, essentially in response, the appellant emphasised the nature of offer and acceptance in Scots law, derived the language the parties have chosen to use. Here, he said the 6 August 2014 letter from HMRC contained an offer which was accepted. He also referred to VATA s73(9). No reference to *full and final settlement* is needed in the exchange of letters as HMRC seem to think.

34. He also submitted, in effect, that HMRC must have known what they were doing when they referred to the two widely different sums in their letter dated 6 August 2014.

35. By letter dated 1 April 2016, Mr Teviotdale invited us simply to proceed with the appeal. He attached a medical report from his GP which indicates that there is considerable concern for Mr Teviotdale's health and well-being.

36. On 25 April 2016, HMRC indicated, by email, that they had no further submissions to make.

Decision

37. HMRC are correct in stating that what is under appeal is the decision to refuse to grant exception from VAT registration. There is no doubt that the appeal must be refused. The facts disclose that there is no basis for a successful appeal, as the appellant ultimately accepted. The appellant could not have demonstrated a clear expectation following the breach of the registration threshold in September 2012 that

its turnover would have fallen below the deregistration limit in the ensuing 12 months in accordance with paragraph 1(3) of Schedule 1 to VATA.

38. As the correspondence in the bundle produced by HMRC plainly included correspondence which at least might have yielded an argument that some form of compromise had been reached, we raised it at the hearing and allowed parties to develop their arguments. The point is effectively raised in paragraphs 16 and 17 of HMRC's Statement of Case. We recognise that the appellant has no legal representation. We encouraged him to obtain legal advice or free legal representation if available. For one reason or another, that has not proved possible. We therefore consider matters on the basis of the material presented to us and give our views briefly as they are not necessary for the determination of the appeal against the refusal to grant exception from registration.

39. It is said by HMRC that there is no statutory right of appeal against the assessment as it does not relate to a period which has been the subject of a return. Even if that is so, the existence of a contract of compromise between the parties must be relevant to the question of the reasonableness and good faith of the assessment, and whether it has been made to best judgment as HMRC contend in their submissions. If the assessment is not appealable, it may be capable of being set aside by the process of *judicial review* or resisted on the basis of some aspect of personal bar. In such proceedings, if permitted, the assessment could, if the appropriate grounds were established, be held to be invalid, set aside and rendered unenforceable.

40. Relevant grounds would seem to us to include the agreement of parties that retrospective liability for VAT amounted to £2,627.30 rather than the sum of £14,888.03. It also seems to us that it is plainly arguable that such an agreement or contract of compromise was reached. It seems to be competent to do so, even though, on one view, the compromise was not in respect of an outstanding appeal (the outstanding appeal being the appeal against refusal to grant exception from liability to register rather than the assessment)[5].

41. The calculation is not explained in the letter of assessment dated 6 August 2014. The letter states that *the total VAT amount due is £2,627.30.* The letter requested the appellant to advise if the figures were *acceptable,* and noted that the absence of a response within 30 days would lead to the issue of an assessment.

42. We do not think that the reasonable recipient of such an offer, circumstanced as Mr Teviotdale was, with no experience of VAT, would assume that some mistake must have been made. The offer was accepted without question. It contained no patent error.

43. These circumstances are distinguishable from *Wilkie,* referred to by HMRC in correspondence, where a joiner offered to carry out work for an agreed sum under reference to scheduled rates. The addition of the sums and rates in the schedule (subsequently correctly calculated) brought out a larger total. He successfully sued

[5] See *HMRC v Southern Cross* [2015] UKUT 0122 (TCC) paragraphs 36-38.

for the difference. The court held that this was not a contract for a lump sum; rather, it was a specification with prices and rates. An examination of one item in the schedule revealed that an error in calculation had inadvertently been made. Had there been a serious mistake made by one party in a private calculation, the position would have been different. Here, whatever calculation HMRC carried out was not fully explained in their letter. *Wilkie* does not, therefore, assist them.

44. In these circumstances, HMRC will no doubt give careful consideration to the question of enforcement of the assessment dated 5 September 2014.

Disposal

45. With some regret, we dismiss the appeal.

46. 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.

J GORDON REID QC FCIArb

TRIBUNAL JUDGE
RELEASE DATE: 16 MAY 2016

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