TC01292

Appeal number: TC2009/15267

VAT - ***exception from registration – whether the value of Appellant's supplies in following year would not exceed deregistration threshold - whether HMRC's refusal to apply the exception was one that a reasonable panel of Commissioners properly directed on the law would have made having regard to relevant factors and disregarding irrelevant ones – yes – Appeal dismissed***.

FIRST-TIER TRIBUNAL

TAX

ROY VICTOR EVANS **Appellant**
T/A BRITANNIA SERVICES

- and -

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

TRIBUNAL: MICHAEL TILDESLEY OBE
DR MICHAEL JAMES

Sitting in public at Vintry House, Wine Street Bristol BS1 2BP on 25 May 2011

John Brooks counsel instructed by Hucclecote Accounting and Taxation Services for the Appellant

Robert Wastall counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs for HMRC

DECISION

The Appeal

1. The Appellant appealed against HMRC decision dated 17 June 2009 confirmed on review dated 14 October 2009 to register him compulsorily for VAT from 1 December 2007. The issue in this case was the lawfulness of HMRC's refusal to apply the statutory exception from registration in paragraph 1(3) of schedule 1 of the VAT Act 1994.

2. In June 2007 the Appellant retired from the family business leaving it in the capable hands of his son. The Appellant, however, decided to retain one part of the business, the hiring out of dehumidifiers, to keep him occupied during his retirement which he ran as a sole trader. From previous experience the Appellant expected an annual turnover of between £30,000 to £40,000 per annum for this part of the business and so he decided not to register for VAT. The starting up of the Appellant's retirement venture, however, coincided with the exceptional and extreme flooding of Gloucestershire, described as the County's worst peacetime disaster in living memory. The aftermath of this disaster resulted in an unprecedented demand for dehumidifiers with the Appellant doing everything possible to help people in dire need of assistance. The Appellant's hiring charges were as a rule paid by the insurers of the properties affected which resulted in a dramatic increase in turnover far beyond the Appellant's original expectations for the business.

3. In August 2007 the Appellant anticipating the potential difficulties with his VAT registration approached his accountants which wrote to HMRC explaining the situation and asking for the Appellant to be excepted from registration under paragraph 1(3) of schedule 1 of the VAT Act 1994. On 24 October 2007 HMRC allowed the request for exception with effect from 1 October 2007. The Appellant erroneously believed that the exception applied to all his business emanating from the damage caused to properties by the exceptional summer floods.

4. In November 2008 when the accountants prepared the Appellant's annual accounts for the year ending 31 March 2008 they realised that the Appellant had misunderstood the terms of the exception, and requested HMRC to issue a fresh ruling on the exemption. The Appellant's turnover as at 31 March 2008 stood at £307,159.

5. On 10 February 2009 HMRC refused the Appellant's request saying that he was liable to be registered for VAT under the forward look principle in accordance with paragraph 1(1)(b) of schedule 1 to the VAT Act 1994. The Appellant requested a reconsideration of the decision which was communicated in a letter dated 17 June 2009. HMRC amended its decision accepting that the forward look principle did not apply but stating instead that the Appellant was liable to be registered under paragraph 1(1)(a) of schedule 1. Further HMRC decided that the exception granted on 24 October 2007 was only applicable for the month of October 2007, and that the Appellant should be registered with effect from 1 December 2007. This decision was confirmed on review on 14 October 2009.

6. The Appellant argued that HMRC in its refusal to continue with the exception placed too much weight on the Appellant's continuing high turnover and failed to look forward as was required by the wording for the statutory exception from registration. HMRC disagreed, contending that its decision was rational and based on the facts known as at 1 December 2007.

7. The Tribunal's jurisdiction in respect of this dispute is limited, in that it cannot substitute its own decision for that of HMRC. Rather the Tribunal must decide whether HMRC's decision was one that a reasonable panel of Commissioners properly directed on the law would have made having regard to relevant factors and disregarding irrelevant ones.

The Law

8. The statutory provisions relating to a taxpayer's liability to register for VAT are found in schedule 1 to the VAT Act 1994. Paragraph 1(1) of schedule 1 sets out the basic rule as to when a person becomes liable to be registered, and in so far as is relevant to this appeal provides as follows:

> "Subject to paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule -
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> (a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded [£64,000]; or
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> (b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period then beginning will exceed [£64,000].

9. The basic rule as to liability to be registered is subject to an exception set out in paragraph 1(3) of schedule 1, which states that

> "A person does not become liable to be registered by virtue of sub-paragraph (1)(a) ... above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed [£62,000]".

10. The Tribunal in *Nicholas Paul Drury* [2009] UKFTT 50 (TC) explained the reasoning for the exception at paragraph 12 of its decision:

> "…..if a trader has, for any exceptional reason, exceeded the turnover threshold for registration, but is then likely to fall below the deregistration threshold for the following year, he should not be required to go through the process of registration which would only take effect at a time when his trading conditions would entitle him to apply for deregistration".

11. Paragraph 5 of schedule 1 to the VAT Act 1994 sets out the obligation placed on the taxpayer to notify the HMRC of his liability to register and the time at which HMRC must register the taxpayer:

> "(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.
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> (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.
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> (3) In this paragraph "the relevant month" in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered".

Consideration

12. The Appellant accepted that he exceeded the registration threshold at the end of October 2007 looking back over his previous 12 months of taxable supplies, and was, therefore, liable to be registered for VAT from 1 December 2007. The Appellant's position was complicated by his failure to notify HMRC within 30 days from the end of October that he had exceeded the registration threshold. In this respect the Appellant made a retrospective application for HMRC to apply the statutory exception to compulsory registration. HMRC accepted that the Appellant held a genuine but mistaken belief that he was not required to renew his application for exemption from VAT registration after HMRC's initial approval of the exemption on 24 October 2007.

13. The sole issue in this Appeal was whether HMRC exercised its discretion lawfully with its refusal to grant the Appellant the benefit of the exception to compulsory registration under paragraph 1(3) schedule 1 of VAT Act 1994.

14. The decision of Ferris J in *Gray trading as William Gray & Son v Commissioners of Customs & Excise* [2000] STC 880 provides authoritative guidance on the scope of HMRC's discretionary powers under paragraph 1(3), and the evidence upon which the discretion is exercised, particularly in relation to a retrospective application.

15. Mr Justice Ferris' construction of the scope of paragraph 1(3) schedule 1 VAT Act 1994 is set out in paragraphs 19 – 23 of the judgment:

> "19. I think that two points stand out clearly. First paragraph 1(3) requires a decision to be made by the commissioners. It does not prescribe a set of criteria which, if satisfied, lead to a particular result. It says that a certain conclusion will follow if the commissioners are satisfied that a particular state of affairs exists. A VAT tribunal, or this court itself, can only interfere with the decision of the commissioners if it is shown that the decision is one which no reasonable body of commissioners could reach.
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> 20. Secondly, paragraph 1(3) is directed primarily to the case where a person making taxable supplies (the trader) complies with his duty to notify the commissioners of his liability to be registered in accordance with paragraph 5. In other words it deals with a position in which the

trader informs the commissioners that, during the twelve months down to the end of the preceding month, his taxable supplies exceeded the threshold but submits that this was exceptional and that the (slightly lower) threshold mentioned in paragraph 1(3) will not be exceeded during the next twelve months. The commissioners are to make their decision on that submission by looking forward and considering, on a prospective basis, whether or not they are satisfied that the value of the trader's taxable supplies for that period 'will not exceed' the threshold amount. All this is envisaged as being done within a short time of the notification of liability being made, because it is part of the process by which the commissioners determine whether registration is required at all. As this determination will affect the trader's tax liability from a date one month after the threshold was crossed it is important that it shall be made promptly. This means that it must be made as at the date when registration would otherwise become effective and that it must be based on an estimate of what is likely to happen in the future. This is precisely in accord with the language of the paragraph.

21. If this is the position when notification is made in due time, as I consider it must be, then it would be surprising if the paragraph requires a different approach to be adopted when the trader is in breach of his duty and notifies late. The question to be decided in relation to such a trader is the same as that which has to be decided in the case of a trader who performs his duty, namely to determine whether or not he must be registered. In my judgment the exercise must be carried out at the same date in each case, namely at the date when registration would have effect in the absence of a decision under paragraph 1(3) which is favourable to the taxpayer.

22. Ms Lonsdale argued that the exercise cannot and should not be carried out until the trader notifies the commissioners that, subject to paragraph 1(3), he has become liable to be registered. Her main justification for adopting this interpretation of the legislation was that otherwise the rules would operate unfairly to a trader who registers late. If it were adopted it would mean that, on the facts of this case, the commissioners would have to consider the facts of which the appellant informed them at or shortly after the time when he submitted form VAT 1. That is, in my view, something which needs to be considered in connection with what I have identified as the second question. It cannot, in my judgment, constitute a reason for requiring the commissioners to look at the matter as at a later date in a late registration case. If it were otherwise a trader who notifies late might secure an advantage, in the form of an ability to show a higher degree of probability that the threshold would not be crossed, than a trader who complies with his obligations. Indeed a trader who registers 12 months or more late would be able to contend that the commissioners should, for the purposes of paragraph 1(3), look no further than the actual figures for the year in question, which would then lie in the past. This would negate the actual requirement of paragraph 1(3) which is that the commissioners must consider whether they are satisfied that the value of taxable supplies in the relevant year '*will* not exceed [emphasis added]' the threshold amount.

> 23. I conclude, therefore, that in cases of late registration as well as in cases where the trader notifies in due time, the commissioners must give effect to paragraph 1(3) by considering the case as at the date from which registration would otherwise take effect and, by looking forward, asking themselves whether they are or are not satisfied that turnover will not exceed the threshold amount. Obviously they cannot do this otherwise than on the basis of what they consider to be likely. But if they reach a conclusion which would be open to a reasonable body of commissioners considering the relevant evidence, an appellate tribunal cannot interfere with their decision. It is not enough that the appellate tribunal thinks that it would have reached a different conclusion on the same evidence".

16. Mr Justice Ferris decided that HMRC under paragraph 1(3) should treat an application for exemption from a late registration tax payer in exactly the same way as a tax payer who made his application on time. In the Appellant's case HMRC was required to exercise its discretion under paragraph 1(3) by looking forward from the date of registration (1 December 2007) and considering, on a prospective basis, whether it was satisfied that the value of the Appellant's taxable supplies in the next 12 months would not exceed the threshold for de-registration[1]. Mr Justice Ferris emphasised that paragraph 1(3) did not prescribe a set of criteria which, if satisfied, led to a particular result. Paragraph 1(3) simply stated that a certain conclusion would follow if HMRC was satisfied that a particular state of affairs existed

17. Mr Justice Ferris' judgment on the nature of the evidence to be taken into account in making its decision under paragraph 1(3) is set out in paragraphs 24-26 of the decision:

> "24. In a case where the trader complies with his obligations in respect of notification the commissioners will not only consider whether they are satisfied as mentioned in paragraph 1(3) as at the date from which registration would otherwise be effective but they will make their actual decision at about the same time. It must follow, in my view, that the only information which they can or should act upon is the information which is available to them at that time. There can be no unfairness or difficulty about this, because the trader will be able to draw to the attention of the commissioners, at the time when he notifies them of his liability to be registered, any facts which he wishes the commissioners to take into account for the purposes of making a decision under paragraph 1(3).
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> 25. A trader who gives late notification of his liability to be registered, or who is registered by the commissioners without having given any such notification, will have missed this opportunity. Ms Lonsdale submitted that if the commissioners cannot take into account information provided after the date when, in the absence of a favourable decision under paragraph 1(3), registration would take effect this would be unfair to the trader. In order to avoid this

[1] The amount specified in paragraph 1(3) is the threshold for making an application for de-registration from VAT which is slightly lower than the threshold for registration.

> unfairness she submitted that the commissioners should take account of whatever information the trader gives them at or about the time when the trader gives the late notification. Hence in the present case, in the event that I hold (as I have) that the commissioners should look at the appellant's position prospectively as at 1 September 1996, there should be attributed to them not only such knowledge (if any) of the appellant's business as they actually had at that date, but the further information obtained through their officer when he inspected the appellant's records in February 1997, the information contained in form VAT 1 and the appellant's covering letter and also, as I understood Ms Lonsdale's submission, the appellant's statements in his letter of 6 June 1997. Except in respect of the last item the commissioners appeared to have accepted this approach in giving their decision under paragraph 1(3), for they had said:
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> 'The Commissioners can only consider this request in the light of the facts which were available at the time you were first required to notify, namely your letter of the 20/05/97 and our correspondence with the Control Officer who carried out a control visit with yourself on 23/02/97. On the basis of those facts they are unable to accept that at the appropriate time they could have been satisfied that the value of your taxable supplies in the period of one year then beginning would not exceed £46,000.'
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> 26. I cannot accept this submission. In my judgment it seeks to introduce a wholly inappropriate complication into what is clearly intended to be a reasonably straightforward scheme for determining whether a trader has to be registered. While it is true that a trader who registers late will not have the same opportunity to draw facts to the attention of the commissioners as the trader who notifies his liability in time, this is hardly a matter which makes him deserving of much sympathy, because the lateness is the result of his failure to perform the duty imposed on him by paragraph 5 of Schedule 1. Moreover, if Ms Lonsdale were right the appellant would be at an advantage compared to the position he would have been in if he had notified his liability in August 1996, as the law required him to do. In his letter of 6 June 1997 he was able to give his actual trading figures for the first nine months of the relevant twelve-month period, something which he could not have done in August 1996. This cannot, in my view, be a proper approach to the application of a statutory provision which envisages that the commissioners will take a forward look. Moreover if it were to be accepted that there should be attributed to the commissioners at the relevant date knowledge which did not come to them until later, at what point, if any, does it become too late to provide further information? What would be the position in a case such as that of *Bjellica* (*trading as Eddy's Domestic Appliances*) *v Customs and Excise Comrs* [1995] STC 329, to which Ms Lonsdale drew my attention, where registration was over 12 years late?"

18. The Tribunal in *Nicholas Paul Drury* decided in the light of the *William Gray & Son* decision that it was required to examine the lawfulness of HMRC's refusal to apply the exception to registration on the basis of evidence which then *would have been available to them* at the date of registration. At paragraph 24 the Tribunal ruled :

> "The Commissioners, in reaching their decision, proceeded on the basis that the relevant point in time at which they had to be satisfied as to reduced turnover was 1 September 2006, that is, the point at which

> the Appellant became liable to be registered. That, it seems to us, is correct. It is implicit in the language of paragraph 1(3) of Schedule 1 that the point at which the Commissioners must be satisfied on the question of reduced future turnover is the point at which the taxpayer is otherwise liable to be registered. It follows that even if the Commissioners are, as in the present case, enquiring into the question for whatever reason at a later date, they must ask themselves whether, at the time the taxpayer was liable to be registered, they would then have been satisfied on the point by reference to the evidence which then would have been available to them".

19. This Tribunal adopts the same construction as the Tribunal in *Nicholas Paul Drury* in respect of examining the lawfulness of HMRC's decision from the perspective of the evidence that *would have been available* at the date of registration, which was also the approach followed by the parties in this Appeal. The Tribunal, however, observes that Mr Justice Ferris in paragraphs 24 – 26 of *William Gray & Son* appeared to be applying a much stricter evidential requirement in the case of a tax payer who has made a late registration in that it should be restricted to the evidence *actually* known at the date of registration. At paragraphs 26 and 27 of his judgment Mr Justice Ferris examined the Tribunal decision in Shephard v Customs and Excise Comrs (1986) VAT Decision 2232:

> "27. I was referred to three cases in which VAT tribunals have dealt with the point which is before me on this appeal. The earliest of these is *Shephard v Customs and Excise Comrs* (1986) VAT Decision 2232, determined by a tribunal presided over by Lord Grantchester QC. So far as material it concerned a case of late registration and a claim by the trader that he should be excepted from registration by virtue of what is now paragraph 1(3) of Schedule 1 to the 1994 Act. On this the tribunal said:
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> 'In our opinion, such exception can only be sought to be relied upon by a trader, where he has not applied to the Commissioners at the right time to consider all the relevant circumstances, if the value of his taxable supplies in the year did not exceed the relevant amount ... and he establishes that no reasonable body of commissioners at the relevant time could have come to any conclusion other than that his taxable supplies in the year would not exceed the relevant amount. In the present case the value of Mr Shephard's taxable supplies in 1985 did exceed [the relevant amount] ... So the first such requirement is not satisfied. But, in addition, we consider that, in April 1985, it would not have been unreasonable for the Commissioners, in all the circumstances, to have refused to apply the exception to Mr Shephard, if they had been asked so to do. In consequence we hold that Mr Shephard has been correctly registered with effect from the 21st April 1985.'
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> 28. There is much in this statement with which I find myself in agreement. It supports the view that the question of exemption from registration has to be considered as at the date (in that case 21 April 1985) when registration would be effective in the absence of exemption. But I make two further observations upon it. First the tribunal did not make it clear whether the information which the commissioners ought to have taken into account on the hypothetical application was limited to that which they actually had on the relevant date, or whether it included information provided by the trader at a later date. Secondly I am not satisfied that the first of the two requirements mentioned by the tribunal is imposed by paragraph 1(3). That paragraph envisages, in my view, a single requirement only, namely that the commissioners are satisfied, looking at the matter at

> the relevant date, that the value of the trader's taxable supplies in the next twelve months will not exceed the threshold amount. If the commissioners are so satisfied, it could not be suggested that their decision is vitiated if, as events turn out, their expectations are not fulfilled. Correspondingly it does not follow that the fact that the threshold has in fact been crossed during those twelve months necessarily prevents the commissioners being satisfied that looking at the matter prospectively this will not happen. I accept, however, that this is a highly theoretical point and that it will at least be very difficult for the commissioners to be so satisfied on a prospective basis if they know that events have already occurred which show that such a prospective view would have been wrong".

20. In his commentary on *Shephard* Mr Justice Ferris drew a distinction between information that was actually held by HMRC on the date of registration, and information provided by the trader at a later date which gave support to the proposition that the evidence should be restricted to that actually known by HMRC at the date of registration. The Tribunal considers such an interpretation of Mr Judge Ferris' information requirements for a decision under paragraph 1(3) schedule 1 of the VAT Act 1994 too restrictive. The practical effect of accepting the correctness of the proposition on actual information held on the date of registration was that in most cases involving a late registration trader there would be no actual information on the trader at the date of registration. Thus there would be no evidence upon which HMRC could make a decision under paragraph 1(3), which would exclude most late registration traders from the ambit of the statutory exception.

21. The Tribunal considers that Mr Justice Ferris' judgment on evidential requirements was directed at excluding facts that could only be known by HMRC and the trader after the date of registration. The Tribunal is fortified in its conclusion by the reference of Mr Justice Ferris in paragraph 28 to the actual value of the trader's supplies in the subsequent 12 months which would not be known at the date of the registration. The Tribunal, therefore, considers the interpretation of evidential requirements by the Tribunal in *Nicholas Paul Drury* as *the evidence which then would have been available to HMRC* a correct construction of the requirements as set out in the decision in *William Gray & Son*.

22. The background facts for this Appeal was as set out in paragraphs 2 to 5 above. The starting point for the Tribunal's analysis of the lawfulness of HMRC's action to refuse the Appellant exemption from VAT was HMRC's decision letters.

23. Officer Peart in her decision letter of 17 June 2009 said that

> " The law relating to exception, as you have stated, can be found in the VAT Act 1994 schedule 1 paragraph 1(3). As you understand exception applies only to traders who become liable to be register under the backward look, so their sales over a rolling 12 month period will have exceeded the registration threshold. Exception from registration can then be granted if the Commissioners are satisfied that future turnover over the next 12 months will not exceed the deregistration threshold.

> Having looked at our decision again,[2] I can agree that the Appellant may have not known, at the beginning of November 2007, the value of supplies that would be made in that month alone. Therefore the Appellant would not be liable to register under paragraph 1(1)(b) (*The forward look)*. I cannot agree that he was not now liable to be registered under paragraph 1(1)(a). Whilst exception can be granted under paragraph 1(3), the exception is granted only for the one month the limit was exceeded and then reverts back to the obligations of paragraph 1(1)(a). The Appellant was, therefore, responsible for checking the accounts at the end of each month to determine if his taxable supplies, in the period of one year then ending, had exceeded the registration limit, if he was liable to be registered at the end of any month, he should have notified us of that liability and applied for VAT registration, or reapply for exception to VAT registration.
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> As the Appellant exceeded the registration limit at the end of October 2007, I will be amending his compulsory registration date to 1 December 2007. Whilst the Appellant would have been entitled to re-apply for exception at this time, had he made an application, I believe it would have been refused, as a more accurate projection of the Appellant's turnover was now available that showed a sustained increase in turnover".

24. Officer Peart's decision was confirmed on review by Officer Hancox on review dated 14 October 2009, who said:

> "However, based on the advice I have received from the Policy Unit, I must uphold the original decision that the Appellant is liable to be registered with effect from 1 December 2007.
>
> The reasoning behind this decision is that when your client applied for exception because of a forecasted high turnover during the period July to October 2007, the Commissioners believed this to be exceptional and that the Appellant's turnover would drop during October as intimated in your fax received 10 September 2007. However it appears that the Appellant's rolling turnover was still above the threshold at the end of October and, at that point, the Appellant should have applied for further exception. However, had the Appellant applied at that time, due to continuing high turnover the Commissioners would no longer have been satisfied that the turnover would be below the de-registration threshold in the following 12 months and exception would have been refused".

25. The Tribunal next considers the information that would have been available to HMRC at the time it would have made its decision on 1 December 2007. The decision letters particularly that of Officer Hancox, indicated that HMRC had regard to the circumstances of HMRC's granting of the exception for October 2007. The Appellant's grounds for the exception were set out in his accountants' letter of 20 August 2007:

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[2] The Tribunal has not recited the previous paragraph which primarily dealt with the forward look registration.

> "We are writing on behalf of a client of ours who for many years has been a director of a VAT registered company which ceased to trade on 30 June 2007. The director concerned is aiming to retire over the coming years and upon cessation of the company he set up a small sole trader business renting out dehumidifiers. His aim was to turnover in the region of £20,000 per annum and therefore had no intention of becoming VAT registered.
>
> Due to the recent extreme flooding in the Gloucestershire area the demand for humidifiers has been demand exceeding supply and our client has found that many customers who he has not heard from for a few years have contacted him requesting the rental of a dehumidifier.
>
> Our client has not raised any invoices as of yet, and predicts the excessive demand for dehumidifiers is likely to continue to the end of October 2007 and at the current rate he could well be invoicing up to £100,000 for the period 1 July 2007 to 31 October 2007, at which stage he expects the turnover will significantly drop to the more manageable and comfortable level he was aiming for. The last time our client understands the market demand for dehumidifiers was to this extent was over 10 years ago.
>
> As the majority of his customers are VAT registered our client doesn't have an issue with registering for VAT should you require, however, we are aware that you are prepared to make concessions for unusual and extreme circumstances that create a non re-occurring fluctuation in turnover, and with the recent extreme flooding in the Gloucestershire area our client wondered if you are prepared to agree to waive the need for VAT registration on this occasion".

26. The Appellant's accountants supplied additional information to HMRC on 10 and 14 September 2007 which included:

> (1) The Appellant only started to trade on the 1 July 2007, therefore no prior figures. Since he started to trade sales have reached £80,000 (£35,000 July, £35,000 August, £10,000 September to date) and expected to increase by a further £10,000 by the end of September. No invoices have been invoiced yet, but are expected to be raised over next couple of weeks.
>
> (2) It is expected that the demand for rental of dehumidifiers will drop off in October 2007 at which stage the Appellant should resume to his planned turnover of no more than £2,500 per calendar month.
>
> (3) No contracts are in place to supply these services; it is purely due to the excess flooding in the Gloucestershire area that demand has increased the Appellant's turnover temporarily.

27. On 24 October 2007 Officer Seed granted the Appellant's application for VAT for exception from VAT registration with effect from 1 October 2007. Officer Seed advised the Appellant that he must notify HMRC if his turnover exceeded the VAT threshold at the end of any month.

28. As at 1 December 2007 HMRC would have had access to information on the Appellant's turnover to the end of November 2007, which was

Month	Value of Supplies (£)	Cumulative 12 months total (£)
July 2007	34,150	34,150
August 2007	7,335	41,485
September 2007	20,885	62,370
October 2007	16,360	78,730
November 2007	78,656	157,386

29. Had the Appellant made a timely application for exception, the Appellant would have made HMRC aware of the fact that the floods had subsided and the area was getting back to normal. Gloucestershire County Council's final report on the *Scrutiny Inquiry into the Summer Emergency 2007* had been published in September 2007. Further the Appellant would have had at the time a legitimate expectation that the increase in his business directly attributable to the floods would cease and that his business would consequently achieve a level of turnover similar to that previously experienced by his previous company for that part of its business.

30. HMRC cross examined the Appellant on his knowledge of the state of his business at or around 1 December 2007. The Appellant indicated that he had about 200 dehumidifiers out on hire. There was limited demand from new work for dehumidifiers because the properties had already been flooded. Invoices for the hiring out of the dehumidifiers would not be issued until the property had been dried out and evidenced by a certificate. The Appellant accepted that as at 1 December 2007 he did not know how long it would take for the properties to be dried out, and when the invoices would be issued for those properties. Also the Appellant acknowledged that as at 1 December 2007 he could not say how many invoices had in fact been issued, and which of his customers had paid the hiring charges.

31. The Tribunal notes that the Tribunal in *Nicholas Paul Drury* adopted a similar approach for ascertaining the trader's state of knowledge as at the registration date. The Tribunal considers such an approach was not in contravention of Mr Justice Ferris' comments about excluding information provided by the trader at a later date. The approach adopted in *Nicholas Paul Drury* was set out in paragraph 26:

> "That, it is clear to us, is exactly how the Commissioners proceeded in the present case. The Appellant was unable to provide any evidence to the Commissioners that, as matters stood at 1 September, he could at that time have reasonably expected that his turnover for the forthcoming twelve months would be reduced below the deregistration threshold. In his evidence to us the Appellant was candid enough to concede that at 1 September 2006 he could have made no forecast of his future turnover: that is consistent with what he told the Registration

> Unit when asked in February 2007 if he could forecast his turnover for the following twelve months. In consequence the Commissioners acted lawfully in deciding that the Appellant should not be excepted from liability to register".

32. The Tribunal makes the following findings of fact on the information that would have been available to HMRC on 1 December 2007:

(1) The Appellant's expectation in August 2007 that the demand for rental of dehumidifiers would drop off in October 2007 with his monthly takings reverting to the planned turnover of more than £2,500 per calendar month turned out to be a wholly unrealistic projection of his future turnover.

(2) The Appellant's turnover in November 2007 had increased significantly to the extent that the turnover for November alone exceeded the threshold for VAT registration.

(3) The floods had subsided and the area of Gloucestershire was getting back to normal.

(4) The Appellant issued invoices for the supplies of hiring out dehumidifiers once the properties had dried out.

(5) Despite the abatement of the flooding and the fall in new demand for dehumidifiers, the Appellant was unable to be specific about the outstanding value of his supplies and when the business would return to normal.

33. The Appellant argued that the relevant decisions of HMRC focussed on the Appellant's continuing high turnover which indicated that HMRC was looking backward and not looking forward as was required under paragraph 1(3) when considering whether to apply the exception from compulsory VAT registration. In its decisions letters HMRC made no specific reference to the exceptional floods, and in so doing failed to take account of the reasons for the high turnover. Finally if HMRC had looked forward it would have found that the floods had subsided and that the Appellant held no grounds for supposing the increase in turnover attributable to the floods would continue. Having regard to these facts the Appellant submitted that HMRC's refusal to except it from registration was plainly one that would not have been reached by a reasonable body of Commissioners.

34. HMRC contended that it was rational for the Officers to predict the value of the Appellant's supplies in the next 12 months based upon the value of supplies in previous months, and the continuing increase in turnover despite the abatement of the floods. The logic of the Officer's reasoning was borne out by the fact that the value of Appellant's taxable supplies did exceed the taxable threshold for the next 12 months from 1 December 2007.

35. In HMRC's view there was no legal requirement for its Officers to refer explicitly to the causes of the high turnover in their decision letters. The circumstances of the Appellant's earlier application for exception from VAT registration was clearly in the Officer's minds with their reference to the continuing high turnover for the Appellant's business. The fact that the Appellant's earlier forecasted drop in turnover did not materialise was a highly relevant matter and

played a significant role in the refusal of the exception from registration. HMRC submitted there were no grounds to substantiate a finding that its refusal in the Appellant's case was unlawful.

36. The Tribunal considers unsatisfactory that it was required to examine the lawfulness of HMRC's refusal from the contents of the decision letters and drawing necessary inferences from those contents. In the Tribunal's view it would have been preferable to have had evidence from one of the Officers as to what was in her mind when the decision was made.

37. The Tribunal is satisfied from the contents of letters that both Officers were aware of the correct legal test involving future turnover which had to be applied to the Appellant's circumstances. Also it was clear particularly from Officer Hancox's letter, that HMRC was using the circumstances of the Appellant's earlier application as the point of reference for the examination of the Appellant's subsequent and retrospective application for exception from VAT. This point of reference was firmly based on the Appellant's assessment of the value of his future supplies in the next 12 months. In this respect HMRC's reliance on the phrases, *a sustained increase in turnover* and *continuing high turnover*, should be viewed in the context of the point of reference which had a future outlook. Thus the Officers in reaching their decision were taking the standpoint of the Appellant looking forward but projecting it to the facts on his turnover that would have been known as at 1 December 2007 to assess to the value of his future supplies in the next 12 months. The Tribunal is, therefore, satisfied that the Officers' use of the phrases, *a sustained increase in turnover* and *continuing high turnover*, and their knowledge of the legal test indicated that they were looking forward and not backward when determining whether to grant the Appellant exception from VAT registration.

38. The question then arises whether the Officers had regard to relevant matters and disregarded irrelevant ones when they refused the Appellant's application. The Appellant's approach to this question has been to list those facts that would have been known at 1 December 2007 and identified those ones which were not explicitly mentioned in the decision letters to argue that the Officers overlooked relevant considerations. The Tribunal considers such an approach one dimensional and underplayed the cumulative process undertaken by HMRC in arriving at its decision. The approach also overlooked the Appellant's responsibilities and his role in providing the necessary information. Finally the approach was contrary to the observation of Mr Justice Ferris on how paragraph 1(3) should be applied to the circumstances. Mr Justice Ferris emphasised that paragraph 1(3) was not about a set of criteria leading to a particular result but about a judgment by HMRC on whether a state of affairs existed.

39. In this Appeal HMRC formed their judgment about the Appellant's business and the factors affecting his turnover on the information provided by him. In his earlier application, as Officer Hancox explained, HMRC accepted the Appellant's submissions that the events were exceptional and that his high turnover was a temporary phenomenon. In this respect HMRC had regard to all those facts that the Appellant considered relevant. In granting the earlier application HMRC

acknowledged the force of the Appellant's arguments that the abatement of the flooding would result in a dramatic fall in the turnover. The validity of the Appellant's proposition on the causal connection between the floods and turnover was undermined by the fact of his continuing high turnover which went beyond the month when he said the turnover would decrease. Thus this was not a situation where HMRC disregarded the relevance of the abatement of the floods on its judgment about the value of the Appellant's supplies over the next 12 months. It was instead the Appellant's own failure to predict with any degree of accuracy the consequences of the flooding on his turnover which eroded the relevance of the abatement of the flooding to HMRC's decision under paragraph 1(3) of schedule 1 to the VAT Act 1994.

40. As at 1 December 2007 the factual context for HMRC's decision under paragraph 1(3) was dominated by one fact, the sustained increase in turnover which in the month of November alone was above the threshold for VAT registration. The other facts which featured in the earlier decision had been discredited by the Appellant's inaccurate prediction. The Appellant as at 1 December 2007 was not in a position to assess the outstanding value of his supplies and when his business would return to normal despite the abatement of the flooding and the falling new demand for dehumidifiers.

41. Given the factual context as at 1 December 2007 the Tribunal is satisfied that the Officers were correct in placing weight on the sustained increase in turnover, and the Appellant's inaccurate previous prediction in arriving at their decision that the Appellant's turnover would not be below the deregistration threshold in the following 12 months.

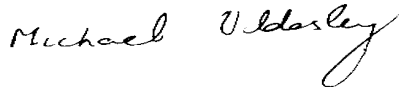
42. The Tribunal gave no weight to HMRC's submission that the logic of the Officers' reasoning was borne out by the fact that the value of Appellant's taxable supplies did exceed the taxable threshold for the next 12 months from 1 December 2007. The Tribunal considers this submission fell foul of Mr Justice Ferris' judgment that a decision under paragraph 1(3) should be based on the information available as at 1 December 2007.

The Decision

43. The Tribunal is satisfied that HMRC in arriving at its decision dated 17 June 2009 confirmed on review dated 14 October 2009 to refuse the Appellant exception from registration took account of relevant factors and disregarded irrelevant ones. The decision was one that a reasonable panel of Commissioners properly directed on the law would have made. The Tribunal dismisses the Appeal.

44. 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.



TRIBUNAL JUDGE
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