TC03306

Appeal number: TC/2013/04522

VAT – Exception from registration –Whether HMRC satisfied that the value of Appellant's supplies in following year would not exceed deregistration threshold – Whether HMRC's refusal to apply the exception was reasonable and if not, whether decision would have inevitably been the same – Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JONATHAN SAVAGAR **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
CHRISTOPHER JENKINS

Sitting in public at 45 Bedford Square, London WC1 on 29 January 2014

The Appellant in person

Martin Priest of HM Revenue and Customs, for the Respondents

DECISION

1. On 29 January 2014 we heard the appeal of Jonathan Savagar against the decision of HM Revenue and Customs ("HMRC") that he should be registered for VAT with effect from 1 December 2011. However, as it was accepted that his turnover exceeded the then VAT threshold as at 31 October 2011, the issue before the Tribunal concerned HMRC's refusal to apply the statutory exception from registration contained in paragraph 1(3) of schedule 1 of the VAT Act 1994 ("VATA").

2. Having heard from Mr Savagar, and Martin Priest on behalf of HMRC, we stated at the conclusion of the hearing that we would dismiss the appeal and would give our reasons in writing at a later date. These are our reasons for deciding that Mr Savagar's appeal should be dismissed.

Law

3. Unless otherwise stated all subsequent references to paragraphs are to the paragraphs of schedule 1 VATA.

4. Paragraph 1(1) which sets out the requirement to register for VAT provides:

> Subject to sub-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–
>
> (a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded [£73,000]; or
>
> (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 [£73,000].

5. Paragraph 1(3) contains an exception to this general or basic requirement. It provides 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 paragraph, he would become liable to be registered will not exceed [£71,000].

6. As the Tribunal in *Mills-Henning v HMRC* [2012] UKFTT 444 (TC) noted, at [32]:

> "… the question posed [by paragraph 1(3)] for HMRC is whether they are satisfied that the future turnover "will not" exceed the threshold: a conclusion that it might not exceed it is not enough to pass the test ..."

7. According to the Tribunal in *Drury v HMRC* [2009] UKFTT 50 (TC):

> "The reasoning behind this exception is clear: 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."

8. Under paragraph 5:

> (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.
>
> (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.
>
> (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.

9. In *Gray trading as William Gray & Son v Customs & Excise Commissioners* [2000] STC 880 ("*Gray*") Ferris J raised the question at what date should HMRC look at the position in making their decision under paragraph 1(3)? In answer to this he said:

> 19. I think that two points stand out clearly. First para 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.
>
> 20. Secondly, para 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 para 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 para 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 para 1(3) which is favourable to the taxpayer.

22. Ms Lonsdale [counsel for the appellant] argued that the exercise cannot and should not be carried out until the trader notifies the commissioners that, subject to para 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 para 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 para 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 para 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.

10. Ferris J went on to consider what evidence is to be taken into account by HMRC in making the decision under paragraph 1(3) saying:

> "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).
>
> 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 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:
>
> > '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.'
>
> 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?"

11. Further guidance of the nature of the evidence to be taken account can be found from the decisions of the Tribunal in *Drury v HMRC* and *Evans t/a Britannia Services v HMRC* [2011] UKFTT 439 (TC) in which Judge Tildesley OBE said:

> "18. The Tribunal in *Drury v HMRC* 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."

12. With regard to whether a decision of HMRC is "reasonable" the decision of the House of Lords in *Commissioners of Customs and Excise v J H Corbitt (Numismatists) Limited* [1980] STC 231 at 239 makes it clear that a decision will not be reasonable:

> "… if it were shown the Commissioners had acted in a way which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant information or had disregarded something to which they should have given weight"

As Lord Phillips of Worth Maltravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

> "… the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters"

However, even if HMRC had acted in a way in which no reasonable panel of commissioners could have acted or had taken into account some irrelevant matter or had disregarded something to which they should have given weight it is clear from Neill LJ (with whom Roch and Hutchinson LJJ agreed) in the decision of the Court of Appeal in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941, at 953, that:

> "… where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal"

Facts

13. Mr Savagar is a builder who operates as a sole trader, mainly in Gloucestershire, carrying out general home improvements to private residential properties. In October 2011 the turnover of his business exceeded the then VAT threshold of £73,000 and, as a result, he was required to be registered for VAT from 1 December 2011. However, at the time Mr Savagar did not realise that this was the case and only became aware of the situation when advised by his accountants, Clarke & Co, when in the process of preparing his 2011-12 accounts.

14. A letter dated 8 January 2013 from Clarke & Co, which was received by HMRC on 13 January 2013 explains the position. It states:

> Dear Sir/Madam,
>
> **Mr Jonathan Savagar**
>
> **VAT REGISTRATION – APPLICATION FOR EXCEPTION**
>
> Please find enclosed a completed VAT 1 form.
>
> Unfortunately, Mr Savagar exceeded the VAT registration threshold during October 2011. This has just come to light whilst compiling his

2011-12 accounts. Upon informing Mr Savagar of the situation, he confirmed that he was unaware of the level for the VAT threshold and that he did not realise that materials were not taken into consideration when calculating the turnover.

The reason for Mr Savagar's turnover increasing as it did was due to completing three consecutive conversions to private property where he provide the majority of materials in each case.

Mr Savagar is self-employed as a sole trader and normally works on a variety of smaller building and maintenance jobs. He does not tend to focus on larger conversions to property and the last run of work has been perceived by Mr Savagar as one-off. The following table, which shows Mr Savagar's annual turnover covering the last 5 years, demonstrates this.

ACCOUNTING PERIOD		Annual Turnover
Start Date	**End Date**	
01/04/2006	31/03/2007	£23,302.00
01/04/2007	31/03/2008	£35,668.00
01/04/2008	31/03/2009	£54,328.00
01/04/2009	31/03/2010	£46,828.00
01/04/2010	31/03/2011	£43,509.00

Mr Savagar believes his 12-month rolling turnover will now drop below £75,000 during February/March 2013 and will then continue to fall to the £40,000 to £50,000 level. Now he is aware of the VAT registration threshold, he intends to work accordingly be ensuring the amount of materials supplied is significantly reduced if he does take on any further conversions or extensions (he has no such work planned at the present time). The following table highlights the impact of the 3 conversions both with regard to his monthly turnover and his rolling 12 month turnover.

Month	Sales	12 Month
Mar-11	£6,580.96	£41,825.00
Apr-11	£2,687.50	£40,139.70
May-11	£3,433.20	£40,402.11
Jun-11	£15,810.64	£53,845.21
Jul-11	£809.00	£48,851.51
Aug-11	£11,375.00	£58,707.76
Sep-11	£2,526.00	£59,732.76
Oct-11	£18,672.50	£75,162.22
Nov-11	£0.00	£70,837.22
Dec-11	£12,863.90	£78,940.16
Jan-12	£10.939.63	£86,667.35
Feb-12	£17,580.13	£103,278.46
Mar-12	£8,594.63	£105,292.13
Apr-12	£21,369.65	£123,974.28
May-12	£13,800.00	£134,341.08
Jun-12	£45.00	£118,575.44
Jul-12	£0.00	£117,766.44

Aug-12	£56.00	£106,47.44
Sep-12	£1,911.15	£105,832.59
Oct-12	£3,962.11	£91,122.20
Nov-12	£3,250.71	£94,372.91
Dec-12	£9,400.00	£90,909.01

> From June 2012, the monthly turnover significantly drops back towards normal levels.
>
> I would be grateful if in due course you could consider this request for exception and inform us of your decision in due course. Your timely response to this letter would be most appreciated as we are unable to complete Mr Savagar's 2011-12 Self Assessment tax return until this matter is resolved.

The VAT 1 form – application for registration – enclosed with the letter estimated Mr Savagar's turnover in the 12 months from 9 January 2013, the date he signed the form, to be £50,000.

15. On 15 January 2013 HMRC's Exceptions Team wrote to Mr Savagar in reply to his accountants letter in the following terms:

> In your letter of 11 January 2013 (sic) you requested that the Commissioners should retrospectively exercise their powers under VAT Act 1994, Schedule 1, paragraph 1(3) not to register you with effect from the date when you first became liable to be registered.
>
> The Commissioners can only consider this request in the light of the facts which were available at the time your liability to be registered first arose.
>
> 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 £71,000.
>
> The Commissioners therefore consider that you should be registered with effect from 1/12/12.

It is accepted that the reference to 1 December 2012 in the letter was a typographical error and that 1 December 2011 was the date from which registration was required.

16. On 25 January 2013 Mrs Savagar telephoned HMRC and spoke to Miss Emma Hinton of HMRC's Exceptions Team who, following their conversation, sent Mrs Savagar an "Exception from VAT Questionnaire" to be completed by Mr Savagar. Miss Hinton's covering letter explained that it was "imperative" to supply the information requested within 28 days otherwise the exception "will be refused". Also, as a result of that telephone conversation, on 28 January 2013 Mrs Savagar sent Miss Hinton a copy of the letter from Mr Savagar's accountants (which we have set out in paragraph 14, above) as an attachment to an email.

17. Mrs Savagar's email was treated by HMRC as a request for a review. In a letter dated 31 January 2013 from HMRC Mr Savagar he was asked to provide any further

information that he would like the review officer to consider "without delay". The letter stated that the review "should be completed by 13 March 2013".

18. Mr Savagar returned the "Exception from VAT Questionnaire" to HMRC where it was stamped as having been received on 15 February 2013.

19. In his answers on the questionnaire, which he confirmed at the hearing, Mr Savagar explained that the nature of his work varies from project to project and, as a general builder, it could consist of a kitchen or bathroom installation through to a complete extension. He said that much of this work was local and usually came as a result of "word of mouth" recommendations and although he did advertise this was kept to a minimum. His method of working was to complete one project before commencing another and when undertaking a project it was not usual for him to have agreed subsequent work and therefore could not anticipate what the next project might be or how much it might be worth.

20. The reason that he had exceeded the VAT threshold in October 2011 was the result of what Mr Savagar described as an "exceptional contract" for a large single storey extension. He had estimated the work, which he had obtained as the result of an advertisement in a Parish Magazine, would last for 16 weeks and valued it at £46,000. However, almost immediately after work had commenced an underground well was found which required extra steel calculations, labour and materials to the foundation which increased the duration of the contract, which Savagar had anticipated would be 16 weeks, by a further six weeks and its value by £9,300 to £55,300.

21. Although by its description as an "exceptional contract" it is clear that such projects are not typical of Mr Savagar's business, October 2011 was not the first time that he undertaken such a project. As he stated in the questionnaire he had also been involved in the following "exceptional contracts":

(1) November 2008 – March 2009: a small two storey extension for £22,270;

(2) November 2009 and February – April 2010: a single storey extension for £16,558 on a labour only basis as Mr Savagar's customer purchased his own materials;

(3) June – August 2011: a garage for £24,000; and

(4) March – June 2012: a three storey flat renovation in central London for £27,000 which was not based on a price but estimated duration at a cost of £43,786 with materials purchased by Mr Savagar's customer.

22. Despite HMRC's letter of 31 January 2013 stating that the review "should be completed by 13 March 2013" it took HMRC until 22 May 2013 to write to Mr Savagar. The letter from Alan Lowe of HMRC's Appeals and Review Team acknowledged the "current further extension period is up to 13 March 2013 but explained that:

> Unfortunately, due to the recent influx of work into this Team we were unable to complete your review by that date.

> I have now extended the review date until **31 July 2013** I apologise for this delay and I hope this extension period will meet with your agreement.

23. On 19 June 2013 Mr Lowe wrote to Mr Savagar with the conclusion of the review. After referring to the relevant legislation the letter stated:

> When considering the exception retrospectively, the most important aspect is that only information that would have been available at the time the liability to register first arose that can be considered.
>
> In his letter of 8 January 2013 your accountant confirms that you exceeded the relevant VAT threshold in October 2011 and as of that date you were not aware of "the level for the VAT threshold".
>
> The commissioners consider that it is a reasonable expectation that a prudent business would monitor turnover and be aware of all potential tax liabilities.
>
> Therefore on the basis that you were unaware of the VAT threshold as of the date of turnover breach and there is no evidence that would have been available as of the critical date that you were reviewing your work levels and giving consideration to either reducing or refusing work, I must conclude that you were not in a position to satisfy the commissioners that as of October 2011 your turnover would fall below the relevant VAT deregistration threshold in the subsequent 12 months.
>
> Exception from registration has been correctly refused.

24. On 8 July 2011 Mr Savagar appealed to the Tribunal attaching the following letter to Mr Rowe, also dated 8 July 2011:

> I am writing to once again appeal against your decision to VAT register me.
>
> As I've previously explained, I am a small self-employed sole trader not consistently turning over any near the VAT threshold and somewhat naïvely considered VAT registration was based on profit, not annual turnover, hence the reason why I carried on working and accepting work.
>
> Suring that year, I became aware I was incorrect in thinking VAT was based on profit, when informed by my new accountant, Mr Martin Clarke of Clarke & Co Accountants (whom we have been with since September 2012).
>
> Last year, I payed (sic) an elevated tax bill to cover this.
>
> I feel this case has been unnecessarily delayed by yourselves [HMRC] for a period in excess of 6 months due to department workload. For that period I've had to continue working and not refusing work as you suggested in your letter dated 19.6.13.
>
> If you do proceed with registration, I must now find VAT for the last six months work, in addition to the VAT which is considered to be owed.

> In the current climate, this will have a severe effect on my financial, family and professional life. This last six months has placed a tremendous strain on my health to the point where I am now taking long term medication in order to treat a stress related illness, as prescribed by my doctor.
>
> I trust you can take into consideration the above and re-evaluate the decision made on my registration.

Discussion

25. Although we do sympathise with Mr Savagar especially the difficulties outlined in his letter of 8 July 2013 (see paragraph 24, above) and would hope that an agreement can be reached with HMRC to enable him to pay any outstanding VAT over a suitable period these are not matters that we can take into account in determining this appeal. This is clear from the decision of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC) in which the judges (Warren J and Judge Bishopp) confirmed, at [56], that the:

> "… Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, …It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

26. Having considered the relevant legislation and authorities, which we have set out at paragraphs 3 to 12 above, it is clear that:

(1) HMRC are required to give effect to paragraph 1(3) by considering the case as at the date from which registration would otherwise take effect, which in this case is 1 December 2011, and by looking forward, asking themselves whether they are or are not satisfied that turnover will not exceed the threshold which in this case is £71,000;

(2) it is necessary for HMRC in making their decision to consider the evidence that *would have been available* at the date from which registration would otherwise take effect;

(3) a conclusion that the turnover might not exceed £71,000 is not enough to pass the test;

(4) the Tribunal can only interfere with the decision of HMRC if it is shown that the decision is one which no reasonable body of commissioners could reach; and

(5) it is not sufficient that we might ourselves have reached a different conclusion on the same evidence.

27. Like the Tribunal in *Evans t/a Britannia Services v HMRC* we did not have the benefit of hearing from any HMRC officers in relation to the decision not to apply the exception from registration. As was said at [36] in that case, with which agree and adopt:

> "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 [his] mind when the decision was made."

28. The first of the decision letters from HMRC in this case, that of 15 January 2013, does not refer to any specific facts on which the decision to refuse the exception was based and it is not possible from this to ascertain whether the decision was based on relevant facts or if irrelevant matters were taken into account. As such, we cannot find that this decision was reasonably arrived at.

29. The second decision letter, dated 19 June 2013, upheld the decision to refuse to apply the exception following a review. This was on the basis that Mr Savagar was not aware of the VAT threshold in October 2011 when it was exceeded by the turnover of his business and was not monitoring the level of his turnover at that time. Therefore he was not in a position to satisfy the HMRC that, as of in October 2011, his turnover in the period of one year beginning at that time would not exceed £71,000.

30. From this letter it would appear that HMRC considered the evidence that was available in October 2011 not at 1 December 2011, the date from which registration would otherwise take effect, as required by *Gray*. Also, as is apparent from the letter, HMRC do not appear to have had regard to the evidence that *would* have been available at the time registration would take effect, such as, for example, the fact that it would have been known that the turnover had exceeded the threshold in October 2011.

31. By failing to take into account such a clearly relevant matter and by failing to consider the position as at 1 December 2011 it must follow that the decision of HMRC to refuse to apply the exception cannot be one that was reasonably made. Therefore, unless we are satisfied that HMRC would *inevitably* have made the same decision, by reference to the facts which would have been available on 1 December 2011, we should set aside the decision that Mr Savagar should be registered for VAT from that day.

32. Taking the facts that would have been available on 1 December 2011 into account, in addition to knowing the turnover had exceeded the threshold in October 2011, it would have been known that this had been caused as a result of payment for work carried out by Mr Savagar under an "exceptional contract". It would also have been known that this was not the first "exceptional contract" that Mr Savagar had undertaken. Although, on 1 December 2011, Mr Savagar could not have known whether he would obtain any further exceptional contracts he would have been aware, because of the discovery of the underground well, of the extension in time and cost of that particular contract and given his previous experience of such projects would not have been able to exclude the possibility of subsequent exceptional contracts which could take his turnover above the registration threshold.

33. As such, although the evidence that would have been available to HMRC on 1 December 2011 may have been enough to satisfy them that the turnover of Mr Savagar's business *might not* have exceeded the threshold in the subsequent 12 months it may also have led them to conclude that it *might*. In our view this evidence is not sufficient to have been able to satisfy HMRC that it *would not* exceed the threshold.

34. Therefore, if HMRC had properly considered the evidence available at the relevant date, we do not consider that it would have been possible for them to be satisfied that Mr Savagar's future turnover *would* not exceed the threshold. Accordingly we find that HMRC would inevitably have come to the same conclusion and not have applied the statutory exception from registration contained in paragraph 1(3) with the result that Mr Savagar is required to register for VAT with effect from 1 December 2011.

Conclusion

35. Therefore, for the above reasons, the appeal is dismissed.

Right to Apply for Permission to Appeal

36. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 5 February 2014