



TC03956

Appeal number: TC/2011/02812

*VAT - Registration – whether HMRC were correct to register the Appellant
– effect of Appellant being victim of alleged fraud – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OONAGH O'RYAN

Appellant

- and -

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

**TRIBUNAL: JUDGE JENNIFER BLEWITT
MS CELINE CORRIGAN**

Sitting in public at Belfast on 22 April 2013

Mr Mallon, Counsel for the Appellant

Mr Haley, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. In a Notice of Appeal dated 31 March 2011 the Appellant, through her
5 Solicitors, Morris & Co, appealed against HMRC's decision to register the Appellant
for VAT with effect from 1 May 2004 until registration was cancelled on 1 November
2006.

2. The grounds of appeal are as follows:

10 (a) The Appellant had no involvement in the operation or management
of The Good Food Company;

(b) Although the Appellant's signature was on the Company's VAT
15 registration form and VAT returns, these signatures were fraudulent which
was accepted by Mr Murray, Senior HMRC Officer, in a letter dated 12
October 2010. The VAT1 application may not have been signed by the
Appellant;

(c) Mr Gary Fleming used the Appellant's name to prevent his
fraudulent actions being detected by HMRC. This is evidenced by the fact
20 that he used false names when contacting HMRC;

(d) The Appellant has not been involved in, or benefitted from, this
20 fraudulent behaviour conducted by Mr Fleming and therefore should not
be held responsible for the same.

3. It will be observed that this case was heard some time ago. Following the
hearing on 22 April 2013 we requested further written submissions from both parties
25 to clarify their respective cases on how the issue of fraud was said to impact on the
issue for us to determine. HMRC provided submissions on 9 May 2013 which we
have set out at paragraph 14 below. The Appellant wrote to the Tribunal by letter
dated 2 January 2014 in which she explained that following the hearing in April 2013
her solicitor had gone into receivership. Ms O'Ryan stated that she was attempting to
30 retrieve her files from the Official Receiver. We should note that the Appellant was
given ample time to consider whether to obtain alternative representation or provide
further written submissions. I explained to the Appellant at a case management
hearing on 20 March 2014 the options available to her and granted further time for
Miss O'Ryan to decide whether she wished to make any further representations to the
35 Tribunal before a decision was issued. A letter from the Tribunal to Ms O'Ryan dated
17 April 2014 explained that if no response was received a decision would be issued
on the information before us. No further response was received from Miss O'Ryan.

Background

4. HMRC received an application for VAT registration dated 19 May 2004 in the
40 name of the Appellant trading under the name "The Good Food Company" and was
duly registered for VAT from 1 May 2004, that being the date requested on the
application. The Appellant was registered as a sole proprietor. The application gave

the nature of the business activities as the sale of foodstuffs and the form indicated that regular repayments of VAT were expected.

5. For the VAT periods 07/04 to 10/06 inclusive repayment returns were repaid (with the exception of period 10/06) in the total sum of £137,880. The return for period 10/06 was selected for verification prior to repayment. As HMRC were unable to make contact with the Appellant and received information that the Appellant's business premises had been vacated some years earlier, it appeared to HMRC that the Appellant had gone missing. As HMRC was unable to validate any of the repayments, Assessments covering periods 04/05 to 07/06 were issued on 6 May 2008 in the sum of £88,637. Periods 07/04 to 01/05 were not assessed due to capping provisions.

6. HMRC received no communication from the Appellant until service of a statutory demand on 14 October 2009. It was stated by the Appellant's accountant that HMRC had been defrauded in making repayments and that the Appellant had not signed any of the documentation which led to registration. It was also asserted that the Appellant had been in India for large periods of time in 2005 and it was not until her return that she discovered that her personal bank account had been drained by her then partner Mr Gary Fleming (who also used the names Mr Gary Flynn and Mr Gary McDermott).

7. HMRC noted that Mr Fleming had been given access to the Appellant's personal and business bank accounts yet despite claims on behalf of the Appellant that the relationship had soured, repayment claims continued for a significant number of months after the Appellant's return from India.

8. HMRC also noted that there were significant transfers from the business account after repayments were made, into the Appellant's personal account.

25 **HMRC's Case**

9. It was submitted on behalf of HMRC that the Appellant declared a liability to be registered and HMRC acted in accordance with this.

10. The Appellant opened a bank account in her name trading as The Good Food Company. The Appellant also signed for and paid the costs of a van for the business on hire purchase from her personal account. By the crediting of VAT repayments to the business bank account in the Appellant's name, the Appellant was able to receive regular credits to her personal bank account which totalled in excess £35,000.

11. HMRC do not accept that the Appellant knew nothing regarding the business or tax liabilities arising over so many years; she is an intelligent and professional woman who failed to take any action until HMRC served a statutory demand.

12. Despite the claimed disassociation from Mr McDermot, the repayments and credits to the Appellant's personal account continued to the benefit of the Appellant for some time.

13. It was submitted that it was reasonable for HMRC to register the Appellant in the circumstances set out above and that the assessments which followed were made by HMRC using “best judgment”.

5 14. In its written submissions dated 9 May 2014 HMRC further contended that the Appellant was entitled to register for VAT voluntarily. HMRC was, at the time of receipt of the VAT 1, satisfied that taxable supplies were being made by the Appellant on the basis of evidence which purported to show purchases connected to the making of taxable supplies. Subsequently HMRC accepted that the VAT 1 was not signed by the Appellant and that Mr Fleming had acted fraudulently. HMRC noted that the
10 Appellant had procured a business account, received payments from HMRC which were transferred from the business account into the Appellant’s personal account, arranged finance for the purchase of a vehicle for the business and had allowed herself to be held out as a taxable person. In all of the circumstances HMRC submitted that the legislative criteria for voluntary VAT registration had been fulfilled.

15 **The Appellant’s Case**

15. On behalf of the Appellant Mr Mallon submitted that the Appellant’s former partner was a plausible and manipulative fraudster who was on occasion violent towards her. The Appellant is a primary school teacher with an impeccable character who never signed any of the documents relating to The Good Food Company, but
20 rather they were forged by Mr Fleming. Furthermore, on the occasions when HMRC had purported to speak to the Appellant by telephone, they had in fact spoken to Mr Fleming’s new partner.

16. When the Appellant went to India, she had given Mr Fleming access to her personal bank account in order that household bills could be paid, however she
25 subsequently discovered that he had squandered her money leaving debts of £8,000 - £10,000. Mr Fleming told the Appellant he would pay back the money, which is how the Appellant came to receive part of the repayments made by HMRC. The Appellant was wholly unaware of the situation.

17. The Appellant has reported the matter to the police and would like HMRC to
30 pursue a complaint against Mr Fleming also.

18. HMRC should have been put on notice that the repayment claims were fraudulent by the different signatures contained on the VAT returns and VAT1 application and the large sums of money involved.

19. HMRC have not challenged the allegations of fraud made by the Appellant nor
35 have they sought to obtain expert evidence to verify the Appellant’s claim that she did not sign any documents relating to The Good Food Company.

20. The Appellant is naïve in the extreme and was a victim of Mr Fleming’s fraudulent and manipulative activities.

Evidence

21. We heard evidence from two witnesses called on behalf of the Appellant; the Appellant herself and Mr Bate, her accountant.

22. For health reasons we heard the evidence of Mr Bate first. He had written to the Appellant's solicitors on 31 March 2010 and we were provided with a copy of his letter which can be summarised as follows:

- 10 (a) HMRC were wilfully defrauded out of approximately £100,000. It is not possible to calculate the exact figure as some monies were probably reclaimable but Ms O'Ryan trading as The Good Food Company reclaimed £107,880 between periods 07/04 and 07/06;
- (b) Mr Bate believes that the fraud was carried out by Mr Fleming without the knowledge of the Appellant;
- (c) Ms O'Ryan did not sign any documents submitted to HMRC;
- (d) Ms O'Ryan did not sign the VAT1;
- 15 (e) Ms O'Ryan did not sign the questionnaire sent out by HMRC, which was largely completed by telephone;
- (f) The accountant named in the questionnaire is Pat Fahy, Castle Street, Enniskillen. Castle Street is a very short street and Mr Bate is the only accountant on the street;
- 20 (g) Ms O'Ryan was extremely naïve to allow herself to be put forward to her bank as a sole trader. It is a fact that a bank account was opened showing Oonagh O'Ryan T/A The Good Food Company. Thereafter Ms O'Ryan gave Mr Fleming free access to this account. He was also granted access to Ms O'Ryan's personal account;
- 25 (h) Ms O'Ryan did not sign the lease for the Company premises;
- (i) Ms O'Ryan did buy a van on HP;
- (j) Ms O'Ryan took a year out from teaching in the UK. In November 2004 to March 2005 Ms O'Ryan was in India and returned to find her personal account drained and loan/HP payments outstanding. This coincided with Ms O'Ryan moving in with her mother who was ill;
- 30 (k) The company closed late in 2006 and Ms O'Ryan heard no more about the company until the statutory demand was received in 2009. Mr Fleming moved to the USA;
- (l) There is a strong case to suggest that HMRC were complicit in the fraud as the initial verification check where invoices were provided to HMRC was not competently carried out. The documents sent to HMRC appear fraudulent yet this was ignored. Furthermore the VAT returns are glaringly incorrect.
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23. In oral evidence Mr Bate explained that he had conducted his investigation from 40 copies of VAT returns, speaking to Ms O'Ryan and accessing her bank accounts. The

only credits into the business account over an 18 month period came from HMRC repayments. There was no indication within the statements for that account of a business being run, for example there were no sales records or lodgements relating to payments to suppliers.

5 24. Mr Bate confirmed that Ms O’Ryan had been out of the country when 2 returns
had been submitted and therefore she could not have signed those returns. He
expressed his opinion that it was quite clear that fraudulent activity was taking place,
as could be seen from the bank accounts. Mr Bate was satisfied from talking to Ms
O’Ryan that she had only signed the HP agreement and no other documents relevant
10 to this case.

25. Mr Bate explained that HMRC have a department which carries out credibility
checks on the first returns submitted by companies and that usually documents in
support of the returns are requested. In this case, the documents which Mr Bate
obtained from HMRC which he believed were provided for such a check (an invoice
15 and a pro forma invoice) were altered to such an extent that HMRC should have
queried the documents.

26. In cross examination Mr Bate stated that he believed that Mr Fleming had
access to Ms O’Ryan accounts although he was not aware as to how this had
happened. He stated that he did not believe that the documents that he had obtained
20 from HMRC could have been provided as evidence of trading.

27. We also heard evidence from Ms O’Ryan who stated that she is a primary
school teacher who had taken 6 months off in 2004/2005 to go to India where she
taught pupils and helped in an orphanage which was run by her brother’s partner’s
parents.

25 28. Ms O’Ryan began a relationship with Mr Fleming in 1999 having known him
socially for about 10 years. The couple’s relationship was very private and they rarely
went out together in public. At the time Mr Fleming was working selling frozen food
from a van and he told Ms O’Ryan that he believed he could successfully set up a
similar business.

30 29. Mr Fleming told Ms O’Ryan that he had a poor credit rating and did not have a
bank account and as a result Ms O’Ryan went with him to her bank where, having set
out the business proposal to the business advisor, an account was set up. Ms O’Ryan’s
evidence was vague on the point but she maintained that she had believed herself to
be a guarantor of the account which was set up with the name “The Good Food
35 Company” at Mr Fleming’s suggestion. As the bank statements are in the name of Ms
Oonagh O’Ryan T/A The Good Food Company, Ms O’Ryan accepts that she must
have signed something but cannot recall so doing. Ms O’Ryan explained that she
never used that account after it was opened nor did she see or open any
correspondence which arrived in the name of The Good Food Company. She believed
40 that Mr Fleming must have stolen some post as he had a key to her house during the
period when she was living with her mother. Ms O’Ryan accepted that she had signed

an HP agreement for a van for the company and that she paid the cost from her personal account.

5 30. The Appellant gave an account of an incident which occurred in 2008 after the couple had separated in which she had gone to the Nationwide Building Society to warn the bank that Mr Fleming was continuing to use her address despite the couple having separated. Mr Fleming was also, coincidentally, at the bank and he threatened the Appellant. After leaving the premises, Ms O’Ryan returned in order to give the bank the information that she had gone there to disclose and when Mr Fleming returned an employee hid her under a desk.

10 31. Ms O’Ryan confirmed that she had not signed any documents pertaining to The Good Food Company nor had she spoken to HMRC on the telephone.

15 32. When Ms O’Ryan went to India she left her card and cheque book for her personal account with Mr Fleming. Rather than paying the household expenses, Mr Fleming spent Ms O’Ryan’s money. When she returned, Mr Fleming agreed to pay the money back. The transfers made from the business account to Ms O’Ryan’s personal account were made either by Mr Fleming or by Ms O’Ryan who was told how much to transfer; the amount depended on the balance of the business account.

The Law

20 33. Before we turn to our assessment of the facts of this case we will set out the law.

34. Both parties agreed that the sole issue for the Tribunal to determine was whether HMRC was correct to register the Appellant for VAT. The legislation applicable is set out in Section 83 of the VAT Act 1994 and in particular Mr Mallon invited us to consider the provisions of S83(a),(p) and (n):

25 *Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters—*

(a) the registration or cancellation of registration of any person under this Act;

(n) any liability to a penalty or surcharge by virtue of any of sections [F559 to 69A];

(p) an assessment—

30 *(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or*

(ii) under... subsections (7), (7A) or (7B) of that section; or

(iii) under section 75;

or the amount of such an assessment

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35. We agreed that the appeal was brought under the correct provisions, however we took the view that consideration must also be given to the legislation applicable to the registration for VAT of a taxable person.

36. Paragraph 9 of Schedule 1 of the VAT Act 1994 provides:

5 *Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he—*

(a) makes taxable supplies; or

(b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,

10 *they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.*

Discussion and Decision

37. On behalf of the Appellant it is submitted that, on the facts of this case, the Appellant should not have been registered as she was not a taxable person and
15 therefore the registration is invalid. If we so find, then the assessments will fall away by virtue of our decision. However if we find that the registration was valid, the Appellant may choose to appeal the assessments arising from her registration as a separate appeal.

38. There can be no dispute that the Appellant was entitled to voluntarily apply for
20 VAT registration as Ms O’Ryan Trading as The Good Food Company which made taxable supplies.

39. The issue for us to determine, it seems to us, is whether on the unusual facts of this case, the registration is, in effect, invalidated by fraud. HMRC did not seek to
25 argue that there had been no fraud, although we note that it reserved its position as to the knowledge and involvement of the Appellant which, in our view, would be an issue more properly explored in an appeal against the assessments. That said, we proceeded on the basis that HMRC could not and did not challenge that the VAT1 and other documents relating to The Good Food Company were not signed by the Appellant.

30 40. The documents held by HMRC in the form of an invoice and pro forma invoice indicated a business being carried on with the intention of making supplies for consideration, namely the sale of frozen food.

41. A VAT1 was received by HMRC which purported to be signed by the Appellant and contained the required information. In those circumstances we concluded that
35 paragraph 9 of Schedule 1 of VAT Act 1994 was satisfied and prima facie there was a valid VAT registration application before HMRC. The same provision of the VAT Act states that where such an application is made, HMRC “shall” if the applicant so

requests, register him. We concluded that in applying the legislation, HMRC had correctly registered the Appellant for VAT.

42. There was no direct evidence before us as to the checks, if any, that were made by HMRC in processing the application, although we noted that there was no statutory requirement for any such checks. We carefully considered the VAT1 form which showed that the details contained therein, such as the Appellant's address and bank account details were correct. The Appellant accepted (despite a lack of recollection) that she must have set up the business bank account as the statements clearly contained the name of Oonagh O'Ryan T/A The Good Food Company. In those circumstances we could see no basis upon which suspicion may have been aroused in respect of the application.

43. We noted the criticism made by the Appellant relating to the documents accepted by HMRC, however it seemed to us that at the time of the application, HMRC required no more than evidence of an intention to trade and altered though the documents may be, they did demonstrate an intention to trade which fulfilled the requirement for registration. The criticisms made of other documents examined by Mr Bate, for example the VAT returns, have no bearing on the issue of registration and we found as a fact that they did not assist us in reaching our decision.

44. We considered what the position would have been had there been no fraud as alleged in this case. HMRC received a VAT1 application which contained correct information pertaining to the Appellant T/A The Good Food Company. The Appellant was entitled to apply to be VAT registered and there were no grounds for refusal on the face of the documents and information held by HMRC. In our view, the fact that there was an alleged fraud perpetrated by Mr Fleming, with or without the knowledge of the Appellant (upon which we make no comment as this may form the basis of further proceedings if the Appellant pursues an appeal against the assessments) cannot alter that position.

45. We were satisfied that the legislative criteria for voluntary registration had been satisfied and that HMRC had correctly registered the Appellant trading as The Good Food Company.

46. The appeal is dismissed.

47. 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.

**JENNIFER BLEWITT
TRIBUNAL JUDGE**

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RELEASE DATE: 21 August 2014