[2016] UKFTT 615 (TC)

TC05351

Appeal number: TC/2016/01591

VALUE ADDED TAX – Flat-rate scheme – change to different trade sector agreed prospectively – whether HMRC decision to refuse to also backdate change made on reasonable grounds – no – decision quashed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JJK ENGINEERING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at City Exchange, Leeds on 23 August 2016

Glyn Edwards CTA of Croner Tax for the Appellant

Bernard Haley, Presenting Officer, for the Respondents

DECISION

1. This was an appeal by JJK Engineering Ltd ("the appellant") against a decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") refusing to backdate the effect of an agreed change to the percentage applicable to the appellant's business for the purposes of the Flat Rate Scheme ("FRS") for accounting for Value Added Tax ("VAT").

2. The FRS is a scheme available only to traders whose business has a turnover below a given annual limit. It allows those traders to account for VAT on a fixed percentage of their turnover but with no deduction for input tax. The percentage to be used in particular cases varies according to which of the statutory trade sectors the trader falls into, the sectors being listed in a table in regulations with the relevant appropriate percentage shown against each.

3. In this decision I deal with the case on the basis that was agreed between the parties. But I have some doubts about whether this is in fact the correct basis in law, and in case those doubts should be thought to be at all worthy of consideration I set them out later in this decision (see §§69 to 80).

Evidence

4. I had a bundle of documents prepared by HMRC which included the limited correspondence on the issue and some relevant documents relating to the appellant's registration for VAT and participation in the FRS.

5. I also had a witness statement from Mr John Ward, the principal of the appellant, and his CV. The statement was mostly taken as read but Mr Haley had some questions for Mr Ward. I accept Mr Ward's evidence as that of a transparently honest and reliable professional person.

Facts

6. I set out here the facts which are not in dispute, taken from the documents in the bundle.

7. The appellant was registered for VAT on 16 June 2008 under Trade Classification 71129, Other Engineering, Not Industrial Design.

8. It applied to join the FRS at the same time, and Mr Ward completed and signed a form VAT 600 FRS. In the box on that form which asked the question "My main business activity is" he had put "Project Management". In fact despite there being words in brackets under "My main business activity is" which said "Type in one of the sectors from the Table in Notice 733", "project management" is not one of the trade sectors to be found in Notice 733 (in the version current in June 2008).

9. It was, however, agreed that the rate chosen, 12.5%, was (at that time) the rate applicable to the sector "Architect, civil or structural engineer" ("ACSE").

10. It was also agreed that at the time of application in June 2008, Notice 733 at paragraph 4.4 had stated:

> "**4.4 Business activities that are the source of common enquiry**
>
> The table below gives the trade sector for particular business activities, which have been the subject of common enquiries to our National Advice Service.

Business activity	*Trade sector*	*Flat rate percentage*
Engineering consultants and designers	—Architects [*sic*], civil and structural engineers [*sic*]	12.5
…	…	…

The other categories of business activity in this table were Agents, Barristers, Florists and Agronomists. At this time the percentage for "[a]ny other activity not listed elsewhere" ("OANLE") was 10.

11. The appellant had made returns on the basis that, as his business was correctly described as "engineering consultants and designers", the correct sector was ACSE from 2008 until October 2015, as this is what his then accountants had advised.

12. On 27 October 2015 his accountants, Phil Dodgson & Partners Ltd ("Dodgsons") (not the firm who had advised him on applying for the FRS) wrote to HMRC's VAT Registration Service in Grimsby explaining Mr Ward's qualifications and work, saying that "in view of the above, our client feels that he is overpaying VAT because he should be registered under the category "any other activity not listed elsewhere" and so be on 12% not 14.5%. They added that Mr Ward requests that his (ie the appellant's) flat rate be amended to 12% and that "any VAT overpaid for the last four years should be subject to a repayment claim, following the decision in Idess Ltd …". It should be noted that by this time the percentage rate for OANLE had increased from 10 in 2008 to 12 in 2015, and that for ACSE from 12.5 to 14.5.

13. On 11 November 2015 Mrs Wolfe of HMRC replied saying:

> "I have updated your record to show you will be using 12% from 1 September 2015.
>
> We will not change your choice of sector retrospectively as long as your original choice was reasonable. It will be sensible to keep a record of why you chose your sector in case you need to show us that your choice was reasonable.
>
> *Note*: Some business activities can reasonably fit into more than one sector. So changing your sector does not automatically make your original choice unreasonable.

> Having looked at your records I will accept the change of trade sector from 1st September but I do not consider your original choice of trade sector to be unreasonable.
>
> Your agent refers to the tribunal case Idess Ltd (2014) TC03638 and I would explain we consider every case on an individual basis and make a decision established on the facts of the case, which I have done.
>
> As the [FRS] is self-assessing it is ultimately up to the trader to make an informed choice, as to which trade sector percentage they apply to their business, and they will be held accountable if the choice isn't correct.
>
> This is because the FRS as introduced to ease the administrative burden placed on small traders and a trader may pay more or less tax when using the scheme. When VAT accounts have already been produced and returns submitted there is no administrative benefit to the trader to go back and produce the same records again under a different system."

The letter then set out the appellant's appeal and review rights.

14. On 10 December 2015 Mr Edwards of Croner Tax, who had been brought in as a VAT specialist, requested a statutory review of Mrs Wolfe's decision. He also noted that the amount of the claim referred to in the accountant's letter of 11 November had not been quantified and asked HMRC to treat the letter as a formal claim for the amounts set out on a quarter by quarter basis from 02/12 to 08/15. This claim did not go back to the start of entry to the FRS, presumably because of the four-year time limit in s 80(4) Value Added Tax Act 1994 ("VATA").

15. Mr Edwards also referred to the refusal to change the percentage retrospectively. He then set out the law and made submissions for the benefit of the reviewing officer that mirrored his submissions to me .

16. This request for a review was ignored by HMRC and so the appellant appealed to the Tribunal.

17. I now deal with Mr Ward's evidence.

18. His witness statement and associated exhibits explain that he is a Chartered Engineer and Fellow of the Institute of Mechanical Engineers. In full he is BEng, CEng, FIMechE, EUR ING and RMaPS. His CV shows that his work (and therefore the appellant's as they are to all intents and purposes synonymous) has been (almost) entirely to do with plant and equipment as a (Technical) Project Manager, Installation Manager and in one case Senior Engineer (at Dounreay in 2013).

19. Mr Ward was asked by Mr Haley to consider what he said about his time at Dounreay where he said that his role "involved the planning of the order of demolition of buildings and how this could safely be conducted." Was this not a matter dealing with buildings so amounting to civil engineering?

20. Mr Ward pointed out that there is a world of difference between doing the professional work of a civil engineer and managing civil engineers as part for a team where he said one-seventh of the total works at Dounreay involved buildings rather than equipment and plant, the field of a mechanical engineer. It was a condition of his professional status that he did not profess to do any other form of engineering for which he was not qualified and he did not.

21. Mr Haley then took Mr Ward to the application to join the FRS (VAT 600 FRS). Mr Ward said that he left the paperwork and authorisation process to his then accountants. He told me that they made it clear that things should be done their way and if he didn't like it he could find another accountant.

22. He agreed that the VAT 600 FRS was signed by him but he said that entries, though in his handwriting, were those his accountants had told him to enter. In the box against which the form said "My main business activity" he had put "Project Management" on his accountants' advice which he was not in a position to contradict. ACSE was what Mr Ward understood to be the sector that his accountants considered to be the correct one. But he was not a civil (or structural) engineer.

23. Mr Ward also said in oral evidence that he had talked about the FRS to 60 or 70 mechanical engineers and all but one had been entered into the FRS under the ASE sector. He confirmed in answer to my question that they were by no means all clients of his accountants.

24. From Mr Ward's evidence and the documents I find as a fact that Mr Ward is not in any sense an architect, structural or (particularly) a civil engineer. I do not think the fact that as a project manager he had responsibility for those working on what were civil engineering matters at Dounreay affects the issue at all. It does not make him a civil engineer. I also find as a fact that in completing the VAT 600 FRS he was guided entirely by his accountants.

Law

25. In the periods with which we are concerned (2012 to 2015) the FRS is authorised by what is commonly known as the Principal VAT Directive ("PVD"), the Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, which in Article 281 says:

> "Member States which might encounter difficulties in applying the normal VAT arrangements to small enterprises, by reason of the activities or structure of such enterprises, may, subject to such conditions and limits as they may set, and after consulting the VAT Committee, apply simplified procedures, such as flat-rate schemes, for charging and collecting VAT provided that they do not lead to a reduction thereof."

26. This, or rather its very similarly phrased predecessor in Article 24(1) of the Sixth VAT Directive (77/388/EEC), was put into effect in UK domestic law by s 26B

VATA in 2002. Section 26B is an enabling provision allowing regulations to be made, and Mr Edwards drew my attention in particular to s 26B(6)(a):

> "(6) The regulations may—
>
> (a) provide for the appropriate percentage to be determined by reference to the category of business that a person is expected, on reasonable grounds, to carry on in a particular period;
>
> …"

27. The regulations are in Part 7A of the Value Added Tax Regulations 1995 (SI 1995/2518) ("the VAT Regulations"). The only regulations relevant to this appeal are:

> "**55H**—
>
> (1) The appropriate percentage to be applied by a flat-rate trader for any prescribed accounting period, or part of a prescribed accounting period (as the case may be), shall be determined in accordance with this regulation and … regulation[ ] 55K.
>
> (2) For any prescribed accounting period—
>
> (a) beginning with a relevant date, the appropriate percentage shall be that specified in the Table for the category of business that he is expected, at the relevant date, on reasonable grounds, to carry on in that period;
>
> (b) current at his start date but not beginning with his start date, the appropriate percentage shall be that specified in the Table for the category of business that he is expected, at his start date, on reasonable grounds, to carry on in the remainder of the period;
>
> (c) not falling within (a) or (b), the appropriate percentage shall be that applicable to his relevant turnover at the end of the previous prescribed accounting period.
>
> **55K Category of business**
>
> …
>
> **Table**

Category of business	*Appropriate percentage*
…	…
Any other activity not listed elsewhere	12
Architect, civil and structural engineer or surveyor	14.5
…	…

28. The only other law that was mentioned related to appeal provisions specifically for the FRS and introduced at the same time. Section 83(1)(fza) VATA provides that:

"Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

(fza) a decision of the Commissioners—

(i) refusing or withdrawing authorisation for a person's liability to pay VAT (or entitlement to credit for VAT) to be determined as mentioned in subsection (1) of section 26B;

(ii) as to the appropriate percentage or percentages (within the meaning of that section) applicable in a person's case."

29. Section 84(4ZA) VATA limits the right of appeal by providing that:

"Where an appeal is brought—

(a) against such a decision as is mentioned in section 83(1)(fza), or

(b) to the extent that it is based on such a decision, against an assessment,

the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for the decision."

30. HMRC have, as I have noted, issued a Notice about the FRS. Certain parts not relevant to this appeal have the force of law, but the relevant parts do not. The relevant parts that were contained in the 2013 version of the Notice, the one in force at the decision date, are:

"**4.2 What if I get the sector wrong?**

We will not normally check your choice of sector when we process your application. So if you have made a mistake you may pay too much tax or too little. Paying too little could mean that you are faced with an unexpected VAT bill at a later date.

However, if we approve you to join the scheme, we will not change your choice of sector retrospectively as long as your choice was reasonable. It will be sensible to keep a record of why you chose your sector in case you need to show us that your choice was reasonable.

Note: Some business activities can reasonably fit into more than one sector. So changing your sector does not automatically make your original choice unreasonable.

4.3 The trade sectors and flat rates

Information regarding the trade sectors and flat rate percentages can be found on the website at FRS7300 in HMRC's VAT Manuals.

4.4 Business activities that are the source of common enquiry

The table below gives the trade sector for particular business activities, which have been the subject of common enquiries to our VAT Helpline.

Business activity	*Trade sector*
Engineering	—Architects [*sic*],

consultants and designers	civil and structural engineers [*sic*]
…	…

"

31. Mr Edwards cited four cases. These were *Idess Ltd v HMRC* [2014] UKFTT 511 (TC) ("*Idess*"); *AML Consulting Ltd v HMRC* [2012] UKFTT 474 (TC) ("*AML*"); *Archibald & Co Ltd v HMRC* [2010] UKFTT 21 (TC) ("*Archibald*") and *John Dee Ltd v Commissioners of Customs & Excise* [1995] STC 941 (Court of Appeal) ("*Dee*"). HMRC cited no case law. Their Statement of Case included no statute law except what appeared to be (it was not labelled) the four paragraphs of regulation 55K of the VAT Regulations without the Table. Unlike the Table the four paragraphs are irrelevant to this case.

Submissions

32. The appellant's submission was that HMRC could not reasonably have been satisfied that there were grounds for concluding that the choice of sector applied by the appellant prior to September 2015 was correct or reasonable.

33. The sector chosen by the appellant's accountants was wrong because the appellant, through Mr Ward, was not then and at all times since has not been carrying on one of the professions in the ACSE sector. The reason why the accountants chose the ACSE sector was because Notice 733 told them to, and on the basis of Mr Ward's evidence it is clear that this is a widespread issue.

34. Mr Edwards asked me to look at [21] to [23] of *Idess* where, at [21], the Tribunal (Judge Mure QC and Mr Whitehead) said that "The adjectives, civil and structural, were, we must assume, chosen consciously and deliberately by the draftsman. The work undertaken by Mr Harris and his company did not involve land, buildings or other structures, but rather plant and machinery."

35. He noted that at [22] the Tribunal said that "it is, we think, well within judicial knowledge that there is an obvious dividing line between *mechanical* engineering and the other two categories of engineering activity mentioned." [The *Idess* Tribunal's emphasis]. I informed the parties in the case that my father had been a Member of the Institute of Mechanical Engineers and that I too can say that it is within judicial knowledge that there is such a clear dividing line.

36. And at [23] the Tribunal said that the parties accepted that paragraph 4.4 of VAT 733 was of no legal effect. "We cannot apply it to extend the sense of the statutory wording of regulation 55K(4) [*sic*] to introduce a distinct and separate category of engineer."

37. Mr Edwards, who appeared for *Idess*, pointed out that in that case the company was using the lower rate that HMRC now accept is correct for this appellant, but

HMRC were arguing that the correct rate was that for ACSE and had assessed the company accordingly (and imposed a penalty).

38. As to the issue of HMRC's decision not to backdate, Mr Edwards accepted that as a result of the decision in *Dee* (which, unlike the other decisions he cited, was binding on me) it was necessary for him to show that in arriving at her decision Mrs Wolfe failed to take into account matters which she should have or took into account matters which she should not have (or both).

39. On this question Mr Edwards said the decision:

(1) gave a windfall to HMRC

(2) gave no explanation why it was reasonable for the appellant to have chosen ACSE in the light of VAT 733 4.4

(3) did not refer at all to the legislation and so ignored that the effect of regulation 55H(1) was to make mandatory use of the correct percentage

(4) failed to address his points on *Idess*

(5) referred to a wholly irrelevant reason why retrospection was not allowed (the last paragraph in the letter quoted at §12)

and so the decision should therefore be quashed.

40. For HMRC it was said that the policy of HMRC as set out in VAT 733 paragraph 4.4 was that backdating would not be allowed if the original choice was reasonable.

41. HMRC noted that at Dounreay the appellant had been involved in demolition and other works on buildings which were civil engineering. HMRC's policy in relation to backdating was not to allow it if the original choice was reasonable, and this was. The sectors in VAT 733 were of necessity broad and it was not unreasonable for the appellant to choose the one he had.

Discussion

42. This appeal, the parties accept, falls within the scope of s 84(4ZA)(a) VATA as an appeal against a decision of HMRC within s 83(1)(fza)(ii) VATA. Thus I can only hold for the appellant if I am persuaded that on the balance of probabilities HMRC "could not reasonably have been satisfied that there were grounds for the decision."

43. HMRC have a policy on backdating. Had that policy been what it apparently was said to be in *AML*, one of the cases cited by Mr Edwards, that is "no backdating at all" we would have said that the policy itself was unreasonable. But that is not the case here. Mrs Wolfe had said that the policy is not to backdate if the original choice was reasonable: the implication is that if HMRC consider that the original choice was not reasonable they will allow backdating. That seems to me to be a reasonable policy in a system where the original choice is one for the applicant to make and to monitor.

44. Whether the original choice was in fact correct or not (in the sense of being the one that most closely captures the applicant's activities) is not really the point. What I have to decide is whether it was reasonable for Mrs Wolfe to say that the original choice was a reasonable one (though maybe not the correct one in the sense I have used that term).

45. The difficulty I have on that score is that, as Mr Edwards points out, there is no reasoning given by Mrs Wolfe. Mr Haley has sought to find some reasoning (or perhaps to better express it) or has suggested what her reasoning might have been. That reasoning is that the original choice was reasonable because the sectors in the Table are broadly based and worded.

46. We agree with Mr Haley that many of the sectors in the Table in regulation 55K are broad, especially those of the OANLE type. But we agree with Mr Edwards (and the Tribunal in *Idess*) that "Architect, surveyor and civil engineer" is a closely limited description, which only includes three professions all of whom are concerned with land and buildings. We agree with the Tribunal in *Idess* that it would not have said "civil engineers" if it meant all engineers who may be involved in some way with work on buildings because, for example, they are mechanical engineers who manage, design and plan the installation and removal or relocation of plant and machinery in buildings.

47. But we know that Mrs Wolfe did not consider *Idess*. She said that each case turns on its own facts. But this ignores the fact that the question in *Idess* is exactly the same (or perhaps the mirror image) of the one here, and that what the Tribunal said about the aptness of ACSE as a sector for mechanical engineers was as relevant to this case as to that. We would not have blamed Mrs Wolfe for not considering *Idess* if she had not had it brought to her attention (though a case could be made that those working in this area should be familiar with the cases). But it was brought to her attention by Dodgsons and she should not have ignored it, together with the clear description given in their letter of Mr Ward's professional expertise which showed that he was in exactly the same position as the Mr Harris of *Idess*. Thus the facts on which each case turns were precisely the same.

48. It is true that Mrs Wolfe did not refer to any legislation, and specifically not to regulation 55H(1) of the VAT Regulations. It is fair to say however that Phil Dodgson & Partners Ltd had not mentioned or drawn her attention to any legislation: Mr Edwards had cited it in his review request and explained why he thought it significant, but it was not before Mrs Wolfe when she made her decision.

49. In any event I do not think that s 55H(1) can quite bear the weight Mr Edwards puts on it. True it says the applicant shall (ie must) apply the appropriate percentage for the category of business. But if there is some ambiguity in the categories it cannot restrict the choice just to one.

50. Nonetheless I agree with Mr Edwards that if the category is obviously wrong as in his example in his review request of a farmer who says he is a food wholesaler (a higher percentage) the farmer has not used the appropriate percentage and his choice

is wrong and unreasonable. If HMRC refused to allow backdating on the grounds that the choice was reasonable then their decision would be unreasonable. But again this example was not before Mrs Wolfe and she cannot be criticised for not taking it into account.

51. But I have to consider whether the appellant's choice was reasonable, not necessarily whether it was correct. HMRC's ready agreement that the appellant could use the "OANLE category does not of itself show that the original choice was unreasonable. But it is telling that, as was pointed out by Mr Edwards, HMRC Notice 733 has in its 2016 version omitted paragraph 4.4 and no longer "encourages" those whose activity is engineering design and consultant to put themselves into ACSE (no doubt in part as a result of *Idess*). But again the 2016 version of VAT 733 was not before Mrs Wolfe when she made her decision.

52. I have decided that that the appellant's "choosing" ACSE was not a reasonable choice, because it did not describe, for the reasons given in *Idess* as well as this decision, the business that the appellant actually carried on.

53. I have put "choosing" in quotation marks because the element of choice here was minimal. I do not consider that Mr Ward's "choice" of sector for the purposes of the Table was informed. He was in effect told by his accountants what the sector was and they in turn were clearly directed by VAT 733 to put the appellant into the ACSE category.

54. It is also clear that Mrs Wolfe did not take into account matters which she should have done, as described in §§45 to 47.

55. But I further agree with Mr Edwards that she seems to have taken irrelevant matters into account, namely the fact that the purposes of the FRS is to prevent small traders having to fully account for VAT and deal with input tax, and so there is no benefit to a trader from applying the FRS when VAT returns have already been made on the standard basis. This is simply not the case here. The appellant has been on the FRS from the outset and has never accounted on the standard basis and is not asking to produce different returns on a different basis. To make this statement suggests that Mrs Wolfe did not understand what the appellant was seeking to do, or did not take sufficient care to ensure that her reply was not just a matter of cutting and pasting boilerplate text.

56. I would therefore hold that for all the reasons given above that HMRC could not have reasonably been satisfied that there were reasonable grounds for their decision. But finally I must do what *Dee* and *AML* say I should, which is consider whether the decision would inevitably have been the same had all matters been properly taken into account or properly ignored.

57. I cannot be at all sure of that, as there is much that was wrong with the decision. The *Idess* point alone means that I cannot be sure.

58. I have not dealt with Mr Edwards' point about a windfall to HMRC. It is inconceivable to me that, had the percentage for ACSE been lower than that for

OANLE and nothing had been said in VAT 733, HMRC would have been content for mechanical engineers to classify themselves as civil engineers and so in ACSE. They would have been right to object.

59. The reason they would have been right stems from the explanation of why there are different percentages for different sectors, and that is because the FRS is required to be neutral in its effect, ie to raise the same amount of VAT as would otherwise arise but in a way that is easier and more convenient for traders. The percentages must have been calculated (and there are many of them) so as to achieve that neutrality. There must have been evidence available to HMRC that those professionals involved with buildings made bigger margins than other engineering consultants and designers. So to put mechanical engineers into the higher percentage flies in the face of the basis of the FRS as expressed in Art. 281 PVD (and in the third bullet point in HMRC's VAT Manuals at FRS2200).

60. Thus HMRC's actions in directing mechanical engineers to the civil engineers' percentage is not reasonable because it is contrary to the requirements of the Directive.

61. It is fair to say that this point was not mentioned in Mr Edwards' letter of December 2015, nor in any documents put to the Tribunal and to HMRC. I have dealt with it because Mr Edwards raised it in making his submissions. Mr Haley, reasonably enough, did not appreciate the significance of what he may have thought was simply a rhetorical flourish on Mr Edwards' part. While I have dealt with it because I think it does raise an important point, I have not taken it into account in making my decision given in §56.

62. Where that leaves the appellant I am not sure. It has made a claim for repayment and quantified it, presumably as a claim under s 80 VATA. HMRC have made no decision on the claim, but I would expect them, assuming the appropriate formalities have been met, to make a decision to meet the claim. In any event they should now make a decision on the claim.

Further observations

63. A strange feature of this case is that I have been dealing with the original decision by an officer and not a review decision. It may have been the case that a review which considered Mr Edwards' and Dodgsons' letters properly would have overturned the decision. But the lack of a review when one was requested is odd and has given rise to some qualms on my part about the propriety of dealing with the appeal (happily assuaged as shown below). Section 83G VATA (Bringing of appeals) says:

> "(1) An appeal under section 83 is to be made to the tribunal before—
>
> (a) the end of the period of 30 days beginning with—
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, …

(ii) …, or

…

(2) But that is subject to subsections (3) to (5).

(3) In a case where HMRC are required to undertake a review under section 83C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.

(6) An appeal may be made after the end of the period specified in subsection (1), (3)(b) … or (5) if the tribunal gives permission to do so.

(7) In this section "conclusion date" means the date of the document notifying the conclusions of the review."

64. In this case HMRC made an offer of a review on 11 November 2015. The appellant accepted the offer through Mr Edwards on 10 December 2015 (so in time). No review was started or carried out and certainly not concluded. By s 83F(6) and (8) the review is treated as having upheld the decision on a date 45 days from 11 December 2015 (the date when HMRC acknowledged receipt of the review request). That deemed conclusion date was therefore 25 January 2016.

65. Section 83G(5) therefore applies to make the period during which an appeal may be notified one running from 25 January 2016 (the s 83F(6) date) to the "conclusion date". There has been no conclusion date so the time limit had not ended when the appeal was made on 10 March 2016.

66. In the appeal notice Section 6 shows that the latest time by which the appeal ought to have been notified was "see below", the box requesting permission to appeal was ticked and the reasons simply recite the facts about the failure to review.

67. Understandably the Tribunal informed HMRC of the late appeal and asked if they had any objection. When HMRC filed their Statement of Case they did not mention the late appeal, and so in the Tribunal's eyes, HMRC had consented to allowing the late appeal.

68. I mention this because it is in my experience unusual in a VAT case for no review to be carried out at all when one is offered and accepted, and this situation appears to have puzzled Mr Edwards who effectively left it to the tribunal to work out whether the appeal was late. In the end all ended well, but it might not have.

69. But I have some more important observations. They arise from VAT 733 4.2 and further thoughts that developed from that.

70. VAT 733 4.2, says, to repeat:

"**4.2 What if I get the sector wrong?**

We will not normally check your choice of sector when we process your application. So if you have made a mistake you may pay too much tax or too little. Paying too little could mean that you are faced with an unexpected VAT bill at a later date.

However, if we approve you to join the scheme, we will not change your choice of sector retrospectively as long as your choice was reasonable. It will be sensible to keep a record of why you chose your sector in case you need to show us that your choice was reasonable.

Note: Some business activities can reasonably fit into more than one sector. So changing your sector does not automatically make your original choice unreasonable."

71. It seems to me that the second paragraph and the note here (which were reproduced verbatim by Mrs Wolfe as the second and third paragraphs of her decision letter) are only aimed at the case where the trader has paid too little because the appropriate percentage in HMRC's eyes is too low. "We will not change your choice" on its own is ambiguous, but in context it seems to me it must denote some action by HMRC, not a reaction to a claim or request for a lower percentage. I say this because of the second sentence of the paragraph: it is only reasonable to note and keep the reasons for the change to convince HMRC that the choice was reasonable if the person is faced with an assessment, as in *Idess*. In this case the appellant wished to show that the original choice was *unreasonable*. In fact Mr Ward was able to show that the choice was not reasonable because he could point to VAT 733 4.4 as it stood in 2008, but he did not keep a record of the reason his choice was unreasonable.

72. The second paragraph of 4.2 follows the sentence of the first paragraph which relates only to paying too little and an unexpected VAT bill. It is natural then to construe the second paragraph as relating only to that situation.

73. In my view it could plausibly be argued that the second and third paragraphs of Mrs Wolfe's letter are irrelevant in this situation. The policy of HMRC in this area referred to in *AML* at [16] and in this decision at §43 does not in fact appear to be a policy relating to claims of this sort.

74. There are further indications. Section 84(4ZA) VATA limits the Tribunal to having only a supervisory jurisdiction in two cases: one where an appeal is made against a decision as is mentioned in s 83(1)(fza) (refusal or withdrawing of authorisation to join the FRS and decision as to the appropriate percentage) or *against an assessment based on such a decision*. What it does not limit to a supervisory jurisdiction is what seem to be about to happen in this case, namely a repayment claim under s 80 VATA to recover the overpayment arising from using the wrong percentage.

75. It is obvious why a s 83(1)(fza)(ii) VATA decision should arise in a case where HMRC during a compliance check discover the use of the a wrong, lower, percentage. This what they thought in *Idess*, *AML* and *Archibald* and why, having made that

decision, they assessed the parties, as there was no other way open to them to collect the tax thought to have been lost.

76. In this case I do not see why the appellant needed to seek HMRC's approval to change its rate. There is nothing in the VAT Regulations which requires their approval. The only provision requiring HMRC to be notified of anything after authorisation is in regulation 55N:

> "(1) Where—
>
> (a) at the first day of the prescribed accounting period current at any anniversary of his start date,
>
> (b) the appropriate percentage to be applied by a flat-rate trader in accordance with regulation 55H(2)(a) for the prescribed accounting period just beginning differs from that applicable to his relevant turnover at the end of the previous prescribed accounting period,
>
> he must notify the Commissioners of that fact within 30 days of the first day of the prescribed accounting period current at the anniversary of his start date."

But this does not go further and is not a matter of approval or authorisation.

77. It seems to me that the appellant could simply have notified that from the start of the 11/15 period it would use 12% (and possibly what the new category was). It is arguable that it didn't even need to do that. Mr Edwards pointed out that the ACSE category, if it was incorrect and unreasonable, was not a s 55H(1) category, whereas the new one was. The notification requirement in regulation 55N is in contrast to regulation 55B which gives HMRC the power of authorisation to join the FRS and regulation 55P which gives them a power of termination.

78. There is no power in the regulations for HMRC to accept or refuse a different percentage even if it is a lower one. And that is not entirely surprising. If a lower percentage is to be used for the future then HMRC will always be able to carry out a compliance check. If the trader wishes to claim a repayment as result of using the wrong higher rate it can do so by making a repayment claim, limited to the four previous years as has in fact been done in this case.

79. I cannot therefore see where is the source of HMRC's power to deny, or for that matter agree to, backdating a change of percentage, except by assessing.

80. None of the above points were argued before me and I have dealt with the case on the basis that I had the power to decide whether or not HMRC's decision was reasonable, so these are very much what used to be called *obiter dicta*.

Decision

81. The appeal is allowed and the decision of HMRC is quashed.

82. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 31 AUGUST 2016