TC01839

Appeal number: TC/2010/02065

VAT – registration – whether Appellant liable to register in respect of earnings from part-time judicial appointment in absence of earnings from practice as barrister – classification previously for income tax purposes as self-employed – EC Directive 2006 arts 9, 10 – held, not a taxable person so not liable to register – appeal allowed

FIRST-TIER TRIBUNAL

TAX

DR AMIR ALI MAJID **Appellant**

- and -

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

TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
NICHOLAS DEE

Sitting in public at 45 Bedford Square, London WC1 on 7 October 2011

The Appellant in person

Edward Brown of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Dr Majid appeals against the decision of the Respondents ("HMRC"), upheld on review, that he was liable to be registered for VAT for the period between 1 February 2006 and 30 June 2007, and a consequent assessment to VAT and the imposition of a penalty.

The facts

2. The evidence consisted of a bundle of documents. In addition Dr Majid provided information in the course of presenting his case. We have treated that information as constituting evidence. We should comment that the bundle did not contain copies of all the correspondence; where letters were not included, we have taken these details from the descriptions in HMRC's Statement of Case, as we did not understand Dr Majid to raise any question as to those descriptions. The letters in the bundle were in the form necessary to take account of Dr Majid's requirements, as correspondence has to be emailed to him so that it can be converted to a form enabling him to read it. From the evidence we find the following background facts. We consider certain other aspects of the facts below.

3. Dr Majid is qualified as a barrister. He is totally blind. He works as a part-time Immigration Judge for what is now the Ministry of Justice, formerly the Department for Constitutional Affairs ("DCA"). At the relevant time, he also undertook employed work as a permanent reader at the London Guildhall University. In addition, he retained the status of self-employed barrister, but derived no income from that role during the period relevant to this appeal.

4. In 1999, the Inland Revenue made a decision that Dr Majid's fees for sitting as a part-time Immigration Judge (at that time, an Adjudicator of the Immigration Appellate Authority) should be treated as employment income. The Inland Revenue had already issued an "NT" code to the DCA. Dr Majid maintained that his income from his judicial role should be treated as self-employment income. He referred to incurring additional expenses involved in carrying out that work because of his blindness.

5. Dr Majid explained to us that the dispute as to his status took five years to resolve. Eventually Mr Phillip Morgan, an Inland Revenue Employment Status Officer, travelled from Cardiff to Dr Majid's home to inspect his methods of working at home. Following this rather brief visit, Mr Morgan wrote to Dr Majid on 25 October 2004 to confirm that Dr Majid was deemed to be self-employed in respect of his part-time work as an Immigration Judge. (We should point out that neither party provided a copy of this letter; for its contents, we have had to rely on Dr Majid's description of it in later correspondence.) Dr Majid stated that this was in order to take account of the additional expenses which he had to incur over and above those which would be incurred by sighted judges. However, subsequent comments from HMRC cast some doubt on whether this was the reason; see below.

6. Dr Majid commented that, when making this decision, Mr Morgan made no mention of any liability to VAT.

7. On the basis of his self-employed status, Dr Majid was required to complete a self assessment return each year. As part of a national exercise carried out by HMRC to identify instances where self assessment returns indicated taxpayers with a turnover in excess of £61,000, the registration threshold applicable at the time, Dr Majid's returns were identified for further action.

8. The resulting examination by HMRC of Dr Majid's returns indicated that he had reached an annual turnover in some periods in excess of the VAT registration threshold. The annual turnover, so far as relevant to this appeal, as declared on the self assessment returns was:

(1) Period April 2004 to March 2005 - £43,632

(2) Period April 2005 to March 2006 - £66,444

(3) Period April 2006 to March 2007 - £65,640

(4) Period April 2007 to March 2008 - £49,080

9. As a result of their examination of the returns, HMRC concluded that Dr Majid ought to have been registered for VAT in 2006. Accordingly, HMRC wrote to Dr Majid on 19 February 2009 (not 2008 as stated in HMRC's Statement of Case) informing him that, from the information currently available to them, he was liable to be registered for VAT for the period between 1 February 2006 and 30 June 2007. (We should again point out that we were not provided with a copy of this important letter, which we consider should have appeared in the bundle.) HMRC also indicated that it appeared that he was no longer liable to be registered after the latter date. The letter informed Dr Majid that VAT would be payable to HMRC on the "revenue" generated between those dates.

10. On 1 April 2009 Dr Majid sent HMRC a letter (originally sent on 14 March 2009, incorrectly dated 2008, but not received by HMRC) asking to be exempted from any VAT liability. (No copy of this letter was provided in the bundle.)

11. HMRC replied on 3 April 2009. (No copy of this letter appeared in the bundle.) They reiterated the requirement for a trader, even if a sole trader (as they considered Dr Majid to be), to register for VAT when the trader's turnover exceeds the VAT threshold. HMRC also requested Dr Majid to provide his monthly turnover figures from April 2005 to April 2008 in order to ascertain his true monthly turnover so that the date of registration and the assessment could be more accurately determined.

12. HMRC wrote again to Dr Majid on 7 May 2009 to request his true monthly turnover figures; on this occasion they requested the details for the periods from April 2004 to May 2007. They stated that if no response was received, a calculation of the period of registration would be made on the basis of the information currently available to them. (Again, no copy of this letter was provided in the bundle.)

13. Dr Majid wrote to HMRC on 16 May 2009 with an explanation of the background to the circumstances on which he was deemed to be self-employed. He understood that he was granted exceptional status because he is the only blind part-time Immigration Judge and as such has to undertake a considerable amount of work at home with a sighted assistant. He also stated that, apart from income from judicial sitting, he did not earn any money from any self-employed source of work. He enclosed certain copy correspondence relating to the decision to treat him as self-employed.

14. He requested exemption from any VAT liability. If the officer was unable to help, Dr Majid requested the reasons in full, so that he could forward them to the Ministry of Justice to consider payment of VAT. He referred to his comment in an earlier letter that he did not know any other judge who was paid any VAT over and above his/her normal fees.

15. Correspondence continued between the parties. On 29 July 2009, HMRC wrote to Dr Majid to notify him of their decision that he was liable to be registered for the periods between 1 February 2006 and 31 May 2007 and that the amount of VAT that he was liable for was £11,264.

16. On 9 October 2009 HMRC notified Dr Majid of their assessment of the VAT due in the sum of £11,264. They also notified him of a penalty for failure to notify HMRC of his liability to register for VAT; the amount of the penalty was £1,689, representing 15 per cent of the VAT due. If he disagreed with the decision, the letter gave him the option either to ask for a review or to appeal to an independent tribunal.

17. A delay occurred because that letter was sent in printed form, rather than being emailed to Dr Majid as required to enable him to convert it into a readable form. In his letter dated 4 November 2009, sent again on 18 December 2009, he referred to it having been sent to him "in the inaccessible format of print". He stated that his request for communications through email had not been taken into account, that he had received a further letter in print, and that the requested review was not commenced. He requested help, and emphasised his position as the only part-time Immigration Judge; he gave further information and asked for the matter to be referred for review.

18. On 11 January 2010, the Review Officer emailed a letter to Dr Majid setting out the results of her review. The following is an extract from that letter:

> "I have now completed my review of your case. My conclusion is that the decision in the letters dated 29 July 09 and 9 October 09 should be upheld. My reasons for this are:
>
> As I understand it you were given self employment status due to the nature of your work and therefore any income from your self employment is considered for VAT purposes. Under VAT Act 1994 Schedule 1, paragraph 1 HMRC have an obligation to register any one who becomes liable for registration.

> According to figures on your self assessment returns the VAT registration threshold was breached during December 05 meaning you should have registered from 1 February 06 and stayed registered until your turnover fell below the limit in June 07.
>
> As already stated the figures used as the basis for the decision came from your self assessment declarations and therefore the dates may not be accurate. It is in your best interests to supply your correct figures to Ms Holman as soon as possible so that
>
> [List of 2 items]
>
> 1. The correct period of registration can be determined
>
> 2. The correct liability can be established."

19. On 11 February 2010 Dr Majid gave Notice of Appeal to the Tribunal.

Arguments for Dr Majid

20. Dr Majid referred to the extended campaign to resolve the conflict following the decision in 24 June 1999 to refuse him self employment status. He commented that if Mr Morgan had informed him that he would have to pay VAT, he would have referred the matter to the Ministry of Justice.

21. In their skeleton argument, HMRC referred to him appearing to ask for an exception not by reference to the statute, but by reference to his disability. Dr Majid stated that he had never asked for any exception with regard to his disability.

22. HMRC had also stated that they had no discretion to remedy what he described as an "absurd result" from albeit proper, cold application of the law. He commented that they even had power to make extra-statutory concessions. He gave an example of discretion being exercised in the case of the hostages who had been released by Saddam Hussein, on their arrival back in the UK in December 1990. A Home Office Minister had indicated that it was not appropriate to make them stand in a queue to have their passports checked. As a result, other persons did not have their passports checked.

23. He submitted that judges did have a discretion to save a citizen from the consequences of an irrational application of a statute. He referred to principles of statutory interpretation applicable where literal meaning led to any manifest uncertainty, irrational result or repugnance; that was seized upon by the judges as not being the intention of the legislature. He argued that the words "an exempt supply" could be construed for his benefit, given that his situation was so rare that it could not easily have been imagined by Parliament.

24. He referred to the Convention on Human Rights, and submitted that it was disproportionate, and contrary to the Human Rights Act 1998, to maintain the decision.

25. He referred to s 3(1)(d) of the Disability Discrimination Act 2005, which imposed obligations on authorities to take steps to achieve the goals set out, even where that involved treating disabled persons more favourably than other persons.

26. He stressed the unfairness of being asked to pay VAT when he was not holding any VAT on anyone's behalf. The amount would come out of his already taxed income. In effect, this would mean that there had been no benefit to him in being granted self-employed status.

Arguments for HMRC

27. Mr Brown referred to Dr Majid's Notice of Appeal. This explained that he had previously obtained self employed status, and asked the Tribunal by pragmatic interpretation to grant an exception.

28. Contrary to the suggestion in the Notice of Appeal, Dr Majid had been assessed as self-employed because all the relevant factors, such as control, pointed to self-employment. The decision had not been the result of exceptional circumstances relating to his disability. In any event, it was not relevant to the liability to register for VAT. The decisions taken by HMRC were an application of the registration threshold provisions as they applied to any self-employed person.

29. On the request for an exception by way of pragmatic interpretation, Mr Brown submitted that Dr Majid had not suggested any principle of statutory interpretation that changed the position in the present circumstances. Instead, he appeared to be asking for an exception not by reference to the statute, but by reference to his disability. HMRC respectfully submitted that no such jurisdiction was conferred by the law, whether to themselves or the Tribunal. The Tribunal was requested to reject Dr Majid's appeal.

30. HMRC had calculated Dr Majid's liability based on his annual self assessment returns. They had not been provided with monthly figures and had therefore calculated the VAT to the best of their judgment. Against this, they had applied a 15 per cent reduction on the basis that Dr Majid would have been able to deduct input tax incurred. In so far as he had incurred input tax liability and could provide supporting evidence, HMRC were prepared to reduce the assessment. They had applied a 15 per cent penalty pursuant to s 67(4(c) of the VAT Act 1994 ("VATA 1994"), in the absence of any reasonable mitigation.

31. In support of their arguments, HMRC relied on ss 1(1), 4, 67, 73(1), 76(1), Sch 1 paragraphs 1 (in its form applicable at the relevant time), and 5 VATA 1994, and regulation 25 of the VAT Regulations 1995 (SI 1995/2518).

32. Dr Majid had raised the question whether HMRC were under a duty to advise him to issue invoices. If this was a public law challenge, Mr Brown submitted that this Tribunal did not have jurisdiction to consider the question. Ultimately it was Dr Majid's responsibility to account for VAT once he reached the registration threshold.

33. In the circumstances there did not appear to be a dispute as to the law. There was no dispute as to the self employed nature of the judicial earnings or as to the VAT registration threshold. His obligation was to collect VAT that was due; that was what the various statutory provisions required to be done. Mr Brown emphasised the absence of any discretion.

34. He submitted that when Mr Morgan had arrived at the view that Dr Majid was self-employed, that had not involved taking an exceptional decision. In any event, this was not relevant to the present appeal, as Dr Majid accepted that he was self-employed. Mr Brown accepted that this was an unusual case, but pointed out that Dr Majid was legally qualified and called to the Bar. In respect of the grounds of appeal, the decision to treat Dr Majid as self-employed did not assist, as this was no ground for exception from the liability to VAT. On the second ground, Dr Majid was saying that he was not asking for special treatment; however, he must be doing so, or the second ground meant nothing at all.

35. In his skeleton argument, Dr Majid had submitted that he had consumed no goods or services, he was holding no VAT on behalf of HMRC, and that he was not willing to pay any amount to HMRC from his already taxed assets. Mr Brown argued that this was not a submission which could find favour. The obligation was to collect VAT and account for it to HMRC. HMRC did not accept that this was an absurd result; it was applying the normal legal provisions. Mr Brown also did not accept that HMRC had the right to apply any form of discretion, as Dr Majid had submitted; this case did not reach the threshold of exceptionality.

36. Dr Majid had referred to "exempt supply"; the supplies in question did not fall into this category.

37. On the reference to Convention rights, Mr Brown submitted that there had been no breach of such rights. This was a taxing statute, and Parliament had had Convention rights in mind when passing legislation for taxes. It was not a breach of human rights for Dr Majid to be required to pay VAT from his already taxed income.

38. Dr Majid had raised the question of disability discrimination. Mr Brown emphasised that HMRC did have regard to the provisions in question. He submitted that none of the decisions was in any way in breach of equal treatment legislation.

39. Ultimately, HMRC said that they were not within the realms of discretion in this case and that therefore the Tribunal was not either. This meant that ultimately there was no basis for allowing the appeal.

Discussion and conclusions

40. By way of preliminary comment, we wish to point out that although Dr Majid is a Tribunal Judge, neither of us has had any previous contact with him or any knowledge of his position. We are therefore able to take an entirely independent view of his case.

41. Although it is not directly in issue in this appeal, we feel the need to comment on the decision by HMRC to confer self-employed status. For income tax purposes, there are two categories of worker falling within the employment tax provisions; employees and office holders. In relation to the latter, in *Great Western Railway Co v Bater* [1920] 3 KB 266; 8 TC 231, Rowlatt J described the term "office" as

> '… a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders.'

Later, in McMillan v Guest ([1942] AC 561; 24 TC 190 HL), Lord Atkin, while approving Rowlatt J's formulation, added a gloss:

> 'A position or place to which certain duties are attached, especially one of a more or less public character.'

42. Later cases made clear that an "office" did not have to have such permanence as to be required to exist indefinitely. As currently interpreted following the enactment of the Income Tax (Employment and Pensions) Act 2003 ("ITEPA 2003"), an office is:

> ". . . a position, often with some public context, independent of any particular individual, and to which a person can be appointed and removed in favour of another person. It does not have to have a long-term existence but has to be more than merely transient. A degree of formality in the appointment of an individual to the post, and in the way that the post was created, will also point to the existence of an office." [Simon's Taxes **E4.203**].

43. Section 5(3) ITEPA 2003 is as follows:

> "(3) In the employment income Parts [ie of ITEPA 2003] "office" includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders."

44. Dr Majid's appointment as an Immigration Judge clearly fulfils those conditions. Where an individual has an "office", this is determinative of that individual's tax treatment. There is therefore no need to examine the indicia of employment, such as "control".

45. In her decision letter to Dr Majid dated 29 July 2009 Ms Holman stated:

> "I have carried out further research into the issue of your status, and I have spoken to Mr Phillip Morgan, who made the decision to allow you to be considered as self-employed. He informed me that under no circumstance would this decision have been made due to a disability or health issue. The decision as to whether you are considered to be employed or self employed would have been made after consideration of your working practices, i.e. the level of control you have over your work. You are obviously entitled to claim an allowance for your disability but this is an entirely separate issue."

46. As the role of Tribunal Judge appears to us to fall clearly within the heading of "office", we find it difficult to understand why the decision as to Dr Majid's status was made in this way. However, it is not for us to decide on that status. Further, as agreement on this issue was reached in 2004 and has been acted upon ever since, it would raise questions going far beyond the scope of this appeal if it were to be suggested that this agreement should be revisited.

47. The relevance of this to the present appeal is that the decision to assess Dr Majid to a sum of VAT and to impose a penalty is based on what we consider to be an erroneous view of his position. If he is working in the capacity of an office holder, how can he be liable to VAT? However, we are able to deal with the question raised by the appeal without being concerned by this, and without reference to HMRC's decision to treat him as self-employed. We set out our reasons below.

48. Dr Majid asked us to apply broad principles of statutory interpretation in order to arrive at a result which would accommodate his position and take him out of the requirement to account for VAT. We do not think this appropriate, or even necessary, in his case. Rather than engaging in a process of statutory interpretation, we find that the issue can be resolved by applying the legislation as it stands.

49. In his skeleton argument, Mr Brown cited ss 1(1) and 4 VATA 1994. We do not think it necessary to set out the former, but s 4 provides:

> "**4 Scope of VAT on taxable supplies**
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

50. In terms of s 4(1), it can of course be said that there has been some form of supply of services by Dr Majid, in the layman's sense that he has provided to the DCA and the Ministry of Justice his work in his capacity as an Immigration Judge. However, in order to be chargeable to VAT, his provision of that work would have to fall within the remaining words of s 4(1), namely: ". . . a taxable supply made by a taxable person in the course or furtherance of any business carried on by him". These words are entirely inapt in the context of an individual engaged in the role of Immigration Judge when this does not form part of any other activity.

51. We are satisfied that at the relevant time Dr Majid was not deriving any income from his practice as a barrister. In the absence of the complication arising from Mr Morgan's determination of Dr Majid's status for income tax purposes, Dr Majid's position would have been exactly the same as that of an individual in the role of a part-time Tribunal Judge but having no other sources of income, ie chargeable to income tax as an office holder and outside the scope of VAT.

52. The position is set out in De Voil Indirect Tax Service at **V2.246 – Employments**:

> ‘The essential distinction is between a person engaged under a contract of service (employee) and a person engaged under a contract for services (self-employment). The VAT legislation is silent on the position of employees and it may therefore be taken as self-evident that an employee acting as such under a contract of service does not thereby carry on a business.
>
> If confirmation of this position were required, the EC legislation provides that the defined class of taxable persons excludes “employed and other persons … in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability”.’

53. The EC legislation in question is Directive 2006/112/EC art 10. An individual who works in an employment or “office” which is not accepted “. . . in the course or furtherance of a . . . profession” within the terms of VATA 1994 s 94(4) (see below) cannot be said to be a–

> “. . . person who, independently, carries out in any place any economic activity . . .”

within the terms of Article 9 of that Directive, as the opening words of Article 10 are:

> “The condition in Article 9(1) that the economic activity be conducted 'independently' shall exclude employed and other persons from VAT...” [continuation as in the extract from De Voil, above].

54. As indicated above, the other provision which could affect Dr Majid’s position is VATA 1994 s 94(4), which provides:

> “(4) Where a person, in the course or furtherance of a trade, profession or vocation, accepts any office, services supplied by him as the holder of that office are treated as supplied in the course or furtherance of the trade, profession or vocation.”

55. HMRC did not seek to argue that Dr Majid’s office as a part-time Immigration Judge had been accepted in the course or furtherance of his profession as a barrister. We are satisfied from the copy Self Assessment Tax Returns included in the bundle that he had no earnings from that source during the period relevant to this appeal. It appears to us that there is no clear association between his past practice as a barrister and his acceptance of that office; of course, his legal qualification was (and is) essential to that role, but there is no evidence that he accepted the role as part of his practice. In any event, it appears to us that his separate employment at the London Guildhall University would have restricted the extent of his practice, given the reasonably substantial earnings from that employment. Accordingly, we find that he did not fall within VATA 1994 s 94(4).

56. We accept that this is an unusual, if not exceptional, case. However, the process by which HMRC arrived at their decision that Dr Majid was liable to register for VAT in respect of his judicial earnings appears to us to have omitted a step in the required logic. Merely because he had been deemed for income tax purposes to be self-employed, it was assumed that he was a taxable person and should therefore have

registered. The question whether he was a person independently carrying on an economic activity does not appear to have been asked. In our view, this led to an erroneous decision.

57. We find that Dr Majid was not liable to be registered in respect of his earnings as a part-time Immigration Judge, and accordingly allow his appeal.

Administrative matters

58. We have pointed out above that various items of correspondence were not included in the bundle. Instead, we have had to derive information from HMRC's Statement of Case. We have done so on the basis that there was no suggestion from Dr Majid that any of the history described in the Statement of Case was incorrectly recorded. However, we regard it as unsatisfactory not to have the actual correspondence available. A particularly important omission was the letter from Mr Morgan giving the decision on Dr Majid's status. Another significant omission was the letter from HMRC dated 19 May 2009. We would ask that all parties, particularly HMRC in their capacity as Respondents to many of the appeals considered by these Tribunals, should ensure that all relevant correspondence is included in the evidence. We accept that in Dr Majid's case there has been the additional requirement to provide him with a copy of the bundle in Braille form, but the parties should be aware of the Tribunal's need to be satisfied as to the evidence to be taken into account.

Right to apply for permission to appeal

59. 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 CLARK
TRIBUNAL JUDGE
RELEASE DATE: 20 February 2012