



TC05617

Appeal number: TC/2016/01474

VALUE ADDED TAX – compulsory retrospective deregistration – whether or not appellant was registerable on the date in question – held yes – appeal allowed – second registration made by appellant – whether valid registration – held not – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ARTHUR EDWYN TURNER T/A WICKED WANG PROMOTIONS Appellant

- and -

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

**TRIBUNAL: JUDGE PHILIP GILLETT
DAVID BATTEN**

Sitting in public at Cardiff on 6 December 2016

The Appellant appeared in person

**Michael Clarke, of Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

5 1. This appeal covered a number of VAT issues, dating back to 2008, some of which had been the subject of a previous tribunal hearing before Judge John Brooks on 9 January 2013.

2. The matters under appeal were set out in the Respondents' Amended Statement of Case dated 6 September 2016 as being:

10 (1) The decision by HMRC, on 30 November 2012, compulsorily to deregister the Appellant, Wicked Wang Promotions ("WWP"), with effect from 1 October 2008.

(2) The decisions by HMRC on 6 December 2011 to:

15 (a) Reduce both the output tax and the input tax to nil for the period 3 July 2008 to 30 September 2008, although this was subsequently amended to a small repayment due to WWP,

(b) Disallow input tax claimed in WWP's returns for the periods from 1 October 2008 to 30 June 2011 totalling £13,472.

(3) The decisions by HMRC on 9 February 2016, in respect of a second VAT registration, to:

20 (a) Disallow input tax of £1,421 claimed in WWP's VAT return for the period 1 August 2014 to 30 September 2014,

(b) Reduce to nil the repayment returns submitted by WWP for the periods from 1 October 2014 to 30 September 2015 totalling £54,059.13.

Background

25 3. The Appellant, Arthur Edwyn Turner, is a sole trader trading as Wicked Wang Promotions. He registered for VAT with effect from 3 July 2008 and stated that the main business activity would be that of festival and concert promotion. His main activity during the period to 30 September 2008 was the organisation and promotion of the Tenby Folk Festival over the 3 days of the August Bank Holiday weekend that
30 year.

4. The VAT returns covering the period to 09/08 and subsequent periods were challenged by HMRC, primarily on the grounds that they considered that there was insufficient supporting evidence for the input VAT claimed to have been suffered but also on the basis of a calculation by HMRC of output tax allegedly due on ticket sales
35 which was subsequently agreed by HMRC to be a fundamentally flawed calculation.

5. Following lengthy correspondence and meetings HMRC initially decided to deregister WWP compulsorily with effect from 1 July 2011. WWP appealed this and the other decisions relating to HMRC's refusal to repay VAT in accordance with the submitted returns, and this appeal came before the First Tier Tribunal (Judge John
40 Brooks and Mr Laing) on 9 January 2013.

6. In August 2012, however, when preparing for that appeal hearing, HMRC came to the conclusion that their argument for compulsory deregistration with effect from 1 July 2011 could not be sustained and therefore sought to withdraw the various decisions under appeal. WWP would not however agree to the simple withdrawal of these decisions and it was therefore decided that the appeals in question should be allowed by consent, which is what the tribunal did.

7. Whether in accordance with HMRC's intentions or not, the appeals allowed at that time included WWP's appeal against HMRC's decision of 6 November 2011 in respect of the period to 09/08 and the subsequent periods from 1 October 2008 to 30 June 2011. It appears that HMRC did not fully understand this because they took no further action in respect of the period to 09/08. They did however take action in respect of the subsequent periods covered by this appeal in that on 30 November 2012 they wrote to Mr Turner informing him that a new decision had been made to deregister WWP with effect from 1 October 2008, thus effectively disallowing any VAT reclaims for the subsequent periods from 1 October 2008 to 30 June 2011.

8. Mr Turner appealed against this decision and this, along with Mr Turner's appeal against the HMRC decision of 9 February 2016 regarding the second registration, is the subject of the current appeal.

Evidence

9. For HMRC Mr Clarke set out a lengthy history of correspondence and meetings between Mr Turner and HMRC, which was not in general challenged by Mr Turner. This included a number of occasions on which information had been requested by HMRC to which no reply had been received.

10. For his part, Mr Turner explained that shortly after the Tenby Folk Festival, on 20 October 2008, he had suffered a brain haemorrhage, and that he was in a coma until 27 October 2008. This had left him with considerable physical and mental difficulties for some time, including memory loss and other issues.

11. Mr Turner also produced two lever arch files containing supporting documents and invoices for his VAT reclaims.

12. Mr Turner said that after the Tenby Folk Festival he had continued to look for business in the area of organising and promoting festivals, but this was by its nature a long term process which only yielded occasional events. In addition this process had clearly been disrupted by his illness. However, he said that he had recently purchased 21 acres of land at Pembrey Country Park, for £66,000, with a view to staging festivals there, and that a festival was in the process of being organised for 4/5/6 August 2017.

13. Mr Clarke asked Mr Turner why he had not mentioned his illness earlier, to which Mr Turner responded that it had not been brought up. In addition Mr Clarke asked Mr Turner why he had not produced the invoices and other supporting documents when these had first been requested. Mr Turner maintained that he had produced the two lever arch files containing these documents at a meeting with

HMRC and his accountant. He accepted that he had not produced them when they were first requested but the tribunal considered that this may have been attributable to his illness.

14. There was some dispute about the involvement and views of David Butler, Mr Turner's accountant. The statement from James Ellis, the HMRC Officer involved with the practical handling of the case, said that Mr Butler had agreed that the documents provided by Mr Turner at their meeting were insufficient to support the VAT reclaims. Mr Turner maintained that Mr Butler had not said this to him and suggested that Mr Butler had been threatened with an audit of the tax affairs of all his clients unless he cooperated with HMRC. Since Mr Butler was not called as a witness we can make no findings of fact on this issue.

15. On the question of the second registration, with effect from 1 August 2014, Mr Turner was quite clear that, as HMRC had closed the portal on his original registration, thus preventing him from making further VAT returns, he had set up the second registration with a view to recovering the VAT which was being denied to him from the first registration. He accepted that most of the entries in the VAT returns for this second registration were in fact the same as those in the returns under the original registration, together with his calculation of interest and penalties thereon.

Discussion

16. Mr Turner had argued in his written submissions that HMRC were not able to make a new deregistration decision because the matter had already been decided by the hearing on 9 January 2013. This was challenged by Mr Clarke, for HMRC, on the basis that the decision to deregister WWP with effect from 1 October 2008 was a new decision, which had not been the subject of that appeal, and therefore the doctrine of *res judicata* should not apply.

17. He did acknowledge that Mr Turner might have an argument for estoppel, such that HMRC should not be able to have "another bite at the same cherry". However, in support of his contention that HMRC should be able to make this second deregistration decision, he referred us to the case of *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236. This was a case originating in the Employment Tribunal but the judgement of Dyson LJ in that case contains some helpful clarifications of the general principles regarding estoppel in similar circumstances.

18. Of particular assistance was that in *Ako* Dyson LJ reviewed the cases of *Barber v Staffordshire County Council* [1996] ICR 379 and *Lennon v Birmingham City Council* [2001] EWCA Civ 435, in which estoppel was also considered. In *Ako* Dyson LJ said, at paragraph [41]:

"In my view, what emerges from these authorities is that there is no inflexible rule to the effect that a withdrawal or judgement by consent invariably gives rise to a cause of action or issue estoppel. If it is clear that the party withdrawing is not intending to abandon the claim or issue that is being withdrawn, then he or

she will not be barred from raising the point in subsequent proceedings unless it would be an abuse of process to permit that to occur.”

19. On the facts of this case it is clear that HMRC did not intend to abandon their claim to deregister WWP, as set out in their letter of 30 November 2012. In addition,
5 we do not see that there is any abuse of process involved in this decision in that at the time of the previous hearing it was clear to both parties what was intended. The decision that the appeals should be allowed by consent was obviously not intended to be an end to the deregistration decision and we therefore decided that HMRC was not estopped from making the second deregistration decision.

10 20. However, we found no evidence that HMRC intended in some way to continue with its case as regards the appeal against HMRC’s decisions relating to the period to 09/08 and its refusal of the repayment claims contained in the returns for the periods from 1 October 2008 to 30 June 2011. The appeal against these decisions was included within the bundle of decisions which were subject to the hearing on 9
15 January 2013 and we have seen no evidence, either before or after that hearing, to suggest that HMRC had in some way indicated that they intended to continue to pursue those decisions as set out in the HMRC letter of 6 December 2011.

21. Clearly the cancellation of the registration from 1 October 2008 would have the same effect as refusing the repayment claims in respect of those periods but this was
20 of course a different decision.

22. In our view the appeal against HMRC’s decision to reduce both input and output tax to nil for the period to 09/08 and to refuse the repayment claims in the subsequent returns were allowed by Judge Brooks, by consent. This does of course mean that that decision has already been made and has not been challenged by HMRC
25 in any way within the prescribed time limits. It is therefore subject to *res judicata* and we cannot interfere with that decision.

23. We were therefore very surprised to see that HMRC had taken no action since that judgement to put the decision into effect as regards the period to 09/08, but when we questioned HMRC on this point it was clear that this had come as something of a
30 surprise to them and that they were unaware that any further action on their part might have been required.

24. Having been given time to consider the HMRC position on this, Mr Clarke suggested that if the appeal against the decision of 6 December were to be allowed then the natural course would be for the position to revert to that set out in a letter
35 dated 26 November 2008 from W Mann of HMRC. This letter had set out a demand for output tax for the period to 09/08 based on what both parties agreed was a totally flawed premise, which had been reversed by James Ellis of HMRC as soon as he became involved. This is not in our view an acceptable outcome. If there has been any confusion on the appropriate way forward then this is entirely due to HMRC
40 failing to act on the decision of 9 January 2013 and we therefore express the hope that HMRC will revisit the issue properly, and in the light of the supporting information which has now been made available.

25. We must then consider whether or not HMRC has made an effective case for the compulsory deregistration of WWP with effect from 1 October 2008. The legislation on this issue is set out in para 13(2) Sch 1 Value Added Tax Act 1994. This states that:

5 “(2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him.”

10 26. This paragraph appears to us to present a very difficult hurdle for HMRC if it is to argue successfully for compulsory deregistration without the taxpayer’s consent, in that it requires HMRC to identify a specific day on which the taxpayer ceased to be registerable.

27. The word “registerable” is not defined in the legislation but para 9 Sch 1 provides:

15 “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,

20 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.”

28. In this case, Mr Turner had already satisfied HMRC that he was carrying on a business and that he intended to make taxable supplies in the future, and it is agreed
25 by both parties that he had indeed made taxable supplies. Mr Turner’s evidence was that he intended to continue to make taxable supplies, although these intentions may not have come to fruition until recently but, in addition, WWP was apparently continuing to receive invoices, presumably from suppliers to the Tenby Folk Festival, in the period ended 12/08.

30 29. Mr Turner’s plans for future activities were also put on hold as a result of his illness in October 2008, but it seems quite clear to us that, on 1 October 2008, the date HMRC has chosen as the deregistration date, Mr Turner was carrying on a business and was also intending to make future taxable supplies. He was therefore in our view registerable for the purposes of para 13(2) on 1 October 2008.

35 30. It follows therefore that in our view HMRC cannot cancel the registration with effect from 1 October 2008 without Mr Turner’s agreement.

31. We now turn to the issue of the second registration.

32. Mr Turner acknowledged in his evidence that he had set up the second registration solely because HMRC had closed the portal for his original registration, meaning that he could not access his original registration to make further VAT returns. He also stated that the majority of the entries in the VAT returns relating to this second registration were merely a restatement of the entries in the returns made under his first registration, in an attempt to recover the VAT he believed he was owed. The numbers in the returns also included his calculation of interest and penalties which he believed were due from HMRC to him.

33. If therefore we are correct in thinking that HMRC have failed to cancel WWP’s original registration then that original registration must still be extant and the second registration is not valid.

Decision

34. Having considered the above the tribunal decided as follows:

(1) Mr Turner’s appeal in respect of HMRC’s decision to cancel his VAT registration with effect from 1 October 2008 is ALLOWED.

(2) Mr Turner’s appeal in respect of HMRC’s decisions relating to the second registration, which are contained in a letter dated 9 February 2016, is DISMISSED.

(3) As regards Mr Turner’s appeal against the decision by HMRC on 6 December 2011 to reduce both the output tax and the input tax to nil for the period 3 July 2008 to 30 September 2008, as referred to in HMRC’s Amended Statement of Case dated 6 September 2016, we found that this appeal had already been allowed by consent at the tribunal hearing before Judge John Brooks on 9 January 2013. It was therefore *res judicata* and not a decision with which we could interfere.

35. 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.

**PHILIP GILLETT
TRIBUNAL JUDGE**

RELEASE DATE: 24 January 2017