



[2020] UKFTT 0007 (TC)

TC07515

VALUE ADDED TAX – requirement to register for VAT – whether Appellant had reached the threshold for VAT registration – paragraph 1 of schedule 1 to Value Added Tax Act 1994 – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/01337

BETWEEN

CHRISTOPHER KENDRICK

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ROBIN VOS
ANN CHRISTIAN**

Sitting in public at The Tribunal Service, Manchester on 5 December 2019

Mr Stephen Chinnery, solicitor of Olliers for the Appellant

Mrs Elizabeth McIntyre, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. Between December 2009 – August 2013, HMRC seized a number of packages of hand rolling tobacco either addressed or belonging to the Appellant, Mr Kendrick.
2. In 2016, HMRC concluded that Mr Kendrick had been selling the tobacco and that, as a result of this, he had become liable to be registered for VAT in March 2010. They issued a VAT assessment for approximately £220,000 and charged a penalty of a similar amount.
3. Mr Kendrick admits selling small amounts of tobacco to family and friends but nothing like enough to come anywhere near the VAT registration threshold. He has therefore appealed against HMRC's decision that he should have been registered for VAT.
4. There is no appeal against the VAT assessment as Mr Kendrick has no right of appeal in the absence of having filed a VAT return.
5. There is also no appeal against the penalty as both parties are agreed that the penalty will not be payable if Mr Kendrick is right that he was not required to be registered for VAT.

THE REQUIREMENT TO BE REGISTERED FOR VAT

6. Paragraph 1(1)(a) of schedule 1 to Value Added Tax Act 1994 ("VATA") requires a person to be registered for VAT if, at the end of any month, the value of his taxable supplies in the previous year has exceeded the VAT registration threshold.
7. The VAT registration threshold at the relevant time was £68,000.
8. Paragraph 5 of schedule 1 to VATA gives an individual 30 days from the end of the relevant month to notify HMRC that they are required to be registered. HMRC must then register the person with effect from the end of the month after the month in which the VAT registration threshold has been reached.
9. In this case, HMRC say that Mr Kendrick reached the VAT registration threshold on 8 January 2010 meaning that he was required to be registered for VAT from 1 March 2010.
10. The only issue for us to determine is whether Mr Kendrick made taxable supplies in excess of the VAT registration threshold of £68,000 in 12 months ending on 31 January 2010.
11. Both parties agree that the burden of proof is on Mr Kendrick to show that he did not breach the VAT registration threshold.

THE EVIDENCE AND THE FACTS

12. The Tribunal had a bundle of documents and correspondence prepared by HMRC. In addition, we heard oral evidence from HMRC's Investigating Officer, Mark Chisman and from Mr Kendrick.
13. Mr Chisman answered the questions put to him in a clear and straightforward way. We have no hesitation in accepting his evidence.
14. Mr Kendrick on the other hand was somewhat vague in the answers he gave to certain questions and, in light of the other evidence before us, we have not accepted some of what he told us. This is explained further below.
15. There are certain facts which are not in dispute and which can be relatively briefly stated.
16. Mr Kendrick lives in a static caravan in Morecambe with his partner.
17. During the relevant period, both of them smoked. They would use approximately 3-4 pouches of tobacco between them in a week.

18. Between 4 December 2009 and 12 August 2013, HMRC seized a number of packages of tobacco either addressed to or held by Mr Kendrick. The following table sets out the details of those seizures.

Date	Weight of Hand Rolling Tobacco Seized	Location
04/12/2009	22Kg	Packages addressed to Christopher Kendrick at DHL Hub Manchester
05/12/2009	4.25Kg	57 Venture Residential Park, Morecambe, Lancashire, LS4 4 th . Home of Christopher Kendrick
08/08/2012	7.5Kg	Package addressed to Christopher Kendrick at Birmingham Airport
17/10/2012	6Kg	Package addressed to Christopher Kendrick at Coventry International Airport
08/04/2013	4Kg	Abandoned by Christopher Kendrick at Manchester Airport
06/08/2013	1.5Kg	Package addressed to Christopher Kendrick seized at Royal Mail Heathrow Worldwide Distribution Centre in Langley
22/08/2013	1.65Kg	Package addressed to Christopher Kendrick seized at Royal Mail Heathrow Worldwide Distribution Centre in Langley

19. On 10 August 2016, Mr Chisman wrote to Mr Kendrick to say that he was proposing to make a VAT assessment and asking whether Mr Kendrick wished to provide any information for HMRC to take into account before any decision was made in relation to the assessment.

20. Mr Kendrick appointed a solicitor who, on 28 September 2016, confirmed that Mr Kendrick did not have any information which he wished to disclose.

HMRC'S CALCULATIONS OF MR KENDRICK'S TURNOVER

21. Mr Chisman explained that he had calculated when Mr Kendrick would have reached the threshold for VAT registration based on the first two seizures on 4 and 5 December 2009.

22. The way he did this was to take the total amount of tobacco seized on those two days and then to divide that amount by two to give a daily average. He then went on to assume that Mr Kendrick sold the daily average amount of tobacco every day.

23. The daily average amount was £2,050.12. This meant that the VAT registration threshold of £68,000 would be reached after 34 days. He assumed that the sales started on 6 December 2009 (the day after the second seizure) so that the VAT registration threshold would be reached on 8 January 2010 (being 34 days later).

24. Mr Chisman took a similar approach to calculating Mr Kendrick's total turnover during the period in question. He added up the amount of tobacco seized on all seven occasions set out above. He then divided this amount by seven to give a daily average. However, as the later seizures related to much smaller amounts of tobacco than the initial seizure of 22kg on 4 December 2009, the daily average for the purposes of calculating Mr Kendrick's turnover during the entire period was only £1,046.54, approximately half of the turnover which Mr Chisman had calculated for the purposes of deciding when Mr Kendrick reached the VAT registration threshold.

25. On the basis of Mr Chisman's calculations, Mr Kendrick's turnover during the period from 1 March 2010 to 22 August 2013 was just over £1.3 million.

26. As mentioned at the outset of this decision, Mr Kendrick accepts that he did receive tobacco, some of which was for his personal use but some of which he sold to friends and family. He asserts that the amount of tobacco which he received and sold was nowhere near the amount which HMRC have calculated and certainly well below the VAT registration threshold. However, he has at no point attempted to try to quantify the amount of tobacco which he sold.

27. In his evidence, Mr Kendrick explained that he had met a man on a boat traveling from Zeebrugge to Hull who had offered to purchase tobacco on Mr Kendrick's behalf and send it to him to avoid the need for Mr Kendrick to travel abroad to purchase tobacco himself.

28. Mr Kendrick said that he would receive a package every 4-6 weeks. Apparently there was no discussion between Mr Kendrick and his supplier as to how much tobacco should be sent to Mr Kendrick and how often. According to Mr Kendrick, the tobacco would just arrive and Mr Kendrick would send his supplier cash in the post either to an address in Leeds or London to pay for it.

29. Mr Kendrick maintains that he did not ask his supplier to send him the 22kg which were seized on 4 December 2009. He also tells us that he did not pay for it given that it was seized and he therefore never received it.

30. By 2013, Mr Kendrick says he no longer wanted to receive the tobacco and so sent three letters to his supplier asking him to stop.

31. In our view, it is simply not credible that somebody who Mr Kendrick had only met once would agree to supply him with such significant quantities of tobacco (even looking only at the amount seized) without any discussion or agreement as to the amount to be supplied, only expect to be paid in cash after the packages had arrived and be willing to forego payment if a package were seized. None of this had previously been mentioned by Mr Kendrick to HMRC prior to the date of the hearing and there is nothing in the documentary evidence to support it.

32. However, one thing which Mr Kendrick has consistently said and which was not challenged by Mrs McIntyre in cross-examination is that the amount of tobacco which he received was significantly less than the amount calculated by HMRC.

33. Mr Chinnery's submissions were framed principally to address the question as to whether Mr Chisman had exercised best judgement in calculating Mr Kendrick's turnover and therefore arriving at the date on which he is said to have reached the VAT registration threshold. He referred to three specific factors on the basis of which he invited the Tribunal to infer that Mr Kendrick could not possibly be selling tobacco on the scale alleged by HMRC.

34. The first factor highlighted by Mr Chinnery is that Mr Kendrick lives in a static caravan and so could not have stored the necessary quantity of tobacco. In his witness statement, Mr Kendrick estimates that somebody selling tobacco in the way suggested by HMRC would need to keep at least two weeks' stock which would be approximately 1,876 pouches. Mr Chisman confirmed during cross-examination that he was aware that Mr Kendrick lived in a static caravan and that he did not know whether Mr Kendrick had any alternative storage facility.

35. The second point made by Mr Chinnery is that there is no evidence that Mr Kendrick had the financial resources to fund such a venture. Again, in cross-examination, Mr Chisman confirmed that he was aware that Mr Kendrick would need working capital and that he had not specifically asked Mr Kendrick about his financial resources.

36. The final point relied on by Mr Chinnery is the potential customer base for hand rolling tobacco in Morecambe. On the basis of figures set out in Mr Kendrick's witness statement as to how many people live in Morecambe and what proportion of those people smoke hand rolled cigarettes, he concludes that, if Mr Kendrick were selling the amount of tobacco suggested by HMRC, he would need to be supplying more than half of the individuals in Morecambe who smoke hand rolled cigarettes.

37. Mr Chinnery established during cross-examination that Mr Chisman's background with HMRC relates to investigating Missing Trader Inter-Community (MTIC) fraud which involves complicated supply chains, large sums of money and sophisticated fraudsters. Mr Chinnery suggested that this may have influenced Mr Chisman's approach to Mr Kendrick's activities by making the assumption that he was also a sophisticated fraudster. Although Mr Chisman was aware, at least of the requirement for storage facilities and working capital, Mr Chinnery submits that Mr Chisman ignored these points and went on to make assumptions which could not possibly be correct.

38. In summary, Mr Chinnery submits that Mr Chisman did not use his best judgement in reaching the conclusion that Mr Kendrick had breached the VAT registration threshold in January 2010.

39. As far as the test to be applied is concerned, Mrs McIntyre makes the point that Schedule 1 VATA does not make any reference to an HMRC officer's "best judgment". The question is therefore simply a factual one as to whether Mr Kendrick had in fact exceeded the VAT registration threshold in January 2010 and was therefore required to be registered from 1 March 2010.

40. Mrs McIntyre submits that Mr Chisman's calculations were perfectly reasonable based on the information which he had available to him, particularly bearing in mind that he had asked Mr Kendrick whether there was any further information he wished to provide and Mr Kendrick's agent (on his behalf) had declined to do so.

41. Mr Chisman gave evidence that the sale of illegally imported tobacco was generally a cash business and Mrs McIntyre invited the Tribunal to take this into account in considering the likely level of Mr Kendrick's turnover.

42. Even if "best judgment" is relevant, as suggested by Mr Chinnery, Mrs McIntyre submits, for the reasons set out above that Mr Chisman's decision was made to the best of his judgment and that the Tribunal should exercise caution in drawing inferences from Mr Kendrick's

unsubstantiated assertions. There is, for example, she says, no evidence that Mr Kendrick was not distributing tobacco through the post rather than just selling it to local smokers in Morecoombe.

43. A key element of Mrs McIntyre's argument is that the burden of proof is on Mr Kendrick to show that he was not required to be registered and that he has simply not engaged with the process as he has failed to provide any information or evidence about the actual amount of tobacco which he received and supplied. As an example of this, she drew attention to the fact that, although Mr Kendrick asserted in his evidence that he had written three letters to his supplier asking him to stop sending tobacco, none of these three letters formed part of the evidence before the Tribunal. Mr Chinnery's response to this was to question why Mr Kendrick might have kept copies of those letters.

44. Despite the limited evidence produced by Mr Kendrick and despite the fact that he clearly has been selling illegally imported tobacco we have come to the conclusion that, based on the evidence before us, Mr Kendrick had not exceeded the VAT registration threshold during the twelve months ending on 31 January 2010 and was not therefore required to be registered for VAT with effect from 1 March 2010.

45. He may have of course exceeded the VAT registration threshold at some point and might perhaps have been required to register for VAT at a later date. This is something which HMRC will need to consider.

46. Despite Mr Chinnery's focus on whether Mr Chisman had exercised "best judgment" in reaching his conclusion, this is not, in our view, relevant to an appeal against a person's registration for VAT. The relevant HMRC officer must of course calculate the amount of any assessment to the best of their judgment; this is a specific requirement of s.73 (1) VATA. However, there is no such requirement in Schedule 1 VATA. Both HMRC and the Tribunal are required to determine, based on the information available to them at the time they are taking the relevant decision whether the VAT registration threshold has in fact been reached.

47. Looking at the factors identified by Mr Chinnery, we do not accept that any of them lead to the conclusion that Mr Kendrick had not reached the VAT registration threshold in January 2010.

48. Although there is no doubt limited space in a static caravan, it would be perfectly possible for the quantity of tobacco referred to by Mr Chinnery to be stored in the space available.

49. As far as Mr Kendrick's cash resources are concerned, we have copies of some of his bank statements which clearly show that he had close to £70,000 in a savings account. Mr Chinnery's estimate of the required working capital was around £14,000.

50. Mr Chinnery's analysis of the population of Morecambe who are likely to smoke roll up cigarettes is interesting but no evidence was given by Mr Kendrick that he only sold cigarettes to people in Morecambe. It is therefore perfectly possible that he could have had a wider customer base.

51. Despite this, we do accept on the balance of probabilities that the amount of tobacco supplied by Mr Kendrick was, as he has consistently said, less than the amount calculated by Mr Chisman. Although Mr Kendrick has not provided any evidence as to the amount which he has supplied, the evidence which we do have supports his assertion that HMRC have over-estimated the amount of his supplies.

52. As explained above, Mr Chisman calculated the date when Mr Kendrick would have reached the VAT registration threshold by looking only at the first two seizures. This led to an

assumed turnover of just over £2,000 per day. However, looking at all of the seizures across the relevant period, the average turnover was only just over £1,000 per day.

53. The fact that the first parcel contained 22 kilograms of tobacco whereas the largest amount of tobacco in any subsequent seizure was only 7.5 kilograms strongly suggests that Mr Kendrick was not receiving daily deliveries of the sort of quantities of tobacco calculated by Mr Chisman.

54. We accept that Mr Chisman took an average of the first two seizures which amount to just over 13 kilograms per day but even this is almost double the amount of any subsequent seizure made by HMRC.

55. During cross-examination, Mr Chinnery pressed Mr Chisman as to HMRC's rate of seizure of packages of tobacco. Mr Chisman was not able to answer this question. Indeed, we suspect that it is not a question which is capable of being answered accurately as HMRC of course have no way of knowing how many packages get through to their intended destination undetected.

56. However, we find it surprising that, if Mr Kendrick were in fact receiving daily deliveries of tobacco, only six packages (the seventh seizure being at Mr Kendrick's home) have been intercepted over a period of more than three and a half years.

57. Based on all of the evidence, we think it is much more likely that the initial package of 22 kilograms was not a daily supply but was intended to last for a number of days or possibly even weeks.

58. Had Mr Chisman used the average turnover over the whole period of the seizures (approximately £1,000 per day) in calculating when the VAT registration threshold has been reached (or possibly even a lower figure to allow for the possibility that Mr Kendrick was not being sent packages every single day) it is much less likely that, based on the evidence, Mr Kendrick would have been able to persuade us that he had not reached the VAT registration threshold on whatever date might be shown by such calculations. However, based on the evidence which we have, we are satisfied that he did not reach the VAT registration threshold by 31 January 2010. He should not therefore have been registered for VAT with effect from 1 March 2010. HMRC will no doubt want to consider whether Mr Kendrick should have been registered for VAT from some later date.

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.

**ROBIN VOS
TRIBUNAL JUDGE**

RELEASE DATE: 30 DECEMBER 2019