[2016] UKFTT 0812 (TC)

TC05537

Appeal number: TC/2016/01455

VALUE ADDED TAX – Voluntary Registration - Taxpayer making taxable supplies - Request to cancel registration with effect from original effective date - Request refused - VAT Act 1994 Schedule 1 Paragraph 13(1) applies - Paragraph 13(3) does not apply - Registration cannot be backdated - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

INSPIRED BY SERVICE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds on 24 August 2016

Mr Paul McManus, an Accountant, for the Appellant

Mr G Hilton, an Officer of HMRC, for the Respondents

DECISION

1. The Appellant is a limited company which was incorporated on 20 November 2011. It was and is in business as an unlicensed restaurant and cafe on the High Street in Harrogate, having purchased an existing business as a going concern.

2. On 25 November 2011 the Appellant (through its then-advisers, TaxAssist Accountants in Harrogate) applied to be registered for VAT. It declared that it was making taxable supplies. It also declared that its taxable turnover was below the registration threshold (which at the time was £73,000: see *The Value Added Tax (Increase of Registration Limits) Order 2011*: SI 2011/897).

3. Its registration was therefore of a voluntary character. Acting on advice, it chose to register, but it was not obliged to do so.

4. Its advisers requested an effective date of registration backdated to 1 November 2011. Pursuant to its application, it was so registered.

5. The Appellant was assessed for VAT thereafter, with the first assessment being for the quarter ending 02/12, albeit returns for the four quarters 02/12 to 11/12 were not filed until 31 October 2013 (which was a matter of days after one of the Appellant's directors, Ms Moore, phoned HMRC to inquire about a surcharge notice which had been received). Thereafter, for six successive quarters from 02/13 to 08/14, no returns were submitted and the Appellant remained subject to the VAT surcharge regime.

6. In August 2014, the Appellant notified HMRC that it had changed advisers, and on 12 August 2014, the Appellant's new advisers applied for it to be de-registered on the basis that its taxable supplies were below the registration threshold, and indeed had been so ever since inception. The appellant gave the following further information: "*The business was erroneously registered for VAT when it was incorporated and has not reached the required threshold"*.

7. On 20 August 2014, the new advisers wrote: "*...as the company has never reached the VAT threshold, and should never have been registered for VAT in the first place, we have applied for de-registration of the business with immediate effect*".

8. Pursuant to that request, and consistently with it, the Appellant was deregistered, with effect from 12 August 2014.

9. The underlying position is that the Appellant has paid approximately £15,000 by way of VAT in relation to the period (1 November 2011 to 12 August 2014) during which it was registered. Various surcharges have also been levied against it. None of this would have happened had it not been registered in the first place.

10. On 20 July 2015 - that is to say, almost a year after the initial request to deregister - the Appellant's advisers wrote a long and detailed letter in which they

requested (for the first time) that the de-registration be backdated - namely, that the cancellation should be with effect from the original effective date.

11. That letter does two things. It sets out the advice which Mr Michael Miller, one of the Appellant's directors, had allegedly received from TaxAssist when applying to be registered, and in particular the advice that, even if registered, the Appellant would not be liable to account for VAT until its turnover crossed the threshold for compulsory registration. The second thing which that letter does is, having set out this advice, it levels forceful criticism at it.

12. On 16 October 2015, HMRC wrote that it could not backdate the de-registration as requested. In support of this position, HMRC relied on Schedule 1 Paragraph 13(1) of the *VAT Act 1994*, which reads as follows:

> "*Subject to sub-paragraph (4) below, where a registered person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him*": emphasis added

13. By its Notice of Appeal dated 8 March 2016, the Appellant again called upon HMRC to cancel its registration with effect from 1 November 2011 - that is, with effect from the original effective date for registration.

14. The Grounds of Appeal observe that:

> "The entire basis of this case is not that Deregistration should be backdated (which has never been any part of this appeal) but that the company should never have been registered in the first place. I believe that the basis on which this registration took place (i.e., as a result of fundamentally wrong advice) fulfils the criteria set out in the relevant Schedule of the VAT Act, on that on the day this entity was registered it was not registrable."

15. I heard evidence from Mr Miller, and find as a fact that Mr Miller was told by his then-accountant, at the time of registration, not only that the appellant company was obliged to register, but would only have to account for VAT after its turnover crossed the VAT threshold. That finding is entirely consistent with the very short note of what Mr Miller is recorded as having told HMRC when he phoned them on 24 April 2012 to query the assessment for 02/12 (i.e., the first assessment which was issued after registration): '*Caller queried 02/12 assessment as he was told by his accountant that he only has to account for VAT after he exceeds the ... threshold*'.

16. Mr Miller accepted that he had made this call, but before me he challenged the accuracy of the remainder of the note. For the sake of completeness (i) noting that Mr Miller did not accept the accuracy of the remainder of that note, and especially its reference to the possibility of deregistration and (ii) given that HMRC has not been able to produce a full transcript of the call, I make no further findings as to what was discussed on 24 April 2012.

17. At the hearing before me, Mr Miller also challenged the reported content of the other calls to HMRC and I ordered that transcripts of those calls be produced. Those transcripts have now been made available. There is now no challenge by the Appellant that there was a further phone call, on 25 October 2013, in which one of the appellant's directors, Ms Moore, was advised by HMRC that, if its turnover was less than £77,000, it could apply to deregister from VAT by submitting a VAT7 form, available for download on HMRC's website.

18. It is common ground that the Appellant's registration took place under Paragraph 9 of Schedule 1 of the VAT Act, which reads as follows:

> *"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,*
>
> *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"*

19. Paragraph 13 of Schedule 1 of the VAT Act 1994 reads as follows:

> *"**Cancellation of registration***
>
> *(1) Subject to sub-paragraph (4) below, where a registered person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him.*
>
> *(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.*
>
> *(3) Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day.*
>
> *(4) The Commissioners shall not under sub-paragraph (1) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement to be registered under this Act.*

(5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act.

(6) In determining for the purposes of sub-paragraph (4) or (5) above whether a person would be subject to a requirement, or entitled, to be registered at any time, so much of any provision of this Act as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision shall be disregarded.

(7) In this paragraph, any reference to a registered person is a reference to a person who is registered under this Schedule.

20. Paragraph 18 of that Schedule reads as follows:

"In this Schedule "registrable" means liable or entitled to be registered under this Schedule."

21. HMRC accepts that the Appellant was not *liable* to be registered, since it was trading below the registration threshold, but maintain that it was entitled to be registered as, at the time of registration, it was carrying out a business and intended to make taxable supplies: *VAT Act 1994 Schedule 1 Paragraph 9(b)*

22. I agree with that analysis. I am satisfied that, when it comes to cancellation, the present situation properly falls within Schedule 1 Paragraph 13(1) of the 1994 Act. The Appellant has to be treated as entitled to be registered for the purposes of Paragraph 13 since it was making taxable supplies.

23. I reject the argument that the the Appellant can rely on Schedule 1 Paragraph 13(3) which does provide a route for retrospective deregistration. I accept HMRC's submissions that Paragraph 13(3), read purposively, is intended to refer to erroneous registration in the sense of an error of identity or attribute - for instance, the registration of the wrong entity, or the registration of a business which makes only exempt supplies or (perhaps) which does not intend to make taxable supplies at all. But none of those were the case here.

24. I am reassured in my conclusion on this point in that the VAT and Duties Tribunal (Chairman Miss J C Gort) applied similar reasoning in dismissing the appeal in *Neil Goodrich t/a Uye Tours* (2002) in reading 'not registrable' in Paragraph 13(3) to mean that a period is 'not entitled to registration at that date': see Paragraph 53 of its Decision.

25. The present appellant was entitled to be registered at the effective date since it was intending to make taxable supplies, and indeed could properly call on HMRC, as it did, to backdate the registration. The Tribunal (Judge Hellier and Mr Coles) reached a similar conclusion (albeit dealing, on the facts, with a different point) in *Hayley Mundy trading as Hayley's Hair Design [2015] UKFTT 0321 (TC*).

26. The serious error in the present appeal consisted in the erroneous belief that the Appellant, once registered, nevertheless did not need to account for VAT until its turnover had crossed the threshold for compulsory registration.

27. My obligation is to determine this appeal on the basis of the facts as I find them and the relevant legislation. I do not have any discretion. Therefore, and whilst I am not without sympathy for the Appellant's position, my view is that the law is clear: the Appellant's registration could only be cancelled (as indeed it was) with immediate effect (as was initially requested) or from a future date. It could not have been cancelled retrospectively.

28. In my view, HMRC did not and does not have any power to cancel the appellant's registration retrospectively. Had it done so, it would have been acting in clear contravention of Paragraph 13(1) of Schedule 1 and therefore acting unlawfully.

29. I note the caution which is tentatively expressed on the point in De Voil's *Tax Service* §2.152 at note 8. However, I am not persuaded that the very short report of the decision in *Royal British Legion Drumnadriocht* (2000) VAT Decision 16957 genuinely supports the proposition that HMRC has any residual power to backdate de-registration. In that case, the learned Commissioner is reported as adverting, obiter (since the actual decision was to refuse the request), to no more than a possibility of agreeing a date of de-registration which was prior to the date of the request. However, the Commissioner was clear that a trader - like the present Appellant - which has collected sums by way of VAT and accounted for them cannot have them re-paid. As the learned Commissioner succinctly puts it: *'The moneys collected as VAT do not belong to the taxpayer, hence the reason why de-registration cannot be permitted from any date prior to a request'*. I respectfully agree with the policy reason which the Commissioner articulates as underlying these provisions of Schedule 1 Paragraph 13.

30. It is not part of the function of this Tribunal, in this appeal, to adjudicate on the quality of the advice which the Appellant was given by its then-adviser. Unlike in some other areas of tax law, there is no provision of the VAT Act relevant to this appeal which allows HMRC, or me, to consider whether the Appellant has a 'reasonable excuse' for what has happened. I nonetheless for the sake of the record note that Mr Miller had not tried to do things for himself but had sought out advice from an ostensibly professional source. Mr Miller had reposed considerable trust and confidence in his earlier advisers because he had come to the UK from Canada and the cafe was his first business venture in the UK. There is no doubt that he followed the advice which he had been given, and he had no reason to suppose, when that advice was given, that it was wrong.

31. Accordingly, I am bound by the legislation to which I have referred, and for the above reasons, I must dismiss the Appeal.

32. 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.

DR CHRISTOPHER MCNALL

TRIBUNAL JUDGE
RELEASE DATE: 7 DECEMBER 2016