[2018] UKFTT 407 (TC)

TC06609

Appeal number: TC/2017/04115

VALUE ADDED TAX – Compulsory registration - Taxpayer did not register - Liable to be registered -– Whether HMRC was wrong to adopt VAT Act 1994 Schedule 1 Paragraph 1(1)(a) 'backward look' as method of calculation of turnover? – No – On that basis, whether FTT otherwise has jurisdiction in relation to the VAT assessment? - No – Schedule 41 Penalty – Whether a reasonable excuse? – No – Whether special circumstances? – No – Whether penalty disproportionate? – Not a matter in relation to which the Tribunal has jurisdiction – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR TIMOTHY HUGHES	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR DEREK ROBERTSON JP

Sitting in public at Llandudno Magistrates Court, Conway Road, Llandudno LL30 1GA on 11 July 2018

The Appellant appeared in person

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

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DECISION

1. This Appeal (made by way of a Notice of Appeal dated 6 May 2017) is against HMRC's decisions:

(1) that the Appellant should have been registered for VAT from 1 July 2011 to 30 November 2012 (that decision is dated 3 November 2016, and it was upheld at departmental review on 2 March 2017);

(2) to impose a penalty assessment of £1,937 under Schedule 41 of the Finance Act 2008 (that decision is dated 30 December 2016).

2. We note that the decisions are both addressed to 'Timothy Hughes & Fiona Hughes'. Fiona Hughes is Mr Hughes' wife. The Appellant's letters (especially that dated 2 August 2017) are signed 'Tim & Fiona Hughes'. Whilst the Notice of Appeal only identifies Mr Hughes as the Appellant, we have, in the circumstances, treated this as an appeal both by Mr Hughes and Mrs Hughes.

3. The Appellant and his wife both filed witness statements. HMRC's Officer Nash also filed a witness statement. We have read and considered those statements, as well as the parties' submissions, the contents of the hearing bundle, and a note headed 'Argument supporting burden of proof' handed up to us by Mr Hughes at the hearing. We heard oral evidence from Mr Hughes, speaking on behalf of himself and his wife, and from Officer Nash.

4. The facts are largely uncontentious, and we find as follows:

(1) In 2010, Mr and Mrs Hughes bought 'The Lion Inn Guesthouse' in Gwrtheyrin near Abergele, intending to run a business there as a pub, restaurant and accommodation;

(2) Their initial intentions were (i) to run the pub and restaurant as one business, and the accommodation as another, and (ii) to keep the Lion Inn open for part of the year only;

(3) They did not intend to trade in excess of the VAT threshold (which from April 2010 to March 2011 was £70,000) and did not register for VAT;

(4) The Lion Inn was open and trading in April 2010;

(5) As at May 2011, the Appellant's turnover in the 12 months then ending was £73,943.18, which therefore exceeded the registration threshold;

(6) At the end of December 2011, the actual turnover for that financial year (and not for the whole 12 month period then ending) was about £67,000 (the precise figure is £67,955, which includes £4919 for the whole of April 2011) against a VAT registration threshold then in force of £73,000;

(7) Mr Hughes personally undertook a lot of building work. Unfortunately, he had an accident, was hospitalised, and could not continue the work himself. He employed a builder, which created additional, unforeseen, expense;

(8) At the end of 2011, he realised that he had run out of money, and so, instead of closing until Easter 2012, which had been the original plan, he opened the reservation diary for the first quarter of 2012;

(9) The figures set out at page 39 of the bundle (being the rolling turnover calculation) are not disputed and we adopt them in this decision;

(10) From 2013 onwards, and consistently with his earlier plan, the Appellant has been able to close the accommodation completely for the first quarter of the year, or even longer;

(11) On 22 September 2015, HMRC's Officer Nash of the North Wales Hidden Economy Team visited the Lion Inn and informed the Appellant that, based on the information available, the figures for the financial year 11/12 took him over the VAT registration threshold which was then in force;

(12) Having received further information from the Appellant on 27 November 2015, 16 December 2015, and 21 January 2016, Officer Nash wrote to the Appellant on 17 March 2016 that he considered that the Appellant had exceeded the VAT registration threshold in May 2011, had remained above it continually thereafter (with the exception of one month) until November 2012, and that therefore the Appellant should have been registered for VAT with an Effective Date of Registration (EDR) of 1 July 2011 to 30 November 2012;

(13) Officer Nash's conclusions were based on his calculation of a 12 month rolling turnover;

(14) On 26 August 2016, Officer Nash arranged for an assessment to be issued;

(15) Following further correspondence, HMRC made further allowances for input tax, which reduced the net amount owed to £9,685, but the liability period remained the same;

(16) The Appellant had not filed any VAT returns for the period 1 July 2011 to 30 November 2012;

(17) HMRC treated the Appellant as 'Liable No Longer Liable' (LNLL) to be registered, and did not register him for VAT.

5. The Grounds of Appeal, in full, are as follows:

"We have been treated with courtesy and professionalism at all times by HMRC.

We do not disagree with the figures regarding our business turnover for the periods in question.

My appeal is my disagreement with HMRC's method of liability calculation. My assertion is that 'rolling liability' calculation is weighed heavily in favour of HMRC.

In our case, it does not stand the test of 'fair and reasonable'.

In support of this, I respectfully point out that an excess of turnover of £5,000 has resulted in a fine of £11,622.

We were obliged to register for VAT if we believed that we were to exceed the threshold. Our intention is and always has been to trade from April-November and effectively close outside this period (subsequent trading years support this). Thus up to December 31 2011 we could not have envisaged exceeding the

threshold. Due to unforseen expenditure and shortage of funds, we had to "open our reservation diary" for January February and March 2012. Subsequently all bookings were made in this period.

The review is perfunctory and completely misses the point!"

6. The Appellant points out that he has not knowingly or deliberately avoided his liability, and that he made no attempt to charge output VAT. Neither of these propositions is disputed by HMRC.

7. His position is that he accepts liability, but only for the period January 2012 to April 2012, because his intention was that the Lion Inn would be closed for this period and it was not. Mr Hughes put forward an alternative figure of VAT for the period January 2012 to April 2012 of £1,882.

8. The Appellant adds that he "totally objects" to the penalty for the period (1/4/2012 to 31/3/2012) "we traded within the VAT threshold level."

The Law

9. The obligation to register arises under Schedule 1 Paragraph 1 of the *Value Added Tax Act 1994*, the relevant sub-paragraphs of which are as follows (including, in square brackets, the thresholds for the relevant years):

> *"(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—*
>
> *(a) at the end of any month, if the person is UK-established and the value of his taxable supplies <u>in the period of one year then ending</u> has exceeded [£70,000/£73,000]; or*
>
> *(b) at any time, if the person is UK-established and there are reasonable grounds for believing that the value of his taxable supplies <u>in the period of 30 days then beginning</u> will exceed [£73,000/£77,000].*
>
> *[...]*
>
> *(3) A person does not become liable to be registered by virtue of sub-paragraph (1)(a) or (2)(a) above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed [£73,000/£77,000]."*

10. The underlined passages are not underlined in the original text of the Schedule. They are underlined by us to add emphasis.

11. The relevant thresholds were £73,000 (1 April 2011 to 31 March 2012) and £77,000 (1 April 2012 to 31 March 2013).

12. The liability to notify arises thirty days after the end of the relevant month, as set out in Schedule 1 Paragraph 5:

> *"(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.*
>
> *(2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.*
>
> *(3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered."*

13. The obligation to notify liability to register is a 'relevant obligation' within the meaning of Paragraph 1 of Schedule 41 of the Finance Act 2008. If the taxpayer was obliged to notify liability to register and did not, then this is a failure to comply with a relevant obligation, which triggers liability to a penalty.

Discussion

The Assessment

14. The Assessment has not been put before us. It is said to have been made under VAT Act 1994 section 73. We have proceeded on the basis of HMRC's argument, which is not disputed, that the amount of the assessment cannot be appealed, on the basis that this was a 'prime assessment' - being one calculated by HMRC in the absence of a VAT return: VAT Act 1994 section 73(1). As such, it is not an appealable matter, because VAT Act 1994 section 83(1)(p)(i) only gives an appeal in cases where an assessment has been made under section 73 "*in respect of a period for which the appellant has made a return under this Act*". In this case, no return has been made by the appellant.

The timing of the Assessment

15. Whilst no point is taken in this appeal as to the timing of the assessment, we still have to satisfy ourselves that the assessment was in time. The actual assessment is not in the bundle before us, but the Statement of Case, which is not challenged in this respect, records it as having been issued on 30 December 2016.

16. The assessment deals with the period 1 July 2011 to 30 November 2012. It was therefore issued more than two years after the end of the prescribed accounting period. However, we consider that the assessment was issued within one year after evidence of facts "*sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge*": section 73(6)(b) of the VAT Act 1994.

17. In our view, it seems to us that HMRC had sufficient facts to make an assessment when it received the final tranche of information from the Appellant on 21 January 2016, and that therefore the assessment was in time. We arrive at that conclusion because it is sufficiently clear from the papers and the evidence that Officer Nash did

not form the view that the Appellant had become liable to be registered, the EDR, and the amount of VAT, until after receipt and consideration of the final tranche of business records delivered on 21 January 2016.

The basis of calculation

18. This brings us to the main issue in this appeal. Schedule 1 Paragraph 1 of the VAT Act 1994 sets out two, alternative ('or'), scenarios in which a person becomes liable to be registered for VAT. The two scenarios are materially different. To paraphrase, Paragraph 1(1)(a) is a 'backward look', calculated with effect from the end of any month, with reference to the 12 month period ending at the end of that month. Paragraph 1(1)(b) is a 'forward look', calculated with effect from 'any time', when a person has reasonable grounds to believe that his taxable supplies in the period of 30 days then beginning will exceeed the threshold. Whilst the two scenarios are each a gateway to the same destination – liability to compulsory registration – they can be seen to engage in materially different circumstances.

19. The Appellant's main argument criticises the 'backward look' method of calculating his rolling 12 month turnover in order to ascertain (i) whether he should have registered for VAT at all; and (ii) if he was, when he became liable to be registered. Although he accepts HMRC's figures, as figures, he argues that HMRC should have adopted some other method of calculation which would have led to a later effective date of registration, and a correspondingly diminished VAT bill and penalty.

20. We do not his accept his argument as to the appropriate method of calculation.

21. Firstly, and looking to the way in which Paragraph 1 is structured, it is not without significance that in Paragraph 1(1) the 'backward look' comes before the 'forward look'. Logically, it is sensible to consider the backward look before the forward look because, if the backward look is satisfied, the business will be liable to be registered and there is no need for either the taxpayer or HMRC to consider the forward look at all. The forward look engages only to catch those businesses where (for example) there is no scope for a backward look, because it has not been trading for long enough, or where the backward look gives the answer of 'not registrable'.

22. The Appellant says that the 'backward look' should be given 'equal weight' to the 'forward look'. But he does not explain why, and we do not see any obvious reason why this should be so. The taxpayer cannot pick and choose Paragraph 1(1)(a) over 1(1)(b) to the exclusion of the other, or vice versa. Nor can the taxpayer 'opt out' of Paragraph 1, or any part of the Paragraph. The way in which the legislation is expressed is carefully designed to catch all businesses which become liable to be compulsorily registered. If the forward look applied, to the exclusion of the backward look, then the compulsory registration threshold would effectively become about £1m. That is an outcome which is obviously, and demonstrably, inconsistent with the registration threshold.

23. Secondly, the Appellant's argument has no regard to the fact that the statutory liability to register for VAT is not imposed on HMRC. Schedule 1 puts the responsibility for dealing with the task of working out whether he or she or it is liable to be registered for VAT squarely on the taxpayer. So, in this case, the obligation to consider whether he needed to register for VAT was on the Appellant throughout.

24. Schedule 1 of the VAT Act 1994 only gives two ways in which this task can be addressed: the 'backward look' and the 'forward look'. The forward look is appropriate only where a person anticipates making taxable supplies in excess of the registration threshold in the next 30 days. The forward look would not have been appropriate in this case. This was never a business which was intended to make (or which in fact ever did make) taxable supplies of anything even remotely approaching the compulsory registration threshold in any 30 day period.

25. That means that the only method left is the backward look. For the reasons already explained, the fact that the forward look is not satisfied does not mean that the backward look should be ignored.

26. Pulling those strands together: in this case, the Appellant, who was making taxable supplies, was obliged, at all relevant times, to keep in mind and work out whether he had become liable to be compulsorily registered for VAT. That involved working out his taxable turnover. That is the same obligation which is imposed on all persons making taxable supplies, including all those – like the Appellant - who are outside the VAT regime, making taxable supplies below the threshold for compulsory registration, and who have decided not to register voluntarily.

27. The Appellant was obliged to conduct the backward look exercise. But he did not do so. Had he done so, then he would have realised that his 12 month rolling turnover in May 2011 was £73,943, which exceeded (albeit only by £943) the registration threshold then in force (£73,000). We agree with HMRC, and so find, that resulted in an Effective Date of Registration of 1 July 2011.

28. In doing what it did, HMRC was simply doing something which the Appellant himself should have done (or had done on his behalf), in the one and only way it could have been done in the circumstances of the Appellant's case (that is, where only the backward look is appropriate) and using the same figures.

29. The Appellant asserts that the rolling liability calculation is weighted heavily in favour of HMRC. We disagree. The backward look is the method which is laid down by Parliament in the VAT Act, and, as the statute says, is done on the basis of a rolling 12 month calculation, and not on some other basis, or for some other period.

30. The Appellant argues that his intention was always to trade for part of the year only (from April to November), remaining closed for the rest of the year, and (on the basis of such part-year trading) trying to ensure that he would remain below the threshold for compulsory registration. He argues that up until December 2011 he could not have envisaged exceeding the threshold.

31. We reject this argument which is somewhat of a distraction from the findings which we have already made as to the date upon which the 12 month rolling turnover exceeded the threshold, and the Effective Date of Registration.

32. Moreoevr, Paragraph 1(1)(a) does not contain any subjective element. A taxpayer either arrives at the position, at the end of any month, that the value of her taxable supplies in the period of one year then ending has exceeded the threshold for compulsory registration – in which case, she is liable to be registered under 1(1)(a) – or she does not – in which case, she is is not liable to be registered under 1(1)(a). The

question is arithmetical. All that matters is the value of the taxable supplies over that period. That is information which is in the hands of the taxpayer.

33. Put simply, it does not make any difference to the analysis that the Appellant in this appeal did not know, or did not realise, that his supplies exceeded the threshold.

34. As a matter of fact, the Appellant argues that he could not foreseen exceeding the VAT threshold. In the light of the legal principles and the discussion above, we do not consider the test of foreseeability to be the right one. Nonetheless, and in order to do justice to the Appellant's argument, we address it.

35. We reject it. The turnover from April 2011 to the end of December 2011 (say, nine months) was already about £67,000 against a registration threshold of £73,000. That is to say, the turnover, three-quarters (9/12 months) of the way through the trading year, was already about 90% of the registration threshold (our figure is 91.8%, but we have rounded it down, so as to give the Appellant the benefit of any doubt). Remaining open for the remaining three months (or 25%) of the year, during which the Appellant had intended to close, was against the background that the Appellant only had about £7,000 (or 10%) 'headroom'. It was (or should have been) clear that there was a real possibility of exceeding the VAT registration threshold, which is exactly what happened.

36. This is not a case in which HMRC has imposed liability on a taxpayer who has trivially exceeded the threshold for a short period.

37. Thereafter, the 12 month rolling turnover remained above the threshold, month after month, for 12 consecutive months, and even though the threshold for compulsory registration increased from £73,000 to £77,000 with effect from 1 April 2012. There is one month – June 2012 – in which the turnover dropped below the threshold (£76,626.02, against a threshold of £77,000). Thereafter, it was above the threshold again for four consecutive months.

38. During this lengthy period, the Appellant had all the information he needed to establish his turnover, and to establish his 12 month rolling turnover.

39. The amount by which the threshold was exceeded goes up to £80,436 (June 2011), during the period when the threshold was £73,000 (being £7,436, or 10.1%, above the threshold) and £82,376 (August 2012), during the period when the threshold was £77,000 (being £5,376, or 6.9% above the threshold).

40. Given the above, HMRC was correct to treat the Appellant as liable to be registered from 1 July 2011 to 30 November 2012.

41. To avoid any doubt, we have had regard to the fact that the Appellant and his wife originally intended to run two separate businesses, with the turnover of each below the threshold for compulsory registration. It is possible that this treatment contributed to a lack of awareness (i) of the 12 month rolling turnover in May 2011 (or, indeed, in any other month) and (ii) how close to the registration threshold the overall turnover of the overall business activity being conducted at the Lion Inn had become by December 2011. But the Appellant has accepted HMRC's view that there was, in reality, only one

business at the Lion Inn, being operated by him and his wife in partnership, and that is not a matter under appeal before us.

42. Seasonality was a matter which was discussed in the correspondence. Officer Nash considered and addressed it in his letter of 9 May 2016. He accepted that the business is seasonal, but he went on to observe that the law regarding exceeding the VAT threshold is a 12 month period. We agree. That is the law regardless of whether a business is subject to seasonality, or enjoys busy or quiet periods.

43. The Appellant argues that an excess of turnover of about £5,000 has led to a VAT bill of over £9,000. We reject this argument, not least because it is a feature of the VAT system that the registration threshold is a 'bright line', and that even a rolling 12 month turnover of (say) £1 above the threshold for compulsory registration generates a liability to register.

The Penalty

44. The Penalty was calculated on the basis of the failure being non-deliberate but 'prompted' (as opposed to unprompted) and hence an 'other case' with a penalty of 30% of the Potential Lost Revenue: Schedule 41 Paragraph 6(2)(c).

45. The maximum reductions for disclosure were applied by HMRC in respect of the Appellant's co-operation, and 'telling', 'helping', and 'giving'. The Penalty ended up as 20% of the eventual adjusted figure of VAT.

46. On the basis of the figures, the Penalty is calculated correctly and lawfully imposed, subject to any arguments of reasonable excuse or special circumstances.

Reasonable excuse

47. The Appellant has to satisfy us that there was a reasonable excuse for his failure to register for VAT: Schedule 41 Paragraph 20(1).

48. If there is found to be a reasonable excuse, which had ceased, the Appellant still has to satisfy us that he had remedied the situation without unreasonable delay after the excuse ceased: Paragraph 20(2)c

49. There is no definition of "reasonable excuse" in the statute, but its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd QC stated (in the self-same context of VAT penalties):

> " It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

50. We apply that test here.

51. We do not consider that the Appellant meets it. This is for the reasons which we have already set out above. The Appellant was conducting a business. As part of that, he needed to make sure that it complied with its legal obligations, including those relating to tax, and notifying HMRC of liability to be registered for VAT if the turnover exceeded the threshold. He failed to do this.

52. Whilst he suffered a serious accident, and was injured, there is no evidence that he was incapacitated to the extent that he could not attend to the affairs of the business at all and/or for the lengthy period – well over a year - in which the turnover exceeded the threshold. On the contrary: on the figures, which are not challenged, the business was prospering.

53. The fact that the Appellant's accident led to the need to employ a builder, which affected cash flow, which in turn brought about the decision to open for part of the year when originally it had been intended that the business was to be closed were doubtless difficult and distressing circumstances, but in our view were part and parcel of the ebb and flow of running a business.

54. There was no reasonable excuse for the failure to register for VAT.

Special circumstances

55. The penalty explanation simply said that "*based on the information we have, we do not consider there are any special circumstances which would lead us to further reduce the penalty.*"

56. So, and whilst the possibility of special circumstances was clearly present in Officer Nash's mind when he calculated the penalty, there was no further explanation.

57. 'Special reduction' is dealt with in Paragraph 14 of Schedule 41. On an appeal, we can only interfere with a decision about special circumstances if we think that HMRC's decision in respect of the application was "flawed" (Paragraph 19(3)(b)), which means "flawed when considered in the light of principles applicable in proceedings for judicial review": Paragraph 19(4).

58. We do not consider that HMRC's decision in this regard is flawed in a public law sense. Officer Nash was aware of special circumstances and decided that there were none. He was asked about this at the hearing, and maintained his position that there were no special circumstances.

59. But, and even if Officer Nash had failed to consider the issue of special circumstances at all, and even if we were to have found that any such failure rendered the penalties "flawed in the light of the principles applicable in proceedings for judicial review", we nonetheless consider that HMRC, looking at all the information and material before us in the light of special circumstances, would still inevitably have come to the same decision as it did: see the decision of the Court of Appeal in *John Dee Limited v Commissioners of Customs and Excise [1995] STC 941*

Proportionality

60. In *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) the Upper Tribunal held that the First-tier Tribunal has no discretion to adjust penalties because of a perception that they are unfair.

61. We are bound by that decision, and therefore we are also bound to reject the argument as to proportionality.

Outcome

62. For the reasons set out above, we are bound to dismiss the Appeal in its entirety.

63. 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: 23 JULY 2018