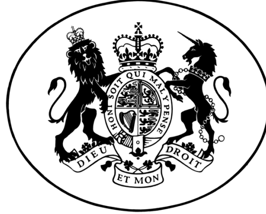
[2011] UKFTT 464 (TC)



TC01314

Appeal number: TC/2010/3612

Appeal against HMRC's decision to compulsorily register the Appellant for VAT – belated notification penalties – appeal dismissed in respect of VAT registration – penalty mitigated to nil

FIRST-TIER TRIBUNAL

TAX

SUSAN EVANS **Appellant**

- and -

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

TRIBUNAL: Miss J. Blewitt (Judge)
Mr J. M. Lapthorne (Member)

Sitting in public at Birmingham on 10 June 2011

Mrs S. Evans, the Appellant, appeared in person

Mr W. Brooke, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. By Notice of Appeal dated 12 April 2010 the Appellant appealed against the decision of HMRC, dated 21 October 2009, to compulsorily register her for VAT by virtue of Paragraph 1 (1), Schedule 1 of the Value Added Tax Act 1994 ("the Act") with effect from 1 January 2002. As a consequence of registering the Appellant for VAT, assessments were raised and belated notification penalties imposed at 15% of the unpaid VAT for the periods 1 January 2002 to 31 December 2003 and 1 January 2004 to 31 July 2006.

2. The Appellant duly requested a review of HMRC's decision, following which the decision was upheld and notification sent to the Appellant by letter dated 22 March 2010.

Background

3. On 6 October 1997 the Appellant began trading as a retail shop at 9 Queensway Mall, Halesowen, West Midlands. The Appellant continued to trade until 5 April 2008 and throughout the period of trading did not register for VAT.

4. From information contained within the Self Assessment returns submitted by the Appellant, it appeared to HMRC that the Appellant was trading above the VAT registration threshold. Consequently, on 3 August 2009 HMRC wrote to the Appellant requesting confirmation of the nature of the Appellant's business and highlighted that their records indicated that trade had exceeded the VAT registration threshold.

5. The Appellant responded by letter dated 6 August 2009 in which she stated that she was perplexed as to why any records would show trade as being above the VAT registration threshold. Mr Evans stated that the business was a small retail unit which no longer existed due to redevelopment of the area. Mrs Evans stated that trade was small, especially in the later years, and that she recalled making a loss in some years. Mrs Evans confirmed that all account figures had been sent to HMRC.

6. In a telephone conversation with the Appellant on 25 August 2009, HMRC established that the Appellant's business had been trading for 8 years and that it was a small shop which sold items such as candles and wind chimes.

7. On 1 October 2009, HMRC wrote to the Appellant setting out how the period of registration had been assessed by using the figures declared by the Appellant in her Self Assessment returns.

8. The Appellant responded by letter dated 6 October 2009 in which she provided breakdown figures for the years requested by HMRC. The Appellant confirmed that the figures were only a guide as no records were available, having been destroyed by the Appellant a few months earlier, following her retirement. The Appellant queried the accuracy of the figures used by HMRC and why HMRC's enquiries had taken so long to commence.

9. The Appellant was notified by letter dated 21 October 2009 of her liability to register for VAT with effect from 1 January 2002, an assessment to VAT in the total sum of £21,542.59 and a penalty in the sum of £3,231. The assessment to VAT was calculated by applying the relevant flat rate scheme percentage at the rates applicable during the period of liability for registration. The letter also invited the Appellant to submit a VAT return for the period 1 January 2002 to 31 January 2006 and to submit a statement of liability in order to calculate the penalty due.

10. On 26 October 2009 the Appellant provided HMRC with a VAT figure in the sum of £65,561 which she stated had been paid on goods and services and which she claimed should be reclaimable as input tax.

11. HMRC rejected this contention, stating in a letter to the Appellant dated 14 December 2009 that the VAT could only be reclaimed as input tax where there was documentary evidence in support of the claim.

12. On 18 January 2010 HMRC wrote to the Appellant setting out the calculation of VAT arrears and explaining that the flat rate scheme had been applied which makes an allowance for input tax.

13. On 14 February 2010 the Appellant wrote to HMRC disputing the figures asserted and stating that she had also traded in books, upon which the profit margin was quite low. In particular, the Appellant stated that by 2003 book sales formed a large percentage of her turnover.

14. Initially HMRC upheld their decision on review, but following further correspondence between the parties and further estimates of book sales submitted by the Appellant, HMRC accepted that 60% of the Appellant's turnover related to book sales. Consequently, Mr Brooke invited us to confirm the assessment in the amended sum of £9, 365.18. As a result of the amendment to the assessment, the penalty for belated notification was also amended to £1,404.18.

Appeal

15. The grounds of appeal relied upon by the Appellant can be summarised as follows;

- The Appellant did not accept the VAT registration number assigned to her as she had not registered for VAT;
- That he records were destroyed in April 2009 after the business closed in 2006;
- HMRC's contention that in the absence of any records, the figures asserted by HMRC must be used is disputed;
- It is disputed that input tax cannot be claimed due to the absence of records;

- The Appellant suffers ill health and has only a limited income consisting of her pension;
- HMRC have not provided copes of her Self Assessment returns and so the Appellant is unable to satisfy herself as to the figures contained therein;
- It is unreasonable for HMRC to have commenced this enquiry after so many years;
- It is possible that HMRC have made an error regarding turnover;
- There is no evidence from HMRC in support of their claim that the Appellant should be VAT registered;
- The Appellant's net profit was small and books which are zero rated would have represented 70 – 80% of sales turnover in the Christmas period;
- At the time of trading the Appellant was not married and had a different name which may have contributed to an error by HMRC;
- Input tax was high and names of suppliers were offered to HMRC but not taken up;
- The Appellant ceased trading due to forced closure for which she did not receive compensation;
- Complaints have been made by the Appellant's husband, who supports this appeal.

16. We also had regard to the numerous letters sent by the Appellant to HMRC which reiterated the grounds of appeal relied upon and provided further background information.

Law

17. The following provisions of the VAT ACT 1994 were relied upon in this appeal:

Schedule 1, paragraph 1:

> *(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 value of his taxable supplies in the period of one year then ending has exceeded [£70,000]; or*

(b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed [£70,000].

5 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 10 *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.

15

Section 30:

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—

20 *(a) no VAT shall be charged on the supply; but*

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

25 Section 67:

(1) In any case where—

(a) a person fails to comply with any of paragraphs 5, 6[, 7][1] and 14(2) and (3) of Schedule 1 ...

he shall be liable, subject to subsections (8) and (9) below, to a penalty equal to the 30 *specified percentage of the relevant VAT or, if it is greater or the circumstances are such that there is no relevant VAT, to a penalty of £50.*

Section 70:

(1) Where a person is liable to a penalty under section 60, 63, 64[, 67 or 69A] [or under paragraph 10 of Schedule 11A], the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

(3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are—

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.

Section 71:

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

Section 83 (a) and (p) (i)

[(1)] Subject to [sections 83G and 84], an appeal shall lie to [the tribunal] with respect to any of the following matters—

(a) the registration or cancellation of registration of any person under this Act;

(p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act;

Evidence

18. We heard evidence from Mrs Evans who explained that she had doubted the figures asserted by HMRC from the outset. Mrs Evans stated that following numerous requests she was provided with copies of her Self Assessment returns from 2006, but not the years prior to that. Mrs Evans explained that she had not kept copies of her returns as all of her records had been destroyed prior to HMRC contacting her.

19. Mrs Evans set out her concern that HMRC may have recorded her data incorrectly, the basis of this concern being that in 2001 she was away from her shop for approximately 4 months due to illness, over which time family and friends provided help in running the shop and that as a result, the turnover figure asserted by HMRC would not have been reached.

20. Mrs Evans accepted that the copies of Self Assessment returns provided to her by HMRC for the years 2005/2006, 2006/2007 and 2007/2008 matched the figures used by HMRC in their calculations.

21. Mrs Evans invited us to disregard the figures she had sent to HMRC as an estimate of her turnover, and explained that she had, in an attempt to cooperate, effectively tried to work back from the figures provided by HMRC. Mrs Evans stated that she regretted providing estimates, which had taken her a significant period of time to prepare, as she disputed those figures.

22. Mrs Evans stated that a high percentage of her turnover would have resulted from the sale of books and that she disputed HMRC's assertion that input tax would not affect their calculation or that she was not entitled to reclaim input tax.

23. Mrs Evans explained that her shop was closed due to redevelopment and that she had not received compensation for the forced closure. She stated that sales rose slightly in her final year of trading as all stock and equipment was sold off. The shop was closed with a loss of £2,000 and Mrs Evans had paid the outstanding bills out of her own money. Mrs Evans also recalled making a loss at some point during the closing down period, although this was not shown on the figures provided by HMRC.

24. Mrs Evans took issue with the time it had taken HMRC to raise the issue of VAT registration and pointed to the fact that other organisations would not make such enquiries so long after the periods to which the enquiries relate.

25. We also heard from Mr Evans who confirmed that the Appellant's business had involved a significant amount of work with little profit, as a result of which he had advised the Appellant to close the shop. Mr Evans provided background as to how he believed HMRC's enquiries had commenced. He explained that he had been involved in a dispute with a male who was aware that Mrs Evans ran a shop and that this male had reported the Appellant to HMRC in order to seek revenge.

Submissions

26. It was submitted by Mr Brooke on behalf of HMRC that the turnover figures used were those provided by the Appellant in her Self Assessment returns. The figures showed that the Appellant's turnover exceeded the VAT threshold in each of the years in question, despite which the Appellant failed to register for VAT or submit a first period return. Mr Brooke contended that once the VAT threshold was reached, there is an obligation upon a taxpayer to review their accounts and establish whether the turnover and taxable supplies exceeded the VAT threshold for the previous 12 months.

27. HMRC contended that book sales, although zero rated, were correctly included in the calculation of taxable supplies, by virtue of Section 30 of the Act. Mr Brooke submitted that input tax on books could not be reclaimed as they were zero rated. Mr Brooke accepted that initially HMRC had taken a stringent view as a result of the lack of records available. Mr Brooke explained that following the Appellant's confirmation that books had been sold, an allowance was made to take account of the likely percentage applicable. Mr Brooke submitted that the Appellant's estimate in relation to books had been too high as the shop was not primarily a book shop, but that HMRC had allowed for 50% for the years ending 2002 and 2003, and 60% for the years ending 2004 to 2008. HMRC had also considered the issue service charges concluding that as a single supply it is exempt. In addition, HMRC had applied the flat rates applicable to the relevant periods in order to give the Appellant credit for outgoings. Mr Brooke submitted that all calculations had been based on the information provided by the Appellant and that, in the absence of any records being available, best judgement had been used.

28. In respect of the Appellant seeking to dispute the quantum of the assessment raised, HMRC submitted that there is no right of appeal, relying on Section 83 (p) (i) of the Act, on the basis that no VAT return has been submitted by the Appellant.

29. Mr Brooke submitted that the Appellant had an obligation to keep records for the period set down by statute, and that had this been done, records would have been available to the Appellant in respect of most of the years relevant to the issue of VAT registration.

30. Mr Brooke explained that the process of recording data ensures that errors are not made. We were helpfully referred to an example showing that if any figures shown on submitted returns are changed, HMRC's computer system highlights the error as a "repair". Mr Brooke also explained that the change in the Appellant's name as a result

of her marriage could not lead to any mistake as the unique taxpayer reference number remains the same, irrespective of any change in a taxpayer's personal details.

31. As regards the penalty imposed, HMRC submitted that the Appellant has not shown any reasonable excuse for her failure to register for VAT. The penalty based on 15% of the unpaid VAT was charged in accordance with Section 67 (4) of the Act as the Appellant failed to register more than 9 months following the date upon which she was liable to register for VAT. HMRC submitted that mitigation of the penalty was considered but rejected on the basis that insufficiency of funds or acting in good faith cannot form part of the consideration.

32. Mrs Evans submitted in closing that despite her shock, she had tried to cooperate with HMRC throughout their enquiries in an attempt to bring the matter to a conclusion.

33. Mrs Evans submitted that HMRC have pursued her, no doubt at a significant cost, without good reason, in order to recover a relatively small amount of money in comparison to amounts owed to HMRC by others.

34. Mrs Evans reiterated the fact that she took no takings from her business and that, as a result of her limited earnings, she had used her own money for living expenses. Mrs Evans submitted that she remains confused as to how HMRC assess her as owing VAT when she remains confident that she should never have been registered.

Decision

35. We carefully considered the submissions made by both parties and all of the correspondence contained within the bundle provided to us.

36. The issue for us to determine was whether the Appellant was correctly compulsorily registered for VAT and our starting point was to look at the figures relied on by HMRC.

37. We noted that the Self Assessment returns copied and provided to Mrs Evans for the years from 2006 contained the same figures used by HMRC in their assessment as to whether the VAT threshold was reached and inferred from this, in the absence of any information or indication to the contrary, that the figures in respect of each relevant year had been correctly recorded by HMRC.

38. We accepted Mr Brooke's explanation that the physical process by which HMRC record data highlights any error made should the figures recorded differ from those submitted by a taxpayer on his return. We were satisfied that all of the figures relied on by HMRC were accurately recorded from the Self Assessment returns submitted by the Appellant and, in the absence of any evidence to the contrary, we found that the Appellant was trading above the VAT registration threshold and that the decision to register the Appellant for VAT with effect from 1 January 2002 was correct.

39. We found that HMRC correctly included the sale of books within the calculation of taxable supplies, as required by Section 30 of the Act.

40. We considered Mrs Evans' submission that she recalled a very low turnover in the first years of trading, but concluded that if turnover had been as low as Mrs Evans recalled she would have made a significant loss, which was not reflected in the Standard Accounts Information from her Self Assessment Return provided to us by HMRC.

41. We went on to consider whether the assessments raised as a result of the registration for VAT were calculated using best judgement.

42. We were sympathetic to the Appellant's difficulties arising as a result of the destruction of records relating to her business. That said, we noted that HMRC had changed their initial stringent, and in our view unreasonable, calculation to take account of information provided by the Appellant.

43. Mrs Evans contended that she would have informed HMRC that her business included the sale of books at the outset. HMRC disputed this fact and submitted that it was not raised until February 2010. Irrespective of when this information came to light, although it appears from Mrs Evans' correspondence to have been raised in 2009, we found that HMRC had acted reasonably in taking this information into account in their calculations.

44. The percentage of turnover relating to book sales submitted by the Appellant was unsupported by evidence and we accepted HMRC's submission that the shop did not trade primarily in books, which was, to a degree, corroborated by the Appellant in a letter to HMRC dated 6 August 2009 in which she described the shop as *"New Age goods, selling candles, crystals, wind chimes, aromatherapy oils and relating books covering hundreds of natural and mystic subjects"*, from which we inferred that books had been one of many, rather than the principal, items sold.

45. Mr Evans accepted during the hearing that there was no dispute that books, as zero rated items, would not give rise to a claim for input tax. We found that HMRC had acted reasonable and used best judgement in applying the relevant flat rate scheme to make an allowance for input tax where there was no supporting evidence provided by Mrs Evans.

46. We accepted the submission that the Appellant has no right of appeal against the assessment raised, which is specifically prohibited by Section 83 (p) (i) of the Act on the basis that the Appellant failed to submit a VAT return.

47. We considered the belated notification penalty assessed as 15% of the unpaid VAT for the periods 1 January 2002 to 31 December 2003 and 1 January 2004 to 31 July 2006. The powers granted by Sections 70 and 71 of the Act clearly set out the limits to our jurisdiction in deciding whether to confirm or vary the amount of the penalty imposed. We are specifically prohibited (by Section 70 (4) (a) to (c)) from taking into account insufficiency of funds, the fact that there has been no significant loss of VAT or that the Appellant acted in good faith and consequently these factors did not form part of our decision.

48. We found that the delay by HMRC in contacting the Appellant to be excessive and without justification. We accept that the Appellant was legally obliged to keep some, although not all, of her records relating to this appeal for the period set down by statute but we were sympathetic to the fact that HMRC did not contact Mrs Evans until 3 August 2009. Mrs Evans had ceased trading in 2006, some 3 years before HMRC made contact. For that reason we took the view that the belated notification penalty should be reduced to nil.

Conclusion

49. The appeal against HMRC's decision to compulsorily register the Appellant for VAT is dismissed and the assessments upheld in the amended amount of 9,365.18. The belated notification penalty is reduced to nil.

50. 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.

TRIBUNAL JUDGE
RELEASE DATE: 11 July 2011