



TC01960

Appeal number: TC/2010/08728

*VAT – registration for VAT – whether Appellant had charitable status – no
– appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**WIRRAL INDEPENDENT RECYCLING
ENTERPRISE (“WIRE”) LIMITED**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE J. BLEWITT
A. CHRISTIAN**

Sitting in public at Manchester on 23 March 2012

The Appellants did not appear and were not represented

**Mr Chapman, Counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal against HMRC's decision to register the Appellant in respect
5 of taxable supplies made on the basis that the Appellant was not considered to be a
charity at the relevant time. The decision was notified to the Appellant by letter dated
16 November 2009.

2. By email to HMRC dated 22 March 2012 the Appellant's representative, Mr P.
Morrissey of Guild Appleton Limited stated that due to health reasons he was unable
10 to attend the Tribunal. The Appellant is anxious for the case to be settled quickly and
consequently no application to postpone the hearing was made. Mr Morrissey queried
whether the Tribunal could continue in the absence of the Appellant and its
representative given that a bundle had been provided. Mr Morrissey also requested
that the Tribunal took into account the pre-hearing review hearing which took place
15 on 17 October 2011.

3. In light of this email the Tribunal considered it to be in the interests of justice to
proceed with the case under Rule 33 of the Tribunal Procedure (First-Tier Tribunal)
(Tax Chamber) Rules 2009. In order to ensure fairness to the Appellant we considered
with care the bundle provided by HMRC and the notes contained within the Tribunal
20 file, including those relating to the pre-hearing review referred to by Mr Morrissey.

Background Facts

4. The Appellant ("WIRE") was incorporated on 11 December 2004 and carries on
business in the sale of second hand furniture from Unit 12 – 14 Kelvinside, Wallasey,
Wirral, CH44 7JY. The Appellant is registered as a limited company for VAT with
25 effect from 1 November 2006 under VAT registration number 980 2754 05.

5. The Appellant collects donated furniture and makes it available to individuals in
the community in social and economic difficulty. The Appellant also operates a shop
selling furniture directly to the public, which helps fund its operations.

6. On 23 November 2005 the Appellant, through its then Company Secretary Mr
30 Adrian Gil, investigated with HMRC the possibility of being VAT exempt as a
charity. Mr Gil stated in a telephone call to HMRC that the business was a Social
Enterprise, a company limited by guarantee and a not for profit organisation. He
explained that the Company had opened a shop in which furniture was sold directly to
the public, and as a result the turnover had increased and would breach the VAT
35 registration threshold. By email dated 6 December 2005 the Appellant was informed
by HMRC that any business, including charities, making taxable sales in excess of the
VAT registration threshold must register for VAT. In an email dated 8 December
2005 the Appellant was advised by HMRC that a VAT 1 should be completed and
that, if necessary, exemption from registration could be applied for.

40 7. The Appellant's VAT 1 application form was received on or about 20 July
2007. By letter dated 21 August 2007 HMRC informed the Appellant that in order to

determine exemption from VAT, HMRC must be satisfied that the Appellant was a registered charity or accepted as a charity by the Revenue Charities Team. The Appellant provided its Memorandum and Articles of Association to HMRC by letter dated 3 September 2007 in which it was explained that the Company was a Social Enterprise with charitable aims and that its application for exemption from VAT was on the basis that it was a charity, even though it was not registered with the Charity Commission.

8. On 17 October 2007, HMRC wrote to the Appellant and explained that in order to treat the Appellant as exempt from VAT registration, it was a requirement that the HMRC Charities Title Team should view the Memorandum and Articles of Association to determine the issue. On 8 November 2007 HMRC's Charity, Assets and Residence Team wrote to the Appellant to explain that the company's turnover had exceeded £5,000 per year and that, if the Appellant was a charity, it had a legal obligation to register with the Charity Commission before HMRC could consider a claim to the Charity tax exemptions. As no trace of WIRE was found on the Charities Commission Register, the Appellant was requested to provide its registration details or copies of correspondence confirming that the Appellant had been unable to register.

9. No further correspondence was received from the Appellant in response to this request and the application for exemption remained unprocessed pending the ruling in respect of the Appellant's charitable status, as had been advised by HMRC in a letter to the Appellant dated 8 November 2007.

10. On 25 August 2009 HMRC officers visited the Appellant and confirmed that it was not VAT registered and did not have charitable status.

11. By letter dated 7 September 2009 the Appellant informed HMRC that the Company Secretary Mr Gil had applied for VAT exemption two years earlier but had failed to pursue the application.

12. On 4 November 2009, HMRC received a VAT 1 application form dated 29 August 2009 with an effective registration date of 1 November 2006.

13. By letter dated 16 November 2009, HMRC confirmed that the Appellant must be registered for VAT.

14. The Appellant requested a review of this decision which was carried out by HMRC. By letter dated 15 October 2010 HMRC upheld the decision that the Appellant did not have charitable status and must, therefore, remain VAT registered.

15. By a special resolution dated 22 June 2010 the Appellant amended its Articles of Association from those contained in the original Memorandum of Association dated 14 December 2004. By a special resolution dated 26 June 2010 further substitute Articles of Association were adopted by the Appellant.

16. The Appellant was registered as a charity following the adoption of the Articles of Association on 26 June 2010.

Review and Appeal

17. The Appellant's appealed to HMRC against the decision to register the Appellant for VAT and relied upon the grounds set out in correspondence to HMRC dated 31 August 2007, 3 September 2007, 3 November 2009 and 23 November 2005 which can be summarised as follows:

- (a) The Company is a social enterprise;
- (b) It is a not for profit organisation limited without share capital;
- (c) The main activity involves the supply of donated goods that should be zero-rated, its only other income is a commission from a charity for selling donated white goods on its behalf;
- (d) The refusal by HMRC's Charities Team to recognise a social enterprise for charitable status is wrong;
- (e) HMRC's Charities Team is wrong in the conclusion that if income exceeds £5,000 there is an obligation to register with the Charities Commission.

18. HMRC's response on 19 April 2010 can be summarised as follows:

- (a) The Appellant was informed on 8 November 2007 that as its income exceeded £5,000 per year there was a legal requirement (arising from the 2010 budget) to register with the Charity Commission which was not followed by the Appellant;
- (b) The Memorandum and Articles of Association were examined by HMRC's CAR (Charities, Assets and Residence) Team which concluded that the Appellant was not a charity for the following reasons:
 - (i) The objectives are not worded in a way that is wholly and exclusively charitable at law;
 - (ii) There is no clear separation between its objectives and powers as required by law;
 - (iii) On dissolution it can pass any assets to a non-charitable company.

19. Further correspondence was received from the Appellant, following consideration of which HMRC confirmed by letters dated 23 July 2010 and 15 October 2010 that the decision to register the Appellant for VAT was upheld.

20. The review conclusion reiterated the points set out at paragraph 18 above and added that the fact that the Appellant was not registered with the Charity Commission at the time of HMRC's visit on 25 August 2009 confirms that it was not a charity at that time; even if failure to register is not conclusive, the Memorandum and Articles of Association in their original form as at 2006 were not sufficient for the Appellant to be deemed a charity.

21. By Notice of Appeal dated 12 November 2010 the Appellant appealed to the Tribunal. The grounds of appeal can be summarised as follows:

- (a) The review of the Memorandum and Articles of Association is flawed/incorrect;
- 5 (b) HMRC used the Companies Act 2006 to review articles created before 2006;
- (c) HMRC falsely claimed that there is no clear separation between objectives and powers;
- 10 (d) HMRC are incorrect to state that the articles allow on dissolution for assets to pass to a non charitable organisation when the articles state that assets go to “institutions having objects similar to the objects of the company” i.e charitable;
- (e) HMRC should review the decision on the basis of the amended Articles of Association as the original ones no longer exist;
- 15 (f) The contention that the Appellant had to register with the Charities Commission contradicts the VAT Charity Notice 701/1 on charitable status in May 2004 and the advice given to the former director Mr Gil by former advisors who sought charitable status on the basis of it being a Social Enterprise with charitable aims;
- 20 (g) The Appellant has now been registered as a charity;
- (h) The Charity Commission website states that HMRC may back date tax exemption to the date on which an organisation started to carry out exclusively charitable aims, even if this was before date of registration and it is contended that this should be the Appellant’s date of
- 25 incorporation;
- (i) HMRC failed to give a formal statement of reasons for VAT registration;
- (j) The consequences to the Appellant of HMRC’s decision are potential insolvency.

30 22. In response HMRC contended that the criterion for charitable status has not changed during the relevant period. A body or persons or trust must be established for charitable purposes only and must have a governing document that declares objects which are exclusively charitable in law or be in otherwise good charitable form. Where necessary a body or trust must register with the Charity Commission under the

35 legal requirement as provided by the various Charities Acts. The Appellant’s Memorandum and Articles of Association were reviewed in accordance with these criterion.

23. HMRC contended that not all of the objects of the Company, as declared in the Memorandum and Articles of Association, were exclusively charitable and the

40 relevant articles were those in existence at the time at which the Appellant was required to be registered, i.e. 1 November 2006.

Issues

24. The issue for us to determine is charitable status in law of the Appellant at the effective date of registration (1 November 2006).

5 25. No issue was taken (subject to the argument on charitable status and finding thereon) as to the effective date of registration.

26. The Appellant has taken issue with HMRC's view that the Memorandum and Articles of Association prior to 26 June 2010 were not exclusively charitable and whether HMRC were correct to make its decision on the basis of the original Memorandum and Articles of Association as opposed to the later version.

10 27. The Appellant contended that the assertion that the Appellant had to register with the Charities Commission contradicts the VAT Charity Notice 701/1 on charitable status in May 2004 and the advice given to the former director Mr Gil by former advisors who sought charitable status on the basis of it being a Social Enterprise with charitable aims.

15 28. It was asserted by the appellant that HMRC should back date the tax exemption to the Company's date of incorporation.

Law

29. The VAT Act 1994 ("the Act") sections 3 (1) and (2) provides:

20 *(1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.*

(2) [Schedules 1 to 3A] shall have effect with respect to registration

30. Section 4 (1) and (2) of the Act states:

25 *(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.*

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

31. Section 30 of the Act sets out the provisions for zero-rating:

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—*

(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.

5 (2) *A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.*

32. The relevant part of Group 15 of Schedule 8 provides as follows:

The sale, or letting on hire, by a charity of any goods donated to it for—

(a) sale,

10 33. The Charities Act 2006 defines whether or not a body is a charity:

1 (1) For the purposes of the law of England and Wales, “charity” means an institution which:

(a) Is established for charitable purposes only...

15 34. Section 2 of the 2006 Act defines charitable purposes:

(a) The prevention of relief or poverty;...

(e) The advancement of citizenship or community development;...

(i) The advancement of environmental protection or improvement;

20 *(j) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage.*

Discussion

35. We were presented with a bundle of evidence, the contents of which we considered thoroughly.

25 36. There was no dispute that the Appellant Company is now a charity, since the adoption of the Articles of Association on 26 June 2010.

30 37. We noted two witness statements; Mr Allan Dunn and Ms Debbie Davies, Directors of the Appellant Company which provided background information and reiterated the grounds of appeal. The statements were, in the main, identical and can be summarised as follows; when the Company was set up the Company Secretary dealt with all legal and financial matters including the company formation and appointment of accountants. Both directors were led to believe that the Company Secretary had resolved the VAT/charity issue with HMRC between 2005 and 2007 and it was a shock when HMRC attended the Appellant’s premises on 25 August 35 2009 and informed the Appellant that the matters had not been resolved, by which

time the Company Secretary no longer worked for the Appellant. On the same date HMRC insisted that a VAT 1 was signed, which was done. Over the following four months advice was sought by the Directors from an accountant; it became apparent that HMRC's position was that it was a legal requirement with a turnover in excess of £5,000 to register with the Charity Commission however this only became a legal requirement in the 2010 Act and therefore HMRC's advice was misleading. Furthermore HMRC took selective wording from the Memorandum and Articles of Association which does not reflect the true inference of the Articles. When the Appellant registered as a charity, the Charity Commission advised that HMRC could back date the tax exemption to the date the Appellant started carrying out exclusively charitable aims. HMRC should not have considered the Articles in existence in 2004.

38. We considered the issue as to whether the Appellant should have been registered with the Charity Commission in order to be considered a charity. Registration gives a body charitable status which would have, had the Appellant registered, undoubtedly ensured that the Appellant's application for exemption from VAT would have been accepted by HMRC in the first instance. That said, registration is not a prerequisite of tax relief under the Taxes Act and we did not find the lack of registration conclusive of the issue as to whether it had exclusively charitable purposes at the relevant time on the basis that registration with the Charity Commission had not been refused to the Appellant, which would indicate that it was not a charity, but rather registration had never been applied for, meaning that the issue had not been determined.

39. We therefore went on to consider whether, in examining the Memorandum and Articles of Association of the Company, the Appellant could be considered to be a charity. We did not agree with the submission on behalf of the Appellant that we should examine the most recently adopted Articles of Association; in our view it is plain that the Appellant was governed by its original Memorandum and Articles of Association at the relevant time and therefore it is on that basis that the issue of charitable status must be determined.

40. We noted the guidance relied upon by HMRC in the case of *Incorporated Council of Law Reporting in England and Wales v AG (1972) Ch 73* as per Buckley LJ (79):

"To ascertain for what purpose the council was established one must refer to its memorandum of association and that alone. It is irrelevant to inquire what the motives of the founders were, or how they contemplated or intended the council should operate, or how it in fact operated...But in order to determine whether an object, the scope of which has been ascertained by due processes of construction, is a charitable purpose it may be necessary to have regard to evidence to discover the consequences of pursuing that object."

41. HMRC also highlighted the guidance provided by Lawrence LJ in *Keren Keyemeth Le Jisroel Ltd v CIR 17 TC 27*:

5 “...it is essential to bear in mind that in order to obtain exemptions from income tax...it is not enough that the purposes in the Memorandum should include charitable purposes, the Memorandum must be confined to those purposes so that any application by the company of its funds to non-charitable purposes would be ultra vires...”

10 42. HMRC cited a number of other authorities in support of their assertion that (both pre and post Charities Act 2006) there was a requirement for the Appellant to have exclusively charitable purposes and that if the object can be fulfilled in a way that is not charitable, then the body is not a charity (*Helena Partnerships Ltd v Revenue and Customs Commissioners* [2011] STC 1307, *Tennent Plays Ltd v IRC* 30 TC 107, *Furniture Finders of Winsford Ltd v HMRC* [2010] UKFTT 426 (TC)).

43. At this point it is necessary to outline the Appellant’s Memorandum of Association as at 1 November 2006, which stated the Company’s objects as:

- 15 i. To utilise a hitherto wasted resource, i.e. unwanted and discarded furniture, as the raw materials to provide the local community with a ready source of fully restored and attractively finished pre-owned furniture at realistic prices;
- ii. To make a significant contribution to the diverting of Bulky Household Waste away from landfill, thereby benefitting the environment;
- 20 iii. To provide free access to the above for organizations, charities and support groups who aid those experiencing social and economic exclusion to regenerate their lives;
- iv. To provide training for those who have or have had a disability including a mental health need, which has prevented them from working or obtaining paid employment.

25 Item 8 of the Memorandum stated:

30 *If upon the winding up or dissolution of the Company there remains after the satisfaction of all its debts and liabilities any property whatsoever the same shall not be paid to or distributed amongst the members of the Company but shall be given or transferred to some other Company or charitable institution or institutions having objects similar to the objects of the Company...*

44. We considered the objects carefully in order to determine whether they could be said to be for exclusively charitable purposes. It may be helpful to also set out the substitute Articles of Association adopted on 26 June 2010, which substantially differ from those set out above:

35 4. *The objects for which WIRE is established are:*

(a) the protection and preservation of the physical and natural environment in particular but not exclusively by the promotion of sustainable waste and management practices;

(b) the relief of financial hardship by the provision of recycled and reused items to people in need;

(c) the relief of unemployment by the provision of training and work experience.

5 45. In our view, the object of providing “*the local community with a ready source of fully restored and attractively finished pre-owned furniture at realistic prices*” cannot be said to be exclusively charitable as it did not prevent those of unlimited means from availing themselves of the Appellant’s activities. By way of example, on the evidence before us, there was nothing to prevent any member of the public entering the Appellant’s shop and purchasing furniture.

10 46. In respect of the object of making “*a significant contribution to the diverting of Bulky Household Waste away from landfill, thereby benefitting the environment*”, we found that in the absence of any evidence or submissions before us to the contrary, was not worded in a way which satisfied us that it was exclusively charitable.

15 47. We accepted HMRC’s submission that the clause of providing free access as set out at (iii) above did not separate the Appellant’s objects and powers sufficiently.

48. We considered that the provision of training for those with a disability was a charitable object.

20 49. We noted that paragraph 8 of the Memorandum, which provided for the transfer of funds on dissolution or winding up of the Company, was not worded in a way so as to be exclusively charitable; it was possible for funds to be transferred to organisations with similar objects, and, having found that the Appellant’s object at (i) above was not exclusively charitable, it follows that funds could be distributed to other bodies which were not charitable.

25 50. In our view, HMRC’s review of the Memorandum and Articles of Association could not be said to be flawed or incorrect. The relevant Memorandum and Articles of Association were those that existed at the relevant time and HMRC applied the guidance provided by case law in assessing whether or not the Memorandum and Articles of Association could be said to be exclusively charitable.

30 51. There was no explanation or evidence in support of the Appellant’s contention that HMRC had falsely claimed that there is no clear separation between objectives and powers and we found as a fact that HMRC’s review of the powers and objectives was not flawed or inaccurate.

35 52. We rejected the Appellant’s submission that HMRC are incorrect to state that the articles allow on dissolution for assets to pass to a non charitable organisation for the reasons set out above.

53. We rejected the submission that HMRC should review the decision on the basis of the amended Articles of Association as the original ones no longer exist as misconceived. The relevant Memorandum and Articles are clearly, in our view, those

that existed at the relevant time, namely the period for which the Appellant has been assessed as subject to VAT registration (1 November 2006 to 30 November 2009).

54. We noted the Appellant's contention that a requirement to register with the Charities Commission contradicts the VAT Charity Notice 701/1 on charitable status in May 2004 and the advice given to the former director Mr Gil by former advisors. There was no evidence before us from Mr Gil or any information purportedly given to him; to the contrary, the only evidence before us was the advice provided to the Appellant by HMRC that it should register with the Charity Commission. Furthermore, VAT Charity Notice 701/1 clearly states that:

10 *"Most charities in England and Wales are registered with the Charity Commission which confirms their charitable status. However some charities are not required to be registered: some are exempted by statute, such as universities; others are excepted because they are too small. In the case of a charity not registered...recognition of charitable status by the Inland Revenue is sufficient proof."*

15 In our view, HMRC acted in accordance with the Notice by looking to the Appellant's Memorandum and Articles of Association to determine whether it fell within the definition of a charity in the absence of it being registered with the Charity Commission.

55. We accepted the Appellant's submission that the Charity Commission website states that HMRC may back date tax exemption to the date on which an organisation started to carry out exclusively charitable aims, even if this was before date of registration. However, we did not accept the submission that this should be the date of incorporation because, in our view, the Appellant did not carry out exclusively charitable aims until the adoption of revised Articles of Association after the relevant period.

56. We found as a fact that there was no requirement for HMRC to give a formal statement of reasons for VAT registration; it was clear from the correspondence and information provided by HMRC during visits to the Appellant that the reason for VAT registration was due to the Appellant breaching the VAT threshold, which then legally requires a company to register for VAT.

57. We were sympathetic to the consequences to the Appellant of HMRC's decision, which were stated as potential insolvency. However, we found as a fact that this was not a relevant consideration in our determination of the issues in this case.

Decision

58. The Tribunal found as a fact that the Appellant did not have exclusively charitable purposes at the relevant time and therefore could not be properly considered a charity.

59. The appeal is dismissed.

60. 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.

10

TRIBUNAL JUDGE

RELEASE DATE: 17 April 2012

15