



TC01975

Appeal number: TC/2011/02971

TYPE OF TAX – VAT – appeal against HMRC’s refusal to apply the Flat Rate Scheme retrospectively –the appellant claimed that there were exceptional circumstances for the late application- appeal dismissed- the purpose of the scheme was to simplify the accounting for VAT by small businesses but three VAT returns had already been submitted by the appellant before the application for admission to the scheme was received

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JMB WILMINGTON

Appellant

- and -

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

TRIBUNAL: JUDGE SANDY RADFORD

Sitting in public at 45 Bedford Square, London on 6 January 2012

Mrs J Braisted for the Appellant

Mrs S Knibbs for the Respondents

DECISION

- 5 1. This is an appeal against HMRC's refusal to apply the VAT Flat Rate Scheme ("FRS") retrospectively.
2. The appellant claimed that there were exceptional circumstances and it should therefore have been allowed.

The Law

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3. Although Article 24 of the Sixth VAT Directive authorised member states of the European Union to introduce revenue neutral schemes with the object of simplifying the administration and collection of VAT in respect of small undertakings, advantage was not taken of this facility in the UK until the enactment of section 26B of the Value Added Tax Act 1994 ("VATA"). That section was inserted by Section 23 of the Finance Act 2002.

4. Section 26B of VATA states:
- (1) The Commissioners may by regulations make provision under which, where a taxable person so elects, the amount of his liability to VAT in respect of his relevant supplies in any prescribed accounting period shall be the appropriate percentage of his relevant turnover for that period.

A person whose liability to VAT is to any extent determined as mentioned above is referred to in this section as participating in the flat-rate scheme.

- 25 (2) For the purposes of this section—
- (a) a person's "relevant supplies" are all supplies made by him except supplies made at such times or of such descriptions as may be specified in the regulations;
- 30 (b) the "appropriate percentage" is the percentage so specified for the category of business carried on by the person in question;
- (c) a person's "relevant turnover" is the total of—
- (i) the value of those of his relevant supplies that are taxable supplies, together with the VAT chargeable on them, and
- 35 (ii) the value of those of his relevant supplies that are exempt supplies.

- (4) The regulations may provide for persons to be eligible to participate in the flat-rate scheme only in such cases and subject to such conditions and exceptions as may be specified in, or determined by or under, the regulations.

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- (8) The regulations may make provision enabling the Commissioners—
(a) to authorise a person to participate in the flat-rate scheme with effect from—
(i) a day before the date of his election to participate, or
(ii) a day that is not earlier than that date but is before the date of the authorisation;

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- (b) to direct that a person shall cease to be a participant in the scheme with effect from a day before the date of the direction.

10 The day mentioned in paragraph (a)(i) above may be a day before the date on which the regulations come into force.

5. Paragraph 55B(1) of Part VIIA of the VAT Regulations 1995 states:

15 The Commissioners may, subject to the requirements of this Part, authorise a taxable person to account for and pay VAT in respect of his relevant supplies in accordance with the scheme with effect from—

- (a) the beginning of his next prescribed accounting period after the date on which the Commissioners are notified in writing of his desire to be so authorised, or

- (b) such earlier or later date as may be agreed between him and the Commissioners.

20 6. Section FRS3300 of HMRC's FRS guidance states:

The policy is to refuse retrospection where the business has already calculated its VAT liability for the period(s) using a different accounting method. The reason for this is that the FRS exists to simplify VAT accounting and record keeping for small businesses, so that they are able to spend less time on VAT.

25 7. Section FRS3300 of the guidance also states:

In line with the rationale of the scheme, the fact that a business will pay, or would have paid, less tax, is not sufficient reason to authorise retrospective use of the FRS.

30 8. HMRC's guidance contained within FRS 3300 "Treatment of applications: Considering requests for retrospective use of the FRS states:

"There may be exceptional circumstances where the policy described in the previous bullet (refusal of retrospective entry into the FRS where a business has already calculated its liability using an alternative method)."

35 9. By virtue of Section 83fza of VATA an appeal lies to a tribunal against a decision of HMRC refusing authority for a person to participate in the FRS. However Section 84(4ZA) of VATA provides that where an appeal is brought against such a decision:

"the tribunal shall not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied that there were grounds for the decision."

10. In the case of *HMRC v Burke* [2009] EWHC 2587 Henderson J said:

5 “I comment that this appears to me to be an entirely rational policy, which reflects the simplification policy of the Flat Rate Scheme itself. If a taxpayer has already accounted for VAT in the past on the normal basis, and in accordance with the general law in force, there is no way in which retrospective admission to the scheme can simplify the accounting exercise that has already been carried out”.

Background and facts

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11. The appellant submitted a claim for admission to the FRS which although dated 7 February 2010 was received by HMRC on 10 February 2011. The appellant requested a retrospective date and asked that the admission come into effect from 1 March 2010.

15 12. HMRC wrote to the appellant on 14 February 2011 confirming authorisation to use the scheme effective from 1 December 2010.

20 13. HMRC confirmed that they were unable to meet the appellant’s request to backdate the scheme to 1 March 2010. Where a trader has already calculated their VAT liability using normal accounting, retrospective use of the scheme would only be authorised where justified by exceptional circumstances.

14. Mrs Braisted, a director of the appellant, gave evidence in support of the appellant’s claim that there were exceptional circumstances.

25 15. She said that after fifteen years as a head teacher she had decided to set up a business to help failing schools by supporting them after an Ofsted inspection and helping them to get on an even keel again. When her husband was made redundant in 2004 he joined her business and was in charge of secretarial, word processing and administration.

30 16. They were recommended to an accountant in 2004 and he did what was necessary including the tax and the payroll. They met once a year to go through the books.

17. At the AGM at the beginning of 2010 it was realised that the company needed to be registered for VAT because it was over the threshold. In normal circumstances she would have checked for herself how the VAT worked but by then her husband was seriously ill.

35 18. As a result she had to take on her husband’s duties as well as her own and in addition both their mothers were in their nineties and needing care because they wished to remain in their own homes.

19. She therefore asked the accountant to register the company for VAT and he duly submitted returns at the end of June and September 2010.

20. Her husband was finally diagnosed with a kidney tumour which had to be removed and while he was recovering she started to look at the VAT guidelines herself. She went to a small business conference where the FRS was explained. She talked to other school improvement partners and realised that for both financial and administrative reasons the appellant would be better off in the FRS.

21. She phoned the accountant in September 2010 and asked him to apply for the FRS for the appellant but after two months he still had not done so. As a result of his attitude and the fact that he had no information on the FRS she changed accountants in November 2010.

22. The new accountants undertook the September – November VAT return in December 2010 and additionally retrospective admission to the FRS was sought.

23. Mrs Braisted admitted that she was not totally aware of how the VAT liabilities were calculated and HMRC looked back over the relevant period. As a result of the mixture of exempt and taxable supplies made by the appellant, HMRC calculated that had the appellant registered for the FRS from the start the result would have been a saving of some £1,400 of VAT which was a relatively small amount when compared to the overall turnover of the appellant at the time.

24. Mrs Braisted confirmed that in fact the appellant had deregistered for VAT in April 2011 as she had subsequently had to curtail her work because her husband had secondary tumours and was now terminal.

25. On 23 February 2011 Mrs Braisted wrote to HMRC explaining her circumstances and asking them to review their decision concerning the appellant's retrospective admission to the FRS. However on review HMRC confirmed their decision and suggested that she refer the matter to a Tribunal.

The appellant's Submissions

26. Mrs Braisted submitted that during the period of her husband's illness they had been forced to rely heavily on the accountant and it was his dilatoriness and failure to advise them correctly which had created the issue.

27. She submitted that her husband's illness had resulted in exceptional circumstances which had ultimately caused the late application for admission to the FRS. Had he not become so ill causing her to take on all his responsibilities as well as her own, she would have investigated the VAT herself.

28. Mrs Braisted submitted that whilst she considered that HMRC had followed their guidelines she felt that her own mitigating circumstances had not been taken into account.

5 29. She submitted that the appellant's admission to the FRS should be backdated to the start of its VAT registration and the appellant should receive the associated refund of VAT. The previous accountant had calculated the March to May 2010 and June to August 2010 VAT returns at the higher rate of VAT at which point she had little awareness and trusted that the accountant had full knowledge of the VAT system.

10 **HMRC's Submissions**

15 30. HMRC submitted that whilst they had every sympathy for Mrs Braisted's preoccupation with her husband's tragic illness and all her other consequent responsibilities, nevertheless it was in fact her reliance on the accountant which she had appointed which had caused the problem. HMRC submitted that reliance on a third person could not be seen as grounds for granting the appellant's request for retrospective admission to the FRS.

20 31. Mrs Knibbs submitted that the purpose and benefit of the FRS was to make administration easier for small companies. Using the FRS meant that the completion of the VAT returns became a simple operation. However if the returns had already been completed then there was no benefit to be gained by completing them again other than a financial one and a financial gain was not a purpose of the scheme.

25 32. The accountant should have kept the appellant informed of its options but even if the appellant was being represented by an accountant the onus was on the appellant to make the final decisions and agree the submitted returns.

30 33. HMRC submitted that as the 5/10, 8/10 and 11/10 returns had already been submitted using the standard rate, allowing backdating of the FRS would undermine the purpose of the FRS which was to simplify VAT accounting and record keeping. The fact that a business will pay or would have paid less tax was not a sufficient reason to authorise retrospective use of the FRS.

34. The FRS could usually be used from the beginning of the next VAT period for which the applicant had not completed a return and this principle was applied to the appellant's application.

35 35. Two returns had already been submitted by the appellant thus complying with its legal obligations and as these had already been submitted prior to requesting admission to the FRS, retrospective admission would give the appellant an unfair commercial advantage.

36. HMRC submitted that as the returns had already been submitted there was no administrative value in re-submitting using a different method.

5 37. HMRC submitted that the very difficult circumstances described were not exceptional enough to warrant conceding to the request given that a legal tax declaration had already been made and reliance on a third party, the accountant, was not grounds for permitting a retrospective admission to the FRS.

38. HMRC submitted that FRS3300 specifically mentioned the survival of a business as the type of circumstances which would allow retrospective admission to the FRS.

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Findings

15 39. The Tribunal found that the FRS existed to simplify VAT accounting and record keeping for small businesses, so that they were able to spend less time on VAT. Accordingly because the appellant had already accounted for VAT for the VAT periods in question using the normal basis, retrospective admission to the FRS would be superfluous.

20 40. The Tribunal had every sympathy with Mrs Braisted and the tragic circumstances in which she found herself. However the Tribunal found that the reason for the delay in requesting admission to the FRS was the apparent incompetence or ignorance of the appellant's previous accountant who had worked for the company since 2004, and not Mrs Braisted's circumstances.

25 41. Although FRS 3300 mentioned that compassionate circumstances might count as exceptional circumstances, it also stated that thus far no such circumstances had been identified as justifying a departure from normal policy and the Tribunal found that in this matter there were no exceptional circumstances, the late application having been caused by the previous accountant.

30 42. The Tribunal also found that it appeared that the new accountants had not submitted the application for admission to the FRS until late January or early February 2011 as it was not received by HMRC until 10 February 2011.

35 43. Despite Mrs Braisted's belief that the appellant would have been better off in the FRS from the start both for financial and administrative reasons, the Tribunal found that had the retrospective admission been allowed there would no longer have been an administrative advantage as the returns had already been submitted and as a result of the exempt supplies made by the appellant, the financial benefit was minimal.

44. The Tribunal found that it appeared that the main reason for the appellant wishing for retrospective admission to the FRS was a financial one and a financial advantage was not an accepted reason for retrospective admission to the FRS. As stated in the legislation, HMRC's guidance and the case of *HMRC v Burke* the purpose of the FRS is to simplify the VAT accounting system for small businesses. As stated by Henderson J in the *Burke* case "If a taxpayer has already accounted for VAT in the past on the normal basis, and in accordance with the general law in force, there is no way in which retrospective admission to the scheme can simplify the accounting exercise that has already been carried out."

45. The Tribunal found therefore that the decision by HMRC to refuse the appellant retrospective admission to the FRS was reasonable. Taking account of all the relevant circumstances the Tribunal considered that HMRC was "reasonably satisfied that there were grounds for their decision" (Section 84(4ZA) VATA).

Decision

46. The appeal is dismissed.

47. 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: 30 April 2012