



**TC02576**

**Appeal number: TC/2012/05396**

*VALUE ADDED TAX – late registration for VAT – whether HMRC’s refusal to grant retrospective exception from registration under paragraph 1(3), Schedule 1, VATA 1994 unreasonable – held no – whether an appeal against a belated notification penalty should be upheld – mitigation to nil ordered by reason of the perceived disproportionate nature of the consequences of his failure to make timely notification of his liability to register – appeal against the refusal to grant retrospective exception from registration dismissed – appeal against the penalty allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL ROBERT HAYNES**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN WALTERS QC  
DUNCAN McBRIDE**

**Sitting in public at Bedford Square, London on 22 February 2013**

**The Appellant in person**

**Ms H J James, Officer, HM Revenue and Customs, for the Respondents**

## DECISION

1. The appellant, Mr Michael Robert Haynes (“Mr Haynes”) is a flat roofer. He constructs and repairs flat roofs. Before 2008 he traded through a limited company and the company’s receipts were below the level requiring registration for VAT. From 1 January 2008 he began to trade as a sole trader under his own name.
2. He appealed, by a notice of appeal dated 30 April 2012, against a refusal of his application for exception from VAT registration and a belated notification penalty of £1,698 assessed on 26 January 2012.
3. We heard oral evidence from Mr Haynes and from Officer Mrs Sharon Hancox of the Appeals and Reviews Unit of HMRC, who had made the decision on review to confirm the decision that Mr Haynes was not entitled to exception from registration and that the penalty issued was correct. We also had a bundle of documents before us, and two authorities relied upon by Ms Jones for HMRC, *Gray (trading as William Gray & Son) v Customs and Excise Commissioners* [2000] STC 880, a decision of Ferris J, and *Mark Mills-Henning v Commissioners for HMRC* [2012] UKFTT 44 (TC), a decision of this Tribunal (Tribunal Judge Heller).
4. We find facts as follows.
5. Details of the amount of the receipts from Mr Haynes’s business, and when they arose, month by month, were sent to the Respondents (“HMRC”) in February 2012 by DHS Consulting of Brighton, who were then acting for Mr Haynes. There was no dispute about the figures before us – they were accepted by both parties.
6. The value of Mr Haynes’s taxable supplies in the period of 12 months then ending first exceeded the threshold figure for VAT registration then applicable (which was £67,000) in October 2008. This gave rise to a *prima facie* obligation on HMRC register Mr Haynes for VAT with effect from 1 December 2008 – see: paragraphs 1(b) and 5(2), Schedule 1, VAT Act 1994 (“VATA”).
7. However in 2008, Mr Haynes’s wife, who up to that point had kept the books of his business for him, took a full-time job and could not any longer fulfil this function. Mr Haynes’s book-keeping thereafter was not diligent.
8. At some point Mr Haynes instructed accountants. They advised him in 2011 that his supplies had exceeded the threshold figure for VAT registration and that he ought to register. A VAT 1 form (Application for VAT Registration) was signed by Mr Haynes and dated 22 November 2011, declaring that he was registering because his taxable turnover had gone over the registration threshold in October 2008.
9. HMRC registered Mr Haynes originally with effect from what they stated was an incorrect date. By a letter dated 8 December 2011, they apologised to him for this and amended the effective date of registration to 1 December 2008. The first prescribed

accounting period was stated to be from 1 December 2008 to 28 February 2012 and he was informed that his first VAT return would show those dates.

10. HMRC wrote a further letter to Mr Haynes, dated 13 December 2011, informing him that his failure to notify his liability to VAT at the proper time had rendered him  
5 liable to a penalty for late notification under section 67(1) VATA and requesting to be told Mr Haynes's net tax liability according to the flat rate scheme to enable the penalty to be assessed, and warning him that absent such information HMRC would assess for a penalty based on the turnover quoted in the form VAT 1, pursuant to their powers under section 76(1) VATA.

10 11. On 14 December 2011, Mr Haynes's accountants wrote again to HMRC enclosing a VAT 7 Form (signed by him on 12 December 2011), in which an application was made to cancel Mr Haynes's VAT registration. This application was based on Mr Haynes's expectation that his taxable turnover in the next 12 months would be below the deregistration limit, in fact £60,000. They included the following further  
15 information in the form VAT 7:

'Turnover has been below the deregistration threshold since August 2009. It only exceeded the registration limit in June 2010 and then fell below the deregistration limit in January 2011. Due to the current economic climate, business has been badly affected and business turnover has remained below the limits.'

20 12. A Schedule produced by Ms Jones, which was not disputed by Mr Haynes, showed that Mr Haynes's receipts were such that he ceased to be *liable* to be registered for VAT in August 2009. However Mr Haynes's receipts improved and he became *liable* to be registered again during June 2010. The following month, July  
25 2010, was a poor month for Mr Haynes and during that month he ceased to be *liable* to be registered, but again his receipts picked up in August 2010 and he again became *liable* to be registered in that month. He ceased to be *liable* to be registered again in January 2011 and, according to the evidence before us he has not again become *liable* to be registered for VAT. (*Liability* to be registered for VAT depends on the value of a person's taxable supplies (paragraph 1, Schedule 1, VATA). *Entitlement* to be  
30 registered for VAT depends on a person making or intending to make taxable supplies of whatever value (paragraph 9, Schedule 1, VATA). A person is *registrable*, if he is *liable* or *entitled* to be registered (paragraph 18, Schedule 1, VATA).)

13. In response to the Form VAT 7, HMRC deregistered Mr Haynes with effect from  
35 19 December 2011, which was the date on which the Form VAT 7 was received by them. HMRC's power to deregister a registered person who has satisfied them that he is not *liable* to be registered (but remains *entitled* to be registered, which is this case, as Mr Haynes continued to make taxable supplies) is a power to deregister at the registered person's request with effect from the day on which the request is made or from such later date as may be agreed (see: paragraph 13(1), Schedule 1, VATA).  
40 Thus, there is no power to backdate a deregistration where the person ceased to be *liable* to be registered but continues to be *entitled* to be registered. It is otherwise in the case of a person has ceased to be both *liable* and *entitled* to be registered. In such a case, the person has ceased to be registrable, and the deregistration can be back

dated to the date on which he ceased to be registrable (see: paragraph 13(2), Schedule 1, VATA).

14. On 26 January 2012, no further information having been sent to HMRC by Mr Haynes in response to HMRC's letter dated 13 December 2011 regarding the penalty assessment, HMRC issued a notice of assessment of civil penalty under section 76 VATA in the sum of £1,698.

15. In February 2012, new accountants acting for Mr Haynes (DHS Consulting) wrote to HMRC asking for an assurance that there would be no VAT liability for the period from 1 December 2008 to 28 February 2012, because Mr Haynes's turnover had only been above the threshold in one month, March 2009. This was an incorrect assertion, because the accountant in making his calculation had not computed the required rolling 12-month totals (such totals are required by the formulation in paragraph 1(1)(a) of Schedule 1, VATA, which provides that there is a liability to be registered 'at the end of any month, if ... the value of his taxable supplies in the period of one year then ending has exceeded [the threshold]').

16. Nevertheless, the point had been made that Mr Haynes's turnover had only been above the threshold from time to time during the period from 1 December 2008 to 28 February 2012 – or during the period from 1 December 2008 to the date of deregistration, 19 December 2011.

17. On 3 February 2012, DHS Consulting appealed (though not to the Tribunal) against the penalty notice, which had been issued to Mr Haynes. In a separate letter dated 3 February 2012, DHS Consulting indicated that they wished to lodge a further appeal on the basis that Mr Haynes's takings had only been above the threshold for (a small) part of the period between December 2008 and December 2011, which should be ignored because Mr Haynes was not at the time aware that he was liable for VAT and the VAT would be irrecoverable from his customers. Under cover of that letter they submitted a VAT return for Mr Haynes, on his instructions, covering the period December 2008 to December 2011, but they said in the letter that they felt it should be reversed (*sic*).

18. It appears that Mr Haynes may himself have written to HMRC on 6 February 2012 asking HMRC to exercise their powers not to register him from the date at which he first became liable to be registered.

19. This is because HMRC (Officer Ric Nichols) wrote to Mr Haynes on 22 February 2012 referring to such a letter. Officer Nichols made the point that HMRC could only consider the question of liability for registration in the light of the facts available at the time that liability first arose, that is, with reference to the facts as at October 2008. Officer Nichols added that on the basis of those facts HMRC could not have been satisfied that the value of Mr. Haynes's taxable supplies in the period of one year then beginning would not exceed £65,000. He required the tax due for the period of registration – i.e. VAT on all supplies made by Mr Haynes between 1 December 2008 and 19 December 2011 – to be declared on a VAT return.

20. From HMRC's Statement of Case it appears that Mr Haynes made his first and final VAT return on or around 5 March 2012. Calculated using the flat rate scheme, this declared a net amount of tax due to HMRC of £13,692. The return was not in the Tribunal's bundle. Mr Haynes has not paid this tax.

5 21. DHS Consulting's correspondence was treated by HMRC as requests for an internal review of the refusal of an application for exception from registration and of the decision to issue him with a belated notification penalty in the amount of £1,698.

22. Officer Mrs Hancox (who gave oral evidence at the hearing) carried out the review and wrote to Mr Haynes on 24 April 2012 with her decision, which was to  
10 uphold Officer Nichols's decision that Mr Haynes was not entitled to exception from registration and to confirm the correctness of the penalty.

23. Exception from registration for VAT is provided for by paragraph 1(3) of Schedule 1, VATA. That sub-paragraph provided at the relevant time as follows:

15 'A person does not become liable to be registered by virtue of subparagraph 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 subparagraph, he would become liable to be registered will not exceed £65,000.'

24. Officer Mrs Hancox made the point that in deciding whether the test for exception from registration in paragraph 1(3) of Schedule 1, VATA has been satisfied, the  
20 Commissioners can only consider information that would have been available at the time that liability to register first arose (i.e. October 2008).

25. Officer Mrs Hancox refused exception from registration for the following reasons, as set out in her letter of 24 April 2012:

25 'Although your accountant claims that the turnover of £8,910 in March 2009 was an anomaly, I would point out that turnover in March, July, August and September 2008 was £8,159, £7,366, £9,426 and £9,046 respectively. It would appear therefore that there are fluctuations in your normal trading pattern and the breach of the threshold was not due to exceptional circumstances.

Although your running turnover did fall below the deregistration threshold in August 2009, it exceeded the registration threshold again in June 2010.'

30 26. Officer Mrs Hancox confirmed the correctness of the penalty, as being in accordance with section 67 VATA, namely a penalty based on 15% of the VAT for which a person is liable for the period of default – i.e. the period between October 2008 and November 2011. Because the period of default was more than 18 months, the penalty rate of 15% fell to be applied, with mitigation of 25% being allowed to  
35 acknowledge that Mr Haynes had registered for VAT of his own volition. The calculation of the penalty was 15% of £15,099.44 (the 'net tax for the period (based on turnover)'), giving £2,264.91, less 25% thereof, giving £1,698.

27. The notice of appeal initiating the appeal to the Tribunal was dated 30 April 2012. Mr Haynes's personal difficulties in paying the tax and penalty were outlined in the  
40 notice of appeal. It stated that he has no assets other than his house which is fully

mortgaged and jointly owned with his wife, a van used for work, while his wife has a car which is subject to hire purchase. The point was also made that Mr Haynes's receipts only exceeded the registration threshold from time to time, and questioned HMRC's reliance on the amounts of receipts before December 2008 in relation to the expectation of the amounts of his receipts in the period from December 2008 to December 2011. It is submitted in the notice of appeal that if Mr Haynes had been able to make quarterly returns, this 'would have greatly reduced the impact of VAT as numerous periods were below the threshold'. Finally, the point is made that Mr Haynes has no chance of recovering VAT in respect of work completed and that had he started charging VAT his prices would no longer have been competitive, and he would not have been able to make a living. It is submitted that 'revised assessments should be raised for the quarters in which Mr Haynes's turnover exceeded the VAT threshold'.

28. As to the penalty, it is submitted in the notice of appeal that the penalty should be totally rescinded because the late registration was made voluntarily.

29. The details of the amount of the receipts from Mr Haynes's business, and when they arose, month by month, sent to HMRC by DHS Consulting show relevantly:

30. In October 2008, the 'rolling total' of Mr Haynes's receipts for the 12 months ended at the end of that month ("the Rolling Total") was £68,783.90. Mr Haynes's business had started at the beginning of January 2008, so this figure represented 10 months' receipts. It was the first month in which the 'rolling total' had exceeded the registration threshold of £67,000.

31. In November 2008, the Rolling Total was £73,825.57; in December 2008 (the end of the first 12 months of trading) it was £76,642.24. In 2009, the Rolling Total steadily declined to £52,865.01 in October 2009. The one month in 2009 in which, exceptionally, the Rolling Total did not decline was March 2009, when, by reason of a good month of supplies (£8,910), the Rolling Total rose from £74,209.03 (February 2009) to £74,960.03, before falling back again to £72,258.36 in April 2009 – April 2009 was a very poor month of supplies (£2,760).

32. The Rolling Total fell again in November 2009, to £50,533.34, but then it started to rise, rising steadily until June 2010, when it reached £73,810. This was above the registration threshold at that time (£70,000), but Mr Haynes's Rolling Total had not been above the registration threshold before that month since June 2009, when it was £68,995.02, as against the registration threshold at that time of £68,000.

33. The Rolling Total fell again below the registration threshold in July 2010, following a poor month of supplies – it was £69,820 – but it rose again in the following months and in the period from August 2010 to December 2010 inclusive it was above the registration threshold of £70,000 – peaking at £79,950 in November 2010.

34. After December 2010 the Rolling Total has been consistently below the registration threshold, declining from £63,780 in January 2011 to £37,282 in January 2012 (the latest month for which we have figures).

5 35. These figures were before Officer Nichols and Officer Mrs Hancox when they made their decisions.

36. The amount of Mr Haynes's supplies varies (obviously) according to the amount of work he is able to do as a flat roofer. There are two variables. One is the weather – he gets work in particular after rainy periods. The other is when cheques come in from customers. His evidence was that months showing particularly high receipts were probably months when an above-average number of customers had paid their bills. He said it was impossible to forecast the amount of 12 months' receipts in advance.

37. Mrs Hancox in making her decision to confirm the refusal of exception from registration had looked to see whether any evidence would have been available at 15 October 2008 to show that it was likely that Mr Haynes's turnover would fall below £65,000 in the following 12 months. Mr Haynes had given no explanation as to why this would have been likely in October 2008. She added that, looking at the figures for supplies in the months leading up to October 2008 (which in July to September 2008 inclusive were all higher than the supplies in October 2008) she considered that there 20 was no reason to think that the supplies in October 2008 had been exceptionally high in amount. (If there had been reason to think that the supplies in October 2008 had been exceptionally high in amount, she acknowledged that that would have been a reason to conclude that the value of Mr Haynes's supplies in the next 12 months would have been below £65,000.)

25 38. On the matter of the penalty, Mrs Hancox had considered whether Mr Haynes had had a reasonable excuse for the late registration, but she could see none. She added that more mitigation could have been given if Mr Haynes had returned figures in response to the letter dated 13 December 2011. She also said that the penalty had been calculated by reference to the figure of £60,000 for the value of taxable supplies 30 Mr Haynes expected to make in the 12 months commencing 12 December 2011, as declared in his application for deregistration on that date.

39. We observe that this last point cannot be right, because VAT calculated by reference to a figure of £60,000 would be much less than the figure of £15,099.44, which was the basis of the penalty calculation.

35 40. On the important question of whether HMRC were correct to disregard the fact known by them that Mr Haynes's turnover was less than £65,000 in the 12 months beginning with November 2008 (it was £52,865.01), Ms Jones relied on *Gray (trading as William Gray & Son)*. From the decision of Ferris J in that case it is clear that the decision whether or not to give Mr Haynes the benefit of exception from 40 registration under paragraph 1(3) of Schedule 1, VATA ought, as a matter of law to have been taken as at the date when the registration would otherwise become effective, that is, on 1 December 2008. Furthermore the information which HMRC are

obliged to consider in making that decision is the information which would have been available to them on that date. Although Mr Haynes was cross-examined by Ms Jones by reference to his trading expectations as in October 2008, rather than as at 1 December 2008, we do not think this is material, because there is no evidence to suggest that HMRC's decision that a forward look taken in October 2008 would not have shown that Mr Haynes's turnover for the ensuing 12 months would have been below £65,000 was unreasonable, and, further, there is no evidence to suggest that the position would have been any different if HMRC's decision had been taken as at 1 December 2008.

41. We therefore hold that HMRC's decision not to except Mr Haynes from registration pursuant to paragraph 1(3), Schedule 1, VATA must be upheld.

42. Furthermore, it is clear, in our judgment, that Mr Haynes's claim that he should only be liable for VAT on his supplies during the period(s) when the Rolling Total showed a *liability* to be registered for VAT must fail. This claim (also reflected in the grounds of appeal settled by DHS Consulting) is misconceived. Once a person is registered for VAT he must charge VAT on all his taxable outputs until he is deregistered. Therefore Mr Haynes's liability for VAT must relate to all the supplies made by him in the business between the effective date of registration (1 December 2008) and the effective date of deregistration (19 December 2011). Mr Haynes has not charged any VAT to his customers, and so the liability must be taken to be that part of his billings which represents the tax chargeable – i.e. the amounts billed must be taken to be inclusive (not exclusive) of VAT. Further, in accordance with usual practice, Mr Haynes should be given credit for any input tax which he could have claimed and any bad debt relief which he could have claimed.

43. We ought to mention that Mr Haynes could issue VAT-only invoices to the customers he has supplied when he ought to have been accounting for VAT. It may be that some of them would pay such invoices, particularly if they were made aware of Mr Haynes's predicament.

44. While we regard ourselves as constrained by the applicable law to reach the above conclusions, we are extremely troubled by the harshness of the practical effect on Mr Haynes of his liability to VAT if it were to be enforced in full by HMRC.

45. During the hearing, Ms Jones and Officer Mrs Hancox made the Tribunal (and Mr Haynes) aware of HMRC's practice in cases of historic liability to VAT where a person has not registered for VAT. This policy is known as 'Liable/Not Liable' and, as we understood Ms Jones and Mrs Hancox, is a humane and sensible policy of seeking to recover from a person liable for VAT but who has not registered, only the amount of VAT due for the periods when he was liable for VAT. That is, HMRC do not in these circumstances seek to recover VAT due for periods when the person was not liable for VAT, although he ought to have been registered for VAT in such periods. There is a reference in the *Mark Mills-Henning* decision to HMRC's Liable No Longer Liable department (*ibid.* at paragraph 25).

46. If that policy were to be applied in this case, it would lead to HMRC seeking to collect an amount of VAT from Mr Haynes which we understand him to accept that he ought to pay. It would be a just result.

5 47. We understood the reasons advanced by Ms Jones and Mrs Hancox as to why that policy was not on its terms applicable in the present case – namely that Mr Haynes had applied for registration for VAT and had been registered accordingly and had applied for deregistration and had been deregistered accordingly. Nevertheless, quite understandably in our view, this had the effect of adding insult to injury as far as Mr Haynes was concerned. He represented his situation as being desperate. He simply  
10 did not know how he would be able to pay the VAT sought by HMRC. And at the hearing he found out that had he not done what he was advised to do and what he honestly understood he was obliged to do, and indeed what he was obliged to do, namely register for VAT, then HMRC would have been able to treat him in a much more lenient way than it was suggested that they could treat him on the actual facts of  
15 the case.

48. Although HMRC's practice in this area is not a matter within our jurisdiction, we do urge HMRC, when considering the practical consequences for Mr Haynes of our decision, to consider whether, on the special facts of this case, the discretion inherent in their powers of care and management of VAT ought to be exercised to relieve Mr  
20 Haynes of what we regard as a wholly disproportionately harsh consequence of his failure to register in 2008, or to seek exception from registration at that time. This is a very hard case indeed, and was recognised to be one by Ms Jones and Mrs Hancox at the hearing. We hope that HMRC may be able to give very sympathetic consideration to Mr Haynes's position.

25 49. As to the penalty assessed on Mr Haynes by reason of his late registration for VAT, we were referred to section 70, VATA pursuant to which the Tribunal may mitigate a penalty imposed (in this case under section 67, VATA for failure to comply with the requirement to notify a liability to register).

30 50. Section 70(1), VATA provides that HMRC or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper. Section 70(3) precludes the taking into account of the following items (listed in section 70(4)):

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

35 (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; and

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

51. Apart from these restrictions, Ms Jones agreed that it was open to the Tribunal to reduce the penalty for any reasons which appeared to the Tribunal to be just.

40 52. Although we cannot reduce the penalty because Mr Haynes has acted in good faith (which he has) or because there is or may be an insufficiency of funds available

- to him for paying the VAT which is legally due or for paying the amount of the penalty (which he said there was), we are able to mitigate the penalty because of what we regard as the excessive harshness of the conclusion we have been compelled to arrive at, as a matter of law, on the question of exception from registration and Mr
- 5 Haynes's strict legal liability to VAT on all supplies made by him between December 2008 and November 2011 without (it may be) any reasonable prospect of being able to recover any of that VAT from his customers. Ms Jones agreed that we could mitigate the penalty for this reason and our decision is that it should be mitigated to nil.
- 10 53. For the above reasons we dismiss Mr Haynes's appeal against the refusal of exception from registration and we allow his appeal against the penalty imposed under section 67, VATA. We emphasise our concerns about the justice of Mr Haynes being held to be liable for VAT on all supplies made by him between December 2008 and November 2011 which we have set out at paragraphs 43 to 47 above.
- 15 54. 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
- 20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **JOHN WALTERS QC**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 28 February 2013**