



TC02683

Appeal number: TC/2012/7218

*VAT – liability to register and entitlement to exemption from registration –
whether HMRC’s decisions correct – appeal allowed in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW QUENTIN MERRELL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE BARBARA MOSEDALE
SHEILA CHEESMAN**

Sitting in public at Bedford Square, London on 21 March 2013

Mr U Patel of Bayar Hughes & Co, ACCA, for the Appellant

Mr P Rowe, HMRC officer, for the Respondents

DECISION

1. Mr Merrell was a self-employed plumber. In around 2002 HMRC compulsorily registered him for VAT with effect from a date in 1997. In 2008 he applied successfully to be de-registered on the basis of his turnover falling below the de-registration threshold. His turnover had fallen due to medical problems which meant he was unable to do certain kinds of plumbing jobs.

2. His son (a trainee carpenter) was made redundant at some point and came to work for the appellant with effect from March 2009 and continued to work for him until February 2011. This led to an increase in the appellant's turnover as, with his son's assistance, he was able to do the heavy jobs that he had been unable to undertake since his medical problems occurred. His son left in February 2011 to set up his own business as a decorator, although he continued to help out on an occasional basis. After February 2011, Mr Merrell's turnover fell.

3. Mr Merrell's evidence was vague on what were his expectations at the time with respect to his son's involvement in his business. He said at the hearing things had worked out much as expected, with his son leaving in February 2011 to form his own business. He said it was not easy for a parent to work with his son and implied employing his son would never have been a long term prospect.

4. Mr Merrell's evidence, which was not challenged and which we accept, was that the experience of being registered late for VAT in 2002 meant that he was well aware of the perils of failing to make a timely VAT registration application and this had led him to appoint an accountant long before his VAT de-registration in 2008. This accountant was not Mr Patel who advised him at the hearing. Mr Merrell handed to this earlier accountant each month a record of his business income and expenditure for the previous month and, once de-registered, relied upon this accountant to tell him should he need to re-register for VAT.

5. This accountant informed him just before 3 May 2011 that he had passed the VAT registration threshold again and needed to apply to re-register. His accountant advised Mr Merrell to apply online, simultaneously with notifying liability to register, for de-registration (on the grounds his turnover would fall again). Mr Merrell attempted to follow this advice on 3 May 2011. Relying on his accountant, his application showed that he had passed the registration threshold in July 2010.

6. The accountant's advice was wrong in a number of respects. Firstly, it was not possible to apply for exemption from registration online. This put Mr Merrell to some trouble as, having submitted the online registration application, he had to contact HMRC, who were not easy to contact by phone, to explain his online application for registration was intended to be an online application for exemption from registration. Eventually, following contact with HMRC and the provision by Mr Merrell of his turnover figures to them, HMRC determined that Mr Merrell had in fact passed the threshold for registration in March 2009. His accountant's most serious failing was that he had failed to advise Mr Merrell of this at the time or at all.

7. Unfortunately for Mr Merrell it appears he is unable to seek redress from this accountant who has since disappeared and it turns out was not authorised by any professional body.

5 8. What matters for this Tribunal is that it was accepted by the appellant and his new accountant who represented him, Mr Patel, that he did pass the registration threshold in March 2009 and (subject to the issue of exemption from registration) should have been registered for VAT with effect from 1 May 2009.

10 9. HMRC considered, in line with case law such as *Gray t/a William Gray & Son* [2000] EWHC Ch 1567 at para [23], that Mr Merrell's application for exemption should be treated as made at the same time as he ought to have made his application for registration (March 2009).

10. They refused his application for exemption. The review letter said:

15 "As your turnover exceeded the registration threshold in March 2009 you should have applied for registration, or exception from registration, by 30 April 2009.

When exception is applied for retrospectively it is only information that would have been available at the time the liability to register arose that can be considered.

20 You explained ... that you took your son on in March 2009 and that this was the cause of the rise in your turnover. I understand that your son worked with you until he started his own business in February/March 2011.

25 It would appear from this information that, in March 2009, you could not have forecast a downturn in your forthcoming 12 monthly turnover and therefore exception from registration was correctly refused.

In fact, your rolling 12 month turnover did not fall below the VAT registration threshold until August 2011 and you have now been de-registered with effect from 31 August 2011."

The law

30 11. The relevant part of the law is contained in the provisions of Schedule 1 to the Value Added Tax Act 1994. The obligation to register (so far as Mr Merrell is concerned) is in paragraph 1(1) which provided a person is liable to register:

"(1)(a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded [a specified figure]"

35 12. The specified figure, commonly referred to as the registration threshold, was £67,000 at March 2009, and £70,000 in July 2010 and £73,000 in May 2011.

13. However, this obligation to register is overridden if paragraph 1(3) applies. This provided:

5 “A person does not become liable to be registered by virtue of sub-paragraph 1(a) ... above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed [a specified figure]

14. The specified figure, commonly referred to as the de-registration threshold, was £65,000 at March 2009, and £68,000 in July 2010 and £71,000 in May 2011.

10 15. In other words, a person who would otherwise be liable to register under paragraph 1(1)(a), is not liable to register if HMRC are satisfied, looking ahead 12 months, that his turnover would not exceed the de-registration threshold.

16. Once registered, a person is entitled to be de-registered in a number of circumstances. So far as relevant these are:

17. Schedule 1 paragraph 3 of the Value Added Tax Act 1994 which provides as follows:

15 “A person who has become liable to be registered under this Schedule shall cease to be so liable at any time if the Commissioners are satisfied in relation to that time that he –

(a) [not relevant]; or

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(b) is not at that time a person in relation to whom any of the conditions specified in paragraphs 1(1)(a) ...above is satisfied.”

25 18. This meant that if HMRC were satisfied that a taxable person’s turnover for the previous 12 months had fallen below the registration threshold, that person was entitled to be immediately de-registered.

19. Schedule 1 paragraph 4 of the Value Added Tax Act 1994 provided as follows:

30 “4. (1) ... a person who has become liable to be registered under this Schedule shall cease to be so liable at any time after being registered if the Commissioners are satisfied that the value of his supplies in the period of one year then beginning will not exceed [the de-registration threshold]”

20. This meant that if HMRC were satisfied that a taxable person’s turnover for the next 12 months would not exceed the de-registration threshold he was entitled to be immediately de-registered.

35 *The Appellant’s case*

21. Mr Merrell considers that he should not be registered with effect from March 2009 because he had relied on his accountant, and his accountant had negligently failed to tell him that the registration threshold was passed at this time.

22. However, the Tribunal is considering whether as a matter of law he should have been registered for VAT from that date. No penalty has been imposed on Mr Merrell for late registration and therefore whether Mr Merrell has a reasonable excuse for not registering at that time is not relevant. Liability to register depends solely on whether the threshold of taxable supplies has been reached and it is not in dispute that it was.

23. Mr Merrell also asks the Tribunal to exercise its discretion in his favour. However, this Tribunal has no discretion. It merely has to determine whether the conditions for registration were met.

Decision on March 2009 registration

24. Liability to be registered depended on Mr Merrill reaching the registration threshold in respect of supplies made in the previous 12 months (paragraph 1(1)(a) above) and HMRC not being satisfied that the de-registration threshold would be met in the next 12 months of trading (paragraph 1(3)).

25. So far as the first criterion is concerned (paragraph 1(1)(a)) it was not in dispute that the registration threshold was reached in March 2009 based on Mr Merrell's previous 12 months' turnover.

26. So far as the second criterion is concerned, this Tribunal has no power to re-make HMRC's decision. It has power to over-ride HMRC's decision that the de-registration threshold was not met but can only do this if HMRC reached a decision that was wrong in law because HMRC took into account irrelevant factors, failed to consider relevant factors or reached a conclusion that on the facts no reasonable person could have reached.

27. It is clear from case law (*Gray t/a William Gray & Son*) that HMRC is unable to take into account any facts other than those known as at the date the registration threshold was reached. This is because the legislation imposes on the taxpayer the obligation to tell HMRC at that time that the threshold is reached and expects HMRC to reach a decision on the de-registration threshold at the same point in time. The taxpayer should not be able to benefit from its failure to notify liability to register on time.

28. As at March 2009, all that could have been known was that Mr Merrill had taken on his son temporarily leading to an increase in turnover that, if it continued, was likely to remain above the registration threshold. On the evidence we had, even Mr Merrell did not expect his employment of his son to cease much earlier than it actually did (in February 2011).

29. In their decision letter HMRC point out, with the benefit of hindsight, that in fact the turnover did not fall below the de-registration threshold until 2011. Strictly this factor should not have formed part of their decision making process as this could not have been known in March 2009. However, since we consider that, even if this point had not been taken into account, HMRC would have come to the same decision in March 2009, their decision that they were not satisfied his turnover would fall

below the de-registration threshold in the next 12 months cannot be seen as wrong in law. And we uphold it.

30. So far as their decision was to register Mr Merrell with effect from 1 May 2009 and refuse him exemption from registration as at that date we dismiss the appeal.

5 *Decision on application to be exempted from registration on July 2010*

31. The story is, however, a little more complicated. It is clear that as from May 2011 Mr Merrell was in contact with HMRC claiming that he was not liable to be registered with effect from July 2010. HMRC responded to this claim by de-registering him with effect from 31 August 2011.

10 32. Jurisdiction: We are conscious that the High Court decision in *Gray* mentioned above appears to indicate that the Tribunal should not have regard to the applicability of paragraphs 3 & 4 of Schedule 1, but this is not in fact what it says. Mr Justice Ferris said at paragraphs [36]-[37] that the Tribunal was only able to adjudicate upon the actual appeal and as in that case the appeal was against a decision to refuse
15 exemption under paragraph 1(3), the Tribunal could not consider whether the taxpayer should have been granted de-registration under paragraphs 3 or 4. In particular, he said that the taxpayer in that case had made no claim to be de-registered.

20 33. However, in this case, HMRC have treated Mr Merrell as having made a claim to de-registration under paragraph 4 because they did de-register him with effect from 31 August 2011 (while his historic 12 month threshold was still above the registration threshold). The de-registration was mentioned in the review letter dated 18 June 2011 and it is against that decision that Mr Merrell appealed. The Notice of Appeal is fairly vague and certainly does not specify any particular paragraph of Schedule 1 under which the appeal is made: it is clear that Mr Merrell did not wish to be
25 registered for VAT and we agree that HMRC were right to consider Mr Merrell's application as a general application not to be registered for VAT made under paragraphs 3 & 4 as well as under paragraph 1(3).

30 34. Therefore, as HMRC treated Mr Merrell as having made an application to de-register, and that decision was part of Mr Merrell's appeal, it seems that this Tribunal, unlike the one in *Gray*, does have jurisdiction to consider that decision as well. It seems to us HMRC must, in de-registering Mr Merrell with effect from August 2011 be seen as refusing to de-register him (or exempt him from registration) from any date before August 2011 and after March 2009.

35 35. Having concluded that this Tribunal does have jurisdiction to consider paragraphs 3 & 4 in respect of the entire period, we find as follows.

40 36. Decision: Although liable to register from 1 May 2009, Mr Merrell was entitled to be deregistered on 1 April 2010 under paragraph 3 as his turnover for the previous 12 months fell below the registration threshold (it was £67,810.58 for the 12 months to end March 2010 at a time when the registration threshold was £68,000). In May 2010 his previous 12 months' turnover again exceeded the registration threshold and

therefore he should have re-registered but such registration should only have been with effect from 1 July 2010 and then only if HMRC were satisfied that his turnover would not fall below the de-registration threshold in the next 12 months.

5 37. Coincidentally, his application to be exempted from registration was with effect from 1 July 2010. It seems HMRC have never considered whether he should have been granted exemption from registration from this date, no doubt because it became clear he should have re-registered from 1 May 2009. So HMRC did not consider entitlement under paragraph 1(3) to be exempted from registration as at 1 July 2010 and must therefore be considered to have refused it. Would that decision have been
10 wrong in law?

38. We find, on the basis of Mr Merrell's unchallenged if vague evidence that things worked out as expected, it seems as at July 2010 HMRC should have expected Mr Merrell's son to cease employment with him around March the next year. Mr Merrell's turnover had varied each month but was on average about £6,500 per month
15 since his son joined him and about £4,000 per month before that. Taking this into account, HMRC should reasonably have expected Mr Merrell's net turnover for the next 12 months to be about £70,500. At the time the de-registration threshold was £68,000.

39. So although HMRC did not positively apply their mind to making the decision,
20 nevertheless they should not be directed to re-consider the matter as it seems to us that it is inevitable that they must come to the conclusion that paragraph 1(3) did not apply to Mr Merrell as at July 2010 because they could not be 'satisfied that the value of his taxable supplies in the period of one year beginning at [1 July 2010] ...will not exceed £68,000...'

25 40. Nevertheless, as we have said we consider that HMRC by de-registering Mr Merrell in August 2011 correctly treated his application as an application not to be registered for VAT under any applicable section and should have considered the matter afresh each month between March 2009 and August 2011. We find it is clear that HMRC should have been satisfied that Mr Merrell was entitled to be deregistered
30 under paragraph 4 no later than October 2010. This is because taking into account Mr Merrell's past average turnover when working with his son of £6,500 per month compared to without his son of £4,000 per month and taking into account his expectation that his son would form his own business in around March 2011, HMRC ought to have been 'satisfied that the value of his taxable supplies in the period of one
35 year beginning at [1 October 2010] ...will not exceed £68,000...'

Summary

41. This appeal is allowed in part.

42. HMRC were correct to register Mr Merrell with effect from 1 May 2009. They were wrong to refuse him de-registration between 1 April 2010 and 30 June 2010 and
40 wrong to refuse him de-registration from 1 October 2010.

43. To that extent the appeal is allowed.

44. 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 30 April 2013