



TC03242

Appeal number: TC/2012/10170

VAT –nature of business– were taxable supplies made?- no – decisions to refuse input tax claims and de-register Appellant for VAT purposes confirmed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW ADELEKUN

Appellant

- and -

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

**TRIBUNAL: JUDGE ALISON MCKENNA
ANTHONY HUGHES**

Sitting in public at Bedford Square on 1 October and 3 December 2013

The Appellant appeared in person

On 1 October Mr Jacobs and on 3 December Mrs Paveley, both officers of HM Revenue and Customs, for the Respondents

DECISION

1. This matter concerns the Appellant's appeal against HMRC's decision of 18
5 July 2012 (confirmed on review on 2 October 2012) to de-register the Appellant for
VAT with effect from 19 July 2012 and to disallow his input tax claim of £25,253.49,
for the period from 1 February 2007 to 30 September 2011. The issue for the Tribunal
is whether the Appellant is entitled to be registered for VAT and to recover the input
tax claimed.

10 2. This appeal was originally listed to be heard on 1 October 2013. At that
hearing, Mr Adelekun (who represented himself) produced a number of new
documents in support of his case, and the Tribunal decided to adjourn in order to
allow HMRC to consider the fresh evidence. The Tribunal re-convened on 3
15 December 2014, when Mrs Paveley explained on behalf of HMRC that its position
had not changed following consideration of the new material, a meeting with Mr
Adelekun in between the two hearing dates, and a further exchange of
correspondence. HMRC helpfully produced a fresh bundle for the 3 December
hearing, including the additional evidence produced by Mr Adelekun and copies of
the correspondence exchanged between the parties following the meeting.

20 3. The background to this appeal was that Mr Adelekun submitted an online
application to register for VAT on 30 November 2010. The application describes the
business as "project initiation, development management, and investor". In response
to HMRC's request for further evidence about the nature of his trading activities, Mr
Adelekun provided some additional information, as a result of which the effective
25 date of registration requested was amended to 1 February 2007 and he was subjected
to a late registration penalty. That penalty was subsequently reduced to nil after the
Appellant informed HMRC that his sales during the earlier part of the period were
primarily to overseas clients and not subject to VAT and that he had himself not been
ordinarily resident in the UK until September 2010.

30 *HMRC's Case*

4. HMRC's position was that it had been impossible for it to ascertain the nature
and extent of the Appellant's trading activity: the HMRC officer who conducted the
pre-registration visit had not been permitted to attend the Appellant's principal place
of business; the Appellant had not produced schedules of monthly trading figures or
35 copies of orders and invoices but had asked HMRC simply to rely on the figures in his
tax return; the Appellant had informed HMRC that he had not been able to produce
some of the supporting documentation for the period in question because it had been
destroyed in a fire; other documentation had been returned to the client under the
terms of his contract. Later correspondence, the documents produced at the first
40 Tribunal hearing, and the Appellant's statements in his meeting with HMRC officers
had still not produced evidence to substantiate the Appellant's case. Consequently
HMRC's submission to the Tribunal was that there was a lack of evidence to show
what the Appellant does for his clients and in consequence HMRC cannot apply the

business test set down by law to determine if he is engaged in the making of taxable supplies. HMRC asked the Tribunal to uphold its decision to refuse the input tax claim and de-register the Appellant for VAT and asked the Tribunal to dismiss the appeal.

5 *The Appellant's Case*

5. Mr Adekun gave evidence to the Tribunal, having affirmed. He also helpfully produced a skeleton argument for the Tribunal, detailing his submissions. He told us that he has a post graduate qualification in Business Administration and Auditing. His case was that he was a sole trader throughout the period and in the business of providing professional consultancy services to clients. He trades under the names of "Enterprise Development" and "Capital Projects Development Group" and has traded under other names. He described the services he provides to clients as being similar in nature to the consultancy services provided by large accountancy firms, for example project advisory services. He said that most of his clients are based overseas although he accepted that some of the services were provided to them when they were in the UK.

6. In his letter to HMRC sent just before the December hearing, Mr Adekun explained that it was not really possible to describe all the services he is expected to provide to clients "*as the issues are on a case by case basis, agreed on an on-going basis, and dependent on commercial reality*".

7. Mr Adekun submitted that HMRC had been inconsistent in its attitude to his case, because it had accepted for the purposes of VAT registration his description of his business as one providing professional services, but had then rejected invoices using that term as evidence of taxable trading. He also alleged that certain original documents provided to HMRC had been retained by it, leaving him unable to produce information for the Tribunal.

8. Mr Adekun indicated during the course of the appeal that he proposed to enter a new area of trading activity in 2014, namely a "financial troubleshooting service" aimed at helping clients repair their credit files. This new proposition cannot of course affect this appeal, which is concerned with the nature of activities conducted over a specific historical period.

The Law

9. This appeal is primarily concerned with the evidence and Mr Adekun has not suggested that HMRC's decision is wrong in law. However, for the sake of clarity, the relevant legal framework is as follows.

10. Schedule 1 to the Value Added Tax Act 1994 provides for the registration of persons who are making "taxable supplies". HMRC must be satisfied that taxable supplies are being made in order to register a person for VAT purposes.

11. The right to deduct VAT falls under Article 168 of Council Directive 2006/112/EC and requires the taxpayer to use the goods or services “for the purposes of the taxed transactions of a taxable person”. The Directive is effected into UK law by s 24 of the VAT Act 1994, which requires the goods and services to be used “for the purpose of any business carried on or to be carried on by him”. “Business” is defined in s 94(1) of the 1994 Act as including “any trade, profession or vocation”.

12. The test of what is a business has frequently been discussed by the Courts with reference to the “badges of trading”, which are the generally recognised indicia of economic activity, most recently stated in the High Court’s decision in *CEC v Lord Fisher* [1981] STC 238. These may be summarised as:

- (1) whether the activity is a serious undertaking earnestly pursued;
- (2) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity;
- (3) whether the activity has a certain measure of substance as measured by quarterly or annual value of taxable supplies made;
- (4) whether the activity is conducted in a regular manner on sound and recognised business principles;
- (5) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration; and
- (6) whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them.

13. The case law makes clear that the badges of trade are indicative only. Further, that it is important to look at the whole picture, rather than considering each “badge” in isolation, as no one factor is decisive.

14. Paragraph 6 (1) of schedule 11 to VATA 1994 requires taxable persons to keep such records as may be required by regulations.

15. Finally we note here that Mr Adekun bears the burden of proof in relation to this appeal and that the relevant standard of proof is the balance of probabilities.

The Evidence

16. In Mr Adekun’s correspondence with HMRC he pointed to the profits identified in his (unaudited) accounts as evidence that he is running a business. He referred to the fact that HMRC is currently making enquiries into his self assessment returns in respect of a possible under-declaration of profits. We note that the accounts for the financial years ended 2008 and 2009 describe the nature of the business as “Project Design Advisors and Management” and “Investor” but that the accounts for the financial year ended 2010 states the nature of the business as “Project Design Advisors and Management” only. We did not in any event receive any evidence about investment activity.

17. Mr Adekun also referred the Tribunal to the fact that he has a separate business bank account with an overdraft facility, a website, Business Protection insurance, business credit and debit cards, and maintained office premises. He produced some documents in support of this picture of his business set up.

5 18. Mr Adekun produced to the Tribunal a “Schedule of Business Nature and Work” which he had created himself. This stated that he had three areas of business activity “from 1999 to date”, as follows: “1. Business/Project Adviser to SMEs; 2. Oil and Gas Project; 3. One Stop Professional Services”. The schedule states that in the period from January 2007 to December 2011, he had concentrated on activity 3
10 together with work under the Lubbe contract (see below). The “One Stop Professional Services” activity 3 is further described in the schedule as follows:

15 “...offering logistical support for overseas business clients and people on their trips to the UK. Such services included transportation, management of investment properties and property repairs, legal services (i.e. acting as an agent for legal services), seeking property rental for overseas clients, seeking and arranging training courses for overseas clients, educational projects including seeking schools/universities for children of overseas clients, private medical treatment etc.

20 All these activities were classified into different projects for ease of identification.

The section of the business is referred to as LOGISTIC SUPPORT.

19. This information is in contrast to the letter written by Mr Adekun to Mr Waterfield of HMRC on 30 November 2013, which states:

25 As explained, I do not charge for logistic support services, but carrying out the logistic support services is a pre-requisite (bundle pricing) for securing the Project Advisory Service business. In simple terms, no logistic support, no project advisory contract, no business!!!

30 20. Mr Adekun produced in evidence a copy of his contract with a South African company called Lubbe Construction. Mr Adekun told the Tribunal that all the documents concerning his work under the contract had been returned to his client, as he said this was a contractual requirement. Mr Adekun had advised HMRC that he had retained no other documents such as correspondence e mails or time sheets which might assist it in understanding the precise work undertaken. He had produced copies
35 of six sales invoices to Lubbe, which referred only to his “professional services provided” but did not specify which project they related to. Mr Adekun also produced a letter from Lubbe Construction dated 19 November 2012 which confirmed that he was a consultant to the company and has assisted with its “logistical activities” in the UK.

40 21. The Tribunal heard that Mr Adekun was the registered owner of a number of residential properties, and that HMRC was trying to establish whether rental income was included in the income shown in his accounts. Mr Adekun was said not to have assisted with these enquiries. HMRC had advised him that this was an exempt supply for VAT purposes so that no input tax could be claimed in respect of it.

22. At the hearing on 3 December, Mr Adekun showed the Tribunal a report that he had prepared for a client, which was a detailed plan for a transport system in Nigeria. The Tribunal could see that a lot of work had been put into the report, but Mr Adekun told us that he would not be sending an invoice for that work until the project was completed so, apart from the report itself, there was no business documentation concerning the transaction available to us.

23. In the correspondence between the parties which took place between the two hearings, Mr Waterfield on behalf of HMRC asked Mr Adekun to elaborate upon the invoices, provided in support of his input tax claim, for legal advice he had received in connection with certain immigration matters. It was not clear from the documents before us whether those costs had been passed on to Mr Adekun's clients, as no sales invoice incorporating those costs had been produced.

24. Mr Adekun had somewhat belatedly produced a quantity of documents in support of his input tax claim, some of which related to periods preceding and post-dating the one under consideration. Some of these were receipts related to purchases which are not apparently connected with a taxable supply by him, for example the purchase of hair products and computer games.

Conclusion

25. We have considered the documentation produced by Mr Adekun carefully. As noted above, the onus of proof in this appeal lies with Mr Adekun. We find that he has not provided sufficient evidence to satisfy us on the balance of probabilities that he has been engaged in a business making taxable supplies during the period in question.

26. We find that the majority of the business activities undertaken during the period in question consisted of the "logistical services" described in the schedule produced by Mr Adekun himself. There is no evidence before us that he ever charged his customers for these services and indeed his own evidence was that he did not charge for them. In the circumstances, we are unable to conclude that his business activities during the period were "predominantly concerned with the making of taxable supplies to consumers for a consideration" as required by the case law referred to above.

27. We have considered the evidence as a whole and are satisfied that Mr Adekun is engaged in a business activity. However, we are unable to conclude that it is one involving the making of taxable supplies due to the lack of documentary evidence available to support this claim. Some of the evidence produced suggests that he is involved in VAT exempt activities. We consider that, if Mr Adekun had been involved in taxable trading to the extent that he suggests over the relevant period, he would have been able to produce satisfactory evidence of it, such as letters from clients engaging him for specific work or copies of sales invoices for specific work completed. We accept that some original documents were destroyed in a fire and that others have been returned to clients. We do not accept the allegation that HMRC has retained original documents and not returned them to Mr Adekun or produced them in evidence. We note that Mr Adekun has been able to produce some copy

documents in respect of his input tax claim but that he has not produced copies of documentation confirming the work he has undertaken for clients, despite plenty of opportunity to do so. We note that Mr Adekun has a legal obligation to retain certain business records but appears not to have done so. In the circumstances, he has simply not discharged the burden of proof that rests on him in this appeal.

28. We note that the documentation that the Appellant did produce to the Tribunal was inconclusive as to the nature of the business activity undertaken due to the lack of specificity in the invoices and in the client letters. The fact that the Appellant has a bank account, business premises, a business loan etc indicates that he is engaged in a business but it is not evidence that he is making taxable supplies. We agree with HMRC that the description of “professional services” only on the invoices we have seen is too broad a description to serve as validation of his claimed business activities.

29. In conclusion, we cannot be satisfied that the business test is met in this case. Accordingly, we uphold HMRC’s decision to de-register the Appellant for VAT and to refuse the input tax claim for the period. We dismiss this appeal.

30. 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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**ALISON MCKENNA
TRIBUNAL JUDGE**

RELEASE DATE: 20 January 2014

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