



**TC04065**

**Appeal number: TC/2013/01640**

*VATA 1994 ss 3, 4 & 73 & Sch 1 – liability to registration – whether goods included with services – assessment to ‘best judgment’ – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRIAN BILSBY**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY  
MRS SHAMEEM AKHTAR**

**Sitting in public at 45 Bedford Square London on 3 September 2014**

**Mr Fidel Fernandez of Fernandez Chartered Accountants instructed by Mrs Louise Slattery MAAT for the taxpayer and Mr David Ridley of HMRC for the Crown**

**© CROWN COPYRIGHT 2014**

## DECISION

### *Introduction*

1 This appeal concerns the liability or otherwise of the appellant to be  
5 registered for value added tax during the period 1 August 2008 to 30  
June 2009 and, if he was liable to be so registered, to a penalty for  
failure to notify his liability; if Mr Billsby was liable to be registered,  
the amount of the tax assessed for this period is also at issue.

### *The legislation*

10 2 The Value Added Tax Act 1994 provides:-

#### *3 Taxable persons and registration*

(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.

15 (3) Persons registered under any of those Schedules shall be registered  
in a single register kept by the Commissioners for the purposes of this  
Act; and, accordingly, references in this Act to being registered under  
this Act are references to being registered under any of those  
Schedules.

20 (4) The Commissioners may by regulations make provision as to the  
inclusion and correction of information in that register with respect to  
the Schedule under which any person is registered.

#### *4 Scope of VAT on taxable supplies*

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.

#### *73 Failure to make returns, etc.*

30 (1) Where a person has failed to make any returns required under this Act  
(or under any provision repealed by this Act) or to keep any documents  
and afford the facilities necessary to verify such returns or where it  
appears to the Commissioners that such returns are incomplete or  
35 incorrect, they may assess the amount of VAT due from him to the best  
of their judgment and notify it to him.

*Schedule 1 - Liability to be registered<sup>1</sup>*

1(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule -

5 (a) at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £67,000; or

10 (b) at any time, if the person is UK-established and there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £67,000.

(2) . . .

(2A) . . .

15 (3) A person does not become liable to be registered by virtue of sub-paragraph (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 sub-paragraph, he would become liable to be registered will not exceed £65,000.

20 **5(1)** A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.

(2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

25 (3) In this paragraph “the relevant month”, in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered.

---

<sup>1</sup> The figures given are for the year 2008-09

*Value Added Tax Regulations 1995*

*25 Making of returns*

5 (1) Every person who is registered or was or is required to be registered shall, in respect of every period of a quarter or in the case of a person who is registered, every period of 3 months ending on the dates notified  
10 either in the certificate of registration issued to him or otherwise, not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return in the manner prescribed in regulation 25A showing the amount of VAT payable by or to him and containing full information in respect of the other matters specified in the form and a declaration, signed by that person or by a person authorised to sign on that person's behalf, that the return is correct and complete, provided that—

(a) . . .

15 (b) the first return shall be for the period which includes the effective date determined in accordance with Schedules 1, 1A, 2, 3 and 3A to the Act upon which the person was or should have been registered, and the said period shall begin on that date;

(c) . . .

20 (d) . . .

*Authorities*

3 The case law as to best judgment is well known. It suffices for present purposes to recall the test described by Woolf J (as he then was) in *Van Boeckel v CCE* [1981] STC 290, at 292: –

25 The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the Commissioners had taken insufficient steps to ascertain the amount of tax due before making the assessment.

30 Therefore it is important to come to a conclusion as to what are the obligations placed on the Commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly, they must perform that  
35 function honestly and *bona fide*. It would be a misuse of that power if the Commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to  
40 seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the Commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

5 Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of  
10 their judgment, is due. In the very nature of things, frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the Commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not  
15 envisage the burden being placed on the Commissioners of carrying out exhaustive investigations.

What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is  
20 one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them.

25 *Jurisdiction*

4 Various issues were raised in the appeal which are outside the jurisdiction which parliament has conferred on the tribunal, and we advised Mr Fernandez and Mrs Slattery of the remedies open to their client in the way of complaint to the Revenue Adjudicator and,  
30 thereafter, a complaint to the Parliamentary Commissioner for Administration made through Mr Bilsby's member of parliament.

5 The matters concerned were, in essence: (i) a claim that Mr Bilsby had a 'legitimate expectation' following the closure of the self-assessment inquiry that no further tax of any kind was due for the  
35 period covered by it; and (ii) a claim that in their dealings with Mr Bilsby the Revenue had in various ways not respected the terms of the Taxpayers' Charter.

*Facts*

6 We received oral evidence from Mrs Louise Slattery, who had acted  
throughout for Mr Bilsby, in addition to the usual documentary  
evidence. Mr Bilsby was not at the hearing. We find the following  
5 facts established on at least the balance of probabilities.

7 Mr Bilsby trades as a plumbing and heating engineer in Clacton,  
Essex, and the greater part of his work is as a subcontractor for main  
contractors who make payment to him under the mechanism of the  
Construction Industry Scheme; in addition, Mr Bilsby does some  
10 direct client work, but it is not a substantial part of his business.

8 Following a review of Mr Bilsby's self-assessment return for the year  
to 5 April 2009, correspondence between the Revenue and Mrs  
Slattery - Mr Bilsby's accountant and tax adviser - led finally to the  
Revenue concluding that Mr Bilsby should have been registered for  
15 VAT from 1 August 2008 to 30 June 2009. An assessment for the tax  
due on that basis was accordingly issued on 4 May 2012 for £5,650  
together with a penalty for failure to notify of £593 (since reduced on  
review to £466).

9 By June 2008, Mr Bilsby's taxable supplies, judged on the basis of his  
20 total income from his business and agreed with the Revenue in  
settlement of the self-assessment enquiry, showed by reference to the  
test in Schedule 1, paragraph 1(1)(a), that the registration threshold for  
the previous twelve months had been exceeded.

10 Thus, for the twelve months to June 2008, Mr Bilsby's turnover (or  
25 total business receipts) was £73,617, clearly exceeding the registration  
threshold for this period of £67,000. Pursuant paragraph 5(2) of  
Schedule 1, Mr Bilsby was accordingly required to be registered with  
effect from 1 August 2008. Overall, however, the cash receipts for Mr  
Bilsby's business showed that he had ceased to be liable to registration  
30 by 30 June 2009, and the assessment was therefore made for the period  
between those two dates.

11 The rolling previous 12 month turnover figures for the period are  
as follows:-

June 2008	£73,617
35 July 2008	£69,123
August 2008	£82,812

	September 2008	£85,351
	October 2008	£82,492
	November 2008	£76,157
	December 2008	£76,558
5	January 2009	£69,931
	February 2009	£67,573
	March 2009	£70,235
	April 2009	£75,707
	May 2009	£76,204
10	June 2009	£66,311
	July 2009	£65,264

12 In effect, Mr Bilsby's trading income during this period had exceeded the normal, and it is not suggested that he was liable for registration before the period began or for any further period after it.

15 For the investigation, Mrs Slattery had been obliged to recreate Mr Bilsby's invoice record by obtaining copies of invoices from his customers, because Mr Bilsby had kept no hard copies of his invoices and when it was interrogated to produce them his computer had crashed; for private client work, she had relied on bank statements to reconstruct receipts. The copy invoices in question were before us and

20 there is no disagreement about the basic figures.

13 There is disagreement, however, over the inclusion in the figures for the total trading receipts of the cost of materials. In the invoices we saw it was apparent that Mr Bilsby had, in order to accomplish the work which he was contracted to do, obtained and supplied materials

25 for the purpose.

14 It was common ground that, if the cost of these materials were to be subtracted from the totals, the VAT registration threshold would not have been reached. The invoices, nonetheless, showed a single

30 composite supply of goods and services, and there is nothing to suggest that the supply contracts to Mr Bilsby's customers provided otherwise; Mr Fernandez's submission indeed confirmed that as a subcontractor Mr Bilsby was required to acquire the materials for each job and recharge them on his invoices, and that the same was true for

35 private customer work.

15 The correspondence shows that the Revenue invited Mrs Slattery to provide any additional information she wished to alter the conclusion reached. This applied in particular to three cash receipts for which no invoices could be found or obtained, amounting to £10,000 received on  
5 29 August 2008, £10,000 on 27 September 2008, and £6,000 tendered on 6 June but received on 26 June 2008 after the previous cheque for the sum had been dishonoured.

16 It was again common ground that, without these 'exceptional' items, the registration threshold would not have been sustained for  
10 the period in question. These payments looked as if they might have been in respect of work done significantly before June 2008, with the completion taxpoint therefore also occurring before that date. In the case of one of the £10,000 payments, it was thought for example that the work might have been done as early as January 2008, and Mr  
15 Fernandez made the point that payments of invoices in this trade were often made late.

17 We asked Mr Ridley whether, in exercising 'best judgment', the assessing officer had looked into this possibility. The officer not being at the hearing, Mr Ridley was not able to answer this question and he  
20 therefore applied for an adjournment to take the matter further. Mr Fernandez, however, strongly objected to an adjournment, saying that the issue had already taken too long to resolve and that his client wished it to be determined without further delay.

18 We record that we were told that before and during the period of  
25 this assessment Mr Bilsby's son had been diagnosed with cancer, but that Mr Fernandez stated clearly to us that he was not arguing that this very sad fact was connected with the issues under appeal.

#### *Submissions*

19 For Mr Bilsby, it was submitted firstly that it was wrong, as a  
30 matter of law, for the cost of materials to have been included in the total business receipts which had been used to determine whether the registration threshold had been reached. Mr Fernandez referred us to what he said was the Wikipedia definition of 'value added', namely gross profit; since the materials supplied by Mr Bilsby had been  
35 charged on at cost and there was no profit on them, they should not be included at all in a calculation made for the purposes of value added tax.

20 Next, Mr Fernandez referred to the claim made in the course of the Revenue investigations by Mrs Slattery that there was no way her client could have known that the value of his supplies was exceeding the VAT registration threshold. Moreover, Mr Bilsby should have  
5 been given the benefit of paragraph 1(3) of Schedule 1 on the basis (as we understood it) that the figures properly calculated did not reach the threshold.

21 Mr Fernandez illustrated this argument by figures which showed that, disregarding the 'exceptional' receipts we have referred to, the  
10 actual month by month turnover from August 2008 to July 2009 totalled £65,263 – a figure which corresponds to the rolling previous 12 month turnover for July 2009, and is below the threshold

22 A rather different point was that the figures on which the assessment had been made had been agreed by Mr Bilsby in the  
15 context of the self-assessment investigation in which it had not mattered to him in which years the debtors were correctly assessable for the purposes of his income tax. From this it was argued that inappropriate figures were, or might have been, used for the VAT registration test, though no working of how this could have affected  
20 the result was offered.

23 We have already adverted to the issue of legitimate expectation and indicated that it is outside our jurisdiction to determine. It may be useful to record however that the specific expectation, which Mr Fernandez claims that Mr Bilsby had, was that the self-assessment  
25 settlement was the end of any further tax claim in respect of the period covered. This was based on a sentence in a letter from the Revenue to Mr Bilsby dated 20 June 2012 which read: "This amount [a total underpaid of £93.46] includes all the items, not just the results of my check".

30 24 Mr Fernandez concluded that if the tribunal was against him on the principal issue, the question of liability for registration for value added tax, he did not pursue any argument with respect to the penalty for failure to notify.

25 For the Revenue, Mr Ridley submitted that they were bound by the  
35 way in which the statutory tests of registrability were formulated and, on that basis, the rolling twelve month figures spoke for themselves.

26 Although references had been made in papers to 'turnover', the correct criterion for assessing registrability was the value of taxable supplies; a 'taxable supply' is defined in section 4(2) as a supply of goods or services made in the United Kingdom, and it was apt to cover all the elements of the supplies made by Mr Bilsby i.e. the labour and materials which were all charged together.

27 As to the paragraph 1(3) submission by the taxpayer, Mr Ridley replied that the test to be applied was by reference to the figures at June 2008 and not one which exercised hindsight at July 2009. In so far as the 'exceptional' receipts were concerned, Mr Ridley pointed out that there had been no evidence put forward with regard to the circumstances which had given rise to these payments and the Revenue had had no alternative but to proceed on the basis of the information available to them.

28 In addition to the classic formulation of the best judgment test in *Van Boeckel* cited above, we were referred to two other authorities, *Gray v CEC* [2000] STC 880, a decision by Ferris J in the Chancery Division, and to *Nash & Nash v CEC*, a decision by the VAT & Duties Tribunal in 1997, which we found of no particular assistance.

29 In *Gray*, the learned judge made these observations, at page 887:-

[23] I conclude, therefore, that in cases of late registration as well as in cases where the trader notifies in due time, the commissioners must give effect to para 1(3) by considering the case as at the date from which registration would otherwise take effect and, by looking forward, asking themselves whether they are or are not satisfied that turnover will not exceed the threshold amount. Obviously they cannot do this otherwise than on the basis of what they consider to be likely. But if they reach a conclusion which would be open to a reasonable body of commissioners considering the relevant evidence, an appellate tribunal cannot interfere with their decision. It is not enough that the appellate tribunal thinks that it would have reached a different conclusion on the same evidence.

[24] In a case where the trader complies with his obligations in respect of notification the commissioners will not only consider whether they are satisfied as mentioned in para 1(3) as at the date from which registration would otherwise be effective but they will make their actual decision at about the same time. It must

follow, in my view, that the only information which they can or should act upon is the information which is available to them at that time. There can be no unfairness or difficulty about this, because the trader will be able to draw to the attention of the commissioners, at the time when he notifies them of his liability to be registered, any facts which he wishes the commissioners to take into account for the purposes of making a decision under para 1(3).

### *Conclusions*

30 The contention that the cost of materials should not have been included in the calculations cannot be accepted. The supplies of services and goods exemplified by the invoices before us were clearly single, composite supplies which were as such taxable supplies.

31 That there was no profit element in the recharging of the cost of materials makes no difference: a supply which is a taxable supply remains so, whether or not it is made at a profit to the supplier – the input equals the output and no tax is therefore due on that aspect of the supply, but it remains a taxable supply and counts for the purpose of the registration threshold. We add, though it should hardly be necessary, that the Wikipedia definition quoted to us is not a source of law and can have no bearing on the issue.

32 We have seen that it was claimed that there was “no way” in which Mr Bilsby could have known that his receipts were such that he was exceeding the VAT registration threshold. It is difficult not to have sympathy with this claim in so far as Mr Bilsby himself was concerned; it is no doubt burdensome for a sole trader, putting all his effort into his work, to need to keep track of the finances of his business, but that is what the law requires and it is why a person is well-advised therefore to retain the services of a professional adviser, as Mr Bilsby did.

33 The test in paragraph 1(a) of Schedule 1 is stated in a particular way, which does not allow for the possibility of what Mr Fernandez claims happened in this case, namely that the period of assessment would see an actual turnover during that time below the annual registration threshold. Again, what the tribunal thinks of that possibility is not the issue: the statutory test is clear and it is for parliament to address any perceived unfairness in the result. And as Ferris J observed in *Gray*, the Revenue can do no other than act fairly on the information available at the time the test is first met.

34 There are, potentially, two loose ends in the matter. The first is the possibility that the time allocation of receipts in the self-assessment enquiry was materially different from their correct time allocation for VAT registration purposes.

5 35 On this, no evidence was offered that such was the case, and the possibility must remain therefore a matter of speculation. As with the second loose end – the possibility that the ‘exceptional’ cash receipts totalling £26,000 could have been identified as having triggered taxpoints far enough distant from the periods in question to alter  
10 registrability conclusions – the principle first established in *Van Boeckel*, and recently affirmed in *Gray*, is that the Revenue are only required to act on the information given to them.

15 36 The Revenue are not required to probe or dig for further details, and it is clear that the evidence we have seen is all that was proffered at the time the assessment was made, even though the officers expressed their willingness to consider anything further that might be put forward. Against this background, Mr Ridley’s application for an adjournment to further check the position on these extraordinary receipts was generous. Mr Fernandez however was entirely within his  
20 rights to demand that the tribunal proceed at once to a decision, and we accordingly dismissed Mr Ridley’s application.

37 The appeal, for these reasons, does not succeed. Liability to registration, the assessment and the penalty are accordingly confirmed.

25 *Further appeal rights*

38 This document contains the 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  
30 application must be received by this Tribunal no 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.

**MALACHY CORNWELL-KELLY  
TRIBUNAL JUDGE**

5

**RELEASE DATE: 7 October 2014**