



TC04338

Appeal number: TC/2014/03727

*VAT – Application to register – insufficient supporting evidence –
cancellation of registration – badges of trade – not a business – appeal
dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TL STEP BY STEP LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE SCOTT
 MRS GILL HUNTER**

Sitting in public at the Royal Courts of Justice, London on 2 March 2015

The appellant did not attend and was not represented

Sharon Spens, Officer of HMRC, for the Respondents

DECISION

1. The appellant did not attend. At the request of the Tribunal the Clerk
5 telephoned the mobile telephone number in the papers but there was no response.
Prior to the hearing both we and HMRC had noted that in the “dates to avoid” notified
to the Tribunal that the Director of the appellant, Mrs Ana Christina Lozano-
Quintana had indicated that the dates to be avoided included 1-15 March “2014”.
That was obviously a clerical error since that was contained in an email of 5
10 December 2014. However, it was clear from the file that the appellant had been
notified of the hearing and had not objected to the listing on 2 March 2015. Further
Ms Spens produced an email from Mrs Lozano-Quintana dated 24 February 2015
confirming that she had received the bundles and that she intended to attend the
hearing on 2 March 2015.

15 2. HMRC vigorously argued that the hearing should take place in the absence of
the appellant on the basis that it was obvious that the appellant had been notified of
the hearing and HMRC had incurred considerable expense in travelling to the hearing
from Belfast. In the event that the hearing did not proceed they intimated that they
would be seeking an order for wasted costs.

20 3. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009 (“the Rules”) and we annex at Appendix 1 a copy of the
relevant Rules.

4. We decided that it was in the interests of justice to proceed with the hearing
since there was no explanation as to the non-appearance by or for the appellant. The
25 appellant’s attention is drawn to Rule 38 of the Rules in the event that there was good
cause for the non-attendance at this hearing.

The issue

5. This was an appeal in regard to a decision issued by the Commissioners for Her
Majesty’s Revenue and Customs (“HMRC”) dated 1 March 2014. That decision was
30 to the effect that the appellant was compulsorily deregistered from the VAT Register
with effect from 1 October 2013 in terms of Schedule 1, paragraph 13(3) of the
VAT Act 1994 (“VATA”) on the basis that insufficient evidence had been produced
supporting the assertion that the appellant was intending to set up a business or make
taxable supplies. The appeal is made in terms of Section 83(1)(a) VATA.

35 *History*

6. On 1 October 2013, the appellant submitted an online application to register for
VAT as an intending trader. The Business Activity Description was wholesale beer,
spirits, wines and liqueurs, and business consultancy activities. The registered
40 address was a residential property.

7. On 2 October 2013 HMRC wrote to the appellant's agent confirming that the application to register for VAT before the appellant started to make taxable supplies had been accepted and that the registration would take effect from 1 October 2013. It was not disputed that the appellant was not liable to be registered in terms of VATA.
- 5 8. The appellant did not submit a VAT return for the period 11/13 as required by the legislation and therefore HMRC issued an assessment for tax due of £264 and that was paid by the appellant on 27 January 2014. On that date HMRC wrote to the appellant intimating that in light of the failure to render a VAT return the appellant had 30 days within which to satisfy HMRC that there was an entitlement to VAT registration.
- 10 9. On 29 January 2014 the appellant submitted a nil VAT return for the period 11/13.
- 15 10. On 17 February 2014 Mrs Lozano-Quintana contacted Officer Patel intimating that although the intention was to acquire wine from France and Italy to supply in the UK, due to family illness the business had not commenced. She offered no evidence in support of the intended business other than stating that she needed the VAT registration number, albeit she could not explain why she needed the VAT registration number other than that "someone" had told her that she needed such a number. Officer Patel confirmed that supporting evidence was still required by
- 20 27 February 2014.
11. Nothing was received.
12. On 1 March 2014, HMRC issued the decision letter which is the subject matter of this appeal.
- 25 13. On 17 March 2014 the appellant submitted another nil VAT return for the period 02/14. On 24 March 2014, HMRC wrote to confirm that the appellant would be deleted from the VAT Register but that representations could be made within 30 days. On 17 April 2014, the appellant wrote to HMRC stating that it was in the process of obtaining a major client and it required a VAT registration number. The appellant requested that the VAT registration not be cancelled as it would have a detrimental effect on the business. No evidence was provided. HMRC responded on
- 30 29 April 2014 stating that in the absence of any evidence the decision would not be reconsidered.
- 35 14. On 23 May 2014, the appellant wrote to Officer Patel stating that it had a "couple of customers already ordering and some promising ones". The appellant enclosed copies of two sequential sales invoices in the sums of £150.77 and £409.32, a letter of intent relating to a potential customer, a letter and some emails from a supplier in Italy and copies of boarding passes and tickets which purported to relate to a wine and food fair in Toulouse on 2-3 April 2014 and one in Verona on 6-8 April 2014. Those tickets indicated that Mrs Lozano-Quintana travelled with her
- 40 infant child on both occasions.

15. On 29 May 2014, HMRC wrote to the appellant intimating that the documents provided were incomplete and in themselves were considered to be insufficient evidence of the company's entitlement to VAT registration. Officer Patel offered to visit the company premises to discuss the matter but pointed out that the appellant had been deleted from the VAT Register. The appellant arranged to meet with Officer Patel but at his offices on 20 June 2014.

16. At that meeting it was established that the two sales invoices related to wine which had been purchased from a UK wholesaler and had been sold to individuals personally known to Mrs Lozano-Quintana. She confirmed that going forward it was still the appellant's intention to acquire wine from Italy and France to supply pubs, bars and restaurants in the UK. She did not have any evidence such as supplier or customer agreements, purchase orders or details of pricing structures. Further although she had furnished a letter of intent with her letter of 23 May 2014, that potential client had not progressed matters further and in particular they had not placed the order that that letter suggested would have been placed in June 2014 (see para 24 below).

17. Mrs Lozano-Quintana confirmed to the officers that she was currently a PAYE employee of a wine supplier in the UK but that her contract would terminate at the end of June 2014 as her employer could not accommodate her request to work part-time due to child care responsibilities.

18. On 7 July 2014 the appellant appealed to the Tribunal.

19. On 5 December 2014 the appellant wrote to the Tribunal enclosing some emails from potential suppliers. Those indicate that following the visit to the Toulouse wine fair, the appellant had received some samples but that nothing had progressed further. That letter also suggested that the decision to remove the appellant from the VAT Register was in part based on the fact that the managing director was not a British national and that she had a small baby.

The oral evidence

20. We heard evidence from Officer Patel. We found him to be a clear and credible witness. In particular we accepted that he had had major concerns about the absence of any business plan, projections, purchase orders, delivery notes or indeed any substantive evidence. That was even more surprising since Mrs Lozano-Quintana's then current employment was as a wine importer. Despite his questioning she had been unable to explain how any mark-up would be arrived at. The only two sales which had been made did not fit with the purported business model which was to import the wine for resale but the wines in question had been purchased from a UK wholesaler. He was very clear that his only interest in the baby was in regard to whether Mrs Lozano-Quintana had arrangements in place in order to enable her to work in the proposed business, as she was the sole employee, and he was wholly uninterested in her nationality. We accepted that.

Reasons for decision

21. The appellant's argument is that it should be registered because if it is not then that would have a detrimental effect on the business. Whilst we accept that that
5 would be the case that is not the issue for the Tribunal. We have to decide whether, on the balance of probability, the appellant has established that it is carrying on a business and intends to make taxable supplies in the course of or furtherance of that business. The answer to that depends on an examination of all of the circumstances and, in particular, the characteristics of the activities carried on by the appellant
10 having regard to the tests established by case law. Those tests are best explained in the judgment of Gibson J in *Customs & Excise Commissioners v Lord Fisher* 1981 STC 238 ("*Lord Fisher*"). While the tests in *Lord Fisher* should not be regarded as a check list they are very useful.

Was the activity, at the material time, a serious undertaking earnestly pursued?

15 22. Mr Justice Gibson described this phrase as "describe the sort of activity normally carried on by way of business or daily work". The two invoices which appear to constitute the only two sales in a period of eight months were to persons known to the managing director of the appellant and are for very small amounts.
20 They do not fit the described business model and the appellant was wholly unable to produce any evidence of how the mark-up, and there was a mark-up, was calculated.

23. Although it is clear that the appellant attended the two wine fairs with the baby and "Ilario", who is presumably her husband although he is described as her "partner" in one of the emails, very little has happened since those wine fairs. Surprisingly on
25 12 May 2014, Mrs Lozano-Quintana wrote to a potential Italian supplier requesting prices for various wines but nothing appears to have happened until 28 October 2014. The appellant replied on 26 November 2014 requesting samples. In any business that might be described as exceptionally slow.

24. In the letter of 23 May 2014, LCI Mayfair Ltd was described as "a very
30 promising potential customer". The letter of intent from that company stated that "... in June we shall require the first couple of cases ... and this order we intend to replicate quarterly". Nevertheless, at the meeting with Officer Patel in June 2014 it was confirmed that there had been no follow-up to that letter. At best that could be described as surprising.

35 25. Further there had been no due diligence completed by the appellant in regard to potential purchasers. That too is surprising.

26. In summary, these factors do not point to there being a business that was a serious undertaking earnestly pursued.

Was the activity an occupation or function which was earnestly pursued with reasonable or recognisable continuity?

5 27. We do not consider that any of the described activities were pursued with any reasonable or recognisable continuity. Attendance at two wine fairs with her husband and child is not evidence of substantive business activity.

Did the activity have a certain measure of substance in terms of annual or quarterly value of taxable supplies made?

10 28. In this case we are, of course, looking at what the projected value of supplies might be. Regrettably the appellant was wholly unable to provide any business plan or projections.

15 29. It was surprising indeed that the appellant was unable to provide even copies of invoices for expenditure on relevant business advice in regard to the start-up company. There was no evidence as to the funding model for the proposed business.

30. We accepted HMRC's evidence that they had been unable to find a website for the appellant or evidence of any advertising or marketing of the business.

20 31. In the application for VAT registration the anticipated turnover was stated to be £100,000 per annum but we note from the emails produced that the sample wines sourced by the appellant were in the price range €2.50 to €6. That level of turnover would require that substantial quantities of wine would be imported. There was no evidence as to where or how that would be stored.

Was the activity likely to be conducted in a regular manner and on sound and recognisable business principles?

25 32. The complete absence of any business plan or due diligence combined with no evidence of market research, marketing or advertising does not suggest a business activity.

30 *Was the activity predominantly concerned with making taxable supplies for consideration?*

33. Insofar as there was any activity we accept that the appellant clearly was concerned with making taxable supplies for a consideration.

Were the (intended) taxable supplies of a kind commonly made by those who seek to profit from them?

35 34. Again we accept that the intended taxable supplies would be of a kind commonly made by those who seek to profit from them.

Summary

35. The appellant appears to have had, and continues to have, aspirations to establish a business. However merely aspiring to a business is not the same as carrying on a business. The evidence in this case clearly shows, in our view, that the appellant's aspirations have not yet crystallised into anything that remotely resembles a business within the meaning of VATA.

Cancellation of registration

10 36. In that context we now address the issues before us for determination. The first is the cancellation of the registration. Cancellation was effected by HMRC under paragraph 13(3) Schedule 1 VATA which provides as follows:-

Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day."

15 37. It is common ground that the appellant has never satisfied the compulsory registration requirement in VATA. HMRC say that the appellant did not satisfy the voluntary registration requirements in paragraph 9, Schedule 1 VATA. Those provisions read:-

20 "9 – Where a person who is not liable to be registered under this Act and is not already so registered, satisfies the Commissioners that he –

- (a) makes taxable supplies; or
- (b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,

25 they shall, if he so requests, register him with effect from the day on which the request is made or some such earlier date as may be agreed between them and him."

30 38. On the basis of our finding that at no material time has the appellant been carrying on any business, the appellant could not have been intending to make taxable supplies in the course or furtherance of that business and therefore is not entitled to be registered under paragraph 9(b) Schedule 1 VATA.

39. Paragraph 13(3) Schedule 1 VATA reads:-

35 "3. Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day."

40 We conclude therefore that HMRC were right to be satisfied for the purpose of that paragraph that the appellant was not registrable on 1 October 2013 and that they were entitled to cancel the appellant's registration from that date, which they have done as notified to the appellant.

40. Accordingly the appeal against the cancellation of the VAT registration is dismissed.

41. 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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**ANNE SCOTT
TRIBUNAL JUDGE**

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RELEASE DATE: 23 March 2015

Appendix

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

- 5 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
- 10 (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- 15 (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.
- 20 (3) The Tribunal must seek to give effect to the overriding objective when it—
- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.
- 25 (4) Parties must—
- (a) help the Tribunal to further the overriding objective; and
- (b) co-operate with the Tribunal generally.

30 5.— Case Management powers

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- 35 (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- (3) In particular, and without restricting the general powers in paragraphs (1) and
- 40 (2), the Tribunal may be direction—
- (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

- (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
- (c) permit or require a party to amend a document;
- 5 (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
- (e) deal with an issue in the proceedings as a preliminary issue;
- (f) hold a hearing to consider any matter, including a case management hearing;
- 10 (g) decide the form of any hearing;
- (h) adjourn or postpone a hearing;
- (i) require a party to produce a bundle for a hearing;
- (j) stay (or, in Scotland, sist) proceedings;
- 15 (k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—
- (i) the Tribunal no longer has jurisdiction in relation to the proceedings; or
- (ii) the Tribunal considers that the other tribunal is a more
- 20 appropriate forum for the determination of the case;
- (l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal.

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10.— Orders for costs

- (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
- 30 (a) under section 29(4) of the 2007 Act (wasted costs) [and costs incurred in apply for such costs]¹
- (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; [...]²
- 35 (c) if—
- (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
- (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within
- 40 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph [; or]³

¹ Words inserted by Tribunal Procedure (Amendment) Rules 2013/477 rule 35 (April 1, 2013)

² Word repealed by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(a) (November 29, 2010)

³ Word inserted by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(b) (November 29, 2010)

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- [(d) in a MP expenses case, if—
 - (i) the case has been allocated as a Complex case under rule 23 (allocation of cases to categories); and
 - (ii) the appellant has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph.
-]⁴
- (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
 - (3) A person making an application for an order under paragraph (1) must—
 - (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
 - (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.
 - (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—
 - (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
 - (b) notice [under rule 17(2) of its receipt of a withdrawal]⁵ which ends the proceedings.
 - (5) The Tribunal may not make an order under paragraph (1) against a person (the “paying person”) without first—
 - (a) giving that person an opportunity to make representations; and
 - (b) if the paying person is an individual, considering that person’s financial means.
 - (6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—
 - (a) summary assessment by the Tribunal;
 - (b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the “receiving person”); or

⁴ Added by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(c) (November 29, 2010)

⁵ Words substituted by Tribunal Procedure (Amendment) Rules 2013/477 rule 36 (April 1, 2013)

(c) assessment of the whole or a specified part of the costs or expenses [, including the costs or expenses of the assessment,]⁶ incurred by the receiving person, if not agreed.

5 (7) Following an order for assessment under paragraph (c)(c) the paying person or the receiving person may apply—

10 (a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

15 (b) in Scotland, to the Auditor of the Sheriff Court or the Court of Session (as specified in the order) for the taxation of the expenses according to the fees payable in that court; or

20 (c) in Northern Ireland, to the Taxing Office of the High Court of Northern Ireland for taxation on the standard basis or, if specified in the order, on the indemnity basis.

[(7A) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed.]⁷

25 (8) In this rule “taxpayer” means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings.

33.— Hearings in a party’s absence

30 If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

35 (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

38.— Setting aside a decision which disposes of proceedings

40 (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

⁶ Words inserted by Tribunal Procedure (Amendment) Rules 2013/477 rule 37 (April 1, 2013)

⁷ Added by Tribunal Procedure (Amendment) Rules 2013/477 rule 38 (April 1, 2013)

(2) The conditions are:-

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

5 (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party's representative, was not present at a hearing related to the proceedings.

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(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

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(4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable.