



TC05021

Appeal number: TC/2014/04130

VAT- registration threshold exceeded – application for exception from registration – para 1(3) of Sch 1 to VATA 1994 – whether decision not to allow exception reasonably reached – Gray and Nash applied – sub-para 1(1)(b) and para 4(2) considered – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**KEN RENFORTH T/A
FACADE DETAILING SERVICE**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
MRS LIZ POLLARD**

Sitting in public at Immigration Appellate Authority, Earl Grey Way, North Shields, on 10 November 2015

No representation for or attendance of the Appellant

Mr J Nicholson, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appeal is against the decision dated 12 March 2014 by the Commissioners that the appellant should be registered for VAT from 1 April 2013, and the application
5 to be exempt from VAT registration was refused.

2. The issue for the Tribunal to determine is whether that decision was reasonably reached in accordance with paragraph 1(3) of Schedule 1 to the Value Added Tax Act 1994 ('VATA') not to allow the exception from VAT registration.

Hearing in absence

10 3. When there was no appearance of the appellant on the day of the hearing at 10am, the Tribunals Service first contacted the appellant and did not get a reply. The appellant's representative, Ms O'Toole of Thomas R Dixon & Co LLP was then contacted, who advised that the appellant had understood that it was not necessary to attend as all relevant papers have been submitted.

15 4. The Tribunal was satisfied that the appellant had been notified of the hearing, and that no postponement application had been made. We considered the position in the light of Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and decided that it would be in the interests of justice to proceed with the hearing in the appellant's absence.

20 Factual background

5. The appellant, Mr Renforth, was previously employed and commenced self-employment for the first time in March 2012 by providing services to clients in the construction industry. His turnover for the first month of trading was £3,978.

25 6. Mr Renforth's turnover for tax year 2012-13 was £97,834. His accountant reckoned that the VAT registration threshold was breached in February 2013.

7. The fact that the appellant's turnover had breached the registration threshold only came to light almost a year after the breach in January 2014, when he submitted his figures to his accountants for preparing his self-assessment return for 2012-13.

30 8. By letter dated 20 January 2014, Ms O'Toole applied for exception from registration on Mr Renforth's behalf. In reply, the Commissioners sent an 'Exception from VAT' questionnaire for completion.

9. By letter dated 20 February 2014, Mr Renforth wrote in detail to support his application, submitting figures of his rolling turnover from March 2012 to February 2014, and returning the completed questionnaire.

35 10. From the figures provided by the appellant in the questionnaire, the Tribunal has collated the table below summarising the monthly turnover from the commencement

of self-employment in March 2012 through to March 2014. The cumulative turnover for the 25-month period, and the rolling 12-month turnover for the same 25-month period are also included, against the registration and de-registration thresholds in force at the relevant times.

| Month | Month's Total | Cumulative total | Rolling 12 mth | Reg / Dereg limit |
|--------------|----------------------|-----------------------------|-----------------------|--------------------------|
| Mar 12 | 3,978 | 3,978 | 3,978 | 73,000 & 71,000 |
| Apr 12 | 5,724 | 9,702 | 9,702 | 77,000 & 75,000 |
| May 12 | 6,444 | 16,146 | 16,146 | 77,000 & 75,000 |
| Jun 12 | 5,706 | 21,852 | 21,852 | 77,000 & 75,000 |
| Jul 12 | 6,240 | 28,092 | 28,092 | 77,000 & 75,000 |
| Aug 12 | 9,900 | 37,992 | 37,992 | 77,000 & 75,000 |
| Sept 12 | 5,346 | 43,338 | 43,338 | 77,000 & 75,000 |
| Oct 12 | 4,032 | 47,370 | 47,370 | 77,000 & 75,000 |
| Nov 12 | 13,716 | 61,086 | 61,086 | 77,000 & 75,000 |
| Dec 12 | 8,604 | 69,690 | 69,690 | 77,000 & 75,000 |
| Jan 13 | 11,048 | 80,738 | 80,738 | 77,000 & 75,000 |
| | Breach Jan 13 | (re-start cum total) | | |
| Feb 13 | 4,680 | 4,680 | 85,418 | 77,000 & 75,000 |
| Mar 13 | 16,020 | 20,700 | 97,460 | 77,000 & 75,000 |
| Apr 13 | 4,392 | 25,092 | 96,128 | 79,000 & 77,000 |
| May 13 | 9,108 | 34,200 | 98,792 | 79,000 & 77,000 |
| Jun 13 | 6,912 | 41,112 | 99,998 | 79,000 & 77,000 |
| Jul 13 | 3,780 | 44,892 | 97,538 | 79,000 & 77,000 |
| Aug 13 | 11,880 | 56,772 | 99,518 | 79,000 & 77,000 |
| Sept 13 | 11,700 | 68,472 | 105,872 | 79,000 & 77,000 |
| Oct 13 | 4,248 | 72,720 | 106,088 | 79,000 & 77,000 |
| Nov 13 | 12,456 | 85,176 | 104,828 | 79,000 & 77,000 |
| Dec 13 | 6,876 | 92,052 | 103,100 | 79,000 & 77,000 |
| Jan 14 | 0 | 12m to Jan 92,052 | 92,052 | 79,000 & 77,000 |
| Feb 14 | 0 | 12m to Feb 87,372 | 87,372 | 79,000 & 77,000 |
| Mar 14 | 0 | 12 m to Mar 71,352 | 71,352 | 79,000 & 77,000 |

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The monthly turnover for the last 3 months from January to March of 2014 was nil according to Mr Renforth's response to the questionnaire made in February 2014.

The appellant's case

11. The main ground for the application for exception is that the breach of turnover was due to a 'one-off' contract which would not be repeated. In his letter of 20 February 2014, Mr Renforth gave the circumstances leading to this one-off contract:

5 '... the company I previously worked for going into liquidation unexpectedly. One of their former clients offered me the opportunity to complete their design on a self-employed basis. It was anticipated that the work would last for around 3-4 months.

10 This arrangement changed when my client ran into difficulties with a separate, much larger construction contract. Key members of their "in house" design team left their employ and as an emergency measure had me to switch projects and roles to a design co-ordination one for this larger project ... Deemed to be a "fire-fighting" role it had no fixed scope or duration, but they anticipated staff replacements would be found within 4-5 weeks.

15 Unfortunately they struggled to achieve this and kept extending my employ and scope. This contract proved to be the exceptional condition that has caused me unexpectedly to exceed the VAT registration figure during Jan/Feb 2013.'

20 12. As regards his projected turnover, Mr Renforth advised in his February 2014 letter that there was no turnover for January to March 2014, and the nil turnover for the quarter meant that the turnover for 2013-14 would therefore be within the registration limit. His next contract was due to commence only in April 2014. Furthermore, Mr Renforth explained that he did not expect to find himself 'in such an unusual open ended contractual arrangement in the future'. He further advised that:

25 'Construction contracts are normally of a fixed price and duration nature that will allow me to better predict future turnover. The emergency nature of this contract was exceptional and I hope this information is of assistance in your consideration that I remain a Non-Registered Trader.'

30 13. By letter dated 12 March 2014, the application to be excepted from registration was refused and the letter stated (wrongly) the effective date of registration to be 1 April 2014, (instead of 1 April 2013).

35 14. By letter dated 11 April 2014 (and received on 16 April), the appellant's accountant filed the completed VAT 1 to register the appellant from 1 April 2014. The letter stated the turnover for the year to 5 April 2014 to be £74,168 and that the turnover for the 12 months to 5 April 2015 was projected to be £60,000.

40 15. According to HMRC's Statement of Case, the respondents reissued the refusal letter on 14 May 2014, amending the effective date of registration to 1 April 2013. (The parties seem to be in agreement that the original letter of 12 March 2014 had stated the effective date of registration as 1 April 2014, though the copy of the letter of 12 March 2014 included in the bundle made available to the Tribunal contains the statement: *The Commissioners therefore consider that you should be registered with*

effect from 01/04/2013.) The Tribunal takes the copy of the letter on file as the amended version.

16. By letter dated 27 May 2014, the appellant's accountant requested an independent review. This letter is not included in the bundle of documents, but is referred to in HMRC's Statement of Case, which notes the letter as advising the following:

- (a) That the appellant breach of VAT threshold in February 2013 was temporary due to a job overrunning;
- (b) That the turnover to 5 April 2014 did not exceed £75,000;
- (c) That the appellant had decided to cease trading from 30 June 2014.

17. On the Notice of Appeal submitted by the accountant and signed by the appellant (undated), the grounds of appeal outline the circumstances as related in earlier letters, with the last three paragraphs stating the following:

'We have submitted our client's tax return for the year ended 5 April 2014, showing turnover of £74,168, which proves he is operating below the VAT threshold.

Furthermore, our client has not had an income from 6 April 2014 to 31 May 2014 and has now ceased to trade as a sole trader.

We believe we have demonstrated to HMRC that our client did temporarily breach the VAT registration threshold but his income in the following 12 months do [sic] not exceed the threshold. He had followed the correct procedure by applying for exemption due to the circumstances outlined.'

HMRC's case

18. On 8 July 2014, the review decision was communicated by letter, and the decision to refuse exception was upheld for the following reasons:

- (a) That the Commissioners must take into account only those facts which would have been available at the time the threshold was breached and cannot consider information that became available later or with the benefit of hindsight.
- (b) The Commissioners must come to the decision that they believe would have been made at the time when the threshold was breached, which meant February 2013.
- (c) At the point that the breach arose in February 2013, this was part way through a contract which had already run for ten or eleven months.
- (d) The contract was being allowed to be extended until such time as the client took on new staff to carry out the services required and the company was in a position to terminate the appellant's contract.
- (e) Mr Renforth had advised that due to the circumstances, the contractual arrangement had no fixed scope or duration, and that he felt committed to see the job to the end.

(f) The onus is on the taxable person to provide compelling reasons as to why he could have forecast that his future turnover would fall below the relevant limits.

5 (g) The VAT Registration Service refused exception on the grounds that it could not be demonstrated that Mr Renforth was in control of the value or duration of the contract as it was based on client's needs.

19. In conclusion, the Commissioners' view was that Mr Renforth could not have predicted with any certainty when the contract would end, and therefore what his turnover would be in the coming twelve months at the point of breach in February
10 2013. For these reasons, the Commissioners were not satisfied that the value of Mr Renforth's taxable supplies in the period of one year beginning at the time he became liable to be registered would not exceed the deregistration threshold, in accordance with paragraph 1(3) Schedule 1 of VATA 1994.

The applicable legislation

15 20. From paragraph 1 of Schedule 1 to VATA, the relevant sub-paragraphs are:

'(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 –

20 (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 [£77,000]; or

25 (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 [£77,000].

...

30 (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 [£75,000].'

21. From paragraph 4 of Schedule 1 to VATA, the relevant sub-paragraphs are:

35 '(1) Subject to sub-paragraphs (2) below, 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 taxable supplies in the period of one year then beginning will not exceed [£75,000].

40 (2) A person shall not cease to be liable to be registered under this Schedule by virtue of sub-paragraph (1) above if the Commissioners are satisfied that the reason the value of his taxable supplies will not exceed [£75,000] in the period in question he will cease making taxable supplies, or will suspend making them for a period of 30 days or more.'

Discussion

22. In interpreting the legislative provision under paragraph 1(3) of Schedule 1 to VATA ('para 1(3)'), the Tribunal is bound by the judicial precedent from *Gray (trading as William Gray & Sons) v Commissioners of Customs and Excise* ('Gray'), a High Court (Chancery Division) decision by Ferris J in the year 2000. The first instance decision in *Nash v Commissioners of Customs and Excise* [1997] VAT 14944 is instructive in setting the relevant date against which the Commissioners are to take account of the set of circumstances as obtained for a para 1(3) decision.

23. A detailed discussion of the application of *Gray* and *Nash* has been set out in *Geoffrey Lane v HMRC* [2016] UKFTT 007 (TC) ('*Lane*') by Judge Poon. Parties are referred to *Lane* for the background analysis for the case law principles that inform the Tribunal's decision.

24. The case law principles relevant to this appeal are:

(1) The Commissioners make a para 1(3) decision with reference to a particular set of affairs existing at the relevant date, and that is the date when registration threshold is breached and triggers the liability to register for VAT.

(2) The Commissioners make a para 1(3) decision by looking forward and considering on a *prospective* basis whether or not they are satisfied that the value of the trader's taxable supplies for that period will not exceed the *deregistration* limit.

(3) The test which the Commissioners apply must be the *same test* and must use the *same facts* whenever they are asked to apply it. This is to preclude a *late* application of exception from obtaining an unfair advantage over a timely application by being able to provide facts as ascertained which would otherwise have been mere estimates.

(4) The legislation does not prescribe a set of criteria which, if satisfied, lead to a particular result. The legislation says that a certain conclusion will follow if the Commissioners are satisfied that a particular set of affairs exists. The Commissioners have discretion to take into account relevant factors in reaching a decision on exception that is in alignment with other provisions in the statute.

(5) The Tribunal can only interfere with the decision of the Commissioners if it is shown that the decision is one which no reasonable body of Commissioners could reach. The auxiliary verb 'can' connotes the curtailment of jurisdiction to only instances where the reasonableness test is not met.

35 *Determination of the relevant date*

25. Applying the first principle to the facts in the current appeal, the relevant date for the Commissioners' decision should be referential to January 2013, when the rolling turnover at £80,738 breached the mandatory registration threshold of £77,000 (see table under §10). The liability to register for VAT therefore arose in January 2013 for the appellant.

26. The Tribunal notes the oddity that both parties seem to have disregarded the first month of turnover from the rolling count in determining when the turnover threshold was first breached.

27. The appellant commenced trading in March 2012, and the basis for determining whether VAT registration threshold has been breached is on the basis of rolling twelve-month turnover from March 2012, which means the first month (March 2012) of turnover only drops out in the rolling count in the thirteenth month (March 2013) of trading. The rolling 12-month basis for VAT registration purpose means that the breach can take place any time within the rolling period.

28. In the appellant's case, the breach took place in January 2013, and the liability to register for VAT arose in January 2013. The date when registration should take effect is normally 30 days after the liability to register first arises in accordance with para 5(1) of Schedule 1 to VATA. By this reckoning, the date the appellant's VAT registration should take effect is from March 2013, and *not* April 2013.

29. The Tribunal reckons that the registration threshold was first breached in January 2013, which differs from the Commissioners' decision made referential to February 2013 as the date of breach. While noting the anomaly, the difference is in the taxpayer's favour, and the discrepancy of a month is not significant for the Tribunal to interfere with the basis of the Commissioners' decision.

The prospective basis to assess taxable supplies not exceeding de-registration limit

30. Applying the second principle, the onus of proof is on the appellant to satisfy the Commissioners that a set of circumstances as obtained at the time of breach meant that the turnover for the next 12 months from the time of breach would not exceed the *de-registration* limit then in force of £75,000.

31. On making a para 1(3) application, the trader has already breached the registration threshold, and is under the presumption that mandatory registration is to apply unless proven otherwise. The trader has the onus to rebut this presumption by redressing the bias towards registration and tilt the balance all the way to de-registration. The Commissioners' decision to grant exception is referential to the *de-registration* limit, and a para 1(3) decision is to be regarded as one akin to whether *de-registration* should otherwise be allowed.

32. From the information supplied to the Commissioners, and taking the breach as arising in February 2013 when the contract had been running for ten to eleven months, the Commissioners had regard that the contract had been allowed to extend with 'no fixed scope or duration', and the appellant was committed to seeing the job to the end until such time as new staff arrangement was in place to allow the contract to terminate.

33. The material fact was the uncertainty surrounding the scope and duration of the contract *as at February 2013*, which meant that the Commissioners could not be

satisfied that the prospective turnover for the one year beginning February 2013 would be within the de-registration limit of £75,000.

34. The appellant's representative submitted that the tax return filed for the year ended 5 April 2014 showed turnover of £74,168, '*which proves he is operating below the VAT threshold*'. The central tenet of this ground of appeal seems to suggest that the Commissioners' decision of refusal is incorrect as proven by actual turnover.

35. We reject this (first) ground of appeal for the following reasons:

(1) That the decision to grant exception is principally a judgment decision based on *foresight* of the likely turnover; it is not a decision to be ascribed correctness by being based on facts proven in hindsight.

(2) What the *actual* turnover for the relevant twelve months has no direct relevance on the reasonableness of a decision based on foresight; the Commissioners in this case would be reasonable even if the actual turnover for the relevant twelve months transpired to be within the de-registration limit.

(3) The Tribunal, nevertheless, would highlight that the relevant twelve months for a para 1(3) decision in this case should have been the twelve months from February 2013 to January 2014, since the correct month of breach was January 2013 as highlighted earlier. The actual turnover for these relevant twelve months stood at £92,052 and exceeded the £75,000 limit by a wide margin. (The turnover for the tax year to 5 April 2014 used by the appellant was not the relevant 12 months for the para 1(3) decision.)

The same test using the same facts

36. Notwithstanding the fact that Mr Renforth made the application in February 2014, when he knew by then that the contract had come to an end, and was able to inform the Commissioners that no turnover accrued from January to March 2014, the Commissioners had to make the para 1(3) decision based on what was ascertainable in February 2013, and *not* in February 2014 when the application was made.

37. The appellant was able to 'project' in February 2014 what would be the actual turnover for the year ended 5 April 2014 by virtue of having no turnover for the three months from January to March 2014. Furthermore, the actual turnover standing at £74,168 was below the £75,000 limit by a very tight margin.

38. Not only are these facts ascertained with hindsight which the Commissioners making a decision *as if* in February 2013 were not entitled to take into account, the facts also reflect the tight margin of the 'projected' turnover against the de-registration limit, and of the turnover only staying within the limit by virtue of a suspension of taxable supplies. The issues of tight margin and of suspension of supplies are both addressed in detail in *Lane* and the appellant is referred to *Lane* for the reasons why these issues support the reasonableness of the Commissioners' decision of refusal.

A para 1(3) decision needs to be in alignment with other provisions in VATA

39. The second ground of appeal is stated as: ‘our client has not had an income from 6 April 2014 to 31 May 2014 and has now ceased to trade as a sole trader.’

5 40. A para 1(3) decision is one akin to whether deregistration should apply, and the Commissioners are entitled to take into account the provision under para 4(2) that ‘*a person shall not cease to be liable to be registered ... if the Commissioners are satisfied that the reason the value of his taxable supplies will not exceed [£75,000] in the period in question he will cease making taxable supplies, or will suspend making them for a period of 30 days or more.*’

10 41. The relevance of para 4(2) provision in a para 1(3) decision is again covered in *Lane* where cessation of trade was advanced as a ground of appeal against the refusal of exception. That Mr Renforth was to cease trading from April 2014 was not a valid ground for removing his liability to become registered for VAT, which arose in January/February 2013, and ‘shall not cease to be liable to be registered’ just because
15 he would cease making taxable supplies.

42. The third ground of appeal is stated as: ‘We believe we have demonstrated to HMRC that our client did *temporarily* breach the VAT registration threshold but his income in the following 12 months do [sic] not exceed the threshold. He had followed *the correct procedure* by applying for exemption due to the circumstances outlined.’
20 (emphasis added)

43. The table of turnover at §10 shows that the appellant’s rolling turnover consistently breached the threshold in the 12 months from January 2013 all through to December 2013, which cannot be described as ‘temporarily’ under any terms.

44. Furthermore, the Tribunal has regard to sub-para 1(1)(b), which provides that
25 ‘*at any time, if ... there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed [the registration threshold]*’, the trader becomes liable to be registered.

45. By virtue of sub-para 1(1)(b), the appellant’s liability to become registered arose in December 2012 when his cumulative taxable turnover stood at £69,690 and
30 he would have ‘reasonable grounds for believing’ that the value of his taxable supplies in *the next 30 days* (ie: in January 2013) would exceed the registration threshold of £77,000 then in force.

46. A trader vigilant of his turnover threshold and mindful of his responsibility and liability to become registered under sub-para 1(1)(b) would have followed the correct
35 procedure by applying for registration to take effect from February 2013. He would have rendered VAT invoices to his customers with effect from 1 February 2013. Not only would the relevant output VAT on his supplies been returned timeously, he would also have protected the *net* value of the supplies he had been making since the breach of threshold – *that* would have been the correct procedure.

47. Depending on the contractual terms and business protocol, the appellant might be able to render VAT only invoices to his customers for the supplies he made when he should have become VAT registered. The law does provide for a customer in receipt of VAT only invoices to recover the input VAT within four years of ‘the date
5 by which the return for the prescribed accounting period which the VAT became chargeable is required to be made’ (reg 29 of VAT Regulations SI 1995/2518).

48. If the arrears output VAT cannot be collected from the customers, then the appellant would be personally liable for the output VAT due, and under such circumstances the arrears output VAT will be assessed taking the turnover as VAT-
10 inclusive.

49. The Tribunal understands the refusal of exception may mean that the appellant could become personally liable for the output VAT after any reclaimable input VAT. However, that of itself is not a reason for the Tribunal to interfere with the Commissioners’ decision to refuse exception, which has been reasonably reached.

15 50. The appellant notified his liability to register for VAT in February 2014; the notification was therefore late by a year. The Tribunal notes that no penalty for late notification is being sought, and we do not intend to raise the matter of penalty.

Decision

20 51. For the reasons stated above, the Tribunal concludes that the Commissioners’ decision to refuse exception from registration of VAT in terms of paragraph 1(3) of Schedule 1 to VATA1994 has been reasonably reached.

52. The appeal is accordingly dismissed, and the Commissioners’ decision is confirmed.

25 53. 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)”
30 which accompanies and forms part of this decision notice.

**DR HEIDI POON
TRIBUNAL JUDGE**

35 **RELEASE DATE: 13 April 2016**