



TCO5089

Appeal number: TC/2015/03326

VAT – HMRC's refusal to register appellant for VAT - Definition of 'taxable person' - Finance Act 1972 and VAT Act 1994 - Compulsory Registration Threshold - Principal VAT Directive Article 286 - Whether United Kingdom enjoys a valid exemption or derogation in relation to the definition of taxable person? - Yes - Whether HMRC was entitled to refuse to register appellant? - Yes - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GEOTRADING EUROPE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MS REBECCA NEWNS**

Sitting in public at The Royal Courts of Justice, on 21 March 2016, and with written submissions from the Respondent on 31 March 2016 and Appellant on 13 April 2016.

Mr Bartłomiej Andrzejewski, a Director, for the Appellant

Dr Eric Metcalfe, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ('the Company') appeals against the Respondents' refusal of its application to be registered for VAT in the United Kingdom.

5 2. At the heart of this appeal, as stated and pursued before us, is the question whether domestic legislation entitled HMRC to refuse to register the appellant for VAT or whether that refusal was unlawful as contrary to the Principal VAT Directive ('PVD'): the Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax.

10 **The scope of the appeal**

3. For the following reasons, the scope of this appeal is a narrow one, focussing principally on law and not on fact:

15 (1) On 6 November 2015, the appellant wrote that it only intended to rely in support of its appeal on three documents - (i) the list of extant authorisations given to Member States to introduce special measures derogating from the normal VAT rules in accordance with Article 395 PVD (the so-called 'Derogations Schedule'); (ii) the Second Report from the Commission on the application of the common system of value added tax submitted in accordance with Article 34 of the Sixth Directive (77/388/EEC); and (iii) the judgment of
20 the Court of Justice in the case of *Valsts ienemumu dienests v Ablessio SIA C-527/11*;

(2) As such, the appellant did not seek to rely on any documents whatsoever which went to its trading activity, or the factual basis upon which its application to register had been refused;

25 (3) On 4 December 2015, the appellant confirmed that it did not intend to rely on any witnesses in support of its appeal;

(4) At the hearing, the appellant confirmed that it did not wish to challenge HMRC's evidence, contained in a witness statement from Officer Arnold, dated 30 November 2015. That witness statement was formally confirmed as Officer
30 Arnold's evidence-in-chief. Officer Arnold was not cross-examined (despite the Tribunal pointing out to the appellant's representative the effect of any failure to do so). For the avoidance of doubt, we accept the facts as stated by Officer Arnold;

(5) Thus, and as we understand it, the appellant neither challenges HMRC's
35 factual assessment that the appellant did not intend to make supplies, nor does the appellant challenge the process whereby HMRC satisfied itself that the Appellant should not be registered. We refer to Paragraph 15 of the appellant's Skeleton Argument, which says:

40 *"The Respondents refused to register the Appellant for VAT purposes claiming the Appellant failed to satisfy the Respondents that he intended*

to make supplies. As the Respondents' "satisfaction" is a discretionary matter, the Appellant has no ground to question that";

5 (6) Regardless of whether that concession as to HMRC's discretion is correct in principle or not, the present Appeal has been conducted and advanced by the appellant on the footing that it was.

4. We remind ourselves that this is an appeal by this particular taxpayer against a particular decision. The appellant does not challenge HMRC's decision that the appellant had failed to provide sufficient supporting evidence to prove its intention to trade. In the absence of any evidence from the appellant, we do not know the
10 appellant's present intentions or its trading activity. Nor do we know (and we cannot speculate) why the appellant, having been refused registration in November 2014, did not then seek either to provide HMRC with further information as to its intention or activity, or sought to put itself into a position where registration could not, on the
15 facts, be refused.

The Facts

5. We find the following facts:

- (1) The appellant was incorporated in England and Wales on 10 March 2014;
- (2) On 6 July 2014, HMRC's VAT Registration Service received the
20 appellant's application for registration for VAT (Form VAT1);
- (3) The appellant stated that its business activity was '*trading geodetic surveying equipment like GNSS receivers, total stations*'. It estimated a turnover of £300,000 in the following twelve months, with £100,000 worth of goods bought from other EU Member States, and £150,000 worth of goods sold to
25 other EU Member States in that period;
- (4) On 7 August 2014, HMRC asked the appellant for further information concerning its intention to make taxable supplies and sent a Form VAT 5;
- (5) On 5 September 2014, HMRC wrote that it was not able to proceed with the application for registration because it had not received the additional
30 information and documents which had been requested in its letter of 7 August 2014;
- (6) On 1 October 2014, the appellant requested a review. Mr B Andrzejewski said that he had already provided answers and some documents. He accepted that he had not provided all documents, but stated that it was not aware of any
35 law setting a VAT registration condition, for example, to make at least three supplies in order to be allowed to be registered for VAT purposes (this referred to one of the questions which had been asked);
- (7) That letter attached a partially completed VAT 5, and a typewritten 4 page appendix which gave further information. The Company had rented office space
40 for a year as part of its company formation package (which had cost £287.75). Its office was a mail-forwarding address, but 'pop-up' or 'virtual office' services were available if (as happened on 10 November 2014) a meeting space was

required. It had no storage space. It gave further information as to its intended trading activity. It did not have a landline. It had a Polish mobile phone number. It gave a Polish 'tax identification number'. It had no employees, and was not going to have any. Mr B Andrzejewski was not going to live or work or receive remuneration in the UK. As a director, he would be an office holder, and, as he understood it, ineligible to apply for an NI number by virtue of that status. The appellant declared that Mr B Andrzejewski lived and worked in Poland;

(8) On 10 November 2014 a meeting took place between Mr B Andrzejewski (by that point, the sole director) and Mr M Andrzejewski (described as a 'technical advisor'), Officers Arnold and Saul at the Company's registered address;

(9) The Officers' Note (dated 13 November 2014) records the meeting. It is exhibited to Officer Arnold's witness statement. Its accuracy was not challenged. Considerable detail was given as to the Company's intentions. However, no trading had commenced, so the Company could not produce any sales invoices, purchase invoices, or contracts. The Company had no UK landline, and no website. It had a UK bank account but no money in it. Mr B Andrzejewski described himself as a tax advisor in Poland;

(10) On 14 November 2014, HMRC refused the application, on the basis that the appellant had not provided sufficient supporting evidence of its intention to trade;

(11) On 14 December 2014, the appellant requested a review. That letter was headed with the Company's London address, but had been sent from Katowice in Poland. This request for a review was the first occasion on which the Appellant raised the argument that it was entitled to be registered under the PVD irrespective of any intention to trade. That letter advanced a number of other criticisms of HMRC;

(12) A review was conducted, and upheld the decision not to register. This outcome was communicated by way of HMRC's letter dated 7 January 2015. HMRC said that it would reconsider its decision if further specified information were sent;

(13) The appellant wrote under cover of an email dated 9 February 2015, attaching a letter (headed with the Company's London address, but sent from Nicosia, Cyprus) reiterating its argument as to the violation of PVD and the binding effect of the decision of the Court of Justice in *Valsts*;

(14) A second review upheld the original decision, communicated in a letter dated 16 April 2015.

The parties' cases

6. In summary, the appellant's case is as follows:

(1) The refusal to register was contrary to the requirements of the PVD;

(2) The United Kingdom enjoys no valid derogation in respect of the definition of taxable person;

(3) Therefore, and in the absence of such a valid derogation, the appellant's entitlement to be registered derives directly from Article 9 of the PVD;

5 (4) Its entitlement to be so registered is implied by two decisions of the European Court of Justice: *Valsts ienemumu dienests v Ablessio SIA* C-527/11 and *Kopalnia Odkrywkowa Polski Trawertyn itd. v Dyrektor Izby Skarbowej w Poznaniu* C-280/10.

7. Insofar as material, Article 9(1) PVD reads:

10 " 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services ... shall be regarded as 'economic activity'..."

8. In response to this appeal, HMRC originally sought to rely on Article 284(1) PVD arguing that it enshrined an exemption in relation to the applicable definition of 'taxable person'. Article 284(1) reads:

15 "*Member States which have exercised the option under Article 14 of Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax - of introducing exemptions or graduated tax relief may retain them, and the arrangements for*

20 *applying them, if they comply with the VAT rules.*"

9. As became apparent during the hearing, the text of Article 284(1) PVD did not self-evidently support HMRC's proposition. Moreover, if there were such an exemption, as argued, no instrument evidencing the same was placed before the Tribunal. When pressed on the point by the Tribunal, HMRC was not able to give

25 much by way of detail as to when the exemption upon which it sought to rely had been exercised, or in what terms.

10. The position was unsatisfactory. Accordingly, both parties were allowed to make further written submissions.

11. The inquisitorial approach adopted by the Tribunal was vindicated. HMRC's

30 further submissions departed from its original position. It was conceded that the United Kingdom's power to impose a compulsory registration threshold was not to be found in Article 284 PVD. It was instead contended that such a power was to be found in Article 286 PVD, which reads as follows:

35 "Member States which, at 17 May 1977, exempted taxable persons whose annual turnover was equal to or higher than the equivalent in national currency of 5,000 European units of account at the conversion rate on that date, may raise that ceiling in order to maintain the value of the exemption in real terms"

12. 17 May 1977 is a reference to Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax.

13. Both Articles 284 and 286 PVD are part of Section 2 of the PVD which is
5 headed 'Exemptions or graduated relief'.

14. HMRC argued that the relevant exemption in force in domestic legislation on 17 May 1977 was to be found in the *Finance Act 1972*, which contains the following:

Taxable persons

10 *4(1) A person who makes or intends to make taxable supplies is a taxable person while he is or is required to be registered under this Part of this Act*

4(2) Schedule 1 to this Act shall have effect with respect to the registration of persons under this Part of this Act.

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15. Schedule 1 is headed "Value Added Tax - Registration, Liability to be registered". It reads as follows:

"1. A person who makes taxable supplies but is not registered is liable to be registered -

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(a) after the end of any quarter, if the value of his taxable supplies in the period of one, two, three or four quarters then ending has exceeded the amount shown in the following Table as applicable to that period; or

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(b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of one year beginning at that or any later time will exceed £5,000;

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except that a person is not liable to be registered by virtue of sub-paragraph (a) above on the ground that the value of his taxable supplies in a period of less than a year has exceeded the amount applicable to that period if the Commissioners are satisfied that the value of his taxable supplies in that period and the remaining quarter or quarters of the year will not exceed £5,000"

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16. The VAT Act 1994 carries over the 1972 legislation in substantially identical terms.

17. Section 3(1) of the VAT Act 1994 provides that a taxable person is someone who is, or is required to be, VAT registered.

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18. Schedule 1 of the VAT Act 1994 deals with 'Registration in respect of taxable supplies'.

19. Paragraph 1 is 'liability to be registered' - that is, compulsory registration. It provides that a person who makes taxable supplies but is not registered under the Act becomes liable to be registered (a) if, at the end of any month, the value of his taxable supplies in the period of one year then ending has exceeded £82,000; or (b) if, at any
5 time, there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £82,000. £82,000 is the present threshold for compulsory registration. It has been incrementally increased from time to time.

20. Paragraph 9 of Schedule 1 of the VAT Act 1994 ('Entitlement to be registered')
10 deals with voluntary registration. It reads as follows:

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

15 *(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,

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

21. HMRC has contended throughout that the reliance on *Valsts* is thoroughly misplaced.

25 22. It argues that the appellant, having failed to satisfy HMRC that it met the requirements of Paragraph 9 of Schedule 1 of the 1994 Act, had no entitlement to be registered, and that the decision to refuse was therefore lawful.

23. In its response, the appellant made further submissions, which we have considered.

30 **Discussion**

24. The appellant was correct when it argued that Article 284(1) PVD was not related to the definition of taxable person. But, given HMRC's concession, the arguments about Article 284 PVD fall away.

35 25. Article 286 PVD is put in general terms, appropriate to a system intended to operate in all the Member States of the European Union. It recognises that certain Member States had already exempted certain persons from registration and it preserved that position.

40 26. The United Kingdom enjoyed, at the relevant date, and still enjoys, a valid derogation as to the definition of taxable person. That derogation first appeared in section 4 and Schedule 1 of the *Finance Act 1972* and now appears in section 3 and Schedule 1 of the *VAT Act 1994*.

27. Article 286 PVD permits the United Kingdom to do two, corresponding, things: (i) to restrict registration to large enterprises and (ii) to waive the requirement for VAT to be accounted for on taxable supplies below a specified threshold, even if the person making those supplies is a 'taxable person' under Article 9 PVD.

5 28. Given the existence of a valid derogation, domestic legislation prevails. In relation to compulsory registration, Schedule 1 Paragraph 1 VAT Act 1994 applies. In relation to voluntary registration, Schedule 1 Paragraph 9 VAT Act 1994 applies.

29. *Valsts ienemumu dienests v Ablessio SIA* C-527/11 (14 March 2013) was a request for a preliminary ruling in a case in which the Latvian tax authority (VID) had refused Ablessio's application for registration, ostensibly on the basis that it did not have 'the material, technical and financial capacity to carry out the declared economic activity, namely providing construction services'. Ablessio had no fixed assets, was not registered in the Register of Construction Companies, had not carried out any commercial activities, had a 4m2 office, and its only employee was the apparently
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15 unremunerated chairman of the board of directors.

30. The questions referred were:

"Is Directive 2006/112 ... to be interpreted as prohibiting refusal of the individual registration number that identifies a taxable person, on the basis that the holder of the taxable person's shares previously obtained on various occasions an individual number for other undertakings which did not carry out any real economic activity, and the shares of which were transferred by the holder to other persons immediately after obtaining the individual number?"
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Is Article 214, in conjunction with Article 273, to be interpreted as permitting the tax authority, before assigning the individual number, to verify the capacity of the taxable person to carry out the activity that is subject to tax, where this verification is intended to ensure correct collection of the tax and prevent tax evasion"
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31. The Second Chamber ruled as follows:

"Articles 213, 214 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the tax authority of a Member State may not refuse to assign a value added tax identification number to a company solely on the ground that, in the opinion of that authority, the company does not have at its disposal the material, technical and financial resources to carry out the economic activity declared, and that the owner of the shares in that company has already obtained, on various occasions, such an identification number for companies which never carried out any real economic activity, and the shares of which were transferred immediately after obtaining the individual number, where the tax authority concerned has not established, on the basis of objective factors, that there is sound
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evidence leading to the suspicion that the value added tax identification number assigned will be used fraudulently. It is for the referring court to assess whether that tax authority provided serious evidence of the existence of a risk of tax evasion in the case in the main proceedings."

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32. We do not derive assistance from *Valsts*. We do not consider that it supports the appellant's position. We do not consider that it can be implied from *Valsts* that the appellant in this case was entitled to be registered:

10 (1) *Valsts* is not, in our view, relevant to the question of whether the United Kingdom enjoys a valid derogation when it comes to the definition of taxable person;

(2) It is plain that the reference, decision, and ruling are all concerned with the materially different issue of the circumstances in which a national authority can properly refuse to register when fraud is suspected;

15 (3) The present appeal is not advanced as case of suspected fraud. It is a case of the appellant's failure to satisfy HMRC that it intended to trade;

(4) At its highest, the decision advances the proposition that, if a national tax authority wishes to refuse to register on the basis of suspected fraud, it has to have some evidence.

20 33. The Appellant also sought to rely the decision of the European Court in *Kopalnia Odkrywkowa Polski Trawertyn itd. v Dyrektor Izby Skarbowej w Poznaniu* C-280/10 (1 March 2012). We have considered the full report. We do not consider that it has any material bearing on this appeal, or on the decision which are asked to reach.

25 34. The Derogations Schedule relied upon by the appellant and appearing at pages 102 to 130 of the hearing bundle is not relevant and we do not derive any assistance from it:

(1) The Derogations Schedule is not a source of law;

(2) It is not part of the PVD;

30 (3) As it states, it is merely an 'indicative document';

(4) Whilst it is correct that the sections relating to the United Kingdom make no reference to PVD Article 9, nor do they refer to Part II PVD;

35 (5) The Derogations Schedule deals only with derogations under PVD Article 395. But, as the Guidance Notes to the Schedule (which appear on-line but which were not put before us by the appellant) make clear, the Schedule does not contain derogations - like the one in this case - which were special measures applied by Member States before 1 January 1977 notified to the Commission before 1 January 1978. Those fall under PVD Article 394 and thus do not appear in the Derogations Schedule.

40 35. We are driven to observe that the arguments advanced in this appeal about the existence and scope of any derogation assume an increasingly academic character

when it is recalled that a trader can voluntarily register if he is carrying on a business and intends to make taxable supplies, irrespective of the registration threshold: Schedule 1 Paragraph 9 VAT Act 1994. However, as described above, that was not the way in which the appeal was put, or pursued.

5 36. None of the grounds advanced by the appellant by way of challenge to the refusal to register succeed. In particular, the appellant's argument that the United Kingdom did not enjoy any valid derogation, and that the appellant was accordingly entitled to be registered under Article 9 PVD is rejected.

10 37. Although the appellant did not formally challenge HMRC's case when it came to the facts which had led HMRC to refuse to register it, we also find, for the avoidance of any doubt, that, given the facts of this case, the Appeal must also fail in that regard.

Decision

38. For the above reasons, the Appeal is dismissed.

15 39. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **DR CHRISTOPHER MCNALL**
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2016