TC01989

Appeal number TC/2009/15278

FIRST-TIER TRIBUNAL

FA 2001 – Aggregate Levy (NI) Tax Credit (Regulations) 2004 – FA 2004 – Aggregates Levy – failure to charge levy at the appropriate rate – ignorance of requirements not accepted as a defence – appeal dismissed

TYRONE SAND & GRAVEL LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC") **Respondents**

TRIBUNAL: IAN WILLIAM HUDDLESTON, TRIBUNAL JUDGE

Sitting in public in Belfast on 9 June 2011
Mr. James Puzey, BL, of Counsel
Mr. George Kelly, Director, on behalf of the Appellant

DECISION

Appeal

1. This appeal arises out of the Appellant's acknowledged failure to charge aggregate levy in relation to supplies made by it to customers in Northern Ireland pursuant to the Aggregate Levy Scheme which operates under the Finance Act 2001 and the Aggregate Levy (Northern Ireland) Tax Credit (Regulations) 2004.

Facts

2. The facts of the case are relatively straightforward. The Appellant was incorporated and registered for VAT in Northern Ireland with effect from the 1 March 2005, operating from trading premises at Old Bridge Road, Victoria Bridge, Strabane, BT82 9JR.

3. It is a limited company involved in the business of extracting sand and aggregate from a quarry site and then supplying it to traders both in Northern Ireland and in the Republic of Ireland.

4. It is accepted that the majority of supplies (circa 57%) are supplies of sand and aggregate which are exported to customers in the Republic of Ireland.

5. HMRC undertook a compliance visit to the Appellant's premises on the 1 November 2007. On that occasion, the particular HMRC Officer, Donagh Doran, noted that the Appellant had failed to register for the Aggregate Levy Scheme.

6. In his discussions with the Appellant it became clear that the Appellant had not been aware of the requirement to register and, more significantly for the purpose of this appeal, had not further been aware of the need to be included in the Aggregates Levy Credit Scheme ("ALCS") and/or to obtain an Aggregates Levy Credit Certificate ("ALCC").

7. The benefit of registering under and complying with the scheme means that it allows traders relief of up to 80% in respect of the aggregate levy which otherwise becomes payable on aggregate which is sold in Northern Ireland.

8. A further visit followed on the 8 July 2008, at which it was noted that the application for registration for the ALCS had still not been submitted, and that the Appellant continued charging at the rate of £4.20 per tonne for both sand and gravel.

9. Subject to that visit, the Appellant was issued with the relevant notice regarding aggregates levy by HMRC, and invited to complete an application for registration and submit the Appellant's first return under the scheme.

10. Following this second visit the Appellant submitted an application to the Department of the Environment for Northern Ireland seeking registration and the

issue of an Aggregate Levy Credit Certificate. The application itself was received on the 8 August 2008, but had an effective date of the 13 February 2008.

11. At that time, the Appellant also lodged its first return in respect of aggregates levy for the period from the 1 March 2005 to the 30 June 2008. That application was received on the 31 July 2008 and disclosed a liability of £288,404.80. In other words, the Appellant, by its own return, declared the liability to tax.

12. At this point it should be noted that HMRC accept that the Appellant was entitled to apply the 80% relief from the 13 February 2008 through to the period of 31 July 2008 and that therefore an adjustment to that figure is required.

13. For the period prior to 13 February 2008 it is HMRC's position that the Appellant was not eligible to apply the relief and that therefore aggregate levy should have been charged at the prevailing rates, firstly £1.60p per tonne for the period from the commencement of trading and after a change in rate, thereafter at the increased rate of £1.95p per tonne until it was eligible to apply the rebate.

14. Except for the adjustment referred to above in respect of the period from the 13 February 2008, HMRC's position is that the Appellant, on the foot of its first return, correctly calculated the aggregates levy which was due (but had not been accounted for) and that the liability, together with interest, is properly due and owing by the Appellant.

The Appellant's Case

15. Mr. George Kelly appeared on behalf of the Appellant and reiterated the Appellant's case as disclosed by a Notice of Appeal which I quote below:

"*Grounds for appeal are that the Company was aware that a levy had to be charged, but believed that it was at the rate of 32p per tonne, and that from the start of business all customers were charged this rate. When it came to their (ie. the Appellant's) attention that they should have registered for A.L. Credit Agreement, they did so and were approved right away. The Revenue is now requesting aggregate levy at the rate of £1.60 a tonne rate, even though the Company did not collect this level from customers. The company is being heavily penalised for an administrative error.*"

16. The grounds of appeal were amplified to some extent in a letter of the 9 October 2008 written on behalf of the Appellant by its accountants. In that letter, the Appellant's accountants advised that the directors had been operating on incorrect advice, which had suggested to them that the aggregate levy "*was to be abolished and that they should not register*".

17. On that basis the Company, when it commenced trading in Northern Ireland, had priced its charges per tonne inclusive of aggregate levy but at the rate of 32p per tonne.

18. Mr. Kelly in his evidence to the Tribunal emphasised the points that the Appellant had previously raised in correspondence, namely:

(1) that the directors had not previously traded in Northern Ireland, and were not familiar with the aggregate levy scheme;

(2) that they did not collect the higher level of duty and only priced in to their charging structure the levels which prevailed in the locality;

(3) that they contended that there was no overall loss of revenue, on the basis that if the Company had priced at the higher rate of levy, that sales would have moved to cheaper competitors in the area, with the consequent reduction in turnover for the Appellant, and therefore the levy would never have been collectible;

(4) that the imposition of the higher level of levy at this stage was likely to lead to the insolvency of the Company and threaten jobs; and finally

(5) that the Company and the quarry site would have qualified for the Aggregate Levy Scheme had the application been made as evidenced by the fact that approval was given immediately after the application was made.

19. In short, the Appellant's case can be condensed to the fact that it suggested, and Mr. Kelly's evidence confirmed, that it was initially ignorant of the need to register for the aggregate levy scheme, and that had they applied, they would have been eligible and that it should not now be penalised.

HMRC's Position

20. The HMRC position is quite clear – namely that the Appellant's own return is broadly correct (subject to the mathematical alterations I have mentioned) and that the tax is due.

Decision

21. Whilst this Tribunal can have sympathy with an Appellant it must, nonetheless, consider only the law which is at play.

22. Likewise, it is clearly settled law that this Tribunal cannot have regard to the consequences of its decisions in terms of the impact upon individual appellants.

23. The position is relatively straightforward.

24. The Finance Act 2001 (Sections 30A(5)(a) and (b)), the Aggregate Levy (Northern Ireland) Tax Credit (Regulations) 2004 and the Finance Act 2004 (Chapter 12, Part 6, Section 291(2)) govern the law which applies in this case.

25. Shortly put, those provisions require a trader involved in the sale of aggregates to levy the aggregate levy at the prevailing rate, unless and until it has registered and been approved by the Department of Environment for Northern Ireland under the

Aggregates Levy Credit Scheme. After registration, the trader is allowed to apply an 80% rebate in respect of the headline rate.

26. The Appellant, by its own evidence, incorporated in Northern Ireland on the 1 March 2005 and commenced supplies with effect from that date. Mr. Kelly, by his own evidence, admits that he relied on advice which subsequently proved to be incorrect.

27. He acted on that advice insofar as the Appellant's pricing model was to absorb the aggregates levy at the lower rate (ie. 32p) into the amount the Appellant charged per tonne.

28. The Appellant said it was not aware of the requirement to charge the higher rate levy, and we accept, as a matter of fact, that it did not do so.

29. Nonetheless, however, that the failure to do so does not absolve the taxpayer.

30. The reality is that the taxpayer failed to appraise itself of the requirements of the aggregate levy scheme, notwithstanding the fact that it incorporated in Northern Ireland specifically to operate within that sector.

31. It is quite clear that the information on the scheme is clearly available to all traders, either upon request from HMRC, or though online information which is supported by HMRC.

32. Simply put, the Appellant failed to undertake even that basic due diligence and cannot now seek to rely upon that failure as a defence to its actions.

33. As we have said, the law imposes upon traders the obligation to charge aggregate levy, save where, subsequent to registration, it is entitled to apply the abatement of 80%.

34. Where a trader fails to comply with the appropriate requirements then, whilst regrettable, it must abide by the consequences.

35. In the present circumstances, therefore, we find that the Appellant is liable for aggregates levy at the higher (unabated) rate for the period from the 1 March 2005 until the date upon which its registration became effective (ie. 13 February 2008). That a recalculation of the liability (ie. in respect of the period from the 13 February 2008 to the 31 July 2008) is required with an appropriate adjustment to the amounts returned.

36. Subject to that, however, we find the Appellant liable to account to HMRC for the aggregates levy attributable to that entire period.

37. It necessarily follows that the appeal is dismissed.

38. No order as to costs.

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

IAN WILLIAM HUDDLESTON

TRIBUNAL JUDGE

RELEASE DATE: 4 May 2012