[2016] UKFTT 34 (TC)

TC04827
Appeal number: TC/2014/06535

VAT – flat rate scheme – application for retrospective entry into scheme – whether HMRC decision to refuse backdating reasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JULIAN ANTHONY GOODMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT
JOHN ROBINSON

Sitting in public at Fox Court, London EC1 on 4 December 2015

The Appellant attended and represented himself in person

Mr Mark Ratcliff, HM Revenue and Customs for the Respondents

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DECISION

The Appeal

5 1. This is an appeal by Mr Goodman against a decision made by HMRC to refuse to allow him retrospective entry into the Flat Rate Scheme ("**FRS**") for VAT purposes. Mr Goodman applied to join the FRS on 6 May 2014, and argues that his entry into the FRS should be back-dated to 1 July 2012.

The Legislation

10 2. The legislative authority for the FRS is continued in section 26B of the Value Added Tax Act 1994 ("**VATA**"). Under section 26B(1):

> "The Commissioners may by regulations make provisions under which, where a taxable person so elects, the amount of his liability to VAT in respect of his relevant supplies in any prescribed accounting period shall be the appropriate percentage of his relevant
15 turnover for that period".

3. Section 26B(4) states:

> "The regulations may provide for persons to be eligible to participate in the flat-rate scheme only in such cases and subject to such conditions and exceptions as may be specified in, or determined by or under, the regulations."

20 4. The timing of entry into the FRS is dealt with by section 26B(8):

> "The regulations may make provisions enabling the Commissioners –
>
> (a) to authorise a person to participate in the flat-rate scheme with effect from :
>
> (i) a day before the date of his election to participate, or
>
> (ii) a day that is not earlier than that date but is before the date of the
25 authorisation;
>
> (b) to direct that a person shall cease to be a participant in the scheme with effect from a day before the date of the direction.
>
> The day mentioned in paragraph (a)(i) above may be a day before the date on which the regulations come into force."

30 5. The regulations making provision for the FRS are contained in Part VIIA of the Value Added Tax Regulations 1995 (SI 1995/2518) ("**the Regulations**"). Regulation 55B of the Regulations provides:

> "**55B Flat-rate scheme for small businesses:**
>
> (1) The Commissioners may, subject to the requirements of this Part, authorise a
35 taxable person to account for and pay VAT in respect of his relevant supplies in accordance with the scheme with effect from:
>
> (a) the beginning of his next prescribed accounting period after the date on which the Commissioners are notified of his desire to be so authorised, or
>
> (b) such earlier or later date as may be agreed between him and the
40 Commissioners.
>
> (2) The date with effect from which a person is so authorised shall be known as his start date.

(3) The Commissioners may refuse to so authorise a person if they consider it is necessary for the protection of the revenue that he is not so authorised."

6. Under section 83(1)(fza) VATA, an appeal may be made to the tribunal with respect to an HMRC decision refusing or withdrawing authorisation of a person for the FRS.

7. Where such an appeal is brought, section 84(4ZA) VATA provides that:

> "the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for the decision."

The Facts

8. Mr Goodman is a solicitor who was acting as a self-employed consultant from 1 July 2012 to 28 February 2014.

9. Mr Goodman registered for VAT from 1 July 2012. He applied to HMRC to join the FRS on 6 May 2014. His application included a request to enter into the Scheme retrospectively, with effect from 1 July 2012. This request was supported by a letter which explained as follows:

   (a) he had been VAT registered since 1 July 2012 but had previously been unaware of the FRS and so had not applied earlier to join it.

   (b) he calculated that his failure to apply earlier had resulted in his overpaying VAT of approximately £7,500.

   (c) he wished to defer payment of his VAT liability for the period 02/14 as this would be approximately the same amount as that overpayment.

   (d) he had been unemployed for two years before July 2012 and had suffered cash flow difficulties before and after that date.

   (e) he had ceased trading as a self-employed consultant and accepted an offer of partnership with a law firm from 1 March 2014.

   (f) he had paid all his VAT, including penalties for late payment, and could "ill afford to forgo the benefit of FRS."

10. HMRC issued a notice on 23 May 2014 authorising Mr Goodman to use the FRS with effect from 1 March 2014.

11. Mr Goodman challenged HMRC's refusal to allow him retrospective use of the FRS. On 7 August 2014 Mr Goodman asked HMRC to review their decision. HMRC gave the conclusions of that review on 19 September 2014. The review upheld HMRC's decision not to backdate the registration to July 2012, but varied the start date to allow the use of the FRS for the period 02/14, on the basis that no VAT return had been submitted for that period at the time when Mr Goodman made his application for the FRS on 6 May 2014.

The Appeal

12. On 30 November 2014 Mr Goodman appealed against HMRC's refusal to allow him retrospective admission to the FRS. The stated grounds for appeal were as follows:

"1.1 The basis of my challenge of HMRC's decision to deny my application to apply for the Flat Rate Scheme ("FRS") is set out in my letter dated 2 August 2014 addressed to the VAT Registration Service (marked for the attention of Hannah Ray).

HMRC's letter dated 19 September 2014 states that the Commissioners have a discretion to authorise that the FRS be applied from such earlier or later date as they may agree.

1.2 I have asked that they exercise that discretion so as to allow my FRS application to take effect from 1 June 2012 for the reasons that I have given to them. The justification by HMRC of its decision not to agree to such a request is, it would seem, based on what I believe to be a quite misplaced decision that FRS may only be used 'to *simplify your VAT'*.

This is a fundamentally incorrect analysis since an individual who takes advantage of the FRS is able to do so whether it simplifies his or her VAT return or not. The FRS operates for many as a means of reducing VAT payable and as such is a concession that is not in any way limited or circumscribed by reference to the '*simplicity'* or '*complexity'* of an individual's VAT account or affairs.

Whilst the FRS may make it simpler to complete returns, it is not a pre-requisite that a return must be complex before the FRS can be applied in order to simplify it and thereby allow to the individual the concession or reduction in VAT that might otherwise be payable or need to be accounted for.

The FRS scheme will of course inevitably only be used by those for whom the effect of its application will either be financially advantageous or neutral – regardless of complexity.

1.3 What is relevant is that there is no qualitative test that is necessary to determine whether one is entitled to the benefit of the FRS and no threshold of complexity that must be reached (indeed many with very simple VAT affairs take advantage of it) and so it is quite wrong to determine whether or not it will be allowed to a tax payer on the basis that it would not have had the benefit of simplifying his or her VAT affairs –whether before or after the event of filing the return – since the complexity or simplification is demonstrably irrelevant to an individual's ability to claim the benefit of FRS.

1.4 The issue of exercising discretion in this case should not therefore turn on the superimposed interpretation of the purpose of the FRS 'to simplify VAT returns'. The scheme is not available only in circumstances where complicated cases can benefit – that is not the case. Many simple accounts take the benefit of FRS.

1.5 The rulings referred to are applying an extraneous fact, rather than objectively deciding whether in the absence of the breached time limit for application the FRS would have been available. Given that the FRS is objectively available to me, as I state in my letter of 2 August 2014, it is '*manifestly unjust and does not reflect a fair and reasonable application of the rights of tax payers'* to deny this retrospective adjustment when without doubt by contrast a mistake in claiming an allowance that proved not to be due would subsequently and retrospectively (subject to the statute of limitations) be vigorously pursued by HMRC if it felt an additional sum was due to it.

The rulings referred to as the basis for not exercising discretion in my favour are applying an extraneous fact irrelevant to the breach of any time limit for application.

1.6 Notwithstanding that an allowance / reduction would be demonstrably due to me if registered for FRS from 1 June 2014, HMRC are trying to apply, as apparently other rulings have purported to do, a spurious argument regarding 'complexity'

which has no bearing on the matter. It is, in my view, a contrived basis for attempting to justify failure to exercise discretion in favour of the tax payer.

1.7 As a tax payer I am honest and open about my income and my tax liabilities are assessed accordingly. If I make a mistake in completing my tax return (whether income tax or VAT) and it is determined subsequently that I should pay more tax then that is what I will be required to do, and will do.

If in error I pay too much tax and this can subsequently re-calculated to be a lower figure then it is only proper and reasonable that HMRC should allow an adjustment in my favour as it would expect in converse circumstances an adjustment in its favour.

1.8 The calculations of the FRS amendments to VAT returns are objective, empirical and do not rely upon the '*purpose*' of the legislation which is claimed to be why the Commissioners are not able or willing to exercise their discretion.

I believe that HMRC should, as a matter of its approach to the taxation of individuals, take a supportive view of a taxpayer's position and not in applying its discretion seek to maximise its tax take on grounds of a technical matter.

The process of assessing tax should be even handed – this case is, in my opinion, not. I ask that discretion be exercised to allow me the benefit of the FRS from 1 June 2012 on the basis of a fair outcome for me as a taxpayer and rejection of the spurious denial on the grounds of a purported legislative intent that has no application to the availability of the FRS to VAT registered individuals."

Discussion and Decision

13. It was agreed that Mr Goodman would have fulfilled the relevant eligibility criteria in the Regulations for admission to the FRS from 1 July 2012. The only question was whether HMRC's decision not to allow admission from that date should be reversed by the Tribunal on the basis set out in section 84 (4ZA) VATA – namely that HMRC could not reasonably have been satisfied that there were grounds for that decision.

14. In considering the application of section 84 (4ZA), we adopted the approach summarised in the decision of this Tribunal in *Anycom Limited v HMRC* [2011] UKFTT 654 (TC) (at [4]):

> "In carrying out this review we should consider this matter according to the tests set out by the Court of Appeal in *John Dee Limited v Customs and Excise Commissioners* [1995] STC 941. The tribunal has to consider whether HMRC have acted in a way which no reasonable panel of commissioners could have acted or whether they have taken into account some irrelevant matter or have disregarded something to which they should have given weight. The tribunal may also have to consider whether HMRC have erred on a point of law."

15. One of the arguments raised by Mr Goodman can be dealt with at the outset. He argued that if he had underpaid VAT, then, subject to time limits, HMRC would pursue that underpayment, so surely the converse should apply when he had overpaid. Leaving aside that there is in any event no such principle in the legislation, this argument is misconceived because Mr Goodman did not "overpay" at all. He paid VAT on the normal basis, in the correct amounts. The fact that he might have paid less VAT if he had been admitted to the FRS at an earlier date did not mean that he had overpaid VAT under the normal rules.

16. It is quite clear that there is no duty on HMRC to permit retrospective admission to the FRS. Regulation 55B(1)(b) of the Regulations permits this, but any authorisation by HMRC for a taxpayer to use the FRS, from whatever start date, is permissive under section 55B(1). So, the issue before the Tribunal was whether HMRC could reasonably have been satisfied that in Mr Goodman's case there were grounds for their decision to refuse retrospective entry.

17. Having reviewed the legislation and relevant case law, and taken into account published guidance, we considered three related questions:

(a) did HMRC consider the relevant issues in reaching their decision?

(b) in reaching their decision did HMRC give due weight to the policy and purpose of the FRS?

(c) were there any exceptional circumstances which should or could have justified a deviation from HMRC's normal practice in relation to retrospective FRS entry?

18. Did HMRC consider the relevant issues in reaching their decisions? It was clear from the correspondence provided to the Tribunal that HMRC did consider the arguments raised by Mr Goodman and other relevant circumstances. The parties agreed that this was the case, but disagreed on whether HMRC's decision was the right one. Since HMRC did consider Mr Goodman's individual circumstances, decisions such as *CJ Anderson v Revenue & Customs* [2007] UKVAT V20255 and *Geoffrey Seeff T/A TPL Associates* [2013] UKFTT 335 (TC) are not in point.

19. Secondly, in reaching their decision, did HMRC give due weight to the policy and purpose of the FRS? HMRC's clear position is that since the policy of the FRS is to simplify VAT compliance for small businesses, retrospective entry will not be allowed for periods where the applicant has already calculated his VAT liability. This is summarised in the following selected extracts from VAT Notice 733 ("**Flat Rate Scheme for small businesses**"):

> "2.1 What is the Flat Rate Scheme?
>
> The Flat Rate Scheme is designed to help small businesses by taking some of the work out of recording VAT sales and purchases. If you use the scheme you apply a single percentage to your turnover in a VAT period. The result is the VAT you pay to HMRC.
>
> 2.2 How will it help me?
>
> The main benefit of the scheme is the time saved recording VAT on sales and purchases. This can also take some of the stress out of completing VAT returns at the quarter end. And because you can easily calculate how much VAT you owe on takings, it can help you to manage cash flow.
>
> 5.5 When can I start to use the scheme?
>
> We will notify you in writing if your application is successful. The letter will tell you the date you can start to use the scheme. This will normally be from the start of the VAT period following receipt of your application. If you request an earlier or later start date, we will consider all the facts including the timing of your application and your compliance record. We will not normally allow you to go back and use the scheme for periods for which you have already calculated your VAT liability."

20. HMRC's internal guidance expands on section 5.5 of VAT Notice 733 at FRS3300:

> "The policy is to refuse retrospection where the business has already calculated its VAT liability for the period(s) using a different accounting method (but see next bullet, below [exceptional circumstances]). The reason for this is that the FRS exists to simplify VAT accounting and record keeping for small businesses, so that they are able to spend less time on VAT. If allowing retrospection will enable the business to benefit in this way then you should consider granting the request …."

21. Mr Goodman argued that HMRC's views of the policy of the FRS, and of the implications of that policy for its discretion to allow retrospective entry, were wholly unjustified and wrong. There was no requirement in the FRS framework, express or implicit, for entry to be determined by reference to criteria such as simplicity or time-saving. By superimposing such policy, HMRC were wrongly and unfairly denying its application when, as in his case, the amount of VAT due could be reduced by retrospective admission to the FRS.

22. While we agree with Mr Goodman that there is no explicit requirement in the FRS for simplicity to be shown, it is clear that HMRC's view of the policy behind the FRS, and their own resultant policy, is justified. It is also appropriate for HMRC to take account of that policy in exercising its discretion. In the High Court decision in *Revenue and Customs Commissioners v Burke* [2011] STC 625, Henderson J commented as follows in relation to HMRC's policy on retrospective entry to the FRS (at [25]):

> "I comment that this appears to me to be an entirely rational policy, which reflects the simplification policy of the flat-rate scheme itself. If a taxpayer has already accounted for VAT in the past on the normal basis, and in accordance with the general law then in force, there is no way in which retrospective admission to the scheme can simplify the accounting exercise that he has already carried out. In such cases, the only likely motive for seeking retrospective entry is that the taxpayer would, in fact, have ended up paying less tax had he been a member of the scheme, and that is indeed the position so far as Mr Burke is concerned."

23. This passage was cited with approval by this tribunal in *Anycom Limited v HMRC* [2011] UKFTT 654 (TC) VAT. We agree with the approach of the tribunal in *Anycom* at [26]:

> "In our view, in particular following the judicial approval of the rationale of the policy of HMRC in *Burke*, it is clear that, in light of the simplification policy of the FRS, the fact that there has been an overpayment of tax under the normal regime, even where such an overpayment is large in comparison to turnover or profitability, can reasonably be regarded by HMRC in their assessment of an application for retrospective application of the scheme as of itself not giving rise to exceptional circumstances such that backdating should be permitted. Such an overpayment may have consequences for the business in question which themselves may constitute exceptional circumstances that will fall to be taken into account by HRMC, but in this case no such consequences were drawn to HMRC's attention."

24. That brings us to the third question we considered, namely whether there were exceptional circumstances in Mr Goodman's case to which HMRC failed to give due consideration in applying its general policy. HMRC's internal guidance quoted at [20] is expressed to be "subject to the next bullet". That bullet is as follows:

> "The proper exercise of the power to allow retrospection means that we should be prepared to recognise there may be exceptional circumstances where the policy described in the previous bullet should be set aside. In principle, such cases are likely to involve compassionate circumstances, or the survival of the business, but we have not identified to date any case where such circumstances justify a departure from the normal policy ….."

25. In this case, Mr Goodman did not present to HMRC, or to us, any circumstances of a compassionate nature. He did, however, argue that he could "ill afford" the additional VAT he had to pay as a result of being refused retrospective entry to the FRS. He estimated that additional VAT to be approximately £7,500. In the context of Mr Goodman's income as a consultant during that period, we consider that HMRC clearly acted reasonably in not considering this to give rise to an exceptional circumstance which would justify backdating. HMRC did take account of the financial consequences for Mr Goodman of their refusal to permit backdating, but did not consider that those consequences justified any deviation from their normal policy.

26. For the reasons given, we find that the Commissioners could reasonably have been satisfied that there were grounds for their decision. The appeal is dismissed.

Right to Apply for Permission to Appeal

27. 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.

THOMAS SCOTT

TRIBUNAL JUDGE
RELEASE DATE: 21 JANUARY 2016