



TC03374

Appeal number: TC/2012/10566

*VAT – flat rate scheme – application to backdate change in trade
classification refused by HMRC – whether decision reasonable – appeal
dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A K BRAY FOR GARDENS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JENNIFER BLEWITT
MRS JO NEILL**

Sitting in public at Bedford Square on 24 February 2014

The Appellant did not attend and was not represented.

Ms E. Carroll, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant did not attend and was not represented. The Notice of Appeal
5 dated 19 November 2012 indicated that the Appellant would not attend the hearing
and in those circumstances we were satisfied that it was in the interests of justice to
proceed in the Appellant's absence under Rule 33 of The Tribunal Procedure (First-
tier Tribunal) (Tax Chamber) Rules 2009.

2. The Appellant appeals against HMRC's decision dated 9 October 2012 to refuse
10 the Appellant's application for retrospective use of a different trade sector within the
flat rate scheme. The issue for us to determine in this appeal is whether there were
reasonable grounds for that decision.

Legislation

3. Section 26B of the Value Added Tax Act 1994 ("VATA") provides:

15 “(1) The Commissioners (HMRC) may by regulations make provision
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
turnover for that period.

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(6) The regulations may

(a) provide for the appropriate percentage to be determined by
reference to the category of business that a person is expected, on
reasonable grounds, to carry on in a particular period.”

25 4. Regulation 55H of the Value Added Tax Regulations 1995 (“1995
Regulations”) provides:

30 “(1) The appropriate percentage to be applied by a flat-rate trader for
any prescribed accounting period, or part of a prescribed accounting
period (as the case may be), shall be determined in accordance with this
regulation and regulations 55JB and 55K.

(2) For any prescribed accounting period

35 (a) beginning with a relevant date, the appropriate percentage shall be
that specified in the Table for the category of business that he is
expected, at the relevant date, on reasonable grounds, to carry on in
that period.”

5. Regulation 55K of the 1995 Regulations provides:

40 “(1) Where, at a relevant date, a flat-rate trader is expected, on
reasonable grounds, to carry on business in more than one category in
the period concerned, paragraph (3) below shall apply.

.....

(3) He shall be regarded as being expected, on reasonable grounds, to carry on that category of business which is expected, on reasonable grounds, to be his main business activity in that period.”

6. Section 83 of VATA provides:

- 5 “(1) Subject to sections 83G and 84, an appeal shall lie to the tribunals with respect to any of the following matters
- (fza) a decision of [HMRC].....
- (ii) as to the appropriate percentage or percentages (within the meaning of that section) applicable in a person's case”

10 7. Section 84 of VATA provides:

- “(4ZA) Where an appeal is brought
- (a), against such a decision as is mentioned in [section 83(1)(fza)], or
- (b) to the extent that it is based on such a decision, against an assessment,
- 15 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.”

Facts

20 8. Mr Bray trading as A K Bray for Gardens registered for VAT as a sole proprietor with effect from 1 October 2001. The Appellant was incorporated on 23 December 2002 and took over the VAT registration number previously allocated to Mr Bray from 5 April 2003.

9. On 31 March 2004 the Appellant applied to join the flat rate scheme with effect from 1 March 2004. The application was accepted by HMRC.

25 10. In the application the Appellant declared its main business activity as “agricultural services” with the appropriate flat rate scheme percentage of 7.5.

11. In April and May 2007 the Appellant’s then representative notified HMRC of an output tax under-declaration which had come to light. A letter from the Appellant’s representative, W Fowles & Co Chartered Accountants, dated 2 April 2007 made

30 reference to the fact that “*our client joined the VAT flat rate scheme on 1 March 2004 and pays VAT at 7.5% of his turnover since that date.*”

12. HMRC visited the Appellant on 5 October 2007. The Appellant and his accountant were both present at the meeting and the visiting HMRC officer recorded in respect of the flat rate scheme: “*checked treatment of scheme and percentages*

35 *applied all periods noting no irregularities.*”

13. On 6 September 2012 the Appellant’s new representative, Steve Faure & Co, applied to HMRC to change the flat rate scheme trade sector to “general building or

construction services” at a rate of 9.5%. The representative also requested that the change be backdated to the date of entry onto the flat rate scheme.

14. It was submitted on behalf of the Appellant that HMRC had allocated the incorrect trade sector category as 90% of its work related to building driveways, building walls and laying bases for buildings.

15. On 9 October 2012 HMRC Officer Wolfe notified the Appellant that the application to change trade sector had been accepted with effect from 1 August 2012. The application to backdate the change had been refused; a decision which was upheld by HMRC following a review.

10 *The Appellant’s Case*

16. Although the Appellant did not attend the hearing, we took into account all of its submissions contained within the Notice of Appeal and various letters of correspondence which were provided to us. The main grounds can be summarised as follows:

- 15 • The business’ main work is laying driveways and brick walls;
- Placing the Appellant in the category of agricultural services was not just wrong but the opposite of the work carried out by the Appellant;
- HMRC need Form VAT98 “Flat Rate Scheme for Agriculture – application certificate” which was not completed by the Appellant. Had it been completed, HMRC would have refused the application and the correct trade category would have been allocated;
- 20 • HMRC was wrong to accept the Appellant into the agricultural flat rate scheme.

HMRC’s Case

17. Ms Carroll explained that the Appellant was sent a copy of Notice 733 “Flat Rate Scheme for Small Businesses” on 11 December 2003. The Flat Rate Scheme application form advises: “Use one of the groups from the Table in Notice 733.” The Appellant selected “agricultural services” from the table, which was accepted by HMRC. The Appellant was made aware of the available trade sector options from Notice 733 several months prior to making the application and it was the responsibility of the Appellant to choose an accurate trade classification. The guidance in Notice 733 makes clear (at paragraphs 4.1 and 4.2):

“The flat rate you use depends on the business sector that you belong in. All the sectors can be found at the link in paragraph 4.3. The correct sector is the one that most closely describes what your business will be doing in the coming year. Sections FRS7200 and FRS7300 of the Flat Rate Scheme Guidance show you which businesses we think belong in each sector.

We will not normally check your choice of sector when we process your application.

So if you have made a mistake you may pay too much tax or too little. Paying too little could mean that you are faced with an unexpected VAT bill at a later date.

5 *However, if we approve you to join the scheme, we will not change your choice of sector retrospectively as long as your choice was reasonable. It will be sensible to keep a record of why you chose your sector in case you need to show us that your choice was reasonable.*

Note: Some business activities can reasonably fit into more than one sector. So changing your sector does not automatically make your original choice unreasonable.”

10 18. The Appellant’s declared business activity is that of a landscape gardener, for which there is no defined category under the flat rate scheme. At the time the Appellant made the application it would not have been clear to HMRC that any other trade classification would have been more appropriate than that chosen by the Appellant. In those circumstances the use of the chosen trade sector, and the
15 acceptance of it by HMRC, was not unreasonable.

19. The Appellant’s contention that overall tax was overpaid is not a sufficient reason to authorise the retrospective use of a different trade sector.

20 20. The Appellant’s representative’s reference to the Appellant being registered under the Agricultural Flat Rate Scheme is incorrect. The Agricultural Flat Rate Scheme is wholly different to that under which the Appellant applied to be registered and relates only to farmers.

21. In the absence of any exceptional circumstances being put forward, HMRC’s decision was reasonable.

Decision

25 22. We carefully considered the information before us and the case of *Archibald & Co Ltd* [2010] UKFTT 21 (TC) cited by HMRC in support of its case. We agreed with and adopted the approach of Judge Barton in that case:

30 *“(19) The flat rate scheme was introduced in order to simplify the operation of VAT for the smaller trader; and a self assessment procedure was established for determining the appropriate trade sector. It is significant that neither the 1995 Regulations nor the VAT Notice 733 contains any detailed description of the various trades, and it is accordingly a matter of applying the ordinary meaning to each of the descriptions as they appear.*

35 *(26)Significantly, s84 of VATA restricts the power of this Tribunal to considering the reasonableness of HMRC’s decision... It is therefore not necessary for the Tribunal to determine what was the “correct” trade sector for the Appellants when application was made to enter the flat rate scheme, or indeed whether the revised category is now “correct”...*

5 (27) ...*The legislation relating to the flat rate scheme does not place any obligation on HMRC to backdate any change of category nor is there any provision whereby a taxpayer can insist on having a change backdated. The question of backdating ordinarily seems to have arisen when the change of category is adverse to the taxpayer's interest...*"

10 23. We found as a fact that responsibility lay with the Appellant, who had first hand knowledge of its business, to decide which trade sector was most appropriate. We noted that the Appellant had, at least for part of the time during which it was registered under the scheme, professional representatives from whom it could and may have sought advice.

15 24. We considered the note of the visit by HMRC to the Appellant in 2007. We noted the comments of Judge Barton at paragraph 20 of *Archibald* that "*In the opinion of the Tribunal, there was no duty on HMRC to advise...*" We also noted that it was unclear from the visit report whether any advice was sought by the Appellant on the issue or whether the HMRC officer made any enquiries. We concluded that there was insufficient information contained in the visit report to assist us in determining this appeal.

20 25. We accepted HMRC's submission that the fact that tax may have been overpaid was not sufficient to warrant backdating the trade sector. We found that the Appellant's reference to the Agricultural Flat Rate Scheme was a misunderstanding; the scheme under which the Appellant was registered was wholly different and governed by different VAT Regulations and the Appellant's submissions in respect of VAT Form 98 were therefore irrelevant to our decision.

25 26. Guidance is set out in Notice 733, a copy of which we accepted was provided to the Appellant. There was no evidence before us as to why Mr Bray chose the category of agricultural services. There being no specific category for landscape gardeners, we concluded that the correct sector was a matter for the Appellant to consider and choose which it believed was most accurate. In those circumstances, there was no evidence before us upon which we could conclude that HMRC's decision was not
30 reasonable.

27. The appeal is dismissed.

35 28. 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.

**JENNIFER BLEWITT
TRIBUNAL JUDGE**

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RELEASE DATE: 28 February 2014