[2106] UKFTT 007 (TC)

TC04815

Appeal number: TC/2014/05702

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 v C & E Comrs *applied – sub-para 1(1)(b) and para 4(2) considered – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GEOFFREY LANE **Appellant**

- and -

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

TRIBUNAL: JUDGE DR HEIDI POON
BEVERLEY TANNER

Sitting in public at Tribunals Service, City Exchange, 11 Albion Street, Leeds on 21 July 2015

Mr John Fuszard, Sagars Accountants Ltd, for the Appellant

Mr Barry Sellers, presenting officer of HMRC, for the Respondents

DECISION

1. The appeal is against the decision dated 19 September 2014 by the Commissioners not to allow exception from VAT registration.

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').

The facts

3. The facts do not seem to be in dispute. From the oral evidence given by Mr Lane and the documents made available to the Tribunal, we find the following facts.

Background to VAT threshold being exceeded

4. Mr Lane is a consultant gynaecologist employed by the NHS. For his self-employment, Mr Lane makes exempt supplies through his private medical practice, and at the material time, his self-employment also included taxable supply of medical legal reports rendered in his capacity as an expert witness in connection with claims in personal injury or medical negligence.

5. The medical legal work was by instruction from firms of solicitors, acting either for a claimant or a defendant. There could be considerable time gap between enquiry that resulted in an instruction, and between instruction and the receipt of documents for report production. The time gap on average ranged from two to three months, but could be up to one year. Sometimes even a 'negative' enquiry (taken to mean the outcome of a potential claim not being hopeful) could still result in an instruction. The fees for each report seldom exceeded £2,500, and took around 10 hours in time.

6. Mr Lane's first instruction for medical legal report dates back to 1995. For some eighteen years, the medical legal work had stayed below the VAT registration threshold. In October 2013, the rolling turnover for the preceding 12 months stood at £83,270, and exceeded the registration threshold of £79,000 then in force by £4,270.

7. It was not until January 2014 when accounts were prepared for submission of Mr Lane's Self Assessment return for the year 2012-13 that it was noted by his accountant that the VAT threshold had been exceeded in October 2013.

8. By letter dated 6 March 2014, Mr Lane wrote to notify HMRC of the VAT threshold having been exceeded and to request exception from registration, on the basis that the projected turnover for the twelve months from 1 December 2013 would be around £65,000 and below the registration threshold. The letter states: 'The reason for this is I will be retiring from practice in August 2014.'

9. The notification of a liability to register for VAT, being made in March 2014, was late by four months. The appellant confirmed, and HMRC did not dispute, that any potential penalty imposable for the late notification has been mitigated to zero.

The decision by the Exceptions Team of the VAT Registration Service

10. By letter dated 8 April 2014, the Exceptions Team requested additional information to be supplied by Mr Lane through completing a questionnaire. Besides turnover projection, Mr Lane was also asked to confirm 'the date the decision was taken to retire', to which he replied as September 2013.

11. By letter dated 14 May 2014, the decision not to grant exception from VAT registration was communicated with the following reason:

> 'With that information, and evidence that you were trading below the VAT registration threshold in the past, we would normally allow exception from registration.
>
> But your predicted turnover for the next twelve months is only below the de-registration threshold because you don't intend to trade for the full twelve month period. In these circumstances, we don't allow exception.'

12. The reason given was taken by Mr Lane's accountant as a direct application of paragraph 4(2) of Schedule 1 to VATA, which provides 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 the registration threshold is that 'in the period in question he will cease making taxable supplies, or will suspend making them for a period of 30 days or more'.

13. On 22 May 2014, Mr Lane's accountant wrote on his behalf to request a review of the decision. The accountant clarified the position in respect of Mr Lane's retirement, stating that Mr Lane would still be continuing with his exempt medical work, and that it was only the taxable medical legal work he would be discontinuing.

14. Further, the accountant stated the relevant factors for consideration should be:

> '… paragraph 1(3) of Schedule 1 to the VAT Act 1994 only requires the Commissioners are satisfied that the value of supplies in the year commencing from the date on which he would otherwise have been liable to register will not exceed £77,000. In addition HMRC Manuals VATREG1900 does not indicate that cessation of taxable supplies in a continuing business would prevent exception.'

15. There was a reply dated 9 June 2014 by HMRC, which is not included in the bundle, but was referred to in the accountant's letter dated 7 July 2014, confirming that Mr Lane would wish the decision 'to be reviewed by an officer who has not been previously involved in this matter'.

16. The 7 July 2014 letter continues by stating why the decision of the Exceptions Team was made on invalid grounds:

> 'Mr Lane is not registered for VAT and therefore we do not agree that paragraph 4(2) can apply to him. In order to do so, the words "by virtue of sub-paragraph (1) above" [as used in paragraph 4(2)] would

have to be omitted or a reference to paragraph 1(3) of Schedule 1 have [*sic* has] to be included.

Our view is strengthened by the fact that VATDEREG09100 (VAT deregistration) specifically refers to paragraph 4(2) but VATREG19000 (Exception from registration) makes no reference to the paragraph.'

17. The letter of 7 July 2014 concludes by giving further information on the projected income of Mr Lane's medical legal work as follows:

'… Mr Lane will not cease making taxable supplies completely but will still undertake a very small amount of "run-off" work and occasional new instructions. Mr Lane's taxable income from 1 December 2013 to 30 June 2014 was £49,260. Mr Lane anticipates that his taxable income for the next 6 weeks will be approximately £5,000 and he estimates that it is unlikely to exceed £4,000 per month thereafter.

Mr Lane does understand that if his turnover does exceed the deregistration limits, he may be liable to account for VAT retrospectively.'

18. On 9 September 2014, the accountant supplied further information by email in response to request by HMRC of 5 September, giving details of actual turnover from May to August 2014, and estimated turnover for September and October 2014. A summary of the taxable turnover (actual and estimated) for the relevant period under consideration was produced by HMRC in a spread-sheet document, and supplied to the Tribunal during the hearing, excerpts of which are as follows:

Month	**Month's Total**	**Calendar total**	**Rolling 12 mth**	**Reg / Dereg limit**
Sept 13	9,150	n/a	74,420	79,000 & 77,000
Oct 13	11,500	n/a	83,270	79,000 & 77,000
Nov 13	8,050	n/a	81,180	79,000 & 77,000
Dec 13	5,859	5,859	82,339	79,000 & 77,000
Jan 14	8,320	14,179	85,659	79,000 & 77,000
Feb 14	4,800	18,979	88,659	79,000 & 77,000
Mar 14	8,472	27,451	93,781	79,000 & 77,000
Apr 14	11,829	39,280	96,373	81,000 & 79,000
May 14	6,740	46,020	95,333	81,000 & 79,000
Jun 14	3,240	49,260	96,183	81,000 & 79,000
Jul 14	7,120	56,380	87,281	81,000 & 79,000
Aug 14	5,225	61,605	82,131	81,000 & 79,000
Sep 14	Est. 3,800	65,405	72,981	81,000 & 79,000
Oct 14	Est. 2,700	68,105	61,481	81,000 & 79,000
Nov 14	Est. 4,000	72,105	53,431	81,000 & 79,000

The decision by the 'Commissioners'

19. The Exceptions Team's decision was reviewed by the Appeals and Reviews officer ('the Commissioners'), whose decision of 19 September 2014 upheld the decision to refuse exception from registration and is the decision under appeal.

20. The Commissioners gave three main reasons for the refusal, which can be referred to as:

(1) Effect of cessation of supplies on turnover estimation;

(2) Divergence of actual from forecast for complex demand led work;

(3) Greater degree of certainty required where margin is tight.

21. The first reason clarifies that the relevant consideration is not cessation *per se*, but the effect of cessation of taxable supplies on the estimated turnover:

> 'It is now agreed that the issue is not primarily one of cessation. ….
>
> It may well be that the Registration Section, having actual monthly figures as far as the end of April 2014, were concerned with a cessation of supplies would have a decisive effect on the estimation which might have been *made in October 2013*. But the statement in the letter of 6 March 2014 is simply that an intention not to proceed with medical reports was to be implemented at the end of August 2014. Doubtless it is necessary to give good notice of an intention of this sort.' (emphasis added)

22. In respect of the accuracy of forecast for turnover, the Commissioners reasoned:

> 'The letter [of 6 March 2014] also gives an estimated turnover of £65,035 for the twelve months from 1 December 2013 to November 2014. As it has transpired, the latest actual figures … show a 12 month turnover of the same period higher than the deregistration threshold. That they do so is not fatal to the application; the test is based on estimation and not on hindsight – but it does indicate that complex demand led work is not prone to lend itself to accurate forecasts.'

23. Finally, the Commissioners stressed the 'greater degree of certainty' that would be required for the exception application to be allowed in a case such as this, where the margin between the forward projection (ie: £65,000) and the deregistration threshold (£77,000) is tight. The Commissioners cited the example of the four months' turnover from May to August 2014, which was estimated at £13,000 against the actual of £22,325, and remarked that the example 'does not show that the estimate was badly made but simply that it was never likely to be able to take into account the unknown factors'.

24. By email on 24 September 2014, Mr Lane's accountant acknowledged the Commissioners' decision, and pointed out an error in a statement in the decision letter, which reads: 'As it has transpired, the latest actual figures … show a 12 month turnover for the same period higher than the deregistration threshold.' The accountant contended that 'the actual turnover (including estimates for very recent months) for

the period 1 December 2013 to 30 November 2014 amounts to only £72,105', and therefore below the deregistration threshold.

25. The Commissioners responded by email on the same day, acknowledging the error but asserted that the point did not affect the conclusion reached in respect of exception, 'for the matter must not be determined by a backward look'. The reasoning for the decision was reiterated in the following terms:

> 'It is the lack of long term precision, and the necessary limitations in having that precision, that suggest that the Commissioners could not reasonably have been satisfied at the material time, certainly not in projection over a whole year to come.'

The registration for VAT

26. The decision letter from the Exceptions Team dated 14 May 2014 concludes with the statement: 'We will therefore register you for VAT with effect from 1 December 2014'. The correct date should have been 1 December 2013, and it is common ground that if exception is not granted, 1 December 2013 should be the effective date of Mr Lane becoming VAT registered.

27. In evidence, Mr Lane confirmed that he did become VAT registered from 1 December 2014, and rendered VAT inclusive invoices for a brief period of 7weeks or so until he became de-registered on 22 January 2015.

28. The Tribunal notes that notwithstanding Mr Lane's decision to retire in August 2014 from his medical legal work, this side of his business did seem to continue at least into January 2015.

29. Mr Lane also confirmed that all his clients are VAT registered legal firms, and would have been able to recover output VAT charged on Mr Lane's invoices as their input VAT. However, due to the passage of time, he considered himself effectively 'time-barred' from rendering VAT only invoices to his clients for the year from 1 December 2013 to 30 November 2014.

30. The Tribunal notes that the law does provide for a customer in receipt of VAT only invoices to recover the input VAT within four years of 'the date 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). Depending on the contractual terms and business protocol, we accept Mr Lane's evidence that if the exception from registration is refused, he will be personally liable for the VAT due on his turnover for the year ended 30 November 2014. The arrears of output VAT due under such circumstances will be assessed taking the turnover as VAT-inclusive.

The applicable legislation

31. 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 –
>
> (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 [£79,000]; or
>
> (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 [£79,000].
>
> …
>
> (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 [£77,000].'

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

> '(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 [£77,000].
>
> (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 [£77,000] in the period in question he will cease making taxable supplies, or will suspend making them for a period of 30 days or more.'

The appellant's case

33. The appellant's case as stated in the Notice of Appeal dated 16 October 2014 is expressed in the following terms:

> 'In reaching a decision in relation to … Schedule 1 paragraph 1(3), the Commissioners should consider *all the relevant facts known at the time of the application* and are required to make a reasonable judgment on them. It is the case for the Appellant that the decision of the Commissioners to refuse exception in this case was not one that could have reached on a reasonable consideration of the facts.' (emphasis added)

34. The appellant contended that had the Commissioners taken into account the relevant facts, it would have led to the decision of granting exception. These facts are detailed in the Notice, and summarised as follows:

> (1) That the 12-month taxable turnover at 31 October 2014 was £83,270 and 'only marginally above the registration limit'. The review officer 'concedes'

that 'there will be future taxable supplies but their value will be markedly less than before'. A marked reduction in turnover must surely have been expected to have the effect of bringing the Appellant's future turnover below £77,000. On these facts alone the application should have been allowed.

(2) That a greater degree of certainty is needed to satisfy the Commissioners 'where there is a tight margin between the forward projection figure and the deregistration threshold' has no legal basis for the approach to be taken.

(3) That 'both parties agree that the application should be judged on the basis of *the known facts at the time of the application.*' The review officer has referred to actual turnover in an attempt to demonstrate that the Appellant's estimated turnover was unreliable. Contrary to the officer's view, 'a likely taxable turnover of £72,105 supports the accuracy of the Appellant's estimation [of £65,035] made at the time of the original application'. (emphasis added)

HMRC's case

35. When considering exception requests, 'the Commissioners must take into account *facts that would have been available at the time the threshold was breached*' and not information that becomes available after the date of breach.

36. The taxable turnover for the year to 31 October 2013 at £83,270 exceeded the de-registration threshold of £77,000 by £6,270; that was 7.5% of the total turnover, and HMRC contend that the amount is not marginal.

37. In respect of paragraph 4(2) of Schedule 1 to VATA, the application to the instant case from HMRC's perspective is that at the material time of the application for exception, the reason given for the reduction in turnover was that the appellant was ceasing to trade. The appellant would therefore remain liable to be registered, and the Commissioners were not satisfied that the turnover would fall below the threshold, 'by virtue of the fact that the only reason for this was that the appellant did not intend to trade for a full 12 month period due to his retirement part way through the year'. HMRC therefore maintain that their refusal on these grounds is in line with the provision under paragraph 4(2).

38. The Commissioners have acted reasonably in refusing the application for exception from registration for the reasons stated in the decision letter of 19 September 2014.

39. The onus of proof in this case is on the appellant as the taxable person, 'to provide compelling reasons as to why he forecasts (or could have forecast) that the future turnover will fall below the relevant limits'. The standard of proof is the civil standard; on the balance of probabilities, the appellant has not discharged the onus.

Discussion

40. 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.

41. The statute clearly states that there is only one basis for determining whether exception from registration is to be granted, and that is if 'the Commissioners *are satisfied* that the value of his taxable supplies in the period of one year *beginning at the time* at which, … [the trader] would become *liable to be registered* will not exceed [the deregistration limit]'.

The manner in which the Commissioners decide on exception

42. In respect of an exception decision made under para 1(3), 'two points stand out clearly' according to Ferris J. The first pertains to the manner or approach whereby a para 1(3) decision is to be reached:

> '[20] … First para 1(3) requires a decision to be made by the Commissioners. It does not prescribe a set of criteria which, if satisfied, lead to a particular result. It says that a certain conclusion will follow if the Commissioners are satisfied that a particular set of affairs exists. A VAT tribunal, or this court itself, 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.'

43. Central to a para 1(3) decision is whether the Commissioners *are satisfied* that a particular set of affairs exists. It is a judgment decision; the legislation does not prescribe a set of criteria to be satisfied. Instead, the Commissioners are given discretion to decide what factors are relevant to take into account in a particular case. This discretion, however, in the view of this Tribunal, is not to be exercised in isolation of other parts of the VATA, but is to be exercised within the confines of the VATA as a whole so that the Commissioners can arrive at a para 1(3) decision that is in alignment with other provisions in the statute.

44. As to the role of this Tribunal in a para 1(3) decision, it should refrain from interfering with a para 1(3) decision unless the decision can be shown to be unreasonable. As Ferris J puts it, 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.

The time frame in which an exception decision is made

45. The second principle in *Gray* concerns the time frame in which the Commissioners are to make a para 1(3) decision:

> '[21] Secondly, para 1(3) … deals with a position in which the trader informs the Commissioners that, during the twelve months down to the end of the preceding month, his taxable supplies exceeded the threshold *but submits that this was exceptional* and that the (slightly

> lower) threshold mentioned in para 1(3) will not be exceeded during the next twelve months.
>
> The Commissioners are to make their decision on that submission 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 threshold amount.' (emphasis added in italics with sub-paragraph division inserted)

46. The time perspective relevant for assessing the reasonableness of a para 1(3) decision is given further refinement in *Gray* by addressing two questions, namely:

(1) At what date should the Commissioners look at the position?
(2) What evidence is to be taken into account by the Commissioners?

47. The first question is of particular importance when the notification of the registration threshold having been exceeded is made *late*. In *Gray*, the appellant submitted that the decision exercise should not be undertaken until the trader notifies that he has become liable to be registered, subject to para 1(3). Ferris J rejected such submission, and stated that a para 1(3) decision is to be taken with reference to a particular set of affairs existing at the *relevant* date, which is '*the date from which registration would otherwise take effect*'. The date of notification should have no direct bearing on the time perspective in making a para 1(3) decision, so as to avoid unequal treatment to those who notify on time:

> '[23] … If it were otherwise a trader who notifies late might secure an advantage, in the form of an ability to show a higher degree of probability that the threshold would not be crossed, than a trader who complies with his obligations….'

48. The answer to the second question follows on from the first – in that having determined the relevant date should be the date from which the registration would otherwise take effect, the evidence relevant to a para 1(3) decision is that which was available at the relevant date. Ferris J cited the decision in *Nash v Commissioners of Customs and Excise* [1997] VAT 14944 at [26] ('*Nash*') with approval:

> 'Paragraph [1(3)] is perfectly clear that the Commissioners are required to make a forward judgment. The judgment is to be exercised at the *date of the transfer*. It cannot be right that a taxpayer, by failing to comply with his legal obligations, can put himself into an advantageous position by expecting the Commissioners to take into account matters which they would not have been able to take into account had they been making their judgment at the correct time. The test which the Commissioners apply *must be the same test and must use the same facts* whenever they are asked to apply it.' (emphasis added)

49. The reference to 'the date of transfer' in the cited paragraph in *Nash* is attributable to the fact that *Nash* was a case where the business had been transferred and the liability to register arose under sub-para 1(2)(a), while *Gray* (as is the instant case), the liability to register arose under sub-para 1(1)(a). Ferris J was 'in substantial

agreement with the whole of what is said' in the cited passage in *Nash*; it was not related why the agreement was only 'substantial' and not 'total', but it would seem that the judgment in *Gray* differs from *Nash* in the setting of the *relevant* date for a para 1(3) decision. In *Gray*, the relevant date is set as '*the date from which registration would otherwise take effect*', whereas in *Nash*, the relevant date is *the date the liability arose*.

50. Ferris J sets out his reason for setting the relevant date for a para 1(3) decision to the date from which registration would otherwise take effect at [22] in *Gray*: 'In my judgment the exercise must be carried out at the same date in each case, namely at the date when registration would have effect in the absence of a decision under para 1(3) which is favourable to the taxpayer.'

51. In the hierarchy of precedent, *Gray* being a High Court decision binds this Tribunal whereas *Nash*, being a VAT Tribunal decision, is persuasive but not binding. By judicial precedent, this Tribunal should follow *Gray* in the setting of the relevant date. However, we consider the *ratio* of the decision is that there should only be *one* relevant date to all para 1(3) decisions, regardless when the decision is made; and the Tribunal is bound by this *ratio*. The setting of the relevant date to the date from which registration would otherwise take effect, we consider, is made in *obiter*. It is important for the Tribunal to examine the difference between the two settings of the relevant date in *Gray* and *Nash*, and to decide which setting accords more closely with the intention of the statute.

A statutory construction of the relevant date

52. Parsing the sentence under para 1(3), the constituent parts are:

(1) A person does not become liable to be registered

(2) by virtue of sub-paragraph (1)(a) or (2)(a) above

(3) if the Commissioners are satisfied

(4) that the value of his taxable supplies in the period of one year

(5) beginning at the time at which … *he would become liable to be registered* (emphasis added)

(6) will not exceed [the deregistration threshold].

Constituent part (5) contains the time reference for a para 1(3) decision, and the phrase 'he would become liable to be registered' is referential to either sub-para 1(1)(a) or 1(2)(a) under constituent part (2). For the purpose of the present appeal, it is sub-para 1(1)(a) liability that applies.

53. The liability to register under sub-para 1(1)(a) arises when a person who makes taxable supplies but is not registered *becomes liable to be registered* –

> '(a) at the end of any month, if … the value of his taxable supplies in the period of one year then ending has exceeded [the registration threshold], …'

Applying this definition to Mr Lane's case, it was at the end of October 2013 when his cumulative twelve-month turnover exceeded the registration threshold, and when his liability to register for VAT under sub-para 1(1)(a) first arose.

54. If one is to apply the relevant date as 'the date from which registration would otherwise take effect' as determined in *Gray*, then in Mr Lane's case, it would be 1 December 2013, being 30 days after the registration threshold was exceeded, and was the date his registration would otherwise take effect.

55. There is no direct reference in para 1(3) to the date when registration would otherwise take effect, which is normally 30 days after the liability to register first arises (para 5(1) of Schedule 1 to VATA). In his judgment. Ferris J has focused on the date '*the exercise must be carried out*' for a para 1(3) decision, and fixed it as '*the date when registration would have effect*'. In doing so, Ferris J has focused on the earliest possible date *in practice* when the Commissioners could have carried out the exercise. However, the Tribunal is of the view that the Commissioners, even when carrying out the exercise at the earliest possible date, should still have considered factors as obtained referential to the time of the registration threshold being breached and the liability to register being triggered, and not to the later date when the registration would have effect.

56. The Tribunal concludes that para 1(3) should be construed with reference to sub-para 1(1)(a), and the Commissioners' decision is to be made referential to the time when the trader *would become liable to be registered*. We therefore adopt the approach in *Nash* in respect of the setting of the relevant date for a para 1(3) decision. In Mr Lane's case, the liability to register arose at the end of October 2013 and is the relevant date for the Commissioners' para 1(3) decision, and is indeed the date used by the Commissioners in his decision letter, and in HMRC's Statement of Case.

Applying case law principles to the instant appeal

57. The relevant principles from the case law precedent to the instant appeal are:

(1) The legislation is not prescriptive as regards the factors the Commissioners are to take into account in reaching a decision on exception.

(2) The Commissioners make a para 1(3) decision with reference to a particular set of affairs existing at the relevant date, which is the date when the liability to register for VAT arises.

(3) 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.

(4) The test which the Commissioners apply must be the same test and must use the same facts whenever they are asked to apply it.

(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.

58. The appellant's grounds of appeal state that 'the Commissioners should consider all the relevant facts *known at the time of the application*'; this premise has to be rejected outright as incorrect. There can only be one time frame for a para 1(3) decision, and it is referential to the time when the liability to register for VAT first arises. That there should only be one referential time frame is to ensure that an application will be determined in the same manner, whenever it is made. It is to preclude a *late* application from obtaining an unfair advantage over a timely application by being able to provide facts as ascertained which would otherwise have been mere estimates.

59. The Tribunal also rejects the appellant's claim that 'both parties agree that the application should be judged on the basis of *the known facts at the time of the application*'. There is no such agreement between the parties, and in fact, contrary to the claim, HMRC's Statement of Case states in no uncertain terms that 'the Commissioners must take into account *facts that would have been available at the time the threshold was breached*'; that is, at the end of October 2013.

60. As regards the contention that there is no legal basis for the Commissioners to require a greater degree of certainty to be satisfied where the margin is tight between the projected turnover and the deregistration threshold, the Tribunal cannot see the validity of the argument in the present instance. If by 'no legal basis', the appellant means that the legislation does not prescribe such requirement, then the Commissioners have no legal basis to make any requirement whatsoever, given that the statute is silent in setting the criteria for reaching a para 1(3) decision. If by 'no legal basis', the appellant means no case law precedent, then whether the requirement has any legal basis is to be judged by the standard of reasonableness.

61. The Commissioners' decision of 19 September 2014, which considered the relevant facts as available in October 2013 (not at any later date), had to refrain from taking into account any information that transpired between October 2013 and September 2014. Despite the passage of nearly a full year, the Commissioners should not base a para 1(3) decision on any ascertained facts subsequent to October 2013.

62. It was reasonable for the Commissioners to conclude that the margin between the estimated turnover of £65,000 and the deregistration threshold of £77,000 was tight, and that a greater degree of certainty for the projected turnover would have to exist, and that such certainty in projection was difficult to establish for 'complex demand led work'. We heard in evidence how the time gap could range from a few months to a year between enquiry and instruction, and how a negative enquiry could still result in an instruction. It was entirely reasonable for the Commissioners to decide in this case, taking the relevant facts *in the round*, with available information as at October 2013, to conclude that a higher degree of certainty in the projected turnover as at October 2013 was required for exception to be granted.

63. The central tenet in the submitted grounds of appeal, considered as a whole, seems to suggest that the Commissioners' decision of refusal is incorrect as demonstrated by the figures of actual turnover subsequently. This might have stemmed from the premise entertained by the appellant that the valid temporal point of making a para 1(3) decision was referential to the known facts at the time the application was made, which is a false premise as rejected earlier.

64. One must not conflate the reasonableness of a decision based on foresight with the correctness of a decision based on hindsight; to do so will be to require the decision-maker to divine the future. A judgment decision as in this case can be ascribed reasonableness, and is distinct from a fact-based decision that can be ascribed correctness.

65. The Tribunal can only interfere with the Commissioners' decision if it is shown that the decision is one which no reasonable body of Commissioner could reach. We are of the view that the Commissioners' decision was reasonably reached, and there is no cause for the Tribunal to interfere. For completeness, however, we will address the issue of onus in respect of a para 1(3) decision in its legislative context.

The legislative context for interpreting para 1(3)

66. The objection to para 4(2) having any bearing on an exception application had been given much coverage in the appellant's correspondence with the Commissioners. Even though in the end, the objection to para 4(2) being applicable is not an express ground of appeal, HMRC have asserted its relevance to the refusal of exception. Whether para 4(2) should have any bearing on a para 1(3) decision is a valid consideration that merits clarification, and the Tribunal will examine the relevance of para 4(2) in a para 1(3) decision in the legislative context of Schedule 1 to VATA.

67. Paragraph 1(3) sits firmly within paragraph 1 of Schedule 1 to VATA, which concerns principally, as the heading suggests, '*Liability to be registered*'. In Mr Lane's case, a para 1(3) decision is to be made in the context of his taxable turnover having been breached, and mandatory registration under sub-para1(1)(a) follows as a matter of fact, subject to para 1(3) exception being granted.

68. In other words, a para 1(3) decision is made in a situation where the balance has already been tilted towards enforcing registration on account of the threshold having been breached. The default position upon such a breach is that registration is mandatory – *that* is the prevailing position. The exception from registration, by its very name, can only be granted as an *exception*.

69. The passive voice in the legislative wording – 'the Commissioners *are satisfied*' – places the onus squarely on the taxpayer. In making a para 1(3) application, the trader does not start with the balance sitting at neutral, but has the onus of redressing the bias already in place towards mandatory registration all the way to tilting the balance towards exception. There is a presumption of mandatory registration that an applicant for a para 1(3) exception has the burden to rebut.

70. Furthermore, it is significant that para 1(3) uses the 'deregistration threshold' not being exceeded as the reference figure for the Commissioners' decision. By using the deregistration rather than the registration threshold, it reinforces the context in which a para 1(3) decision is to be made; that is, under the presumption of mandatory registration and the Commissioners' decision is one akin to whether *deregistration* should otherwise apply.

71. The burden is on the taxpayer to provide compelling reasons to satisfy the Commissioners why mandatory registration should not prevail. If the only reason afforded by the applicant on applying for para 1(3) exception is that mandatory registration should be set aside because he has decided to retire, and therefore does not anticipate that there will be twelve months of turnover from the month of breach for the deregistration threshold to be exceeded, the Commissioners are fully entitled to consider para 4(2) as applicable and that mandatory registration should prevail.

72. We therefore reject the appellant's reasoning that para 4(2) only applies to a trader who is *already* VAT registered, and that it cannot have any bearing on a para 1(3) decision on a trader who is *liable* to be registered. We reject this reasoning because at the point of an exception application being made, the applicant is under the presumption in law that his registration is mandatory unless proven otherwise. As stated earlier, in determining whether exception is to be allowed, the Commissioners are making the decision referential to the *deregistration limit*. An exception decision is a decision akin to whether *deregistration* should be allowed; it follows therefore that the Commissioners are fully entitled to apply para 4(2) reasoning in making a para 1(3) decision.

73. Furthermore, the Commissioners are given wide discretion to determine the factors in a particular case as relevant for deciding whether exception should be granted, and there is no prohibitive provision that para 1(3) should not take account of other parts of Schedule 1 to VATA (such as para 4(2)) in order to achieve consistency and fairness for traders in similar circumstances.

74. Apart from para 4(2), the Tribunal has regard also to the provision under sub-para 1(1)(b), which states that '*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.

75. Though neither party has made any reference to sub-para 1(1)(b), the Tribunal is of the view that a trader with the same set of trading figures (see table at §18) as Mr Lane, would have become liable to be registered for VAT by the end of September 2013 by virtue of sub-para 1(1)(b), when his cumulative annual taxable turnover stood at £74,420. Such a trader would have 'reasonable grounds for believing' that the value of his taxable supplies in *the next 30 days* (ie: in October 2013) would exceed the registration threshold of £79,000 then in force.

76. Indeed, such a trader would continue to be liable to register under sub-para 1(1)(b) for the eleven months from October 2013 to August 2013 inclusive, when his cumulative annual turnover was consistently over the registration threshold by as

much as £15,373 at one point, (that was in April 2014 when the registration threshold was also raised to £81,000). A trader considering his liability to register under the terms of sub-para 1(1)(b) would not have availed himself of the option to apply for exception from registration, because para 1(3) makes express reference only to liability to register under sub-para 1(1)(a) or 1(2)(a), but not to sub-para 1(1)(b).

77. Suppose such a trader, on notifying his liability to register under sub-para 1(1)(b) in October 2013 became VAT registered in November 2013, also decided to retire in August 2014, he would be expressly bound by para 4(2) and 'shall not cease to be liable to be registered' just because he would cease making taxable supplies.

78. Viewed in this light, the Commissioners' decision to refuse exception in Mr Lane's case has achieved a consistent and fair outcome when compared with the treatment under the law of this supposed trader with an identical turnover profile but vigilant of his liability to register under sub-para 1(1)(b). The *forward-looking* approach whereby the supposed trader notifies a liability to register for VAT under sub-para 1(1)(b) applies equally in a para 1(3) decision; the *prospective* basis is an underlying theme giving coherence to the legislative design of Schedule 1 as a whole.

79. We heard Mr Lane's predicament that should his appeal fail, he would have to make good the output VAT; that the passage of time in pursuing a review and this appeal has left an unbridgeable time gap, which bars him from seeking the collection from his clients of any output VAT chargeable on his taxable supplies.

80. In his accountant's letter of 7 July 2014 regarding his exception application, reference was made of Mr Lane being aware that if his turnover were to exceed the deregistration limit, he would be liable to account for VAT retrospectively. This, however, is not the only scenario where reliance on exception from registration can transpire to be misplaced to the financial detriment of the trader.

81. The risk of such reliance is associated with the Commissioners having to make a reasonable decision based on foresight, and such risk cannot be fully removed by simply controlling the actual turnover to stay within the deregistration limit. The Commissioners can still have made a reasonable decision to refuse exception, notwithstanding the fact that the *actual* turnover for the relevant 12-month period turns out to stay within the deregistration limit. While the Tribunal understands Mr Lane's predicament, that of itself is not a reason for us to interfere with the Commissioners' decision that has been reasonably reached.

Decision

82. For the reasons aforesaid, 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.

83. The appeal is accordingly dismissed, and the Commissioners' decision is confirmed.

84. 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.

DR HEIDI POON

TRIBUNAL JUDGE
RELEASE DATE: