[2018] UKFTT 776 (TC)

TC06910

Appeal number: TC/2017/06918

VALUE ADDED TAX – registration – whether plastering and floor screeding activities constituted a single business or two separate businesses, one carried on by the Appellant as sole trader, and the other carried on by the Appellant and his wife in partnership

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARREN VAUGHAN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR DEREK ROBERTSON

Sitting in public at Llandudno on 6 December 2018

Dai Davies of DMB Davies Accountants Ltd for the Appellant

Sean McDermott, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a decision of HMRC dated 5 January 2017, upheld in a review decision dated 12 May 2017, to the effect that business activities treated by the Appellant as two separate businesses were in fact one legal entity for VAT purposes, and that this single business had an effective date of registration for VAT of 1 March 2013.

2. The Appellant's case is that his activities as a plasterer constitute one business which he carries on as a self-employed individual, and that activities in relation to liquid floor screeding are a separate business carried on by a partnership of which he and his wife are the partners.

3. The Appellant has been open about the fact that originally both activities were carried on as a single business, and that he consciously set out to separate the activities into separate businesses on the advice of his accountant due to the VAT advantages that this would bring. The Appellant's case is as follows. The liquid floor screeding work is undertaken almost entirely on new build properties, such that the supplies are zero rated. The partnership has therefore been registered for VAT even though its turnover does not reach the VAT threshold, with the intention that the input tax on the materials used in this work can be recovered. On the other hand, the plastering work is undertaken almost entirely for private customers. The effect of treating this work as a separate business is that it does not have to be VAT registered as its turnover does not reach the VAT threshold. The result is that the plastering work can be offered to customers at a lower cost than would be the case if VAT had to be added, and the Appellant can remain competitive in the market.

4. HMRC on the other hand contend that all of these activities constitute a single business, the combined turnover of which exceeds the VAT threshold, such that all of its supplies are subject to VAT.

5. The Appellant contends in the alternative that even if all of the activities constitute a single business, HMRC cannot register the plastering business for VAT retrospectively, but can only do so prospectively. HMRC dispute this.

Background facts

6. The Appellant registered for self-assessment in April 1994 as a sole trader. His business activities were described as a subcontractor, and later this was changed to a plasterer.

7. On 21 March 2012, the Appellant applied to Gwynedd Council for a local investment fund grant to purchase a liquid screed pump. The Appellant stated in that application that he was a sole trader, that his main business activities were "plastering, pebbledashing & liquid floor screeding", that he intended to be VAT registered in the future, and that the cost of the screed pump would be £19,000 plus VAT. The application also stated that the screed pump would "create more work & increase

company turnover", that "Having the new equipment enables us to offer a more diverse service and also enables us to offer a wider range of services", and that "It will be more beneficial to the company once equipment is purchased".

8. The application was approved by Gwynedd Council on 27 April 2012, which provided a grant of 40% of the cost of purchasing the new equipment. The terms and conditions of the grant expressly prohibited the Appellant, during a 3 year period, from selling or agreeing to sell the whole or any part of his interest in the screed pump without the prior written approval of the Council.

9. On 1 December 2013, the Appellant and his wife registered for self-assessment as a partnership under the name "D & C Flooring", with the business activity described as "flooring".

10. On 7 October 2014, HMRC received an application for VAT registration of a partnership under the name D & C Flooring, in which the Appellant and his wife were named as the partners. The main business activity was described as "flooring contractor". The application stated that the registration threshold had not been exceeded. HMRC granted this application with effect from 1 October 2014, the date requested.

11. By letter dated 14 June 2016, HMRC required the Appellant to provide certain information in order to determine whether he needed to register for VAT, given that the declared turnover in his 2012-13, 2013-14 and 2014-15 self-assessment tax returns as a sole trader exceeded the threshold for VAT registration.

12. According to a file note prepared by Officer Richards, on 19 October 2016 she had a meeting with the Appellant's accountant, who said that the Appellant had set up a partnership for his flooring business, and that monies relating to that business had been transferred from his personal bank account to the partnership account.

13. On 31 October 2016, a meeting was held between the Appellant, his accountant and HMRC. According to a file note prepared by Officer Richards, at that meeting:

(1) the Appellant said that floor laying work was rare until he got the screed pump, and that this work was previously done by hand;

(2) the Appellant said that if a customer required both flooring and plastering, he issued separate invoices for each but the money went into one account;

(3) when asked by HMRC why there were two separate businesses, the Appellant replied that he "doesn't have a clue" and his accountant said it was due to the new screeding;

(4) the Appellant said that his wife was preparing accounts before the business split;

(5) the Appellant said that the plastering work was diminishing;

(6) the Appellant said that the screeding pump had not been transferred or leased to the partnership.

14. By letter dated 5 January 2017, the Appellant was advised of HMRC's decision that the creation of the partnership was a disaggregation of an existing business which comprised two elements, flooring and plastering, in order to avoid registering for VAT. The letter advised that HMRC considered on the material before it that the business was required to register for VAT on 1 March 2013, but requested the Appellant to provide further information to enable HMRC to determine the correct effective date of registration.

15. This decision was subsequently upheld by HMRC in a review decision dated 12 May 2017.

16. In a letter to HMRC dated 20 May 2017, the Appellant's accountant maintained that there were two businesses, one being a plastering business which the Appellant had before he met his wife, the other being a new floor screeding business started with his wife.

17. In a letter to the Appellant dated 6 July 2017, HMRC advised that the entry in the VAT register had been changed from D & C Flooring to Darren Vaughan.

18. On 15 September 2017, the Appellant commenced the present Tribunal appeal proceedings.

19. The matter was referred to Alternative Dispute Resolution ("ADR"); however, no resolution was reached.

20. On 17 April 2018, HMRC issued to the Appellant a notice of assessment to VAT.

21. In a letter dated 31 July 2018, the Appellant's accountant stated as follows:

> I would like to elaborate … as to why it was necessary to split the business… The new flooring business using the liquid screed, its work was on new residential builds, and the customer was entitled to receive the service free of VAT, as such a service is zero rated. The cost of screeding consists of the cost of the material used and the labour costs of laying it with 75% of the cost being the material cost and my client quickly realised that the cost of the material to his customer was 20% higher than it should be, as he could not recover the VAT in any other way than from his customer as he was not registered for VAT, hence the decision to register. …
>
> [HMRC] argues … that grant application to Gwynedd County Council for the purchase of the equipment to carry out the new screeding business was made by my client as a sole trader, which is correct, but because of the argument given above my client realised that he needed to register the new business for VAT. The reason for registering the new business only would allow his general building and plastering business to continue unregistered which would benefit his customers as they in the main are unregistered householders. It would also help to keep him competitive as he states that his competitors in this trade were all unregistered for VAT.

Applicable legislation

22. Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax provides that "'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity".

23. Paragraph 1 of Schedule 1 to the Value Added Tax Act 1994 ("VATA") provides that:

> (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 the registration threshold.
>
> …

24. Paragraph 1A of Schedule 1 to VATA provides that:

> (1) Paragraph 2 below is for the purpose of preventing the maintenance or creation of any artificial separation of business activities carried on by two or more persons from resulting in an avoidance of VAT.
>
> (2) In determining for the purposes of sub-paragraph (1) above whether any separation of business activities is artificial, regard shall be had to the extent to which the different persons carrying on those activities are closely bound to one another by financial, economic and organisational links.

25. Paragraph 2 of Schedule 1 to VATA provides that:

> (1) Without prejudice to paragraph 1 above, if the Commissioners make a direction under this paragraph, the persons named in the direction shall be treated as a single taxable person carrying on the activities of a business described in the direction and that taxable person shall be liable to be registered under this Schedule with effect from the date of the direction or, if the direction so provides, from such later date as may be specified therein.
>
> (2) The Commissioners shall not make a direction under this paragraph naming any person unless they are satisfied—
>
> (a) that he is making or has made taxable supplies; and
>
> (b) that the activities in the course of which he makes or made those taxable supplies form only part of certain activities, the other activities being carried on concurrently or previously (or both) by one or more other persons; and
>
> (c) that, if all the taxable supplies of the business described in the direction were taken into account, a person carrying on that business would at the time of the direction be liable to be registered by virtue of paragraph 1 above.

The documentary evidence

26. Various documents were relied on by the Appellant to demonstrate that the plastering work and the screeding work were two separate businesses. Some of these documents were provided to HMRC before the 5 January and 20 May 2017 decisions were taken, and others were not. Some were provided for the first time at the hearing, and HMRC did not object to this.

27. There are printouts from the CIS database, showing that the Appellant and the partnership have separate CIS registrations and separate UTRs, and that both submit CIS returns.

28. There is the Appellant's 2014-15 tax return, containing a partnership page returning his income from the partnership business of "flooring", and a self-employment page returning his income from self-employment as a "plasterer". There is also the Appellant's wife's 2014-15 tax return, which contains a partnership page relating to the partnership business of "flooring", and nothing related to the business of plastering.

29. There is a certificate of employer's liability insurance covering the period 16 October 2018 to 16 October 2019, naming the insured as "Mr Darren Vaughan trading as Darren Vaughan Plastering (Trading as & C Liquid Floor Screeding)".

30. There are statements from a bank account in the joint names of the Appellant and his wife "T/A D&C Flooring".

31. There are two separate invoices dated 30 September 2018 from a business called Mile End Services, one issued to "Vaughan Darren M" and one issued to "D & C Flooring".

32. There are two separate invoices from a business called Huws Gray Limited, one dated 1 September 2018 issued to "D & C Flooring" and one dated 3 September 2018 issued to "D Vaughan".

33. There are numerous invoices from a business called Hogan Concrete issued during 2014 and 2015 to the Appellant personally or to "DM Vaughan Plastering". The Appellant confirmed at the hearing that all of these invoices were for materials for the screed flooring activities. A statement of account from the bank shows payments to Hogan Concrete being made from a company credit card in the Appellant's sole name.

34. There are invoices from a business called Hope Construction Materials issued during 2014 to "DM Vaughan Plastering". One of these invoices was for materials for the screed flooring activities, and the Appellant has provided a bank statement showing that this invoice was paid from the account referred to in paragraph 30 above.

35. There are a number of invoices issued with the header "Darren Vaughan Plastering Contractor & Pebbledashing Liquid Floor Screeding". These invoices

relate to both the plastering work and the screed flooring work. For instance, invoice no 160 dated 6 June 2013 is for a single sum of £2,600 for "Plastering of house and laying floor screed". Invoice no 195 dated 19 March 2014 is for a single sum for "Supply and lay new floors. Plastering of house inside and out". Invoice no 201 dated 14 April 2014 is for "Supply and lay liquid floor screed".

36. There are a very few invoices dated 2014 and 2015 that look similar to those referred to in the previous paragraph, but bearing the header "D & C Flooring Liquid Floor Screeding". These relate only to the laying of liquid floor screed or "pump hire".

37. There is an advertising brochure, which on one side has the title "Darren Vaughan Plastering & Pebbledashing" and on the other has the title "D & C Liquid Floor Screeding". The latter side contains the text "Also all of your plastering requirements". Both sides give the same contact e-mail address and telephone numbers.

The position of the Appellant

38. The Appellant, either personally or through his representative, stated the following at the hearing.

39. The Appellant is a tradesman who left school at the age of 16. He had to undertake separate training to do the screeding work with the new machine, as this was a relatively new system for screeding floors and the training for plasterers does not cover this. He originally bought the machine as a sole trader, and for a period conducted both the plastering and floor screeding activities as a sole trader. The partnership was registered on 1 December 2013, and operated as a separate business from that date. The Appellant's reasons for having two businesses is as explained in paragraph 3 above. The Appellant's intention was not to avoid paying VAT, but to make his business more competitive. His wife does the books for both businesses, and assists him with both businesses. The customer base of the two businesses are different. The customers for the plastering work are private householders mainly in the local area. The customers for the floor screeding work are developers of new build properties located all over Wales and as far away as Birmingham. The Appellant has one employee who only works in the plastering business. The partnership was registered with HMRC, but the Appellant and his wife have no written partnership agreement. Title to the screed pump was transferred to the partnership in the accounts; unlike in the case of real estate or a car, there is no formality for transferring legal title to such an item of machinery. The transfer of the screed pump to the partnership occurred within 3 years of the Appellant acquiring it, so it is accepted that the Appellant is in breach of the terms of the grant from the Council, but that is a matter between the Appellant and the Council. The Appellant lives in a rural area, where everyone knows him as Darren Vaughan and calls him this, without distinguishing the business capacity in which he is acting. He has told Hope Construction several times to stop using the name "DM Vaughan Plastering" on their invoices but they keep doing it.

40. The representative of HMRC stated that he did not wish to cross-examine the Appellant.

The evidence of HMRC Officer Richards

41. Officer Richards is the officer who issued the 5 January 2017 decision. Her witness statement sets out the history of the enquiry she made leading up to that decision, including the different documents she received at different times, and explains her reasoning that let her to form the view that she did.

42. As the Tribunal is required to reach its own conclusions on the basis of the evidence before it, the witness statement of Officer Richards does not need to be set out in detail.

The Appellant's submissions

43. The Appellant had every right to separate his businesses and did everything necessary to do so.

44. The Appellant's submissions are otherwise as set out above.

HMRC submissions

45. HMRC submitted as follows.

46. The evidence strongly indicates that the Appellant as a sole trader is the taxable person carrying out all the business activities, and the registering of a partnership with HMRC was simply an attempt at artificial separation:

(1) The Appellant carried out both plastering and flooring as a sole trader prior to registering as a partnership for self-assessment and VAT. Both activities are still carried out by the Appellant.

(2) Although the Appellant's wife prepares sales invoices, the Appellant confirmed in the meeting on 31 October 2016 that this was also the case before the business was separated.

(3) The Appellant purchased a liquid screed pump as a sole trader for flooring to be carried out more efficiently. The application to Gwynedd Council stated that the Appellant was a sole trader and intended to use the machine to increase his turnover and be VAT registered in the future. The application expressed no intention for a partnership to be created.

(4) The liquid screed pump was owned and used by the Appellant as a sole trader for two years prior to advising HMRC that a partnership had been set up and was not transferred or leased to the partnership. The Appellant did not seek the required approval from Gwynedd Council for the machine to be used by an entity other than the Appellant as a sole trader.

(5) When asked by HMRC at a meeting on 31 October 2016 why there were two separate businesses, the Appellant was unable to provide an explanation.

(6) Sales invoices provided for the years 2012-13 to 2014-15 were headed "Darren Vaughan Plastering Contractor & Pebbledashing Liquid Floor Screeding". Although the Appellant notified HMRC of a partnership for self-assessment purposes in December 2013, invoices up to 2015 were still issued by the Appellant as a sole trader for all supplies. Some invoices included both plastering and flooring in the same transaction.

(7) The purchase invoices for the years 2012-13 to 2014-15 were all issued to the Appellant as a sole trader.

(8) The Appellant's accountant confirmed in the ADR meeting and by letter dated 31 July 2018 that the separation was for financial reasons.

(9) The certificate of employers' liability insurance names only the Appellant as the insured person, with two trading names. The Appellant's wife is not named anywhere in the document.

(10) Purchase invoices from September 2018 were issued to both the Appellant and D & C Flooring. However, given that the Appellant has employers' liability insurance solely in his own name with two trading names, HMRC's position is that the invoices simply reflect this and do not confirm that there is a separate partnership.

47. Although it is possible to split a single business into two, in this case the Appellant's wife bears no economic or business risk (reference was made to *Nigl* at [28]), and all the activities in reality remain part of the Appellant's business alone. There are examples of individual invoices, purchase orders and bank accounts relating to both purported businesses, showing that in reality there was no separation between them. There was no clear business division in place. The business structure and the way it operated were the same both before and after the partnership was formed. The Appellant's wife had the same responsibilities both before and after the partnership was formed.

48. The Appellant has failed to discharge the burden of proof that a separate partnership exists which, when assessed objectively, carries out an economic activity in an independent manner (reliance was placed on the judgment of the CJEU in its Judgment of 12 October 2016, *Nigl*, EU:C:2016:764 ("*Nigl*"); *Burrell (t/a The Firm) v Customs & Excise* [1997] STC 1413 ("*Burrell*"), *Parker and Parker t/a Sea Breeze Café* (1999) VAT and Duties Tribunal decision no 16350 ("*Sea Breeze*") and *Smith and Smith t/a "The Salmon Tail"* (1999) VAT and Duties Tribunal decision no 16190 ("*Salmon Tail*")). The facts of the present case are distinguishable from *Belcher v Revenue and Customs* [2017] UKFTT 427 (TC) ("*Belcher*").

49. Only one business has ever existed for VAT purposes. The Appellant was liable to be registered on 31 January 2013 in accordance with paragraph 1(1)(a) of Schedule 1 to the Act. This is because the value of his taxable supplies in the period of one year then ending had exceeded the registration threshold, which at the time was

£77,000. He was therefore correctly registered with effect from 1 March 2013 in accordance with paragraph 5 of Schedule 1 to the Act.

50. It is true that a direction under paragraph 2 of Schedule 1 to VATA can only be prospective. However, that provision applies in cases where there are in fact two separate businesses, but where the separation is to be disregarded because it is artificial. In cases where there has only ever been one business, it can be retrospectively registered for VAT in the usual way.

The Tribunal's findings

51. The Appellant does not deny that he originally acquired the screed pump in April 2012, and undertook floor screeding work using this machine, as part of his sole trader business. He further freely admits that it was on his accountant's advice, in order to obtain VAT advantages, that he deliberately decided some time later to split the business into two by transferring the floor screeding activities to a new enterprise conducted by a partnership with his wife.

52. HMRC accept that it is possible for one business to be split into two for VAT purposes. Indeed, paragraphs 1A and 2 of Schedule 1 to VATA enable HMRC to make a direction where there has been an artificial separation of business activities resulting in an avoidance of VAT. This implicitly acknowledges that there will be cases where a single business has been successfully split into two businesses for VAT purposes, even though the reason for separating the business into two was to obtain VAT advantages and the split is artificial, since otherwise there would be no need for a power to make such directions. Thus, the question whether a business has been split into two, and the question whether that split was artificial and leads to an avoidance of VAT, are two separate questions.

53. The Tribunal therefore does not place overly great weight on the fact that the partnership was set up in December 2013 on the advice of the Appellant's accountant in order to obtain VAT advantages. This circumstance might be relevant to any consideration by HMRC as to whether or not to exercise the power under paragraphs 1A and 2 of Schedule 1 to VATA, but is not of direct or determinative relevance to the question whether, objectively, what was originally one business has been split into two.

54. HMRC has not disputed that two separate business can exist for VAT purposes in a situation where one business is owned by person A, and the other is jointly owned by person A and his or her spouse or other close relative. *Burrell* is an example of where such a situation was claimed to exist. In that case the appellant contended that a health club was carried on by him as a sole trader, and that various aerobics activities in the same premises were carried on as a separate business in partnership with his father. In that case it was said that:

> … as is common ground between the parties here, the absence of a formal partnership agreement, for example, is not and cannot be definitive of the existence of a partnership. It is also correct to say that

> it is unnecessary for each partner to take an active role in the running of the business and there is no formal requirement under the Partnership Act 1890 that each partner needs to be identified on the documents emanating from the partnership. All those are trite matters of law. Accordingly the absence of such material cannot of itself necessarily point against the conclusion that there was a partnership. But I accept for this purpose … that … the tribunal should examine the substance and reality and should only conclude that there are only separate taxable entities if (1) the so-called separate businesses are sufficiently at arms' length each from the other; and (2) the businesses have normal commercial relationships with each other.

55. In *Burrell*, the tribunal had found that there was only a single business. On appeal, the High Court found that that conclusion had been open to the tribunal, but acknowledged that "It may be that others would have reached a different conclusion". This indicates that this kind of issue is very fact sensitive, a point that was made again in *Belcher*, the most recent of the cases that the Tribunal has been referred to, at [59].

56. In *Belcher*, the Tribunal found that a husband and wife were each conducting their own separate business, even though they had been filing partnership tax returns. The husband ran a barber shop on the ground floor of their home premises, and the wife ran a ladies' hairdressing salon in a converted garage of the home premises. Both traded under the name "Crewe Cuts". The Tribunal accepted that the appellants in that case were members of one family who did not conduct themselves independently in relation to HMRC (given that they filed partnership returns). Furthermore, and they pooled the net profits of both businesses and shared them in their capacity of being husband and wife living together. Additionally, they bought consumables from both businesses from the same account, and shared the costs of utilities and a music licence, but the Tribunal considered that these circumstances did not have great significance as they were "organisational matters arranged for convenience".

57. It appears to have been an important consideration for the Tribunal in that case, in concluding that there were two separate businesses, that that the appellants "never expressly agreed between themselves to operate the barber's shop and the ladies' salon in partnership", and that they "had no conscious intention to run a single business in partnership" (at [66]). Other considerations leading to that conclusion were that each of the appellants was separately responsible for the hiring and dismissing of the staff in the two respective shops, that there were separate tills and ledgers for each, and that the pools of customers were different and were managed differently (at [68]).

58. The Tribunal in *Belcher* also considered it relevant that the expenses of the barber's shop were met out of the takings from the barber's shop and the expenses of the ladies' salon were met out of the takings from the ladies' salon. The Tribunal found that there was is no cross-absorption of losses between the two, which showed that each appellant separately bore the economic risk associated with the carrying out of the barber's shop and the ladies' salon respectively (at [68]). However, if the Appellant's pooled the net profits of both businesses and shared them in their capacity

of being husband and wife living together, it might be said that the economic risk became shared again at the point of distribution of the profits.

59. In *Sea Breeze* at [19], the Tribunal also was of the view that "we should not expect relationships between husband and wife to be wholly at arm's length or commercial". In that case, the Tribunal found that there were two separate businesses, even though it found at [22] that "The public perception is certainly that of one business".

60. In *Salmon Tail*, the appellants who were husband and wife carried on a public house business in partnership. In that case, Customs and Excise had rejected an argument that food sales and accommodation facilities at the public house were supplied by a separate business carried on by one of the partners alone. An appeal against that decision was rejected by the Tribunal. However, the Tribunal's decision in that case also turned on its own specific facts. Customs and Excise argued that the Tribunal had to apply *Wednesbury* principles to assess whether the decision of Customs and Excise was reasonable (see at [18]), and the Tribunal appeared to agree, since it found at [27] that the decision of Customs and Excise was "justified" and that the Tribunal "cannot fault" that decision. This again leaves open the possibility that different decision makers might reasonably have reached different conclusions in relation to the matter. A primary consideration in that case was that the entire premises of the public house were leased by the partnership from a brewery, and the partnership paid all of the utilities bills for the entire premises and its insurance covered all of the activities at the premises. No rent or consideration was paid to the partnership for the use of the premises for the food and accommodation business. The Tribunal relied on the principle of partnership law that a partner, in transacting partnership affairs, is not allowed to carry on for his or her own sole benefit any separate trade or business which, were it not for his or her connection with the partnership, he or she would not have been in a position to carry on.

61. Given that cases such as these are fact specific, the Tribunal does not consider any more detailed examination of the facts of other cases to be of assistance.

62. The Tribunal considers a significant fact in this case to be that the Appellant and his wife very clearly did intend to separate the Appellant's existing sole trader business into two businesses. The intention of the parties was considered a strong factor in *Belcher* at [65]-[66]. The Tribunal gives weight to the fact that the Appellant and his wife registered a partnership with HMRC in December 2013, and the Appellant and his wife each returned a share of the partnership profits in a partnership page in their self-assessment tax returns, while the Appellant additionally returned the income from the plastering activities in a self-employment page in his tax return. The fact that there is no written partnership agreement between the Appellant and his wife is taken into account, but as a matter of law a partnership can exist without there being a partnership agreement in writing (see paragraph 54 above).

63. The Tribunal also gives weight to the fact that the plastering activities and the floor screeding activities have different customer bases, in largely different geographical locations.

64. The Tribunal takes into account that there are separate CIS registrations for the Appellant as sole trader and for the partnership.

65. The Tribunal also gives weight to the fact that the Appellant has made certain efforts to present the activities to the public as two separate businesses, issuing invoices and an advertising brochure with separate headers (see paragraphs 35-37 above). The Tribunal also takes into account that there are bank accounts in the Appellant's own name, as well as in joint names with his wife "T/A D&C Flooring".

66. The evidence does not point to the Appellant's wife having a prominent business role in the activities of the partnership. Furthermore, she also assists the Appellant in his sole trader activities as a plasterer, and appears to have performed essentially the same role in relation to all of the activities even before the partnership was established. However, it is not a requirement for the existence of a partnership that both partners perform an equally prominent business role, and indeed, it would be possible for one partner to have no active role at all (see paragraph 54 above). Furthermore, as was said in *Sea Breeze* at [19], "we should not expect relationships between husband and wife to be wholly at arm's length or commercial". The fact that the plastering activities were carried on by the Appellant as a sole trader rather than by the partnership would not exclude his wife from assisting him in those activities as "part of the normal husband and wife relationship" (see *Sea Breeze* at [22]).

67. The Tribunal takes into account that although the Appellant took some steps to present the plastering activities and floor screeding activities as two separate businesses, he failed to do so consistently. In particular, he issued invoices which included both types of activities. Nor did others consistently perceive there to be two separate businesses. Thus, there are invoices from suppliers addressed to the Appellant as sole trader in respect of supplies for the floor screeding work. There is also an employer's liability insurance policy naming the insured as "Mr Darren Vaughan trading as Darren Vaughan Plastering (Trading as & C Liquid Floor Screeding)". However, as was noted in *Sea Breeze* at [22], the fact that there is a public perception of only a single business is not determinative.

68. The Tribunal also takes into account that the Appellant failed to keep the finances of the plastering activities consistently separate from the finances of the floor screeding activities. However, given especially that the partners of the partnership were husband and wife, the Tribunal also does not consider this to be determinative (compare paragraph 54 above).

69. The Tribunal takes into account that both businesses are run from the same address. However, as that is the home address of the Appellant and his wife, the Tribunal attaches little weight to this. The activities of the business are not conducted at that address, and as noted above, the plastering work and the floor screeding work are largely conducted in different geographic locations.

70. It is furthermore noted that the floor screeding pump was purchased by the Appellant as a sole trader, with a grant from Gwynedd Council that prevented him from transferring title to it within a 3 year period. The question is whether this

consideration leads to the conclusion that there was only one business even after December 2013, as opposed to the conclusion that there were two separate businesses one of which failed to comply with a condition of a Council grant. On its consideration of the evidence, the Tribunal does not consider that this circumstance requires the former conclusion to be reached.

71. The parties were agreed at the hearing that the only issue for determination by the Tribunal was whether there was one business or two. Balancing all of the evidence as a whole, the Tribunal is satisfied that from 1 December 2013, the floor screeding activities were a business carried on by the partnership that was separate from the other activities carried on by the Appellant as a sole trader business.

72. The Appellant has not disputed that the plastering and floor screeding activities were both carried on by him as a sole trader before the partnership with his wife was established. On its consideration of the evidence, the Tribunal is not persuaded that the partnership was established any earlier than 1 December 2013. The Tribunal therefore finds that the floor screeding activities and the plastering activities were carried out as a single business by the Appellant as a sole trader until 30 November 2013, and that the floor screeding activities and the plastering activities were carried out by separate business entities for VAT purposes from 1 December 2013.

73. This means that HMRC cannot treat the floor screeding activities and the plastering activities as a single business at any time in the period from 1 December 2013 without making a direction under paragraphs 1A and 2 of Schedule 1 to VATA, and HMRC have accepted that any such direction would have only prospective effect. However, HMRC do not need to make such a direction in order to treat the floor screeding activities and the plastering activities as a single business in the period until 30 November 2013, given that until then, objectively, there was only one business.

74. As in *Sea Breeze* at [23], this Tribunal expresses no view on the potential application in this case of paragraphs 1A and 2 of Schedule 1 to VATA. The Tribunal's finding of fact that there are two separate businesses implies no finding as to whether or not the separation into two businesses was artificial leading to a loss of VAT.

Conclusion

75. For these reasons, the appeal is allowed in part, as set out in paragraphs 72 and 73 above.

76. 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 CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 31 DECEMBER 2018