TC03625

Appeal number: TC/2013/04088

Value Added Tax - Calculation of VAT for back periods during which the Appellant had not been registered, but should have been registered according to HMRC - Penalties - Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

GIRMA MESFIN

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE HOWARD M. NOWLAN
MRS CAROLINE de ALBUQUERQUE

Sitting in public at 45 Bedford Square in London

Andrew Stylianou of Kounnis and Partners on behalf of the Appellant

Bernard Haley of HMRC on behalf of the Respondents

DECISION

Introduction

1. This was a very difficult case. It raised no difficult legal issues, but essentially raised just the factual issue of the level of taxable supplies made by the Appellant from the year 2004 when, according to the Respondents, the Appellant had wrongly sought, and secured, de-registration from VAT. In this Introduction, we will barely mention the detailed facts but just concentrate on what we regard to be the key issue in this Appeal, namely whether we should believe the Appellant's claims.

2. The Appellant's decision to de-register in 2004 resulted partly from a decline in his turnover caused by some diversion of the footways where the A40 fly-over crosses the Edgware Road, such that fewer pedestrian customers passed his small kiosk, and partly because he claimed to have thought (wrongly as it now transpires) that much of his remaining turnover was zero-rated. Even the Appellant concedes, now that he accepts and understands that all his turnover was standard-rated, that for some of the VAT periods since 2004 his turnover was above the registration threshold, and that he should have been registered for at least some of the periods during which he had initially not been registered.

3. The Appellant contends however that, from April 2008 onwards, his turnover had dropped below the de-registration level, so that if at least HMRC choose now to exercise the discretion that they have to de-register him from the date when his turnover fell (on his claim) below the de-registration level, his current liability will still be at a daunting level for the Appellant, but it will nevertheless be much reduced. It might be roughly in the amount of an additional liability of £8,000. In their turn, HMRC have doubted the Appellant's claims and calculations and on their case his turnover never fell below the de-registration level. As a result, the initial liability sought by HMRC, including VAT and penalties, was at a level that we believed the Appellant could not possibly have discharged, roughly £91,000, and as HMRC had pointed out, he faced bankruptcy on HMRC's contentions, and some potentially dire consequences.

4. The difficulty in this case stems from whether we accept the Appellant's evidence. We have no hesitation in saying that we both found the Appellant to be a man of some integrity, seemingly honest, and certainly someone (we assume initially from Ethiopia or Somalia) who was intensely proud to have built up a small business, and who was patently struggling to maintain his wife and small child. Beyond our concluding that he was honest, it was very evident that his initial accountant knew him well, clearly declared that he was honest, and had considerable respect for his client. Sadly that accountant died of a heart attack. The HMRC officer who had conducted the investigation was good enough to confirm that he had considered the accountant to have been a very nice man. On our reading of the correspondence, and on the Appellant's own claim, he had been a "father figure" to the Appellant. It seemed to us that the original accountant had also been a man of integrity, and certainly not the type of small accountant who might assist a devious appellant to cook the books to avoid or diminish a VAT liability.

5. So too was the Appellant's current accountant a man in the same mould. HMRC pointed out that there is relatively little significance to the assertion by his current accountant, who was not giving evidence on oath, that he believed his client's claims, but he certainly asserted that he did, and we believe that he did.

6. In his turn, HMRC's officer, Mr. Spranklen, who had conducted the investigation into the Appellant's trading and the similar businesses conducted by others, had done a very impressive job in trying to reconstruct figures and calculations that he considered to be fair and realistic. If the issue for us were whether the Appellant or HMRC's investigating officer had been the more sophisticated, producing considerable support and cross-checking for his competing calculations, we would have had little doubt that we would have decided that the Appellant had failed to sustain his case, of defending his suggested more modest figures, to the standard of the balance of probability.

7. We accept that it is of no relevance to our decision that were we to have dismissed the Appellant's claim in full, the cumulative liability and penalties would have been in the region of £91,000 (already reduced from an earlier figure) such that the Appellant would appear to have had not the slightest chance of satisfying the liability. Doubtless he would have gone bankrupt, HMRC would have received nothing, and quite possibly after losing his business he might have claimed state aid. None of this is strictly relevant. We do however consider that we should be extremely hesitant in reaching such a decision when its consequences to the Appellant would appear to be ruinous, and when we are both convinced that the Appellant is an honest man of integrity. This does not change the strict burden of proof, in that clearly the Appellant had the burden of demonstrating that on the balance of probability his claim was correct. It does however mean that we should be especially cautious of rejecting his case, when the consequences of so doing would be so disastrous to the Appellant.

8. Our decision is that we do accept the Appellant's case. That still leaves him, at the very least, with a liability to VAT in respect of the undeclared turnover in the period from 2004 to 2008 of about £8,000. It will be an immense struggle for the Appellant, already facing additional competition and thus lower turnover, to discharge that liability in stage payments. We assume and believe however that the Appellant is determined to do so, it being fairly obvious that there would have been no purpose in pursuing an Appeal on a basis that would still leave him with this liability if he thought that he stood no chance of ever discharging that liability. Restricting the liability to a figure in this region is also, however, dependent on HMRC following our request and suggestion that they exercise their discretion to de-register the Appellant at least from 1 April 2008, the date when on his current figures his turnover fell below the de-registration level. Since we have no jurisdiction to de-register him ourselves, we made it clear in the hearing that the outcome of capping the liability to the figure of roughly £8,000 is entirely dependent on HMRC being prepared to so de-register him. Since at this stage we cannot anticipate whether HMRC will follow our strong suggestion that the Appellant be de-registered for at least the period from 1 April 2008, and possibly for another short period as well, this decision must in part be simply a decision in principle. We will also need to summarise the outcome in relation to penalties, though again the quantum of penalties is again heavily dependent on whether HMRC adopt our suggestion of de-registering the Appellant.

The facts in more detail

The Appellant

9. We did not enquire whether the Appellant was a British national and whether he had been born in Britain. In 2011 we know that he was abroad for a considerable period, looking after his terminally ill mother until she died, and we imagine that he may have been

of Ethiopian or Somali origin. The principal relevance of this (beyond its relevance to the trade conducted) was that the Appellant had a very strong accent, and his spoken and written English were sometimes difficult to understand. In addition he was under great stress at the hearing and was often in tears. As a result we both were unable to understand everything that he said, and we were not entirely confident that he understood everything said during the hearing either. His current accountant remarked that when HMRC's investigating officer, Mr. Spranklen, had periodically suggested that some of the Appellant's claims had been inconsistent, it was entirely possible either that the Appellant might have misunderstood the questions, or indeed that Mr. Spranklen might have misunderstood the responses. This seemed to us to be a realistic observation.

The nature of the trade

10. The Appellant's trade consisted of selling product from a small kiosk of three descriptions, namely:

- a few cigarettes and cans of drinks;
- Ethiopian style injera bread, and
- khat.

The Appellant had been registered for VAT purposes from 1 March 1999 to 2 September 2004. By that date, the sales of cigarettes and cans of drink (and perhaps in those days some newsagency business) had been badly hit by some diversion of the footways in the vicinity of his kiosk so that fewer pedestrian customers passed the kiosk. The turnover fell such that the Appellant sought de-registration. We were not told how he had been reporting his various categories of turnover prior to 2004, but it seems possible that he had regarded the turnover in khat as zero-rated supplies of a vegetable product, because it was partly on that assumption that he assumed that his turnover would fall below the VAT threshold from 2004 onwards. We were told by HMRC that at one time the supply of khat had been zero-rated, but that this had been changed well before 2004, possibly in 1989.

11. The turnover in injera bread was always modest, and we were told that by the various periods around 2012 and 2013, sales had dropped to about £2,000 to £3,000 a year. Injera bread is a flat unleavened bread that is part of the staple diet of many Ethiopians.

13. The Appellant's main trade, progressively so during the period 2004 to 2013, consisted in selling khat. Khat is a green-leaved vegetable product that has been chewed by people in the Horn of Africa and the Arabian peninsula for centuries. It is a stimulant that creates a feeling of euphoria. It is presently legal to sell khat in the United Kingdom, though it is illegal to sell it in many countries, and there are proposals to make it illegal to sell it in the UK. We were told that the Appellant's customers for khat were predominantly from Somalia and Ethiopia.

14. The Appellant's trade was conducted from a small kiosk in the subway under the A 40 flyover over the Edgware Road. We were not shown pictures of the kiosk, though we gathered that it was very small, and open to the elements. The Appellant had a refrigerator in the kiosk for the purposes of keeping the khat as fresh as possible. There was clearly no distinct office part to the kiosk and the Appellant stored the boxes of khat in the kiosk, performed the necessary task of chopping it up and re-packaging it that we will describe below, and kept the good quality khat in the refrigerator and sold to his customers all from

the small kiosk. We were told that there was a Casio cash register in the kiosk but that it did not work.

15. The dispute in this Appeal in relation to the credible turnover in khat sales was considerably influenced by the various difficulties in selling khat. These difficulties resulted almost entirely from the fact that khat had an extremely short shelf life. From the moment that it was cut, probably in Somalia or Ethiopia, it had to be packaged up in boxes (each box probably containing 30 or 40 – probably 40) bunches of khat, and then it had to be flown to Heathrow, and moved quickly to the Appellant's kiosk. According to the Appellant's evidence, he then had to chop up the bunches, splitting the original bunches, say 40 bunches, into roughly 12 that could be sold as good quality khat, about 16 that could be sold as inferior product, and finally throwing away refuse equal to 12 bunches. The Appellant still only had perhaps a couple of days in which to sell the selected good khat at the price he expected to receive for it. If any was not sold, it would have to be sold as the inferior product, and failing that, after a further short period, thrown away.

Specimen calculations in relation to the on-sales of khat

16. In more detail we were told by the Appellant that he received two supplies of khat a week and that in total he usually received about 17 boxes of khat a week. There had been some doubt as to how many bunches of khat were in each box, though it sounded as if in more recent years there had been 40 bunches. Apparently if the box was filled, the product was more likely to retain its freshness. The Appellant then said that he expected to be able to divide the bunches in the following manner:

	From each box of 40 bunches	***From 17 boxes a week***
Good quality	12 bunches	204 bunches
Inferior quality	16 bunches	272 bunches
Rubbish	12 (equivalent to bunches)	204 (equivalent to bunches)

We were told that the good quality khat was sold for £5 a bunch until 30 April 2011, and for £6 a bunch thereafter. The inferior quality product was sold at 80p a bunch, and the remainder was thrown away. Accordingly, aggregating the weekly gross turnover on selling the good and the inferior quality khat before and after 30 April 2011 produced gross weekly turnover of £1238 and £1442 respectively. Converting those figures to annual sales, assuming trading during 50 weeks, produced figures of £61,900 and £72,100 respectively, and assuming trading during all 52 weeks, £64, 376 and £74,984 respectively. None of these figures were asserted to show the actual turnover in any period. They simply illustrated what the Appellant might expect to receive on average, according to his claim as to how the bunches in each original box were divided. They provided a type of "sanity check" for the actual figures of turnover claimed by the Appellant.

The purchase arrangements

17. We were given the following information by the Appellant about the purchase, and the purchase price of the khat.

18. We were never given detailed figures in relation to the purchase price, and indeed the relevance of the purchase price was somewhat secondary. We were nevertheless told that the price could fluctuate quite widely, and that perhaps an average price for one of the boxes was £40. Assuming that that was right, then on the basis of the Appellant's sales of the good and the inferior quality khat prior to April 2011, he would have been buying the khat for £40 plus a further payment to the clearing agents to cover any customs duty and VAT on importation, and selling the khat for approximately £86.

19. Not surprisingly almost all of the Appellant's sales were cash sales. Accordingly in the early part of the total period for which he was retrospectively registered by HMRC (the total period running from 1 November 2004 to 31 July 2012), the Appellant paid for the khat by providing cash to either Subway Money Transfer or Western Union which then discharged the purchase price charged by the supplier. In the latter part of the period under review, it seemed that the Appellant was putting the cash proceeds into his Barclays Bank account, making weekly drawings of £200 from that account for his family's living expenses, and making electronic transfer payments to the supplier or suppliers from the Barclays account. We accept that we had no way of checking whether the Appellant had retained some of the cash turnover for further living expenses, without banking it at all, and we note that nobody had analysed the credits to the bank account to judge whether they fell short of, or matched, the claimed gross turnover. Since, however, the very modest rent for the kiosk, and the payments to the supplier(s) were all made out of the bank account, there was certainly no material opportunity for significant amounts of cash turnover to be applied in paying other business expenses.

20. Three factors mean that the facts relevant to purchases lead to some considerable confusion. First, it seems that because better prices could be secured from the suppliers as the quantity of boxes purchased increased, the Appellant and other traders clubbed together, made one large order, and then shared out the relevant order in the amounts that each required, and that each separately paid for. We were even told at one point that the various traders took it in turns to be the named purchaser on the combined order. At one point, HMRC were contending that these purchase mechanics ballooned the Appellant's turnover in that if he ordered a quantity of product to satisfy his own, and other traders', requirements, his supplies to the other traders should all be taken into account in calculating his turnover. It also appeared that in certain periods he seemed to be acquiring from a trader in Birmingham, rather than importing, whereupon HMRC contended that he ought to have been claiming an input deduction in respect of the sales by the trader in Birmingham, providing proper invoices to claim the input tax. Alternatively if the Birmingham trader's trading was below the registration threshold, the consequence of purchasing from that trader would be that the Appellant would be unable to claim any portion of the VAT charged on importation, since the analysis would be that the unregistered trader was the importer.

21. We pointed out to HMRC that since the Appellant had described the arrangement in relation to joint purchase to be one where the various traders simply amalgamated their respective orders, and then individually paid for their respective purchases, the analysis of there being purchases and sales between the UK traders was itself unrealistic. We had little doubt that none of the traders would have expressed matters in terms of each nominated buyer on each global order being just a nominee for the others, such that beneficially each purchaser was importing directly, but that seemed to us to be the most realistic construction put on the arrangement of the traders "clubbing together" to amalgamate their orders.

22. The second confusing factor about the purchase arrangements was that the Appellant admitted that he and the other traders had been forced by the supplier to record a low and incorrect value of the product imported on the importation and customs documentation. The Appellant said that the supplier would not have dealt with the UK traders unless they did as demanded. The consequence of this is of course that customs duty would have been diminished (though nobody knew the relevant rate of duty), and insofar as purchasers were not registered for VAT purposes, the "stranded" VAT charged on the importation would have been wrongly diminished. The VAT issue would have been irrelevant in practice where the purchasers were VAT registered, because of course they would anyway claim an input deduction for the VAT on import, such that there would be less of a deduction where the importation value had been suppressed.

23. We might mention, in commenting on the points just disclosed, that whilst HMRC understandably said that the feature of the wrong valuations should cease, and that they were improper, we did accept that they were almost certainly occasioned by the suggested insistence from the supplier, and that it was entirely credible that more would have been involved in understating the sales price in saving tax in the supplier jurisdiction than was actually involved in the UK.

24. The third confusing feature of the purchase arrangements is of course that if our expectation is right and the correct analysis is that each trader was directly importing, albeit with one being named as the nominee purchaser, then calculations would have to be done to allocate the input VAT, customs duty and other charges met via payments to the clearing agents amongst the respective purchasers.

The calculation of gross turnover prepared by the Appellant's original accountant

25. When HMRC undertook its investigation into the Appellant's past trading, all in the context of visits made to all the khat traders, the Appellant naturally had to seek to provide turnover figures to HMRC in order to ascertain whether in the various periods since late 2004 his turnover had been above the VAT threshold for registration or not. These figures were calculated and provided by the Appellant's original accountant in two ways.

26. For the earlier periods, the Appellant himself had been unable to provide any details of gross turnover. The Appellant's accountant accordingly derived turnover figures by breaking down the profitability from the Appellant's self-assessment returns between the three product categories mentioned in paragraph 10 above. He then assumed a profit margin in relation to the sale of the injera bread to calculate the assumed turnover in relation to the bread, and in relation to the khat sales he added the allocated khat profits to all the payments made to purchase the khat, and asserted that the resultant total equalled the sale price and thus the khat turnover. We should add that for a specimen 9-month period we were shown details of the payments of purchase price and the total figures (following two or three adjustments that the Appellant claimed were appropriate) did tally with the figures of cost price that would justify the Appellant's reduced turnover claims.

27. For periods after July 2007, the historic turnover figures were provided in a different way in that the Appellant had apparently retained a "red book", or perhaps various red books, that illustrated the turnover figures in the latter periods. Whether this tied in with the way in which the later cash turnover was credited to the Barclays account we do not know. HMRC doubted the credibility of the turnover figures derived from the red book, but prior to

addressing that, we must give the relevant figures of total turnover claimed by the Appellant for the various periods, based on the figures calculated in the two ways described in the previous paragraph and this paragraph.

28. The resultant turnover figures provided by the Appellant, and substantially by his original accountant, were as follows. While it is obvious from the table, we have added an asterix against the figures where the turnover had dropped below the deregistration threshold.

Year ended	***Total sales***	***VAT threshold***
30.06.2004	£61,182	£58,000
30.06.2005	£54,099	£60,000*
30.06.2006	£66,624	£61,000
30.06.2007	£77,156	£64,000
30.06.2008	£61,521	£67,000*
30.06.2009	£56,229	£68,000*
30.06.2010	£52,141	£70,000*
30.06.2011	£55,363	£73,000*
30.06.2012	£61,669	£77,000*

29. It is worth making some observations about those figures. We accept of course that it is possible that, while the figures were provided in the two different ways mentioned in paragraphs 26 and 27 above, the figures on either basis of calculation could have been wrong and understated. It is nevertheless noteworthy that there was one period when the figures were derived from profit figures, augmented by cost price, when the resultant turnover was below the registration and de-registration thresholds, so that it is certainly not just as if the later figures from the red book become suspicious, since they alone suppress the turnover. It is also of considerable significance that in 2013 the Appellant de-registered again for VAT purposes because increased competition had reduced his turnover. Whether the broad pattern of falling turnover in the last five years recorded in the above table is in any way consistent with the feature that he has now de-registered again we cannot say for certain. It does, however, seem clear that after the battle that the Appellant has had for the last few years with HMRC, he would be very cautious of de-registering if that could only be sustained by suppressing his current turnover in some way. Accordingly it seems at least possible that the small business has been in decline during the last few years, except for the year 2012, illustrated in the above table.

30. Not that this has any relevance to the past, but we might mention that there appears to be a possibility that the supply of khat will be rendered illegal in the UK, and that that is an additional possible problem that the Appellant faces.

The various challenges by HMRC

31. The various challenges by HMRC commenced with a visit by Mr. Spranklen in June 2009. The points that Mr. Spranklen considered to be significant, quoting from his visit note, were firstly the Appellant's response that *"he sold between 300 – 350 bundles per week at £5 or sometimes £6 a bundle (latter price only since a few months ago)"* and the other statement that *"Over the course of a week he estimates that he nets around £300 - £400*

profit", the cost of a bundle being approximately £4 a bundle, with the Appellant making a profit of about £1.20 a bundle.

32. At this date, the Appellant had not explained the facts that sound to us to be genuine, namely that good quality khat could be sold for £5 a bunch, whilst inferior khat was sold at only 80p a bunch. Understandably therefore Mr. Spranklen assumed that the turnover in khat alone, on the basis of say 325 bunches being sold for £5 (i.e. £1625) would have put the annual turnover, ignoring the minor sales of cigarettes, drink cans and bread, at roughly £84,000. These sales of product, all assumed to be good product, would also have considerably exceeded the sales that we mentioned in paragraph 16 above, where the Appellant had suggested that only approximately 200 sales were made at the £5/£6 level per week, with roughly 270 sales being made at 80p a bunch. Since at the first visit there had been no discussion about the difference between good and poor product, we consider it at least distinctly possible that the Appellant was referring (in giving the sales figures of 300 – 350) to all sales, and not just to those at £5. Furthermore, the profit estimate just referred to would produce a total annual profit of about £1750, i.e. average profit of £325 multiplied by 50 weeks. Looking at the original accountant's figures for 2004 and 2005 (where khat turnover was derived from profit allocated to khat, augmented by cost), we note that the profit figure for khat was nearly £14,000, and the total profit nearly £20,000. Adding the cost of khat in that year (£28,130) to the khat profit (£14,000), the resultant assumed turnover in khat was just short of £42,000, i.e. very roughly half of the figure assumed by Mr. Spranklen of £84,000.

33. Before looking at a quite different approach to the calculations, we might just note that the last sentence of the first visit report said that *"Mr. Mesfin had been very co-operative throughout and had said that he was more than willing to answer our questions."*

34. On 31 July 2009 Mr. Spranklen visited the Appellant's original accountant, and they discussed arrangements for the provision of figures. Mr. Spranklen's visit note records that *"[The accountant] said that he couldn't believe that Mr. Mesfin was trading at the level indicated at the visit. He felt that his client was very honest and would not mislead him."*

35. Following a later visit, and further consideration, Mr. Spranklen presented his figures in a quite different way, at least for the later years in the whole period in dispute. He obtained the figures of product, at the point of importation from HMRC or Border Control officials, and sought to calculate turnover from those figures. We accept that Mr. Spranklen conducted a proper analysis, and periodically gave the Appellant the benefit of the doubt, but we conclude that seeking to calculate gross turnover from the importation figures was a method fraught with difficulty. As Mr. Spranklen noted, there is first the confusion that the import figures failed to indicate the allocation of product ordered between the different traders. In some periods the Appellant ended up with product when he appeared to have imported none, and in some he imported excess product. This results fairly obviously from the "clubbing together" point that we have mentioned. Secondly, the import price had been distorted and nobody knew by how much. Most significant of all, however, is the fact that all Mr. Spranklen's turnover figures are based, when he commenced the analysis by addressing the boxes purchased, on his disputing the split between good product, poor product and waste on which the Appellant relies so heavily. For those figures, and Mr. Spranklen's challenge of the Appellant's evidence, are absolutely central to the analysis of how much of the product purchased ends up being wasted, and how much can be sold at the £5 or £6 price payable for first-quality khat. Mr. Spranklen advanced some tenable points

in support of his suggestion that the level of wastage had been exaggerated, and the percentage of bunches in the imported boxes that generated "good quality product" had been understated. He referred to the Appellant's statements that he sought to import directly from the suppliers in order to ensure that the product was of good quality, and that he required more bunches to be put into each box to keep the product fresh. Accordingly it seemed improbable to Mr. Spranklen that only 30% of the original boxed product (12 out of 40 bunches) ended up being saleable as good quality product at the full price. Whilst these points seemed to be of some relevance, no actual evidence was given on behalf of the Respondents as to how imported bundles of khat might be expected to divide up into good, poor and reject product. For his part, the Appellant consistently advanced the evidence summarised in paragraph 16 above. He also said that once he had sold the 12 bunches of good quality khat, he was already making a modest profit so that what he could obtain for the balance simply increased the profit, even if on an allocation of cost rateably between all sales, he ended up selling some bunches at a loss.

Our decision

36. As we said at the outset we have found this case very difficult.

37. There is no doubt that the Appellant has not helped himself by not making and retaining good documentation to establish his case. We do, however, note that while every trader is meant to make and retain records to the standard that HMRC requires, it is obviously a challenge for a small trader in an open kiosk, with no working cash till, and with slightly hesitant English, to make and retain records while chopping up the product and selling it.

38. There are clearly also some oddities in the figures, and there is always bound to be the suspicion that the Appellant will have understated takings in an effort to avoid a charge to tax and penalties that would almost certainly result in his bankruptcy.

39. We have concluded however that, with so much evident support for the honesty and integrity of the Appellant, our own clear conclusions in this regard included, and with no third party actual evidence as to the proportion of imported khat that can be sold at full price, alongside all the other difficulties in computing turnover from very muddled importation statistics, we will not reject the Appellant's evidence and his case.

40. Our first conclusion is therefore that we accept that the Appellant's turnover was at the levels indicated in paragraph 28 above.

41. It is nevertheless the case that once HMRC has retrospectively registered the Appellant as from November 2004 (and clearly for the immediately following period that action was justified even on the Appellant's figures that we have just confirmed), it is not open to us to de-register the Appellant for those periods indicated in paragraph 28 in which his turnover fell below the de-registration level. HMRC does, however, have the discretion to so de-register the Appellant for periods when his turnover fell below the de-registration threshold. We do accordingly express the strongest request that HMRC de-registers the Appellant for the last five periods indicated in paragraph 28. We understand that there may be more resistance on the part of HMRC to de-register the Appellant also for the second period mentioned in paragraph 28, though on the figures it would appear that his turnover for that period had dropped well below the de-registration threshold. Hopefully he may be de-registered for that period as well. We make these requests both because it would seem to be

unjust to charge tax on the whole of the turnover for the relevant periods when on our decision the turnover had dropped below the threshold by quite a margin, and because it may have been through the mistaken belief that supplies of khat were zero-rated that the Appellant had initially sought de-registration. Beyond that, there is the strictly irrelevant point that if the turnover for all periods is subjected to VAT, the Appellant will almost certainly be bankrupt, and the outcome both disastrous to the Appellant and almost certainly futile to the exchequer.

42. This decision will inherently be a decision in principle, because beyond our being unable to de-register the Appellant in the manner requested in paragraph 41 above, we cannot in any way calculate the amount of input VAT deductible to match that charged on the supplies allocated to the Appellant on importation for those periods that manifestly remain (on the Appellant's own figures) within the charge to VAT.

Penalties

43. We would like to thank HMRC for making two concessions during the hearing. One was the suggestion that we reach a decision that the percentage wastage of khat was mid-way between the figures claimed by the Appellant and those asserted by HMRC. For the reasons already indicated, we have felt unable to base our decision on that concession.

44. The other concession was more significant and that was to give a 100% reduction in the original claimed penalties in respect of those periods covered by the penalty provisions in force prior to the Finance Act 2007 regime coming into force. Since the Appellant has been cooperative throughout, and there is nobody who doubts his honesty and integrity, we agree that this reduction is realistic, but are nevertheless very grateful for HMRC's concession on this point.

45. Finally there is the issue of the penalties for those periods covered by the Finance Act 2007. The conclusion that we reached in relation to these was that we would have to await HMRC's decision as to whether to de-register for the later periods. We were unclear whether that would entirely vacate the liability for VAT, and accordingly for penalties as well for those periods covered by the Finance Act 2007 penalty provisions. We again express the hope that if any penalty remains owing in respect of any period left in charge to which the penalty provisions of Finance Act 2007 are applicable, this will be measured, taking note of our remarks about the Appellant's honesty and integrity. Were any dispute to remain between the parties, they would need to revert to us to seek to resolve it.

46. In the event that the eventual outcome of this case is that the level of the liability is one that the Appellant will seek to discharge over time, we hope that the HMRC officers dealing with this case will make appropriate recommendations to the collection section of HMRC such that a sensible payment profile can be agreed with the Appellant for the payment of whatever the eventual liability may be.

Right of Appeal

47. This document contains full findings of fact and the reasons for our decision in relation to this appeal. Either party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASE DATE: 20 May 2014