

Permission denied!

Les Howard highlights a case where HMRC removed a company's permission to use the Cash Accounting Scheme

This is not something we come across every day! Very many small businesses use the Cash Accounting scheme, some without knowing it! Originally, when the scheme was introduced, the taxpayer had to apply to HMRC for permission. Now, of course, there is no requirement to seek permission.

However, the scheme still has a number of conditions. In particular, in relation to the Michael Robinson case, there is a general power of HMRC to exclude someone from the scheme. VAT Regulation 64(1)(d) reads: "A person shall not be entitled to continue to operate the scheme where... the Commissioners consider it necessary for the protection of the revenue that he shall not be so entitled."

Michael Robinson was involved in a number of companies, which were involved in property development. The economic crisis in 2008/09 led to the loss of finance for a £7m residential housing development. This left the companies short of cash. While Mr Robinson sought further funding, invoices raised from one of his companies, *PMR Ltd* to two more of his companies, *Castle Developments Wales Ltd (CDW)* and *Court Estates & Developments Ltd (CED)* were unpaid. However, PMR used Cash Accounting, while CDW and CED used 'normal' accrual accounting. The obvious outcome was that CDW and CED claimed input tax but PMR did not account for the corresponding output tax.

It was not until April 2014 that HMRC opened an investigation into this disparity (the Tribunal decision does not explain the reason for this long delay.) As a result of this investigation and using the 'protection of the revenue' powers, HMRC directed PMR to cease using Cash Accounting.

During the period of investigation, Mr Robinson had been in contact with HMRC, explaining the difficulty in raising finance. So, although the correspondence from HMRC had directed that PMR cease using Cash Accounting after VAT period P02/15, he understood that the communication between himself and HMRC meant that they were granting him a transitional period to put matters in order. The significant of this will become clear later.

The Tribunal explains the repeated issuing and withdrawing of penalties against the company, PMR and against Mr Robinson. I have to say that this is a little confusing. The end result was a personal liability penalty issued against Mr Robinson for around £31,000. This was on the basis that the company's failure to cease using Cash Accounting was deliberate AND that that failure was attributable to Mr Robinson. (Such a penalty cannot be issued if the original error is deemed to be careless. Further, such penalties are frequently issued if HMRC think that the company will become insolvent.)

In his original appeal, one ground was that HMRC were wrong to withdraw use of the Cash Accounting scheme. This was withdrawn before the hearing. I think the company would have lost on that ground, as it does not require proof of deliberate action. HMRC's 'protection of the revenue' power is quite broad.

There is a right of appeal against a decision to withdraw use of Cash Accounting from a taxpayer (s83(1)(y)). HMRC guidance at ARTG3042 states that the Tribunal has only limited jurisdiction on such an appeal. This is because the Commissioners are acting for 'the protection of the revenue'. This broad power was at issue in the previous case of *FPV Ltd & Marketing Middle East Ltd* (VTD 15666). Since the protection of the revenue is a matter for the Commissioners, an appeal cannot be made directly against the use of that power unless the Commissioners can be shown to have acted unreasonably. It also explains why s84 does not refer to s83(1)(y).

The second ground of appeal was whether the company and, by implication, Mr Robinson, had acted deliberately in submitting the Return using Cash Accounting. There is a test in the FTT case of *Auxilium Project Management Ltd* which is applied: "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

The Tribunal made a distinction between whether Mr Robinson had a good reason to act as he did, or whether he genuinely believed he had a good reason (see para 61). The Tribunal held that, on this subjective test, Mr Robinson did believe he had been given effective permission to continue to use Cash Accounting at the time. The Appeal was therefore allowed.

Comment

This is one of those case that raise a number of VAT issues:

- There is the basic question of compliance, in this case, with the rules of the Cash Accounting scheme.
- Then there is the way a penalty against a company can be applied to a Director or other person where the inaccuracy is attributable to him or her.
- Added to that is the process from HMRC decision(s) to Tribunal hearing.

Mr Robinson was fortunate to be represented by Counsel. Most taxpayers do not enjoy that luxury. Usually, the taxpayer's accountant is the first port of call for an unwelcome HMRC decision and/or assessment.

Best advice is to seek a specialist to review matters at an early stage and present options for moving the case forward.

For more go to <https://tinyurl.com/55ac8vsa>

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