IN THE HIGH COURT OF JUSTICE CO/3038/99
CHANCERY DIVISION

B E F O R E:

MR JUSTICE FERRIS

B E T W E E N:

JOHN GERALD GRAY
(T/A WILLIAM GRAY & SONS)

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS & EXCISE

Respondent

Ms Marion Lonsdale instructed by Messrs Wilson Nesbitt appeared for the Appellant.

Mr Hugh McKay instructed by HM Customs & Excise Solicitor's Office appeared for the Respondents.

Hearing Date: 28 July 2000

Judgment: 23 August 2000

1. This is an appeal by Mr John Gerald Gray from a decision of a VAT Tribunal sitting in Belfast and presided over by His Honour Judge John McKee. The decision appealed from is dated 11 June 1999. The Tribunal upheld the decision of the Commissioners of Customs and Excise ("the Commissioners") to register Mr Gray as a taxable person for the purposes of VAT as from 2 July 1996. The effect of this decision was not only to uphold the correctness of the registration but to uphold a penalty of £l56 imposed on Mr Gray for late registration.

2. The appeal turns on certain of the provisions of Sections 3 and 4 of and paragraphs 1 to 5 of Schedule 1 to the Value Added Tax Act 1994. So far as material sections 3 and 4 read as follows:

> "3. (1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.
>
> (2) Schedules I to 3 shall have effect with respect to registration.
>
> (3) ...

(4) ...

4. (1) VAT shall be charged on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) ..."

3. No question on the meaning of 'taxable supply' arises on this appeal. The question is whether Mr Gray is correctly to be treated as a 'taxable person' as from 2 July 1996 or some later date or is not a taxable person at all. This depends on whether Mr Gray was required to be registered under the Act, which in turn is, in relation to the particular facts of this case, governed by Schedule 1 to the Act. The material provisions of that Schedule are as follows:

"1. (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 value of his taxable supplies in the period of one year then ending has exceeded [£47,000]; or

(b) (b) ...

(2) ...

(3) A person does not become liable to be registered by virtue of sub-paragraph (1)(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 [£45,000].

(4) to (9) ...

3. A person who has become liable to be registered under this Schedule shall cease to be so liable if the Commissioners are satisfied in relation to that time

(a) (a) has ceased to make taxable supplies; or

(b) (b) is not at that time a person in relation to whom any of the conditions specified in paragraphs 1(1)(a) and (b) and 2 (a) and (b) is satisfied.

4. (1) Subject to [an immaterial exception], 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 [£45,000].

(2) to (4) ...

5. (1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the

liability within 30 days of the end of the relevant month.

> (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.
>
> (3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered."

4. The amounts stated in square brackets in paragraphs 1(1)(a), 1(3) and 4(1) above have been varied from time to time. The particular figures set out above are those which were in force at the times which are relevant to this appeal.

5. The facts of this case as they appear from the decision of the Tribunal or from certain agreed documents most of which are expressly or impliedly referred to in the decision of the Tribunal can be summarised as follows. Mr Gray carries on business as a building contractor from premises at Bangor, County Down in Northern Ireland under the name of William Gray & Son. I will refer to this as "the unincorporated business". Mr Gray is also a director, and in a position to control the affairs, of a company named William Gray & Son Limited, which carries on a similar business from the same premises as the unincorporated business. At all material times the company has been registered for VAT purposes. Mr Gray, as proprietor of the unincorporated business, was not registered for VAT purposes until the happening of the events with which this appeal is concerned. Mr Gray's case is that, except in relation to one twelve month period he took care to ensure that the unincorporated business did not have a turnover which would bring it above the threshold level for registration. He did this by making sure that any additional business was carried on by the company, not by the unincorporated business.

6. During 1996, however, Mr Gray failed to keep track of the amount of business being transacted by the unincorporated business with the degree of diligence required to ensure that this policy was effective. During October 1996 Mr Gray's accountant advised him that the unincorporated business was above the VAT threshold. Apparently the accountant gave Mr Gray no other advice and Mr Gray took no action himself.

7. On 21 February 1997 a VAT officer made what seems to have been a routine inspection of the records of the unincorporated business. He discovered that the turnover of the unincorporated business for the immediately preceding year was considerably greater than he had found it to be on his previous visit. The Tribunal found that Mr Gray explained this by saying that the larger contracts had "dried up" and that in consequence he had done more repair work. The implication of this seems to be that the larger contracts were those undertaken by the company and the repair work was undertaken by the unincorporated business. At any rate the VAT officer found that the turnover of the unincorporated business for the preceding year was above the threshold and advised Mr Gray that he ought to register for VAT.

8. Mr Gray was provided with a form VAT 1 in which to apply for registration. He completed and signed this on 15 March 1997. He answered the question in the form which asked whether his taxable supplies in the past twelve months or less gone over the registration limit by saying that they had and that he went over the limit on 2 July 1996. It seems probable that Mr Gray had calculated his turnover on a day to day basis and that he meant that 2 July was the first day on which the running twelve month total exceeded the threshold. What the Act requires, of course, is that the turnover shall be looked at at the end of each period of one

month. What Mr Gray should have said was that he went over the threshold in July 1996. This made July 1996 the "relevant month" for the purposes of paragraph 5 of Schedule 1. The appeal has been conducted on both sides on the footing that this represented the correct position.

9. Mr Gray sent the completed form VAT 1 to the Commissioners under cover of a letter dated 5 March 1997 in which he said (so far as material):

> "Thank you for your leaflet and forms. I have read them and am still not sure if I need to be registered for VAT. ... In October 1996 my accountant told me I had exceeded the VAT threshold in the 1995-96 trading year of the self-employed business, this happened in the last month (August). I told her I was going to start moving bigger jobs i.e. anything over £1000, to the Ltd company and the matter was not raised again by her. I completed work already started and since January 1997 I have been moving work to the Ltd company in the belief that I was not liable to register for VAT. ... I do not wish to register the self-employed business for VAT unless I have to comply with the law. I have completed the forms you sent me and leave it to you to judge if I have to register."

He wrote again to the Commissioners on 20 May 1997, apparently after having a telephone conversation with a registration control officer. In that letter he said:

> "I wish to confirm that as a sole trader my business will not be going over the VAT threshold again, and I wish to claim exemption to registration. ... Could you please advise me of my position and should I still fill in the VAT return form that has been sent to me to cover the period 2-7-96 to 30-4-97."

10. In a letter dated 6 June 1997 Mr Gray referred to having completed the VAT return and went on to give his turnover figures for the period from July 1996 to date. On these figures the turnover for the nine completed months starting in August 1996 and ending in May 1997 was £37,890, the turnover for April and May having been nil. Mr Gray said that no work had been done by him as a sole trader after he finished off work started in February.

11. At some time during or after this correspondence the Commissioners registered Mr Gray for VAT with effect from 2 July 1996. This was the date on which Mr Gray said that he had gone over the threshold. On 21 July 1997 the Commissioners informed Mr Gray that he was liable to a penalty for late registration. On 3 September 1997 the amount of this penalty was quantified at £156.

12. In the meantime, as the result of a telephone call from Mr Gray made on 23 July, the Commissioners understood that Mr Gray wished to be considered for exemption from registration. The Commissioners interpreted this, together with the preceding correspondence, as a request for a decision in Mr Gray's favour under paragraph 1(3) of Schedule 1 to the 1994 Act. On 2 September 1997 Mr Gray was notified of the Commissioners' decision on this application in the following terms:

> "In your letter of 20/05/97 you requested that the Commissioners should retrospectively exercise their powers under the VAT Act 1994 Schedule 1, paragraph 1(3) not to register you with effect from the date at which you first became liable to be registered.
>
> The Commissioners can only consider this request in the light of the facts which were available at the time you were first required to notify, namely your letter of 20/05/97 and our correspondence with the Control Officer who

carried out a control visit with yourself on 23/02/97. On the basis of those facts they are unable to accept that at the appropriate time they could have been satisfied that the value of your taxable supplies in the period of one year then beginning would not exceed £46,000.

The Commissioners therefore consider that you were correctly registered with effect from 02/07/96."

13. Mr Gray appealed from this decision to the VAT Tribunal. In his notice of appeal Mr Gray indicated that he wished to appeal against the late registration penalty and against the refusal of his request for retrospective exception from registration. The Tribunal sat to hear Mr Gray's appeal on 13 May 1999, when Mr Gray appeared in person before it. The Commissioners were represented by a member of the staff of the office of the Solicitor to the Commissioners.

14. In its decision released on 11 June 1999 the Tribunal began by setting out the relevant facts, which I have stated above in a form which makes somewhat more extensive reference to the documents than the Tribunal did. It then referred to paragraph 1(3) and to earlier decisions of VAT Tribunals in the cases of Nash and Shephard. I shall myself examine these decisions later. The Tribunal expressed its conclusion in the following paragraphs:

> "9. The Commissioners ... 'should only have been expected to take into account those factors of which they would have had knowledge at the date when registration should have taken place' (see paragraph 30 of the decision in Nash v. the Commissioners of Customs and Excise). In this case that date was 2 July 1996.
>
> 10. The decision to register the Appellant in this case was quite proper. It has not been shown that no reasonable body of Commissioners would have come to that conclusion. The Appellant's appeal therefore fails."

15. Mr Gray has now appealed to this court from the Tribunal's decision. Three main grounds of appeal are stated in the notice of appeal. In summary form they are as follows:

(1) If Mr Gray was liable to be registered at all, he should have been registered from 1 September 1996, not 2 July 1996.

(2) The Commissioners adopted a flawed approach in making their decision under paragraph 1(3) and the Tribunal was wrong to uphold that decision.

(3) In any event Mr Gray was entitled to be de-registered under paragraph 3 or 4 of Schedule 1 and the Tribunal should have given effect to this entitlement by setting aside the registration.

I will consider these in turn.

(1) If Mr Gray was liable to be registered at all, he should have been registered from 1 September 1996, not 2 July 1996.

16. This is accepted by the Commissioners, who no longer seek to uphold 2 July 1996 as the correct date. As I have previously mentioned the relevant month for the purpose of paragraph 5 of Schedule 1 was July 1996. It was Mr Gray's duty under paragraph 5(1) to notify the Commissioners of his liability to be registered within 30 days after the end of that month, that is to say on or before 30 August 1996. Whether or not he performed this duty the Commissioners were obliged to register him with effect from the end of the month following

the relevant month (i.e. 1 September 1996) or 'from such earlier date as may be agreed between them and him'. There was no evidence of the agreement of an effective date earlier than 1 September 1996. Accordingly there can be no doubt that, subject to the point under paragraph 1(3), that was the date from which the registration should have had effect. This was correctly understood by the department of the Commissioners' office responsible for the imposition of the penalty for late registration, for it assessed the penalty by reference to a period beginning on 1 September 1996. The department responsible for the registration itself seems, however, to have been led into error by Mr Gray's reference to 2 July 1996 as the date when he exceeded the relevant threshold.

17. There was some difference between the parties as to the effect of this error. On behalf of Mr Gray, Ms Lonsdale submitted that it coloured the whole case and meant that the Commissioners and the Tribunal must have gone wrong in considering the application of paragraph 1(3) because it showed that this had been examined at what was, on any view of the matter, the wrong date. She submitted that on this ground I should set aside the Tribunal's decision and remit the case for further consideration. On behalf of the Commissioners Mr McKay submitted that the error in the date was something in respect of which there can only be one answer and that I can and should give effect to it by my order on this appeal. I agree with Mr McKay on this.

(2) The Commissioners adopted a flawed approach in making their decision under paragraph 1(3) and the Tribunal was wrong to uphold that decision.

18. This constitutes the real substance of this appeal. It involves two questions, namely (i) at what date should the Commissioners look at the position in deciding whether or not they are satisfied as mentioned in paragraph 1(3); and (ii) in the case of a late registration should they consider only the knowledge of the facts which they actually had at that date or should there be attributed to them knowledge which they acquired only at a later date. I propose first to consider these questions without reference to previously decided cases and then to comment upon certain Tribunal decisions which have dealt with these points.

(i) <u>At what date should the Commissioners look at the position in making their decision under paragraph 1(3)?</u>

19. I think that two points stand out clearly. First paragraph 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 state 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.

20. Secondly, paragraph 1(3) is directed primarily to the case where a person making taxable supplies (who I will refer to as "the trader") complies with his duty to notify the Commissioners of his liability to be registered in accordance with paragraph 5. In other words it 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 paragraph 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. All this is envisaged as being done within a short time of the notification of liability being made, because it is part of the process by which the Commissioners determine whether registration is required at all. As this determination will affect the trader's tax liability from a date one month after the threshold was crossed it is important that it shall be made promptly. This means that it must be made as

at the date when registration would otherwise become effective and that it must be based on an estimate of what is likely to happen in the future. This is precisely in accord with the language of the paragraph.

21. If this is the position when notification is made in due time, as I consider it must be, then it would be surprising if the paragraph requires a different approach to be adopted when the trader is in breach of his duty and notifies late. The question to be decided in relation to such a trader is the same as that which has to be decided in the case of a trader who performs his duty, namely to determine whether or not he must be registered. In my judgment the exercise must be carried out at the same date in each case, namely at that date when registration would have effect in the absence of a decision under paragraph 1(3) which is favourable to the taxpayer.

22. Ms Lonsdale argued that the exercise cannot and should not be carried out until the trader notifies the Commissioners that, subject to paragraph 1(3), he has become liable to be registered. Her main justification for adopting this interpretation of the legislation was that otherwise the rules would operate unfairly to a trader who registers late. If it were adopted it would mean that, on the facts of this case, the Commissioners would have to consider the facts of which Mr Gray informed them at or shortly after the time when he submitted form VAT 1. That is, in my view, something which needs to be considered in connection with what I have identified as the second question. It cannot, in my judgment, constitute a reason for requiring the Commissioners to look at the matter as at a later date in a late registration case. 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. Indeed a trader who registers twelve months or more late would be able to contend that the Commissioners should, for the purposes of paragraph 1(3), look no further than the actual figures for the year in question, which would then lie in the past. This would negate the actual requirement of paragraph 1(3) which is that the Commissioners must consider whether they are satisfied that the value of taxable supplies in the relevant year '<u>will</u> not exceed' the threshold amount (emphasis added).

23. I conclude, therefore, that in cases of late registration as well as in case where the trader notifies in due time, the Commissioners must give effect to paragraph 1(3) by considering the case as at the date from which registration would otherwise take effect and, by looking forward, asking themselves whether they are or are not satisfied that turnover will not exceed the threshold amount. Obviously they cannot do this otherwise than on the basis of what they consider to be likely. But if they reach a conclusion which would be open to a reasonable body of Commissioners considering the relevant evidence, an appellate tribunal cannot interfere with their decision. It is not enough that the appellate tribunal thinks that it would have reached a different conclusion on the same evidence.

(ii) <u>What evidence is to be taken into account by the Commissioners in making their decision under paragraph 1(3)?</u>

24. In a case where the trader complies with his obligations in respect of notification the Commissioners will not only consider whether they are satisfied as mentioned in paragraph 1(3) as at the date from which registration would otherwise be effective but they will make their actual decision at about the same time. It must follow, in my view, that the only information which they can or should act upon is the information which is available to them at that time. There can be no unfairness or difficulty about this, because the trader will be able to draw to the attention of the Commissioners, at the time when he notifies them of his liability to be registered, any facts which he wishes the Commissioners to take into account for the purposes of making a decision under paragraph 1(3).

25. A trader who gives late notification of his liability to be registered, or who is

registered by the Commissioners without having given any such notification, will have missed this opportunity. Ms Lonsdale submitted that if the Commissioners cannot take into account information provided after the date when, in the absence of a favourable decision under paragraph 1(3), registration would take effect this would be unfair to the trader. In order to avoid this unfairness she submitted that the Commissioners should take account of whatever information the trader gives them at or about the time when the trader gives the late notification. Hence in the present case, in the event that I hold (as I have) that the Commissioners should look at Mr Gray's position prospectively as at 1 September 1996, there should be attributed to them not only such knowledge (if any) of Mr Gray's business as they actually had at that date but the further information obtained through their officer when he inspected Mr Gray's records in February 1997, the information contained in form VAT 1 and Mr Gray's covering letter and also, as I understood Ms Lonsdale's submission, Mr Gray's statements in his letter of 6 June 1997. Except in respect of the last item the Commissioners appeared to have accepted this approach in giving their decision under paragraph 1(3), for they had said:

> "The Commissioners can only consider this request in the light of the facts which were available at the time you were first required to notify, namely your letter of the 20/05/97 and our correspondence with the Control Officer who carried out a control visit with yourself on 23/02/97. On the basis of those facts they are unable to accept that at the appropriate time they could have been satisfied that the value of your taxable supplies in the period of one year then beginning would not exceed £46,000."

26. I cannot accept this submission. In my judgment it seeks to introduce a wholly inappropriate complication into what is clearly intended to be a reasonably straightforward scheme for determining whether a trader has to be registered. While it is true that a trader who registers late will not have the same opportunity to draw facts to the attention of the Commissioners as the trader who notifies his liability in time, this is hardly a matter which makes him deserving of much sympathy, because the lateness is the result of his failure to perform the duty imposed on him by paragraph 5 of Schedule 1.Moreover, if Ms Lonsdale were right Mr Gray would be at an advantage compared to the position he would have been in if he had notified his liability in August 1996, as the law required him to do. In his letter of 6 June 1997 he was able to give his actual trading figures for the first nine months of the relevant twelve month period, something which he could not have done in August 1996. This cannot, in my view, be a proper approach to the application of a statutory provision which envisages that the Commissioners will take a forward look. Moreover if it were to be accepted that there should be attributed to the Commissioners at the relevant date knowledge which did not come to them until later, at what point, if any, does it become too late to provide further information? What would be the position in a case such as that of Bjelica [1995] STC 329, to which Ms Lonsdale drew my attention, where registration was over twelve years late?

(iii) Earlier VAT Tribunal decisions

27. I was referred to three cases in which VAT Tribunals have dealt with the point which is before me on this appeal. The earliest of these is the case of Shephard (3023), determined by a Tribunal presided over by Lord Grantchester QC on 19 November 1986. So far as material it concerned a case of late registration and a claim by the trader that he should be excepted from registration by virtue of what is now paragraph 1(3) of Schedule 1 to the 1994 Act. On this the Tribunal said:

> "In our opinion, such exception can only be sought to be relied upon by a trader, where he has not applied to the Commissioners at the right time to

consider all the relevant circumstances, if the value of his taxable supplies in the year did not exceed the relevant amount ... and he establishes that no reasonable body of commissioners at the relevant time could have come to any conclusion other than that his taxable supplies in the year would not exceed the relevant amount. In the present case the value of Mr Shephard's taxable supplies in 1995 did exceed [the relevant amount]. ... So the first such requirement is not satisfied. But, in addition, we consider that, in April 1985, it would not have been unreasonable for the Commissioners, in all the circumstances, to have refused to apply the exception to Mr Shephard, if they had been asked so to do. In consequence we hold that Mr Shephard has been correctly registered with effect from 21 April 1985."

28. There is much in this statement with which I find myself in agreement. It supports the view that the question of exemption from registration has to be considered as at the date (in that case 21 April 1985) when registration would be effective in the absence of exemption. But I make two further observations upon it. First the Tribunal did not make it clear whether the information which the Commissioners ought to have taken into account on the hypothetical application was limited to that which they 'actually' had on the relevant date, or whether it included information provided by the trader at a later date. Secondly I am not satisfied that the first of the two requirements mentioned by the Tribunal is imposed by paragraph 1(3). That paragraph envisages, in my view, a single requirement only, namely that the Commissioners are satisfied, looking at the matter at the relevant date, that the value of the trader's taxable supplies in the next twelve months will not exceed the threshold amount. If the Commissioners are so satisfied, it could not be suggested that their decision is vitiated if, as events turn out, their expectations are not fulfilled. Correspondingly it does not follow that the fact that the threshold has in fact been crossed during those twelve months necessarily prevents the Commissioners being satisfied that looking at the matter prospectively this will not happen. I accept, however, that this is a highly theoretical point and that it will at least be very difficult for the Commissioners to be so satisfied on a prospective basis if they know that events have already occurred which show that such a prospective view would have been wrong.

29. The second case is that of Fawson (9340), decided by a VAT Tribunal on 11 November 1992. In that case Mr Fawson was, in 1991, registered for VAT with effect from 1 June 1990. His business collapsed in February 1991 and he was de-registered on 2 May 1991. This left a period of ten months during which he was liable for VAT but had not charged it to his only customer. The customer was a company which went into liquidation in 1991, before it had paid the invoice for the VAT. In view of its insolvency it was unable to pay the VAT. Mr Fawson claimed bad debt relief, but this was allowed only in respect of a much reduced sum. He appealed to the Tribunal which upheld this decision for reasons which it is not necessary to go into. However the Tribunal clearly had sympathy for him and, although the Commissioners had not been asked to make a decision under paragraph 1(3) of Schedule 1 to the VAT Act 1983 (which was in the same terms as the provision with which I am concerned) and there was accordingly no appeal from such a decision before the Tribunal; the Tribunal decided itself to consider whether exemption under that paragraph should be allowed. On this the Tribunal reviewed the evidence, including evidence produced for the first time at the hearing, and concluded:

"On the balance of probabilities I am satisfied that at the time Customs required Mr Fawson to register on 27 February 1991 they knew that he had ceased working some 17 days earlier on 10 February 1991. This is reflected in the fact that Customs were prepared to de-register Mr Fawson with effect from 2 May 1991, i.e. two days after the period of his single VAT return ended. ... I am satisfied on the evidence set out above that Customs cannot

> have been satisfied that the value of Mr Fawson's taxable supplies in the period of one year beginning at the time he should have been registered, namely 1 June 1990, would have exceeded [the threshold amount]."

30. The decision in Fawson is not altogether easy to understand, largely because of the unusual course taken by the Tribunal, but it seems clear from this extract that the Tribunal considered that paragraph 1(3) was to be applied as at the date of the decision to require registration, not from the earlier date from which registration had effect. It is thus in conflict with Shephard and with the views which I have expressed earlier in this judgment.

31. The third case is that of Nash, decided by a VAT Tribunal on 7 May 1997. This too was a late registration case involving the possible application of paragraph 1(3). The Tribunal was referred to the decisions in Shephard and Fawson and preferred the view taken in Shephard to that taken in Fawson. The chairman said:

> "Paragraph (3) is perfectly clear that the Commissioners are required to make a forward judgment. The judgment is to be exercised at the date of 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 the 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."

The reference to 'the date of transfer' in the second sentence of this extract is attributable to the fact that Nash was a case where the business had been transferred and the liability to register subject to paragraph 1(3), those under paragraph 1(2)(a), not as in the case before me under paragraph 1(1)(a). The corresponding date in the present case is 1 September 1996.

32. I am in substantial agreement with the whole of what is said in the passage I have cited. In my judgment it states the principle correctly.

(iv) Conclusion on this ground of appeal

33. The letter of 2 September 1997 giving the decision of the Commissioners in this case indicates that they had looked at the evidence which had become available to them in Mr Gray's letter of 20 May 1997 and in what they describe as their 'correspondence with the Control Officer who carried out a control visit on 23/02/97'. In my judgment they were wrong to consider this evidence because it was not in fact available to them as at the relevant date, 1 September 1996, and it appears to relate, at least in part, to things which had not then happened. The Tribunal in this case does not specifically deal with the approach adopted by the Commissioners. Instead having cited from Shephard and Nash it said that the relevant date was 2 July 1996 and said that the decision of the Commissioners was quite proper without saying what material was to be regarded as available to the Commissioners at that date.

34. Ms Lonsdale argued that, even if the proper approach to the making of a decision under paragraph 1(3) is what I have held it to be, the decision of the Tribunal in this case cannot stand because of this failure to define the available material and because the relevant dale is 1 September 1996, not 2 July 1996. The Tribunal's decision should therefore be set aside and the case should be remitted to a fresh Tribunal.

35. I cannot accept this. It is true that the relevant date is 1 September and that in this respect the Tribunal was in error. But it is manifest that at that date the Commissioners had no material available to them which was capable of satisfying them as mentioned in paragraph 1(3). As at that date Mr Gray had told them nothing about the level of his trading down to the

end of July 1996 or about its prospects for the future and it is not suggested that this information was available to the Commissioners from any other source. If the case were remitted the new Tribunal could only reach one conclusion, namely that the Commissioners were fully justified in saying that they were not satisfied as mentioned in paragraph 1(3). Only the reason for this conclusion would be different, the conclusion itself being the same. In these circumstances no useful purpose would be served by remitting the case.

(3) Should the Tribunal have ordered that Mr Gray be de-registered under paragraph 3 or 4 of Schedule 1?

36. Ms Lonsdale submitted that the evidence showed that Mr Gray was entitled to be de-registered under one or other of these paragraphs and that it was the duty of the Tribunal to consider this entitlement and give effect to it.

37. I do not agree with this. The duty of the Tribunal was to consider and adjudicate upon Mr Gray's appeal. This was an appeal against the decision to refuse exemption under paragraph 1(3) and against the penalty, but it was not an appeal against anything else. The appeal against the penalty clearly stands or falls with the objection to registration. If it was wrong to require Mr Gray to be registered at all he could not be penalised for registering late. No other argument against the penalty could be or was presented to the Tribunal As to de-registration under paragraph 3 or 4, no claim to be de-registered had ever been made by Mr Gray and the Commissioners had made no decision to grant or refuse de-registration. There was therefore nothing for the Tribunal to consider in this respect.

38. Ms Lonsdale also sought to contend that the assessment to VAT made on Mr Gray was excessive. But this matter too was not within the scope of the appeal. Indeed the very fact that there has been an assessment is alluded to only indirectly in the papers relating to the case. Mr McKay accepted on behalf of the Commissioners that if I were to hold that the registration was unjustified any assessment must be discharged and any tax paid must be repaid to Mr Gray. Mr McKay submitted that except in his indirect way this appeal does not relate to any assessment on Mr Gray. I agree.

(4) Overall conclusion

In the result I find that this appeal fails and must be dismissed. As the Commissioners wanted to have a decision of the High Court on the effect of paragraph 1(3) they agreed to pay Mr Grav's costs of this appeal whatever the outcome. In the circumstances it is unnecessary for me to make any order as to costs.