TC03987

Appeal number: TC/2012/03358

VALUE ADDED TAX – assessment under section 73 VATA – under-declared takings – clearly there were under-declared takings – what the correct amount of the assessment ought to be having regard to the evidence – found the correct amount was less than the amount assessed and the assessment reduced accordingly – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

THAMBITHURAJ SANJEEVRAJ t/a CAMBRIDGE FOOD & WINE — **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MRS RUTH WATTS DAVIES

Sitting in public at London on 14 April 2014

The Appellant appeared in person, assisted by Mr J Malhotra, Ashwin Associates, Accountants, New Malden, Surrey

Erika Carroll, Presenting Officer of HMRC, appeared for the Respondents

DECISION

1. Thambithuraj Sanjeevraj, who trades as Cambridge Food and Wine, and whom we refer to in this Decision as "the Appellant", appeals against an assessment made by the Respondents ("HMRC") under section 73 VAT Act 1994 ("VATA") – an assessment made to the best of HMRC's judgment in a case where (on the facts of this case) it appears to HMRC that a taxable person's returns are incomplete or incorrect. The assessment was originally made on 27 July 2009 in the amount of £46,282, excluding interest (£3,337.30) covering the VAT periods 06/03 to 12/08 inclusive. On 10 August 2008, A1 Accountancy, acting for the Appellant, sent in some workings for the VAT periods 09/08 and 12/08 suggesting a lower level of undeclared takings than had been assessed. After a long period for consideration, HMRC amended the assessment on 30 August 2012, by reducing the amount assessed for the VAT period 09/08 from £3,532 to £1,767 and the amount assessed for the VAT period 12/08 from £3,861 to £1,325. The total reduction for these two periods (£4,301) caused a reduction in the assessment from £46,282 to £41,981.

2. The Appellant's appeal was originally heard by the First-tier Tribunal (Tax Chamber) on 7 January 2013. That Tribunal released a Decision on 14 February 2013 dismissing the appeal. An application for permission to appeal that Decision was made to the Upper Tribunal which, in a Decision Notice issued on 5 August 2013 formally allowed the appeal and remitted the appeal to be heard afresh by a differently constituted panel of the First-tier Tribunal (this Tribunal).

3. The Upper Tribunal observed that the original First-tier Tribunal had failed to determine the tax (if any) payable and instead had confined itself to a consideration of the question whether the assessments had been made to best judgment. The Upper Tribunal added that the original First-tier tribunal had raised but failed to consider whether the assessments were in time. As to this last point, the original First-tier Tribunal had observed that there was a 3 year delay in making an assessment. We find on the evidence that there were 3 visits by HMRC officers to the Appellant, on 7 November 2006, 1 August 2007 and 31 July 2008 with a view to gathering evidence on the Appellant's pattern of transactions. The original assessment was issued on 27 July 2009, more than 4 years after the end of the periods 06/03 to 06/05 inclusive. 4 years is the normal time limit for the making of assessments (section 77(1) VATA) but it is extended to 20 years in cases involving a loss of VAT brought about deliberately by the assessed person (section 77(4) and (4A) VATA) and it is HMRC's case that the under declarations in this case were deliberate. We therefore hold that the assessments were in time (and indeed there was no argument by the Appellant or Mr Malhotra, who was assisting him, to the contrary).

4. Our function is primarily to find the correct amount of tax, so far as possible on the material properly available to us, the burden resting on the Appellant (see: *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509 at [38]). Indeed, this was the issue to which the arguments addressed to us were directed.

5. We heard oral evidence from the Appellant, and from Mr Malhotra, and from Officer Robinder Dhinsa, who also provided a Witness Statement. We also had before us a bundle of documents. The Appellant gave his evidence through an interpreter. From the evidence, we find the following facts.

6. The Appellant has been in business for more than 10 years, trading as Cambridge Food and Wine from an address in Cambridge Road, Kingston upon Thames. It was registered for VAT in 2002. We were told that the shop, at which zero-rated items as well as standard-rated items are sold is in a "rough area". The Appellant works in the shop with the assistance of his father and 2 or 3 other people. The opening hours are 7 a.m. to 10:30 p.m., except on Sundays, when the shop is open from 8 a.m. to 10 p.m.

7. On 7 November 2006, the business had been visited by HMRC for a "till interrogation exercise". This is a procedure for checking that all sales are recorded on the till records. There were 2 tills in use at that time, both being Sharp UP 700 models. The exercise revealed that there were a high number of "no sales" – that is, occasions when a till was opened without a sales transaction being recorded in the till records. There were also a large number of void transactions. HMRC regard "no sales" transactions and void transactions as being indicative of the possibility of under-declared sales with consequent evasion of VAT. The manager of the shop, not the Appellant, was asked questions by Officers Gorin and Busby, and a copy of the questionnaire completed at that time was with our papers.

8. The officers noted that there was a "slight language barrier" and they were "not sure the manager understood all [the] questions", but, when asked, he said he did understand.

9. On 1 August 2007, Officer Dhinsa, with another HMRC officer, visited the Appellant's business premises to take a further printed report from the tills. The tills were the same as had been observed on the earlier visit. The Appellant was present at the time of this visit and was asked a number of questions by Officer Dhinsa and the other officer. A copy of the questionnaire completed at that time was also with our papers. The Appellant told the officers that payments were made from the tills for deliveries of dairy products and "sometimes when someone is trying to sell new products". He said that sometimes a refund was given from the till when a wrong product had been entered, but otherwise no refunds were done on the till. When asked what his policy for "no sales" was, he replied that "no sales" was 'used for change, taking money in/out'.

10. The report taken from the tills on that visit was later analysed by another officer, Chris Nowak, who did not give evidence before us. His analysis suggested a high ratio of "no sales" and a potential suppression of VAT of around £65,000. This figure was arrived at by using an average sales price determined from the reports and applying it to the number of "no sales" identified from the reports – in other words, the amount of the potential suppression of VAT was arrived at by assuming that every "no sale" represented, in fact, a sale at the average sales price ascertained.

11. A third visit to the Appellant's business premises took place on 31 July 2008. The officer visiting were Officer Dhinsa and Officer Bhangu. Again reports were taken from the tills to identify the numbers of "no sales" and void transactions. Again, the Appellant was questioned by the visiting officers. He said that payments were made from the tills to dairy product suppliers, cash and carry suppliers and occasionally also to pay wages. He said £600 per week approximately was taken for purchases for resale and £250 per week for staff wages. He also said that he would perform a "no sale" to give change to customers or "removing cash". He said that "no sales" were not recorded or monitored and the average daily occurrence of "no sale" use was 'numerous occasions, daily'. He told the officers that staff stole from him and that was the reason for declaring a smaller income for tax purposes. The officers commented that the cash controls were very poor. They noted that the Appellant said that he had not taken money from the tills himself as a way of suppressing takings, but that he could not be certain whether money was currently going missing from the till. They also recorded the comment that the Appellant had said that since 2005 no money had gone missing and thus sales were higher than before 2005 – to the best of his knowledge.

12. After this visit, Officer Dhinsa analysed the till reports. They showed that from 5 January 2008 to 28 June 2008, 44,768 "no sales" were undertaken out of a total of 131,783 transactions. The figure, and proportion of "no sales" seemed to Officer Dhinsa to be excessively high and he formed the view that dishonest conduct had been taking place and he invited the Appellant to attend for a "PN 160 Meeting". This is a meeting where a trader is invited to speak to HMRC officers about their business affairs, where an opportunity is given to disclose any dishonest conduct, with a view to the mitigation of penalties.

13. The meeting took place on 9 September 2008 and was attended by the Appellant and his then representative, Mr Karan of A1 Accountancy, who met Officer Dhinsa and Officer Nowak. A note of the meeting was with our papers. It lasted 1 hour and 10 minutes. The Appellant said that all sales get recorded. He also said that money was taken from the till to pay for sandwiches 3 times a week, and that when this was done the "no sales" button was used. He said that the "no sales" button was used '20/30 times' for 'change for meters or change', 2 or 3 times a week for payments to suppliers, mentioning especially sandwich and chewing gum suppliers. It is not clear from the note whether the Appellant said that the "no sales" button was used for giving change '20/30 times' per day, or per week, or per some other period of time. However from the cropped copy of the note with our papers it seems likely that he referred to '20/30 times' a day. Officer Dhinsa's witness statement evidence was that the Appellant had said at the meeting that he used the "no sales" function approximately 20-30 times a day for parking but for no other reason.

14. A cash book was kept, but HMRC could not reconcile its contents to the VAT returns rendered by the Appellant.

15. Officer Dhinsa remained of the view that the Appellant had dishonestly suppressed takings and raised an assessment in July 2009 based on the sample period

from 5 January 2008 to 28 June 2008, but extrapolated to cover the VAT periods 06/03 to 12/08.

16. A1 Accountancy, on behalf of the Appellant, responded to Officer Dhinsa by a letter dated 10 August 2008, appealing the assessment for the following stated reasons:

- The sample period was not a fair reflection of the whole period assessed. Workings were attached for the VAT periods 09/08 and 12/08;
- The method of assessment was 'not a fair reflection of under declaration'. A1 Accountancy suggested that the method of assessment used by HMRC for assessing additional profits for income tax purposes would be a fair reflection – the attached workings were referred to;
- The "No sale" button was also used for lottery prize payouts, staff training and staff learning purposes. The allowance of 30 "No sales" for change given was an under-estimates, even though the Appellant had given that figure at the meeting on 9 September 2008.

17. The attached workings showed "No sales" running at 13% by value of the total transactions in the VAT period 09/08 and 9.3% by value of the total transactions in the VAT period 12/08. They also showed that "additional profits" – presumably those taken into account by HMRC for income tax purposes – were £82,306 for the years ending 31 March 2004 to 2008 inclusive, and asserted that those additional profits related as to 45% to zero-rated sales and 55% to standard-rated sales and suggested that VAT at 17.5% on 55% of the "additional profits" thus stated would be £7,921.95. This appears to be an offer to settle the VAT liability on undeclared sales at £7,921.95.

18. There was a hiatus in dealing with matters between 2008 and early 2012, when the assessment was amended to reduce the amounts assessed for the two periods 09/08 and 12/08 as already mentioned. Mr Malhotra had been appointed by the Appellant in January 2010 and in April 2010 the Appellant applied to cancel his VAT registration on the grounds that he had ceased trading. Mr Malhotra complained that he had not been able to make progress despite repeated efforts because Officer Dhinsa had been unavailable.

19. The Appellant told us that he had never recorded the uses of the "No Sales" button. He said the assessment was excessive and the officer could have come to his shop and witnesses 4 or 5 days of trading to get a more accurate picture of the amount of his sales.

20. Mr Malhotra told us that the Appellant's shop was surrounded by council flats. There was quite a turnover of people coming and going and many asked for change because there was no bank nearby. They wanted money for meters etc. He said that the Appellant was often threatened by people who demanded change and, if none was given, would threaten to break a window. He said that that had happened. He also said that the Appellant had to pay lottery winners out of the till and opened the till

(using the "no sales" button) to store important documents on a temporary basis – for example, off licence documents, and other documents concerning the business, bills and Pay Pal documents – he would take out the tray of the till and put them underneath.

21. Officer Dhinsa's oral evidence included his statement that he would have expected to see 5% of transactions recorded as "no sales", but that in this case there were over 20% so recorded. When asked by the Tribunal, he confirmed that he accepted the figures provided by A1 Accountancy for the periods 09/08 and 12/08 as genuine – even though they showed 13% and 9% of transactions recorded as "no sales" as opposed to 22%. He said that he did not use that information to make a fundamental adjustment to the whole assessment because it had been provided in 2009 when the Appellant "already knew our concerns".

22. Ms Carroll in her submissions emphasised that the assessment had been based on an analysis of the till reports and that the Appellant had supplied no reliable evidence to support his argument that the assessment had over-estimated the number of transactions where takings were suppressed by use of the "no sales" button.

23. She did, however, agree with a suggestion from the Tribunal that we could, if we thought it right to do so, revise the quantum of the assessment on the basis that the further evidence supplied by A1 Accountancy on 10 August 2008 should have been taken into account in a complete revision of the quantum of the assessment over all periods in issue.

24. In determining this appeal, we are faced – as HMRC were faced – with a paucity of reliable evidence to displace HMRC's calculations which form the basis of their assessment.

25. It is clear that there has been some – maybe considerable – suppression of sales and evasion of VAT by the Appellant. This much was admitted by A1 Accountancy on his behalf in their letter of 10 August 2008. Nevertheless we regard HMRC's refusal to give wider effect to their acceptance of A1 Accountancy's figures for the periods 09/08 and 12/08 in their review of the assessment as being inconsistent with Officer Dhinsa's acceptance that the figures provided for those two periods were genuine. If the genuine figures for the periods 09/08 and 12/08 were less than those used in the original assessment for those periods, then in our judgment it is likely that the correct figures for the other periods assessed will also be lower than those used in the original assessment. We accept the Appellant's evidence that the various legitimate circumstances in which he used the "no sales" button exceeded 30 times a day, and we consider that it would not be right in all the circumstances to hold him to that estimate made at the meeting on 9 September 2008. We consider, on the basis of the evidence, that HMRC's assessment overstates the VAT lost through suppression of takings. Rather than a figure of 22% suppression of takings, we consider, doing the best we can, that a figure of 14% overall is a likely to be a truer estimate (being the average of 22%, 9% and 11%) and we reduce the assessment from £41,981 to £29,452 (being 14/22 of the original amount of the assessment - £46,282).

26. The appeal is allowed in part accordingly.

27. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 3 September 2014