TC04290

Appeal number: TC/2013/02677

VAT-assessment-both input and output tax in dispute-no evidence either incorrect-appeal dismissed"

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINDA SHERRATT **Appellant**
t/a THE BEECHES

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
MRS SHAMEEM AKHTAR

Sitting in Stoke-on-Trent on 22 January 2014 and 23rd January 2015

John Routledge, Accountant, for the Appellant

Anne Sinclair, Litigator, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Sherratt was appealing against two decisions of the Respondents, of which the first was their decision to compulsorily register her for VAT with an effective registration date ("EDR") of 1 July 2000. This decision had been the subject of correspondence between the parties and when the appeal came on for hearing, Mr Routledge accepted, on behalf of the Appellant, that this EDR was correct and this decision was therefore no longer in issue before us.

2. The second decision under appeal related to the consequential assessment raised by the Respondents. The original assessment was raised by Notice dated 5 January 2012 covering the period 1 July 2000 to 31 October 2011 and was in the sum of £75,376.45. This was amended when reviewed by the Respondents as part of the appeal process to £60,033.69, the notification being dated 31 July 2012.

3. The assessment had also been the subject of correspondence between the parties, the main thrust of which had been directed at the output tax element. There had been indications that the input tax was also in issue but neither party had pursued this and there was no reference in the Notice of Appeal to any challenge to the input tax. Three things became immediately apparent at the outset of the hearing. First, the input tax element was very much a live issue and there was a vast discrepancy between the input tax allowed in the assessment and that which the Appellant was now claiming. Secondly, the Appellant had produced nothing to the Respondents or to the Tribunal in support of her claim although Mr Routledge maintained he had a full supported schedule of the claim in his office. Thirdly, because of this omission, neither of the parties could argue this element of the case and we had nothing before us which would enable us to resolve it. With the agreement of the parties it was therefore decided that we should at this hearing adjudicate upon and determine the correct figure for the output tax element of the assessment. The parties would then, subject to timetable, attempt to agree the input tax figures, in default of which the matter would come back before us.

4. Mrs Sherratt did not give formal oral evidence but did address us at the conclusion of the hearing. The assessing officer had been Mr Douglas Wilkie whom we would normally have expected to attend the Tribunal and to give oral evidence. However, Mr Wilkie had retired and we understand from Mrs Sinclair that it is not obligatory for retired officers to come back to attend tribunals. Mr Wilkie had been asked but had declined. We were therefore without the benefit of his evidence but with Mrs Sinclair's help we managed to deal with the case without him.

Background

5. Mrs Sherratt carries on a business which has been variously described as a sandwich shop, take away sandwich bar and a café. She had begun trading in 1993 and had put in regular Self-Assessments Returns. In May 2011 Mr Wilkie began an investigation when an analysis of the Returns revealed that Mrs Sherratt would have exceeded the VAT registration threshold by the end of May 2000 but she had not in

fact registered. Mr Wilkie contacted Mrs Sherratt and there ensued correspondence and telephone communication between the two of them and latterly between Mr Wilkie and Mr Routledge. It should be said at this stage that throughout the investigation Mrs Sherratt was as co-operative and as helpful as it was possible to be and indeed this was acknowledged by Mr Wilkie in correspondence.

6. Mr Wilkie was told that Mrs Sherratt sold both zero rated cold foods and standard rated hot foods and verbally she gave an approximate split between the two of 50/50. Mrs Sherratt had not operated a till until advised to do so by Mr Wilkie when she acquired a second hand one. It was agreed between Mrs Sherratt and Mr Wilkie that the month of August 2011 would be taken as a representative period during which Mrs Sherratt operated her till, collected the till rolls and submitted them to Mr Wilkie in September. The till rolls showed that her standard rated sales percentage was 72.33. Mrs Sherratt had told Mr Wilkie that her trade had stayed much the same over the years and at this early stage she gave no indication of any alteration in trading practice.

7. In his calculation of the output tax due, for the period 1 July 2000 to March 2010, Mr Wilkie took his figures from the Self Assessment Returns. The method of his calculation, we discuss in greater detail below in relation to Mr Routledge's submissions. For the period April 2010 to October 2011, he applied the figures declared by Mrs Sherratt in a trading questionnaire which she had completed.

8. To complete his calculation for the assessment, Mr Wilkie needed an input tax figure and he wrote to Mrs Sherratt asking her to provide to him cost of sales figures. This she did and these figures were used by Mr Wilkie. We will not go into them here as we are at not at this stage determining the input tax.

9. Mr Wilkie issued to Mrs Sherratt a long return for the period 1 July 2000 to 31 October 2011. This was completed by Mr Routledge and declared output tax of £64,386. This figure had not been accompanied by any explanation.

10. During the correspondence between Mr Routledge and Mr Wilkie, it had been mentioned that, contrary to what Mrs Sherratt had told Mr Wilkie, in fact the nature of her business had changed somewhat in that she initially traded only as a sandwich bar and it was not until March/April 2003 that she became a café, supplying rather more hot food. This factor did not appear to have been taken into account by Mr Wilkie but it was taken into account by the Review Officer who looked at the case as part of the appeal process. He formed the view that, although still correctly registerable, until March 2003 Mrs Sherratt's sales would have been of largely zero rated cold foods and there would therefore be no liability to output tax during this early period. The assessment was therefore reduced to take out the period prior to April 2003.

The Appellant's contentions

11. Mr Routledge's primary submission was that in calculating the output tax due, Mr Wilkie had incorrectly treated the figures from the Self-Assessment Returns as VAT exclusive. In carrying his calculation through he would therefore have charged

a tax on already taxed figures. We will deal with this argument first as it goes to the heart of Mr Wilkie's methodology. Mr Routledge, Mrs Sinclair and we carried out an analysis of the calculations and concluded, to the satisfaction of Mr Routledge, that Mr Wilkie had quite correctly treated the figures as VAT inclusive. As a base figure, Mr Routledge was able to agree all months except December 2008 to December 2009 inclusive. Mr Routledge's calculations led to a difference of some £226.55 in total. As Mr Wilkie had used the standard method of calculation, applying the correct VAT percentage, we will adopt and accept Mr Wilkie's calculation and uphold the base figures which he has reached for each month.

12. Mr Routledge made further challenge to Mr Wilkie's use of the figures. In Mr Routledge's submission, for two reasons, Mr Wilkie should not have relied on the till receipts for the single month of August to reach his apportionment between standard and zero rated sales. First, meteorological records showed that August 2011 was the coldest August since 2003. The apportionment would therefore not be typical of an average August and in any event it was wrong to take just one month and Mr Wilkie should have applied a seasonal average. Secondly, Mrs Sherratt had only just purchased and set up her till and the August till receipts were the very first. It was quite likely, submitted Mr Routledge, that Mrs Sherratt had set it up wrongly and the figures which it produced were therefore incorrect. Mr Routledge also contended that on the basis of only one month's till receipts, Mr Wilkie had based an 11 year assessment which was totally disproportionate.

Conclusions

13. We have to reject Mr Routledge's contentions. First, the only use of the August figures was to establish the apportionment between standard and zero rated sales. In no other respect did he base an 11 year assessment on one month's figures. His core figures were all provided by Mrs Sherratt either by way of her Self-Assessment Returns or those returned in the trading questionnaire. Further, there was no evidence put before us that Mrs Sherratt had set up the till incorrectly. There will almost certainly be seasonal variations in a business such as Mrs Sherratt's which will give varying splits between zero and standard rated sales. However, we would not have thought that there could be a month much more favourable to a trader than the month of August when typically there would be a predominance of cold sales. Even though this particular August was "cool" it would be nowhere near as cold as the temperatures would reach throughout the winter when there would be a predominance of hot sales. We would therefore have thought that an apportionment based on a seasonal average would not be favourable to Mrs Sherratt.

14. In his oral submissions, Mr Routledge did not in fact suggest that the assessment of output tax was not made to best judgment although this may well have been at the root of his arguments. For the avoidance of doubt we would therefore make it clear that we do not believe that any such argument could be substantiated. Mr Wilkie acted throughout on figures provided by Mrs Sherratt. For the entire period he used a combination of her own Self-Assessment Returns and figures which she had disclosed on the trading questionnaire. The apportionment between zero and standard rated sales was calculated from her own till receipts. Throughout the

correspondence Mr Wilkie stressed his willingness to look at any further evidence which she could produce. It is of course open to the Tribunal, even when an assessment is raised to best judgment, to vary the quantum but in this case we see no reason to do so. Although Mr Routledge had attacked Mr Wilkie's methodology he has produced nothing to back up his submissions. He has produced no calculations to show that applying a seasonal average would come out any more favourably to Mrs Sherratt. He has produced no calculations based on more than one month's till receipts even though the till has by now been in use for over two years. The onus of proof is upon the Appellant to show that the quantum of the assessment is incorrect and only if she satisfies us on the balance of probability that it is would we have cause to amend it. In the absence of any such evidence, we accept Mr Wilkie's calculation of the output tax due and uphold the output tax element of the assessment.

The input tax

15. As we set out in paragraph 3, the calculation of the input tax element is very much still in dispute. We directed orally, and record here, that within 14 days of the date of the hearing, Mr Routledge is to produce to Mrs Sinclair his schedule of the input tax claimed by Mrs Sherratt, such calculations to be accompanied by the supporting invoices. Mrs Sinclair is then within 14 days of receipt, to advise Mr Routledge whether or not the figures can be agreed or are to be amended. The parties are then to notify the Tribunal as to whether or not agreement on the input tax has been reached. If it has then, alongside our finding here of the output tax, the appeal will be resolved. If agreement is not reached, then the hearing is to be reconvened before the same Tribunal and we will adjudicate upon the input tax issue as well.

The resumed hearing relating to input tax

16. In paragraph 3 we referred to a fully supported schedule of the input tax claim which Mr Routledge advised us he had in his office and as related in paragraph 15 Mr Routledge had agreed to produce it to Mrs Sinclair within 14 days of the previous hearing. This schedule never materialized and from then until now, the final resumed day of the hearing, no evidence whatsoever has been put in by or on behalf of the Appellant in relation to the input tax claim.

17. The hearing was due to resume on 22nd September 2014. The notice of hearing was sent to both Mrs Sherratt and to Mr Routledge, her authorised representative. The notice to Mrs Sherratt was returned. The Tribunal advised Mr Routledge of this and also advised him that the hearing would go ahead on the 22nd. On the 22nd there was no attendance by either Mrs Sherratt or Mr Routledge. The tribunal clerk telephoned Mr Routledge who confirmed that he was still acting for Mrs Sherratt. He seemed uncertain as to whether or not he had been intending to attend but told the clerk that Mrs Sherratt had been going to attend but her husband had been taken ill. It was therefore agreed over the telephone with Mr Routledge that the hearing would be adjourned. Mr Routledge told the clerk that he knew of Mrs Sheratt's current address and he would advise the tribunal that afternoon. Nothing was heard from him and to this date the tribunal had not been informed of any current address for Mrs Sheratt.

18. The hearing notices for the hearing on the 23rd January 2015 were sent out to Mr Routledge and to the only known address for Mrs Sherratt and neither were returned. Neither attended the hearing but we were satisfied that, at the very least, Mr Routledge had been properly served with notice and we decided to go ahead in their absence.

19. By letter dated 16th September 2011, Mr Wilkie asked Mrs Sherratt for details of the input tax which she had paid on the goods and services purchased for use in the course of the business. In reply, Mrs Sherratt provided a piece of paper on which she stated that the "V.A.T paid by the beeches" was £1,793.66 for the year 2005/06 and £2,556.75 for the year 2007/2008. No further breakdown was given. To complete his assessment, Mr Wilkie averaged the two figures at £2.175.21 and Mr Wilkie wrote to Mrs Sherratt on 17th November 2011 advising her that this was the figure which he would be applying. Nothing was heard in response and for the period of his assessment, the overall figure for input tax was allowed at £24,660.33. In the subsequent review of the assessment, the allowable input tax was reduced to £18,671.05.

20. Other than the original unsupported written statement of the amount of input tax, neither Mrs Sherratt nor Mr Routledge have provided any further evidence, written or oral, to upset the input tax element of the assessment. The assessment and its subsequent reduction were based on the figures provided by Mrs Sherratt and we see no reason to do anything other than uphold the revised allowance of £18,671.05 for input tax.

21. Having upheld both the output tax (para 14) and the input tax (para 20) elements of the assessment for the reasons given, the appeal is dismissed.

DECISION

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

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 19 February 2015