[2017] UKFTT 742 (TC)

TC06153

Appeal number: TC/2017/00275

VAT – quantum of assessments - onus of proof – assessments upheld – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LIFESTYLE HOTELS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: PETER R SHEPPARD

Sitting in public at Leeds Magistrates Court and Family Court Hearing Centre, Leeds on Wednesday 6 September 2017

Mr Shaun Conway for the Appellant

Mr Bernard Haley, Presenting Officer of HMRC, for the Respondents

DECISION

The Decision in issue

1. The disputed decision of the respondents ("HMRC") is a Value Added Tax Notice of Amendment of Assessments dated 25 November 2016 in the sum of £25,876 covering the quarterly tax periods referenced 08/12 to 05/16 inclusive. The original Notice of Assessments was calculated on 7 September 2016 and issued on 29 September 2016.

2. The Notices were issued pursuant to Section 73(1) of the Value Added Tax Act 1994 ("VATA").

3. Although there had been other issues included in the assessments, the only issue currently in dispute related to advance deposits.

4. The burden of proof lies with the appellant to show that the amounts assessed are incorrect. The standard of proof is to the civil standard on the balance of probabilities.

The facts

5. The appellant is a hotelier and as part of its business it caters for weddings. It has been registered for VAT with effect from 5 February 2007. Mr Conway is the managing director.

6. In the course of a routine compliance visit Officer Barraclough checked the VAT records on 19 and 20 July 2016 and, amongst other matters, explored the appellant's treatment of advance deposits for weddings.

7. It transpired that although the tax point is triggered on receipt of the deposits, the appellant had not accounted for VAT in each quarter as it was required to do. (In fact, for ease of operation, HMRC usually permits businesses to account for VAT on the "movement" of deposits from quarter to quarter.) Instead it had operated what it described as a "catch up" system whereby occasionally a VAT return would be submitted on the basis of the then total of the deposits and a payment of VAT would be made.

8. On a quarter by quarter basis there was therefore an underpayment of VAT on each return.

9. However, the appellant also accounted for VAT when the full payment for the wedding was made and that resulted in later over declarations of VAT.

10. The Officer ascertained that in quarter 05/16 the gross value of such deposits, on which VAT should have been, but had not been, accounted for, was £145,473.85. VAT that had not been declared amounted to £24,245.

11. On further inspection of the records, the Officer ascertained that in 05/10 there had been a "catch up" exercise and an accounting for VAT amounting to £17,301.32. In 02/12 it was £3,138.99 and in 05/12 it was £4,166.67. There does not appear to have been a "catch up" in the period between 05/12 and 05/16.

12. In an email to HMRC dated 1 September 2016, Mr Conway explained how the three "catch ups" had worked and that in the following terms:

> **"Advanced deposits – extra VAT paid**
>
> On 29/06/2010 (for VAT Quarter 31/05/2010) we paid across an extra £17,301.32 in VAT to cover Advanced Deposits Held - £116,116.03 (£98,864.71 Net with VAT of £17,301.32).
>
> On 4/04/2012 (for VAT Quarter 28/02/2012) we paid across a further extra £3,138.99 in VAT to cover Advanced Deposits Held – **increased Advanced Deposits Held to £135,000 from £116,116.903** (increase of £18,833.97 - £15,694.98 Net with VAT of £3,138.99).
>
> On 5/07/2012 (for VAT Quarter 31/05/2012) we paid across a further extra £4,166.67 in VAT to cover Advanced Deposits Held – **increased Advanced Deposits Held to £160,000 from £135,000** (increase of £25,000 - £20,833.33 Net with VAT of £4,166.67).
>
> **Extra VAT has been paid across to cover Advanced Deposits of £160,000**"

13. There is in fact an error in relation to quarter 2/12 since the increase in the deposits amounted to £18,883.97 not £18,833.97.

14. The Officer responded on 7 September 2016 stating that since his visit had been in July 2016, the assessments that would be raised would incorporate adjustments from the period ending 31 August 2012 (ie 08/12). He described it as a "4 year cut off".

15. The payment of £4,166.67 made in 05/12 being the VAT included in additional advanced deposits of £25,000 would be deducted from the assessments on the basis that he assumed that the deposits underpinning that would relate to weddings within the four year period where there had thus been an overpayment. In relation to the 02/12 payment of £3,138.99, he asked for details of weddings in the period 08/12 but pointed out that there could be no adjustment for weddings before that since the 4 year cut off did not allow him to incorporate the over declarations in the assessments.

16. On 27 September 2016, HMRC having intimated the quantum of the assessments which would be issued, the appellant's new representative contacted HMRC. That representative was subsequently able to establish that the deposits underpinning the 02/12 payment of £3,138.99 related to weddings within the four year period. The Officer therefore deducted that from the assessments.

17. The appellant lodged the appeal dated 20 December 2016 with the Tribunal.

18. In the interests of clarity, it is appropriate to record here the detail of the summary prepared by the appellant that underpinned the calculation when the 05/12 "catch up" exercise was completed. It was lodged in process and reads:

VAT on deposits of £160,000 Duplicated VAT reclaimed (see breakdown sheets)	£26,666.70 £19,361.04
	£ 7,305.66
Paid in on account quarter ending 02/2012	£ 3,138.99
	£ 4,166.67
Add £4,166.67 into quarter ending 05/2012	

19. As can be seen from paragraph 12 above, the £116,116.03 and £18,883.97 formed part of the £160,000 having been carried forward. The appellant calculated the VAT on the total. The duplicated VAT reclaimed (and itemised) on the breakdown sheets related to deposits *said* to have been paid from June 2010 to September 2011. In fact the deposits were all paid before 1 June 2010 and the weddings were between June 2010 and September 2011 (see paragraph 34 below).

20. If one grosses up the three VAT payments made in respect of the "catch ups", one arrives at the £160,000 being the total of the deposits in the three quarters.

The appellant's Notice of Appeal and arguments

21. The Notice of Appeal restated the quantum of the three "catch up" exercises and said that it had been agreed that a list of the deposits held on 05/10, would be prepared to go with the list already provided for 05/12 and explained the mechanics of the 05/12 calculation with the figures set out at paragraph 18 above. However, it stated that the figure of £19,361.04 related to "duplicated VAT between 31/5/10 and 31/5/2012".

22. It finished by stating that: "As at VAT quarter ending 31/05/2012 we accounted for £160,000 in advanced deposits. These deposits were for bookings between 3rd June 2012 and 26th July 2014".

23. The primary thrust of the appellant's argument was that the Officer had not asked to see the mechanics of the VAT adjustment in 05/12 and that the liability in respect of the advance deposits was an "afterthought". Mr Conway argued that the assessment did not take account of the 05/12 adjustment and that instead of HMRC "allowing" the £7,305.66 of over declarations they should have allowed the £26,666.70 less the amount already allowed (£7,305.66) namely £19,361.04.

HMRC's arguments

24. HMRC relied on Sections 6(3) and 6(4) Value Added Tax Act 1994 ("VATA") which reads:

"6(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time the services are performed.

6(4) If before the time limit applicable under subsections (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b), or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment , be treated as taking place at the time the invoice is issued or the payment is received."

25. HMRC also relied on Section 77(1) VATA which reads:-

"77(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—

(a) more than [4 years][1] after the end of the prescribed accounting period or importation or acquisition concerned, or

(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, [4 years][1] after the event giving rise to the penalty."

26. HMRC argued that:

(a) VAT was not accounted for on the advance deposits when received which resulted in under declarations.

(b) Although VAT was accounted for on the advance deposits in the three "catch-up exercises" it was again accounted for in full at the time of the wedding which resulted in overpayments.

(c) Credit has been given for the overpayments in the four allowable years.

27. The Statement of Case was predicated on the basis that the over declarations caused by the duplication of payment on the deposits underpinning the £17,301.32 paid in 05/10, could not be allowed because they were subject to the capping provisions in Section 77(1) VATA.

28. In the course of the hearing, it became increasingly apparent that the "Duplicated VAT reclaimed" in 05/12 as shown at paragraph 18 above included those very deposits so in closing it was argued that the appellant had achieved relief in 2012. There was therefore no argument in relation to time limits or anything else. The appeal should be dismissed.

Discussion and Decision

29. The appellant's tax advisor had told HMRC in October 2016 that he was "struggling to see the wood for the trees … with the way in which he has kept his records". We sympathise. After extensive questioning we finally discovered part of how the appellant had operated. The appellant's system, if it can be called that, was very odd, and

[1] Sub-s (3A) inserted by FA 1997 s 48(1) and deemed to have come into force on 18 July 1996 for determining the amount of any payment or repayment by C&E on or after that date

inappropriate. It did not comply with the requirements of the legislation. The appellant, and its' representative on its' behalf now accept that.

30. At best the appellant's arguments can be summarised as being opaque, diffuse and occasionally factually inaccurate. The latter point is seen in the Notice of Appeal where, as we indicate in paragraphs 19 and 21 above, the basis period to May 2012 referred to is not the period covered by the breakdown sheets for the VAT reclaimed annexed to the 05/12 calculation (see paragraph 18 above).

31. The appellant lodged witness statements from Mr Conway and the appellant's company secretary and book keeper Ms Jane Sargent. These focussed on the VAT paid on advance deposits of £160,000 in 05/12 and questioned why the Officer had not looked in detail at the adjustment in 05/12.

32. The appellant has produced little evidence of relevance other than two unanalysed and unreferenced lengthy "Deposits On Hold Reports". In oral evidence, Mr Conway was unable to explain these documents or their relationship to other documents or whether or to what extent, if any, these deposits had been included in the "catch up" exercises. He could not link them with the assessments.

33. Reluctantly, since the appellant is no longer represented, we have analysed them when preparing this decision.

34. The first, being 23 pages long was produced on 10 June 2010 and covered what was described as "arrival dates" from 11 June 2010 until 9 September 2011 with 328 entries. The other columns included the deposit amounts, payment method and date received. The total of the deposits is £116, 693.83. The deposits were all paid between 28 June 2008 and 10 June 2010.

35. The payment dates for the deposits, and therefore the tax points, are not in date order since it has been sorted by "arrival date". An example is the first entry which is for Miss S***** L****** with an arrival date of 11 June 2010 and showing that she paid five deposits of differing amounts between 7 May 2009 and 27 March 2010. She is the first entry on the breakdown sheets for the reclaimed VAT. We take "arrival date" to be the wedding date or the date of payment for the wedding.

36. The only entry in this report that is not replicated in the "Duplicated VAT reclaimed breakdown sheets" (see paragraph 18 above) is a deposit of £760 paid on 2 April 2010 for an arrival date of 27 May 2011 that was cancelled. With that exception the lists are identical.

37. It is not possible to reconcile the total of the deposits but the difference is not material. It is clear that, in fact, when deducting the £19,361.04 in the computation for 05/12 the appellant has reclaimed all of the VAT that was overpaid on the deposits included in the 05/10 payment.

38. The second such report was generated on 2 June 2012, extends to 34 pages, has 493 entries, covers arrival dates between 3 June 2012 and 26 July 2014 and shows total deposits of £187,682.35 paid between 9 August 2010 and 2 June 2012. We make

no comment thereon since we have no other point of reference. It is therefore relatively meaningless.

39. We assume that these reports are the lists of deposits referred to in the Notice of Appeal.

40. Mr Conway's witness statement does not address these reports. He stated that: "The adjustment in quarter ending 31 May 2012 accounted for £160,000 in advanced deposits. These advanced deposits were for bookings between 3 June 2012 and 26 July 2014."

41. He was repeatedly asked if the £160,000 had included the £116,116.03 and he stated that it did. If his oral evidence and his email of 1 September 2016 are to be believed, the witness statement is not correct. Further when looking at the breakdown sheets together with these reports it is clear that the computation underlying the 05/12 payment took into account the weddings, such as that of Miss S L, between June 2010 and September 2011.

42. The £160,000 of advance deposits paid between 28 June 2008 and 2 June 2012 related to weddings between 11 June 2010 and 26 July 2014.

43. We note in passing that there is an unexplained gap in the Deposits On Hold Reports between 9 September 2011 and 3 June 2012 but neither party addressed that.

44. As we indicate above, the onus is on the appellant to establish that the assessments are incorrect. It has not done so. On the contrary, perhaps inadvertently, the appellant has obtained relief for all of the overpayments of VAT that could be identified in the relevant periods.

45. For all these reasons the appeal is dismissed.

46. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 9 OCTOBER 2017