Neutral Citation: [2022] UKFTT 00159 (TC)

Case Number: TC08486

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal reference: TC/2018/00832/P

Income Tax and VAT – final decision on quantum following release of Tribunal's "in principle" decision – new evidence introduced after hearing - treatment of capital losses arising on closure of business

Judgment date: 09 May 2022

Decided by

TRIBUNAL JUDGE ALEKSANDER
SIMON BIRD

Between

BEST ON CONVENIENCE STORE
(a firm)

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

DECISION

INTRODUCTION

1. The Tribunal released its "in principle" decision in this appeal on 16 March 2022. That decision allowed in part the Appellant's appeal against VAT assessments, VAT penalties, and determination of its income. In consequence adjustments needed to be made to the VAT assessments and income determinations to take account of the adjustments that the Tribunal found needed to be made.

2. The Tribunal gave directions for HMRC to prepare an updated calculation of these amounts, and of the consequential adjustments that would need to be made to the amount of the tax-geared penalties. The directions provided for the Appellant to have an opportunity to comment in writing on the calculations before the Tribunal made a final determination of the amounts.

3. We have considered HMRC's calculations (and supporting schedules) dated 17 March 2022, and the Appellant's responses dated 17, 18 and 27 March 2022. As the Appellant's responses raised issues going beyond just the calculation of the tax and penalties payable, we gave HMRC an opportunity to file a written reply. On 11 April 2022 HMRC wrote the Tribunal stating that they have no further comments to make.

4. We have made this decision without a hearing, on the basis of the written submissions of the parties.

HMRC'S CALCULATIONS

5. HMRC's calculations set out:

   (1) The deductions of the loans from the net bank receipts and how this has adjusted the VAT due (and also took account of the adjustment to the suppression ratio in 2012/13);

   (2) The revised VAT assessments on a quarterly basis;

   (3) The deductions of the loans from the net bank receipts and how this has adjusted the partnership profits (including the adjusted 80% suppression ratio for 2012/13);

   (4) The revised partnership profits; and

   (5) The revised VAT penalties.

6. HMRC also deducted £51,910 in calculating the Appellant's income for the year 2012/13. On 1 March 2022, HMRC wrote to the Tribunal apologising for an error in Mr Shaw's evidence, as £51,910 (which the Appellants said had been received by the Partnership by way of a consolidation loan) had in fact been taken into account as income in Mr Shaw's original calculations (see paragraph 72 of the Tribunal's *in principle* decision). HMRC referred to the BDO Report which mentions this amount and that BDO were "in the process of seeking to obtain further corroborative evidence" as regards the Appellant's claim that the funds were borrowed from a friend. At the time, Mr Shaw had requested evidence from Mr and Ms Balesaria in respect of the £51,910, but such corroborative evidence was never received.

7. Unfortunately, HMRC's 1 March 2022 letter was received by the Tribunal panel after the *in principle* decision had been released. In the circumstances, HMRC have rightly deducted the £51,910 in their amended calculations.

APPELLANT'S SUBMISSIONS

8. The Appellant makes the following submissions in respect of HMRC's calculations.

(1) First, that HMRC's calculations wrongly include amounts deposited into bank accounts after the shop had closed.

(2) Second, that Mr Pervaiz had mentioned his illness to Mr Shaw on a number of occasions. Included with the Appellant's submissions were copies of letters dated 19 May 2013, 29 July 2013, and 20 November 2017. Ms Balesaria also states that she can provide a copy of Mr Pervaiz's health report to evidence the fact that he had suffered a stroke in 2016. The 2013 letters refer to Mr Pervaiz having suffered from a Bell's palsy. The 2017 letter had been included in the bundle. It makes no reference to Mr Pervaiz having suffered a stroke, rather it includes an apology for the delay in responding to Mr Shaw's letter because (in part) of Mr Pervaiz "not enjoying good health for the last few months probably getting old".

(3) Third, that a capital loss of £77,212 arose as a result of the closure of the shop.

9. The Appellant did not otherwise challenge or disagree with HMRC's calculations.

DISCUSSION

10. The Tribunal released its "in principle" decision on 16 March 2022 which set out the basis on which the amounts under appeal should be finally determined. The Tribunal did not calculate the VAT, penalties, and profits. Instead, it gave directions for HMRC to calculate these (in accordance with the "in principle" decision), and for the Appellant to have an opportunity to check the calculation and comment on it.

11. This process is not intended (and does not) give the Appellant an opportunity to re-open issues already decided by the "in principle" decision. Nor does it give the Appellant an opportunity to raise new arguments or introduce new evidence in the absence of any explanation as to why this was not (and could not have been) done at the hearing. Many of the points raised in the Appellant's submissions are of these kinds.

12. We address each of the points raised by the Appellant in turn as follows.

Post-closing receipts

13. Ms Balesaria referred us to HMRC's schedule (included in the hearing bundle) of bank deposits. Some of deposits of cash occurred after the shop had closed. The only point raised by the Appellant at the hearing in relation to deposits following closure of the shop was the £51,900 loan. HMRC have taken this into account in their revised calculation and have deducted it in calculating turnover for the final accounting period.

14. Other than the £51,910 loan – the points made by Ms Balesaria are new, and could have raised at the hearing, but were not. No reason has been given as to why they were not raised at the hearing. For this reason, we find that these submissions are inappropriate, and we have not had regard to them. We therefore decline to adjust the HMRC's revised calculations of the Appellant's income (other than to take account of the £51,910 loan).

15. But even if we were to have given them consideration, Ms Balesaria provided no evidence and gave no explanation as to the sources of the cash banked after the shop had closed, and why it did not represent cash received in the course of trading prior to 31 October but only deposited with the banks after that date. The burden of proof falls on the Appellant to displace HMRC's assessments and to demonstrate that these cash deposits do not represent trade income. Absent such evidence and explanations, her submissions would have been bound to fail.

Illness

16. In relation to VAT penalties, at the hearing the Appellant had submitted that one of the reasons for the delays in responding to HMRC questions and correspondence was due to Mr Pervaiz being ill. We addressed these submissions in our "in principle" decision at [78].

17. The 2013 letters now produced by the Appellant evidencing that Mr Pervaiz had suffered from Bell's palsy were not included in the bundle of evidence before the Tribunal at the hearing. No reason has been given as to why these letters could not have been included in the hearing bundle or produced at the hearing. It is therefore now too late to introduce such evidence – and it is also too late to adduce further evidence in the form of Mr Pervaiz's health records. We decline to admit this evidence.

18. In any event, there is no evidence of any kind to suggest that the Bell's palsy suffered by Mr Pervaiz in 2013 was the reason for the delays that occurred after Mr Shaw took over the enquiry in 2014. As regards Mr Pervaiz's stroke, this is not mentioned in his letter of 20 November 2017, only that he has not enjoyed good health due to old age. And even if we believe Ms Balesaria's submission that Mr Pervaiz had a stroke in 2016, this does not explain the delays that occurred in 2014 and 2015.

19. We find that these submissions (and the associated new evidence) could have been made at the hearing. Absent any reasons why they were not then made, we decline to have regard to them. We therefore decline to reduce the penalty percentages on account of these additional submissions made by the Appellant.

Capital loss.

20. In his letter of 24 February 2017, Mr Pervaiz said the following in relation to losses arising on the closure of the shop:

> We would like to bring your attention about Capital Losses that our clients made at the closure of the trade as at 31st March 2013
>
> | | |
> |---|---|
> | Goodwill Cost | £62000 |
> | Motor Vehicle: Cost £2000 Less Depreciation £1774 £226 | |
> | Furniture, Fixture Fittings: Cost £7895 Less Depreciation £6171 | £1724 |
> | Plant Equipment: Cost £3500 Less Depreciation £2738 | £762 |
> | Stock | £12500 |
> | Total Capital Losses - Terminal | £77212 |

21. Mr Shaw's reply of 16 June 2017 responds to the capital loss claim as follows:

> You have brought to my attention capital losses at the closure of trade as at 31 March 2013. The losses total £14,986 for Fixtures & Fittings, Plant & Equipment and Stock.
>
> I would like to draw your attention to paragraph 59 of the notes of our meeting on the 21 October 2014. Mr & Mrs Balesaria said they sold the fixtures & fittings and stock for minimal amounts. I therefore can't accept that there were losses on these items.
>
> Your clients are also claiming losses of £62,000 for the cost of goodwill. As this constitutes a capital loss it is not available to set against trading profits.

22. On 20 November 2017 Mr Pervaiz writes back to Mr Shaw saying the following in respect of the capital loss:

> Please make a note Capital Losses are genuine & were computed by taking care of amounts received on disposals where loss on goodwill is terminal hence such losses can be claimed against business profits saying that it can be over looked in case we reach to an amicable settlement in this long going inquiry.

23. As regards the claim in respect of goodwill, this is a capital asset, and any loss arising on the termination of the trade would give rise to an allowable loss for the purposes of capital gains tax. As the Appellant is a partnership, the allowable loss will not be recognised in the Appellant's partnership tax return, but should be claimed in the self-assessment tax returns of the individual partners. This loss is therefore outside the scope of the appeals before us.

24. In his letter Mr Pervaiz states that "where loss on goodwill is terminal hence such losses can be claimed against business profit". We disagree. The ability to offset losses arising on the disposal or impairment of intangibles (such as goodwill) against trade profits is usually only applicable to incorporated business within the scope of corporation tax, and does not apply to businesses, such as the Appellant's, which are undertaken by individuals in partnership. We also note that, as a general rule, CGT allowable losses cannot be set against trade profits, but only against capital gains.

25. As regards the motor car, furniture, fixtures, fittings, plant and equipment – some, possibly all, of these items are within the scope of capital allowances. Mr Pervaiz's letter of 24 February 2017 does not include a capital allowance computation, and no such computation has been provided by Mr and Ms Balesaria to show the tax written-down values of these items for capital allowance purposes. The burden of proof falls on the Appellant to displace HMRC's assessments and to demonstrate that balancing allowances arise on the disposal of these assets. As the Appellant has not provided a capital allowance computation, we find that it has not discharged that burden. For the reasons given below, it seems likely to us that even if a capital allowance computation had been provided, the likely quantum of any allowable loss would be very small indeed.

26. To the extent that an allowable loss arises on the disposal of these assets for CGT purposes, the same issues arise as for goodwill – and such losses would need to be claimed in the self-assessment tax returns of the individual partners, and are outside the scope of this appeal. But for the reasons discussed below, it seems to us highly unlikely that any of these assets would give rise to a CGT allowable loss.

27. In the absence of any evidence, we make no findings in respect of any capital allowance or CGT losses relating to the motor car, furniture, fixtures, fittings, plant and equipment. However, we make the following observations for the benefit of the Appellant:

(1) Given the likely age of pre-2008 assets by the time the business closed in 2012 (and the likely availability of initial investment allowances in respect of assets acquired from 2008), it seems to us probable that the closing balance of any capital allowance pools at the time the business terminated would be very small indeed – with the consequence that no material balancing allowance would be available on the termination of the business.

(2) It is also unlikely that any loss arising on disposal would give rise to an allowable loss for CGT purposes. As a general rule, chattels that are sold for less than £6000, chattels that are wasting assets (namely having a predicable life of less than 50 years), and most motor cars, are outside the scope of CGT. The evidence of Mr and Ms Balesaria was that at least some of these items had to be given away, and it seems likely that more expensive shop equipment (such as fridges and freezers) would have had a useful life of less than 50 years. These assets are probably therefore outside the scope of CGT, and any loss arising on their disposal would probably not give rise to an allowable loss for CGT

purposes. Even if a CGT allowable loss did arise it would be outside the scope of these appeals as it would be a matter to be returned on the self-assessment tax returns of the individual partners.

28. Mr Pervaiz's claim for a loss of £12,500 in respect of stock is not credible. The evidence of Mr and Ms Balesaria was that the shop had to be returned to Blackpool Council with vacant possession, and that all the stock was sold or given away by the time the shop had closed. There would therefore have been no stock on hand on the termination of the trade, and therefore no loss could have arisen on the writing-off of stock on the closure of the business.

29. We therefore find that no adjustment should be made to HMRC's calculations to reflect any capital losses arising on the termination of the business.

30. Finally, we note that we were provided with no computations in respect of any of the losses claimed for CGT purposes. If Mr and Ms Balesaria wish to pursue claims for allowable losses for CGT purposes (for example, in respect of the loss relating to goodwill on the closure of the shop), they cannot rely on this decision as regards the quantum of any CGT allowable loss suffered. We also draw their attention to the provisions of s43 Taxes Management Act 1970, which require claims for allowable losses to be made no more than four years after the end of the tax year in which the loss arises.

CONCLUSION

31. Attached to this decision are annexes (based on the schedules prepared by HMRC) setting out the revised amounts of VAT and VAT penalties payable by the Appellant, and the revised profits to be allocated between the partners for income tax purposes.

32. We find that the Appellant is liable for the VAT set out in Annex 1, totalling £84,672.00

33. We find that the Appellant is liable for VAT penalties set out in Annex 2 totalling £61,743.40.

34. We find that the Appellant's profits for income tax purposes are as set out in Annex 3. The Appellant's income will need to be allocated between the partners (Mr and Ms Balesaria) pro-rata to their respective profit-sharing ratios in each of the relevant periods. HMRC will then make the necessary consequential amendments to each partner's individual income tax self-assessment return for those periods.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

FURTHER OBSERVATIONS (NOT FORMING PART OF OUR DECISION)

36. We make some further observations.

37. First, interest will accrue on these tax liabilities. The amount of interest will be calculated by HMRC on the basis of the rates in force as set down in the relevant regulations. This Tribunal has no jurisdiction in relation to the calculation of the interest payable.

38. Second, the tax and interest now fall due for payment in full. Whilst HMRC have power to agree to payment in instalments, this is entirely a matter for their discretion, and is not something over which this Tribunal has any jurisdiction.

39. Third, we were sent a copy of Mr Balesaria's Self-Assessment Statement for March 2022, which shows surcharges for tax years 05/06 to 09/10 and late filing penalties from 11/12 to 20/21 (including late filing penalties in respect of the Appellant partnership for 11/12) – we were asked why these surcharges and penalties were accruing notwithstanding that the Appellant's tax return was under appeal. Mr Balesaria will need to ask HMRC to what these surcharges and penalties relate, as this is not self-evident from the Statement. All that said, we want to provide some assistance to Mr Balesaria. But, as this appeal relates solely to the tax position of the Appellant partnership, we have only very limited knowledge about the tax position of Mr and Ms Balesaria individually. For that reason, what follows is inevitably impressionistic, and should not be treated in any way as binding HMRC or any future appeal to this Tribunal. It seems to us that the surcharges levied for the periods from 05/06 to 09/10 relate to late payment of income tax and Mr Balesaria should have received a separate formal notice from HMRC in respect of each such surcharge. As this appeal relates solely to the tax position of the Appellant partnership, and not to the income tax position of the individual partners, we have no knowledge of the extent to which Mr and Ms Balesaria had any taxable income outside the partnership, and therefore whether the late payment penalties relate to the late payment of income tax on their other income, or whether they relate to the late payment of income tax in respect of his share of the partnership's income. If they relate to the late payment of income tax on his partnership income, he will need to lodge an appeal against these surcharges – as the appeal is outside the 30 day limit, he will need to explain the reasons why he had not appealed previously, as well as explaining that the reason for late payment is because the unpaid tax was in dispute. As we have no knowledge about the reasons for the imposition of these surcharges, we can give no indication as to whether a late appeal would be allowed – and if allowed, on its prospects of success. As regards the late filing penalties for 11/12 to 20/21, again, Mr Balesaria should have received a separate formal notice from HMRC in respect of each such penalty. But we would note that the fact that the Appellant's partnership income tax return is subject to an appeal in respect of tax years 04/05 to 12/13 does not in any way suspend the obligation of Mr and Ms Balesaria to file their own individual income tax returns (even if the amount of income to be returned is negligible). We are aware that the Appellant did not file a partnership tax return for tax year 11/12 (see [82] of our *in principle* decision), and – absent a reasonable excuse – it would appear that late filing penalties are potentially chargeable for this failure. To the extent that Mr Balesaria had a reasonable excuse for the late filings, he will need to lodge an appeal against these penalties – as the appeal is outside the 30 day limit, he will need to explain the reasons why he had not appealed previously. As we have no knowledge about the reasons for the imposition of these penalties in respect of his individual income tax returns, and do not know why the Appellant's partnership tax return for 11/12 was not filed, we can give no indication as to whether a late appeal would be allowed – and if allowed, on its prospects of success.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 09 MAY 2022

Annex 1

VAT Liability

Return Period	Revised VAT Assessment
04/05	£8,255.00
07/05	£5,424.00
10/05	£5,424.00
01/06	£5,424.00
04/06	£5,208.00
07/06	£4,776.00
10/06	£4,776.00
01/07	£4,776.00
04/07	£4,083.00
07/07	£2,696.00
10/07	£2,696.00
01/08	£2,696.00
04/08	£2,483.00
07/08	£2,057.00
10/08	£2,057.00
01/09	£,2057.00
04/09	£1,888.00
07/09	£1,552.00
10/09	£1,552.00
01/10	£1,552.00
04/10	£1,807.00
07/10	£2,316.00
10/10	£2,316.00
01/11	£2,316.00
04/11	£1,618.00
07/11	£222.00
10/11	£222.00
01/12	£222.00
04/12	£148.00
07/12	£342.00
10/12	£1,711.00
Total	**£84,672.00**

Annex 2

VAT Penalties

Return Period	Revised VAT Liability	Penalty Percentage	Revised Penalty Amount
Apr-05	£ 8,255.00	70.0%	£ 5,778.50
Jul-05	£ 5,424.00	70.0%	£ 3,796.80
Oct-05	£ 5,424.00	70.0%	£ 3,796.80
Jan-06	£ 5,424.00	70.0%	£ 3,796.80
Apr-06	£ 5,208.00	70.0%	£ 3,645.60
Jul-06	£ 4,776.00	70.0%	£ 3,343.20
Oct-06	£ 4,776.00	70.0%	£ 3,343.20
Jan-07	£ 4,776.00	70.0%	£ 3,343.20
Apr-07	£ 4,083.00	70.0%	£ 2,858.10
Jul-07	£ 2,696.00	70.0%	£ 1,887.20
Oct-07	£ 2,696.00	70.0%	£ 1,887.20
Jan-08	£ 2,696.00	70.0%	£ 1,887.20
Apr-08	£ 2,483.00	70.0%	£ 1,738.10
Jul-08	£ 2,057.00	70.0%	£ 1,439.90
Oct-08	£ 2,057.00	70.0%	£ 1,439.90
Jan-09	£ 2,057.00	70.0%	£ 1,439.90
Apr-09	£ 1,888.00	82.5%	£ 1,557.60
Jul-09	£ 1,552.00	82.5%	£ 1,280.40
Oct-09	£ 1,552.00	82.5%	£ 1,280.40
Jan-10	£ 1,552.00	82.5%	£ 1,280.40
Apr-10	£ 1,807.00	82.5%	£ 1,490.78
Jul-10	£ 2,316.00	82.5%	£ 1,910.70
Oct-10	£ 2,316.00	82.5%	£ 1,910.70
Jan-11	£ 2,316.00	82.5%	£ 1,910.70
Apr-11	£ 1,618.00	82.5%	£ 1,334.85
Jul-11	£ 222.00	82.5%	£ 183.15
Oct-11	£ 222.00	82.5%	£ 183.15
Jan-12	£ 222.00	82.5%	£ 183.15
Apr-12	£ 148.00	82.5%	£ 122.10
Jul-12	£ 342.00	82.5%	£ 282.15
Oct-12	£ 1,711.00	82.5%	£ 1,411.58
Total	**£ 84,672.00**		**£ 61,743.40**

Annex 3

Profits for purposes of income tax

Tax Year	Revised profits
2004/05	£ 16,888.96
2005/06	£ 77,918.70
2006/07	£ 116,398.83
2007/08	£ 51,109.82
2008/09	£ 39,776.35
2009/10	£ 32,982.65
2010/11	£ 83,692.19
2011/12	£ 36,790.72
2012/13	£ 13,259.51