TC02391

Appeal number: TC/2011/02538

VAT – time limit for assessments – date of notification – best judgment – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHRISTOPHER DOCKETT **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR HOWARD MIDDLETON

Sitting in public at Manchester on 18 September 2012

Mr Christopher Dockett appeared in person

Ms Pat Roberts of HMRC appeared for the Respondents

DECISION

Background

1. On 23 April 2008 HMRC made assessments to VAT on Mr Dockett in the sum of £105,876 ("the Assessments"). The Assessments related to VAT periods 05/05 to 11/07. In the circumstances set out below Mr Dockett appeals against the Assessments. HMRC have subsequently agreed to reduce the Assessments to £16,843 whilst at the same time agreeing a repayment in relation to period 08/07 in the sum of £3,518.

2. Mr Dockett agrees that the Assessments as reduced are a fair reflection of his liability for the VAT periods in question. However he disputes the Assessments on the following grounds:

(1) The Assessments are out of time;

(2) The Assessments were not made to best judgment.

3. Mr Dockett was registered for VAT as a sole trader with effect from 22 March 2000. He carried on business as a wholesaler of pet and animal foods from premises at Pegswood Industrial Estate, Pegswood, Morpeth, Northumberland ("Pegswood"). He ceased trading in 2007 and was eventually deregistered with effect from 30 November 2007.

4. We set out below the legal framework which governs the time limits within which assessments to VAT can be made. We also consider the authorities as to the meaning of "best judgment" including the effect of an assessment which is found not to have been made to best judgment. We then consider our findings of fact based on the evidence before us and our decision applying the law to those facts.

Legal Framework

5. The Assessments were made pursuant to *section 73(1) Value Added Tax Act 1994 ("VATA 1994")* which provides as follows:

> "*Where a person has failed to make any returns required under this Act … or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.*"

6. The time limits within which HMRC can make an assessment under *section 73(1)* appear in *section 73(6)* and *section 77(1) VATA 1994*. At the material time for this appeal they provided as follows:

> "73*(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time*

limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge …"

"*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 3 years after the end of the prescribed accounting period or importation or acquisition concerned, …"

7. Both of these provisions in relation to time limits refer to the date on which an assessment is made. It is well established that the making of an assessment is a separate procedure to the notification of an assessment to a trader. The time limits referred to in *VATA 1994* appear to apply by reference to the date when as assessment is made rather than when it is notified to the trader (See the discussion of Lawrence Collins J in *Cheesman (t/a Well in Tune) v CCE [2000] STC 1119*). However we understand that HMRC, in favour of taxpayers, apply the time limits in *VATA 1994* as if they referred to the date of notification. In other words if an assessment is notified to a trader after the time within which it must be made, HMRC will not seek to adduce evidence that it was made at any earlier date (*See HMRC "Assessments and Time Limits: Statement of Practice Notice 915 (March 2002)*).

8. Whilst it is not strictly relevant to the issues we must decide, we should record that we have considered this appeal on the basis that there were separate assessments for each accounting period, rather than a single global assessment covering the whole period (see the distinction in *CCE v Le Rififi Ltd [1995] STC 103*).

9. We are also concerned in this appeal with the meaning of the words "*best of their judgment*" in *section 73(1)*. That term has been considered by the Court of Appeal on a number of occasions, most recently in *CCE v Pegasus Birds Ltd [2004] EWCA Civ 1015*. At [21] and [22] Carnwarth LJ stated as follows:

"*21. Chadwick LJ (para 5) [in Rahman No 2 [2003] STC 150] noted that the wording of section 83(p) reflected "the two distinct questions" which may arise where an assessment purports to be made under section 73(1):*

> *"First, whether the assessment has been made under the power conferred under that section; and, second, whether the amount of the assessment is the correct amount for which the taxpayer is accountable."*

Having referred with approval (para 31) to my judgment in Rahman (1) and that of Dyson J to like effect in McNicholas Construction Co v Customs &

Excise [2000] STC 553, he addressed the taxpayer's submission that because the tax due had been found to be less than half the amount of the assessment, the assessment could not have been to "best judgment" (para 32). He regarded that as a "non-sequitur":

> *"The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or 'quantum', stage of the appeal, has made different assumptions - say, as to food/drink ratios, wastage or pilferage - from those made by the commissioners. As Woolf J pointed out in Van Boeckel ([1981] STC 290 at 297), that does not lead to the conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgment in these cases. Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake - that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. In such cases - of which the present is one - the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary." (emphasis added)*

That formulation of the "relevant question" was part of the ratio of the decision in that case; it is binding on us, and on the Tribunal in future cases.

22. In the light of that authoritative statement of the law, I would caution against attempts to refine or add to it, by reference to individual sentences or phrases from previous judgments. In Rahman (1), as already noted I listed a number of phrases used in earlier cases as "examples", to illustrate that the test was higher than was being submitted by the taxpayer. I added that the tests were "indistinguishable from the familiar Wednesbury principles". In retrospect, I think the reference to Wednesbury principles was unhelpful and a possible source of confusion, and may raise as many questions as it answers (see the comments of Neill LJ in John Dee Ltd v Customs & Excise [1995] STC 941, 952; and of the Tribunal in W H Smith Ltd v Customs & Excise [2000] V&DR 1 para 124). Another phrase (used by Woolf J in Van Boeckel) referred to the obligation of the commissioners "fairly (to) consider all material placed before them". As a general proposition that is uncontroversial. However, it should not be seen as providing a separate and sufficient test of the invalidity of the assessment, nor as justifying lengthy cross-examination to establish whether the relevant officers have in fact looked at all the available material. Even the term "wholly unreasonable" (also used in Van Boeckel) may be misleading if it is treated as a separate test, rather than as simply an indication that there has been no "honest and genuine attempt" to make a reasoned assessment."

10. That is the test we shall apply in this appeal in considering whether the Assessments were made to best judgment. Where it is found that an officer making an assessment has misunderstood or misinterpreted material or made a mistake, the issue is "*whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it*".

11. Carnwarth LJ also considered the effect of a finding that an assessment was not made to best judgment at [28] and [29]:

> "*28. Where, however, the complaint in substance is not against the assessment as such, but is that the amount has not been arrived at by "best of their judgment", I see nothing in the statute or in principle which requires the whole assessment to be set aside. Clearly much will depend on the nature of the breach. We were told by Miss Foster that the Commissioners would not seek to defend an assessment which was arrived at dishonestly in any respect. That is understandable as a matter of public policy. However, the issue facing the Tribunal is unlikely to be so clear-cut. Fortunately in this country, sustainable allegations of actual fraud or corruption on the part of public officials are likely to be very rare indeed. What is much more likely is an allegation that, in "the heat of the chase" of an apparent wrongdoer, the officers concerned have, consciously or unconsciously, cut corners or closed their minds to relevant material. Defining the boundaries of "dishonesty" in such cases is notoriously difficult (cf Twinsectra Ltd v Yardley [2002] 2 AC 164, 170).*
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> *29. In my view, the Tribunal, faced with a "best of their judgment" challenge, should not automatically treat it as an appeal against the assessment as such, rather than against the amount. Even if the process of assessment is found defective in some respect applying the Rahman (2) test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before it. In the latter case, the Tribunal is not required to treat the assessment as a nullity, but should amend it accordingly.*"

12. Even if an assessment has not been made to best judgment, the question remains whether in all the circumstances, taking into account in particular the nature of the breach, it is appropriate to set aside the whole assessment.

Findings of Fact

13. We heard evidence from Mr Barry Rush, the officer of HMRC who made the Assessments, and from Mr Dockett himself. We also had documentary evidence comprising mainly correspondence between HMRC and Mr Docket and visit reports of HMRC officers. On the basis of the evidence we make the following findings of fact, dealing firstly with facts primarily relevant to notification of the Assessments, and secondly facts primarily relevant to the question of best judgment.

(1) Notification of the Assessments

14. From May 2007 onwards Mr Rush was attempting to arrange a visit to Mr Dockett's business to review his records. He wanted to enquire into recent VAT returns which claimed repayments of VAT. Correspondence was sent to the address which HMRC had for the business at Pegswood. Visits were also made but the premises were locked up. There was no contact from Mr Dockett. Mr Rush then checked the electoral roll and obtained a home address of 10 Blenheim Gardens. He wrote to Mr Dockett at that address to arrange an appointment to visit on 2 November 2007. Mr Dockett received that letter and replied by fax cancelling the appointment because he was going into hospital for a hip operation. HMRC replied re-arranging the visit at 10 Blenheim Gardens for 13 December 2007.

15. In the meantime the house at 10 Blenheim Gardens was sold on 20 November 2007. At about this time Mr Dockett also wrote to HMRC using a Pegswood letterhead. The letter was undated but it was received by HMRC on 27 November 2007. It stated:

> "*Please cancel the above registration as continued ill health makes it impossible for me to continue working.*"

16. Mr Rush attended at 10 Blenheim Gardens on 13 December 2007. He was advised by the occupant that she had just bought the house and gave a forwarding address called Garden View in Morpeth. She also provided a mobile phone contact number. Mr Rush attempted to find that address without success. However Mr Rush was able to speak with Mr Dockett by phone and was told that he would be in Spain for the next couple of months.

17. In February 2008 an officer again contacted Mr Dockett by phone and was told that he was still in Spain and was unsure where the business records were. She was also told that Garden View was where Mr Dockett's son lived. Mr Dockett was given 3 weeks in which to produce the business records.

18. The business records were not produced and on 19 March 2008 HMRC wrote to Mr Dockett at Garden View seeking to arrange an appointment for Mr Rush to visit on 1 April 2008 to inspect the business records at Garden View. Mr Dockett did not respond or make himself available on 1 April 2008.

19. On 14 April 2008 HMRC wrote to Mr Dockett, this time at the Pegswood address. The letter was copied to Garden View and enclosed a schedule of the VAT considered to be due for periods 05/05 to 11/07. The letter indicated that an assessment would follow in due course.

20. On 25 April 2008 "*Notice of Assessment(s)*" was sent to Mr Dockett at the Pegswood address. The total VAT assessed was £105,876. Mr Dockett states that he did not receive the Notice and we accept that evidence.

21. At some stage thereafter the Assessments were passed to the HMRC debt management office which also sought assistance from the Spanish Authorities in

enforcing the debt. The evidence before us showed a letter dated 20 October 2009 to Mr Dockett at an address in Tarragona, Spain. The unpaid amount, presumably including interest, was £155,050. Mr Dockett replied by an undated letter which was received by HMRC on 4 November 2009. He expressed surprise at having received the letter and said "*…when I left the UK as far as I knew I owed you nothing … When I left the UK I meant to inform you that I had ceased trading but was not fully compos mentos due to high levels of prescription drugs …*".

22. There was then further correspondence and a period of delay on the part of HMRC before notices of the assessment were sent to Mr Dockett in Spain on 24 August 2010. This letter was not returned to HMRC and we find on the balance of probability that Mr Dockett first became aware of the actual Assessments at the end of August 2010. There was subsequent correspondence returned undelivered but on 9 February 2011 Mr Dockett wrote criticising the Assessments. By that stage he was certainly aware of the basis on which the Assessments had been made.

(2) Judgment in Making the Assessments

23. HMRC carried out an audit visit on 3 May 2005 during which the officer was satisfied as to the zero rating of certain supplies. Since then Mr Dockett had made VAT returns giving rise to quarterly repayments of approximately £3,000. One of the matters Mr Rush wished to consider at the visit he was seeking to arrange in 2007 was a fall in declared sales from June 2006 onwards which did not seem to reflect in the amount of quarterly repayments.

24. In the absence of any opportunity to inspect the business records or discuss the business with Mr Dockett, Mr Rush made the Assessments in April 2008. He was not satisfied that the business should be in a repayment position. He considered other pet food shops and wholesalers which were all making payment returns. In the circumstances he based the Assessments on the flat rate scheme for "*wholesaling not listed elsewhere*". He did so not because Mr Docket might have qualified to use that scheme, his turnover was in excess of the limits, but because Mr Rush considered that it gave the best estimate he could get of what Mr Dockett's liability should be. He applied the scheme percentage of 6% to the gross sales declared on the VAT returns to give the net tax due for each quarter totalling £105,876 with a separate adjustment on the same basis for period 08/07.

25. Mr Dockett challenged the basis upon which the Assessments were made as being fundamentally flawed. In a letter dated 9 February 2011 he gave information about the business. In particular he described purchasing standard rated bags of dog food in order to make a mix which was intended for working dogs and which he contended gave rise to zero rated supplies. He described the circumstances in which he became ill, the business ceased to trade and the business records were lost or destroyed. This was the start of a period of correspondence in which Mr Dockett tried to convince Mr Rush to reduce the Assessments. The arguments initially put forward were as follows:

(1) The flat rate scheme only applied to businesses with a turnover of less than £150,000 pa which was clearly inapplicable.

(2) The scheme was not suitable where a business made a large amount of zero rated sales.

(3) The scheme could only be used where a business applied to use it.

26. In the course of correspondence Mr Dockett put forward what he considered to be a better estimate of the VAT liability for the periods in question. In July 2011 he calculated that there was an amount due to HMRC of £16,072. Effectively that was based on a straightforward calculation of the amount repaid in the periods 05/02 to 02/05 compared to the total sales in those periods. Mr Dockett applied the same proportion to his sales in the periods in issue. At the same time Mr Dockett also identified that during those periods the zero rated sales were 47% of total sales and the gross profit made on zero rated goods was 12%.

27. There was then a period of correspondence as Mr Rush sought to understand Mr Dockett's calculations and put forward alternative calculations. Mr Rush clearly had reservations that the business should have been in a repayment situation at all. However it seems that he eventually put those reservations to one side. This is the process that ought to have occurred in 2007 but which was frustrated because Mr Dockett had failed to give an address for correspondence. Mr Dockett criticises the officers for failing to ask him for a correspondence address when he spoke to them by phone in late 2007 and early 2008. We reject that criticism. The onus was on Mr Dockett to provide a correspondence address.

28. Following further correspondence, including correspondence after the appeal to the tribunal had been submitted, agreement was reached to reduce the Assessments to £16,845 and to reduce the repayment in period 08/07 to £3,518.

29. The agreed figures were calculated by taking the declared sales from the VAT returns submitted. The output tax due was calculated on the assumption that 53% of all sales were standard rated. The input tax available for credit was calculated on the basis that there was a gross profit percentage of 12% on all sales, not just the zero rated sales, and that standard rated expenses amounted to 13% of total sales.

Decision

30. We were referred to the VAT 641 which generated the Assessments in the present case. It indicates that the Assessments were made at the latest on 24 April 2008. On that basis the Assessments were all made in time. However HMRC do not seek to rely on that date for present purposes. Accordingly we shall approach this appeal on the basis that the Assessments were not made until they were notified to Mr Dockett.

31. Mr Docket contends that he was not aware of any liability until October 2009 and that he did not receive the Assessments until late 2010. We have found that he received them at the end of August 2010. If 31 August 2010 is the date of notification, and on HMRC's case the date of notification is the date on which they were made,

then they were plainly out of time. The 3 year time limit for the earliest assessment in relation to period 05/05 expired on 31 May 2008. The 3 year time limit for the latest assessment in relation to period 11/07 expired on 30 November 2010. However that time limit is subject to *section 73(6)* which provides a time limit of the later of 2 years after the end of the accounting period and 1 year after evidence of facts sufficient to justify the assessment comes to the knowledge of HMRC. Evidence of the facts which justified the Assessments was plainly within HMRC's knowledge by April 2008. Hence for period 11/07 the time limit for making an assessment would be 30 November 2009, 2 years after the end of the accounting period.

32. The issue on this appeal concerns the date when the Assessments were made, which HMRC accept is the date they were notified to Mr Dockett. Were they notified when the Notice was sent to the Pegswood address in April 2008 in which case the Assessments were in time. Alternatively were they notified when they were sent to Mr Dockett in Spain in August 2010 in which case they were out of time.

33. *Regulation 5(2) Value Added Tax Regulations 1995 (SI 1995/2518)* provides that:

> *" Every registered person … shall, within 30 days of any changes being made in the name, constitution or ownership of his business, or of any other event occurring which may necessitate the variation of the register or cancellation of his registration, notify the Commissioners in writing of such change or event and furnish them with full particulars thereof."*

34. Where a taxable person is required to be registered, HMRC require particulars of that person's address. HMRC say that regulation 5(2) requires a registered person to notify them in writing of a change of address.

35. *Section 98 VATA 1994* provides:

> *"Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative."*

36. HMRC say that the last place of business of Mr Dockett was Pegswood Industrial Estate and that they were therefore entitled to notify the Assessments to Mr Dockett at that address.

37. In our view HMRC are right in their submissions. There is an obligation on the part of a registered person to notify any change in address. HMRC are entitled to notify an assessment at the last known business address which, if the register has been properly maintained will be the registered address. In Mr Dockett's case that was his Pegswood address. Not only was that his registered address but it was also his last known business address. HMRC cannot be criticised for notifying an assessment to

the registered address of a trader. Certainty as to the address to which formal documents are to be sent is for the benefit of both HMRC and taxable persons alike

38. We acknowledge that on 27 November 2007 Mr Dockett had written stating that he could not continue trading and asking for his registration to be cancelled. It is not clear what steps if any HMRC took to cancel the registration at that time. In any event, however, Mr Dockett provided no alternative address for HMRC to communicate with him. In our view it is incumbent on a trader in those circumstances to provide an address for correspondence if the business address is no longer to be used.

39. In the circumstances therefore we find that the Assessments were notified to Mr Dockett on 25 April 2008 and that they were therefore made in time.

40. We now consider whether the Assessments in their original amounts were made to best judgment.

41. We do not accept Mr Dockett's submissions that the flat rate scheme was not applicable to his business. HMRC were not applying the flat rate scheme. What Mr Rush did was to use the figure of 6%, derived from the flat rate scheme, to calculate his best estimate of Mr Dockett's liability to VAT for the periods under consideration. He used that figure because Mr Dockett had ceased trading and failed to provide his business records. It may be that they had been lost or stolen as Mr Dockett says, but in any event Mr Rush did the best he could in the circumstances.

42. We can accept that the finally agreed basis of calculating the tax due was one way in which Mr Rush might have gone about making the assessments in April 2008. However it was not the only available method. Indeed on one view it would have been a very generous concession to make at that stage because it would have involved accepting that Mr Dockett was entitled to repayments for each of the periods under consideration, albeit smaller repayments than those originally claimed in the return.

43. Mr Dockett maintained that Mr Rush failed to consider the overall credibility of the Assessments. If he had done so he would have realised that the Assessments must have been grossly excessive. He submitted that if the Assessments had been correct the business would have been making a net profit of £773,585 on a turnover of £1.2 million over a period of approximately 2 years. We are not satisfied on the basis of the evidence adduced that Mr Dockett's calculation is correct. We simply do not know enough about how the business operated in the periods assessed and the assumptions involved in that calculation to be satisfied that it is correct.

44. We are however satisfied that the Assessments originally made were an honest and genuine attempt by Mr Rush to make a reasoned assessment of the VAT due from Mr Dockett.

45. Even if we had concluded that Mr Rush should have realised the Assessments were grossly excessive and were not an honest and genuine attempt to make a reasoned assessment, we would not have set the Assessments aside. Quite properly there has been no suggestion of any impropriety on the part of HMRC. Mr Rush was

doing a difficult job under difficult circumstances. The defect would not be so serious or fundamental that justice requires the Assessments to be set aside. Mr Dockett accepts the amount of the reduced Assessments. Justice could be done by upholding the reduced Assessments.

46. For the reasons given above we dismiss the appeal.

47. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 26 November 2012