TC02464

Appeal number: TC/2009/14072

VAT – s 73(6) VATA – whether assessments were in time – supplementary decision.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BOUNDS GREEN SUPERMARKET (a partnership) Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

TRIBUNAL: JUDGE CHARLES HELLIER
CAROLINE de ALBUQUERQUE

SECOND PART OF DECISION

Sitting in public At Bedford Square WC1 on 22 and 23 May 2012 with later evidence and written submissions

Altan Zorba and Naim Zorba, of A Zorba & Co, the Appellants' accountants, for the Appellants

Patrick Way, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This decision follows from our decision released on 1 August 2012 in relation to appeals against VAT assessments for the periods 07/07 (that is to say the period ending 31 July 2010), 10/07, 01/08 and 04/08, 07/08 and 01/09. In that decision we:

(i) dismissed the appeal in relation to all periods other than 07/07 and 10/07;

(ii) indicated that it seemed to us that the 07/07 and 10/07 assessments were out of time, but found that HMRC succeeded in relation to the question of the amount of VAT assessed in those periods; and

(iii) because the time limit issue had not been raised at the hearing gave HMRC 21 days to make submissions in relation to that issue for 07/07 and 10/07.

2. HMRC, having been granted an extension of time by the tribunal, sent additional submissions to the tribunal. They were sent by the tribunal to the Appellant, and a direction was made that if the Appellant wished to make any reply it must do so by writing to the tribunal so that it was received on or before 28 October 2012. No such reply was received.

3. This supplementary decision thus relates only to the 07/07 and 10/07 periods and the question as to whether HMRC were out of time to make the assessments. If they were in time the appeals in relation to those periods must be dismissed.

4. The background to the appeal is set out in our earlier decision. The following subsection of section 73 VAT Act 1994 is central to this decision:

"(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 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;

but (subject to that section) where such further evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1) ... another assessment may be made under that subsection in addition to the earlier assessment".

5. In our earlier decision we said, at [80]:

"The assessments for 07/07 to 01/09 were made on 6 November 2009. The two year limitation in section 73(6) means that the assessments for periods ending after 6 November 2007 were in time. However the periods 07/07 and 10/07 fall more than two years before the date of that assessment. As a result an assessment for any of those periods is permitted only if it falls within section

73(6)(b) ie if it was made within 12 months after facts sufficient to make the assessments came to the Commissioners attention. The only facts relevant to these assessments appear to us to be those collected on the visit of 6 November 2007 (since after that date it appears that the only additional information obtained by HMRC was the failure or inability of the appellant to produce any records). That was more than 12 months before the date of this assessment. These two assessments therefore appear unlawful."

6. It was this question which was addressed by HMRC's additional submissions.

The 10/07 Assessment

7. Subject to the discussion in relation to VAT periods at [24]ff below, we accept HMRC's submission that the assessment in respect of this period was made on or before 29 October 2009 (rather than on 6 November 2009) and was therefore within 2 years of the end of the prescribed accounting period (namely 31 October 2007). Thus s73(6)(a) is satisfied and the assessment was in time. That is for the following reasons.

8. On 26 October 2009 Mr Novak wrote to the appellant, heading his letter "Output VAT assessed for underreported sales". In that letter he says:

"The assessments of under declared Output VAT have been arrived at by applying an uplift of 55% of each declared Output VAT amount since the commencement of your business.

"A further piece of information comes from the visit of Mr. Gajjar are on the 6th November 2007 is a copy of Clark 4 sales slip dated 6 November 2007 timed at 01:12 hours. This is a sale made by the concealed Clark and I conclude that the business has continued to make these concealed sales throughout the period assessed.

"I enclose a schedule of the amounts under declared.

"You will shortly receive a notice of assessments showing the amounts shown in this letter posted to your VAT account at the VAT Central Units together with instructions for payment.".

9. He attaches a schedule to the letter which shows in a table "assessment calculation … new assessments" and gives assessment amounts for 07/07 and 10/07.

10. In a letter of 29 October 2009 Mr. Novak sets out right of appeal against the decision.

11. In *Courts v C& E commissioners* [2005] STC 698 [99] Jonathan Parker LJ says

12. "In my judgement, therefore, if what Mr. Gurd did in December 1999 amounted, on an objective analysis, to the making of an assessment (as to which see below) then there can be no room for any further enquiry as to whether he had decided to do what he did. Conversely if on an objective analysis what Mr. Gurd did

in December 1999 did not amount to the making of an assessment, and his state of mind cannot alter that fact."

13. It is clear to us that, while HMRC's internal computer entry assessment form is dated 6 November, not only did the letter of 28 October, objectively viewed, constitute the making of an assessment by Mr. Novak, but also notified that assessment to the appellant.

The 07/07 Assessment

14. It matters not whether this assessment was made on 29 October 2009 or 6 November 2009 because either way it was made more than two years after the end of the 07/07 period. The question which arises in relation to this assessment is therefore whether it was made within 12 months of evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment coming to their knowledge. The following facts are relevant.

15. It appears that the appellant's advisers made a return for the six-month period from 1 May 2007 until 31 October 2007. That return was made on 21 November 2007

16. Between 31 March 2008 and 9 September 2008 HMRC made a number of requests of Zorba & Co for the submission of separates returns for the 07/07 and 10/07 periods. On 2 December 2008 HMRC sent new VAT return forms to Zorba & Co for these periods. On 10 December 2008 Zorba & Co completed separate returns for each of these periods and sent them to HMRC.

17. In the meantime on 12 September 2008 Mr. Novak had notified the appellant of assessments. His letter of 9 September 2008 indicates that the assessments were made on the basis of daily undeclared sales figures for each day within each of the periods of £1774.15. His assessment covers the period from 31 May 2007 to 31 April 2008 and is for a total of £33,892. Then, following a review, on 16 June 2009 Mr. Sparkes of HMRC wrote to Zorba & Co indicating that the earlier assessments would be re-computed and withdrawn. He says that notice of assessment withdrawals and re-computed assessments would be sent shortly. The new assessments were made by treating a set percentage of the declared VATable sales in each period as underdeclared rather than using a fixed daily value (£1774.15) as had been done in the 9 Septmber assessments. The assessments are then notified in the letter 26 October 2009 and formally recorded HMRC's system on 6 November 2009.

18. Mr. Way says that it was only when HMRC received the 07/07 and 10/07 returns that they had the information upon which they could make assessments for those periods. That was on 10 December 2008. Until then it was not possible for them to know the position in relation to the two separate VAT periods. After all, he says, the attempt to suppress the figures might not have occurred until after the first period, and that information could not have been ascertained until such time as two separate returns were produced giving HMRC sufficient evidence upon which to consider the position. (We add that it was only after 5 October 2007 that the appellant started

trading for 24 hours a day, so that the split between the first and second three months of the six-month period might not have been even.)

19. Mr. Way relies upon what Woolf J said in Parekh:

> "The making of the nil returns did not amount to "evidence of facts" for the purposes of [section 73(6)(b)]. In saying this I should make it clear that I am referring here to the contents of the particular returns. Sometimes returns could have contained evidence of facts which are not within the knowledge of the commissioners. If this is the case, and this evidence resulted in them being sufficient evidence in the opinion of the commissioners to justify the making of an assessment which would not have been justified before this evidence came to the knowledge of the commissioners, then the position would be different."

20. Mr. Way says that the exception advanced by Woolf J applies in this case. The Commissioners were not in a position to know whether there had been suppression across the board or in just one VAT periods and not the other. They were entitled to wait for new evidence and apply their suppression rates to the new facts when they were ascertained.

Discussion

21. We agree with Mr. Way that until the receipt of a separate VAT returns for the 07/07 and 10/07 accounting periods, HMRC could not have been of the opinion that they had evidence of facts sufficient to make the particular assessments under appeal because the assessments were made by reference to a proportion of the declared sales for each of those periods. Thus those particular assessments could not have been made before 10 December 2008, and were in time.

22. Clearly HMRC considered that they had sufficient information to make an assessment before the receipt of the 07/07 and 10/07 returns because Mr Novak had made one in September 2008, but the assessments under appeal were different assessments and the test in section 73(6)(b) relates to facts justifying the making of "the" assessment. The assessment made by 7 November 2007 was made within the period prescribed by section 73(6)(b).

Conclusion

23. We conclude that the 07/07 and 10/07 assessments were made in time.

VAT return periods.

24. There is one further matter on which we should comment. Regulation 25 of the Value Added Tax Regulations 1995 provides that: --

> "(1) Every person who is registered … shall in respect of every period …of three months ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day of the month next

following the end of the period to which it relates, make to the Controller a return ... showing the amount of VAT payable by him… provided that -

(a) …;

(b) the first return shall be for the period which includes the effective date determined in accordance with Schedules 1 ... to the Act upon which the person was or should have been registered, and the said period shall begin on that date;

(c) where the Commissioners consider it necessary in any particular case to vary the length of a period or the date on which any period begins or ends or by which any return shall be made, they may allow or direct person to make returns accordingly, whether or not the period so varied had ended ..."

25. In the bundle there was a letter from which Zorba & Co to HMRC dated 4 April 2008 indicating that they understood that the appellant's first VAT return was for the period 1 May 2007 to 31 October 2007. They enclosed a copy of the VAT registration certificate. This was an amended certificate which was stated to have been issued on 3 October 2007. It specified the effective date as 1 May 2007 and included the following words:

"Returns to be made in respect of period ending 31 October 2007 and three monthly thereafter".

26. This raised in our minds the possibility that by that certificate HMRC had exercised the power in Regulation 25(1)(c) to vary the length of the first VAT period so that, rather than being three months from 1 May 2007, it was to be a long period of six months to 31 October 2007, as Zorba & Co seemed to have understood. There was no copy of the original VAT registration certificate before us and it may have specified the period to 31 July 2007 as the first period (the amended certificate, having been issues in October 2007 thus only showing the next applicable period end date). It seems to us that:

(1) if the first VAT period was, by virtue of the legend on the VAT registration certificate, a long, six months, period ending on 31 October 2007, then the assessments made on 29 October 2009 can properly be viewed as assessment for that long period, and made in time because made within two years after 31 October 2007;

(2) if the original VAT certificate showed a first return period of three months to 31 July 2007 so that returns were due for both 07/07 and 10/07, then, for the reasons above it was not until 20 December 2008 that HMRC's officers could have been had sufficient information to make the assessments of those periods.

Disposal

27. We dismiss the appeal in relation to the 07/07 and 10/07 assessments.

Rights of Appeal

28. This document read with our earlier decision contains full findings of fact and reasons for the decision in relation to the 07/07 and 10/07 assesssments . 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.

29. Zorba & Co have already submitted a timely application for permission to appeal against our earlier decision. If the appellant wishes to appeal against this decision too it should made a similar application. If such an application is received in time both applications will be considered together.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 4 January 2013