TC02794

Appeal number: TC/2009/15182

VALUE ADDED TAX – under-declaration of input tax – whether assessment made to best judgment – whether fatal flaws in calculation method used – HMRC withdrawing assessment and vacating proceedings – whether acted unreasonably in pursuing assessment – application for costs – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

S TARAFDAR
t/a SHAH INDIAN CUISINE **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC

Sitting in public at Bedford Square, London WC1 on 11 January 2013

Mr Kevin Andrews of VAT Consultants Ltd for the Appellant

Mr Philip Rowe, Appeals and Reviews Officer for the Commissioners of HM Revenue and Customs

DECISION

Introduction and background

1. This is an application for the Appellant's costs under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the grounds that HMRC acted unreasonably in bringing, defending or conducting the proceedings.

2. The origins of this matter lie in an assessment totalling £37,133.00 plus interest, issued on 30 August 2007 in respect of output tax that HMRC considered to have been under declared in periods 06/04 to 05/07 on standard rated supplies made by the Appellant.

3. The Appellant carried on the business of an Indian Restaurant in Burnham-on-Sea, Somerset. HMRC selected the restaurant for a visit by the "Cash Team" based in Taunton. Officer Reed made an unannounced visit in May 2007 and followed that up with a visit to the Appellant's accountant. Officer Reed took the view that there was an understatement of sales and therefore also of output tax.

4. The Officer put his concerns to the Appellant and his accountant at a meeting and requested any further information that he should take into account in making an assessment. The accountant was unable to respond by the deadline set by the Officer, who then made an assessment to ensure that the earliest period sought to be assessed was not time barred.

5. The assessment was appealed (although apparently late) and the Appellant applied for the appeal to be considered without payment or deposit of the tax on grounds of hardship. HMRC subsequently agreed to the late appeal and the hardship application.

6. There was produced to me a chronology for the progress of the appeal, which I shall not set out in full. On 18 August 2010 Judge Berner ordered that HMRC should serve their Statement of Case within 42 days and this was served on 22 September 2010 together with HMRC's list of documents.

7. On 23 November 2010 Judge Berner ordered the Appellant to file and serve his list of documents within 14 days but this was followed by several applications of extensions of this time limit (to which HMRC did not object). The next substantive step was service of the Appellant's witness statement on 8 July 2011. Then on 19 September 2011 both parties applied to stay all proceedings until 15 October 2011.

8. On 17 October 2011 the Tribunal issued a Hearing Notice for 1 March 2012. That hearing was adjourned and in due course a further Hearing Notice was issued for 28 September 2012. On 13 September 2012 the Respondents notified the Appellant and the Tribunal that they were withdrawing from the proceedings and that the assessment under appeal was to be withdrawn. They requested that the hearing set for 28 September 2012 be vacated.

The application for costs

9. Against that background Mr Andrews applies for the Appellant's costs on the basis that HMRC have "acted unreasonably in bringing, defending or conducting the proceedings". The basis for this claim can be found in a letter that Mr Andrews wrote to Officer Reed on 24 April 2009. The letter is brief—

> "Having reviewed the calculation leading to your assessment I think that it is fatally flawed. You have calculated an average mark-up based upon the purchase and selling price of several lines irrespective of volumes purchased. The effect of this is that products of small purchase volume but high mark-up are having a vastly disproportionate effect on the resultant figure. For this reason the assessment is wholly unsafe and should be withdrawn with immediate effect."

10. A different officer replied to that letter on 27 April 2009, which elicited a response from Mr Andrews on 29 April 2009 to the effect that. "I am not simply saying that the mark up is too high although it almost certainly is, I am saying that the methodology is fatally flawed as it is totally unsound mathematically."

11. It is fair to say that the matter does not seem to have been put in quite such terms at the outset by the Appellant's accountant. On 5 September 2007, however, he did express the view to Officer Reed that although he understood the reasoning behind the calculations he was "unhappy with this approach because small differences on the basis adopted become grossly magnified in the whole grossing up process."

12. At the hearing of the application Mr Andrews sought to persuade me that the Officer's calculation methodology was fatally flawed. The problem that he faces, however, as I pointed out, is that for the Tribunal to reach a conclusion on that issue it would effectively have to hear the Appellant's appeal. It may be that that Mr Andrews can demonstrate to the Tribunal's satisfaction that there are fatal flaws in the underlying maths of the calculation. The real issue, however, is whether the assessment was made to the Officer's best judgment. The fact that mathematically it may be flawed may be relevant to a determination of that matter but is not a complete answer. For his part Mr Rowe for the Commissioners suggested that the assessment would have to be shown to be entirely capricious and based on no evidence. It could still be to the Officer's best judgment even if it was clearly wrong as a matter of calculation and quantum.

My decision

13. Having regard to the point that I have just made I think that this application must fail. HMRC have withdrawn their assessment and discontinued the proceedings. The Tribunal is therefore no longer seized of the matter essentially complained of and the Appellant is essentially saying that HMRC should have adopted that course of action at an earlier stage of the appeal proceedings. However, the grounds on which the Appellant makes that claim can, practically speaking, no longer be determined. Whatever mathematical flaws Mr Andrews can draw to my attention they cannot of themselves lead me to determine the application in his favour.

14. In *G Wilson (Glaziers) Ltd v HMRC* [2012] UKFTT 387 (TC), the successful appellant sought costs on the grounds that HMRC had acted unreasonably in imposing default surcharges which were the subject of the appeal. The Tribunal held that, as HMRC cannot bring appeal proceedings, it followed that it is only HMRC's conduct after commencement of the appeal, ie after the notice of appeal was served, that is relevant to the question of whether they have behaved unreasonably. The Tribunal in *Yurdaer Yetix* [2012] UKFTT 753 (TC) agreed with that conclusion, as do I. The Tribunal in that second case accordingly concluded that it could only award costs if it considered that HMRC had acted unreasonably in defending or conducting the appeal after it was brought. It also drew attention to the requirements of Rule 10(3) and (4) in relation to any application for costs.

15. Adopting that approach the enquiry here would be whether HMRC had unreasonably prolonged matters once they were in the Tribunal or should have withdrawn the assessment at an earlier stage. Even if I were to conclude that HMRC might have abandoned the case at an earlier stage, the award of costs is subject to the discretion of the Tribunal (see section 29 of the Tribunals, Courts and Enforcement Act 2007). Having regard to the basis on which this application is made and to the disproportionate enquiry that would be needed to resolve the matter, it is not something that I am prepared to do. On what I know of the matter, there is no reason to think that HMRC should have abandoned the case before it entered the Tribunal or at any earlier stage of the Tribunal proceedings. The fact that they eventually took that decision is not a reason for saying that they should have taken it at an earlier point in time.

16. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 22 July 2013