TC02819

Appeal number: TC/2011/03707

VAT – Whether the turnover of two separate businesses had to be aggregated – Whether one of the businesses was conducted by a sole trader and the other by joint proprietors – In the particular circumstances of this case, yes – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GEORGE CHRISTODOULOU **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR DUNCAN McBRIDE

Sitting in public in London on 8 July 2013

The Appellant in person

Ms E Carroll, Senior Officer of the Solicitor's Office of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of HMRC to assess the Appellant for VAT in the sum of £78,235 for the period 1 September 2001 to 30 June 2008 in respect of sales from a restaurant trading as Mediterranean Touch (the "Restaurant").

2. It was common ground between the parties that at material times, the Appellant was the sole proprietor of a hairdressing salon known as New Looks (the "Salon"). The issue in dispute was whether the Appellant was also (as contended by HMRC) the sole proprietor of the Restaurant, or whether (as contended by the Appellant) the Appellant and his wife were joint proprietors of the Restaurant.

3. The parties were in agreement that this was the only issue of substance in this appeal. There was no dispute as to the significance of that issue. If the Appellant was the sole proprietor of both businesses, then his liability to register for VAT, as well as his VAT liability, would be determined by reference to the aggregated sales of both businesses. On the other hand, if the Restaurant was jointly owned by the Appellant and his wife, it was a separate business to the Salon. In that event, any liability to register for VAT in respect of the Restaurant, and any liability to pay VAT on sales from the Restaurant, would be determined separately by reference to the sales of the Restaurant alone.

4. The HMRC case is that sales from the Salon alone exceeded the threshold of liability to register for VAT on 1 September 2001, and that the Appellant is therefore liable to VAT on all taxable sales from all of his businesses from that date. (In fact, the Restaurant did not begin trading until 2003-04, and ceased trading during the course of 2011.) HMRC accept that the sales of the Restaurant alone never reached the threshold for liability to register for VAT. However, on the basis that the Restaurant is one of the Appellant's businesses, HMRC has assessed him to VAT on sales of the Restaurant in the sum of £78,235. On the Appellant's case, because the Restaurant was a separate business jointly owned by his wife, the sales of which never reached the VAT threshold, there is no liability to VAT on sales of the Restaurant at all.

5. Because this appeal turns on a case-specific issue of fact, it is unnecessary to set out in detail the relevant legislation.

The hearing

6. At the commencement of the hearing, the Appellant requested an adjournment citing three reasons. On behalf of HMRC, Ms Carroll opposed the request for an adjournment. The Tribunal decided not to grant the request, noting that the hearing had already been adjourned twice previously, that the Appellant had not produced satisfactory evidence of his wife's inability to attend or of his own ability to proceed with the appeal, and that if during the course of the hearing the Appellant felt that he

was unwell or was having difficulties in presenting his case, the matter could be raised by him and addressed at the relevant time.

7. At the Tribunal's suggestion, and with the agreement of the parties, Ms Carroll presented the HMRC case first. She called two witnesses, Mr Philip Miles and Ms Tess Bush, both HMRC officers. The Appellant cross-examined both HMRC witnesses and gave evidence himself. Both parties made submissions.

The documentary evidence

8. The evidence before the Tribunal relevant to the question of whether or not the Appellant and Mrs Christodoulou were joint proprietors of the Restaurant consisted primarily of the following.

9. At pages B26-B29 of the bundle are copies of two applications for a licence for the Restaurant, dated 12 October 2003. One application is made by the Appellant. The form contains a question "In what capacity are you applying (e.g., Manager, Freeholder, Tenant or Company Representative)". Here, the word "Freeholder" has been underlined, and the space for an answer has otherwise been left blank. There is another question asking who else will be involved in the day to day running of the license premises or have an influence on the running of the business, and here are entered the details of Mrs Christodoulou. The other application was made by Mrs Christodoulou. On her form, in answer to the question about the capacity in which she is applying, the word "manager" has been entered. In answer to the question about others who will be involved in the running of the business, the Appellant's details are given.

10. At pages C67-C74 of the bundle are copies of two applications for a liquor licence for the Restaurant. Again, one application is by the Appellant, and one is by his wife.

11. At page B30 of the bundle is a photograph of a sign that reads "Mr George Christodoulou & Mrs Nicola Christodoulou t/a Mediterranean Touch at 248A Northolt Road South Harrow". The Appellant's evidence was that this sign was displayed in the Restaurant from the time that it commenced business in December 2003.

12. At pages C47-C53 of the bundle is a copy of a premises licence for the Restaurant issued by Harrow Council, and dated 15 September 2005. It indicates that the holder of the premises licence is "George Christodoulou & Nicola Christodoulou". It is noted that the licence states that the date of first grant was 5 August 2005, which was some time after the Restaurant began trading.

13. At pages C28-C37 of the bundle are minutes of a meeting of Harrow Council, dealing with the approval of an application for a variation of hours at the Restaurant. These minutes contain a reference to "Mr and Mrs Christodoulou owners of the Restaurant". From this extract, the exact date of the document is unclear. The document was sent to HMRC by the Appellant's present accountants under cover of a

letter dated 23 July 2009, in which it is stated that the document was found on the internet and that it dates from September 2005 (which may coincide with the document referred to in the previous paragraph).

14. At pages D29-D46 of the bundle are accounts prepared by the Appellant's former accountants dating from 2007. The accounts for the Restaurant are headed "Mr G Christodoulou T/a Mediterranean Touch". The Accounts for the Salon are headed "Mr G Christodoulou T/a New Looks".

15. At pages D13-D21 of the bundle are questionnaires in respect of the Restaurant and the Salon, containing printed questions to which answers have been entered in handwriting. It is common ground that these questionnaires were completed by HMRC officers Mr Miles and Miss Bush on a visit to the Restaurant on 20 May 2008. They asked the Appellant the questions in the questionnaire, and then wrote down the answers that the Appellant provided. One question in each questionnaire was "status". In the questionnaire for the Restaurant, the handwritten answer to this question is "OWNER—SOLE PROP". In the questionnaire for the Salon, the handwritten answer is "OWNER".

16. At pages D22-D28 of the bundle is a VAT registration form, indicating that the Appellant is a sole proprietor, using both "Mediterranean Touch" and "New Looks" as trading names. The form is signed 20 June 2008. It is undisputed that this form was signed by the Appellant during a second visit to the Restaurant by HMRC officers Mr Miles and Miss Bush on that day.

17. At page D1 of the bundle is a note of the 20 June 2008 meeting prepared by HMRC officer Mr Miles. It states that at that meeting, the Appellant said that "he felt that the businesses should be treated separately", and that he preferred to complete the VAT form later. The note indicates that Miss Bush informed the Appellant that if he did not complete the form "it may be necessary to compulsory register the business".

18. At pages E57-E60 of the bundle are accounts for the Restaurant prepared by the Appellant's present accountants dated 2 July 2009, and covering the years ending 30 April 2006, 2007 and 2008 respectively. These are entitled "N and G Christodoulou T/a "Mediterranean Touch".

19. At pages E60-E63 of the bundle are printouts from an HMRC database showing that the Restaurant has been designated to HMRC as a partnership, the partners being the Appellant and Mrs Christodoulou. Page E60 contains an entry "Date Set Up 25/06/2010", which HMRC contends, and which the Appellant has not sought to dispute, means that the Restaurant was only designated to HMRC as a partnership on that date. However, other pages contain the reference "Partner start date 20/12/2003", suggesting that HMRC was informed on 25 June 2010 that the partnership had existed since 20 December 2003.

20. At page E58 of the bundle is a printout from an HMRC database containing "individual designatory details" for the Appellant's wife. It contains an entry "Date

set up 15/02/2010". According to HMRC, this means that the Appellant's wife only registered for self-assessment on that date.

21. At page E58 of the bundle is a printout from an HMRC database containing "individual designatory details" for the Appellant. This contains an entry "Date set up 13/10/1996", which would suggest that he registered for self-assessment on that date.

22. It was not in dispute that profits from the Restaurant were paid into an account held in the Appellant's name only, and that profits from the Restaurant were returned in the Appellant's self-assessment only.

HMRC's witness evidence

23. The evidence of Mr Miles was as follows.

24. Mr Miles visited the Restaurant with Miss Bush on 20 May 2008. They completed the questionnaires (paragraph 15 above) from the answers that the Appellant gave them during the visit. The Appellant told him that he was the owner and sole proprietor of the Restaurant and the Salon.

25. Mr Miles and Miss Bush visited the Restaurant again on 20 June 2008, when the Appellant gave them copies of accounts for the Restaurant and Salon (paragraph 14 above). Mr Miles asked the Appellant for details of his staff, wages and PAYE scheme. As the Appellant did not have any written records, Mr Miles recorded the information which he gave verbally. The Appellant told him that he paid his staff with cash taken from the till.

26. During this second visit on 20 June 2008, Mr Miles and Miss Bush assisted the Appellant in completing the Application form to register for VAT (paragraph 16 above). The Appellant was asked the questions on the form, and his answers were recorded on the form. The form was then read back to him, and when he agreed that the information was correct, he signed the form. At no time during that process did he say that he owned the Restaurant jointly with his wife.

27. Mr Miles subsequently got further information from the Appellant (paragraphs 9 and 13 above). This did not alter Mr Miles's view that the Appellant was the sole proprietor of the Restaurant. The bank account into which earnings from the Restaurant were paid was in the Appellant's sole name.

28. The Salon exceeded the threshold for VAT registration in July 2001, but the Appellant did not register for VAT until the time of the second visit on 20 June 2008. The Restaurant did not begin trading until 2003-04.

29. In cross-examination, the Appellant asked Mr Miles whether Miss Bush had been heavy handed on the issue of filling out the VAT form. Mr Miles said that this was not the case. The Appellant asked Mr Miles whether he remembered the Appellant asking him what he meant by "partnership". Mr Miles said that he did not remember this.

30. The evidence in the witness statement of Miss Bush is in many respects confirmatory of the evidence of Mr Miles. Most pertinently, her evidence included the following.

31. During the 20 May 2008 visit to the Restaurant the Appellant was asked if the Restaurant was a limited company, partnership or sole proprietorship. The Appellant said that the Restaurant was a sole proprietorship. At the second meeting on 20 June 2008, Miss Miles assisted the Appellant to complete the VAT registration form. She asked him the questions as shown on the form and wrote down his responses. She then went through the questions and answers on the form with the Appellant and he agreed that the information was correct, and signed the form. The HMRC computer system showed that the Appellant's self-assessment record indicated that he was registered as a sole proprietor.

32. In cross examination, the Appellant put it to Miss Bush that he had been pressurised into signing the VAT form during the second visit. He said that he had wanted time to discuss the matter with his accountant, but that Miss Bush had insisted on it being signed then and there. The response of Miss Bush was that if he had not signed it then and there she would have compulsorily registered him anyway on returning to her office. She said that it would have made no difference if she had given him time to consult with his accountant. She said that what occurred amounted to compulsory registration in any event and that it made no difference whether the Appellant signed the form or not. The Appellant put it to her that she had not explained to him clearly that the Salon had exceeded the VAT threshold, and that he would have discussed the matter with his accountant. Mrs Bush said that the date that the Appellant completed the VAT registration form was some six or seven years after the event.

33. In response to a question, Miss Bush said that she asked the Appellant during the first visit whether the Appellant was a sole proprietor, a limited company or partnership in order to establish that she was speaking to the right person. She did not explain what she meant by those terms, but assumed that the person spoken to would understand. The Appellant put it to her in cross examination that he had asked her what she meant by partnership, and that she had not explained this to him. Miss Bush denied that this was the case.

The Appellant's evidence

34. The Appellant's evidence was as follows.

35. The Appellant comes from a small place in Cyprus. He was an electrician until 1992. He started in business in 1998. He started the Salon and ran it alone because Mrs Christodoulou had another job. When he started the Restaurant, Mrs Christodoulou still had another job. While the Restaurant was running, she worked 9-to-5 in her job, and worked in the restaurant in the evenings. She worked in the Restaurant from the beginning, and was paid nothing for this. Both she and he worked 20 hours per day. They made no money, and eventually the Restaurant had to close in 2011 after they had lost a lot of money trying to make it succeed.

36. At the time of the HMRC visits to the Restaurant, he was confused. If it had been explained to him clearly from the beginning that he should have been registered for VAT in respect of the Salon, and if HMRC had then followed up in relation to the Restaurant, he would have understood. He was in the process of changing accountants at the time of the visits, and may have missed a few things. He subsequently told his accountant everything, and has been as honest as he could. He had a separate account for each business.

37. During the HMRC visits, he originally said he was a sole trader, as he did not know that he could be a partner with his wife. That is why he asked Miss Bush what she meant by partnership. She responded that it meant in partnership with another person. If he had realised that his wife could be a partner, he would have said that she was.

38. Mrs Christodoulou does not own any of the property of the Restaurant. She was the co-owner of the business, as they started together. The Restaurant was registered in both names. He did not remember where the Restaurant was registered, as experts were supposed to be doing these things for him and his wife.

39. Initially, all of the income from the Restaurant was included in his tax return. This was until he spoke to his new accountant, who advised him that he was already a partner with his wife. He assumes that the accountant separated the income between his Mrs Christodoulou and him, but he was not sure at what point the income was separated. The money from the Restaurant business was paid into an account in his name only. He did not pay his wife any wages, and she worked for nothing. She worked as hard as the Appellant if not harder.

40. In cross-examination at the Appellant said as follows. The Restaurant first started trading on 25 December 2003. His wife's name was not on the bank account of the Restaurant. When he started the Salon in 1998 he did this alone. However, his wife had to be a partner in the Restaurant business, because it was a requirement of the liquor license. When it was put to him that he had told Miss Bush that he was in charge, he said that it was true that he was in charge because his wife let him be. He said that the business freehold was in his name. It was consistent with his culture for everything to be in his name. When asked if he registered jointly with his wife with HMRC when the business opened in 2003, he said that he relied on his accountant. When it was put to him that the accounts were prepared by his former accountant on the basis that he was a sole trader (paragraph 14 above), he said that he had not been advised properly and that is the reason why he had problems with his former accountants. When it was put to him that the accountant acts under his instructions, he said that the accountant advises him, and tells him what he ought to do. As soon as he went to a new accountant, the new accountant saw the mistake and tried to correct it. He said that his former accountant was aware of the fact that his wife was involved in the Restaurant business, because his former accountant had visited the Restaurant and would have seen his wife, as well as the sign displayed there (paragraph 11 above). When it was put to the Appellant that the Restaurant was only registered with HMRC as a partnership on 25 June 2010, the Appellant said that as soon as he went to his

new accountant he was advised that his wife was in business with him and should be a partner in the business.

41. The Appellant said that if Mrs Christodoulou had been present at the hearing she would have said the same things at he had said, and would have added nothing except that she may have remembered some additional details.

The submissions of HMRC

42. The submissions on behalf of HMRC were as follows.

43. The definition of a partnership is that contained in s 1 of the Partnership Act 1890. Section 2(3) of that Act contains the rules to which regard is to be had in determining whether a partnership does or does not exist. The question whether the Appellant and his wife were in partnership depends on the facts and on the true nature of the relationship and not on the label attached thereto. One must look to the substance of the relationship between the parties, and a relationship is not a partnership simply by calling it one. The burden of proving the existence of the partnership is on the Appellant. The relevant facts are, or should be, within his own knowledge.

44. The Appellant has provided no details of any written or oral agreement between him and his wife concerning the partnership. The licensing application does not describe the Appellant and his wife as partners, and the Appellant failed to mention this licensing application to Miss Bush. If the Appellant's wife's involvement was as great as the Appellant claims, it is not unreasonable to expect that he would have told HMRC at the time of the 2008 visits. Nor did the Appellant's wife herself tell HMRC of her involvement. The business accounts produced by the Appellant at the initial meeting in 2008 were prepared on the basis of the Appellant was a sole trader. The Appellant signed the accounts a sole trader and submitted tax returns on the basis that he alone was the taxpayer responsible for the profits and losses. At the meeting with Miss Bush the Appellant described himself as a sole trader. In the HMRC review letter of 24 June 2010 it is pointed out that the Appellant was still registered for self-assessment purposes as a sole trader for both the Restaurant and the Salon. A partnership in respect of the Restaurant was notified to HMRC only on 25 June 2010, some six and a half years after the date on which the Appellant states that the partnership commenced in relation to the Restaurant, and only in response to the HMRC visits. The preparation in July 2009 by the Appellant's new accountants of accounts for years ending 30 April 2006, 2007 and 2008, describing the Appellant and his wife as joint owners of the Restaurant, cannot bring into existence a partnership that did not exist at the time. The Appellant contends that his wife shared responsibility, profits and workload, but has failed to show evidence of each of these factors despite being asked by Miss Bush in her letter of 23 November 2009 to confirm actual responsibilities and workload. The Appellant's own evidence was that the bank account into which receipts from the Restaurant were paid was in his name only. HMRC relied on a number of authorities including *Britton* LON/85/617, 15/8/86, where it was found that there was "an informal domestic arrangement as between husband and wife falling short of a contract" and in which it was found that

the appellant's wife "turned her skills to helping" her husband, and that they shared the profits only "in a domestic as distinct from a commercial sense".

The Appellant's submissions

45. In addition to submissions made during the course of giving evidence, the Appellant said that if HMRC was willing to accept from 2010 that the Restaurant was a partnership, it should accept that this was also the case previously as nothing had changed.

The Tribunal's findings

46. The Tribunal found Mr Christodoulou generally to be a credible witness, and that he freely gave evidence of certain matters that were potentially unhelpful to his case.

47. Section 1 of the Partnership Act 1998 defines a partnership as "the relation which subsists between persons carrying on a business in common with a view of profit". In a case to which the Tribunal was not referred in argument, it has been stated that:

> It can be seen that the definition is both short and simple. A written partnership agreement may extend to many pages and deal with a multitude of different matters, but there is no requirement, in statute or elsewhere, for any measure of complexity, nor indeed for a partnership agreement to be in writing. All that is required is that the partners carry on a business in common, with a view to profit. (*Colin Summers & Christopher Summers v Revenue & Customs* [2012] UKFTT 590 (TC) at [25].)

48. In this case there is no suggestion of any written agreement. It is undisputed that the Restaurant was carried on with a view to profit. The question is whether the business was carried on, not by the Appellant alone, but in common with Mrs Christodoulou.

49. The Tribunal is satisfied on the basis of the evidence referred to in paragraphs 9, 10, 12 and 13 above that from the beginning, the Restaurant licence and liquor licence were in the joint names of the Appellant and Mrs Christodoulou. The Tribunal is also satisfied that the sign referred to in paragraph 11 above was displayed in the Restaurant from the time that it was opened. Apart from anything else, this would presumably have been a requirement of the licence.

50. The Tribunal also accepts the Appellant's evidence that from the beginning, his wife worked with him in the Restaurant, that she worked at least as hard as he did, and that she received no wages for her work. On that basis, the Tribunal is persuaded that this was not a case of person occasionally helping out a spouse in a business run by the spouse. The fact that she was not paid for her work leads to the conclusion that she was not an employee. The fact that she contributed so much for no remuneration suggests that she and her husband considered themselves as running the Restaurant together.

51. Because each case is fact-specific, we do not find any of the cases relied upon by HMRC to be particularly helpful. In *Britton*, the case on which HMRC placed the greatest reliance, it appears to have been accepted that the appellant and his wife were partners in a newsagents' business, and the question was whether a separate shopfitting business was owned by the appellant as a sole trader or owned by the appellant and his wife as partners. The evidence was that the profits of both businesses were paid into an account held jointly by the appellant and his wife, that they used for both domestic purposes and as a business account for the shopfitting business. Nevertheless, it was held that the shopfitting business was not a partnership on the ground that "The profit was Mr Britton's and Mrs Britton as his wife had access to it". The basis for the decision in *Britton* is not clear. Despite the fact that the profits went into their joint account, it seems that the tribunal may in that case have considered that there was no partnership because the shopfitting business had been established separately by the appellant, and he worked much longer hours in it.

52. In the present case, unlike in *Britton*, the revenue from the Restaurant was paid into an account in the Appellant's name only. The Appellant said in evidence that his wife trusted him completely to handle their joint finances, but he also said that his wife had her own account into which her income from her job was paid. The Tribunal considers that this is one factor that weighs in favour of a conclusion that the Appellant was sole proprietor of the Restaurant. However, it is not conclusive.

53. The fact that all of the income from the Restaurant was returned solely in the Appellant's self-assessments also is a factor that weighs in favour of a conclusion that the Appellant was sole proprietor of the Restaurant. However, it is also not conclusive. If income of a partnership or of joint proprietors is incorrectly returned as income of one of the partners or proprietors alone, that does not negate the existence of a partnership or joint proprietorship.

54. The Tribunal places no weight on the fact that the Restaurant was notified to HMRC as a partnership on 25 June 2010. The Tribunal also places no weight on the accounts dated July 2009 (paragraph 18 above). While that registration, and those accounts, may express the Appellant's or his accountants' view of what the situation had previously been, that is a matter for the Tribunal to determine on the evidence. The Appellant argues that if HMRC has accepted the existence of a partnership since 25 June 2010, it should accept that a partnership existed previously because nothing has changed. However, Ms Carroll explained, and the Tribunal accepts, that HMRC simply accepts the declaration at face value unless and until there is a reason to enquire into it. The HMRC position is that if it did have reason to enquire into the matter, it might well consider the declaration to be incorrect, and that it therefore cannot be said that HMRC has actively "accepted" that there was a partnership after 25 June 2010.

55. As to what the Appellant said in the course of the meetings with HMRC, the Tribunal finds that this evidence must be treated with caution. At the hearing, the Tribunal formed the view that the Appellant had a very limited understanding of tax matters. The minute of the second meeting at bundle page D46 supports his claim that he was reluctant to complete the VAT registration form at the meeting, but

wanted to complete it later having had an opportunity to consult. In her evidence, Miss Bush accepted that the VAT registration on that day was in effect an enforced registration, and that it would have made no difference whether he had signed the form at the meeting or not, since HMRC would have registered him for VAT anyway. The Tribunal can accept that at the meetings the Appellant may have been confused, and felt under pressure, and that he lacked sufficient knowledge to answer correctly whether the business was a partnership or a sole proprietorship. Miss Bush accepted in her evidence that she did not explain the concepts to the Appellant, but assumed that he would understand.

56. Ultimately, the Tribunal finds that there is evidence pointing both ways. The Tribunal must reach a conclusion as to what was the position on a balance of probabilities. The Tribunal finds that the Restaurant was run jointly by the Appellant and Mrs Christodoulou, and the restaurant and liquor licences were in their names jointly. Although there was no written partnership agreement, and although there are considerations of some weight militating against the existence of a partnership, the Tribunal finds on the evidence, on a balance of probability, but only just, that the Appellant and Mrs Christodoulou were joint proprietors of the Restaurant.

Conclusion

57. The appeal is allowed.

58. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 7 August 2013