TC03497

Appeal number: LON/2006/01121

VALUE ADDED TAX – Assessment in respect of input tax – whether invoices in question had been paid within six months of issue – no – whether assessment to the best of the officer's judgment – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR C A DOBNEY **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MRS GILL HUNTER

Sitting in public at 45 Bedford Square, London WC1 on 4 April 2014

The Appellant appeared in person

Bruce Robinson, Tribunals Case Worker, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the Appellant ("Mr Dobney") against an assessment under section 73 Value Added Tax Act 1994 ("VATA") to recover input tax claimed in period 10/04 in the amount of £47,470.00.

2. We heard evidence from Mr Dobney. Our decision is based on that evidence and the documents put before us.

Proceedings to date

3. The matter had an unusual and protracted procedural history. The appeal was made as long ago as 23 October 2006. The substantive hearing of the appeal commenced on 1 April 2008 before the VAT and Duties Tribunal, this Tribunal's predecessor, before Mr Edward Sadler (Chairman) and Mr R G Grice (Member). No substantive consideration of the issues took place at that hearing because Mr Dobney successfully applied for the hearing to be adjourned as part heard, having claimed that all his papers relating to his case (including in particular copies of letters and bank statements not previously produced to the Respondents ("HMRC") had that morning been stolen together with his briefcase.

4. Following the adjournment, Mr Sadler issued directions for the resumption of the adjourned hearing and also the following directions:

> "Not later than 14 days before the day on which the adjourned hearing is listed to be resumed the Appellant will send to the Respondents (with a copy to the tribunal centre) copies of any documents on which he intends to rely as evidence in presenting his appeal (including copies of any letters or bank statements, to the extent he is able to obtain further copies, stolen with his briefcase prior to the commencement of the hearing in Birmingham). The Appellant is to take note that if he fails to do this the Tribunal will not allow in evidence at the hearing any papers not copied and produced in advance to the Commissioners unless the Appellant can show good reason for his failure to copy and produce those papers in advance of the hearing in compliance with this direction."

5. For reasons we do not need to recite, this direction was not complied with by Mr Dobney until 16 April 2012, shortly after the appeal had been struck out by Judge Herrington for non-compliance with earlier directions that Mr Dobney provide the documents within specified time limits.

6. The appeal was subsequently reinstated by Judge Walters on 28 February 2013 and has eventually been listed to be heard before this Tribunal.

7. It has not been possible to list the resumed hearing before Mr Sadler and Mr Grice as both have now retired. On that basis, we have treated the substantive hearing

that took place before us on 4 April 2014 as a fresh hearing rather than a resumption of the adjourned hearing.

The Facts

8. Based on the evidence that we heard and the documents put before us, we find the following facts.

9. Mr Dobney previously carried on a business as a sole trader under the name of Park Lane Flowers, growing, packing and selling cut flowers wholesale. The business was registered for VAT on 1 August 2001.

10. The business ceased to trade at some point during the spring of 2005. Due to the passing of time and the fact that Mr Dobney has lost most of the documents relating to the business he cannot be more precise about the date. It was clear that HMRC became aware that the business had ceased to trade because Mr Dobney was compulsorily deregistered for VAT purposes with effect from 1 May 2005 shortly after the issue of the assessment which is the subject of this appeal.

11. Bank statements for the business produced by Mr Dobney show that the business carried a large overdraft for the latter period of its trading. The latest statement provided shows as at 15 July 2004 an amount overdrawn of £319,955.90. Mr Dobney's evidence, which we have no reason to doubt on this point, was that he owed the bank a similar amount when the business ceased trading. He says the balance was finally settled with the bank, after he had been pressed for payment for some time, in 2008 by the sale of property. We have seen no evidence to corroborate that statement.

12. On 6 April 2005 Mr Boyd of HMRC visited Mr Dobney's accountants, where the records for the business's last financial year were kept. The business had been selected for visit because of the use of sub-contracted labour to pick flowers. Mr Boyd checked the business's Sage reports against figures produced for the VAT return for period 10/04, the purchase listings showing a high amount of input tax claimed in this quarter. Eight invoices had been listed on the records for bought in labour spanning July to September 2004. Mr Boyd noted that the total input tax claimed in respect of these invoices was £64,597.68. The supplier was noted as Ian Peter Reid ("Mr Reid") who had been deregistered by HMRC on 8 March 2004 following identification by HMRC as a "missing trader".

13. Two of the invoices had a list of cheque payments made in instalments for the invoiced total; cheque book stubs for these payments were inscribed "cash". Mr Boyd was unable to reconcile why the sales figure on the return for the period was considerably lower than the purchases figure.

14. As a follow up to what he found at this visit on 8 April 2005 Mr Boyd wrote to Mr Dobney alerting Mr Dobney to the fact that Mr Reid, trading as Standish Labour, had been deregistered with effect from March 8, 2004 and warning him that if

he had outstanding amounts to pay to this trader, VAT on those amounts should not be paid.

15. Mr Boyd visited Mr Dobney on 20 April 2005 in order to establish, among other things, why the sales for the period 10/04 were so low in relation to the amounts invoiced for labour to cut the flowers he intended to sell. There is a note of that meeting prepared by Mr Boyd which records Mr Dobney as answering that he had been forced to dump some of his flowers as they had been of poor quality. Mr Boyd's note records that an examination of the aged creditors report as of 20 April 2005 showed an amount of £318,728.54 owing to Standish Labour Services, Mr Reid's trading name.

16. We have seen a copy of the report as of 6 April 2005 which we assume, and so find, was produced to Mr Boyd at his visit to Mr Dobney's accountants on that date. This latter report showed a balance of £364,228.54 in respect of the eight invoices concerned. This copy has been annotated in handwriting with a heading "aged creditors analysis at 20/4/05" and it shows six of the invoices still outstanding for a total of £318,728.54. In our view it is likely, and we so find, that Mr Boyd went through the 6 April report with Mr Dobney to establish what had been paid and this process, together with the exercise he had conducted on 6 April at the accountant's offices led him to conclude that two of the original eight invoices had been paid, resulting in the remaining six remaining unpaid, in a total amount of £318,728.54.

17. Mr Boyd's handwritten calculation shows he calculated that the VAT element represented by those invoices, which Mr Dobney had claimed as input tax for the period 10/04 on his VAT return, was £47,470.20.

18. Mr Boyd's note, which was made a short time after his visit, does not record Mr Dobney disputing his conclusion that the six invoices remained unpaid.

19. On 25 April 2005 Mr Boyd wrote to Mr Dobney with his conclusions following his visit on 20 April 2005. His letter contains the following paragraph:

> "I had seen copies of the invoices carrying the details of the supplier, Iain Reid trading as Standish Labour Services, VAT number 789 7220 76 at the offices of your accountant Duncan & Toplis. I subsequently informed you by letter that this VAT number had been cancelled in March 2004. You have now confirmed that there is an outstanding balance of £318,728.54 on your list of aged creditors relating solely to this supplier. This debt is now over 6 months old. For supplies on or after 1 January 2003 you are required to repay input tax if you do not pay for the supplies within six months of the relevant date. Public Notice 700/18 refers. As stated in my letter sent to you on April 8th 2005 regarding the deregistration of Iain Reid trading as Standish Labour, any outstanding VAT should not be paid to this trader. If any further payments of VAT are made you will not be entitled to treat this VAT as input tax.
>
> I have therefore raised an assessment to recover the amount of £47,470.00 VAT. This debt will become recoverable 30 days after the date of the assessment. This assessment is issued without prejudice to any action the Commissioners may take under the VAT Act 1994 or any other enactment."

The letter enclosed the assessment referred to. We note in particular that this letter records Mr Boyd stating that Mr Dobney had confirmed at the meeting on 20 April 2005 that these invoices had not been paid at that time. It is therefore consistent with Mr Boyd's note of the meeting.

20. Mr Dobney did subsequently contend that the invoices had in fact been paid. There is an undated note of a telephone conversation with Mr Dobney's accountant in which the latter stated that Mr Dobney had informed her "that he had remembered that he had paid his supplier from a personal bank account". This conversation clearly took place after Mr Boyd's letter. Mr Boyd prepared the note of the conversation.

21. Mr Dobney repeated this account in substance in his letter of 24 May 2005 to Mr Boyd in which he notified him of his intention to appeal against the assessment. This letter provided as follows:

> "I am writing to appeal against the assessment of £47,470.00, which was sent to me recently. My appeal is on the grounds that the invoices sent to me by Standish Labour Services were not still outstanding after the 6 months from the date they were raised.
>
> The invoices had actually been paid by cash from my own private source within six months of their issue. This was made possible because I had a substantial win at the casino.
>
> Please find enclosed copies of the relevant bank statements, which show the amounts drawn from my private account and then paid as cash to Standish Labour Services."

22. HMRC's records do not show that the bank statements referred to in this letter were enclosed. Before us Mr Dobney maintained that they were. We have no reason to doubt HMRC on his point and we note that Mr Dobney has not been able to produce copies of the statements since.

23. Neither has Mr Dobney produced any evidence of his casino win. He told us that he won £280,000 at the Park Lane Rendezvous sometime in early 2005 and had been paid £30,000 in cash and £250,000 by cheque. He could not be precise about the date.

24. Mr Dobney maintained that he had not been able to provide copies of the relevant bank statements, although the purpose of the adjournment of the hearing in April 2008, as clearly appears from Mr Sadler's directions, had been to enable Mr Dobney to obtain copies of those statements to replace those which he said had been lost when his briefcase was stolen. The copy statements he finally produced in 2012 only related to Park Lane Flowers; nothing has ever been produced by way of his private bank statements to corroborate his account.

25. Mr Dobney clearly has not attempted to obtain copies of those statements from his bank. He told us that the account had been closed before he was asked to provide them and he did not realise statements could be obtained in respect of a closed account. We do not accept that this is the case, the bank concerned would certainly have records of Mr Dobney's account and it is likely that those would still have been

accessible in 2008 and 2012, when the direction for their production was received, albeit at a cost.

26. It would also have been possible for Mr Dobney to have asked the casino to confirm that he was paid a sum of £250,000 by cheque in 2008. On Mr Dobney's evidence this took place early in 2005, only a short time before his letter of 24 May 2005 and there would have been no difficulty in providing that evidence then. Again there was no evidence that Mr Dobney had sought this evidence at any time thereafter.

27. We are therefore left with Mr Dobney's assertion that he paid the invoices by 20 April 2005 and that Mr Boyd's note of the meeting and his subsequent letter were incorrect. Mr Dobney asserts that he told Mr Boyd at the meeting that the invoices had been paid. He also says that the monies due under the invoices were ultimately payable to a gangmaster, who would not have allowed them to remain unpaid for such a lengthy period without there being unpleasant consequences for him.

28. We cannot accept Mr Dobney's evidence on these points and we find that Mr Boyd's note of the meeting and his subsequent letter reflects the true position. Had Mr Dobney disputed Mr Boyd's account and had told him the invoices had already been paid at the meeting we would have expected him to say so in his letter of 24 May 2005, but he did not.

29. With regard to the gangmaster not being prepared to wait for payment, on Mr Dobney's own account his casino winnings were in early 2005. If the gangmaster was a person who was likely to become impatient if he was not paid promptly that would have manifested itself by early 2005. The invoices would have been outstanding for some time at that point having been issued between July and September 2004. It therefore seems equally plausible that the gangmaster would have been paid some time after April 2005, that is after Mr Dobney had been warned not to pay the VAT element on the invoices, in preference to his outstanding loan to the bank, who Mr Dobney told us would be easier to fend off.

30. The burden is on Mr Dobney to satisfy us that the invoices had been paid less than six months after their issue. In our view the evidence, in particular Mr Boyd's note and his subsequent letter and the annotations he made on the aged creditor report of 6 April 2005 points compellingly to the conclusion that the six outstanding invoices on which the assessment was based had not been paid by 20 April 2005 and therefore had not been paid within six months of their issue.

The Law

31. Section 26A VATA so far as is relevant provides as follows:

> "(1) Where –
>
> (a) A person has become entitled to credit for any input tax, and

(b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date, he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

(2) For the purposes of subsection (1) above "the relevant date", in relation to any sum representing consideration for a supply, is –

(a) the date of the supply; or

(b) if later, the date on which the sum became payable."

32. Section 73(1) VATA provides as follows:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns 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 them."

The question as to what constitutes "to the best of their judgment" was considered in the case of *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 and in the decision at page 292 Woolf J in referring to section 31 of the Finance Act 1972, the predecessor legislation to section 73(1) of the Act, laid down the following principles:

> "The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the commissioners had taken insufficient steps to ascertain the amount of tax due before making the assessment. Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable , and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is nomaterial at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required

> to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

Later in the decision, at page 296, Woolf J stated:

> "As I have indicated, unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations then they have got to take into account the material disclosed by those investigations. Obviously, as a matter of good administrative practice, it is desirable that the commissioners should make all reasonable investigations before making an assessment. If they do that it will avoid, in many cases, the necessity of appeals to the tribunal. However to try and say that in a particular case a particular form of investigation should have been carried out, is a contention which, in my view, as a matter of law, bearing in mind the wording of s.3.1(1), is difficult to establish."

33. The legal questions we therefore need to determine are as follows:

(1) Whether the input tax referable to the six invoices in question was unpaid at the end of the six months following the later of the date of the supply or the date on which the sum on the invoice became payable. If that is the case, then HMRC are entitled to raise an assessment so as to correct Mr Dobney's return so as to exclude the input tax claimed in respect of those invoices; and

(2) Whether the assessment made to correct the return was made to the best of Mr Boyd's judgment and in that respect we will apply the principles laid down in *Van Boeckel* as set out above.

34. Section 74 VATA so far as relevant provides:

> "(1) Subject to section 76(8), where an assessment is made under any provision of section 73 and, in the case of an assessment under section 74(1) at least one of the following conditions is fulfilled, namely –
>
> (a) the assessment relates to a prescribed accounting period in respect of which either -
>
> (i) a return has previously been made, or

(ii) an earlier assessment has already been notified to the person concerned,

(b) the assessment relates to a prescribed accounting period which exceeds 3 months and begins on the date with effect from which the person concerned was, or was required to be, registered,

(c) the assessment relates to a prescribed accounting period at the beginning of which the person concerned was, but should no longer have been, exempted from registration under paragraph 14(1) of Schedule 1 under paragraph 13 of Schedule 1A under paragraph 8 of Schedule 3 or under paragraph 7 of Schedule 3A, the whole of the amount assessed shall, subject to subsection (3) below, carry interest at the rate applicable under section 197 of the Finance Act 1996 from the reckonable date until payment."

We shall also have to determine whether one of the relevant conditions has been met so as to allow HMRC to claim interest in respect of the amount of the assessment.

Conclusions

35. The findings of fact that we have made lead inevitably to the conclusion that the provisions of section 26A have been satisfied in this case. The six invoices concerned were unpaid six months after the date each was issued. None of the invoices was expressed to be payable any later than their date of issue. Mr Dobney therefore was no longer entitled to credit for the input tax shown on those invoices at the expiry of that period.

36. As Mr Dobney was no longer entitled to credit for the input tax concerned, HMRC were entitled to raise an assessment for it pursuant to s73(1) VATA.

37. In our view the assessment was made to Mr Boyd's best judgment. It appears from our findings of fact that he examined all the relevant material that Mr Dobney and his accountants put before him, namely the aged creditors report and the cheque book for the business. He was able to ascertain from that information that two of the eight invoices he received had been paid and therefore confined the assessment to the six remaining invoices. No other evidence has been produced by Mr Dobney to cast doubt on the calculations Mr Boyd made, as recorded on 20 April 2005 on the copy of the aged creditors report dated 6 April 2005. We therefore find that Mr Boyd's calculation of £47,470.00 was based on all the relevant material that was available to him and was made to best judgment.

38. It is clear that condition (a) (ii) of section 74(1) VATA has been satisfied. There is no evidence before us to suggest that the sum added to the assessment in respect of interest, namely £1,432.96, has not been correctly calculated, Mr Dobney making no submissions in that regard.

39. We therefore dismiss the appeal.

40. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 25 April 2014