TC04134

Appeal number: TC/2013/06168

VAT – Registration threshold – whether exceeded – Yes – liability to assessment and penalty – Sections 67 and 70, and Schedule 1, VATA 1994 and VAT Regulations 1995 (SI 1995/2518) – penalty mitigated; quoad ultra appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOHAMMED IMRAN **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
DR HEIDI POON, CA, CTA, PhD

Sitting in public at George House, George Street, Edinburgh on 2 May, 18 August and 11 September 2014

Appellant:- Mr Imran, in person, assisted by Mrs H Scott

Respondents:- Mrs E McIntyre, Officer of HMRC

DECISION

Preliminary

1. The issue in this appeal is whether during the period from 1 May 2009 to 30 January 2010 the Appellant's turnover exceeded the threshold for registration for VAT. The annual threshold then was £67,000. When a trader's turnover approaches the threshold, he has to review the level monthly and anticipate future trading levels: it requires in effect a "rolling" review.

2. In the event of the threshold being exceeded and there being a failure to notify HMRC an assessment at standard rate results together with a penalty of 15%. Here the appeal is in respect of an assessment to VAT of £7,900.70 and a penalty of £1,185. A subordinate issue was canvassed, *viz* as to whether an appellant's financial circumstances might competently be considered in mitigation of these liabilities.

3. Mr Imran was not represented professionally at the hearing. He did, however, have the support and guidance of Mrs Scott from the office of his MP, Gordon Banks. We explained to them that ordinarily the Appellant would be expected to lead and, too, that the *onus* of proof rested on him. Mrs McIntyre suggested that she might lead her sole witness first, which had the advantage of setting out HMRC's stance in detail to Mr Imran and Mrs Scott. Adopting this course was acceptable to them.

Evidence

4. Firstly, **Mrs Alison Barclay** gave evidence. She read out the terms of her Witness Statement which is contained in section C (p 91-94) of the Respondents' bundle of productions. At the material time, she was the manager of the Hidden Economy Group in Dundee, which has the responsibility of reviewing businesses' liability to registration for VAT. She delegated the investigation in this case to another officer, Douglas Wilkie (who did not give evidence), but supervised its progress throughout. Mrs Barclay spoke to the course of correspondence throughout between HMRC and those acting for the Appellant, and the exchange of internal memoranda between herself and Mr Wilkie. This correspondence is contained mainly in section D of the Respondents' Bundle. The initial enquiry by HMRC dated 22 November 2011 is included at p142. Mrs Barclay explained that the assessment and penalty had followed upon the figures stated by Mr Imran or on his behalf in his income Return for self-assessment purposes.

5. After the assessment and penalty were raised, Askari Limited, the Appellant's then accountants, had sought to substitute for the "self assessment" figures stated originally, lower amounts. They had produced records of Daily Takings (p 125 – 136) bearing to relate to the business over an extended period, beyond the period assessed.

6. HMRC had urged the Appellant repeatedly to produce prime records, such as till-rolls, sales receipt slips, and bank records, as a means of supporting the lower figures claimed, but there had been no response. It was noted also (p 120) that the revised figures produced only a marginal profit for the Year to March 2009 and a loss of almost £6,000 for the period to 31 January 2010. This seemed irreconcilable with the Appellant's standard of living. In these circumstances, HMRC adhered to their stance, maintaining the assessment and seeking a 15% penalty.

7. A review by an independent officer of HMRC was then sought. The reviewing officer, Mr Ian Hartley, confirmed the assessment and penalty (p 220 – 222).

8. At the conclusion of Mrs Barclay's evidence, the Tribunal explained to the Appellant and Mrs Scott the possible implications of the self-assessment returns, prime records (such as till-rolls), the import of HMRC's calculations at p 120, and the implications of a taxpayer's personal expenditure. The need to produce bank statements and witness statements and, as appropriate, leading supporting witness evidence was noted.

9. Mrs Barclay's evidence was not challenged in cross-examination and we found her a credible and conscientious witness who dealt satisfactorily with all the issues arising.

10. At that stage the hearing was adjourned and a **Directions Notice** was prepared requiring Witness Statements from the Appellant and appointing a continued hearing date. Some general procedural advice as set out in the appended Note was given. The Tribunal stressed the importance of producing prime records so far as recoverable. In the event the Tribunal was asked to cite the Appellant's accountant, Mr Askari, and direct him to produce any relevant records in his possession. Consequently the original adjourned hearing date was postponed to 18 August 2014.

11. The first witness for the Appellant was his accountant **Mr G H Askari.** He holds a law degree and is a chartered certified accountant, practising as director of his own limited company. As it had proved necessary to cite Mr Askari, it was thought expedient to hear him on 18 August and that before the Appellant, to enable him to complete his evidence that day.

12. Mr Askari explained that he had acted for the Appellant since 2007 until he transferred the business to his sister-in-law in early 2010. He acted for the Appellant throughout the material period. He had been instructed to deal with the Appellant's income tax liabilities and PAYE. After HMRC had written to the Appellant in relation to VAT, Mr Askari had advised on these matters also. Mr Askari claimed that he had warned the Appellant in July 2007 that as he was running a restaurant business, he was likely to have a potential VAT liability. The Appellant had not discussed the matter further with him at that stage.

13. Mr Askari had prepared simple accounts on the basis of the limited information (as he claimed) provided by the Appellant. The Appellant, Mr Askari stated, had not provided him with cash records, such as till-rolls, and gave him only a handwritten note of various expenses, such as wages, telephone and power bills (p 148). Otherwise Mr Askari relied on verbal information from the Appellant given at infrequent meetings. Mr Askari did not visit the restaurant itself. While he had misgivings about the adequacy of the information provided, he was prepared to act. His accounts were approved by the Appellant.

14. Mr Askari then referred to HMRC's letter to the Appellant dated 22 November 2011 (p 142) anent the requirement to register for VAT in view of the turnover disclosed in the self-assessment returns. His original explanation (p 146) was in error, he claimed. The true figure of turnover did not exceed the margin, Mr Askari continued, and the registration limit had not been exceeded. This was explained in his letter of 18 February 2014 (p 222A). The accurate figure for turnover

for the Year to 31 March 2009 was £67,000, just below the then registration Level of £68,000, Mr Askari asserted to the Tribunal. A member of his staff had inserted the higher figure in error, he claimed. The Appellant, Mr Askari continued, had not provided an exact figure for turnover until HMRC's warning letter. Mr Imran had always assured him that his turnover was below the registration limit. Mr Askari explained that the practice of his staff was to enter the maximum exempt figure for turnover as an estimate. He insisted that he had warned the Appellant that HMRC would be likely to challenge the turnover figure for VAT purposes. Mr Askari claimed that his difficulty was that he did not have access to prime records.

15. In response to questioning by Mrs Scott about the terms of any letter of engagement with the Appellant as a client, Mr Askari referred to the document produced at p 272. That, however, post-dates the material time, and it refers to Mrs Amjed, who took over the business, as the client, with Mr Imran guaranteeing the payment of fees. Mr Askari had no comment on the slightly varying form of the signature purporting to be Mr Imran's on p 148, 272 and 273. Mrs Scott then referred to till-rolls and other cash records given to Mr Askari according to the Appellant. Mr Askari denied ever receiving them. The only written record received, he claimed, was the note at p 148. He never received bank records. Mr Askari did admit to completing four tax Returns, viz 2007, 2008, 2009 and 2010.

16. In the course of the evidence it emerged that Mr Askari and the Appellant were in dispute over the payment of professional fees. To the Tribunal's surprise there is no copy of any VAT invoice which, as a registered business, Askari Limited should have issued. To our further surprise Mr Askari remarked in relation to this Appellant:–

> "I knew I was getting false figures. …… It is up to VAT [officers] to catch them, not us accountants."

17. At this point the Appellant stated that he had spoken to Mr Askari after receiving the letter from HMRC (p 142) and asked him why he had not been registered for VAT. The Appellant claimed that Mr Askari replied to the effect:-

> "That that would have added pressure on to him (the Appellant) … and that he (Mr Askari) would have lost him as a paying customer.

This was categorically denied by Mr Askari, who explained that he would have been able to charge extra for preparing VAT Returns.

18. In the course of cross-examination by Mrs McIntyre, Mr Askari was insistent that the note at p 148 was the only documentary record received from the Appellant in spite of his requests (by phone and in correspondence) for bills, sales records etc. He then explained how he computed gross profit. He explained that his clients would not agree sales figures. He considered that generally gross profit represented 60-65% of sales. Also, the personal expenditure of the trader would represent net profit. He conceded that he had never carried out bank reconciliations in the Appellant's case: he complained that he never received bank statements from him. He calculated total sales by reference to the taxpayer's living costs and trading expenditure. The Appellant, Mr Askari insisted, never disputed the contents of the Returns submitted on his behalf until HMRC's letter of 22 November 2011 (at p.142.) The records of "Daily Takings" which bear the name of Mr Askari's company, were only provided

by the Appellant after the commencement of the VAT inquiry, Mr Askari explained. (He was referred to the Appellant's MP's letter at p 124) The "Daily Takings" had not been vouched for by cash or contemporaneous records.

19. In re-examination by Mrs Scott, Mr Askari could not comment on the possible variation in the style of the signatures bearing to be by Mr Imran at p 148, 272 and 273.

20. We were appalled by Mr Askari's evidence. His conduct was utterly unprofessional. This was an instance not of simple negligence, but, rather, of conscious, continuing failure. Mr Askari showed gross contempt both to Mr Imran as a client and to HMRC. Where Mr Askari's evidence was in conflict with Mr Imran's, we had no hesitation in preferring the latter's.

21. Finally, the **Appellant, Mr Mohammed Imran**, gave evidence. His Witness Statement had been produced earlier. He started his business at the "Shaan's Palace" restaurant in about January 2007 and continued there until January 2010 when his sister-in-law, Mrs Amjed, took over. Shortly after he started trading, a friend recommended that he should consult Mr Askari. Mr Askari assured him that he would attend to his tax and accountancy affairs. Initially income tax was mentioned specifically, and later at Mr Imran's request the service was extended to VAT matters.

22. Mr Imran explained that he kept all receipts, till-rolls, and records of sales, whether at table, takeaways or deliveries. Mr Askari asked for receipts at the end of the Year, and Mr Imran would deliver these personally to his office. There was no exchange of correspondence about the transmission of these records. However, throughout his evidence Mr Imran was insistent that he delivered all prime records to Mr Askari. Mr Askari never visited the restaurant. He did not explain his calculations to Mr Imran, who explained simply that he trusted him.

23. According to Mr Imran the level of trading at the restaurant initially had been satisfactory. It continued at this level for six months or so but thereafter declined. Competition in the form of other restaurants and Subway takeaway outlets were opened in the locality. (At this point Mrs Scott interjected to explain the economic "downturn" affecting the area: it receives special European aid; there are serious problems of unemployment and homelessness; there are a large number of food banks in the area. All this did not seem to be controversial and in the absence of any serious objection by Mrs McIntyre we are inclined to accept this as accurate.) Mr Imran has worked in restaurants since 1992 and his employment latterly had been as a chef before starting the restaurant business. He had a small staff. He relied on Mr Askari to attend to PAYE administration. Mr Imran's wife assisted with internal cash administration. He relied on her and trusted her. He himself gathered up receipts and made up the Daily Takings records produced. He kept receipts for expenditure but did not tabulate them. He was referred to the bank statements produced on his behalf and agreed that credit and debit card receipts would be reflected there.

24. On the second day of the hearing, before examination-in-chief of the Appellant was concluded, the Tribunal indicated that a comparison of the bank entries and record of "card" receipts would be useful. Mrs McIntyre obliged by producing before the final day a comparative table, which did not seem to be disputed by the Appellant. Significantly the comparison made for the nine-month period in respect of which the

assessment is made shows an under declaration of "card" receipts of 14.4% approximately.

25. Finally in examination-in-chief Mr Imran was asked about his personal and family expenditure during the period in question. A monthly total of £1900 or so in respect of mortgage payments, council tax, car expenses, utility bills, and food was spoken to. Mr Imran explained that he withdrew only about £150 per week from the business as a wage. His wife did not withdraw any further sum for her (part-time) services. He explained that child tax credits and other family benefits and assistance from his family enabled him to balance his budget. Mr Imran added that his brother-in-law, Mr Rashid, in addition to assisting him financially in setting up the restaurant business, had also provided £30,000 to enable him (Mr Imran) and his wife to buy a family house.

26. In cross-examination Mrs McIntyre asked about the management of the cash receipts taken by the business. It emerged that certain significant expenses were paid out of cash takings, but were not reflected in the cash figures shown in the Daily Takings records. These showed cash takings after deduction of sums paid to a major supplier (of spices and "dry" foods) and a window-cleaner, and wages to part-time staff.

27. Lastly, Mr Imran was invited to comment on the copy photograph of the restaurant at p228. It shows, he explained, a take-away area and also at downstairs level a restaurant area of eight tables, sitting four customers each. Earlier in 2007 the upstairs accommodation had been used too. This had nine tables.

28. We considered Mr Imran to be a straightforward and honest witness. It was clear to us that he has suffered a gross disservice as a client of Mr Askari. There was a special dependency in their relationship given Mr Imran's limited English and need to communicate in Urdu.

29. In addition to the witness' evidence noted there were produced signed Witness Statements from the Appellant's brother-in-law, Mr Nadeem Rashid, a solicitor in Lancashire, and his sister-in-law, Mrs Shagufta Amjed, who took over the restaurant business in January 2010. These were not formally admitted but reference in particular was made in evidence to financial assistance afforded by Mr Rashid. In evidence it was suggested that he had paid £30,000 to enable the Appellant and his wife to purchase a family home. This is not mentioned, perhaps curiously, in his signed Statement.

Submissions

30. We were with parties' agreement addressed firstly by Mrs McIntyre and thereafter by Mrs Scott on behalf of the Appellant.

31. Mrs McIntyre invited us firstly to uphold HMRC's decision to register the Appellant for VAT for the period from 1 May 2009 until the transfer of the business on 31 January 2010, and, secondly, to confirm the penalty for failure to notify the level of turnover in terms of Section 67 VATA. It followed, she argued, that an assessment to VAT of £7,900 resulted in respect of the material period following registration.

32. Mrs McIntyre explained that on the basis of his self-assessment Return, the Appellant's turnover in the year to 30 April 2009 exceeded the then registration limit of £67,000. Accordingly, he was under a duty to notify HMRC of this and account for VAT with effect from one month thereafter, ie 1 May 2009. The fact of trading during the relevant period was not disputed. The dispute related to the calculation of turnover. The alternative figures now proposed by the Appellant were not reliable, Mrs McIntyre submitted. There was a significant discrepancy between "card" takings and the relative bank deposits. The "cash" takings figures were depressed by payments to a supplier, the window-cleaner, and certain wages. That was a matter of admission, she observed. On the balance of probabilities, Mrs McIntyre maintained, the decision to register the Appellant for VAT had been correct.

33. In terms of Section 67(4) a penalty of 15% resulted as there had been a failure to notify for a period in excess of 18 months. While mitigation was competent in terms of Section 70, Mrs McIntyre did not consider that appropriate. There had been a lack of cooperation by the Appellant in providing information, she added.

34. In her concluding remarks Mrs Scott reminded us that the Appellant was a chef without any business training. He had no experience of book keeping. On reflection he may have had too much faith in his accountant. The Appellant expected him to give advice and training about the maintenance of business records. This was not done. The taxpayer did not have an extravagant lifestyle and had not drawn a regular and sufficient income out of the business. HMRC had failed to appreciate the complexity of the Appellant's situation. Mrs Scott commented also on the general economic depression which had affected the local area throughout the relevant period. While not representing formal evidence, this was not disputed by Mrs McIntyre.

Decision

35. The issue for the Tribunal to determine is whether HMRC were justified in their decision to register the Appellant for VAT all as recorded in their letter of 22 March 2012 (p155/156) and, further, in the particular circumstances of this case whether there is a basis for the alternative figures of turnover suggested subsequently on the Appellant's behalf.

36. HMRC based their decision on the "self-assessment" Return submitted on behalf of the Appellant. They relied simply on information supplied by his accountant. They were, in our view, perfectly entitled to do so, and we consider their decision in the letter of 22 March 2012 entirely reasonable.

37. The burden of establishing an alternative lower figure of turnover falls on the taxpayer in our view. As the evidence emerged at the hearing we were conscious that the "professional" representation given by Mr Askari was very far from satisfactory. There was a distinct risk that the Appellant's interests might have been prejudiced as a result, and accordingly having regard to the duties of fairness owed to the taxpayer, we considered it appropriate to adopt an interventionist stance in our assessment of the information before us.

38. At the hearing the Appellant put forward his notes of Daily Takings (p159 *et seq*) as an accurate record of his receipts from all sources. These show separately cash receipts and credit/debit card receipts on a monthly basis over an extended period and, indeed, beyond the period assessed. Interestingly these records show at

the material time gross receipts in the region of £5,000 per month. That could produce an annual figure under the registration threshold, and accordingly the Tribunal suggested that a comparison might be made of the total "card" receipts recorded and the bank's "streamline" deposits shown in the restaurant's bank statements. That comparison, however, indicated an under-recording averaging approximately 14-15%, but varying significantly from month to month. Adding that percentage to total receipts (ie both cash and "card") produced a figure slightly in excess of or perilously close to the registration limit.

39. Further, in his evidence to the Tribunal, the Appellant volunteered that he had paid out of cash receipts various business expenses. That had depressed the "cash" receipts figure and further undermined the value of the accuracy of the Daily Takings in our view.

40. For all of these reasons the Tribunal considered that no reasonably satisfactory alternative computation of turnover had been presented on behalf of the Appellant. Accordingly we uphold the decision of HMRC to register the Appellant for VAT and dismiss the appeal to that extent.

41. A penalty is consequent upon the Appellant's failure to register for VAT in terms of Section 67 VATA. Subsection (4) provides for a penalty in the circumstances of this case at the rate of 15%. That, however, is subject to mitigation where appropriate in terms of Section 70. The "involvement" of Mr Askari again looms large in our view. In this context the shortcomings of Mr Askari's service as an agent is not apparently excluded from consideration by subsection (4).

42. Mrs McIntyre's criticism of Mr Imran personally was in relation to his failure to respond to correspondence. This, we consider, was almost certainly referred to Mr Askari, and we consider that most, if not all, of the delays and lack of response was attributable to him. Subsequent to the hearing and in response to the Tribunal's query Mrs McIntyre submitted a copy of the decision of the High Court in *Jo-Ann Neal* [1988] STC 131, where, in circumstances in which the taxpayer claimed ignorance of basic principles of VAT, an appeal against a penalty was refused. (A copy was also sent to Mrs Scott for comment.) It was suggested that a different decision might be appropriate in relation to more esoteric aspects. The circumstances of the present appeal are, in our view, exceptional. Mr Imran's command of English is somewhat limited and we accept that he was entirely reliant on Mr Askari in any dealings with HMRC. Further, the level of service rendered was wholly lamentable. In these circumstances we consider that the penalty should be substantially mitigated and we substitute a rate of 5%. To that extent the appeal succeeds.

43. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

RELEASE DATE: 13 November 2014