



TC05371

Appeal number: TC/2014/04145

VAT – Assessments following invigilation by HM Revenue and Customs officers – Ratio between Zero and Standard rated supplies – Suppression of sales – whether assessments to ‘best judgment’ – Yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MEHMOODA SULTANA KHAN
t/a CAFÉ AROMA**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
MOHAMMED FAROOQ**

Sitting in public at Eastgate House, Newport Road, Cardiff on 9 September 2016

Wahid Khan, of J K Accountancy, for the Appellant

Bernard Haley, of HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Mehmooda Sultana Khan, who trades as Café Aroma, appeals against VAT assessments issued by HM Revenue and Customs (“HMRC”), under s 73 of the Value Added Tax Act 1994 (“VATA”), in respect of VAT periods 05/08 to 02/11 inclusive. The assessments were amended and re-issued in January and February 2014 following a review and it is these re-issued assessments in the sum of £19,567 in relation to Vat periods 05/08 to 02/11 and £5,026 in respect of VAT periods 11/09 to 08/10 with which this appeal is concerned.

2. A further assessment, also made under s 73 VATA, in the sum of £54,721, was issued by HMRC on 9 September 2013 in respect of VAT periods 05/11 to 05/13 inclusive. However, as VAT returns for these periods have not been filed the Tribunal does not have jurisdiction to consider any appeal against this assessment (see s 80(1)(p)(1) VATA which provides that an appeal may only be made “in respect of a period for which the appellant has made a return”).

3. Although the appeal was not made within the statutory time limit HMRC did not object to it proceeding out of time. In the circumstances, having regard to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with cases “fairly and justly”, we agreed and allowed the appeal to proceed notwithstanding it was late.

Evidence and Facts

4. In addition to a bundle of documents we heard the oral evidence of Mr Michael Savva (formerly Mr Khan) who is the husband of Mrs Khan, the appellant. He is responsible for the day to day operation of the business. In addition, we heard from HMRC Officer Marianne Rogers who made the assessments which are the subject of this appeal. On the basis of this evidence we make the following findings of fact.

5. Café Aroma is situated in Crwys Road, Cathays, a part of Cardiff which is near the University and, in term time at least, home to many students. Although Mrs Khan is the VAT registered proprietor of Café Aroma it is in fact run by her husband, Mr Savva. At the time of the assessments the café was open between 9:00 am and 6:00 pm. It has a capacity of about 30 covers and caters mainly for students, a high proportion of whom are Muslims, who enjoy the halal breakfasts, coffees and cakes that it serves.

6. Mr Savva explained that he recorded the takings on a piece of paper each day which he wrote up at the end of the week in a green book (the “Green Book”). He did not retain the paper record of daily takings. He told us that he had suffered from ill health that had required a stay in hospital during 2011.

7. Also in 2011 there had been a burglary at the café and the coffee machine had been stolen. As this had been plumbed into the mains water supply the financial records of the business such as bank statements and receipts had been destroyed. Mr

Savva accepted that he did not keep accurate records and that the VAT returns that had been submitted were incorrect.

8. Prompted by an apparent high level of zero-rated sales and low average daily gross takings HMRC Officers made an unannounced visit to the café on 24 November 2011. A further, arranged, visit took place on 13 February 2012 at which HMRC Officers Rogers and Morgan discussed the business with Mr Savva and Mrs Khan. Records, including data from the till, were provided to HMRC and the results analysed. Subsequent visits and observations of the business took place on 24 February, 7 March and 4 April 2012. Although these confirmed to Officer Rogers that there was a potential issue regarding the proportion of zero-rated to standard rated sales and the amount of gross daily takings they did not form any part of her assessment. This was based entirely on the findings on an all day invigilation visit that took place on Wednesday 26 June 2013 by arrangement.

9. The takings for that day were £320.54 with 93.71% of these sales being standard rated. This was compared to the previous 16 consecutive Wednesdays, as this was all that had been recorded in the Green Book. The average takings for these Wednesdays was £229.54 amounting to an under declaration rate of 28.32%, which for the purposes of the assessment was treated as 28%. The assessments were subsequently made on this basis and upheld on 6 January 2014 following a review.

10. On 29 July 2014 Mrs Khan appealed to the Tribunal on the grounds that the assessments failed to take account of the drop in sales during Ramadan and during University vacations or periods when the café was closed for two weeks during the summer and a week over the Christmas holidays.

Law

11. Section 73(1) VATA provides:

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 him.”

7. In *Khan v HMRC* [2006] EWCA Civ 89, Carnwath LJ (as he then was) said, at [69]

“The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

"The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).

That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509; [200

4] EWCA Civ 1015. We also cautioned against allowing such an appeal routinely to become an investigation of the *bona fides* or rationality of the "best of judgment" assessment made by Customs:

"The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." (para 38(i))

It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady v Group Lotus Car Companies plc* [1987] STC 635, 642 per Mustill LJ)."

Discussion and Conclusion

12. As it is accepted that the VAT returns are incorrect the primary task of Tribunal is to find the correct amount of tax. The starting point being, as Carnwath LJ observed, the assessments are *prima facie* right and it is for the taxpayer to show that they are wrong or show positively what corrections should be made to make the assessments right or more nearly right.

13. For Mrs Khan, Mr Wahid Khan of J K Accountancy, submits that the assessments should have been calculated on a basis of daily takings of £260 of which 12% relate to zero-rated supplies. However, unlike the assessments made by Officer Rogers which are based on the results of the invigilation exercise of 26 June 2013, this is not supported by evidence.

14. While we accept the submission of Mr Haley, for HMRC, that as the assessments are based on declared turnover that any reduction for University vacations, Ramadan and closures will be reflected in the assessments we note that the takings for Wednesday 27 March 2013 recorded by Officer Rogers in the schedule of takings from records (ie the Green Book) as £537.24 was recorded in a separate schedule of 'Wednesday Takings' for the purposes of calculating the average Wednesday takings as £237. Although Mr Hayley, on instructions, explained that the correct figure was £237 and not £537.24 it was not possible at the hearing to check that this was the case and, as such, we are concerned on the effect that this could have on the rate of under declaration and the assessments.

15. It was therefore agreed that as the figure was as recorded in the Green Book Mr Khan would confirm the correct figure and notify the Tribunal and HMRC accordingly. Also, because of the omission of any reference to Sunday 31 March 2013 in the schedule of 'Wednesday Takings' a short adjournment was necessary to enable the parties to verify that only Wednesday takings had been included in the assessment calculation. However, given that Saturday 30 March 2014 is followed in the schedule by Monday 1 April 2013 we are able to accept the assurances of Mr Haley that this was the case.

16. Subject to clarification of the daily takings for Wednesday 27 March 2013, we consider that, in the absence of any positive correction to the assessments advanced on behalf of Mrs Khan, the assessments are in principle right. Therefore, unless Mr Khan is able to confirm to the Tribunal and HMRC within 14 days from the date of this decision, with a copy of the relevant entry in the Green Book, that the daily takings for Wednesday 27 March 2014 was £537.24 we dismiss the appeal and confirm the assessments as stated.

17. If, however, such confirmation is provided within 14 days although the appeal is dismissed the assessments shall be reduced accordingly. In such circumstances we direct the parties to use their best endeavours to determine the figures in respect of the assessments. However, should this not prove possible an application may be made to the Tribunal for this purpose, with any such application to be made within 28 days of the release of this decision.

Right to apply for permission to appeal

18. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 14 SEPTEMBER 2016