[2018] UKFTT 489 (TC)

TC06667

Appeal number: TC/2017/02292

VAT - suppression of takings - assessment to best judgement – upheld – penalties - deliberate and concealed - upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAIMA KHALID **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: PETER SHEPPARD

Sitting in public at George House, Edinburgh on Monday 6 August 2018

No appearance by or for the Appellant

Mrs E McIntyre, Officer of HMRC, for the Respondents

Decision

Preliminary issues

Absence of the representative and appellant

1. There was no appearance by or for the appellant. On 23 May 2018 this appeal had been listed for hearing on 6 August 2018 and the appellant and her representative had received notification. There was further correspondence with both the appellant and the agent on 19 June 2018 in relation to an application from the respondents ("HMRC") to lodge further documentation for the hearing set down for 6 August 2018. There was no response from the appellant or the agent but the date of the hearing was confirmed in HMRC's application. Both the appellant and the representative therefore knew or should have known the date and time of the hearing.

2. On 3 August 2018, the Clerk at George House contacted the representative to ask, for security purposes, who would be attending the hearing. The representative expressed surprise to learn the hearing was scheduled for 6 August 2018 and said that he thought it was on 13 August 2018. He said that he was in Spain and he would revert to her.

3. He did not. He emailed the Tribunal administration stating:

> "Due to exceptional circumstances beyond my control I will need to cancel this meeting scheduled for Monday 6 August 10am I'm abroad due to a personal family matter and cannot get back in the UK in time to attend this meeting".

4. He emailed HMRC on Monday 6 August 2018 stating that he had emailed "the vat tribunal" requesting a postponement and stating "I also informed verbally over the phone to Elizabeth McIntyre. Please offer me alternative dates as written in my email cancellation notice of 3/8/18."

5. Mrs McIntyre produced that email to the Tribunal. Firstly, he had not contacted Mrs McIntyre or anyone in her office. She had been on leave and no contact was made with her deputy. Secondly, no voice mail had been left as her telephone was not switched on in her absence.

6. We also observe from the papers that HMRC wrote to the appellant (and the representative) on 23 May 2018 stating that they had written to the representative on 29 March 2018 (just after the postponement of the previous hearing) regarding the possibility of reducing the VAT assessment. No response had been received from the representative. Regrettably no response has been received from either the appellant or the representative to date.

7. HMRC requested that in all these circumstances, given that they were present and their witness was present, the Tribunal should proceed to decide the matter in the absence of the appellant or the representative. We had due regard to Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and decided that the matter should proceed.

Late appeal

8. The appeal in this case was very late. The appellant had made an application for admission of the late appeal but provided no explanation for the delay. However, HMRC did not oppose the grant of an extension of time for lodging the appeal. We had regard to the Rules and decided that it would be appropriate to proceed to consider the substantive appeal.

The issues

9. HMRC sought confirmation of the amended assessment in respect of under-declared Value Added Tax ("VAT") in the amount of £18,831 and associated Default Interest. A penalty assessment had also been issued in terms of Schedule 24 Finance Act 2007 and that had been amended subsequently. No appeal had been lodged in respect of that penalty but HMRC sought formal confirmation of same.

Background

10. On 18 July 2014, HMRC opened a check into the appellant's self-assessment (SA) tax return for the year to 5 April 2013. HMRC visited the appellant's premises on a number of occasions to extract information from the tills operated by the appellant's business. The appellant and her representative did not produce the documentation requested by HMRC so on 18 November 2014 a Notice was issued under paragraph 1 of Schedule 36 Finance Act 2008.

11. On 15 September 2015, HMRC wrote to the appellant's representative advising that it was considered that the sales of the business had been under-declared and that the true value of the sales was £779,385 and that the Gross Profit Ratio ("GPR") should be increased to 18.5%. That resulted in assessments being calculated showing further amounts due in relation to the appellant's SA returns. Those were agreed by the appellant's representative on 20 January 2016 and a Closure Notice was issued the following day. The appellant did not appeal and penalties were imposed and those were not appealed either.

12. On 18 September 2015, HMRC wrote to the appellant's representative about the VAT returns setting out proposed assessments based on the information retrieved for SA. Effectively the turnover was increased to agree with that calculated for SA.

13. Correspondence then ensued.

14. On 28 January 2016, HMRC wrote to the representative setting out the revised basis for calculation and seeking a response by 11 February 2016. There was no response so on 17 February 2016, HMRC intimated that if no response was received before 2 March 2016 then the assessment would be raised. The representative telephoned indicating that he would be responding promptly but he did not. On 7 March 2016 he stated that he had been ill and asked for an extension of time until 11 March 2016.

15. On 15 March 2016, HMRC wrote to the representative pointing out that there had been no response. The representative telephoned to say that he would contact HMRC after meeting the appellant. He did not. HMRC stated that they required a response before 24 March 2016 which failing an assessment would be issued.

16. On 24 March 2016, the representative emailed stating that the proposed assessment for the year to 30 June 2013, giving rise to further VAT due of £11,586, was agreed. The value of the purchases used for the year to 30 June 2014 was not agreed. HMRC responded that day with a proposed revised net amount of VAT due for the year to 30 June 2014 of £12,692. The representative emailed on 30 March 2016 stating that he would respond within a week. He did not.

17. On 26 April 2016, HMRC issued an assessment in respect of under-declared VAT for the periods 11/12 to 08/14 in the amount of £24,273.

18. On 2 June 2016, HRMC issued a penalty explanation letter to the appellant setting out penalties totalling £9,345.07 that HMRC intended to charge in relation to the errors on the VAT returns for the periods 11/12 to 08/14.

19. On 4 July 2016, HMRC issued the penalty assessment under Schedule 24 of the Finance Act 2007.

20. On 8 March 2017, the Debt Management Unit of HMRC having pursued the appellant for settlement of £31,998.40, a late appeal was lodged with HMCTS by the appellant's agent. The basis of the appeal was a proposal that the VAT should be calculated "in a different way". The only explanation for the delay was "I have not been well and under depression". No evidence was produced.

21. On 8 December 2017, HMRC having lodged their Statement of Case, the representative lodged a reply setting out their proposed method of calculation.

22. On 29 March 2018, HMRC wrote to the appellant with a copy to the representative. That letter pointed out that HMRC had attempted to contact the representative on four occasions, being a letter on 19 December 2017 and two emails on 21 February and 2 March 2018. On 7 March 2018, Officer Ronald had called the representative and had been assured that the representative would prepare a response to the letter and emails. No response had been received from him. To date no response has still been received from him.

23. The purpose of the contact with the representative was in order to discuss the possibility of reducing the VAT assessment in the sum of £24,273 (excluding interest). Officer Ronald went on to explain that having taken cognisance of the representative's arguments, he proposed reducing the assessment to £18,833 (in fact it was £18,831). Default interest would be applied. The penalties would be adjusted to take into account the reduction.

24. Officer Ronald explained why he disagreed with the representative's alternative input tax calculation. Quite simply that calculation, if utilised, was not consistent with the undisputed method of calculating the output tax which took into account the difference between what was declared and the revised figure. The alternative calculation resulted in a cost of goods sold ("COGS") of £530,619 whereas the figure actually claimed by the appellant had been £568,322 of COGS.

25. The appellant was asked if she wished to discuss this further or present any further proposals. Nothing was forthcoming.

26. On 23 May 2018, HMRC wrote again to the appellant and the representative stating that the assessment in the sum of £18,831 would be issued and the appellant

had the right to appeal. Nothing was forthcoming. The assessment was duly recalculated as at 1 June 2018 and issued.

Discussion

27. We heard very clear, competent and credible evidence from Officer Ronald. The original assessment, under section 73(1) Value Added Tax Act 1994 ("VATA"), was raised timeously in terms of section 73(6) VATA.

28. Section 73(1) VATA provides that "*where it appears to the Commissioners that [a VAT return is] incomplete or incorrect, they may assess the amount of VAT due from [the taxpayer] to the best of their judgement and notify it to him*". The appellant appealed the assessment under section 83(1)(p) VATA. Under section 84 VATA the Tribunal can increase the amount of the assessment if it thinks it is too low. Otherwise it can either allow or dismiss the appeal.

29. The requirements for a decision to be to the best of HMRC's judgement were set out in the High Court case of *Van Boeckel v C & E Commissioners*[1] where Woolf J, as he then was, said:

> "…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…
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
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> 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."

30. We were not referred to the case but three further criteria were identified in the case of *C A McCourtie*[2] where the Tribunal stated:

> "In addition to the conclusions drawn by Woolf J in Van Boeckel earlier tribunal decisions identified three further propositions of relevance in determining whether an assessment is reasonable. These are, first that the facts should be objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and, finally, that any sampling technique should be representative and free from bias."

31. We found that the assessment, as amended, had been made to best judgement and was certainly not frivolous, vexatious or capricious. The appellant and her

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[1] *[1981] STC 290*,

[2] *LON/92/191*

representative had been given every opportunity to make further proposals and have not done so.

32. The explanation offered by Officer Ronald for his methodology of using the standard rate percentage of sales to the total value of sales was a fair and reasonable method of calculating the VAT due. HMRC had made an allowance for the VAT incurred on purchases that were under-claimed. The exempt income had been regarded as *de minimis* by HMRC for calculation of input tax recoverable.

33. At paragraph 29 of his judgment in *Rahman (t/a Khayam Restaurant) v Commissioners of Customs and Excise* ("Rahman")[3], Chadwick LJ referred to what Woolf J said in *Van Boeckel*:

> "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 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 no material 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."

34. At paragraph 36 of his judgment in *Rahman* Chadwick LJ stated in relation to "best judgment":

> "But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment."

35. In summary, we find that HMRC has made reasoned calculations on the basis of the materials and information available to them.

36. We accordingly consider that HMRC made the assessments to the best of their judgement.

37. It is for the appellant to show that, on the balance of probabilities, the assessment was incorrect and this she has failed to do.

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[3] [2003] STC 150

38. As indicated above the penalties were never appealed. However, HMRC have established beyond any doubt that in the period 11/12 to 08/14 there were inaccuracies in the VAT return. Those inaccuracies were deliberate but not concealed. The disclosure of the inaccuracies was most certainly prompted by HMRC's visits and interrogation of the tills. The VAT returns have not been based on the Z readings from the till or the reports which could have been accessed from the till to establish an accurate income figure. HMRC did consider that the correct range for a penalty which is deliberate and prompted is 35% to 70% of the Potential Lost Revenue. HMRC have, in our view generously, applied a 90% reduction to the difference between the maximum and minimum of the penalty range which has resulted in a penalty percentage of 38.5%.

39. HMRC have considered that there are no special circumstances which apply in this particular case and we agree. The penalties have been correctly calculated.

Conclusion

40. The amended assessment and the amended penalties are confirmed and the appeal is dismissed.

41. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 21 AUGUST 2018