[2012] UKUT 224 (TCC)

Appeal number FTC/77/2011

Value Added Tax – whether assessments made in time – yes - whether First-tier Tribunal gave adequate reasons why it found that assessments made in time – yes - whether First-tier Tribunal erred in upholding centrally issued assessments showing trading below compulsory registration threshold - no - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

M R KHAN t/a KHAN TANDOORI II
KHAN TANDOORI (NW) LIMITED

Appellants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge John Walters QC

Sitting in public in London on 8 May 2012

Nigel Ginniff, counsel, for the Appellants

Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellants, Mamunr Rashid Khan ("Mr Khan") and Khan Tandoori (NW) Limited ("the Company"), both trading as Khan Tandoori II, appeal against the decision of the First-tier Tribunal ("FTT") released on 17 March 2011, [2011] UKFTT 189 (TC). The FTT dismissed the Appellants' appeal against the decisions of the Respondents ("HMRC") to register and assess the Appellants for VAT. The Appellants now contend that the FTT erred in law in two respects, namely

> (1) in failing to address and give adequate reasons for its decision that the assessments were made within the applicable time limits; and
>
> (2) in deciding that the Company was liable to be registered for VAT when its turnover was below the compulsory registration threshold.

For the reasons given below, we dismiss the appeal on both grounds.

Facts

2. The facts are set out in the FTT's decision and may be summarised as follows. Mr Khan ran a takeaway food business as a sole trader until the Company, of which Mr Khan was sole director, took over the business with effect from 1 December 2005. Two officers of HMRC visited the premises on 2 February 2008 and examined a duplicate numbered receipt book used for recording meals ordered. Following examination of other records of the business obtained from its accountants on 27 February 2008 and comparison with the receipt book, HMRC concluded in a letter dated 3 July 2008 that takings had been underdeclared. On applying an estimate of the correct turnover, HMRC determined that Mr Khan was liable to have been registered for VAT with effect from 1 December 2002 until 30 November 2005 when the business was transferred to the Company which should have been registered from 1 December 2005. HMRC assessed Mr Khan for VAT of £41,400 for the period 1 December 2002 to 30 November 2005 and the Company for £10,200 for the period 1 December 2005 to 30 September 2008 and five quarterly accounting periods thereafter.

FTT's decision

3. The Appellants appealed to the FTT. The Appellants contended that HMRC's calculations of turnover were flawed in that the receipt book used related to two or three days rather than just the day of the visit by HMRC and the estimates of meat sales and wastage were inaccurate. The FTT accepted HMRC's evidence that the receipt book related solely to the day of the visit in preference to the Appellants' evidence. The FTT found that, even using the Appellants' figures for volumes of meat used in meals sold, the turnover of the business exceeded the VAT registration threshold. In relation to wastage, the FTT noted that the Appellants had not produced any evidence to support the rates of wastage for which they contended and that

HMRC had already made some allowance for wastage and staff consumption in their calculations.

4. The Appellants argued that the assessments were invalid because they were made outside the time limits in the VAT Act 1994 ("VATA") and we deal with this issue in more detail at [6]-[13] below. The FTT decided that the Appellants were liable to register for VAT holding that the assessments were validly made and dismissed the Appellants' appeal.

5. The Appellants applied to the FTT for permission to appeal on four grounds. The FTT refused permission to appeal in a decision issued on 12 July 2011. The Appellants renewed their application to the Upper Tribunal which, in a decision dated 23 September 2011, refused permission to appeal on two grounds and granted permission on the two grounds described in [1] above.

First ground of appeal

6. Mr Ginniff, for the Appellants, submitted that the FTT erred in law by failing to address and provide adequate reasons for its decision that the assessments were made within the time limits set out in section 73(6) VATA. Section 73, as relevant, provides:

> (1) 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.
>
> …
>
> (6) An assessment under subsection (1) … above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following
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> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge …"

7. At the relevant time, section 77 VATA provided that an assessment shall not be made more than three years after the end of the prescribed accounting period to which it relates.

8. The FTT records the Appellants' submissions on this issue and its conclusions at [40] and [41] of the decision. The Appellants submitted that no formal assessment was received by them prior to demands for payment, in respect of the Company on 29 May 2009, and in respect of Mr Khan on 24 June 2009. The submission could

only relate to the assessment of Mr Khan as the earliest period for which the Company was assessed ended on 30 September 2008 and, even if no assessment was made until May 2009, it was within two years of the end of the prescribed accounting period. In [40], the FTT rejected this submission. The FTT found that a letter, dated 25 September 2008, from HMRC to Mr Khan clearly notified him of the assessment payable by him. The FTT found that the letter was sufficient to enable Mr Khan to be fully aware of his situation. The FTT also noted in [41] that there is no right of appeal against an assessment under section 73(1) where the person assessed has not made a return for the relevant period because section 83(1)(p)(i) VATA only applies where a return has been made.

9. Mr Ginniff's criticisms of the FTT are that:

(1) it failed to determine the date on which the amount to be assessed was finally determined by HMRC;

(2) it failed to determine the date on which the assessments were made;

(3) it failed to address the submissions made on behalf of the Appellants concerning HMRC's stated practice in Notice 915; and

(4) it made an irrelevant reference to section 83 VATA.

10. We do not accept these criticisms. In [40], the FTT found that the letter dated 25 September 2008 to Mr Khan notified him of the assessment. That is hardly surprising as the letter specifically states

> "the Commissioners of HM Revenue and Customs, by virtue of the powers conferred upon them by the VATA, section 73, assess the amount of tax payable by you in respect of the above period as being £414,000".

The letter later refers to itself as "this assessment". In a letter dated 14 November 2008, which was before the FTT although not referred to in its decision, the Appellants' accountant referred to “this assessment issued on 25 September 2008”.

11. The assessment notified by the letter dated 25 September 2008 must have been made before that date. It follows that the assessment was made both within one year of the first visit on 2 February 2008, which is the earliest point at which HMRC could have had evidence of facts sufficient in their opinion to justify the making of the assessment, and within three years of the end of the accounting period assessed on 30 November 2005. As the assessment issued to Mr Khan was clearly made within the time limits (and the assessments to the Company even more clearly so), there was no need for the FTT to try to determine the precise dates on which the amounts to be assessed were determined and the assessments were made in order to reject the Appellants' submission that the assessments were made outside the time limits.

12. Mr Ginniff criticises the FTT for ignoring case law on the issue of whether an assessment has been issued within time limits and refers to *Cheesman v HMCE* [2000] STC 1119 (ChD) and *Kidz R Us Children Centre Ltd v HMRC* (VATD 20882). These cases do not appear to have been referred to by the Appellants in their submissions to the FTT. In our view, the cases do not cast any doubt on the

conclusions of the FTT in this case. In *Cheesman*, the issue was whether a notification in September 1996 was of an assessment form completed and signed by an officer in March 1996 but which had never been processed or of an assessment form processed in September 1996. On an appeal to the High Court, Lawrence Collins J observed, at [31], that:

> "Assessment of VAT is an important step, and it is unsatisfactory that the process is not transparent, and not defined by legislation or even by clear administrative practice."

13. Lawrence Collins J went onto hold that he did not have to decide on the mechanism by which the assessment became complete in that case as the notification was plainly based on the assessment form that was actually processed. In *Kidz R Us*, the issue was whether the assessment had been made within one year of evidence of facts sufficient to justify the assessment coming to the knowledge of HMRC and the tribunal in that case referred briefly to the observation in *Cheesman* and held that it had been. In this case, the FTT found that the assessment was notified within the time limits and, as explained above, it must have been made before that time. That conclusion is entirely consistent with *Cheesman* and *Kidz R Us*.

14. Mr Ginniff submits that the FTT failed to address the Appellants' submissions on Notice 915 Assessments and Time Limits: Statement of Practice (March 2002), namely that an assessment must be headed "Notification of Assessment" and will be signed and dated. It is correct that the FTT did not refer to Notice 915 in its decision but we consider that it had dealt with the issues in [40] when it found that the letter of 25 September 2008 was notification of the assessment.

15. Mr Ginniff also criticises the FTT for making an irrelevant reference to section 83(1)(p)(i) VATA. At the hearing of this appeal, Mr Mantle said that HMRC were not seeking to rely on this provision. He said that it was not appropriate to rely on it in an appeal against a decision to register a person and assess them. In such cases, there would not have been any returns and the effect would be to deny a person, who may wish to argue that no liability to register arose, the right to appeal. In any event, the FTT did not rely on section 83(1)(p)(i). The FTT had already found that the letter of 25 September 2008 was notification of the assessment. The analysis of section 83(1)(p)(i) was merely an additional argument which led to the same conclusion.

16. At the hearing of the appeal, Mr Ginniff submitted that the FTT had failed to consider the submissions by the Appellants on whether the assessment of Mr Khan was invalid as a global assessment. This point was not included in the grounds of appeal to the Upper Tribunal. A note of the Appellants' submissions was provided to the FTT and was included in our bundle of documents. This indicates that the Appellants contended that the assessment (which we note seems to be an acceptance that the letter of 25 September 2008 was an assessment) was a global calculation. In fact, the letter of 25 September 2008 clearly refers to the period from 1 December 2002 to 30 November 2005 and, from that, we conclude that HMRC assessed Mr Khan for a single period of three years. It seems to us that HMRC were entitled to issue an assessment for an extended period in the circumstances of this case as the

Court of Appeal held in relation to an even longer period in *Bjellica (trading as Eddy's Domestic Appliances) v HMCE* [1995] STC 329.

Second ground of appeal

17. The Appellants' second ground of appeal is that the FTT erred in law in deciding that the Company was liable to be compulsorily registered for VAT when the assessments issued to the Company were calculated on a turnover below the VAT registration threshold for the periods. The Appellants submit that the FTT's decision on this point is contradicted by the evidence and one that no reasonable tribunal and properly instructed as to the relevant law could have come to on the evidence (*Edwards v Bairstow* [1956] AC 14 per Lord Radcliffe at 36). Alternatively, the Tribunal failed to give reasons why they decided that the assessments against the Company could stand in the light of such figures.

18. We do not agree that the fact, which is accepted, that the assessments of the Company were based on estimated takings below the VAT registration threshold lead to the conclusion that the Company was not liable to be registered from 1 December 2005. The Company was required to register for VAT because the business was transferred to the Company as a going concern by Mr Khan who was required to be registered for VAT at the time of the transfer. Section 49 VATA provided that where a business carried on by one taxable person is transferred as a going concern to another then, for the purpose of determining whether the transferee is liable to be registered for VAT, the transferee is treated as having carried on the business before as well as after the transfer. The effect of this provision is that the taxable supplies by the transferor are treated as made by the transferee when calculating whether or not the transferee has exceeded the VAT registration threshold.

19. On the figures accepted by the FTT, Mr Khan was liable to be registered for VAT as at 30 November 2005. It followed from that finding that the Company was required to be registered for VAT with effect from 1 December 2005. In addition, at [16], the FTT accepted the evidence, based on the Business Economics Exercise, that the Company was trading at a level above the registration threshold in the period September 2006 to July 2007. At [38], the FTT rejected the Appellants' submission that, on a review of the original decision, HMRC had accepted that the figures produced by the Business Economics Exercise had been too high. The FTT found that the review simply considered the issue of compulsory registration. The FTT stated at [39] that the Appellants did not produce any documentary evidence to support their contention that the VAT registration threshold had not been crossed and the FTT did not accept the oral evidence on behalf of the Appellants. The FTT found at [18] and [39] that, even if the Appellants' figures were used, the VAT registration threshold had still been crossed.

20. Mr Ginniff criticises the FTT for not specifically addressing the issue of the Company's liability to register for VAT on the transfer of a going concern. In our view, the FTT dealt with the issue of the Company's liability to register independently of the transfer of a going concern as described above. The FTT noted at [3] that the status of the business changed on 1 December 2005 when the Company took over but

did not refer to a transfer of a going concern or section 49 VATA. We do not consider that the failure to make a specific reference is an error of law in the circumstances of this case or justifies this appeal being remitted to the FTT as Mr Ginniff urged us to do. The FTT had found that the Company was liable to register for VAT. Even if it had also set out the provisions of section 49, it was inevitable that the FTT would have found that there had been a transfer of a going concern and that the Company was liable to register for VAT.

Decision

21. For the reasons set out above, we conclude that neither of the two grounds of appeal put forward at the hearing before us has been made out. Our decision is that the appeal is dismissed.

Greg Sinfield

Upper Tribunal Judge

John Walters QC

Upper Tribunal Judge

Release date: 16 July 2012