



TC01599

Appeal number TC/2009/11814

VALUE ADDED TAX – whether the appellant or his brother was the correct person to assess for allegedly underdeclared VAT on outputs from a café business – found the taxpayer had not shown that his brother and not himself was the owner of the business – whether the assessment was to the assessing officer’s best judgment – held not – criticisms of her methodology – the tribunal exercised its own judgment to reduce the amount assessed – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ISHAG SALAMA trading as IZZY STORE

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS (*Value Added Tax*)**

Respondents

**TRIBUNAL: JOHN WALTERS QC
RICHARD LAW**

Sitting in public in London on 8 and 9 June 2011

Brian Corbould, VAT Management Services Limited, for the Appellant

Robert Wastell, Counsel, instructed by the Solicitor for HMRC, for the Respondents

DECISION

- 5 1. The Appellant, Ishag Salama (“Ishag”) appeals against the decision of the Respondents (“HMRC”) to raise an assessment to VAT on him in the sum of £49,524 (plus interest) for the VAT periods 11/06 to 08/08. The decision was made on the basis that Ishag ought to have accounted for VAT on the supplies made at the business called Izzy Café, a café-bar in Brighton.
- 10 2. Ishag however challenged the assessment on the basis that the Izzy Café business was not his, but was the business of his brother, Ramie Salama (“Ramie”).
3. Ishag also takes the point that in any event the assessment was not made to the best of HMRC’s judgment and was not reliable.
- 15 4. We therefore heard argument on two issues – first, whether Ishag has shown that Ramie (and not Ishag, himself) was the owner of the business carried on at Izzy Café, and secondly, if we found that Ishag was the owner of the business, whether he has proved that the assessment ought not to be confirmed, or the quantum of it should be reduced.
- 20 5. We heard oral evidence from Ishag and from Ramie for the Appellant, and from Officers Diana Shirley and Chris Nowak for the Respondents. These witnesses had all put in witness statements. Another witness, Officer Lamb, also made a witness statement, which was not challenged by the Appellant. She did not give oral evidence.
- 25 6. Apart from the witness statements and oral evidence, we had before us two bundles of documents.

The first issue – the evidence

- 30 7. We approach the issues in turn and recount the evidence material to the first issue – who was the owner of the business? – below and we accept it, and find facts accordingly, except where we indicate to the contrary.
8. Ishag has been registered for VAT since 1 November, 2006 as a sole proprietor. He runs a convenience store (Izzy Stores) and a taxi business and is a partner in a launderette business.
- 35 9. By a Licence to Assign dated 6 February 2006 (produced to the Tribunal on 27 June 2011, following the hearing of the appeal and with the Tribunal’s leave), the then lessees of the premises at 2 St James Street, Brighton (“the Premises”), which comprised restaurant premises with a residential flat above, were licensed by the then lessor of the Premises to assign their lease (“the Lease”) to Ishag. We were shown no assignment of the Lease to Ishag made pursuant to this licence.
- 40 However we conclude that the Lease was indeed assigned to Ishag on or shortly after 6 February 2006.

10. A copy of the Lease was produced to the Tribunal (with leave) on 27 June 2011. The Lease is dated 12 September 2002 and the term of the lease is 12 years from 1 April 2002. The rent reserved was £8,000 per annum until 1 April 2005 and thereafter such rent as would be fixed pursuant to the rent review clause in the Lease (clause 6).

11. Ishag stated in his witness statement that the Lease was assigned to him for £100,000 – to include stock, goodwill, fixtures and fittings and that this was financed by a mortgage of £99,477 from National Westminster Bank plc and the balance (£523) was funded by himself. He stated that he took this assignment in order to enable Ramie to run a café business from the Premises. He stated that Ramie had agreed to ‘repay’ him ‘the money he loaned to’ him, and that such ‘repayment’ would come (in part) from the rents received from the residential flat, which would be paid into an account in Ishag’s name.

12. Ishag corrected this evidence in his oral evidence in chief, when he said that the mortgage from the Bank was £50,000 and that his family had put up a further £60,000 to enable the purchase of the Lease to go ahead.

13. We were shown consecutive pages of statements of a current account with National Westminster Bank plc, in the name of “I Salama t/a Cafe Bar” over the period from 17 February 2006 to 13 March 2008 and from 18 April 2008 to 11 June 2008, which record monthly credits (at about the middle of the month) relating to ‘The Property Shop 2 S J S’ which we take to be the net rents from the residential flat, net of the commission retained by The Property Shop who were managing the letting. From March 2006 to July 2007 (inclusive) the monthly credit to the account was £1,191.37, except for December 2006 and May 2007, when a smaller amount was credited. In August 2007 it was £1,288.50 and from September 2007 to April 2008 (inclusive) it was £1,323.75 – except that we have no details for March 2008.

14. Ishag was the ‘Designated Premises Holder’ of a supervisory licence in relation to the sale of alcohol at the Premises and he also allowed Ramie the use of his ‘cash and carry card’ to purchase stock for the café business.

15. From HMRC records included in the documentary evidence, it was clear that Ishag had returned £15,000 income for self-assessment purposes for an accounting period ended 31 March 2007 from a business (not described). It appeared that this business had commenced on 15 April 2006. It is possible that this figure might have included profit derived from Ishag’s other businesses.

16. However, on 6 June 2008 Ramie returned completed an HMRC Request for Trading Details form, which Officer Shirley had sent to him on 11 April 2008, in which he stated that he had started the Izzy Café business on 15 April 2006. In that form he gave as his Unique Taxpayer Reference Number (“UTRN”) the UTRN of his brother, Ishag.

17. From contemporaneous notes taken by Officer Lamb of a meeting on 27 August 2008 in Brighton VAT Office between Officer Shirley, Officer Lamb and Ramie, it appears that Ramie stated that 'Mr. Ishag Salama has control of business finances'. Officer Shirley's contemporaneous note stated: 'Izzy Café – decided to start up. If we get business going he needs control, be named after him. Follows name of store. Ishag Salama'. Ramie in his oral evidence denied that he had said that Ishag controlled the business.

18. In cross-examination, Ishag agreed that he had insured the café and had paid the utility bills for the Premises. We were shown evidence of an electricity account for the Premises opened in Ishag's name and also of attempts to collect from Ishag an outstanding sum due from him at the address of the Premises to a company called Bizzenergy Limited (an online energy company now in administration). Ramie's evidence was that he repaid his brother Ishag in respect of the utility bills by depositing money in the National Westminster Bank account. The statements of that account do show some credits which could represent such repayments.

19. However, when questioned in cross-examination about the two payments of £2,000 each credited to the National Westminster Bank account on 1 August 2006 and 16 August 2006 respectively, Ramie said that they represented 'money that I took from the till to give my brother to repay rates and electricity – to top up money from rental'. There were no rates bills or electricity bills before us, which could confirm this statement.

20. On the first day of the hearing (8 June 2011) some non-consecutive pages of statements of a bank account with Lloyds TSB in the name of Ramie, covering periods between 21 June 2006 and 20 March 2008 were handed up to the Tribunal. HMRC had not seen these before. The statements record purchases and some deposits that could relate to the operation of the café business at the premises.

21. Officer Shirley also took contemporaneous notes of the meeting on 27 August with Ramie, at which Officer Lamb was also present. They show that Ramie told her that Ishag had taken out a business loan of £60,000 which was being paid back at a rate of approximately £650 per month. Officer Shirley's evidence was that Ramie had said he was not repaying his brother, although she did not make a contemporaneous note of the statement. Ramie in his oral evidence denied having made that statement. It is, however, included in the typed 'Report on Visit to Trader' VAT 465B with our papers.

22. On the first unannounced call made by Officer Shirley to the business, on 10 April 2008, she spoke to the sister of Ishag and Ramie, Ms. Reham Salama ("Reham"). Reham told Officer Shirley that Ramie was the business owner and provided Ramie's telephone number. Ramie confirmed that he was the business owner in the completed Request for Trading Details form.

23. On 30 May 2008 Ishag applied to Brighton & Hove City Council for a temporary event notice, being a licence to use the Premises including the footpath in front of the Premises for a temporary event on 2 and 3 August 2008. He made a similar application in 2009. In both applications he led the Council to believe that he (and not Ramie) would be operating the café at the time of the temporary event. Ramie said in his evidence that Ishag was applying for the licence on his behalf, because he (Ishag) was the ‘Designated Premises Holder’.

The first issue – discussion and conclusion

24. The burden of proof is on the Appellant, Ishag, to show that he was not the owner of the Izzy Café business.

25. Mr. Corbould, for the Appellant, stressed that Ishag had not been interviewed by Officer Shirley or any other officer before the decision to raise the assessment on him was made. We regard this as highly regrettable and hope that in future in such cases care will be taken to interview a person in the Appellant’s position before such a decision is taken, if such an interview can be arranged.

26. Nevertheless, on the evidence before us, we have reached the conclusion that Ishag has not persuaded us that his brother Ramie owned the business and that he, Ishag, did not.

27. Although many of the facts recorded are consistent with Ramie having run the business on his own account with the assistance of his brother, Ishag, in acquiring the Premises, making available his cash and carry card, funding the utility bills on the basis that they would be repaid by Ramie out of the takings of the business, and being the ‘Designated Premises Holder’ for licensing purposes to enable Ramie to hold temporary events, we find that they are also consistent with Ishag, himself, being the owner of the café business.

28. The documentary evidence also suggests that Ishag owned the business. Firstly, the title of the National Westminster bank account “I Salama t/a Cafe Bar”; second, his purchase, not only of the Lease but also stock, goodwill, fixtures and fittings; third, the likelihood that Ishag returned the profits of the business on his self-assessment return for the period ended 31 March 2007; fourth, Ramie’s statement at the meeting on 27 August 2008 that Ishag had control of the business finances and that the naming of the business ‘Izzy Café’ reflected his control; and fifth, that no satisfactory explanation of all the credits to Ishag’s National Westminster Bank account was given, leaving us with the impression that some or all of the takings of the business were regularly credited to that account.

29. We have also to record that we found the evidence of Ishag and Ramie unsatisfactory as to the precise nature of the funding arrangements for the purchase of the Lease and the conversations with the Officers. We found their answers in cross-examination on some occasions to be evasive and their oral evidence departed from what was written in their witness statements on some relevant matters, without good reason being given.

30. We accordingly find that in the VAT periods 11/06 to 08/08 Ishag, and not Ramie, owned the Izzy Café Bar business and that therefore the assessment was made on the correct person.

The second issue – the evidence

5 31. The second issue concerns the Appellant’s submission that the assessment was not made to the best of HMRC’s judgment and was not reliable.

32. It is clear from authority that the validity of the assessment cannot be challenged as a whole on ‘best judgment’ grounds unless some kind of impropriety on the part of the assessing officer is shown. No such impropriety on the part of Officer Shirley has been shown and we do not understand such even to have been alleged.

33. Accordingly the assessment was validly made. The question for us is whether the quantum is correct, or whether, alternatively, the Appellant has been able to show that it was unreliable. If so, we must do our best to arrive at a reliable figure.

34. We record that in argument Mr. Corbould in terms did not dispute that the turnover of the business was higher than the VAT threshold.

35. On 10 April 2008, Officer Shirley had spoken to Reham, who had told her that the café was open 7 days a week from 7 am to 7 pm and is licensed to sell alcohol. The officer noted approximately 37 covers, but no seating outside. Reham said that to her knowledge there were 3 or 4 employees and that the business took between £250 and £350 a day. On the basis of takings of £300 a day, Officer Shirley calculated the potential annual turnover as £109,200.

36. In the Request for Trading Details form which Officer Shirley forwarded to Ramie and which he completed and returned on 6 June 2008, he declared 12 months’ turnover from April 2007 to March 2008 at £59,714.

37. On 6 August 2008, when Officer Shirley made an unannounced call to the business, accompanied by Officer Lamb, she was present when Reham cashed up the till contents and produced a Z reading at 18:44 (6.44 pm) showing sales of £556.95. This suggested that that amount was the total takings for that day.

38. On 27 August 2008, as we have indicated above, Ramie attended Brighton VAT office and saw Officer Shirley. On that occasion he produced business records and other documents including Z readings taken from 1 May 2008 to 24 August 2008, but, Officer Shirley noted, 2 Z readings were enclosed for 6 August 2008 and none for 5 August 2008. There was, however, a slip of paper dated ‘5/8/8’ and marked ‘taken by HM’. Officer Shirley makes the point that the Z reading she had taken was on 6 August 2008, not 5 August 2008.

39. The records, when examined, showed average daily takings of between £167 and £262, which were far lower than the £556 observed on 6 August 2008.

Officer Shirley also examined the profit and loss account for the 4 months to 31 July 2008.

5 40. On 11 September 2008, Ramie produced further records at Officer Shirley's request. When she examined them later, she noticed that no 'no sales/no rings' were included in the Z readings between 1 May 2008 and 24 August 2008 (apart from the day of the cold call and cash up) but 'no sales' were recorded for all Z readings produced from 1 to 6 September 2008.

41. On 1 October 2008, Officer Shirley made a visit to the Premises with Officer Nowak and Officer Sleight, who were specialists in till interrogation.

10 42. Officer Nowak conducted a till interrogation which showed that sales were set to be made with the cash draw open, the open cash draw alarm was switched off, the printing of consecutive receipt numbers was switched off, the provision for printing an electronic journal was switched off and none of the available memory bytes had been allocated to the electronic journal.

15 43. Officer Nowak also discovered that the Z counter was set to re-set to 1 after each financial report. This led him to believe that there was no reliable way to confirm that the Z readings which Ramie had given formed a complete series or whether the readings had been manufactured by re-ringing sales through the till. Officer Nowak concluded that the Z readings provided were likely to be false.

20 44. On 20 November 2008, Officer Shirley wrote to the Appellant, Ishag Salama, informing him that HMRC regarded him as the person trading at the café and as responsible for the VAT liabilities arising. She also included a calculation of the amount she proposed to assess, as follows:

- 25 • She took the Z reading obtained on 6 August 2008 at 18:44 hours and noticed that it totalled £556.95 from 136 sales, with 11 'no sales'. She concluded that the 'no sales' represented unrecorded sales, except for one, which she allowed as occurring on the introduction of the float. She concluded that there had been 146 sales at an average amount of £4.09 (£556.95/136), giving a corrected daily gross take of £597.14
- 30 • She took the Z reading obtained on 1 October 2008 at 14:00 hours and noticed that it totalled £176.70 from 45 sales, with 63 'no sales'. By the same reasoning she concluded that there had been 107 sales at an average of £3.92 (£176.63/45). She calculated that these results for 7 hours trading should be increased by a factor of 5/7 to account for a 12 hour trading day. These calculations gave a daily gross take of £719.04.
- 35 • She noted that both Z readings had been obtained on a Wednesday and that the average assumed daily gross take was £658.09.

- 5 • She referred to the Z readings handed in by Ramie which related to Wednesdays (they numbered 18) for a 4 month period from 1 April 2008 to 31 July 2008, which she said showed an average daily take of £160.45. She compared this to the figure she had arrived at (£658.09) and concluded that the business’s records showed a 75% suppression of sales.

- 10 • She ascertained the 12 months’ sales declared on the Request for Trading Details form (for the period 1 April 2007 to 31 March 2008) of £59,714 and applied a factor of 4 to give a revised annual gross sales of £238,856, which gives a monthly figure of £19,904. Against this she allowed a 2% allowance for unquantified zero-rated sales and then applied an adjusted VAT rate of 12% (this percentage is a flat rate adopted by HMRC for this type of business to recognise input tax credits).

- 15 • The result was an assessment covering the VAT periods 11/06 (only 1 month) and 02/07 to 08/08 inclusive of £51,494.

20 45. On 30 April 2009, after receiving representations from Mr. Corbould, Officer Shirley reduced the assessment to £49,514, which represents a suppression rate of 74%, rather than 75%. This was the result of allowing 4 further ‘no-sales’ per day as legitimate, relating to, for example, ‘no-sales’ rung up to pay cash for supplies.

25 46. Mr. Corbould, before us, maintained that recognising only 5 ‘no-sales’ per day was unreasonable and illogical. The figure of 63 ‘no-sales’ observed on 1 October 2008 was, in his submission, incredible and its inclusion in Officer Shirley’s calculations had led to an end result in terms of undeclared takings which was wholly exaggerated and unbelievable.

30 47. Ramie’s oral evidence included a suggestion that the results for 6 August 2008 were higher than usual because of increased trade in Gay Pride Week in Brighton (the busiest period of the year). He also said that the figure of ‘no-sales’ observed on 1 October 2008 was so high because on that day he was repricing stock at the end of the summer season (though that explanation had not been given to HMRC before). Officer Nowak gave evidence to the effect that he did not think that repricing would lead to any need for there to be an increase in the number of “no-sales”.

The second issue – discussion and conclusion

35 48. Although we reject Ramie’s explanation for there being so many ‘no-sales’ recorded on 1 October 2008, we regard the result reached by Officer Shirley’s methodology of a 64% suppression of takings to be surprisingly large, though of course not impossible.

40 49. We consider that her methodology made the following assumptions which we consider are unreasonable. First, she assumed that daily takings were at an even rate throughout the year, being an average of the ascertained daily takings on 6

August and 1 October. We consider this unlikely and that the assumption was likely to lead to an exaggerated degree of suppression of takings because 6 August was a date in high summer and 1 October was also a date in or near the high season. Further, we consider that Officer Shirley’s calculation derived from the observed Z reading on 1 October 2008 was unreasonable and likely to lead to an exaggerated rate of suppression, because she assumed that trading in all hours at which the café was open would be conducted at an even rate. This seems to us highly unlikely. We consider that, to obtain a more accurate methodology, more observed Z readings should have been taken, as well as more extensive monitoring of transactions and test purchases. We are also sympathetic to Mr. Corbould’s submission that factoring in 63 ‘no-sales’ on 1 October 2008 as unrecorded sales was highly likely to be unjustified and distortive of the end result.

50. We have therefore done our best to arrive at a more reliable figure. For this purpose we have taken the Z readings declared for Monday 1 September 2008, Tuesday 2 September 2008, Wednesday 3 September 2008, Thursday 4 September 2008 and Saturday 6 September 2008 (there was no Z reading for Friday 5 September 2008 in our bundle). While this period is still potentially within the high season, we consider that it is more likely to be reflective of actual transactions, given that the operators of the business would have been aware that they were under HMRC scrutiny.

51. We are troubled, as indicated above, that Officer Shirley’s approach to the ‘no-sales’ declared did not allow for enough genuine ‘no-sales’ and also that we consider takings are likely to have varied through the year, though any simple methodology will have to take a daily average and apply it on an annual basis. To meet these objections, we have in our calculation allowed 10 (rather than 5) genuine ‘no-sales’ every day. We set out our calculation in the Appendix to this Decision notice and note here that the result is that the tax assessed by the assessment falls to be reduced from £49,514 to £37,469, which we consider is likely to be the best estimate which can be arrived at on the information available.

52. We therefore allow the appeal in part by reducing the tax assessed accordingly.

53. Neither party asked for a costs order and so we make no order for costs.

Right to apply for permission to appeal

53. 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 WALTERS QC

**JUDGE OF THE FIRST-TIER TRIBUNAL
RELEASE DATE: 24 November 2011**

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