



TC02171

Appeal number: TC/2010/01681

*VAT AND INCOME TAX – additional and amended assessments –
apportionment between standard and zero-rated supplies – input tax and
income tax deductions where no invoices available – quantum of penalty*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MITA KHAGRAM

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
SONIA GABLE**

Sitting in public at Bedford Square, London on 26 June 2012

The Appellant appeared in person

Kim Sukul for the Respondents

DECISION

1. These are appeals against:

5 (1) Notices of assessment and additional assessments for VAT totalling £8,338 (plus interest of £321.66) in respect of tax periods 10/06, 01/07, 04/07, 07/07, 10/07, 01/08 dated 03/12/08 (£600.12), 09/07/09 (£7077.34) and 25/07/09 (£982.20) respectively.

10 (2) An amendments and assessments to income tax and national insurance contributions for the years 2004/2005, 2005/2006 and 2007/2008 in the sums of £3,003.00, £3,722.70, £4,295.40 and £6,773.10 respectively.

(3) Penalty determinations in the amounts of £1,201.00, £1,489.00, £1,718.00 and £2,709.00 for the years 2004/2005, 2005/2006, 2006/2007 and 2007/2008 respectively.

15 **The facts**

2. We find the following facts.

3. The appellant carried on a business trading as a confectionery station kiosk located at Southfield Underground Station. The businesses ceased trading in February 2008.

20 4. Mr Kim Crisp, an HMRC officer based in London who gave evidence at the hearing, visited the appellant (together with a colleague) at her home on 19 May 2008 to carry out a VAT assurance visit. He asked the appellant about her cash control and was concerned that there did not appear to be any robust control system, particularly since the appellant informed Mr Crisp that the till at the kiosk did not work.

25 5. The appellant confirmed to Mr Crisp that she had kept the records in the same way from the commencement of business in January 2003 to its cessation in February 2008. The only change in the appellant's record-keeping was that when she registered for VAT she incorporated a column in the cash book to show standard rated and zero rated supplies.

30 6. HMRC commenced an enquiry by the issue of the Notice under section 9A Taxes Management Act 1970 ("TMA") on 2 June 2008. The enquiry was into the appellant's self-assessment income tax return for the year ended 5 April 2007.

7. Mr Crisp reviewed the records (consisting of the cash book, purchase invoices and bank statements) submitted by the appellant. Mr Crisp concluded:

35 (1) the appellant had overstated her purchases from a supplier (Freshways) by recording the cumulative total due to Freshways within the cash book instead of the cost incurred in that particular week. Mr Crisp noted that the appellant had done this on at least 13 occasions during the year.

(2) The total of the purchase invoices supplied was significantly less than the amount claimed in the tax return.

5 8. Mr Crisp wrote to the appellant on 2 October 2008. He set out his concerns regarding the purchases and a VAT apportionment of standard and zero rated supplies and invited the appellant to comment. He also raised concerns that the business records provided did not seem reliable, that certain commissions had not been returned on the appellant's tax return and that no allowance had been made in respect of stock taken by the appellant for her own use. He also considered the appellant had overstated purchases (he could not see how the additional purchases could have been made because the appellant had insufficient funds available to make them). He noted that private utility expenses had been charged to the business.

15 9. After correspondence, the appellant informed Mr Crisp in a letter dated 13 January 2009 that all the purchase invoices she held had been submitted, but some were missing. She said that she would try to find them. However, no further invoices were supplied.

20 10. Mr Crisp wrote to the appellant on 25 March 2009 and enclosed the reconciliation of the purchase invoices to the cash book and figures supplied by the appellant's accountants, Hussain Bulman & Co. This reconciliation showed that the amounts of invoiced stock (from the purchase invoices totalling £37,849) generally matched the amounts recorded in the cash book totalling £39,327. The discrepancy related to purchase amounts recorded by the accountants, totalling £54,278. Mr Crisp could not establish where the accountants had obtained these figures but noted that these were the amounts recorded in the appellant's tax return.

25 11. The appellant supplied VAT accounts to support the apportionment between standard and zero rated supplies. Mr Crisp analysed these invoices and identified in respect of each purchase whether it was standard or zero rated. Based on this analysis he recalculated the percentage of standard and zero rated purchases for each quarter ended 10/06, 01/07, 04/07, 07/07, 10/07 and 01/08.

30 12. Mr Crisp concluded that the appellant had reclaimed too much tax in each quarter and had applied a different standard rated and zero rated apportionment to the outputs. Based on an analysis of the actual purchase invoices (which he considered the most reliable method), the apportionment between standard and zero rated supplies was approximately 88%: 12% and not 70%: 30% as the appellant had claimed in her accounts.

35 13. Mr Crisp concluded that recorded stock as purchased was £37,150, whereas the figure claimed in the appellant's accounts was £54,278. He noted, also, that there were omissions of some of the commissions paid to the appellant from the sale of phone cards. There was no "own goods" adjustment (ie stock taken by the appellant for her own use) in the accounts. Private utility bills were recorded as business expenses. He estimated that the appellant had over-claimed tax reclaimed and understated tax due on sales by £7,362.30. He sent his calculations to the appellant on 8 May 2009.

14. Mr Crisp considered it was likely that similar errors arose in other years as the appellant had confirmed that the business has always been operated in the same manner and as such there was a presumption of continuity ie that the errors were likely to have occurred in other years.

5 15. The appellant wrote to Mr Crisp on 5 June 2009. She accepted that there was a discrepancy in HMRC's favour but did not accept the extent of the discrepancy as calculated by Mr Crisp.

10 16. The appellant contends that purchase invoices totalling £16,429 were missing, although they were claimed for income tax and VAT input tax purposes. The appellant also contends that the appropriate apportionment between standard and zero rated supplies was 85%: 15%.

17. No further documentation was supplied by the appellant to Mr Crisp.

15 18. On 30 June 2009 Mr Crisp issued a closure notice under section 28A TMA for the year ended 5 April 2007 and discovery assessments under section 29 TMA for the years ended 5 April 2005, 5 April 2006 and 5 April 2008. Mr Crisp also sent VAT assessments on 9 July 2009. These assessments were based on the following conclusions:

(1) the purchases had been overstated for both income tax and VAT purposes.

20 (2) The apportionment between standard and zero rated supplies was incorrect.

19. In a letter dated 25 July 2009 the appellant wrote to Mr Crisp disputing his calculations in respect of VAT and income tax. The appellant accepted that she had been negligent.

25 20. On 5 August 2009, Mr Crisp raised an income tax penalty determination for the four years ended 5 April 2008 under section 95 TMA. Section 95 provided for a maximum penalty of 100% but Mr Crisp abated the penalty to 40% based on:

(1) Disclosure – allowing 10% out of a maximum of 20% because the appellant admitted on challenge that some errors had been made.

30 (2) Cooperation – allowing 25% out of a maximum of 40% as the appellant had provided some information

(3) Seriousness – allowing 25% out of a maximum of 40% to reflect the level of increases to the profits.

35 21. The appellant stated that she had lost a number of the relevant invoices. She had given them to one of her customers, a Mr Omer Shah, who had volunteered to help sort out her book-keeping, but he never gave most of them back. Mr Crisp noted, however, that he did not believe that there were funds available to the appellant to pay for the purchases contained in the alleged missing invoices, based on his examination of the cash book and the appellant's bank account. Mr Crisp accepted that his analysis of the funds available to the appellant related only to one year.

22. The appellant stated that the main items sold in the kiosk were cakes, biscuits, fruit, muffins, cigarettes and (soft) drinks.

Arguments of the parties

23. Ms Sukul submitted that the question before the tribunal was the reliability of the appellant's figures for VAT and income tax. She submitted that the evidence
5 showed that the figures returned by the appellant in her VAT and income tax returns were unreliable. There was a discrepancy between the figures returned and the cash book figures. The only accurate basis for calculation was the actual invoices and this was the basis for HMRC's calculations. Ms Sukul argued that the presumption of
10 continuity should apply in respect of the various years under appeal and referred to *Jonas v Bamford (H M Inspector of Taxes)* 51 TC 1.

24. Ms Sukul argued that the appellant had not discharged the burden of proof to show that the assessments were excessive and she further submitted that HMRC had demonstrated that the appellant had been careless in the delivery of her income tax
15 return. She submitted that the penalty was appropriate in all the circumstances.

25. The appellant said that she ran a small kiosk until February 2008. She tried her best to do the right thing she ran the business by herself. She had re-mortgaged her house in 2006 and had paid legal fees relating to have husband's bankruptcy. She had lost some of the purchase invoices when they were given to Mr Omer Shah.

20 Our decision

26. In our view, these appeals must be dismissed. The appellant simply has not discharged the burden of proof in respect of the VAT and income tax assessments.

27. We are persuaded that HMRC adopted a legitimate and reliable method of calculating the sales made by the appellant when Mr Crisp based his calculations on
25 the actual invoices provided by the appellant, when read with the cash book and the appellant's bank statements.

28. In *Jonas v Bamford (H M Inspector of Taxes)* 51 TC 1 at 25 Walton J said:

30 "But, so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr. Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

29. We consider that the presumption of continuity should apply in the light of the
35 appellant's confirmation to Mr Crisp at their first meeting on 19 May 2008 that she had kept the records of the business in the same way since its inception in 2003.

30. Since we are dismissing the appellant's appeal in respect of the various VAT and income tax assessments, we see no reason to interfere with HMRC's income tax

penalty determination. The appellant admitted that she was negligent. The abatement of the penalty made by Mr Crisp seems to us entirely appropriate.

31. For these reasons, we dismiss these appeals.

5 32. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 1 August 2012

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