



**TC02546**

**Appeal number: TC/2012/03358**

*VAT – assessment - best judgment – whether assessment reasonable– yes -  
appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THAMBITHURAI SANJEEVRAJ T/A  
CAMBRIDGE FOOD & WINE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE KAMEEL KHAN  
CAROLINE DE ALBUQUERQUE**

**Sitting in public at Bedford Square, London on 7 January 2013**

**The Appellant represented himself with the help of his accountant Mr Jai Malhotra.**

**Mrs E Carroll, Higher Officer, at HM Revenue and Customs, for the Respondents**

## DECISION

### Appeal

1. This is an assessment raised by HM Revenue & Customs (“HMRC”) under Section 73 (1) of the Value Added Tax Act 1994 (“VATA 1994”). On 9 December 2009 in relation to under declared output tax for the period 1 April 2003 to 31 December 2008 in the sum of £46,290.37 which includes interest at 3%.
2. The Tribunal must decide whether the Appellant has satisfactory evidence to demonstrate that the sales arising from his business made during the period 1 April 2003 to 31 December 2008 were not understated and secondly whether the assessment was properly made under the provisions of Section 73(1) of the VATA 1994.

### Facts

3. The basic facts in this case are undisputed. There is one dispute relating to the number of no sales. The Appellant’s say that the number of no sales is 20 to 30 per hour, not per day as claimed by the Respondents. A “no” sale occurs when the cash machine is opened but there is no sale.
4. The Appellant was registered for VAT with effect from 20 January 2002. The business was acquired as a going concern. The core business activities are that of a supermarket/general store. The store sells groceries, alcohol, tobacco, newspapers and general foods. It is open seven days a week until late each day.
5. The shop has two electronic tills and the till readings form the basis of VAT quarterly returns. The till readings are provided to the Appellant’s accountants who prepares the VAT return.
6. The business operates HMRC’s point of sale “Retail Scheme” for calculation of VAT. The scheme works by identifying the VAT liability for the goods or services sold at the time the sale is made. A record of the daily gross takings for each rate of VAT is maintained and the appropriate VAT fraction applied accordingly in order to arrive at the tax due.
7. HMRC officers paid three visits to the Appellant’s business premises. These were on 7 November 2006, 1 August 2007 and 31 July 2008. On each occasion, HMRC officers interrogated the main till in operation at the business premises and obtained various printed till reports. The Appellant and the Manager were also interviewed concerning the use of the till.
8. The visits which were undertaken were as follows:
  - (1) 7 November 2006 – Officers James Gorin and M Buzby carried out an unannounced VAT visit to the premises. In addition to reports on the two tills in

operation, a questionnaire was completed with Mr Raj Tahambi, the manger of the Appellant's business.

(2) The second visit was on 1 August 2007 and was undertaken by officers N Conquest and R Dhinsa Singh ("Officer Dhinsa"). These officers also interrogated the two tills in operation and a questionnaire was completed with the Appellant.

(3) The third visit was undertaken by Officer Dhinsa and HMCRC Officer Jas Bhangu who visited the Appellant's premises unannounced. The officers interrogated the two tills in operation and a questionnaire was completed with the Appellant.

The interrogation of the data from the till reports showed that there was a significant number of "no sale" transactions. A no sale transaction occurs where the till drawer is opened without having to ring a sale.

9. On 14 August 2008 Officer Dhinsa wrote to the Appellant confirming that an enquiry was being undertaken into an under declaration of VAT.

10. On 9 September 2008 a meeting took place between the Appellant and the Appellant's representative at the time (Mr Karon), Officer Dhinsa and HMRC Officer Chris Nowak. This meeting was called a PN 160 Meeting (Public Notice 160) where the Appellant was invited to make full disclosure of any irregularities.

11. In the letter which invited the Appellant to that meeting which was dated 14 August 2008 a request was made by HMRC to the Appellant to state any "health, disability or language issues" for which arrangements had to be made at the meeting. There was no communication on these points by the Appellant. It should be noted that throughout the proceedings at the Tribunal the Appellant had an interpreter (Dr Anant H Ananthavarathan).

12. On 7 July 2009, Officer Dhinsa wrote to the Appellant with the details of the assessment he intended to raise. Details of the Appellant's right to appeal and the appeal procedure were provided.

13. On 9 December 2009, an Assessment under Section 73 (1) VATA 1994 was raised for VAT and interest.

14. Mr Karon, the adviser to the Appellant, wrote to Officer Dhinsa on 10 August 2009, appealing against the Assessment.

15. The Appellant's new accountant, Mr Jai Malhotra, Accountant and Senior Partner of Ashwin Associates wrote to HMRC on 5 March 2010 querying the amount shown on Debt Demand Notice to the Appellant. HMRC responded to that letter on 18 March 2010, providing a breakdown of their client's debt.

16. Ashwin Associates wrote to HMRC on 5 May 2010 appealing the Assessment.

17. On 15 July 2010 HMRC received an Application by the Appellant to cancel his VAT registration with effect from 1 April 2010 due the business having ceased trading. The de-registration of the business took place on 1 April 2010.

18. Ashwin Associates wrote to HMRC Officer Colin Sparkes on 22 August 2011. They noted that someone from HMRC was supposed to be contacting them concerning the case and stated that they wished to appeal against the Assessment. They believed their client had overpaid VAT due to the wrong formula being used by the previous accountant. They wanted the Assessment cancelled and to be allowed to resubmit VAT returns for the periods concerned.

19. Ashwin Associates wrote to HMRC on 24 August 2011 regarding a Debt Demand Notice stating that the Assessment had been appealed and enclosing a copy of their letter of 22 August 2011. On 21 October 2011, HMRC Officer Andrew Stowe replied to Ashwin Associates' letter of 22 August 2011. He stated that he had carried out a review of the Assessment but did not agree that it should be cancelled. He confirmed the reason why the assessment had been raised. He explained that the Assessment raised by HMRC did not rely on any formula the previous accountant had used. The Assessment was raised because of the large number of no sales that were being run through the electronic cash register which could not be explained by the Appellant.

20. He explained that 44,000 no sales had been run through the electronic cash register during the period 5 January 2008 to 28 June 2008. The review suggested that the under declaration of tax was deliberate. On 26 January 2012, Officer Dhinsa suggested to the Appellants that they should appeal to the Tribunal since an internal review would be out of time. On 15 February 2012 Ashwin Associates notified the Tribunal of an appeal against the Notice of Assessment.

### **The Appellant's submissions**

21. The Appellant's submissions are contained in a Notice of Appeal dated 15 February 2012. The Appellant claims that they had legitimate reasons to open the till 44,000 times during the six month period which was the subject of the Assessment. They say that the tills were opened for the following reasons:

- (1) To pay lottery winnings
- (2) To rectify mistakes
- (3) For customers requesting change.
- (4) Storing important documents for safekeeping
- (5) Cash dropped from till to safe
- (6) Cash back service to purchase goods and to pay staff wages.

These were corroborated by the Appellant's Accountant Mr Jai Malhotra, who appeared as a witness.

22. The Appellant complained about the fact that they had not received a reply from HMRC for “three to four years” regarding the Appeal and this was unsatisfactory.

23. The Appellant stated that the HMRC Officers had misunderstood the no sales figures. The no sales figures related to 20 to 30 no sales per hour not per day and to that extent their conclusions were incorrect.

### **The Respondents submissions**

24. The Respondents say that the till reports obtained on 31 July 2008 in relation to a twenty-six week period from January to June 2008 showed that there were 44,768 ‘no sale’ transactions out of a total of 131,783 transactions. The till drawer had been opened in excess of 44,000 times during that period for which no sale had been rung through.

25. The Appellants stated that they had used the no sale function 20 to the 30 times per day (later changed to 20 to 30 times per hour) and HMRC in doing their calculations gave an allowance of 30 no sales per day to arrive at a figure of the total no sales for the period in question.

26. The Appellant’s had provided no evidence to show that the no sale transactions related to such things as lottery winning payments, cash back services, change for parking meters, paying suppliers, putting documents in the till for safekeeping and petty cash.

27. The evidence provided by the Appellant is minimal and unreliable. There is a lack of supporting evidence to substantiate their position.

28. The Appellant’s claimed that they have recorded all daily sales taking figures into a green cash book. However Officer Dhinsa found that recordings in the cash book did not correlate to the VAT returns rendered by the Appellant and when questioned on this matter the Appellant’s replies were unconvincing. The Respondents claim dishonesty by the Appellant.

29. The Respondents say that the Assessment was reasonable and was calculated in a reasonable manner with an allowance given to the Appellant for no sales and to take account of information which was sent in by the Appellant’s representative on 10 August 2009.

30. The Respondents submit that the Assessment under Section 73(1) VATA 1994 as a best judgment assessment was correctly made. The Appellant’s business records and VAT returns contained inaccurate figures. They submit that the Appellant’s have provided no satisfactory explanation to satisfy the concerns of the HMRC officers.

### **The Law**

31. The legislative provision under which the Respondents decision was made is contained in Section 73(1) VATA 1994. It states:

“(i) Where a person has failed to make any returns required under the 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”.

32. The Respondents also refer to the following cases:

- (1) *Customs & Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509
- (2) *Van Boeckel v Customs & Excise Commissioners* [1981] STC 290

### **Witness Statements**

#### **Mr Jai Malhotra**

33. Mr Malhotra appears as a witness for the Appellant, he made the following points:

- (a) He was appointed the Appellant’s Accountant on 20 January 2010.
- (b) He confirmed that the shop was in a dangerous area where money change could not be refused to local residents. He said it was his belief that the cash register would have been opened 20 to 30 times per hour in order to give change to local residents who required such change for parking, washing machines or telephones.
- (c) He confirmed he had no involvement with the Appellant before 2010. He had not been nor visited the shop before that date.

#### **Mr Robinda Dhinsa**

34. Mr Dhinsa is an Officer with HMRC based in Finchley, London. He job is largely concerned with visiting retail businesses to confirm their business activities and ensure they are paying the correct amount of tax.

35. He made the following points:

- (1) During his two visits to the business premises lasting approximately one hour each there were no local residents seeking change from the Appellant’s shop.
- (2) The evidence from the till reports for the period January to June 2008 confirmed approximately 44,000 out of 131,000 transactions as being no sale transactions.
- (3) At the PN 160 meeting the Appellant proffered no reasonable explanation for the no sale transactions. He said that the shop had poor cash control and staff members were stealing. This however did not explain why the VAT returns were not accurate.
- (4) While the Appellant provided a figure of between 20 to 30 no sales per hour, he also confirmed by signing a questionnaire on 31 July 2008 that there

was no monitoring of the sales or credit control in the shop and no records were taken of sales and no sales.

(5) The green coloured cash book which was presented by the Appellant showing daily gross takings but contained figures which could not be deciphered, did not relate to the VAT returns, or explain the daily takings. It could not therefore be relied upon as an accurate document.

(6) He confirmed that he had given an allowance of 20 to 30 no sales per day to the Appellant in arriving at the final assessment figure. The till rolls interrogated showed a pattern in using the cash machines which suggested dishonesty.

### **Other evidence**

36. The Tribunal was presented with a documents bundle and an authorities bundle. The documents bundle which contained copies of the two till rolls evidence which showed the no sale transactions.

### **Conclusion**

37. Some preliminary points:

(a) The onus is on the Appellant to show good reasons to open the till 44,000 times. They would need to present evidence that the sales were not understated in the six month period. The standard of proof is the civil standard of the balance of probabilities.

(b) “Best of their judgment” means that the Commissioners will fairly consider all materials placed before them and on the material, come to a decision which is reasonable and not arbitrary as to the amount of tax that is due. In essence, the taxpayer has to show that the assessment is incorrect.

(c) The question for this Tribunal is whether the Respondents, in assessing to the best judgment, have acted unreasonably in either failing to take something into account, or taking something into account which they should not have.

38. As a general finding, the Tribunal found the evidence presented by the Appellant and their witness was not convincing. It was inconsistent and unreliable and not supported by any facts or figures. There is no real evidence, other than assertions made by the Appellant, and those assertions were unsubstantiated.

39. The Appellant’s main assertion is that the till was opened on a no sales basis 44,000 times to service the needs of the local community. The Appellant was under an obligation to provide change when requested to do so since the area was dangerous and a failure to provide change to customers or residents could have resulted in physical attacks or damage to his shop. The Appellant provided no evidence that the area was dangerous. It may be dangerous but there is no evidence that there was an imminent threat to the employees and premises. The Tribunal would have liked to have seen a community police report, threats made, photographic evidence of attacks on the shop, reports to the local police regarding threats and information which

supports neighbourhood being unsafe. Similarly with the regard to the assertions that no sale transactions were conducted to pay lottery winnings, cash back to customers, purchase of cash goods and payment of wages, these are all matters which can be supported by physical evidence. The appellant confirmed in a signed questionnaire that no records were kept of cash inflow and outflow. There is no evidence to support the assertions made.

40. The officers examined the till records. The evidence provided from the till rolls is indicative of a substantial under declaration. The Appellant was given an opportunity to meet with the HMRC officers and to provide a full and frank disclosure of all irregularities. The Appellant gave unconvincing explanations as to poor cash control and the possibility that staff members were stealing from the cash register. The evidence was not corroborated and therefore is not acceptable.

41. The Appellant's Accountant's Mr Malhorta supported the contentions of the Appellant that the area was dangerous and the Appellant was obliged to provide change to customers under threat of violence. This may well be true, but where is the evidence to support that contention? The Tribunal notes from his oral evidence that Mr Malhorta was not involved with the shop before 2010 and so his knowledge of the relevant period would be limited.

42. The totality of the Appellant's case is based on conjecture and assertions without any supporting evidence. It would have been helpful to the Tribunal if the Appellant gave oral evidence or provided a witness statement. He stated that the HMRC Report was wrong and there were 20 to 30 requests for change on an hourly basis rather than on a daily basis. This would have explained 44,000 no sale entries into the cash register but while interesting, it is not convincing in the absence of evidence. The HMRC officers conducted a detailed analysis of the till rolls. They made visits to the business premises and during that time did not find any customers requesting change from the Appellant. The cash book of the Appellant, which would have corroborated the VAT figures, was an unreliable document containing figures which were unrelated to the VAT returns. It was not a document which could be relied upon.

43. The calculations done by the HMRC officers were reasonable and logical. They gave an allowance of 20 to 30 no sales per day arriving at the final assessment. The Tribunal was provided with comprehensive figures and details of the till rolls. The evidence from the till rolls was clear and unequivocal. In the absence of any records or evidence from the Appellant the till rolls provides the only reliable evidence. By his own admission, the Appellant said he had poor cash control and this may explain why the VAT returns were not accurate. The better explanation is that the sales were not monitored or recorded and there is therefore no record kept by the Appellant of the number of no sales, reasons for opening the cash register or the proportion of no sales entry which relates to change, lottery winnings, wages, etc.

44. The evidence of Mr Dhinsa was convincing. He explained in quite great detail how the assessment was made in conjunction with help from HMRC Appeals team.

The assessments were amended to take account of information sent in by the Appellant. In his witness statement he said:

“No sales analysis provided showed for quarter ending 09/08, no sales were 13% and for period 12/08 no sales were 9.3%. Amendments were made on 28/8/12, and reduced the assessment for period 09/08 from £3,532 to £1,767, and for period 12/08 the assessment was reduced from £3,861 to £1,325. Period 03/09 was also reduced from £1 to £0, and this was because it was initially entered in error. The new assessment total was therefore reduced from £46,282 to £41,981”

This clearly shows that adjustments were made to the figures based on the representations by the Appellant in finalising the assessment.

45. The Tribunal therefore finds that the Respondents acted entirely properly and reasonably. The conclusion that there was an under declaration by the Appellant is one that was reasonably arrived at and follows naturally from the number of no sales entries into the cash register and the lack of a proper sales book record. The Appellant has provided no reliable evidence which would allow the Tribunal to conclude that the assessment was wrong or unreasonable. The Tribunal finds that the assessment was made to best judgment. The Appeal is therefore dismissed.

46. Finally, the Tribunal should mention that it took a considerably long time for HMRC to arrive at their assessment. The Appellant appeared to be kept in the dark as to what was happening and his advisors had to write to HMRC to get information which should have been provided at an earlier date. It is understandable that the officer dealing with this, Officer Dhinsa was ill for a six month period. This however does not excuse the three year delay in making an assessment. The Appellant would be justified in making a complaint on this ground should he wish to do so.

47. 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.

**DR K KHAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 14 February 2013**