



TC04764

Appeal number: TC/2013/02733

VAT – assessments and penalties - best judgment – evidence of double counting of cash and debtors – onus on appellant – evidence not provided – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Avenir Business Solutions Limited

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
Ms Janet Wilkins (Member).**

Sitting in public at Eastgate House, Newport Road, Cardiff on 19 May 2015

Mr Arthur of Martyn F Arthur Limited, Forensic Accountant and Mr Ntereba of J M Frederick and Co Limited, accountant for the Appellant

Mr Robinson Higher Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against VAT assessments for the 10/10, 01/11 and 07/11 VAT
5 periods of the Appellant amounting to £50,916.75 in total and penalties charged for
periods 10/09, 01/10, 04/10, 01/11, 04/11, 07/11, 10/11 and 01/12 amounting to
£14,029.85 charged in each case at a rate of 22.5% of the VAT outstanding.

2. The assessments in question were made by HMRC under s 73(1) Value Added
Tax Act 1994 and the penalties were raised under s 97 Finance Act 2007. An appeal
10 was made by the Appellant to this Tribunal against those assessments and penalties on
30 March 2013.

3. HMRC did not carry out an internal review of those assessments despite
requests from the Appellant to do so. At the Tribunal HMRC stated that they accepted
that it was incorrect for them to have refused this request and Mr Arthur confirmed on
15 behalf of the Appellant that this issue was not being raised as part of the appeal.

Preliminary Matters

4. On the day of the hearing the Tribunal Centre in Cardiff suffered a power cut.
HMRC had arranged that their witness, Mrs Rosemary Marinelli, should provide
witness evidence by video link. This was not possible. The parties agreed that in the
20 circumstances they would proceed with the hearing on the basis that neither party
would provide oral witness evidence and that there would be no cross-examination.
The Tribunal reserved the right to adjourn the hearing to a later date if it considered
that oral witness evidence was required. In the event the Tribunal concluded that this
was not necessary.

5. At the Tribunal a number of matters were agreed between the parties; it was
25 agreed that the only periods for which the VAT assessments were disputed were the
periods 01/11, 04/11 and 07/11.

6. It was also agreed that the VAT overpaid for the 04/11 period should be offset
against the VAT due for the 01/11 period and that the VAT payable for those periods
30 was no longer in dispute.

7. Finally, the parties agreed that any residual penalties due for the 01/11, 04/11
and 07/11 periods would be mitigated to 18.75% of the VAT owing.

The 07/11 period

8. The only substantive issue which remains in dispute is the VAT assessment for
35 the 07/11 period.

The law

9. The relevant legislation is set out at s 73(1) Value Added Tax Act 1994:

5 “Where a person has failed to make any returns required under the 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”.

Evidence seen relevant to the 07/11 period

10 10. We saw a written witness statement of HMRC Higher Officer Rosemary Marinelli dated 24 April 2015. Due to the power cut at the Tribunal Centre Mrs Marinelli did not give oral evidence to the Tribunal. Mrs Marinelli worked for HMRC’s compliance team and was responsible for the Appellant’s VAT compliance.

15 11. Mrs Marinelli’s written witness statement explained that she undertook a VAT records visit to the Appellant’s accountant’s premises on 15 March 2012 at which a director of the Appellant was present (Mr Suresh Kumar Kondapureddy) and the Appellant’s accountant, Mr Frederick. From information which she obtained at the meeting Mrs Marinelli concluded that the Appellant should have been on invoice accounting from the end of 2010. She was told by Mr Frederick that he thought the company had moved to invoice accounting for the 04/11 period.

20 12. Mrs Marinelli identified a number of discrepancies in the Appellant’s VAT returns including for the 07/11 period for which she saw a SAGE report giving a total value of sales as £683,775.90 (including zero rated sales) giving rise to VAT of £135,826.55. The Appellant had only declared VAT of £109,589.80 on its VAT return for that period.

25 13. Mrs Marinelli confirmed in her witness statement than none of the additional information provided by the Appellant in later correspondence made her change her original decision about the discrepancies for this period and the correct VAT to be assessed for that period.

30 14. Mrs Marinelli recorded her conclusions from this meeting and later correspondence as: *“the records were a mess. Neither the accountant nor the new book keeper knew where anything was. The summaries and spreadsheets differed from the figures declared; I was unable to verify when the change [to invoice accounting] took place”*.

35 15. We also saw extensive correspondence between HMRC and the Appellant starting from the date of Mrs Marinelli’s meeting in March 2012. Much of that related to issues with periods other than the 07/11 period, but the correspondence which did cover the 07/11 period comprised;

40 (1) HMRC letter to Appellant of 2 April 2012 asking for *“VAT Records; please provide the VAT summaries and sales and purchase spreadsheets for periods 01/09, 01/11, 04/11 and 07/11. Please state on which VAT return the company changed from cash to invoice accounting and send me a copy of the*

VAT summary and detail reports which must clearly show the adjustments for trade debtors”.

(2) The Appellant’s accountant responded by letter on 20 April 2013 but made no reference to the 07/11 period.

5 (3) HMRC letter to the Appellant’s accountant of 3 May 2012 stating “*VAT summary 07/11: Please confirm this is the quarter in which the company started to invoice account and that an adjustment was made for the debtors. If this is the case I will need a comprehensive breakdown of the SAGE line 50 figures of £657,538.80 and VAT £109,589.80. I have not received the purchase summary*
10 *for this period. Please forward this to me.*”

(4) The Appellant’s accountant replied on 27 May 2012 attaching a SAGE summary – VAT report for the 07/11 period and various bank statements including a Barclays bank statement for an account in the name of the Appellant covering the period 26 – 28 April 2011. No documents attempting to reconcile
15 amounts included in the April bank statement with amounts in the 07/11 SAGE report were provided.

(5) HMRC letter of 31 May 2012 referring to the 07/11 SAGE print out saying that it showed a difference of £26,236.75 compared with the VAT return which “*I assume is the adjustment due for debtors and therefore an assessment*
20 *will be due for the difference and if proof of zero rated sales is not received VAT will be due on the total amount. Purchase summary required*”.

(6) HMRC letter of 25 July 2012 asking for a response to their letter of 31 May.

(7) Appellant accountant’s response of 7 August 2012 “*the 07/11 reconciliation – This was the transition period from cash accounting to invoice*
25 *accounting. I do not understand how you have arrived at this figure from your assessment*”.

(8) HMRC letter of 24 August 2012 saying; “*No new additional information has been received that would indicate that the assessments were not issued*
30 *correctly in the first place. The assessments [including the 07/11 assessment] stand as issued*”.

(9) Appellant accountant’s letter to HMRC of 18 September 2012 stating; “*07/11 assessment – I tend to disagree on this*”

(10) Appellant accountant’s letter of 12 October 2012 “*Assessment on 07/11 is*
35 *not agreed. I have already provided an explanation and figures. Your assessment leads to double counting. We have assessed VAT on invoices and taken on account the cash adjustment for the same period as it was a transition from cash accounting to invoice accounting. We cannot calculate VAT on invoices and also cash as some of those invoices were paid in the same period. I*
40 *have not agreed on this and would like to appeal this assessment*”. The Appellant provided copies of bank statements from Barclays Bank for an account in the Appellant’s name for the period 1 February to 26 April 2011 and a spreadsheet summarising the payments received and VAT payable on those receipts for that period.

(11) Letter from HMRC of 29 October 2012 “*The information and documents provided do not lead me to alter my decision*”.

Appellant’s Arguments

5 16. The Appellant’s appeal against HMRC’s assessment for 07/11 is based on the
assertion that HMRC have failed to take account of double counting of supplies which
have arisen in this period, which is a period of transition from the cash to invoicing
basis of accounting for VAT. The Appellant says that the invoices included in the
10 07/11 period include supplies for which cash has already been received in earlier
periods or during this period and work in progress which has been included in prior
periods. To include those amounts again when invoices are issued in the 07/11 period
means that those supplies will have been made subject to VAT twice.

15 17. On behalf of the Appellant Mr Ntereba explained to the Tribunal that the
Appellant had moved from cash accounting to invoice based accounting in April
2011. Its 07/11 VAT return was the first return to be made on an invoice basis. He
had provided HMRC (Mrs Marinelli) with a list of invoices and bank statements
which reconciled payments made and received on a cash and invoicing basis to avoid
any double counting for this transitional period. He said that any cash amounts
20 received prior to April had already been included and that they did not need to be
included in any later periods. He explained that invoices raised in May 2011 included
work in progress which had been included in the 04/11 period. For the 07/11 period
he had taken account of invoices raised and not paid but ignored any cash payments
which had been received in that period.

25 18. Evidence of how this reconciliation had been done had been provided to Mrs
Marinelli in the form of bank statements, SAGE records and spreadsheets which had
been sent with the Appellant’s letter of 20 April 2012. Some of the relevant
documents, including the spreadsheets, had not been included in the document bundle
which HMRC had provided for the Tribunal.

30 19. Mr Ntereba accepted that some supplies which had been stated as zero rated for
this period were incorrect and should have been included in the Appellant’s standard
rated supplies.

35 20. At the hearing Mr Ntereba referred to core records of the Appellant which he
had available, but which had not been seen by HMRC or the Tribunal, to support his
arguments that HMRC’s assessment for the 07/11 period was incorrect because it
failed to take account of double counting of some supplies by including both cash
received and invoices issued. The Tribunal issued directions that the Appellant should
provide those core records to HMRC and the Tribunal so that these could be
considered and, if possible, the VAT for the 07/11 period could be agreed between the
parties.

21. The Appellant failed to provide these documents within the prescribed time limit and therefore the Tribunal is issuing this decision on the basis of the information which was provided to the Tribunal and HMRC at the hearing on 19 May only.

HMRC's Arguments

5 22. HMRC pointed out that there were discrepancies between the records provided by the Appellant for the 07/11 period and the amount declared in its VAT return and that no evidence had been provided to support the zero rating of supplies valued at £4,643.14.

10 23. Mr Robinson said that HMRC had compared the figures in the Appellant's VAT return with the spreadsheets and accounts provided by the Appellant. In particular it was their view that for the 07/11 period debtors (to whom invoices had been issued) should be included in that period because that period was being dealt with on an invoice and not a cash basis. They did not accept the Appellant's explanation that these were not included because cash representing those debtors had already been received. HMRC had not seen any evidence that these debtors had been counted
15 twice. HMRC did not accept that they had failed to take account of the transition from cash to invoice accounting.

Decision

20 24. We have considered the correct approach to be adopted by a tribunal in considering a best of judgment assessment under s 73(1) VAT 1994 as stated in the *Pegasus Birds* decision: "*When faced with "best of judgment arguments" in future cases the tribunal should remember the following four points. (i) Its primary task is to find the correct amount of tax, so far as possible, on the material available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing.....*" *Customs & Excise Commissioners v Pegasus Birds Ltd*
25 [2004] STC 1509.

30 25. The main focus of the Tribunal is to come to a decision about the correct amount of tax due. In coming to that conclusion the Tribunal needs to consider whether HMRC failed to exercised best judgment in issuing this assessment for the 07/11 period and whether the Appellant can demonstrate that this assessment is incorrect and what the correct assessment should be.

35 26. We have concluded that Mrs Marinelli did fairly consider the rather limited information provided to her about the 07/11 period and come to a reasonable decision about the basis for the discrepancy between the SAGE report and the Appellant's VAT return for that period, having given the Appellant ample opportunity to provide evidence that her conclusions were not correct. Mrs Marinelli had been told by the Appellant that this was a transitional period and it was reasonable to assume that any discrepancies between the information provided by the Appellant and the Appellant's VAT return arose from that fact.

40 27. The onus is on the Appellant to demonstrate that the assessment raised for the disputed 07/11 period is not correct and to demonstrate what the correct liability for

the period is. The Appellant has accepted HMRC's refusal to accept £4,643.14 of supplies as zero rated but not HMRC's inclusion of debtors in the value of supplies made for this period which it says have effectively been counted twice because cash payments have been received in this or earlier periods representing those debtors. The Tribunal gave the Appellant additional time after the hearing on 19 May to provide further information to explain why the disputed debtors should not be included in the 07/11 VAT period but no further information was provided.

28. On that basis the Tribunal is compelled to conclude that the information given to the Tribunal has not provided sufficient evidence to support the Appellant's explanation of why certain debtors should be excluded from the 07/11 period. In the absence of this evidence the Tribunal finds that the Appellant has not displaced the burden on it to demonstrate that HMRC's assessment for this period is not correct or what the correct liability for this period should be.

29. We have considered whether in the absence of any information from the Appellant about which debtors have been double counted in the 07/11 period there is any basis on which the Tribunal should amend HMRC's assessment relying on the material available to it. The only material available to the Tribunal is the SAGE VAT report for the 07/11 period, the Appellant's bank statements and spreadsheets for the February to April 2011 periods provided to HMRC on 17 May and 12 October 2012. The Tribunal considered these documents but was unable to easily reconcile the cash payments received by the bank to the end of April 2011 with the payments reflected in the SAGE report and concluded that it was not possible on the basis of that information alone to make any reasonable conclusions about the level of likely double counting for the 07/11 period.

30. The Tribunal has also considered whether, in the absence of specific information, it could nevertheless apply some level of discount against the supplies made for the 07/11 period on the basis that this was said to be the transitional period from cash to invoice accounting and that there was likely to be some double counting arising as a result of the change. We were not given any information by the Appellant at the hearing or subsequently to suggest what a reasonable level of double counting might be. Therefore we have concluded that we are not in a position to make a better assessment of the correct amount of tax due than that represented by HMRC's assessment for the 07/11 period.

31. 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.

RACHEL SHORT

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TRIBUNAL JUDGE

RELEASE DATE: 3 December 2015