[2016] UKFTT 0252 (TC)

TC05027

Appeal number: TC/2013/09243

VAT – Disparity between turnover figures in accounts and VAT returns for same period – No explanation provided – Difference assessed to VAT – Whether assessment to best judgement – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WHOLESALE CLEARANCE UK LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
SIMON BIRD

Sitting in public at Eastgate House, Newport Road, Cardiff on 13 April 2016

Faye Debono assisted by Martyn Arthur, both of Martyn F Arthur Forensic Accountant Limited, for the Appellant

Les Bingham of HM Revenue and Customs, for the Respondents

DECISION

1. Wholesale Clearance UK Limited (the "Company") makes both standard-rated and zero-rated supplies. During a compliance visit by HM Revenue and Customs ("HMRC") on 13 February 2013, which at the Company's request was at the offices of its accountants, the sales figures on the Company's annual accounts were compared with the turnover figures declared on the VAT returns covering the same period.

2. Although the accounts for the year ended 31 July 2009 showed sales of £944,159 the turnover declared on the VAT returns for the equivalent period was £601,183, a difference of £342,976. For the year ended 31 July 2010 the turnover in the accounts was £1,173,209 while that declared on the VAT returns was £1,096,119, a difference of £77,090. In the year ended 31 July 2011 a greater amount was declared on the VAT returns, £1,135,894, than shown in the accounts, £1,122,987 (a difference of £12,907). The Company's accountants did not provide any explanation for this disparity, which is not disputed, despite a written request from HMRC, in a letter dated 26 February 2013, to do so.

3. Therefore, on 22 April 2013, HMRC Officer Mr Doug Jones wrote to the Company as follows:

> Further to my letter addressed to your accountant, Mr Dunne, dated 26 February 2013 I have arranged for the issue of an assessment to recover the differences between the turnovers as recorded in your annual accounts for the years ended 31 July 2009, 2010 & 2011 and the outputs declared in the corresponding VAT returns.
>
> As discussed with Mr Dunne, although the visiting officer, Caroline Hill, requested as copy of the annual accounts for the year ending 31 July 2009 there is no record of these having been received. I have had a word with her and she cannot recall ever receiving them and her assessment at the time referred to similar errors in previous years. I am now assessing for VAT on the difference in that year, and the following two years, but I am only assessing for half the difference in the year ended 31 July 2009 because half of the year (to 31 January 2009) is now out of time.
>
> I have enclosed a schedule which calculates the VAT due as **£27,768**. This includes an allowance for the inclusion of zero-rated sales. The percentage of the standard-rated to total sales was 89% and zero-rated was 11%. To get these figures I took the VAT return figures for your latest six periods to 07/12. I felt your accounts in these periods were on a sounder footing than earlier years and the VAT rates was a continual 20%, so a reasonably stable state was achieved.
>
> The formal assessment, which will include some interest, will follow in due course. …
>
> If you have any queries, or have anything further to add please let me know as soon as possible. The assessment can be amended if you can give me a valid reason.

4. The assessments, made under s 73(1) of the Value Added Tax Act 1994 ("VATA"), covering this period were subsequently issued on 9 May 2013. The total sum assessed was £30,047.80 (which included interest of £2,479.80). On 28 November 2013 the Company appealed to the Tribunal on the grounds that "HMRC's decision is estimated, excessive and unsustainable."

5. Following receipt of the Notice of Appeal HMRC withdrew the assessment for the 04/09 accounting period as it was out of time (see s 77(1)(a) VATA) thereby reducing the VAT in dispute to £17,614.

6. Section 73(1) VATA provides:

> 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."

7. In *Khan v HMRC* [2006] EWCA Civ 89, Carnwath LJ (as he then was) said, at [69]

> "The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
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> > "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).
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> That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015. We also cautioned against allowing such an appeal routinely to become an investigation of the *bona fides* or rationality of the "best of judgment" assessment made by Customs:
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> > "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." (para 38(i))

> It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady v Group Lotus Car Companies plc* [1987] STC 635, 642 per Mustill LJ)."

8. Although he was unable to attend in person Mr Karl Baxter, the Managing Director of the Company who gave oral evidence via telephone, explained that the Company had used a small firm of accountants, which he described as "effectively a one-man band", for all of its routine bookkeeping, the completion of its VAT returns and preparation of its accounts. The Company had provided the firm with all of its financial information including original invoices etc on a weekly basis. However, because of a personal tragedy suffered by the accountant, it was not possible to obtain any documentary evidence in relation to periods for which the assessments were made. This lack of evidence, he said, had also prevented the Company from establishing that it was due a repayment of approximately £18,000 from HMRC in relation to input tax incurred on stock in hand held at the date the Company left the VAT Flat Rate Scheme. He says that it is unreasonable for HMRC to revisit periods included in a previous enquiry in the knowledge that the Company does not hold the records for the period which has prevented it from claiming a refund to which it otherwise be entitled.

9. However, as is clear from *Khan v HMRC*, the burden is on the Company to establish the correct amount of tax due and unless and until it can establish otherwise the assessments "remain right". We have no doubt that in making the assessment, the basis of which was explained in his letter of 22 April 2013 (see paragraph 3, above), Mr Jones of HMRC properly exercised his judgment. For reasons with which we understand and sympathise the Company has not been able to establish that these assessments are wrong or positively show what corrections should be made to make them "right or more nearly right".

10. Therefore the only course open to us is to dismiss the appeal and confirm the assessments.

11. We should add, in case of any further appeal, that in the absence of any clarification prior to the hearing as the grounds of appeal merely state that the assessments are "estimated, excessive and unsustainable" we did not permit Mrs Debono or Mr Arthur to attack the assessments on 'best of their judgment' grounds. It is clear from Carnwath LJ's "guidance to the Tribunal" at [38] in *Pegasus Birds* that if such a challenge is to be made "it is essential that the grounds are clearly and fully stated before the hearing begins."

12. 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 BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 15 APRIL 2016