



TC05295

Appeal number: TC/2015/06933

VAT assessment – appeal in relation to HMRC conduct and appellant’s legitimate expectation – appeal struck out as not within Tribunal’s jurisdiction

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ANNE ELIZABETH MITCHELL
T/A ENQUIRING MIND**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at Fox Court, London EC1 on 25 July 2016

The Appellant appeared in person

Mrs Jane Ashworth, HMRC officer, for the Respondents

© CROWN COPYRIGHT 2016

DECISION

Introduction

1. The Appellant appealed against HMRC's assessment in respect of an under-declaration of VAT for periods 02/12 to 08/15 in the sum of £956.90. The under-declaration arose from the incorrect application of the Flat Rate Scheme. HMRC applied to have the appeal struck out under Rule 8(3)(c) of the Tribunal Rules on the grounds that there was no reasonable prospect of the Appellant's case succeeding.

Evidence

2. In addition to the various documents and records provided by the parties, I heard oral evidence from Ms Mitchell. I found Ms Mitchell to be an articulate and entirely credible witness.

Facts

3. Ms Mitchell applied VAT to her business income using the Flat Rate Scheme. On 17 September 2015 HMRC wrote to Ms Mitchell stating that they would be checking her VAT returns for the periods from 02/12 to 08/15.
4. On 7 October 2015, following the supply to HMRC by Ms Mitchell of the requested information, HMRC wrote stating that their check had shown that she had incorrectly calculated VAT during the checked periods.
5. The additional VAT due was initially calculated as £1041. That was subsequently adjusted to £908.
6. On 16 November 2015 HMRC issued a notice of assessment to Ms Mitchell for £956.90, comprising the £908 of under-declared VAT plus statutory interest of £48.90. No penalty was charged.
7. Ms Mitchell appealed against the assessment on 25 November 2015.

Grounds of Appeal

8. The under-payment arose because Ms Mitchell had incorrectly applied the Flat Rate Scheme to her business income. This problem followed advice received by Ms Mitchell from the VAT telephone helpline (the "National Advice Service") at some time prior to February 2012.
9. It is not clear whether that advice was incorrect, or misleading, or whether it was misunderstood by Ms Mitchell.
10. In any event, the incorrect application of the Flat Rate Scheme led to the under-payment of VAT for the relevant periods.

11. The following extracts from Ms Mitchell's grounds of appeal describe the background and bases of the appeal:

"I believe HMRC's decision is wrong on the grounds of unfairness, and poor advice and support from HMRC.

I am voluntarily registered for flat-rate VAT. My turnover is nowhere near the threshold for compulsory registration.

I have completed VAT returns and sent proceeds to HMRC for many years, initially on standard rate then, as my business activities have reduced, on flat-rate (since April 2007).

I asked HMRC when I changed to flat-rate how I should complete my returns, which were on paper at the time, as there was no specific return for flat-rate payments. I was initially told by VAT helpline to complete Box 6 with the gross amount for the quarter, including 20% VAT. Later, on further enquiries to HMRC, I was told this was wrong, and that it should be the quarterly turnover, including the flat-rate VAT (13% currently in my case, as a freelance TV camera operator)...

I have acted with good intentions at all times, complied with HMRC instructions, submitting returns and paying VAT due in good time. I have spent many hours on the telephone trying to clarify and understand all of this...

I feel the VAT "system" has not served me well. I have been presented with a large bill and made to feel like some sort of miscreant, when any error I had made was in the firm belief that I was following correctly HMRC's directions on flat-rate VAT. Flat-rate VAT appears complicated, many professionals (including accountants) often leave clients to their own devices, to make mistakes and suffer the consequences, with no proper process to seek advice or clarification.

I have had to spend many hours making phone calls, hanging on for call centre responses, being passed from proverbial "pillar to post", waiting weeks for correspondence, and spending sleepless nights worrying. Even HMRC's own staff admit to a degree of confusion on where advice/ information on correct compliance should be sought. What chance do I have, as a modest sole-trader?"

12. HMRC have applied to have the appeal struck out, on the basis that it has no reasonable prospect of success. Their argument is that Ms Mitchell does not dispute the validity or amount of the assessment, but rather the conduct of HMRC, and the latter is not a matter over which this Tribunal has jurisdiction.

Discussion and Decision

13. In relation to a VAT assessment, an appeal lies to the Tribunal under section 83(1)(p) of the Value Added Tax Act 1994. The appeal lies in relation to the assessment or its amount.
14. Ms Mitchell does not dispute the relevant assessment or its amount. She confirmed this in her evidence.
15. Rather, Ms Mitchell believes the assessment is unfair, particularly because of poor and misleading advice given to her over the telephone by the VAT National Advice Service.

16. HMRC's application to strike out the appeal was under Rule 8(3)(c) of the Tribunal's Rules, namely that the Tribunal should exercise its discretion to decide that the appeal had no reasonable prospect of success. The application might have been based on Rule 8(2)(a) of the Tribunal's Rules, under which the Tribunal must strike out an appeal over which they have no jurisdiction. Since, however, the issue for determination is the jurisdictional one, nothing turns on that in this particular application.
17. On the authority of the decision in *HMRC V Abdul Noor* [2013] UKUT 071 (TCC), HMRC's application must succeed.
18. That decision of the Upper Tribunal, which is binding on me, makes it clear that this Tribunal does not have any general "supervisory" jurisdiction, when dealing with a VAT appeal, to consider a taxpayer's claims based on the public law concept of "legitimate expectation".
19. *Abdul Noor*, like this appeal, concerned misleading advice given over the telephone by the National Advice Service, albeit relating to the recoverability of input tax.
20. *Abdul Noor* does not have the effect that public law rights can never be within the jurisdiction of the FTT. As stated in *Simon Newell v HMRC* [2015] UKFTT 0535, at [97]:

"While... the absence of a supervisory jurisdiction does not preclude public law rights being considered or given effect to [the passage at [31] of *Abdul-Noor*] makes it clear that whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction."
21. In this appeal, the statutory provisions relating to the assessment and its amount, based on the correct application of the Flat Rate Scheme, and the related appeal rights, are not matters which, as a matter of construction, permit of any such public law jurisdiction.
22. Certain of Ms Mitchells's complaints against HMRC refer more widely to the unfairness of her situation. Again, I have no jurisdiction in this tribunal to cancel or adjust the assessment on grounds of fairness. The Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363 (TCC) set out the position as follows, at [56]:

"Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paragraphs 36 and 43 above the [Tribunals, Courts and Enforcement Act 2007] gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it – a power to override a statute or supervise HMRC's conduct."

23. Ms Mitchell has already instigated the procedure with HMRC to make a complaint regarding the issues which she has raised. I should make it clear that I have not considered the merits or otherwise of Ms Mitchell's arguments.
24. For the reasons given, this Tribunal does not have jurisdiction over the issues raised by Ms Mitchell in her appeal, which is accordingly struck out.
25. 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.

**THOMAS SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 3 AUGUST 2016