[2016] UKFTT 0685 (TC)

TC05414

Appeal number: TC/2015/04291

VAT – Best judgment assessment – Café operated by appellant – Whether correct apportionment between standard and zero-rated sales – Primary task of Tribunal to find correct amount of tax – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOYCE WHITFIELD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
JOHN COLES

Sitting in public at Eastgate House, Newport Road, Cardiff on 27 July 2016 and at Caradog House, St Andrew's Place Cardiff on 10 October 2016

Mike Jones, of Mike Jones Ltd, for the Appellant

Jane Ashworth of HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Joyce Whitfield appeals against an assessment to VAT, in respect of under declared output tax for the VAT accounting periods 09/10 to 06/14 (inclusive), in the sum of £20,239 issued by HM Revenue and Customs ("HMRC"). Although she was notified of the assessment by letter dated 22 September 2014 the assessment was not in fact issued until 18 November 2014 and was upheld on 6 February 2015 following a review.

Adjourned hearing

2. The appeal first came on for hearing on 27 July 2016 at which an issue arose, on the application of Mr Mike Jones (who appears for Mrs Whitfield) as to whether documents, including the notebook of an officer (of HMRC) recording details of a visit to the café and on which the assessment under appeal is based should be admitted as evidence.

3. Under directions issued by the Tribunal on 14 January 2016 the parties were to provide their lists of documents to each other on 26 February 2016. However, the disputed documents were sent to Mrs Whitfield's representative, Mike Jones Ltd, on 29 February 2016, three days late. Because of this, on receiving the letter Mr Jones opened the envelope, saw what the documents were but did not read them. Instead he returned them to HMRC "because they were late". As these documents were highly relevant to the appeal, in the absence of any compelling reason otherwise, we decided that they should be admitted and directed accordingly. However, as it was necessary for Mr Jones to read them to be able to present Mrs Whitfield's case we granted an adjournment to enable him to do so.

4. In granting the adjournment we had regard to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Procedure Rules"), to deal with case fairly and justly. In doing so we noted that under Rule 2(4) the parties have an obligation to help the Tribunal to further the overriding objective and that Rule 2(2) explains that dealing with a case "fairly and justly" includes dealing with the case in ways which are proportionate to the importance of the case and avoiding unnecessary formality and seeking flexibility in the proceedings.

5. We did not consider it to be proportionate to open an envelope, see what it contains and return it to the sender unread just because it was a few days late. Such action is hardly flexible and does not avoid unnecessary formality. In the circumstances, as the adjournment would not have been necessary had Mr Jones taken a different approach, we considered it appropriate that he should pay HMRC's wasted costs of the adjourned hearing. We therefore directed HMRC to produce a schedule of these costs and that Mr Jones be given an opportunity at the commencement of the re-listed hearing to make representations as to why he should not be ordered to pay HMRC's wasted costs.

6. However, Mrs Jane Ashworth, for HMRC, explained that, despite the direction, because of a lack of time and in view of the small amount of costs involved a schedule was not prepared. In the circumstances we did not seek submissions from Mr Jones or make any wasted costs direction.

Evidence and Facts

7. In addition to a bundle of documents, including those admitted following the application at the adjourned hearing we heard from Mr Matthew Mantle, the HMRC officer who visited Mrs Whitfield's business and who made the assessment under appeal. He was cross-examined by Mr Jones. We also heard from Mrs Whitfield who was cross-examined by Ms Ashworth. It is on the basis of this evidence that we find the following facts.

8. Mrs Whitfield runs a café, *The Village Munchbox* in Rumney, Cardiff, serving hot and cold food to eat in and take away from Monday to Friday between 08:00 and 14:30. There are seven tables in the café, three of which are lower coffee tables which Mrs Whitfield explained would not be suitable for eating at. There is also a breakfast bar with stools although we were told that due to lack of space in the premises these could not be used at the same time as the tables. Mrs Whitfield said business had suffered following the front of the café having been rammed by a vehicle on several occasions. This not only resulted in the business being closed for a period for repairs to be undertaken but had led to fewer customers. She explained that the busiest periods for the café were in the run up to Christmas and its quietest times were in the summer months. Also, because of local competition, in particular a nearby pub serving breakfast, sales of standard rated food had been in decline.

9. On 28 August 2014 Mr Mantle and another HMRC officer, Tracy Mackenzie, visited the café. They were told by Mrs Whitfield that she charged VAT at the standard rate on crisps, drinks and hot food consumed there but that if customers ate cold food at the café she treated it as being zero-rated. She also said that a jacket potato would be charged at a standard rate but if it had a cold filling that would be zero-rated. Mr Mantle explained that such treatment was incorrect and that all food and drink consumed on the premises should be standard rated.

10. An invigilation of sales undertaken by the HMRC officers, between 11:00 and 13:00 that day, found that £58.90 (43%) of the total sales of £139.10 were properly subject to VAT at the standard rate. This was higher than the standard rated sales shown on Mrs Whitfield's VAT returns. It was therefore agreed that Mr Mantle would return on 2 September 2014 to carry out a second invigilation. This was undertaken between 09:50 and 13:50 and showed of total sales of £200.50 of which £105.20 (which Mr Mantle rounded down to 51%) were standard rated. Mrs Whitfield agreed to record her daily standard rated sales and on 10 September 2014 provided the following details to Mr Mantle: 2 September 2014, 38.68%; 3 September 2014, 18%; 4 September 2014, 25.48%; 5 September 2014, 25.11%; 8 September 2014 49.8%; and 9 September 2014 24.03%.

11. Mr Mantle calculated the average percentage of his invigilation over two days, rounded down as 47%. He then calculated the average percentage as recorded by Mrs Whitfield, 29%. He then took an average of these two figures, 38%, as the basis of his assessment of VAT that had been under declared. Mrs Whitfield was notified of the assessment by letter, dated 22 September 2014 although, as we have noted above, the assessment was not issued until 18 November 2014. The letter of 22 September 2014 summarised the output tax due in a table, which we have reproduced as table 1 in the appendix.

12. On 21 October 2014 Mrs Whitfield's accountants, Mike Jones Limited, wrote to HMRC requesting a review. This was undertaken and the assessment upheld on 6 February 2015. In a letter to HMRC of 10 April 2015 Mike Jones Limited explained:

> "Our clients have now carried out a review of their takings and customer numbers for the month of March 2015. Their hand written notes are attached.
>
> The total sales are recorded as £5844.30 of which £705.60 is standard rated. This represents 12.07% of gross takings.
>
> Attributing this percentage to the periods assessed by you the output tax would be £8003.00 against declared output tax of £2578 resulting in an under declaration of £5425.00
>
> Our clients are prepared to settle the matter on that figure and we therefore look forward to receiving amended assessments."

13. In his letter of 22 May 2015 in reply for HMRC Mr Mantle explained that as the review had been concluded if Mrs Whitfield did not agree with the decision to uphold the assessment she could appeal to the Tribunal. This she did on 26 July 2015.

Law

14. It is not disputed that sales of food eaten on the premises, whether hot or cold, is chargeable to VAT at the standard rate whereas cold food which is taken away is zero-rated (see s 30 and Group 1 of schedule 8 VATA).

15. 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."

16. 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:

> "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).

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:

> "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)."

Discussion and conclusion.

17. Although Mrs Whitfield's appeal to the Tribunal was not made within 30 days of the decision to uphold the assessment as required by s 83G VATA, HMRC did not object to the appeal being admitted out of time. Therefore, having regard to the overriding objective of the Procedure Rules we allowed the appeal to proceed notwithstanding it was late.

18. It is accepted that there were errors in Mrs Whitfield's VAT returns during the VAT accounting periods covered by the assessment because of the application of a zero-rate of VAT to sales that should have been standard rated. Therefore, as is clear from *Khan* the primary task of the Tribunal in an appeal such as this is to determine the correct amount of VAT.

19. Mr Jones, on behalf of Mrs Whitfield, contends that in doing so we should prefer the figures that she recorded in March 2015 as these are over a longer period than those used by Mr Mantle in the assessment. However, given the evidence of a decline in standard rated sales since the assessment period we do not consider that much assistance can be gained from these figures which have been compiled almost a year after the period under assessment. That said, we are concerned by the approach adopted by Mr Mantle in that he has taken an average of the percentage of two days

invigilation and an average of six days percentages as recorded by Mrs Whitfield and then used a simple average of the two average percentages to reach his conclusion.

20. First, the average percentages of the two days invigilation would only be accurate if the turnover was the same for each day, which it was not; and secondly, the simple average percentage over six days would only be accurate with the same turnover on each day. Fortunately, we have the turnover figures and amount of standard rated sales for the invigilation undertaken by HMRC although not on the days where the percentage of standard rated sales was provided by Mrs Whitfield. On the first day of the invigilation, 28 August 2014, the turnover was £139.10 of which £58.90 was standard rated. The turnover for the second day, 2 September 2014, turnover was £200.50 of which £105.20 was standard rated. Therefore, over the two days standard rated sales accounted for 48% of the turnover.

21. Using these percentages, it is possible to make the assessment "more nearly right" (to use language of Lord Lowry in *Bi-Flex Caribbean Ltd v Board of Inland Revenue* cited by Carnwath LJ in *Khan*). If standard rated sales are taken to be 48% of turnover on each of HMRC's two days invigilation and then taking an average of the whole eight days which, rounded down, is 34% (ie 48 + 48 + 38 + 18 + 25 + 25 + 49 + 24 = 275/8 = 34.37).

22. If this percentage is applied, adopting the method used by Mr Mantle in making the assessment, the output tax under declared by Mrs Whitfield is £17,841 (see table 2 in the appendix). We therefore conclude that the assessment should be reduced accordingly.

23. Therefore, to the extent that the assessment is reduced from £20,239 to £17,841, the appeal is allowed in part.

Appeal Rights

24. 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: 27 OCTOBER 2016

Appendix

Table 1: *Summary of Output tax due as stated in HMRC's letter dated 22 September 2014 (see paragraph 11, above).*

Period	Gross sales	38% S/R	Output tax	Less Output tax declared	Output tax due
09/10	31208	11859	1766	374	1392
12/10	21911	8326	1240	325	915
03/11	29471	11198	1866	402	1464
06/11	16284	6187	1031	443	588
09/11	8490	3226	538	133	405
12/11	11571	4397	733	61	672
03/12	26476	10060	1677	51	1626
06/12	20808	7907	1318	39	1279
09/12	27085	10292	1715	65	1650
12/12	21159	8040	1340	131	1209
03/13	22612	8592	1432	80	1352
06/13	26578	10099	1683	126	1557
09/13	28861	10967	1828	112	1716
12/13	25428	9594	1599	111	1488
03/14	25428	9594	1599	94	1505
06/14	24507	9312	1552	131	1421
				Total	**20239**

Table 2: *"More nearly right" summary of Output tax with 34% of sales at standard rate (see paragraph 21, above).*

Period	Gross sales	34% S/R	Output tax	Less Output tax declared	Output tax due
09/10	31208	10610	1580	374	1206
12/10	21911	7449	1109	325	784
03/11	29471	10020	1670	402	1268
06/11	16284	5536	922	443	479
09/11	8490	2886	481	133	348
12/11	11571	3934	655	61	594
03/12	26476	9001	1500	51	1449
06/12	20808	7074	1179	39	1140
09/12	27085	9208	1534	65	1469
12/12	21159	7194	1199	131	1068
03/13	22612	7688	1281	80	1201
06/13	26578	9036	1506	126	1380
09/13	28861	9812	1635	112	1523
12/13	25428	8645	1440	111	1329
03/14	25428	8645	1440	94	1346
06/14	24507	8332	1388	131	1257
				Total	**17841**