[2016] UKFTT 0816 (TC)

TC05541

Appeal number: TC/2016/00967

VAT – Flat Rate Scheme – Assessment – Strike Out – Application Granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID JENKINS **Appellant**

- and -

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Edinburgh Tax Tribunal, George House on 1 November 2016

Mr David Jenkins, for the Appellant

Mr Gareth Hilton, Presenting Officer of HMRC, for the Respondents

With supplementary submissions received from the Respondents dated 7 November 2016

DECISION

1. Her Majesty's Revenue and Customs (HMRC) apply to strike out the appeal of the appellant, David Jenkins, against a notice of assessment in the sum of £10,660 in respect of VAT periods 01/12 to 07/15 inclusive.

2. HMRC's written application was made by notice dated 26 July 2016. It was made pursuant to Rule 8(2)(a) of the Scottish Tax Tribunals (Time Limits and Rules of Procedure) regulations 2015. This Rule is identical in substance to Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

The Facts

3. The tribunal received a bundle of documentation from HMRC and loose-leaf documentation from the appellant. The appellant also made oral submissions at the hearing which the tribunal accepted as evidence. The tribunal finds the following facts.

4. The appellant is a self-employed courier carrying on business as a sole trader. He has been registered for VAT since 6 May 2003. He subsequently applied to use the Flat Rate Scheme (FRS) to account for VAT. This was approved with effect from 1 August 2004. His VAT registration remains extant.

5. In January 2005 an adjustment was made to the appellant's VAT returns for the period 10/04.

6. At some point in 2005 the appellant had a conversation by telephone with an officer of HMRC regarding his VAT returns. The factual findings in respect of this are dealt with in detail below.

7. HMRC issued a letter dated 16 July 2007 to the appellant requesting him to review his records and ensure that VAT had been correctly accounted for under the FRS.

8. On 25 July 2007 HMRC received a signed declaration dated 23 of July 2007 from the appellant, which confirmed that he had reviewed the records and identified no errors within them.

9. In September 2009 the appellant's VAT return for the period 07/09 was returned to him to request a correction to some of the figures.

10. Following a telephone conversation with the appellant, HMRC issued to the appellant by email a letter dated 29 October 2015 advising him that a visit had been scheduled for 13 November 2015.

11. The purpose of the visit was to check the appellant's VAT returns records as well as systems he had in place to record VAT transactions accurately. Attached to the email were fact sheets titled 'General information about compliance checks' and 'Visits-by agreement or with advance notice'

12. During the visit of 13 November 2015 the officer of HMRC discovered that the appellant had been incorrectly calculating the amount of VAT due under the FRS by

calculating and paying a percentage of the VAT he had charged and received rather than a percentage of his gross turnover inclusive of VAT.

13. Following the visit, the appellant emailed copies of his bank statements for the period 1 August 2014 to 31 July 2015 to HMRC on 18 November 2015. On 19 November 2015 HMRC issued a letter to the appellant which included a schedule of the amounts said to be due in the sum of £10,660 for the VAT periods 01/12 to 07/15. The appellant telephoned HMRC on 24 November 2015 and confirmed that he agreed with the calculations included in the schedule.

14. On 27 November 2015 HMRC issued to the appellant a VAT notice of assessments letter in the sum of £10,660. The letter covered those quarterly tax periods 01/12 to 07/15 inclusive.

15. On 9 December 2015 a Notice of Assessment was issued to the appellant by HMRC in the sum of £10,660. The notice was issued pursuant to section 73(1) of the Value Added Tax Act 1994 (VATA). The disputed decision is capable of being appealed under section 83 (1) (p) of VATA.

16. The appellant requested a review of the decision by email dated 3 December 2015. Following the review HMRC upheld the decision in a letter dated 12 January 2015.

17. The appellant submitted a notice of appeal to the tribunal dated 12 February 2016. HMRC submitted their statement of case to the tribunal on 27 June 2016. This was returned by the tribunal on 11 July 2016 as it did not adequately set out HMRC's position. The tribunal directed an amended statement case be issued within 21 days.

18. HMRC submitted an amended statement of case to the tribunal on 26 July 2016 together with an application to strike out the appeal. The grounds for the strike out application were that the appeal was tantamount to a complaint and did not raise issues within the tribunal's jurisdiction.

The appellant's grounds of appeal

19. The appellant's grounds of appeal were as follows:

It started when I made a VAT return in 2005, this was promptly returned a couple of weeks later when I put the total in box 4 instead of box 3. The sheet had been altered with a Tipex, and I was asked to correct my mistake and initial it when I was happy with it. I couldn't believe I'd made this error and rectified it and initialled it.

I then decided to phone and apologise for my stupid error and declare it sorted and that I was returning it immediately. I spoke with a girl named Judith who was very nice and helpful. While I was on I asked her "Am I doing this correctly, I'm putting in boxes one, three and five my VAT due my turnover box 6 excluding VAT. The other box is zero." Her reply was "Yes that's fine as long as you don't put anything in boxes 4 and 7 you're fine. Carry on doing what you're doing." I thanked her and thought good I'm doing right and if I make mistake I knew then it would be returned promptly. But it was so straightforward I wouldn't. Then in 2007 I received a records check and asked was I happy with my records, yes I said as I had never had any other contact. This continued until I was visited in November 2015, when a discrepancy

was discovered, my figures were fine but I hadn't been adding my turnover with VAT to get my due figure.

I was horrified, I cannot believe this was detected after all those years. One box mistake picked up right away in 2005, but all those years of returns and no one picked up the error, surely if this was being checked the difference in figures should have been noticed. Even when times were tough I have never missed a payment and when you're advised to "carry on doing what you're doing" its just what I did, having never been advised to do otherwise. During my conversation with Judith I scribbled down on an envelope what to put in the boxes and on the back her emphasis of 'don't put anything in 4 and 7'. I kept that envelope and enclose a copy for your record.

20. The tribunal finds as a matter of fact that the grounds of appeal represent an honest and reliable statement of what the appellant believed to have transpired in the telephone call he had with HMRC in 2005 and the way in which he approached filling in his VAT returns under the FRS.

The Law

21. Part VIIA of the Value Added Tax Regulations 1995, comprised of Regulations 55A-55V, provides for the operation of a flat-rate scheme for small businesses in relation to VAT. Under Regulation 55D, for any prescribed accounting period of a flat rate trader, the output tax due from him in respect of his relevant supplies shall be deemed to be the appropriate percentage of his relevant turnover for that period.

22. Regulation 55G provides for the manner of determining relevant turnover. This is not now in dispute by the appellant.

23. Under Regulation 55K different categories of businesses are assigned differing appropriate percentages. The current appropriate percentage for transport or storage, including couriers, freight, removals and taxis is 10%.

24. HMRC issues 'VAT Notice 733: Flat rate Scheme for small businesses' which provides some further guidance:

"The Flat Rate Scheme is designed to simplify your records of sales and purchases. It allows you to apply a fixed flat-rate percentage to your gross turnover to arrive at the VAT due."

25. HMRC's assessment was raised pursuant to 73(1) of the Value-Added Tax Act 1994 (VATA) which 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.*'

26. For the purposes of this appeal section 77 of the VATA, provides that an assessment under section 73 shall not be made more than four years after the end of the prescribed accounting period.

27. An appeal lies to the tribunal under section 83(1)(p) VATA in relation to an assessment under section 73(1) in respect of a period for which the appellant has made a return under the Act.

28. Rule 8(2)(a) of the First-tier Tax Tribunal for Scotland Rules of Procedure 2015 provides:

Striking out a party's case

8 (2) The First-tier Tribunal must strike out the whole or a part of the proceedings if the First-tier Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them;

HMRC's submissions

29. HMRC submit that the appellant's grounds of appeal do not disclose any arguable point of law. They further submit that the real issues that the appellant raises are not ones over which the tribunal has jurisdiction. They submit that the appellant is in effect raising a complaint as to the conduct of HMRC.

30. They submit that the appellant does not dispute that he was operating the flat rate scheme incorrectly in applying the appropriate percentage only to the VAT he had charged and received and not to the turnover including VAT (the gross turnover). They submit that therefore the appellant does not dispute that the VAT, as assessed, is due to be paid. They submit that the appellant has confirmed the assessment under appeal is for the correct amount owed.

31. They submit that the returns submitted by the Appellant were incorrect and HMRC assessed the amount of VAT due to the best of their judgment in accordance with section 73(1) of VATA.

32. They submit that HMRC became aware of the incorrect returns following a visit to the Appellant on 13 November 2015. The assessment was issued on 9 December 2015, covering periods 01/12 to 07/15. This was in accordance with the time limit of one year after the evidence of facts came to the Respondents' knowledge under section 73(6)(b) of VATA.

33. They submit that section 77(1)(a) of VATA provides that an assessment under section 73 shall not be made more than four years after the end of the prescribed accounting period. The first accounting period covered by the assessment was 01/12, which commenced on 1 November 2011 and ended on 31 January 2012. The assessment was issued on 9 December 2015, in accordance with the four-year time limit. HMRC submit that therefore they properly accounted for VAT commencing from 1 November 2011.

34. They submit that the appellant's grounds of appeal are based on the assertion that he was misdirected by HMRC following advice received on the telephone call in 2005. HMRC are unable to locate any record of that telephone call.

35. HMRC submit that the appellant's grounds of appeal do not address the issue of best judgement in relation to the notice of assessment to VAT which is the subject of appeal. They submit that grounds of appeal are tantamount to a complaint that HMRC

have misdirected the appellant and that such matters do not fall within the tribunal's jurisdiction but are matters that are proper to the adjudicator.

36. HMRC rely upon on the First-tier Tribunal decision of *Preece* [2012] TC 01887, in which it was stated:

'…..this Tribunal has no jurisdiction over complaints against HMRC's handling of a taxpayer's affairs. It is also unable to reimburse financial costs (such as telephone calls) or compensate taxpayers for emotional stress.'

37. HMRC submit that if the appellant wishes to pursue the matter further then the appropriate course of action would be for him to contact HMRC to lodge a complaint for which they have procedures in place to handle.

38. They therefore submit that the appeal should be struck out under rule 8(2)(a) of the Rules as to the tribunal has no jurisdiction to hear it.

Appellant's representations

39. At the hearing the appellant made various oral representations which repeated and expanded upon the grounds of appeal he set out in his notice of appeal.

40. The tribunal accepts that these representations represent the appellant's true belief as to the events that occurred.

41. The appellant submitted that in 2005 he had a conversation with a woman named Judith from HMRC in relation to his VAT returns and how they should be filled out.

42. The appellant asked if he could check how he was coming to the figures which he entered into the various boxes contained within the paper VAT return. The appellant said to Judith 'I am doing it as 9% of the VAT figure (not of the gross turnover)'. She said 'fine you carry on as long as you don't fill in boxes 4 and 7.'

43. It is to be noted that box 4 on the paper return is for input tax and box 7 is for the total amount and that, as he understood it, as a general rule, he could not claim back any input tax and this would be nil as he was operating the flat rate scheme.

44. The appellant's understanding of the conversation is evidenced by the handwritten notes which are on the back of the envelope he had retained and served. These notes are consistent with his understanding of the conversation.

45. The appellant then submitted that when he went through what he had written on the envelope – 'Judith' had said 'carry on doing what you are doing' and that was the end of the conversation. When he hung up the appellant thought he had been told he was filling in his VAT returns correctly and if he did make a mistake then HMRC would come back to him.

46. After this conversation the appellant carried on filling out his VAT returns in this manner until in 2007, two years later, when he had correspondence from HMRC regarding a records check. Everything was in order as far as he was concerned.

47. He continued in the same manner for a further eight years and never heard anything from HMRC until November 2015 when he was visited by HMRC officers.

48. When he received the visit he was horrified to discover that he had not been accounting for his VAT correctly. The HMRC officer explained that the percentage (8 or 10%) should be applied to the gross turnover figure including VAT and not simply the output VAT he had charged and received. He had showed the officer how he had been accounting for VAT and showed his envelope which contained the notes of his conversation with HMRC in 2005.

49. He was upset that no one from HMRC had ever noticed and told him how to fill out his VAT return correctly under the flat rate scheme. He was aggrieved that he had been left to carry on accounting for VAT in an incorrect fashion for many years.

50. The appellant had never ever tried to cheat HMRC and had always paid his VAT on time and had made every payment even during tough times. Paying this further sum would cause him real difficulty. He was horrified that he had been given the wrong advice and no one from HMRC had picked up on his mistake while he had been left to account incorrectly for VAT for many years.

Discussion and Decision

51. The appellant was an honest and reliable witness. He has always paid his VAT on time and always attempted to do his very best in accounting to HMRC.

52. He holds an honest belief that he was misadvised by HMRC in a phone conversation in 2005 as to the operation of the flat rate scheme in accounting for VAT. HMRC does not hold any record of the contents of any telephone call with the appellant. The appellant's handwritten note of the telephone call, as recorded on the back of the envelope he has retained, is consistent with the advice that he should not fill in boxes 4 and 7 on the VAT return.

53. The notes also state 'Only fill in boxes 1, 3, 5 with 8% Total'. They do not state whether the advice was that the percentage was to be applied to the gross turnover inclusive of VAT or merely VAT charged and received by the appellant. It is unnecessary to determine what may have been said by the HMRC officer in the phone call. As above, the appellant clearly and honestly believes this was the advice had received. Without making any finding of fact as to what was actually said by the officer of HMRC, it has to be accepted that ultimately the burden falls upon a taxpayer to ensure he accounts properly for VAT. Public notices and information are freely available which explain the correct method for operating the flat rate scheme.

54. Unfortunately, the tribunal does not have jurisdiction to allow the appeal to proceed, in circumstances where the appellant accepts that the notice of assessment to VAT issued by HMRC is correct to the best of their judgment. The appellant accepts that the VAT assessed is due and payable. He also accepts that he is likely to have had the benefit of his misapplication of the flat rate scheme between 2005 and 2011 up to the date of the beginning of the assessment period of 01/12. During this time he is likely to have accounted to HMRC for less VAT than was actually due. He has, rightly in my view, not been made the subject of any penalties.

55. The appellant does not dispute that he was operating the flat rate scheme incorrectly in applying the appropriate percentage only to the output VAT he had charged and received and not to the turnover including VAT (the gross turnover) and that therefore the VAT as assessed is due to be paid. The appellant has confirmed the assessment under appeal is for the correct amount owed.

56. The VAT returns submitted by the appellant were incorrect, and HMRC assessed the amount of VAT due to the best of their judgment in accordance with section 73(1) of VATA.

57. HMRC became aware of the incorrect returns following a visit to the appellant on 13 November 2015. The assessment was then issued covering periods 01/12 to 07/15. This was in accordance with the time limit of one year after the evidence of facts came to the Respondents' knowledge under section 73(6)(b) of VATA.

58. Section 77(1)(a) of VATA provides that an assessment under section 73 shall not be made more than four years after the end of the prescribed accounting period. The first accounting period covered by the assessment was 01/12, which commenced on 1 November 2011 and ended on 31 January 2012. The assessment was issued by 9 December 2015 at the latest, in accordance with the four-year time limit. HMRC therefore lawfully assessed the appellant for VAT commencing from 1 November 2011.

59. Unfortunately, the appellant's grounds of appeal do not challenge the accuracy of HMRC's best judgment in the notice of assessment to VAT.

60. While the tribunal has real sympathy for the appellant's predicament, his grounds of appeal do indeed constitute a complaint that HMRC have misdirected him. Such matters do not fall within the tribunal's jurisdiction but are matters that are proper to the adjudicator.

61. If the appellant wishes to pursue further his complaint that he was misadvised then the appropriate course of action would be for him to contact HMRC to lodge a complaint. There are procedures in place to address this.

62. Sadly therefore, the appellant's appeal does not raise any issue which is within the tribunal's jurisdiction and it should be struck out pursuant to rule 8(2)(a) of the Rules.

63. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 8 DECEMBER 2016