



TC05719

Appeals numbers: TC/2015/4744 & 4884

VAT & INCOME TAX – quantum – previous decision in principle allowing the appeals in part – parties unable to agree exact figures - determination by Tribunal of exact figures – taxpayers contending that method directed by Tribunal resulted in “negative assessments” for certain periods, which should be aggregated with assessments for other periods to produce a net result - Held: No – exact figures for VAT, income tax and penalties determined

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BALTI HUT (GLOUCESTER) LIMITED
Mr ABDUL GHANE ALI**

Appellants

-and-

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

Respondents

TRIBUNAL: Judge Peter Kempster

Sitting in public at City Centre Tower, Birmingham on 22 February 2017

The Appellants did not appear and were not represented

Mr John Corbett (HMRC Appeals Unit) for the Respondents

DECISION

Introduction

1. By a decision notice giving full facts and reasons issued on 25 August 2016 (“the 2016 Decision”) the Tribunal (myself and Mrs Akhtar) allowed the appeals in part, stating: “We give this decision as a decision in principle with leave to the parties to apply for determination of exact figures if they are unable to agree such figures.” ([44] of the 2016 Decision).

2. The matters under appeal by Balti Hut (Gloucester) Limited (“the Company”) (after some changes at the hearing - all explained in the 2016 Decision) were (a) VAT assessments for the quarterly VAT periods 03/08 to 12/12 inclusive; and (b) deliberate inaccuracy penalties (sch 24 FA 2007 refers) for the quarterly VAT periods 12/11 to 12/12 inclusive. The in-principle determination of the Company’s appeals was ([45] of the 2016 Decision):

“(1) The VAT assessments against the Company are varied so as to reduce the additional turnover to reflect cash sales as 40% of total sales.

(2) The sch 24 FA 2007 penalties against the Company for the quarterly VAT periods 12/11 to 12/12 inclusive are varied so as (i) to reduce the potential lost revenue calculations to reflect the reduced VAT assessments (above); and (ii) to be in the amount of 49% of the revised potential lost revenue.”

3. The matters under appeal by Mr Ali were (a) income tax assessments for the tax years 2009-10 to 2011-12 inclusive (being discovery assessments pursuant to s 29 Taxes Management Act 1970 for the first two years, and a closure notice pursuant to s 28A TMA 1970 for the final year); and (b) sch 24 deliberate inaccuracy penalties for all three years. The in-principle determination of the Mr Ali’s appeals was ([45] of the 2016 Decision):

“(3) The income tax assessments against Mr Ali are varied so as to reduce them to reflect (i) the reduced turnover (above); and (ii) a 35% deduction for costs and expenses.

(4) The sch 24 FA 2007 penalties against Mr Ali are varied so as (i) to reduce the potential lost revenue calculations to reflect the reduced income tax assessments (above); and (ii) to be in the amount of 49% of the revised potential lost revenue.”

4. The parties were unable to reach agreement on exact figures and applied for determination, with stated reasons for their disagreement.

Hearing

5. Both parties consented to the quantum hearing being before myself alone, and I considered that I could fairly determine the figures sitting alone.

6. The Appellants did not appear and were not represented. Prior to commencement of the hearing the Tribunal's clerk telephoned the Appellants' Rule 11 representative (Mr Wildin). Mr Wildin confirmed he was aware of the hearing but had it diarised for the following day, and he was at some distance from the hearing venue; he requested that the hearing proceed in his absence. I was satisfied that the notice convening the hearing had stated the correct date and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33. In particular, the Appellants had provided a detailed written submission describing their position.

The Dispute

7. HMRC have provided detailed figures which they contend give effect to the outcome of the 2016 Decision. My understanding is that the Appellants raise a single objection to the calculations. The objection is that when the takings figures of the business are adjusted in accordance with the 2016 Decision, for some periods the result gives a lower turnover figure than stated by the Appellants on the Company's original VAT returns and used in Mr Ali's income tax self-assessment returns. The Appellants contend those resulting "negative assessments" should be taken into account, so as to reduce the overall (adjusted) VAT assessments and income tax discovery assessments and closure notices (and applicable penalties). HMRC contend that the effect of the adjustments resulting from the 2016 Decision can be only to reduce the appealed assessments to zero, not to produce negative figures to be aggregated with other (adjusted) assessments that produce positive figures. To quote from the Appellants' written submission:

"[HMRC] are attempting to alter the Judgement [ie the 2016 Decision] by claiming that those items which are in the favour of HMRC should be adjusted for and those which cause any figures which work against HMRC should not. This cannot be correct. It has to be assumed that the Judge considered all of the facts when arriving at his Judgement and considered that in making the Judgement that he did that he acknowledged that some figures would work either way but that overall his Judgement was fair, having regards to all of the facts."

Consideration and Reasons

8. It is settled law that this Tribunal as a creature of statute must determine disputes within its jurisdiction on the basis of the relevant statutory provisions; the Tribunal does not have any equitable or common law jurisdiction outside the explicit terms of the relevant legislation. For example, in *HMRC v Hok Limited* [2013] STC 225 the Upper Tribunal stated (at [56]):

"... 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."

9. The jurisdiction conferred by statute on the Tribunal in relation to the current dispute is as follows.

10. *In relation to income tax* – Section 31 Taxes Management Act 1970 provides (so far as relevant):

- 5 “(1) An appeal may be brought against—
- (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
 - (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
 - 10 (c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
 - (d) any assessment to tax which is not a self-assessment. ...”

15 An appellant may notify an appeal to the Tribunal and the Tribunal is to decide the matter to which the appeal relates (ss 49D & 49I TMA 1970). Section 50 TMA 1970 states (so far as relevant):

- “(6) If, on an appeal notified to the tribunal, the tribunal decides
- (a) that, the appellant is overcharged by a self-assessment; ... or
 - (c) that the appellant is overcharged by an assessment other than a self-assessment,
 - 20 the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
- (7) If, on an appeal notified to the tribunal, the tribunal decides
- (a) that the appellant is undercharged to tax by a self-assessment; ... or
 - 25 (c) that the appellant is undercharged by an assessment other than a self-assessment,
 - the assessment or amounts shall be increased accordingly.
 - ...
- (8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which—
- (a) assesses an amount which is chargeable to tax, and
 - (b) charges tax on the amount assessed,
 - 30

5 the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.”

11. *In relation to VAT* – HMRC may assess VAT to the best of their judgment if it appears to them that returns are incomplete or incorrect (s 73(1) VAT Act 1994). An appeal lies to the Tribunal against such an assessment or the amount of the assessment (s 83(1)(p) VATA 1994). Section 84 VATA 1994 states (so far as relevant):

“(5) Where, on an appeal against a decision with respect to any of the matters mentioned in section 83(1)(p) ...

(a) it is found that the amount specified in the assessment is less than it ought to have been, and

15 (b) the tribunal gives a direction specifying the correct amount,

the assessment shall have effect as an assessment of the amount specified in the direction, and that amount shall be deemed to have been notified to the appellant.”

12. *In relation to penalties* – Schedule 24 Finance Act 2007 states (so far as relevant):

20 “15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person. ...

25 16(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal). ...

30 17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may

(a) affirm HMRC's decision, or

35 (b) substitute for HMRC's decision another decision that HMRC had power to make. ...”

13. Having carefully considered those statutory provisions, I have concluded that HMRC are correct and the Appellants are incorrect in relation to the disputed matter.

14. Taking first Mr Ali's appealed income tax assessments, these are a mix of s 29 discovery assessments for two tax years and a s 28A closure notice for the third tax year. Those are all appealable under s 31; the discovery assessments pursuant to s 31(1)(d) and the closure notice pursuant to s 31(1)(b). The effect of the 2016 decision is to reduce all three disputed assessments, pursuant to s 50(6) & (8), in the manner stated in the 2016 Decision. For one or more years that may result in the disputed assessment being reduced to Nil. I do not accept that the Tribunal has any power to reduce an assessment so as to produce a negative figure that can be aggregated with or netted off against assessments for other years. I also do not accept that the Tribunal can reduce the figures given by a taxpayer as his own self-assessment; that must be done by the taxpayer himself by amending his own return pursuant to s 9ZA TMA 1970 (subject to the time limit in s 9ZA(2)). The reference in s 50(6) to an appellant being "overcharged by a self-assessment" is to cases where HMRC have amended a self-assessment; although that is not stated explicitly in the legislation, I consider it is the correct reading of that provision, and I note that a similar conclusion was reached recently by Jay J in his careful analysis of the relevant provisions in *R (oao Archer) v RCC* [2017] EWHC 196 (Admin) (at ¶ 56).

15. Taking next the Company's VAT returns, these are appealable under s 83(1)(p). Although s 84(5) addresses only the increase of an assessment and not its reduction, I consider it is implicit that the Tribunal can reduce a disputed assessment (see, for example, the judgment of Carnwath LJ in *CCE v Pegasus Birds Ltd* [2004] STC 1509). Again, I do not accept that the Tribunal has any power to reduce an assessment so as to produce a negative figure that can be aggregated with or netted off against assessments for other periods. Again, I do not accept that the Tribunal can reduce the output tax given by a trader on its own VAT return; that must be done by the trader himself by a claim pursuant to s 80 (subject to the time limit in s 80(4)).

16. Taking last the sch 24 penalties, these are appealable pursuant to para 15 and the effect of the 2016 Decision is that the Tribunal substituted its own decision pursuant to para 17(2)(b). The penalty appeals are treated the same as the underlying tax assessments (per para 16) and thus the same comments apply as made above in relation to reduction of the assessments (indeed, the strangeness of the concept of a negative penalty points to the correctness of those comments).

17. For the above reasons, I conclude that each appealed assessment and penalty can be reduced as directed by the 2016 Decision but only to a minimum of Nil, so that no negative figures can be produced for any tax year or VAT period.

18. At the conclusion of the hearing I asked Mr Corbett for HMRC to produce a schedule showing the VAT allocated by VAT quarterly period, which he duly supplied after the hearing.

Determination

19. The exact figures are determined as follows.

20. The Company's VAT assessments and penalties:

VAT Period	VAT	Penalty
03/08	Nil	-
06/08	Nil	-
09/08	Nil	-
12/08	Nil	-
03/09	£157	-
06/09	£212	-
09/09	£264	-
12/09	Nil	-
03/10	£424	-
06/10	£618	-
09/10	£78	-
12/10	£244	-
03/11	£964	-
06/11	£1,641	-
09/11	£760	-
12/11	£1,348	£660.52
03/12	£1,730	£847.70
06/12	£2,762	£1,353.38
09/12	£1,477	£723.73
12/12	£152	£74.48

21. Mr Ali's discovery assessments, closure notice and penalties:

Tax Year	Income Tax	Penalty
2009-10	Nil	Nil
2010-11	£151.20	£74.08
2011-12	£6,105.08	£2,991.49

22. 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.

10

**PETER KEMPSTER
TRIBUNAL JUDGE**

15

RELEASE DATE: 21 MARCH 2017