[2015] UKFTT 0183 (TC)

TC04376

Appeal number: TC/2013/5436

VAT – best judgment assessments – whether to best judgment – yes - whether they should be reduced - no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

M & R MARBLE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale
JUDGE Jonathan Richards

Sitting in public at Fox Court, Gray's Inn Road, London on 23 March 2015

Mr A Mosawi of Ali & Ali, Accountants, for the Appellant

Mr B Sellers, HMRC officer, for the Respondents

DECISION

1. The appellant was assessed to tax by decision of 15 March 2013. The letter adjusted the return for 01/12 from being a repayment return to one with an amount owing to HMRC. It also enclosed an assessment on VAT 655 for periods 10/11, 4/12 and 7/12. The assessments were reduced following a review by letter dated 24 July 2013, and further reduced prior to the parties entering into alternative dispute resolution ("ADR") by letter dated 7 January 2014.

2. HMRC's case is that two of the issues under appeal were resolved in ADR in HMRC's favour. Those issues were:

- Absence of a C79 evidencing a claim for repayment of £2,094.59 in 01/12;
- Arithmetical error in return for 10/11 in taxpayer's favour of £707.47.

In the hearing, Mr Mosawi indicated he still wished the Tribunal to consider the matter of the C79. The Tribunal refused. The Tribunal would have no jurisdiction to consider the C79 matter if it had been settled between the parties. As the appellant had not made it clear to HMRC before today's hearing that it still considered the C79 to be in dispute, this had deprived HMRC of the opportunity to demonstrate (if they could) that the C79 matter was settled in arbitration. Therefore, we were unable to determine whether we had jurisdiction to hear the matter. We informed Mr Mosawi that if his client wished to take the matter of the C79 further, it would need to write to the Tribunal with evidence that the matter had not been settled in the ADR process.

3. The remaining matters in dispute, and over which the Tribunal accepted jurisdiction, were:

- The validity of the best judgment assessment of £8,937.60 for period 10/11 in relation to missing invoices 54-70;
- The validity of assessments in period 04/12 to recover VAT claimed on four invoices issued in 10/11 on the basis the invoices were unpaid;
- The validity of the assessment in period 01/12 for failure to account for output tax on invoice 103.

The facts

The witnesses

4. The director of the appellant company is a Mr Abdulsalam Salam. He did not attend the hearing of the appeal and we had no evidence from him.

5. Mr Mosawi, his accountant and representative at this hearing and also in the ADR, gave evidence; largely this consisted of repeating what his client had told him,

although it also included his evidence of what he had said at ADR (in so far as relevant).

6. The witness for HMRC was Ms Alpa Adatia, who was the HMRC officer who raised the assessments and had attended the ADR on behalf of HMRC. We accepted her evidence; it was consistent, and moreover she was prepared to accept matters put to her in cross examination even if not favourable to her position. In particular she accepted that she could not be sure that appellant had not sent an invoice from McMarmilloyd to the officer at HMRC who had previously dealt with the appellant: she was only certain that she had not seen any invoices from McMarmilloyd.

The missing invoices

7. It was accepted that the appellant's records failed to record the issue of any invoice with the numbers 54-70 (inclusive). The question of fact for us to resolve was the reason for this. Had the invoices been issued but not recorded, or had they never been issued?

8. The appellant's case is that the invoices were never issued. In a letter dated 11 January 2013, Mr Mosawi wrote that:

> "We cannot explain the gaps in the sales invoices or the great number of credit notes but this is due to inexperienced staffs who have not been updating the system."

9. This explanation was given by Mr Mosawi on Mr Salam's instructions. However, in so far as what Mr Mosawi said in letters and in evidence before us simply reported what he said Mr Salam had told him, we chose to put little weight on this because Mr Salam, who could have given direct evidence of what had happened, chose not to attend the hearing and although Mr Mosawi was asked, he did not give us an explanation why this was so beyond indicating Mr Salam was busy.

10. We also had reservations over accepting Mr Mosawi's evidence generally because he was less than straightforward in answering some questions. This was most noticeable over the second explanation given by the appellant for the jump in invoice numbers from 53 to 71. Ms Adatia gave evidence that Mr Mosawi had told her during the ADR process that a fire at the appellant company's premises was responsible for the jump in numbers: Mr Mosawi interjected to say that it was not "in writing" that he had said there was a fire. Later, when we asked Mr Mosawi to give further evidence in response to Ms Adatia's evidence, he vacillated between saying Mr Salam had instructed him that there had been a fire and saying that he didn't know if he (Mr Mosawi) had mentioned a fire. Therefore, we reject as unreliable Mr Mosawi's evidence on this and accept Ms Adatia's evidence that the appellant did claim during an ADR meeting that a fire was responsible for the jump in invoice numbers.

11. A third explanation put forward by the appellant for the jump in numbering was a computer problem. Mr Mosawi sent to HMRC after the ADR proceedings a letter from a Mr Abdel Fliti dated 25 April 2014. In this Mr Fliti said that he had visited the

company's premises in October 2011 as a computer engineer and found that the company's computer's hard drive had overheated and that data could not always be backed up. Mr Fliti said he replaced the hard drive but the lost data could not be recovered.

12. Even if this had been the only explanation offered, rather than the third, we would not be inclined to accept it. Firstly, Mr Fliti did not attend to give evidence. No reason was given for this. This denied HMRC the opportunity of asking him questions about his letter. Secondly, there were questions to be asked about his connections to the company. HMRC's case is that (based on payroll records seen by Ms Adatia) Mr Fliti became an employee of the company in 2013. However, Mr Mosawi had earlier in the hearing described him as 'just' a contractor but later (in response to Ms Adatia's evidence) said he did not know if he was an employee. For reasons explained above, we reject Mr Mosawi's evidence as unreliable: it was in any event contradictory on this. We accept Ms Adatia's evidence. Our third reason for rejecting this explanation is that the letter actually gives no real explanation for the jump in invoice numbers: indeed it does not even mention the issue. It just says 'data' was lost begging the question whether only the record of the invoice *numbers* were lost or the record of the invoices themselves.

13. And in any event, as we have said, it was only one of three explanations offered. Mr Mosawi suggested to us that these differing explanations were not inconsistent; he suggested that a fire could have caused a computer malfunction; he also suggested that inexperienced staff found a faulty computer hard to use.

14. We do not accept that the differing explanations can be reconciled. If a fire and/or a computer failure had caused a problem back in 2011, we would expect them to have been mentioned in the letter written in January 2013. Moreover, it is not obvious why a fire would cause invoice numbers to jump, nor why losing data would cause invoice numbering to jump. Nor do we have any reliable evidence the jump in invoice numbers was caused by inexperienced staff. We also find that the appellant was asked by HMRC to verify the fire at the premises (eg with an insurance claim) but failed to take up this opportunity, only confirming our doubts about the reliability of any of the appellant's various explanations.

15. Our conclusion is that we had no reliable explanation for the missing invoices. It had not been demonstrated to us that they were not issued.

Payment of invoices

16. It was accepted that HMRC had inspected the appellant's records following a repayment claim made by the appellant for period 1/12. We accepted Ms Adatia's evidence that HMRC had selected random invoices for verification that the appellant had paid them.

17. The assessment was originally for £5650 in period 4/12. On 7 January 2014 Ms Adatia reduced this to £2,512 to reflect VAT on just four invoices which she considered were unpaid. These were:

- Stoneyard no. 3979/11 dated 20 August 2011 for £2337.84
- Stoneyard no. 4011/11 dated 26 August 2011 for £2414.88
- Stoneyard no. 4122/11 dated 20 September 2011 for £2325.07
- McMarmilloyd no. 17266 dated 26 September 2011 for £8,000.

18. Stoneyard: In support of its claim that the invoices from Stonyard had been paid, the appellant provided photocopies of three cheques from the appellant to Stoneyard Ltd for (respectively) £4,862.22, £3,103.95 and £2,639.59 dated 1 September (the first) and 19 October 2011 (the last two). These amounts totalled £10,605.76 and none of them matched the above invoice amounts. On one of the photocopies someone had scribbled the first two of above invoice numbers with their amounts, and on the copy of the third cheque the number of the third invoice was scribbled. Mr Mosawi's case is that these annotations and the (unreadable) stamps next to them were made by Stoneyard and were confirmation that these cheques included payment of the invoices (together with other invoices as well).

19. We find that HMRC had made a random selection of invoices and that in the VAT quarter 10/11 the appellant had a total of 11 invoices from Stoneyard, totalling £20,566,79 (allowing for a credit note). The cheques came to roughly half that figure. Moreover, the third cheque was exactly equal in amount to a different invoice (no. 4270/11) and dated the same date as this invoice, which indicated to us it was nothing to do with the above 3 invoices queried by HMRC and calling into question the reliability of the annotations.

20. There was a clear discrepancy between amounts paid and owed. We find the appellant was given a long period of opportunity to explain this (including during the ADR process) but no further information was forthcoming. There was nothing from Stoneyard clearly confirming payment and no one called from Stoneyard to give evidence. We did not consider the annotations reliable for the reasons given above and there was nothing in the banking evidence showing that the amounts owing to Stoneyard were paid.

21. In the hearing Mr Mosawi was asked how the appellant paid Stoneyard; did it pay per invoice or a rolling balance? However, he was unable to help. He said the appellant was given 30 days to pay but on questioning this turned out to be an assumption he had made. We disregard this as it was an assumption and not evidence. And it does not correlate with the appellant's case as, firstly, the invoice amounts don't match the cheques, and the cheques are not dated 30 days after the invoice dates.

22. Mr Mosawi also produced in the hearing a ledger from Stoneyard showing the state of the appellant's account with them in April 2012. This has not previously been seen by HMRC but Mr Sellers did not object to its admission into evidence. We find it shows that the appellant had a running debit balance with Stoneyard for the whole of April in excess of £11,000. This does not really demonstrate anything other than

that some £11,000 was still outstanding as at 30 April 2012, which is not inconsistent with the assessment.

23. We accept that the appellant paid some of Stoneyard's invoices issued in 10/10. We do not have evidence, and we do not find, that it paid these particular three invoices.

24. McMarmilloyd: Mr Mosawi's evidence on this caused us to doubt whether an invoice from McMarmilloyd to the appellant had ever been issued, let alone paid. He started by explaining that the appellant had no evidence of payment because McMarmilloyd was paid direct by the appellant's customer (Stromeiro). He went on to say the goods would have been delivered direct by McMarmilloyd to Stromeiro and that *the invoice was issued to Stromeiro.*

25. Mr Mosawi later tried to undermine what he had said by suggesting to Ms Adatia that she would have seen invoices from McMarmilloyd to the appellant. While, as we have said at §6, she accepted that the previous officer may have received invoices for inspection, her evidence, which we accept, was that she had never seen an invoice from McMarmilloyd, and its existence had simply been inferred from the appellant's purchase list for the VAT quarter in question where the number and amount was listed next to the supplier's name.

26. While we had doubts that the invoice had ever been issued to the appellant, it was no part of either HMRC's case or the appellant's case that it had not been issued, and so we make no finding on this point. HMRC's position was that it had not been paid by the appellant. We had no reliable evidence that an invoice from McMarmilloyd addressed to the appellant had ever been paid by the appellant, or by someone else on the appellant's behalf. We reject Mr Mosawi's evidence that Stromeiro paid the invoice on behalf of the appellant: we did not find him to be reliable for the reasons outlined in §10 above and because he made statements to the Tribunal based on assumptions rather than knowledge. It seems at least as likely to us that if Stromeiro did pay, they paid on their own behalf as on the appellant's behalf.

27. So we find that the appellant has not shown us that it paid the McMarmilloyd invoice on which it had reclaimed the input tax.

Invoice 103

28. HMRC's case is that the sales day book presented to HMRC showed that invoice 103 was a credit note to FK Concept for £233.33. However, on inspection on 29 January 2013 Ms Adatia discovered that the appellant's computer recorded invoice 103 as issued to Chic Marble for £30,407 incl VAT. We accept this evidence, which was not in dispute. Moreover, we were shown a copy of the invoice.

29. Mr Mosawi accepted that invoice 103 was issued for £30,407 incl VAT of £5,067.83 and that his client had not accounted for VAT on that invoice. His case was that there was a dispute with Chic Marble over performance and the customer had

only paid his client £7,005 of the invoice. His case was that his client was therefore not liable to account for VAT on the balance.

30. Mr Mosawi was asked if his client had sued Chic Marble for the balance and he said they had not.

The law

The missing invoices

31. Ms Adatia made her assessments under s 73 Value Added Tax Act 1994 ("VATA"). This provides in so far as relevant:

> **73 Failure to make returns etc**
>
> (1) ….where it appears to [HMRC] that …returns are incomplete or incorrect, they may assess the amount of VAT due form [the taxpayer] to the best of their judgement and notify it to [the taxpayer]

32. Her evidence was that, in the absence of an explanation of why the issue of invoices nos. 54 to 70 (incl) was not recorded, she proceeded on the assumption that the appellant had issued them but not recorded the issue of them in its books. She averaged the amounts charged in respect of VAT on previous invoices nos 20 to 53 (making this £558.60 VAT per invoice and assessed the appellant to £8,937 (16 x £558.60) for period 10/11.

33. There is an arithmetic error in this calculation as there were 17 missing invoices. The error is in the taxpayer's favour and HMRC did not seek to correct it so we say nothing more about it. An arithmetic error does not mean the assessment was not to best judgement.

34. Her calculation of the average amount charged on the previous invoices also appeared to contain an arithmetic error in that she took all invoices from and including 20 to 53 and divided by 33 rather than by 34. However, we accept that that is explained because invoice 52 was missing too.

35. <u>Best judgement:</u> The first question we must determine is whether the assessment was, as s 73 requires it to be, to Ms Adatia's 'best judgement'. There have been cases which have considered what this means, such as *Van Boeckel* [1981] STC 290 where Mr Justice Woolf said that the officer must consider all material provided by the taxpayer and must "come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due". Lord Pentland in *Queenspice* [2010] UKUT 11 (TCC) said much the same:

> "the power given to [HMRC]…is to make an estimate or an assessment to the best of their judgment on such information as is available to them. This necessarily allows [HMRC] a substantial margin of error. They are entitled to make what one might describe as an educated guess. They are not required to carry out exhaustive investigations…."

36. Mr Mosawi challenged the reasonableness of the assessment on three bases:

- That if the total assessed was correct, it would (he said) mean that the appellant's turnover in 10/11 was considerably greater than in 7/11 which was improbable;

- That there was no evidence in the appellant's bank records that there were undeclared takings;

- That the assessment necessarily supposed that the appellant had issued 17 invoices in a few days which was improbable.

37. The appellant's VAT return for 07/11 showed a total of £36,862 net in sales. The assessment for 10/11 assumed *additional* sales of £44,685 (net) and £53,622 (gross). We were given no evidence on the value of sales declared in the return for period 10/11.

38. We consider that it was reasonable for Ms Adatia to make the assessment in the amount which she did despite this discrepancy: firstly the discrepancy is not shown to be particularly large and in any event there was no reason to suppose that business was steady in all quarters. Most businesses have peaks and troughs. Secondly, HMRC did not have to assume that the 7/11 quarter was correctly reported.

39. We also consider it reasonable for Ms Adatia to make the assessment despite the bank account information which Ms Adatia accepted did not show large unexplained deposits. As Ms Adatia said, she did not assume that payment for the invoices would necessarily have been deposited in a bank account or in the bank accounts the statements for which she was shown. We consider that this is a reasonable assumption.

40. Invoice 53 was issued on 28 October 2011, 3 days before the end of the VAT quarter. The next recorded invoice was no 71 but neither side was able to tell us on what date it was issued other than it was issued sometime during the next quarter.

41. Ms Adatia's assessment was made in 10/11 and therefore necessarily assumed that the missing 17 invoices were issue in that quarter. Mr Mosawi's case was that her assumption was that the missing invoices were issued in the last four days of it, and that, he said, was unreasonable.

42. We find that there was evidence in front of the Ms Adatia when she made the assessment that the appellant's pattern of issuing invoices was quite irregular. Twenty seven invoices were issued between 11 and 15 January 2012; while elsewhere in January 2012 a week or more would go by without the issue of any invoices. Moreover, while a taxpayer might issue invoices in a batch at the end of a quarter, that did not necessarily mean that the supplies were all made at that time.

43. In conclusion, the appellant, whose appeal it is, has not satisfied us that the assessment was not made to Ms Adatia's best judgment. We consider that the assessment was based on assumptions which were reasonable for an HMRC officer to make on the basis of the information in front of her.

44. However, we then go on to consider whether the assessment should be upheld. The rule is that to displace an assessment, the appellant must show what his tax liability actually was. It is not enough to show that the assessment is wrong: he must show what it should have been. As Lord Lowry said in *Biflex v Carribean Ltd* [1990] UKPC 35 at page 10:

> "The element of guesswork and the almost unavoidable inaccuracy in a properly made best of judgement 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. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer."

45. We found (see §15 above) that the appellant failed to satisfy us that the invoices were not issued. So we proceed on the basis that they *were* issued. The appellant has given us no evidence of the amount that these invoices would have charged. In so far as it is its case that £53,622 (gross) is excessive, he has not shown us that a lower amount is more likely to be right. In so far as it is its case that the it simply could not have issued 17 invoices on 4 days at the end of the VAT quarter, he has not demonstrated to us that this is true either. We had no evidence from Mr Mosawi about the appellant's billing practices and what little evidence we did have suggested that it did issue its invoices in batches. And again there was nothing in the evidence from which we would make the assumption that any invoiced amounts would necessarily be shown being banked in the bank statements provided by the appellant.

46. Therefore, the appellant has failed to demonstrate that any corrections ought to be made to the assessed amount and so we uphold it.

Payment of invoices

47. The VAT Act provides at s 26A:

> **26A Disallowance of input tax where consideration not paid**
>
> (1) Where -
>
> (a) a person has become entitled to credit for any input tax, and
>
> (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date,
>
> he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

48. We have found that there were 4 invoices dated in period 10/11 which were unpaid: see §§23 and 27 above. Ms Adatia assessed the amount of VAT on this invoices in period 04/12. That was six months after the 'relevant date' being the dates

on the invoices (it not being shown either that the time of supply was later than the invoice date nor that payment was due later than the invoice date).

49. We therefore consider that the assessment for £2,512 in 04/12 period was correct and we uphold it.

Invoice 103

50. The appellant accepts that it carried out the supply for which it issued this invoice. It is therefore the case that it is liable to account for VAT on that supply. S 1 of VATA provides that VAT was chargeable on the supply; s 25 requires a taxpayer to account for that VAT in accordance with regulations. Regulation 25 of the VAT Regulations 1995/2518 requires quarterly VAT returns to be made showing the amount of VAT owing in that quarter and regulation 40 requires the VAT to be paid at the same time.

51. The appellant should have shown invoice 103 in its VAT return for 01/12 but it failed to do so and therefore we find HMRC were correct to assess it for the amount of VAT showing on the invoice.

52. While the appellant says that the invoice has only been paid in part, there is no evidence that the appellant has accounted for any of the VAT, even the part it accepts was paid by its customer, and therefore HMRC were correct to assess the appellant for the full amount of the VAT showing on the invoice.

53. To the extent that the debt remains unpaid the appellant may be able to claim bad debt relief. It has not made such a claim and this Tribunal does not have to consider it. The appellant would need to consider whether it meets the terms of the relief and make a claim.

54. But the assessment for £5,067.83 for 01/12 is upheld.

55. For the reasons given above, we dismiss the appeal.

56. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 27 April 2015