



[2019] UKFTT 0740 (TC)

TC07498

VAT – supplies to persons with disabilities – Zero rating – VAT Assessment – record keeping obligations – permissible deductions - loss of records? – appeal dismissed

Appeal number: TC/2018/07654

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**DR MARTIN OSMENT
(T/A ZIPPY ENGINEERING SERVICES)**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN MANUELL
Mrs SONIA GABLE**

**Sitting in public at Brighton Family Court, 1 Edward Street, Brighton BN2 0JD
on 25 November 2019**

Having heard the Appellant in person and Ms Olivia Donovan, Presenting Officer, for the Respondents

DECISION

1. The Appellant appealed against HMRC's decision dated 22 August 2018 to assess him to VAT in the sum of £28,134 under section 73(1) of the Value Added Tax Act 1994 ("VATA 1994"), for the periods 06/14 to 9/17, inclusive.

2. The Appellant is an engineer. He is physically disabled as a result of serious injuries suffered in a light aircraft accident in 1993. His own mobility problems led him to set up a business as a sole trader, under the trading name of Zippy Engineering Services (“Zippy”) modifying, adapting and repairing personal transport devices for people with disabilities. He told the tribunal and it accepts that profit as such was not his motive. He registered himself for VAT with effect from 2 January 2011. Because the supply of equipment for use of disabled people is zero rated (provided a declaration of use is signed by the purchaser) the Appellant’s input tax was significantly higher than the output tax. It was still necessary for a VAT invoice to be issued to each purchaser in the correct form.

3. The history of the enquiry was set out in HMRC’s Statement of Case dated 3 September 2018 and was not in dispute. In outline, the Appellant was selected for investigation and on 4 July 2017 was visited by an HMRC officer. No records were available for inspection. The Appellant subsequently offered to provide records with the help of a bookkeeper. These were not provided within any of the agreed timescales and a penalty of £300 was charged (not the subject of the present appeal). Further correspondence and meetings followed. On 18 April 2018, after Zippy’s schedule of invoices had at last been received, the Appellant was notified of the proposed assessment and given the opportunity to comment. No response was received from him, despite extensions of time. The VAT assessment was eventually notified in the sum of £30,586 on 22 August 2018. Following the review requested by the Appellant, on 2 November 2018 the assessment was reduced to £28,134, as two VAT periods were deemed to be out of time. The Appellant then appealed to this tribunal.

4. HMRC had identified the following issues with the Appellant’s VAT returns:

- (a) Input tax had been claimed on invoices to a third party;
- (b) Input tax had been claimed on items where VAT had not been charged;
- (c) Input tax had been claimed on non-recoverable items, such as fuel, business entertainment and food items;
- (d) The necessary certificates for zero rating were not held;
- (e) The necessary supporting documents required to submit repayment VAT returns could not be provided despite requests.

5. The main applicable legislation was VATA 1994, sections 26, 30, 73, 83 and schedule 8, group 12 and regulation 29(2) of the VAT Regulations 1995 (SI 1995/2528). HMRC’s public notices 700/21, 700/64, 700/65 and 701/7 are also relevant. These were all included in HMRC’s bundle and were supplied to the Appellant. Extracts from the statutes and regulations are set out as an appendix to the present decision, together with HMRC’s public notices. No legal issue arose during the hearing and the outcome largely turned on the Tribunal’s findings of fact.

6. The Appellant’s case as set out in his Notice of Appeal was that he was entitled to deduct all of the input tax he had claimed, and that he had made zero rated supplies to his disabled customers correctly.

7. The burden of proof was on the Appellant, to the civil standard (balance of probabilities), to show that the assessment was incorrect.

8. The Appellant gave evidence and was cross examined. In outline he said that all or almost all of the supplies he made were to disabled people to whom zero rating applied. Zippy was not really a business, it was there to help people in need. He accepted that his record keeping was not good and had not been a priority for him. Many of Zippy's records had been lost or stolen, along with other property such as spare parts. They could not be returned to him as those which had been discovered fly tipped were contaminated. The loss included computers as well as paper records. He believed that the claims he had made for meals were within the permitted guidelines for business entertaining. The Appellant could not recall any specific details when shown copies of past VAT returns. VAT invoices had been created on his computer. His customers were not always able to pay him much. His customers would have been at a disadvantage he had not registered for VAT. He had tried to comply with his record keeping obligations. The Appellant explained about his other business activities. These were not connected with Zippy.

9. Mr David John Trigwell ("Mr Trigwell") gave evidence on behalf of the Appellant in accordance with his witness statement dated 12 August 2019. Mr Trigwell said that he was a business neighbour of the Appellant. He was aware that Zippy had records which were in a shipping container which was removed when their landlord went into liquidation. Mr Trigwell had no knowledge of the contents of Zippy's records.

10. The tribunal heard submissions for both parties, which each had put in writing. The Appellant drew the tribunal's attention to *Okolo* [2012] UKUT 416 (TCC), an appeal concerning fictitious income tax returns, and the treatment of credibility where a taxpayer appellant had admitted dishonesty. The tribunal's decision was reserved.

11. The Appellant was obliged to retain records relating to his VAT for 6 years. That was not in dispute. He has been aware since the enquiry was first opened by HMRC in July 2017 that he would need to provide records, and take steps to recover or reconstruct records which were missing. The Appellant has had the benefit of accountancy advice during the enquiry, and has also had the opportunity to seek legal advice. He has had access to the information in HMRC's public notices. After a lengthy delay he submitted a detailed schedule to HMRC, consisting of some 5 pages with several hundred transactions shown relating to Zippy, and some of his other businesses. At the hearing the Appellant confirmed that this schedule was prepared on his instructions and was as accurate as he could make it.

12. It has to be said that the Appellant's evidence about his record keeping for Zippy's business was not altogether easy to follow. He said that it was low on the list of his priorities. At no stage during his dealings with HMRC which led to the issue of the assessment under appeal did the Appellant claim that Zippy had records which were lost or no longer accessible. So far as the tribunal can see, the first time the Appellant said that any of Zippy's VAT records had been lost was after the original VAT assessment was issued on 22 August 2018. It has to be said that the tribunal would

have expected the loss of important records to have been mentioned to HMRC as soon as the enquiry had opened, not at the end of the enquiry, if that were a material matter.

13. Limited evidence of the circumstances of the loss was given by Mr Trigwell. Mr Trigwell had however no personal involvement in the Zippy operation. His association with the Appellant was through another project. He had no knowledge of the contents of Zippy's actual records, whether on paper or computer files.

14. The tribunal accepts that some of the property of Zippy was stolen or lost in 2017. The tribunal is not however satisfied that any such property included VAT records (including customer declarations) as the tribunal cannot be satisfied that full and proper records were kept for Zippy in the first place. The Appellant's evidence about his records was vague, as might be expected when he admitted that record keeping was not his priority and had not claimed his full attention. As the Zippy operation was not intended to be profitmaking, that would perhaps have been a matter mainly for the Appellant, save that by registering for VAT he placed himself under a statutory regime with binding obligations. To claim zero rating, Zippy's customers were required to sign the appropriate disability declaration: see HMRC Public Notice 701/7. The Appellant produced only one declaration to HMRC or the tribunal covering the disputed period. No copy VAT invoices were available. The Appellant was unable to explain his VAT returns satisfactorily, despite having had months to prepare his evidence for the hearing and having obtained a full set of copies of his VAT returns from HMRC. He had some 10 months to prepare, review and/or reconstruct his records with book keeping assistance. This was a small operation, run by him, creating bespoke solutions. The tribunal considers his absence of recollection is significant.

15. The Appellant's schedule shows a relatively large amount of input tax claimed for business entertaining. The Appellant was unable to explain to the tribunal how he was entitled to claim input tax for such entertaining, in the face of HMRC's express guidance to the contrary in Public Notice 700/65. Plainly the Appellant misunderstood whatever advice he claimed he had been given in the past about his VAT input tax. The schedule produced by the Appellant's bookkeeper was the basis of HMRC's assessment. It is difficult to see how the Appellant can object to its use.

16. The analysis of the Appellant's records made by HMRC's officer was in the tribunal's view careful and thorough. The Appellant was given the opportunity by HMRC to provide detailed personal expenditure figures and further details of expenses incurred in the course of his operations and was given abundant time to do so. The figures were revised in part in the Appellant's favour when a limitation point was noted during the independent review process. In the tribunal's view, the final figures determined by HMRC are logical and reasonable, and are supported by the calculations presented. They constitute a proper best judgment assessment reflecting the facts established, in accordance with section 73(1) of VATA 1994. The Tribunal so finds.

17. The Appellant was concerned that HMRC had asserted that he was dishonest. The tribunal has not seen any such allegation. It does not form part of HMRC's Statement of Case. *Okolo* (above) is not relevant to the tribunal's deliberations. In the tribunal's view, the Appellant in his zeal to assist his customers to avoid VAT (which

if disabled they were not required to pay) unfortunately misunderstood what was allowable as input tax on his part. As already noted, perhaps because he had no interest in making a profit in the conventional sense, the Appellant took a casual approach to record keeping, and was unable to prove that he had complied with the VAT Regulations and Public Notices. Unfortunately that is simply not permissible under the VAT system, where traders are collecting tax revenue on behalf of the government, and must render a strict account or face the consequences.

18. The Appellant indicated that he felt victimised, but it seems to the tribunal that HMRC have a statutory duty to protect tax revenues. It is almost inevitable that a business whose input tax and output tax sit uncomfortably together will attract attention at some point.

19. It follows that the appeal must be dismissed.

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.

TRIBUNAL JUDGE MANUELL
RELEASE DATE: 06 DECEMBER 2019

APPENDIX

Key statutory and other regulatory provisions

[Relevant extracts and current versions only reproduced]

Value Added Tax Act 1994

Section 26

Input Tax allowable under section 25

- (1) The amount of input tax for which a taxable person is entitled at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below
- (2) The supplies within the subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –
 - (a) taxable supplies;
 - (b) supplies outside the United Kingdom which would be taxable if made in the United Kingdom;
 - (c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection;
- (3) The Commissioners shall make regulation for securing fair and reasonable attribution of input tax to supplies within subsection (2) above...

Section 30

(2A) A supply by a person of services which consist of applying a treatment or process to another person's goods is zero-rated by virtue of this subsection if by doing so he produces goods, and either –

- (a) those goods are of a description for the time being specified in Schedule 8; or
- (b) a supply by him of those goods to the person to whom he supplies the services would be of the description so specified.

Section 73

Failure to make returns, etc

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 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

Schedule 8

Group 12

Drugs, medicines, aids for the disabled, etc

2. The supply to a disabled person for domestic or his personal use, or to a charity for making available to disabled persons by sale or otherwise, for domestic or their personal use of - ...

(f) motor vehicles designed or substantially and permanently adapted for the carriage of a person in a wheelchair or on a stretcher and of no more than 11 other persons;

The Value Added Tax Regulations 1995 (Statutory Instrument 1995/2518)

Regulation 29

Claims for Input Tax

(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

(b) a supply under section 8(1) of the Act, hold the relative invoice from the supplier;

(c) an importation of goods, hold a document authenticated or issued by the proper officer, showing the claimant as importer, consignee or owner and showing the amount of VAT charged on the goods;

(d) goods which have been removed from warehouse, hold a document authenticated or issued by the proper officer showing the claimant's particulars and the amount of VAT charged on the goods;

(e) an acquisition by him from another member State of any goods other than a new means of transport, hold a document required by the authority in that other member State to be issued showing his registration number including the prefix “GB”, the registration number of the supplier including the alphabetical code of the member State in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document and description sufficient to identify the goods supplied; or

(f) an acquisition by him from another member State of a new means of transport, hold a document required by the authority in that other member State to be issued showing his registration number including the prefix “GB”, the registration number of the supplier including the alphabetical code of the member State in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document and description sufficient to identify the acquisition as a new means of transport as specified in section 95 of the Act;

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a), (b), (c), (d), (e) or (f) above, such other documentary evidence of the charge to VAT as the Commissioners may direct.

Public Notice 700/65

Business Entertainment

Business entertainment and VAT

You cannot recover input tax incurred on the provision of business entertainment expenses.

You can normally recover, as input tax, VAT incurred on goods and services used for a business purpose. However input tax incurred by you on the provision of business entertainment to UK business contacts and non UK business contacts who are not customers is blocked from recovery under a special legal provision

Public Notice 700/64

Motoring expenses

8.4 Circumstances when you need to separate your business mileage from private mileage

If your business funds both business and private motoring and you wish to recover some of the VAT, but don't want to apply the fuel scale charge you must keep detailed mileage records to enable you to calculate how much fuel is used for business and private motoring

Public Notice 701/7

VAT reliefs for disabled and older people

This notice explains:

- which goods and services for disabled people are zero rated for VAT
- which goods and services for older people are reduced rated for VAT
- the declaration your customer should give to you