



[2020] UKFTT 0022 (TC)

**TC07528**

*VAT – assessment under section 73(1) VAT Act 1992 – failure to register - whether best judgment, whether quantum can be adjusted by the Tribunal – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/03144**

**BETWEEN**

**SITAL KHIMJI**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE GETHING  
MEMBER MR DAVID WILLIAMS**

**Sitting in public at Taylor House, London on 5 December 2019 at 10.30am to 4pm**

**Mr Doshi, an accountant for the Appellant**

**Mr Cameron, an Officer of HMRC for the Respondents**

## DECISION

### INTRODUCTION

1. The issues in this case arises out of a failure by the Appellant, who ran a corner shop selling fresh, tinned and packaged foods, some alcoholic drinks, general household and personal goods and newspapers, to register for VAT for the years 12/13, 13/14, 14/15, 15/16 and 16/17. The Appellant ceased to carry on business in 2016 and when she moved to London in 2016 she thought she no longer needed the records and disposed of them. She therefore no longer had the purchase orders in relation to the goods although her bank account statements were available and she provided to HMRC the names of her suppliers. HMRC assessed the Appellant under Section 73(1) Value Added Tax Act 1992 using a level of turnover calculated by taking data obtained from the current owner of the business, rounding down the figure to £200,000, then adjusting the figure downwards for the Retail Prices Index (RPI ) over the period, to which the officer then applied the flat rate scheme of 4%. This produced an assessment of £27,325.53 for the periods in question. The issues to be determined by the Tribunal are:

- (1) whether the assessment made by the HMRC officer was a "best judgment" assessment,
- (2) whether the Tribunal has jurisdiction to make an adjustment to the assessment given no returns were filed by the Appellant, and
- (3) if the Tribunal has jurisdiction, what would be a fair basis of assessment and what would be the resultant liability.

2. We heard evidence from Miss Khimji. We had a witness statement from the case officer ("the Officer") but for circumstances beyond his control he was unable to attend the hearing.

### The Facts:

3. We found the following facts:

- (1) The Appellant was 20 years old when she began running the corner shop under the name Skittlez
- (2) She acquired a lease of the business premises in November 2011. She paid rates from 17 November 2011 to 7 February 2016.
- (3) The premises were fitted out as a general dealer when she acquired the lease but she considered the premises needed to be refurbished – new fridges were needed, the main shelving unit needed to be upgraded, and although the flooring was in reasonable condition and the paintwork was reasonable, the lighting was inadequate and needed adjustment. Owing to the proximity to Christmas the works took longer than might otherwise have been the case and the shop was up and running in February 2012.
- (4) The Appellant had no recollection of the costs of the refurbishment and had no evidence of them. Family and friends had helped to undertake the works.
- (5) The Appellant could not recall the exact date the shop opened but the bank statements do show the first deposit of cash was on 14 February 2012.
- (6) The business did not thrive. There was at the time another convenience store close by although it is now no longer trading. Often the Appellant closed early because of the lack of business and as the business was not generating sufficient income to live on, the Appellant started to work part-time outside the business and her mother and brother

helped look after the shop. HMRC's records show that the Appellant was employed in the following years and received employment income of the following amounts:

- (a) 2012/13 £3,105
- (b) 2013/14 £7,948
- (c) 2014/15 £16,271 (almost full time wage)
- (d) 2015/16 £8,250 (the Appellant was not getting the help needed)
- (e) 2016/17 £4,616

(7) The Appellant felt that, in her absence in the shop, there was insufficient enthusiasm for the business on the part of her mother and brother. The Appellant ceased carrying on the business in February 2016 when she sold it to the current owner. There was no payment for goodwill. She received a payment only for the stock.

(8) HMRC first became aware of the existence of the business through the licence to sell newspapers and having made enquiries found that no business returns had been filed in respect of the business and opened an enquiry into the liability to be registered for VAT. The officer sent a letter opening the enquiry to the last known address of the Appellant on 12 December 2016.

(9) The Appellant immediately took steps to try comply with the request and appointed an accountant to prepare accounts based on the information then available which was the bank accounts.

(10) The officer issued a formal request for information seeking business records on 16 January 2017.

(11) Owing to the lack of records the accountant used the Appellant's business bank statements to prepare a set of accounts. The first draft accounts were submitted to HMRC on 24 February 2017.

(12) The Officer wrote on 22 March 2017 requesting further information relating to purchases and sales seeking a month by month break down. To which the Appellant replied on 19<sup>th</sup> April indicating the records are no longer available but between 65 and 70% of sales related to bread, fresh food and dairy products.

(13) The bank statements show that the business generated cash sales and card sales. The bank statements show both cash deposits and card receipts and payments. The statements show the proportion of cash to card sales as 60% cash to 40% cards.

(14) In addition to the zero rated supplies of fresh food, the business also generated some standard rated supplies in the form of alcoholic drinks, household and personal items and confectionary.

(15) The accounts produced in 2017 by the Appellant's first accountant and by Mr Goshi's firm in 2018/19 showed turnover as follows:

- |     |         |         |         |
|-----|---------|---------|---------|
| (a) | 2012/13 | £78,000 | £92,300 |
| (b) | 2013/14 | £80,400 | £79,500 |
| (c) | 2014/15 | £83,200 | £81,000 |
| (d) | 2015/16 |         | £28,000 |

(16) The Appellant genuinely did not realise that she ought to have been registered for VAT. The Appellant regrets not making enquiry of HMRC or a tax professional to ascertain her obligations.

(17) The officer did not accept the bank records as being a good starting point for the following reasons:

(a) The appellant admitted sometimes goods were acquired with cash from the till. So the bank account did not show all of the cash received had been deposited into the bank account.

(b) He had found the Appellant had deposited cash into her accounts for a friend and then made a payment to his bank account. The Tribunal was not taken to the entries in the Appellant's bank statements, indeed Mr Doshi, the Appellant's current accountant, had been unable to find these alleged payments although the Appellant seemed to accept she had done this and indicated to the Tribunal that she regretted doing so and recognises that it was wrong to do so.

(18) The Appellant appointed Mr Doshi in place of her original accountant. He had reviewed the personal and bank statements of the Appellant and produced a revised set of accounts that showed her turnover to be £110,000.

(19) The officer disregarded the accounts prepared by Mr Doshi and the first accountant and sought information from the current owners of the turnover of the business.

(20) The officer then sought to obtain information about the business from the current owners. He conducted an interview with them. A note of the interview is annexed to the officer's witness statement. In response to the question what were the takings in a good week and a bad week the current owner had said £3,000 and £1,000. He asked them what level of cash and card sales does the business turn over and the owner indicated that the proportions were 60% cash and 40% card sales.

(21) The officer disregarded those statements. His witness statement says he obtained the accounts of the business from the current owner's accountant which was initially conducted as a sole trader and then as a company. He did not share the statements with the Appellant. He states that the turnover was c. £230,000. He makes no enquiry of the break-down of zero rated to taxable supplies and no enquiry as to the level of input to output VAT.

(22) The Officer calculates the VAT owing for the periods as follows:

(a) by taking as the turnover of the business being carried on by current owner as £214,000 p.a.

(b) rounding the £214,000 down to £200,000 without any explanation as to why

(c) reducing the 200,000 by the differences in the RPI between the year in question to the current year

(d) applying the flat rate scheme (even though it is not available for businesses with a turnover of more than £150,000) to the turnover produced by the method described above produces a turnover per annum as shown below and an associated VAT liability as follows

	Year	Turnover	VAT Liability
(i)	2011/12	£66,450	£2,658
(ii)	2012/13	£179,231.30	£7,169.24

(iii)	2013/14	£184,405	£7,376.2
(iv)	2014/15	£188,987.40	£7,559.49
(v)	2015/16	£ 160,386.40	£6,415.45

Giving a total of £27,325.53. This seems to represent 4% of £683138.27 being the total turnover from 1 June when the Appellant's business became liable to be registered for VAT.

(23) The Appellant accepts that the turnover exceeded the threshold for registration and that the business ought to have been registered for VAT with effect from .

#### THE LEGISLATION

4. The relevant statutory provisions are set out below.

#### Value Added Tax

##### ***"S73 Failure to make returns***

*(1) 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 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 judgement and notify it to him."*

##### ***Section 83 Appeals***

*(1) .....an appeal shall lie to the Tribunal with respect to any of the following matters:*

*(a)...*

*(p) An assessment –*

*(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or*

*(ii) under subsection (7), (7A) or (7B) of that section; or*

*(iii) under section 75;*

*or the amount of the assessment."*

#### **Respondents' Submissions**

5. The Respondents' case is that as Appellant commenced business on 11 November 2011 the turnover of the business exceeded the VAT threshold for 2011/12 that the business was required to be registered with effect from 1 June 2012 on the assumption that the turnover accrued at a constant rate. In the absence of any evidence to the contrary HMRC do not accept that the business did not commence until February 2012 or that any refurbishment work was carried out.

6. The Officer's decision to calculate the Appellant's turnover in the manner described above, to assume it accrued in equal monthly amounts even for a start-up, even if there were a competing convenience store in the vicinity, and apply the flat-rate scheme, results in a best judgment assessment of the turnover of the business in the periods under consideration and the resultant VAT liability.

7. As the turn over exceeded the threshold amounts in each year the Appellant has no right to appeal the determination that the business was liable to be registered for VAT.

8. Further as the Appellant had failed to file returns, HMRC was enabled to make an assessment under section 73 VAT Act.

9. The Appellant has no ability to challenge the quantum of the assessment under section 73(1) because the conditions of section 83(1)(p)(i) have not been satisfied because the Appellant did not make any VAT returns.

10. It is not HMRC's obligation to undertake the work of the taxpayer in preparing an assessment following Van Boekel. The accounts prepared by the Appellant's own accounting advisers show differing amounts and cannot be relied upon.

## 11. The Appellant's Submissions

12. The Appellant submits that:

(1) The threshold for registration of supplies was only exceeded and the business was liable to be registered with effect from 1 June 2012 because the business only commenced trading in February 2012 not in November 2011 even allowing for the turnover to accrue at an equal rate.

(2) The VAT threshold was exceeded for each of the following years in question and so the Appellant does not appeal against the determination that the Appellant was liable to be registered for VAT.

(3) The Appellant appeals against the amount of the VAT assessment under section 73(1) on the ground that it is not a best judgment assessment.

(4) The Appellant has a right to appeal against the quantum of the assessment and the Tribunal has jurisdiction to hear the appeal and determine the quantum because of the general words at the end of Section 83(1)(p).

(5) That the Appellant has the right to appeal against an assessment under section 73(1) in circumstances where the Appellant has not filed a return, was established by the Court of Appeal in the case of *Kahn v (trading as Greyhound Dry Cleaners) v Customs & Excise Commissioners* 2006 EWCA Civ, 2006 STC 1167. The case concerned a liability to be registered for VAT, whether the threshold limit had been exceeded, whether the assessment was based on best judgment in circumstances where no returns had been filed. Carnwath LJ said at Para [12]:

*"Section 83 provides for appeals to the Tribunal in respect of a large list of decisions or actions by Customs. Relevant for present purposes are: (a) appeal against registration; (n) (appeal against liability to a penalty under section 60); (p) (appeal against assessment under section 73(1) or the amount of such an assessment) and (q) the amount of any penalty specified in an assessment under s76."*

(6) The Appellant accepts that the burden of proof rests on the Appellant to show that the assessment is not a best judgement assessment. The Appellant submits that the following is evidence that the assessment was not a best judgment assessment:

(a) The Officer's disregard of the computations of turnover based upon the bank statements of the business without giving valid reasons is illogical and unjustified. The admissions of wrong doing on behalf of the Appellant relating to depositing cash for a friend and paying a sum into his bank account and the occasional payment of cash for supplies out of the bank accounts does not justify the wholesale disregard of the financial evidence available.

(b) The Officer could have obtained the information about the volume of supplies purchased from the suppliers all of whose details had been provided to HMRC (although not a list of the goods purchased). The Appellant gave the Officer the details. The statement in the Reviewing Officer's report that the Appellant prevented the Officer from obtaining this information is incorrect. Based upon those values, and the application of a usual mark up in businesses such as this would have provided a more reliable check of the computations. The Officer failed to follow up this lead without giving reasons.

(c) The Officer disregards the statements of the new occupier that takings of £3,000 is a good week and £1,000 is a bad week. The average week would be £2,000 and the turnover likely to be close to £100,000 which is in the ball park of turnover figures ascertained by both of the Appellant's accountants. The turnover should not be assessed at more than £100,000.

(d) The Officer disregards the cash to card ratio of sales (60:40) provided by the new owner and instead adopts a cash to card ratio of 70:30 thereby unjustifiably boosting the value of the gross sales.

(e) Adopting as a turnover figure of £214,000 which figure is said to be in the accounts of the current owner which is much higher than the £150,000 which would result if every week was a good week and without providing the Appellant or the Tribunal a chance to review the accounts and the basis of the computation.

(f) Rounding down the figure to £200,000 without reason. (The Appellant accepts the attempt to reduce the turnover in line with inflation and the RPI would be a sensible and logical element of working backwards from a current day turnover figure.)

(g) The application of the flat rate scheme to the turnover figure of £200,000 is not permitted as the flat rate scheme is not available to businesses with turnover of more than £150,000.

(h) The application of the flat rate scheme to the turnover of a business making significant zero rated (food) supplies produces a harsh and unfair result that the resulting assessment cannot be said to be a best judgment assessment.

(i) In a case such as this, only a direct calculation that involves trying to identify the level of purchases, making assumptions on the levels of sales of zero rated goods and on an assumed level of mark-up, can produce a fair result. Mr Doshi produced the VAT calculations of four clients that carry on similar businesses to the Appellant:

(i) MM had turnover of £174,000 and has an annual VAT liability of £1,482.85 – applying the flat rate scheme would cause a far greater VAT liability.

(ii) SRC had a turnover of £246,278 and a VAT liability of £3,130. 32. The VAT liability using the flat rate scheme would produce a far higher sum.

(iii) MS had a turnover of £183,000 and a VAT liability of £1,623.

(iv) TSS had a turnover of £204,000 but had a VAT liability of only £1,950.

(j) Statements were obtained from the main suppliers Batleys and Booker which show that the total purchases over the 5 year period were £76,774.51. Even if a

35% mark-up were to be applied which is outlandish the VAT liability would be small.

(k) Mr Doshi has over 100 clients of this nature and the average mark up in these businesses is 17% but even if a 25% mark-up is adopted and a 60%/40% split of zero rated to standard rated supplies on gross sales of £100,000 after credit for input tax is given the net VAT liability of £1,666.67 p.a. would ensue. This of course disregards the fact that not all purchases will result in sales of fresh food and no relief is being given for input tax deduction in respect of overheads.

13. Mr Doshi sought to include in the appeal the issue of penalties as the liability to penalties will require a consideration of the facts currently before the Tribunal. Mr Cameron for HMRC indicated that there had been no appeal against the penalties and he has no instructions on this issue. Mr Doshi did not contest that there should be a penalty for the failure to register but considered it should not be set at 57.75% as it is because the Appellant genuinely did not know that the business ought to be registered for VAT. It is accepted that the Appellant was careless and her failure will be deemed to be deliberate and the penalty within the 35% to 70% range. However the Appellant had on every occasion responded to HMRC within the time frames set by HMRC and had given all documents available to her, told HMRC all of the relevant facts including names of suppliers and had assisted HMRC in assessing the liability. The maximum discount ought to be available. As the Appellant is no longer conducting the business or any business there was no possibility of postponement of the penalty.

#### **Discussion**

14. We hold that Appellant has a right of appeal against quantum because the general words, appearing after the subparagraphs(i), (ii) and (iii) do provide such a right and that this Tribunal has jurisdiction consider the nature of the best judgment assessment and reduce the quantum if necessary. In this respect the Tribunal must follow the decision in the Court of Appeal in *Khan v Commissioners of Customs & Excise*.

15. We consider the assessment made by the Officer in this case cannot be regarded as a best judgment assessment which according to Woolf J in *Van Boekel* is one which requires an "*honest bona fide judgment by the Commissioners on the material before them of the amount of tax due*" and that the "*Commissioners will fairly consider all material placed before them and, on that material, come to a conclusion which is reasonable and not arbitrary as to the amount of tax which is due*". In a case such as this in our opinion would require the commissioners to take into account the nature of the Appellant's business, the known facts about the trading conditions including the date of commencement, the existence of any competitors, the split between standard and zero rated supplies, the split between card and cash sales and any other special factors brought out in the enquiry. A blanket approach can never be a best judgment assessment.

16. We accept the representations made on behalf of the Appellant by Mr Doshi that the Officer:

- (1) failed to give adequate reasons to disregard the actual evidence of the turnover,
- (2) failed to obtain evidence during the course of the enquiry of the level of purchases from the principle suppliers to assist in creating a best judgment assessment,
- (3) failed to take into account evidence of the current owners as to the level of turnover in a good and a bad week, which even if there were a preponderance of good weeks would not take the turnover beyond £150,000,



(4) failed to consider the impact of the supply of zero rated food and newspapers on the VAT liability of the Appellant and the current owner and failed to obtain that information or if it was obtained failed to share it with the Appellant or the Tribunal,

(5) failed to explain the difference between the level of turnover alleged to have been communicated to the Officer by the current owner's accountant and the current owner's estimated average of £2,000 a week,

(6) failed to recognise that the flat-rate scheme cannot be available if the turnover is as the Officer considers it to be c£200,000.

In consequence we consider the Appellant has discharged the burden of proving the assessment was not best judgment.

17. We accept that the Appellant commenced carrying on the business in February 2012 as shown by the first deposit of cash in the bank statement of the business and that the level of the supplies exceeded the threshold for VAT registration at the end of March 2013 so that the business ought to have been registered with effect from the end of April 2013.

18. We accept that the turnover and cost of sales as shown in the revised accounts prepared by Mr Doshi would have been as follows:

	Year	Gross Sales	Cost of Purchases
(1)	2012/13	£92,300	£ 76,516
(2)	2013/14	£79,500	£65,866
(3)	2014/15	£81,000	£67,027
(4)	2015/16	£28,000	£18,195

19. We consider that the current owner's estimated split of zero rated and standard rated supplies ought to be adopted of 60% zero rated and 40% standard rated.

20. We consider that a best estimate of the VAT payable in each year would be as calculated as follows:

Year	SR purchases	Input tax	SR sales	Output tax	VAT due
2012/13	30,606.6	6,121.28	36,920	7,384.0	£1,262.72
2013/14	26,346.4	5,269.28	31,800	6,360	£1,090.72
2014/15	26,810.80	5,362.16	32,400	6,480	£1,117.84
2015/16	7,278	1,455.6	11,200	2,240	£ 784.40
Total VAT due					£ 4,255.68

21. We found the Appellant to be an honest witness, as a young woman of 20 we accept that she genuinely wasn't aware that she ought to have registered for VAT but we also find that she failed to make enquiry and obtain the necessary advice. She understands that that was wrong. We also find that as soon as the enquiry was opened the Appellant did everything required of her within the time limits set for her in terms of responding with the information and assisting HMRC Officer to reach a decision. The issue of penalties was not strictly before the Tribunal but it would be a terrible waste of resources of the parties and the Tribunal to have the information marshalled and considered again to determine penalties. We would have given the maximum reduction of cooperation, disclosure and assistance.

**Decision**

22. For the reasons set out above allow the appeal against the assessment under section 73 and reduce the liability to VAT to £4255.68.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

23. 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.

**JUDGE GETHING  
TRIBUNAL JUDGE**

**Release date: 13 January 2020**