[2020] UKFTT 0031 (TC)

TC07537

VALUE ADDED TAX – Food takeaway - Cold takeaway food and drink - Zero-rated items - Agreement as to proportion of zero-rated items - Period that agreement was to cover - Best Judgment Assessment - Section 73 VAT Act 1994 - Whether to best judgment? - Yes - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05079

BETWEEN

2 STRAND ROAD LIMITED
(TRADING AS 'HILLBILLYS FRIED CHICKEN') **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS PATRICIA GORDON

Sitting in public at Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 12 December 2019

The Appellant appeared by a director, Mr Louis McLoughlin

Mary Hendrick, an HMRC Litigator, instructed by HMRC Solicitors' Office and Legal Services, Custom House, Belfast, for the Respondents

DECISION

INTRODUCTION

1. The Appellant is a limited company which is registered for VAT and which owns and operates 'Hillbillys Fried Chicken', which is a food outlet and takeaway on Strand Road in Londonderry / Derry.

2. This is our decision in relation to its appeal, made by way of a Notice of Appeal dated 16 July 2018 and received on 18 July 2018, against HMRC's decision to issue an assessment for VAT, pursuant to section 73(1) of the *Value Added Tax Act 1994*, in the sum of £23,555 (but revised at departmental review on 21 June 2018 to £15,865) in relation to periods 07/14 to 01/18.

3. The assessment was made as a 'best judgment' assessment, and relates to the Appellant's sales over those periods of zero-rated items, and in particular 'cold take-away food and drink' (see VAT Act 1994 Schedule 8 Group 1, and VAT Notice 709/1 Paragraph 4.1) and especially coleslaw and cold dips.

4. The assessment relates to under-declared output tax on the VAT returns, resulting from what HMRC argues was an over-statement of zero-rated sales. An unusual part of this appeal is that it is not in dispute that the zero-rated sales were overstated, but there is now an argument that an agreement as to that proportion was applied by HMRC to four years rather than one year only. Other arguments are touched upon which seek to challenge the best judgment assessment.

REPRESENTATION AT THE HEARING

5. Mr McLoughlin is a director of the Appellant. He had instructed an accountant, a Mr Flanagan, to advise and represent him in relation to this appeal. Unfortunately, Mr Flanagan had phoned Mr McLoughlin at a late stage - the evening before the hearing - to tell him that he would not be able to attend the hearing due to a conflicting professional commitment.

6. We canvassed the parties' views as to whether it was still appropriate to proceed with the hearing in the circumstances. We drew Mr McLoughlin's attention to the fact that this was his company's appeal, and to our view that it bore the legal and evidential burdens of seeking to displace the best judgment assessment.

7. We are confident that Mr McLoughlin understood what he was being told, and understood the nature of the task which he faced in bearing the burden in seeking to challenge a best judgment assessment. Notwithstanding Mr Flanagan's absence, Mr McLoughlin was very insistent that the hearing should go ahead and should not be adjourned. Mr McLouglin assured us that he was fully conversant with all the documents, and was in a position to present the appeal. In the circumstances, we concluded that it would not have been appropriate to adjourn the hearing.

8. Mr McLoughlin presented the appeal with vigour and courtesy.

THE GROUNDS OF APPEAL

9. In summary, the Grounds of Appeal are as follows:

   (1) In terms of cold takeaway food, the Appellant does not only sell coleslaw, but also sells cold dips;

   (2) The 7% adjustment which was agreed should apply was to apply only for one year and not for four;

   (3) The Appellant "is one of the very few restaurant/takeaway businesses in Londonderry that actually pay VAT. A very significant number of them are over the

threshold and yet HMRC do not do anything to help tax compliant traders compete on a level playing field";

(4) Mr McLoughlin only became responsible for the administration of the business in or about April 2016;

(5) He has only recently managed to get accurate reporting out of the till system.

10. Mr McLoughlin's oral evidence and submissions, which were put firmly and candidly, focussed on his argument that his business was being treated unfairly by HMRC, in the sense that he (unlike, on his evidence, many of his competitors) was an honest and compliant trader.

11. He was especially concerned to establish, through the means of this appeal, the proportion of businesses in his 'zone' (which, in response to a question from us, he refined to his postcode: BT48) which were not registered for VAT and/or non-compliant with VAT Regulations. None of HMRC's witnesses were in a position to answer this question for him, but ultimately it is one which lies outside our jurisdiction. Our role in this appeal is simply to decide this appeal by this appellant. We are not empowered to engage in a roving inquiry as to the tax position of other takeaway businesses, whether in Londonderry or elsewhere. Mr McLoughlin had been particularly exercised by a passing comment said to have been made by an HMRC officer when visiting HMRC's offices, that Londonderry was 'the capital of non-compliance'. Again, and whilst we have no doubt as to the accuracy of Mr McLoughlin's recollection (which was not challenged in this respect), the comment (even if true) is one which does not really help us resolve this appeal. Although Mr McLoughlin was troubled by the idea that he was being singled-out for assessment by HMRC, the point, no matter how strongly and sincerely felt, does not assist us in resolving the appeal. We simply have no means of assessing whether, as Mr McLoughlin submitted, 'the Revenue's writ does not run large in Londonderry.'

12. Mr McLoughlin voiced strong criticism of the system of VAT generally (which he described at the start of his submissions as a 'socially regressive tax') especially when he is in competition not only with traders in Londonderry but also (given the proximity to the border) traders in the Republic of Ireland, where rates of VAT are lower than in the United Kingdom. But those are not matters to which we can properly have regard. The rates of VAT are matters for national government and are not matters in relation to which this Tribunal has any power.

THE EVIDENCE

13. We considered the bundle and 'supplementary bundle' of papers placed before us.

14. Mr McLoughlin informed us that he had brought with him (although he had not shared this with HMRC) a recently conducted survey or questionnaire of his customers as to whether or not they had been provided with coleslaw and/or dips. We declined to consider allowing him to rely on this as evidence unless and until it had been shown to HMRC.

15. The application was not pursued. We are bound to say that seemed sensible to us. A recent questionnaire of whether coleslaw and/or cold dips are offered is most unlikely to have been of any evidential value where the best judgment assessment (a) relates to the periods up until 01/18 - i.e., relates to periods the latest of which was almost two years ago; (b) Mr McLoughlin's own evidence is that the till system has changed / been reprogrammed since then; and (c) the test purchases in mid-2018 did not include any coleslaw or dips.

16. The following officers had given witness statements, which were relied on by HMRC:

(1) Kathleen (aka Kitty) Harvey, a VAT assurance officer of HMRC in the Taskforce and Special Compliance team in Derry, dated 14 January 2019;

(2) Breid Hendron, an officer of HMRC in the Complex and Agents Team, Derry, dated 15 March 2019;

(3) Peter Harvey, an officer of HMRC in the Construction Hub Team, dated 19 March 2019.

17. A witness statement had also been given by Officer Colin Hewitt, dated 15 March 2019, who had made a test purchase, but he could not attend the hearing, and we give his witness statement only such weight as is appropriate in the circumstances, bearing in mind that it was not tested by way of cross-examination.

18. The evidence of Officers Kathleen Harvey, Hendron, and Peter Harvey was not agreed by the Appellant. They were required to attend the hearing, and all gave oral evidence confirming the truth of their witness statements. Mr McLoughlin was given the opportunity to cross-examine these officers, so as to seek to challenge or test any part of their evidence, but their evidence was not substantially challenged.

19. We should also record that we consider Mr McLoughlin's evidence to have been given honestly and straightforwardly. We should also record that this is not a case in which any dishonesty, fraud, or lack of good faith is alleged by HMRC against the Appellant company, Mr McLouglin, or any of its officers or employees. This is not a case of deliberate, or conscious, wrongdoing. It is a case of careless record-keeping.

20. However, and even though his evidence was honest, his oral evidence does suffer from serious difficulties, principally being the lack of reliable contemporary documentation to support his position as to the proportion of zero-rated items being sold and that this should be anything other than the 7% which he had agreed.

FINDINGS OF FACT

21. On the basis of the evidence which we have heard and read, we make the following findings of fact.

22. The Appellant has been registered for VAT since 28 October 2011.

23. Mr McLoughlin has been a director from 11 April 2014 (disregarding an earlier period of directorship in 2012).

24. The Appellant was declaring zero-rate sales ranging from £12,000 to £24,000 per quarter.

25. On 8 April 2016, HMRC's Officer Molloy wrote that HMRC intended to visit the premises to review the Appellant's VAT affairs from 01/13 to 01/16 inclusive.

26. A visit eventually took place on the afternoon of 18 July 2017. Officer K Harvey was present at that visit. HMRC were told that only one till was used per shift. HMRC took a till report but this did not show the split between zero-rated and standard-rated items, and did not support the amounts claimed on the VAT returns as zero-rated sales.

27. On 31 October 2017. HMRC's Officer K Harvey wrote and said that she intended to visit the premises and that the review would continue with 04/16 (i.e., the period immediately following the period referred to by Officer Molloy) so as to bring the review up to date.

28. On 19 December 2017, Officer K Harvey wrote and asked a number of questions, including information as to how the Appellant decided what meals included zero-rated sides and which included standard-rated sides (such as curry sauce and gravy) and asking what items, apart from coleslaw, were included as zero-rated.

29. On 5 February 2018 and 27 March 2018, meetings took place. A figure of 7% was eventually agreed as the figure for zero-rated sales.

30. The tills were reprogrammed in about June 2018.

31. Officer Peter Harvey made a test purchase at 4.45pm on 30 July 2018. He bought a BBQ Chicken and Bacon Fillet Burger Meal for £5.99. He was not provided with any coleslaw, whether as a side or on his burger.

32. Officer Hendron made a test purchase at 17.45 on Thursday 9 August 2018. He bought two meals for £10.88 and was charged £2.50 for two cold dips (recorded on the receipt) which were neither offered nor provided.

DISCUSSION

Accuracy

33. The first issue is whether the Appellant has discharged the burden of showing that the figures on his VAT returns are accurate (i.e., not inaccurate) insofar as they relate to zero-rated sales. The fact that Mr McLoughlin agreed a 7% figure demonstrates that he himself accepted that the figures were not accurate. But, even had he not so agreed, we would not have been satisfied that the figures were accurate. They were inaccurate.

34. HMRC's visit in July 2017 identified a problem with the way in which information was being recorded on the till. There was no ability to identify which sales were zero-rated and which were standard-rated. Mr McLoughlin acknowledged to us that the percentage was 'so difficult to ascertain'.

35. The premises are open until 2am on weekdays and 3am at weekends. It is a fair point, and we accept, that the character of the takeaway changes over the course of the day. Its clientele changes from (say) mid-afternoon to the early hours of the morning when the takeaway can be very busy and the customers somewhat rowdy or disorderly. The premises have a fairly large sit-in area (33 seats), but customers sometimes order take-away food, and then sit-in, and vice versa.

36. But even though this may have been the case (and we accept that it was) something was obviously going wrong with the Appellant's making and recording of zero-rated sales.

37. HMRC's initial view was that the Appellant's level of zero-rated sales over the preceding four years was approximately 14%, which were considered to be too high. That initial view was vindicated by the two test purchases referred to above, which were done in response to information provided to HMRC on 10 July 2018 about the reprogramming of the till.

38. Both of those were made in the afternoon, when the takeaway was relatively quiet. Neither of which was made in the hurly-burly of the early hours of the morning.

39. Those test purchases are consistent with the purchase made by Officer Hewitt (from whom we did not hear oral evidence) on 7 August 2018, who was charged £1.25 for a cold dip, although there was no cold dip in a separate container, but only on the burger.

40. HMRC's view of all this is that the inaccuracy on the Appellant's VAT returns resulted from carelessness, and that the inaccuracies were not deliberate. That is the main reason why HMRC (in our view, sensibly) has not sought to raise a penalty assessment against the Appellant.

The period of the 7% agreement

41. There were meetings on 5 February 2018 and 27 March 2018. Following discussion on the latter occasion, we find that it was agreed that the figure of 14% was too high. HMRC and the Appellant therefore agreed, at that meeting, to a figure of 7% for zero-rated sales, which HMRC then applied to raise an assessment covering the preceding four years.

42. The Appellant broadly agrees with the 7%, but disputes that it should have been applied to the preceding four years.

43. We disagree. Looked at objectively, and irrespective of what the parties may or may not have believed at the time about the scope of the discussion, the discussion could only sensibly have been on the footing of four years, taking into account Officer Molloy's letter of 8 April 2016 (periods up to 01/16), and Officer Harvey's letter of 31 October 2017 (periods from 04/16).

44. Even if that were not the case, we find that Officer K Harvey's note (at page C38 of the bundle) of that meeting to be accurate, which records her acceptance on behalf of HMRC, that 7% (and not 14%) of sales should be zero-rated, 'going back 4 years'. Officer Harvey's note is entirely consistent with her letter, dated 28 March 2018 (i.e., the very next day) and the Schedules attached to it, which ran from period 04/14 to 01/18 inclusive.

45. Although the Appellant, through his then-accountant, quickly sought to challenge whether the discussion had been on the basis of one year or four years, neither he nor his accountant had put forward, as evidence, any note made at the time of the meeting. The best evidence is therefore the note from Officer Harvey.

Mr McLoughlin's role as a director

46. Mr McLoughlin is the director. There is no doubt, and we accept, that he works hard, and that his hours are long. Nonetheless, he has a duty as director to make sure that the company's books and records are kept properly, which includes making sure that its tills are correctly programmed and operational, and that the staff accurately take orders, record sales, and hand over the food which has been ordered and paid for.

47. That was his duty throughout the whole period of his directorship, from the day on which he took up office as a director. The split of workload between him and any other director does not make any legal difference. It does not make any legal difference that another director, said to have been a Mr O'Kane, 'was responsible for all accounting and other tax issues' until his resignation on 8 April 2016. This appeal concerns the VAT affairs of the Appellant, the limited company: not the VAT affairs of Mr O'Kane (or, for that matter, Mr McLoughlin).

48. Each director of a limited company owes statutory and other duties, not only to each other, but also, individually, to the relevant regulatory and other authorities. Therefore, it is no answer for Mr McLoughlin to say that, although he was a director from 2014, he nonetheless was not responsible for the tax affairs of the Appellant limited company until April 2016. As a matter of law, he was.

The reprogramming of the tills

49. Following the reprogramming of the tills in about June 2018 (as set out in the accountant's letter of 14 June 2018) the Appellant advanced an alternative analysis that the weighted average of VAT after taking account of cold sales should be 15% of gross takings.

50. However, we do not accept that figure. The difficulty which the Appellant faces here, and does not overcome, is that the two test purchases, made in July and August 2018 which revealed that although the tills had been reprogrammed to include cold dips and/or sides with every meal deal sold, those were not routinely, and as a matter of fact, being offered by the staff, or included in the meal deals. Those two test purchases are consistent with Officer Hewitt's test purchase on 7 August 2018.

51. Therefore, the till figures still did not actually tally up, as a matter of fact, even in mid 2018, with what was actually being sold.

52. Even if Mr McLoughlin was not personally aware of this, at the time, due to his other work in the business, and leaving this in the hands of the serving staff, he was nonetheless

responsible for ensuring that what was recorded on the till receipt accurately married up with what was actually passing over the counter to the customers.

BEST JUDGMENT

53. We have already noted that the Appellant agreed with the 7%, which represented a commercial compromise between its preferred figure and that of HMRC, albeit Mr McLoughlin considered that this should apply for one year and not four. We have rejected that argument for the reasons set out above.

54. Compromise was entirely rational since it is common ground that the Appellant's figures are such that the exact amount of sales which should be zero-rated cannot not accurately be established. The best that can be done, as the parties have done, is to seek to arrive at figures which are intelligible and reasonably robust.

55. We are satisfied that the material before HMRC from its visits, discussions, and test purchases was sufficient for them to form a view as to the assessment, and to maintain that view before the Tribunal. It is well established that the Commissioners do not have to undertake 'exhaustive investigations': see *Van Boeckel* [1981] STC 290 at 292 per Woolf J.

56. Otherwise, in a case of this nature, the Appellant bears the burden of showing (albeit, only to the civil standard - the balance of probabilities) that the best judgment assessment was not arrived at using best judgment, but was arrived at arbitrarily or was in some way tainted by bad faith or dishonesty. There is nothing of that nature in this case.

57. But even if the 7% had been in dispute, we would nonetheless have been satisfied that the assessment on that footing was right:

(1) It was a rational compromise, arrived at against the background where the till receipts did not allow the segregation of zero-rated from standard-rated sales;

(2) There was no reason for HMRC to depart from that percentage later in 2018, when the figures were for a later period, but the test purchases (which HMRC was not obliged to do) still showed a discrepancy between the till receipts and what was actually passing over the counter to the customer.

58. That stance seems to have been vindicated insofar as we were told by HMRC, and it was not disputed, that the last 2 VAT returns for the Appellant recorded 8% as zero-rated sales.

OUTCOME

59. For the above reasons, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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.

Dr Christopher McNall

TRIBUNAL JUDGE

RELEASE DATE: 16 January 2020