TC02315

Appeal number LON/08/0391

VATA 1994 s73 – incomplete records – assessment to 'best of their judgment' – whether all relevant evidence taken into account – prolonged delays by taxpayer - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KANDIAH SKANDAMOORTHY

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR HARVEY ADAMS FCA

Sitting in public at 45 Bedford Square London on 28 September 2012

The taxpayer did not appear and was not represented

Ms Gloria Orimoloye of HMRC Solicitor's Office for the Crown

DECISION

1.

2. 1 This case was first heard on 10 December 2010, when before the Tribunal was an assessment made on 9 February 2005 for £27,325 tax and £1,920.77 interest in respect of tax underdeclared from 6 November 2002 to 31 December 2003. The taxpayer was represented by Mr R Paramesuhran of Waran & Company and the commissioners by Ms G Orimoloye.

3. 2 The taxpayer was registered for VAT with effect from 6 November 2002 following the transfer of a going concern, the business – an off-licence - being carried on at 134 Forest Road, Walthamstow, London E17 6JQ. No return was made for the period of the assessment and that issued was therefore an estimated assessment issued to the best of the commissioners' judgment. It was initially estimated, on the basis of incomplete records submitted by the taxpayer covering the period in question, at approximately £25,000 and put to him in January 2004 but in the absence of any response the commissioners made more precise calculations and the assessment under appeal was issued on 9 February 2005. To reach this figure, the commissioners had calculated the business's average daily takings at £468.63 and from that had concluded that total sales for the period were £213,620.40, with input tax not exceeding £6,000.

4. 3 In June 2005, the taxpayer's then representative claimed on his behalf that Mr Skandamoorthy had never been involved day to day in running the business but had, in effect, delegated the management and record-keeping of it to his nephew and his wife, who it was said held the liquor licence in his own name. Although the application for VAT registration had been made by Mr Skandamoorthy for himself, it was now said that he had been incorrectly registered and that his nephew and wife should have been registered instead. The commissioners, however, had evidence that the business had indeed been transferred to the taxpayer on 6 November 2002 by a Mr Bektas Kara and that Mr Skandamoorthy had himself confirmed that to them; and he indeed repeated that confirmation on 25 June 2005.

5. 4 On 14 June 2005, the taxpayer notified the commissioners that the business had ceased trading on 31 December 2003 and accordingly applied for deregistration. Revised calculations were put to the commissioners on 25 June 2005 estimating the average daily takings as only £339.80, but it was still clear that no complete or accurate records were available and in particular that in many instances purchase invoices either did not exist or that those that did exist were not addressed to the business. The commissioners did not accept the revised calculations and the taxpayer's representatives replied with a further estimate of daily takings at £400, and again arguing that he should not have been registered. In continued correspondence, in July 2005, the representatives revised their estimate of daily takings again, this time to £422.61.

6. 5 A meeting to resolve matters was called for by the representatives on 10 September 2005, to which the commissioners replied seeking an agreed date on 15 September, after which no further communication took place until 16 July 2006 when

the commissioners had been active in seeking to recover the debt. New representatives claimed to have submitted an appeal to the tribunal in January 2007 although there is no record of it, and they submitted the present appeal to the tribunal dated 21 January 2008.

7. 6 In the notice of appeal, showing Waran & Co as representatives, the following grounds were stated:-

8. 1 Notice of assessment is unfair and incorrect and not taken the facts completely.

9. 2 VAT officer Mr Cordwell did not acknowledge or cooperate (?) with us when records were handed over.

10. 10. 3 No correspondence were received regards local review from Customs.

11. 4 [left blank]

12.

13.

14. 7 Amended grounds of appeal were lodged by Waran & Co dated 27 November 2009:-

15. 4 Further evidence and documents were provided to the commissioners with the amended calculation for the commissioners to review and agree between us. We have agreed to have the registration date should be 6 November 2002 and only not agreed is the assessment which we have provided with our revised calculation.

16. 16. 8 From this it is apparent that the issues in the appeal are the validity and amount of the assessment, and that the claim that the present appellant should not have been registered is not pursued.

17. 9 When the appeal came on for hearing in December 2010, the appellant's representative submitted that that a substantial number of records existed which would bear on the amount of the assessment, but which had not been seen by the commissioners. No explanation as to why these documents had not been brought to the hearing or proffered to the commissioners was forthcoming; it appeared to us, especially since the taxpayer was professionally represented, that the appeal up to that point had not been conducted reasonably, but the commissioners declined to seek a costs order.

18. 10 In view of the appellant's claim, however, we directed in the interests of justice that the appeal be adjourned and that the documents, notes, records and other papers which the appellant claimed were relevant should be delivered to the commissioners by 7 January 2011. They were so delivered, and the commissioners by 14 January had examined them and issued a reasoned revised calculation to the appellant's accountants Waran & Company showing tax due of £17,277.31, plus interest and penalties. That was contested by the accountants on 8 February and HMRC replied on 14 February maintaining their estimate. The points of disagreement concerned

input invoices claimed by the taxpayer which HMRC did not accept because they were not addressed to him; they allowed £14,293.44 input tax and estimated daily takings at £508.62 and assumed a mark-up of 50%.

19. 11 Two more letters were exchanged between the parties in February, which took the matter of the invoices no further, but Waran & Company claimed that the business had ceased by 10 October 2003 and that the average daily takings figures should be put at £422.81. A letter dated 14 June 2005 from the taxpayer to the commissioners was produced, however, in which he stated "Here I let you know that after 31 December 2003 there is no business whatsoever in that shop", and requesting deregistration. The commissioners replied on 14 February that they maintained their estimate of average daily takings at £508.62 because it was based on more till 'z' readings than the accountants were citing and took into account over rings that could be confirmed. The commissioners' position was maintained in further correspondence in February which took matters no further.

20. 12 Waran & Company did not pursue the correspondence again until 10 October 2011 when they sought a settlement with a revised estimated figure for average daily sales of £454.02 based on the number of days on which they said there were very low sales being taken out of account. The commissioners' response on 26 October 2011 did not engage with that suggestion but referred to a telephone call with Waran & Company in which it apears the proposal was rejected; the commissioners formally demanded that the outstanding tax, interest and penalties should now be paid. There has been no response.

21. 13 When the case was called on for hearing on 28 September 2012, there was no appearance by or on behalf of the taxpayer. We were satisfied that he had received notice of the hearing and, having regard to rule 33, we considered it in the interests of justice to proceed in his absence.

22. 14 *Value Added Tax Act 1994 - s73 Failure to make returns etc*

23.

24. (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 the 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 judgment and notify it to him.

25. 15 The essential case law in this matter consists of the familiar decisions of Woolf J (as he then was) in *Van Boeckel v CEC* [1981] STC 290, and the decision of Dr Nuala Brice in *McCourtie v CEC* LON/92/191. In *Van Boeckel*, referring to the requirement that assessments must be made by the commissioners "to the best of their judgment", the learned judge said:

26. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed upon the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that

the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them.

27. 16 In *McCourtie*, Dr Brice added:

28. In addition to the conclusions drawn by Woolf J in *Van Boeckel*, earlier tribunal decisions identified three further propositions of relevance in determining whether an assessment is reasonable. These are, first, that the facts should objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and, finally, that any sampling technique should be representative and free from bias.

29. 17 We are fully satisfied that these criteria have been met by the revised assessment made in this case. The commissioners have been remarkably patient and willing to consider further evidence and further proposals from the taxpayer over a very extended period, the taxpayer has been given ample opportunity to put new material before them and they have taken it into account reducing the assessment by some £10,000. There is every indication that the commissioners have given careful and repeated consideration to the evidence. We are satisfied that the commissioners' revised estimate of tax due of £17,277.31 has been made to the best of their judgment and that the appeal must therefore be dismissed.

30.

31. Appeal rights

32. 18 Because the appellant was not present at the hearing at which this appeal was determined, he entitled under rule 38 to apply to the Tribunal for it to be set aside if the Tribunal considers it in the interests of justice to do so; his application must reach the Tribunal no later than 28 days after the date on which the Tribunal sent this Decision to him or his representatives.

33. 19 This document contains the 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 no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 18 October 2012