[image removed]

TC03749

Appeal number: TC/2012/01515 & TC/2012/08077

TYPE OF TAX – VAT – assessment upheld and appeal dismissed – section 60 penalty appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HAMID REZA ROWSHANZAMIR t/a YUMMIES PIZZERIA **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD BARLOW
MRS MARY AINSWORTH

Sitting in public at Manchester on 13 January 2014 and 26 February 2014.

Mr Philip Ford for the Appellant

Miss Sue Ellwood for the Respondents

DECISION

1. The appellant, Mr Hamid Reza Rowshanzamir, was assessed for VAT in the sum of £42,227.00 for the period 6 April 2006 to 31 December 2009. That assessment was notified to him by a letter dated 12 May 2010. By a letter dated 21 December 2011 the assessment was reduced to £40,334.00 but the period covered by it was not altered. By a letter dated 1 August 2012 the appellant was notified that a penalty under section 60(1) of the VAT Act 1994 had been imposed on him in the sum of £36,300.00 which was based on the, by then amended, amount of tax assessed and which was reduced by 10% for co-operation. The penalty assessment was for the dishonest evasion of VAT.

2. The appellant had operated the business known as Yummies Pizzeria from premises at an industrial estate in Skelmersdale. He ceased to operate the business a few months after the respondents' officers began the investigation. The nature of the business was the delivery of fast food mostly consisting of pizzas and kebabs in response to orders obtained mostly by telephone. Customers did not normally attend the premises though a few called in in person en route from a local pub.

3. At about 00.20 hours on Sunday 1st March 2009 HMRC officers Lybert and Duxbury attended the premises to make an unannounced visit. They spoke to a man identified as the manager and Mr Lybert said in evidence that two other persons were working at the premises, one cooking and one as a delivery driver. The appellant was not present.

4. The officers noticed that four order books were in use and that the telephone rang 'constantly' though whether that means that a single call went unanswered or a succession of calls were received is unclear. Some orders were also being recorded on paper as well as in the books. Mr Duxbury wrote his name on three of the four order books so as to identify them later if necessary. The manager telephoned someone he described as the owner and passed the phone to Mr Duxbury who spoke to the appellant or someone purporting to be the appellant. In fact we find that it was the appellant for reasons we will explain in a moment. The appellant said he would not speak to the officers over the phone and needed to speak to his accountant.

5. The manager then spoke to the appellant on the phone in a foreign language and thereafter refused to allow the officers to take away any records and ceased to co-operate with them and asked them to leave. The officers left a card asking the owner of the business to contact them. The officers took with them a menu which showed the items available for sale and their prices.

6. On the following day the appellant's then accountant, a Mr Rohani, telephoned Mr Duxbury and it was apparent that the appellant had been in contact with him. That confirms, we find, that it was Mr Rowshanzamir that Mr Duxbury spoke to on the telephone during the visit. The reason that is significant is that the appellant claimed, while giving evidence to the tribunal, that he had not in fact been running the business at the time of the officer's visit and that he had sublet the premises and in effect the

business to someone else at that time with a view to that person buying it. That was something that had not previously been claimed either by the appellant or any of the three accountants who acted for him between the time of the visit and the hearing. We find the appellant's evidence on that point was clearly untruthful. The contention that the appellant was not running the business at that time was entirely inconsistent with the fact that the appellant's accountant spoke to the officer the day after the visit and that both he and either of the other two accountants who acted had failed to mention then or later that the appellant was not running the business.

7. After some time and several reminder letters Mr Rohani agreed to meet the investigating officers and, at the meeting, he handed to them thirty order books which included the three signed by Mr Duxbury. The books were not dated and it was impossible to discover what, if any, sequence they covered. The appellant did not attend that meeting.

8. There were some times shown on some of the books which suggested that certain entries related to particular shifts but the officers concluded that the order books were not an adequate audit trail from which to calculate the true takings of the business, not least because they had seen takings recorded on pieces of paper as well as in the books. Such analysis of the books as was possible suggested that the takings were higher than those declared in the appellant's tax returns and in the records kept by the accountant (which also did not agree with each other).

9. We find that the officers were entitled to reject the evidence of takings presented to them as a correct basis for assessment. They decided to carry out an exercise based on purchases. Even this may have been incomplete because the purchase records themselves appeared to be incomplete in that there were gaps during which certain regular items were not purchased.

10. Mr Lybert set his assessment out in detail in a letter dated 22 October 2010 sent to Mr Rohani. This is the reduced assessment of £40,334 which is under appeal. We will summarise it.

11. Mr Lybert identified the purchase in the records for the period from April 2007 to March 2008 which had been given to HMRC by Mr Rohani. He had to make certain assumptions and it is important to note that he had not been able to speak to the appellant who was abroad by the time Mr Rohani had met the officers.

12. Mr Lybert assumed that all pizza boxes were used either for pizzas or garlic breads – the latter in the case of 10 inch boxes only. Based on what Mr Rohani told Mr Lybert, he allowed 25% of the boxes as having been used for garlic bread. In respect of the 10 and 12 inch boxes he allowed 19% and 8% respectively as having been used in 'two for one' deals which he calculated by determining the proportion of takings itemised in the record books which exceeded the amounts for which the menu said such offers were available, thereby assuming in the appellant's favour that all customers who spent enough to qualify for the offers would have taken them up. Applying those percentages to boxes purchased and the menu prices shown on the menu taken up on the 1 March visit takings for pizzas were calculated.

13. Later, the appellant criticised these calculations on the basis that Mr Lybert should have allowed 3% wastage on pizzas and that the prices would have been lower in the earlier years. As far as wastage was concerned Mr Lybert pointed out that as he had worked on boxes there would have been no wastage or at most minimal wastage as spoiled or incorrectly cooked pizzas would not have been put in boxes. Therefore he concluded that boxes used equated to pizzas sold.

14. The appellant also raised the question whether the closing stock of boxes should have been taken into account as at the date the business closed and was sold to a new owner. But as no opening stock figure was given to him we hold that it was not necessary or even possible for Mr Lybert to allow for that and indeed there is no reason to think it would have helped the appellant if he had done so.

15. As far as kebabs were concerned, the calculation of the numbers produced was based on standard figures held by HMRC as to the amount of meat taken to produce a single item which was then applied to the meat purchases (both lamb and chicken) to calculate a number produced. The appellant claimed his portions were larger than average but in the absence of any corroborative evidence of that contention we do not accept it. We have already held that Mr Rowshanzamir lied about the business being run by someone else at the time of the unannounced visit and we are not satisfied that he told the truth about the large size of his kebabs.

16. Mr Lybert deliberately omitted shish kebabs and a number of other items from his calculations because they were in small quantities though in doing so he was favouring the appellant.

17. Beef and chicken burgers, southern fried chicken, chicken nuggets and goujons and onion rings were taken as having been sold in the same numbers as they had been bought. Mr Rohani had asked for 3% wastage but Mr Lybert pointed out that, as these items were all cooked from frozen, there should have been no wastage. Mr Lybert took a portion of chips to be six ounces although Mr Rohani had asked for eight ounces to be used and for 3% wastage. The wastage figure was refused because the chips were cooked from frozen and Mr Lybert rejected the eight ounce figure as the chips were French fry style and in his experience would be sold in smaller portions sizes than chip shop chips would be and he took six ounces as a reasonable figure.

18. The appellant asked for 25% of canned drinks purchased to be taken out of the calculations on the basis that the staff used them. Mr Lybert said he thought that figure was excessive but he decided to allow it anyway, again in the appellant's favour.

19. Mr Rohani agreed Mr Lybert's figures for other items such as chocolate cake and garlic mushrooms.

20. Gaps in the purchase records where some of the apparently essential items were not purchased for several months also gave rise to the conclusion that the assessment

was not excessive because Mr Lybert did not add any supposed purchases to fill these gaps.

21. Although the appellant's later representatives have argued that some reduction should have been made for the assumed effect of inflation over the period of assessment no evidence was given by the appellant about the actual effect of that and, as with other issues of fact relating to the calculations, the burden of proof rested on the appellant to prove that effect if he contended for it and he has failed to do so.

22. Given the inadequacy of the appellant's records we hold that the respondents were entitled to raise an assessment as there was reason to believe there had been an under-declaration. The legal requirement was therefore that the assessment should be to the Commissioners' best judgment which is recognised by authoritative decisions of the High Court and the Court of Appeal to be satisfied if the Commissioners make a bona fide attempt to estimate the tax due on some reasonable basis.

23. We hold that Mr Lybert's assessment was made bona fide and to best judgment in the relevant sense.

24. The evidence of the appellant came nowhere near refuting that assessment even if we had been fully satisfied that he told the truth. But given that we also reject his evidence as unreliable and in part untruthful we have no hesitation in concluding that the assessment was properly made and that the sum assessed is due.

25. Mr Rohani asked the officers to raise the assessment from 1 April as that was the start of the appellant's accounting year. Whilst a different and later effective date of registration might have been necessary on the assessed figures that date was therefore an earlier date agreed by the appellant and so we uphold the period of the assessment as well as its calculation.

26. Officer Lynda Smith gave evidence in support of the penalty assessment. She said she had decided to recommend that it be imposed on the grounds that the appellant had told his manager to remove the records from the officers' view at the time of the unannounced visit and that he had subsequently failed to give any reason for that action and because he had failed to give any explanation for the difference between the assessed turnover and that claimed by the appellant.

27. She said that the only reason the appellant could have had for the removal from the officers of the records would be that he knew they would show that the takings were above the registration limit.

28. Whilst the decision about whether dishonesty has been proved is one for the tribunal and we need not be limited by the reasons given by HMRC, we certainly do not think those reasons prove dishonesty on a balance of probability. Mr Rowshanzamir might just as well have panicked when he heard the officers were at the premises or he may well have simply wanted to do what he said he wanted to do which was to speak to his accountant first before allowing them to see the records. It is also apparently true that the appellant's accountant had not advised him he needed

to be registered. Had he so advised him and had Mr Rowshanzamir failed to heed his advice Mr Rohani should have ceased to act which he did not do until much later.

29. We are not satisfied the respondents have proved dishonesty.

30. We therefore allow the appeal in respect of the penalty and dismiss the appeal in respect of the assessment. The sum of £40,334.00 is therefore payable by the appellant.

31. 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.

RICHARD BARLOW
TRIBUNAL JUDGE

RELEASE DATE: 24 June 2014