TC02896

Appeal number: TC/2011/03811

VAT –Assessments –s73 VATA 1994 –preliminary issue as to whether assessment duly made and notified – the assessment was made and it was notified – preliminary issue determined in Respondents' favour

FIRST-TIER TRIBUNAL
TAX CHAMBER

SUNLANDER OUTDOOR PRODUCTS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at 45 Bedford Square, London on 17 June 2013

Mr Les Minney, chartered accountant, of Minney & Co. for the Appellant

Mr Alan Bates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

Introduction

1. The underlying appeal in this matter relates to a purported assessment against the appellant for £144,152 in relation to VAT periods 02/03 through to 05/05. This decision is however in relation to the preliminary issue of the validity of the purported assessment.

2. The issue of how the "validity" of an assessment is to be approached given the relevant legislation and case law is discussed below. The appellant puts the issue of validity in terms of there having been no valid assessment raised or communicated to the appellant. HMRC point to a distinction drawn in legislation and in case law on making an assessment on the one hand and notifying the assessment on the other. The parties dispute what actions were carried out by HMRC and whether certain documents were sent by HMRC and received by the appellant.

Background facts

3. The appeal which gives rise to these proceedings was lodged on 13 May 2011. One of the grounds of appeal was the validity of the assessment purported to have been made in February 2006 in the amount of £144,152 in relation to VAT periods 11/03 through to 05/05. The appellant also challenges the quantum of the assessment.

4. On 12 March 2012 I heard HMRC's application to strike out the appeal in so far it challenged quantum on the grounds that that aspect of the appeal was out of time, together with the appellant's application for permission to extend its time to appeal. HMRC's application was dismissed and the appellant's application was granted. The full reasons for the decision are set out in *Sunlander Outdoor Products Limited v HMRC* [2012] UKFTT 325 (TC). That hearing proceeded on the assumption there was a valid assessment as of 2 February 2006. The current hearing was listed further to a direction made by the Tribunal on 8 October 2012 following an application made by consent by the parties for a preliminary issue determination on the matter of assessment validity.

5. For the purposes of this hearing it is sufficient to recount the following by way of background. The main business of the appellant was to sell outdoor furniture. The directors of the appellant were Mr Richard Swift and Mr Morris. The company's accountant was Mr Les Minney. The company ceased trading some time in 2005. The company's registered office address was the address of its accountants in Union Street, Dunstable. The appellant was selected by HMRC for a visit and on 10 January 2006 HMRC Officers Ms Henton-Pusey and Miss Alison France attended at the address of the accountants. HMRC took away the records of the appellant held by Mr Minney. Following examination of the records HMRC came to the view that there were errors which resulted in both under and over-declarations of VAT and wrote to the appellant on 2 February 2006.

6. The letter included the following:

> "…You will, therefore, shortly be receiving a Notice of Assessment (VAT 655) for £144,152. This assessment is issued without prejudice to any further action that may be taken by the Department. You will find a list of the errors in the enclosed Schedule of Assessment. A more detailed schedule will be sent to you in due course."

7. It is common ground that the letter of 2 February 2006 was received by the appellant but that the "more detailed schedule" was not created or therefore sent.

8. But, there is a dispute of fact as to whether the "Schedule of Assessment" said to be enclosed was enclosed or if it was enclosed whether it was received with the letter. It is also disputed whether a Notice of Assessment (VAT655) was subsequently produced, sent and received.

9. The appellant was wound up on 21 March 2007 upon the petition of HMRC and joint liquidators were appointed on 7 September 2007. The liquidators were represented by Clarke Wilmott solicitors who forwarded correspondence they had received from HMRC to Mr Minney on 28 March 2008. This included a document headed "Schedule of Assessment". At the foot of the schedule the following was stated "Assessment Produced By: Julie Fitzhenry INSOL 104 B06" and "Date: 17/11/2006". The parties were alerted to the fact the date stated on this document post-dated the date of the letter of 2 February 2006 by Judge Mosedale at a hearing of HMRC's application to strike out an earlier appeal. That hearing took place on 28 April 2011.

10. The disputed facts and their relevance to the preliminary issue are discussed in more detail below.

Evidence

11. On behalf of the appellant I received witness statements and heard oral evidence from Mr Les Minney, the appellant's accountant and Mr Richard Swift, director of the appellant. On behalf of the Respondents, I received a witness statement and heard oral evidence from Julie Henton-Pusey, the visiting officer. All the witnesses were cross-examined. I directed, following an application by HMRC, that Mr Minney give his evidence without Mr Swift being present.

Framing of preliminary issue on assessment validity

12. HMRC point to a distinction drawn in legislation and in case law on making and notifying the assessment. The appellant puts this in terms of there being no valid assessment having been raised or communicated to the appellant.

Law

13. Section 73(1) of the Value Added Tax Act 1994 ("VATA") as it was in force at the time of the purported assessment stated:

> "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 judgement and notify it to him".

14. Section 77(1)(a) VATA stated:

> "(1) Subject to the following provisions of this section, an assessment under section 73…shall not be made-
>
> (a) more than [3] years after the end of the prescribed accounting period or importation or acquisition concerned…"

15. In making their submission that the above legislation drew a distinction between making and notification of assessments HMRC also drew my attention to a similar distinction drawn between the two acts of making and notifying in s77 VATA (Assessments: time limits and supplementary assessments).

16. The appellant referred me to the decision in *House (trading as P&J Autos) v CCE* [1996] STC 154 as authority for the proposition that the minimum requirements for a valid assessment are that it should "state the name of the taxpayer, the amount of the tax due, the reason for the assessment and the period of time to which it relates". The appellant also accepted that both the High Court and Court of Appeal have accepted that those minimum requirements may be satisfied by their being contained in one or more documents sent together.

17. By way of authority for the proposition that making and notification are two separate acts HMRC took me to the Upper Tribunal decision of *Queenspice Ltd v Revenue and Customs Commissioners* [2010] UKUT 111(TCC) where Lord Pentland after referring to observations of Parker LJ (with whom Hooper and Pill LJJ agreed) in *Courts plc v CCE* [2004] EWCA Civ 1527 stated:

> "…the passage makes it clear – as has been made clear in the past – that i) the assessment of the amount of tax considered to be due pursuant to s73(1) of the 1994 Act, and (ii) the notification thereof to the taxpayer, are separate operations: see also the Court of Appeal in *House* ([1996] STC 154 at 161), per Sir John Balcombe. Secondly, Jonathan Parker LJ also makes clear that the 1994 Act does not prescribe a time limit in respect of notification. This is consistent with the principle that notification can be validly given by means of the provision of several documents, issued over time and taken together."

18. Although the appellant has put its case in terms of issuing or raising an assessment on the one hand and communicating it on the other, there was nothing in any of its arguments which suggested that it disagreed with the proposition that when the legislation spoke of making and notifying assessments these were two different operations. The more important question though is what the consequences are of making such a distinction.

Consequences of making / notification distinction?

19. HMRC referred me to the High Court case of *Grunwick Processing Laboratories Limited v HMCE* [1986] STC 441. This concerned an appeal from the VAT tribunal. The taxpayer submitted that the assessment was not notified to the taxpayer as the statute required it to be and the assessment was therefore flawed. The Tribunal chairman had found that there was no proper notification but also that the result was that the assessment was simply unenforceable unless and until it was notified properly. Macpherson J dealt with the appellant's argument on the point as follows:

> "The point has very little, if any, merit since the taxpayer company plainly got the assessment through their own solicitors, but it is a point which exists and had to be met, and has to be met by me.
>
> I conclude that on the facts the chairman was correct and he was correct in his conclusions. The matter could be and indeed, in my judgment, has been rectified by notification now. There has been formal notification in accordance with the 1983 Act so that any irregularity is cured, and the taxpayer company can no longer have the protection, in my judgment, of that argument."

20. In *Queenspice* the following passage from De Voil indirect tax service was quoted with approval:

> "an assessment is not invalidated, it is merely unenforceable unless and until it is duly notified, and a failure to notify can thus be rectified. Such rectification may take the form of the inclusion of a copy of the assessment in a statement of case sent to the appellant."

21. HMRC argue that it is enough for the purposes of today's hearing to show that the assessment was made. Where an assessment had been made but not notified the assessment is not invalid but merely unenforceable until such time as the trader has received notification of the assessment and has therefore had an opportunity to lodge an appeal against it. The appellant did not put forward any countervailing legal arguments, however having considered the authorities I was referred to I am not persuaded, for the reasons outlined below, that they necessarily establish with enough certainty that it is sufficient to stop my consideration at the issue of whether the assessment was made and not go on to consider the issue of notification too.

22. In *Grunwick* while Macpherson J clearly endorsed the Tribunal chairman's view as to the consequences of non-notification it is also clear he agreed there had been the necessary notification on the facts, and there is no discussion as to why notification was only relevant to enforceability of the assessment. Further, being an appeal from the VAT Tribunal as opposed to say the county court, the issue of whether the assessment was enforceable or not was not before the tribunal or the High Court.

23. Similarly the Upper Tribunal in *Queenspice* was not concerned with enforceability of the assessment but an appeal from the First-tier Tribunal, and amongst other matters whether an assessment was invalid because it was not related

to a defined accounting period. After considering a number of documents and schedules the Upper Tribunal found at [39] that:

> "…the appellants were accordingly notified of exactly what the effect of the assessment was and as to the time periods to which it related".

24. Although the Upper Tribunal clearly endorsed there being two separate actions of making and notification it did not stop its analysis short at the operation of "making" but went on to consider notification.

25. While I have no reason to think that the proposition that due notification is a pre-requisite to enforceability is not correct the statements to that effect in the authorities I was referred to make this point by way of observation rather than as a matter of binding precedent. The authorities do not in any case establish that an assessment is capable of being appealed to the tribunal and determined by the tribunal if the assessment was made but was not notified. It will I think therefore be necessary to consider both whether the purported assessment was made and whether it was notified.

Was the assessment made?

26. The authorities I was referred to did not set out what requirements needed to be satisfied in order for an assessment to be regarded as made. It has already been discussed above at [16] that certain matters must be specified in order for there to be notification. As set out by May J in *House* as quoted in *Queenspice* at [25] these are:

> "(a) the taxpayer's name, b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates."

27. Given these are the minimum requirements for notification of an assessment it seems to me that by implication these pieces of information ought to be established and recorded within HMRC by the time the purported assessment is said to have been made. In relation to the level of detail required for the reason for the assessment I note from the decision in *Queenspice* at [30] that the reason for the assessment was stated as being "that the correct amount of VAT was not declared for the periods shown." None of the other documents referred to by Lord Pentland mention further reasons given and at [36] he concludes that when taken together the documents he identified set out clearly and unambiguously, the four matters identified as being the necessary elements of valid notification. I take from this that the requirement to notify "the reason for the assessment" does not necessarily require detailed reasons to be notified.

28. Ms Henton-Pusey's evidence included a description of HMRC's procedures for inputting figures onto HMRC's system and the generation of documents and schedules and her recollections about issuing what she termed a pre-assessment letter and attached schedules. HMRC argue Ms Henton-Pusey made the assessment on or around 2 February 2006 based on her recollection of creating the Schedule of Assessment, the reference to the Schedule as an enclosure in her letter of 2 February 2006 and HMRC's records that a form VAT655 was scanned to their Electronic Folder (EF) system on 4 February 2006 and issued to the appellant on 7 February

2006. Ms Henton-Pusey's evidence states it was not possible for there to have been a VAT655 generated without prior production of a VAT641 and Schedule of Assessment.

29. The appellant disputes that an assessment was made (or using their term "raised"). Their case rests on attacking the credibility of the evidence given by Ms Henton-Pusey. I disagree with that suggestion for the reasons set out at [44] to [45] below. I also think that the appellant's point that Ms Henton-Pusey's evidence lacks weight because it speaks to matters outside her knowledge is not founded. Her evidence as to assessment procedure was within her frame of reference and not an area of specialist expertise. I accept her evidence that the procedure was for details of the period, the type of error, total VAT due to/from HMRC to be keyed onto a particular tab (ADS Data) on the Officer's Assessment section and that this information automatically populated the next tab "VAT 641". Reason codes for the errors were selected from a drop-down list setting out the key to the reasons and the codes are listed on the VAT641. The VAT 641 then had to be printed for signature by the officer and counter signature by a checking or authorising officer. When the VAT 641 was printed a Schedule of Assessment from the details on the ADS Data tab was automatically printed too and this feature could not be overridden. The assessing officer then sent the authorised VAT 641 to be keyed onto HMRC's mainframe which in turn automatically generated a VAT 655 Notice of Assessment(s) and/or Overdeclaration. One copy was issued to the trader at the address on the VAT655 and the other copy was captured to the Electronic Folder with the date of issue to the trader noted on a secure note facility.

30. I find that this process was followed by Ms Henton-Pusey in relation to the purported assessment. I was able to examine a copy of the VAT641 Officer Assessment which was printed out and signed by Ms Henton-Pusey as assessing officer and Miss Alison France as checking officer and counter-signatory on 2 February 2006. The VAT655 was created and scanned to the EF system on 4 February 2006.

31. I conclude the assessment was made on 2 February 2006. The appellant points to the fact the VAT655 which was signed and countersigned does not bear a date. I understood their concern on this to be raised principally in the context of the issue of whether any assessment was notified or, as the appellant put it, whether any assessment was communicated. But to the extent the appellant is seeking in any way to use this as a basis to question whether the assessment was made I do not think this would get them anywhere. The decision sets out at [55] the reasons why the copy document does not bear a date stamp (which I accept) and in any case I find that the act of making the assessment occurred beforehand on 2 February 2006 when the relevant details were confirmed and checked by the respective issuing and checking HMRC officers.

Was the assessment notified?

32. It is common ground that while HMRC's letter of 2 February 2006 by itself was insufficient to constitute notification of an assessment because it lacked all of the

necessary details, that the letter when read with either the "Schedule of Assessment" said to be enclosed with that letter or the form VAT655 did constitute due notification. There is a dispute of fact however over whether either of these documents were sent or received.

Was the "Schedule of Assessment" created and enclosed with the 2 February 2006 letter?

33. The evidence of Mr Minney and Mr Swift was that no enclosure was received with the letter of 2 February 2006 and that Mr Swift sought Mr Minney's advice as to what to do about this. Mr Minney's advice was to do nothing and await the "detailed schedule" which Ms Henton-Pusey's letter said would follow on the basis that there was no point in discussing the matter further until the detail was known. Mr Swift confirmed he received this advice.

34. Ms Henton-Pusey's evidence was that she enclosed the Schedule with the letter to the appellant at his principal place of business (the Union Street address of Minney & Co.). When directed in cross-examination to the copy of the letter of 2 February 2006 which was addressed to Mr Swift's home address she explained this letter was sent by way of "back-up" as she was not sure whether Mr Minney was still acting for the appellant. To create this further copy Ms Henton-Pusey had over typed Mr Swift's address onto the version of the letter with the Union Street address. No copy was kept of the version of the letter with Mr Swift's address on HMRC's system.

35. HMRC highlight the very late stage at which the allegation that the Schedule was not enclosed had been raised in that neither Mr Minney nor Mr Swift raised any issue about the schedule not having been enclosed until many years later. Mr Swift had telephoned Ms Henton-Pusey on 7 February 2006 but did not bring up the fact that he had not received the enclosure in that conversation.

36. HMRC also drew attention to the fact Mr Minney had subsequently stated in a letter to Ms Henton-Pusey on 6 October 2010 the following:

> "Would you please provide for each period a precise and accurate reconciliation between the figures in that letter per quarter and the original schedule of assessment that was forwarded to Mr Swift on 2 February 2006".

37. In response to cross-examination on this point Mr Minney explained that he would have been referring to the correspondence that had been forwarded to him from the liquidator to Minney & Co.

38. This is consistent with the fact that on 28 March 2008 Clarke Willmott who were acting for the liquidator wrote to Minney & Co. stating:

> "Please find attached a letter from HM Revenue & Customs dated 2 February 2006 sent to Mr Swift direct, enclosing a Schedule of Assessment along with historic return details. These are the details that our client has provided to us."

39. Taking account of the fact that neither Mr Minney or Mr Swift are legally qualified I do not find it surprising that they did not seek to raise any point about the schedule not being enclosed until a question mark had been raised over the assessment in the course of a Tribunal hearing on 28 April 2011. Assessment validity not being in issue from the point of view of Mr Minney and Mr Swift I accept Mr Minney's explanation as to his statement in the letter of 6 October 2010. The statement does not in my view demonstrate that the Schedule of Assessment was enclosed with the 2 February 2006 letter. There also does not seem to me anything untoward to be drawn from the fact that Mr Swift did not raise the non-enclosure of the schedule in his telephone conversation with Ms Henton-Pusey on 7 February 2006. Mr Minney's advice to Mr Swift, the merits of which are not in issue, had been to wait for the detailed schedule. Mr Swift accepts he told Ms Henton-Pusey in that conversation, that there was no money, and that she need not bother with sending an assessment. If the schedule had not been enclosed, it does not strike me as surprising, given Mr Swift's attitude that he would be chasing for the enclosure to be sent.

40. The matter which appears to have precipitated the issue of assessment validity being raised was that it was noticed by the Tribunal Judge at the hearing on 28 April 2011 that the schedule bore a later date (17 November 2006) than the covering letter of 2 February 2006. However I accept HMRC's explanation that the date of 17 November 2006 is a reflection of the date the assessment was printed out, not the date of its creation. The dating of the schedule does not show the schedule was not produced before that date or point one way or other as to whether any schedule was enclosed with the letter as stated.

41. Given the mail-forwarding procedures which I accept were in place at Minney & Co. if it is correct that a letter was also sent to the appellant at Minney & Co's Union Street address this would be forwarded, unopened to Mr Swift at his home address. I need to consider Ms Henton-Pusey' evidence as to sending the letters and enclosures and Mr Swift's evidence that he did not receive the Schedule of Assessment.

Reliability of Ms Henton-Pusey's evidence

42. The appellant argued that Ms Henton-Pusey's evidence was unreliable for a number of reasons. She had admitted she was responsible for a mistake in the VAT fraction used to calculate the figures. This was a basic error and any failing lay in assuming the calculation of a colleague was correct rather than in making the error herself. Similarly the appellant invited me to find her evidence to be less credible because the letter to Mr Swift had not been signed. HMRC suggested this may have been because it was a copy letter. But the letter was written as a separate letter to Mr Swift rather than copied. Therefore it ought to have been signed. The other explanation was that this was a file copy of a copy of which had been signed.

43. A further matter is Ms Henton-Pusey's admission that a more detailed schedule did not follow. I accept that this was because her intention was that the detailed schedule was to be produced after a meeting had taken place but that in fact no meeting had taken place. If there was any error it was in Ms Henton-Pusey's 2

February 2006 letter not linking the production of the more detailed schedule with action on the appellant's part.

44. From the above the appellant seeks to build a picture of an officer whose work is prone to error and who therefore lacks credibility. I am not satisfied this is the case.

45. The picture I formed was one of a person who while perfectly competent was not perfect and who was susceptible to human error. Ms Henton-Pusey was an experienced officer having worked for the Respondents for 17 years. An error in relying on a colleagues' work, or not signing a letter, or not constructing a letter to reflect conditionalities does not indicate to me a greater propensity to be careless about putting in enclosures with letters or indicate that her evidence on the procedures and practices inherent in her day to day duties in the position she held was not to be believed. Ms Henton-Pusey gave her evidence in a straightforward manner without any prevarication, was non-defensive and frank about any shortcomings. I am satisfied she was a credible witness.

46. If there is any issue over Ms Henton-Pusey's evidence it is not credibility but simply the length of time over which she makes her recollection of having put an enclosure in with the letter. While it may right that as a generality a person would tend to notice if any enclosure was not put in with a letter particularly if the enclosure was thick and the envelope was correspondingly not thick enough to account for both the letter and the enclosure being contained within it I approach with caution any suggestion that an officer in 2013 specifically remembers putting in an enclosure with a letter back in 2006. The best I can take away is that it would have been the officer's normal practice to put enclosures in with a covering letter.

47. A similar point could be made about the length of time over which Mr Swift's recollection that no Schedule of Assessment was enclosed but against that it seems quite plausible that the initial letter stating £144,152 was due would stick in his mind, and would prompt him to seek advice, and further that if a document stated to be enclosed was not enclosed then this would be raised as between Mr Swift and Mr Minney.

48. It seems improbable to me that if the Schedule of Assessment was enclosed with the 2 February 2006 letter to Mr Swift's home address that the letter could arrive but not the enclosure. Mr Swift's evidence that he did not receive an enclosure with this letter, and the evidence of both Mr Swift and Mr Minney that they specifically discussed this in my view outweigh Ms Henton-Pusey's evidence of a more generic nature that if an enclosure had not been included with the letter to Mr Swift this is something she would have noticed. It also seems more likely that a document might be omitted to be enclosed if a letter was being sent as a back-up. I find that the Schedule of Assessment was not received by Mr Swift with the 2 February 2006 letter sent to his home address. Given the improbability of an enclosed document but not the covering letter being lost in transit I also find that it was more likely than not that the Schedule of Assessment was not enclosed.

The 2 February 2006 letter addressed to Union Street

49. Ms Henton-Pusey's evidence is that she sent the letter to the Union Street address and this letter enclosed the Schedule of Assessment. The Union street address was the registered office address of the appellant and the default address for correspondence (hence the letter to Mr Swift's address was a back-up). It seems unlikely to me that having gone to the effort of producing and recording the assessment calculation internally, and documenting the issue of the 2 February 2006 letter on the appellant's VAT audit report that Ms Henton-Pusey would not have then sent the letter. It seems unlikely on the basis that this being the first letter to the appellant and not the back-up that Ms Henton-Pusey would omit to enclose the Schedule of Assessment in with the letter. I accept her evidence that the letter and schedule were sent to the Union Street address.

50. The letter sent to the Union Street address in accordance with the mail forwarding arrangements in place at Minney & Co, would have been forwarded to Mr Swift's home address. Mr Swift's evidence makes no mention of a letter being forwarded and his evidence is that no Schedule of Assessment was received. HMRC raise questions about Mr Swift's level of diligence in handling the appellant's affairs in the period January / February 2006. Although under cross-examination Mr Swift denied the financial affairs of the appellant were in a state of disarray he later accepted he had told Ms Henton-Pusey on 7 February 2006 that the company had "no money". He estimated that in January 2006 he had received no more than 10 items of mail which had been forwarded to his home address. He said that if the mail raised questions relating to a VAT officer's calculations he would raise this with Mr Minney. When letters came in from creditors he did not answer these. Although Mr Swift explained his lack of willingness to ask for more details about the calculations on 7 February 2006 as being due to being in a state of stress about the amount of VAT said to be due he was not pressing to get access to the appellant's business records which were being held by HMRC.

51. The impression I formed from Mr Swift's evidence to his approach to the appellant's business at this time was that, the business having ceased trading, he was not engaging with matters proactively. As regards the appellant's VAT position he had formed the view through advice he was given that the ball was in HMRC's court to send the "more detailed schedule". He was not curious to find out the basis of HMRC's assessment or to move the process along.

52. The letter having been forwarded from Minney & Co. would take longer to arrive than the letter sent direct to Mr Swift's home address. In contrast to that first letter which stated a significant amount was due and which would likely stick in a person's mind receipt of a second letter which was simply a copy of the first would not be likely to be very memorable several years later. Having received advice from Mr Minney to the effect that Mr Swift should await the more detailed schedule which was to come later there is no reason to suppose that a Schedule of Assessment enclosed with the letter (which was not the "more detailed schedule") would necessarily pique Mr Swift's further interest or prompt him to take additional action.

53. Taking this into account I am not persuaded that although Mr Swift says he does not recollect receiving a letter or Schedule of Assessment that this means no such letter or enclosure was sent to Minney & Co's address or forwarded on to Mr Swift's address.

54. On the balance of probabilities I find that a letter with identical contents to that of the 2 February 2006 letter to Mr Swift's home address (apart from the address) and which included the Schedule of Assessment was sent to Minney & Co. and forwarded on and received at Mr Swift's home address. The appellant was duly notified of the necessary details of the assessment.

Was the VAT 655 Notice of Assessment sent?

55. The appellant points to the lack of date stamp on the copy VAT 655 provided and says there is no proof this was sent. Ms Henton-Pusey explained however that while the original form which went out to the trader would be date stamped there was no need to date-stamp the copy because the date would be captured in the electronic folder system. Ms Henton-Pusey's evidence referred to a notation in the system recording the note that the form was "Sent to trader". The Date/Time is stated to be 7 February 2006 13:42.

56. The lack of a date stamp does not indicate the VAT655 was not sent when it was stated to be. I am satisfied from the evidence given by Ms Henton-Pusey that the after the VAT641 was signed it would have been sent to be keyed in onto the mainframe and then this would result automatically in the issue of VAT655. I accept from her evidence and the accompanying documentary records that the VAT 655 was sent on 7 February 2006.

57. The VAT655 was addressed to the Union Street address and in line with mail forwarding procedures would have been forwarded unopened to Mr Swift. Mr Minney told us he has some 1000 clients. He confirmed no record was kept of incoming and forwarded post. Mr Swift does not recollect receiving the VAT655. However the reasons which explain why I am not persuaded his lack of recollection of the 2 February 2006 Union Street letter does not mean that letter with enclosure were not received apply correspondingly to the issue of the reliability of Mr Swift's recollection as to receipt of the VAT655.

58. Mr Swift makes his recollection that he did not receive the schedule some 5 years after the relevant time. I also note it was clear that Ms Henton-Pusey's letter referred to the VAT655 as distinct from "the more detailed schedule". It seems to me quite possible that if Mr Swift were to have received the VAT655 after having received the advice from Mr Minney to do nothing until receipt of the more detailed schedule that Mr Swift would do nothing with the VAT655 as it would be seen as part and parcel of the 2 February 2006 letter. What he would have been waiting for was the "more detailed schedule" so there is no reason to think receipt of a VAT655 would stick in his mind as a "call to action".

59. In contrast to the non-inclusion of a document that was said to be enclosed and which was specifically mentioned in discussion between Mr Minney and Mr Swift there would be no reason to remember at the time whether a document which was expected to arrive did arrive.

60. I find that the VAT655 was sent when it was stated to be to the Union Street address. That in itself would in my view constitute due notification but if there is any doubt over this then I would in any case find that on the balance of probabilities the VAT655 was received by Mr Swift at his home address.

61. Although the VAT655 refers to Notes of appeal being sent there was no evidence before me as to whether these were sent. This does not however affect the argument on whether the assessment was notified as the notification of appeal rights is not required by the legislation or mentioned in the four case law requirements described above at [26].

Notification of assessment given to liquidator?

62. It is clear in any event from Mr Minney's evidence that subsequent to the appellant being wound up in 21 March 2007 the liquidator who was then appointed received notification of both the 2 February 2006 letter and the Schedule of Assessment which together would constitute due notification of the assessment. This is confirmed by documentary evidence in the form of a letter dated 28 March 2008 in which Clarke Willmott who were acting for the liquidator wrote to Minney & Co forwarding the 2 February 2006 letter and Schedule of Assessment.

Strength of appellant's substantive case

63. The appellant argues they are confident they have evidence the under and over declarations will reduce to zero and that the strength of their case indicates the merits of the validity issue lie in the appellant's favour. If I have understood the argument correctly it amounts to saying the appellant would not have gone to the trouble to argue about validity if they did not think there was something in it given the strength of the merits on the substantive matter. I do not have any evidence on this but even if I did I do not see that the merits of the appeal help one way or the other with establishing the facts around whether and if so when an assessment was duly made or notified. The point does not assist the appellant.

Conclusion

64. The assessment was made on 2 February 2006. It was notified at the earliest on 2 February 2006 or at the latest by 28 March 2008. There is a valid assessment and a valid appeal (permission to extend the time limit for appeal already having been granted on the assumption the assessment was valid).

65. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 25 September 2013