[2017] UKFTT 171 (TC)

TC05663

Appeal number: TC/2015/04496

VAT – output tax – exempt supplies – Item no. 1, Group 1, Schedule 9, VATA 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mohamed El-Baghdadi **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Ms Helen Myerscough

Sitting in public at Fox Court, London on 11th January 2017

In the absence of the Appellant

Jane Ashworth of HM Revenue and Customs for the Respondents

DECISION

Preliminary matter

1. Neither the Appellant nor the Appellant's representative attended the hearing. The Tribunal considered whether to proceed with the hearing in their absence and concluded that reasonable steps had been taken to notify the Appellant of the hearing (in writing to the address given in the Notice of Appeal) and that in all the circumstances it was in the interest of justice to proceed with the hearing.

Background

2. In June 2007 the Appellant applied to register voluntarily for VAT and he was registered with effect from 20th June 2007 until 1st July 2012, when he de-registered.

3. On 12th December 2011, Officer Jennings of HMRC visited the Appellant and his then advisers, Sadika Vale Limited ('Sadika Vale').

4. On 16th December 2011, Officer Jennings wrote to Sadika Vale requesting further information about one of the Appellant's properties, known as NOA, 200 Woodstock Road, Oxford ('NOA'). His understanding from the meeting (set out in this letter) was that NOA was run by Gazel Hotels Limited ('Gazel'), who paid the Appellant £2,000 per week under an agreement, and no output tax was accounted for on these payments.

5. On 22nd March 2012, Officer Jennings sent a reminder to Sadika Vale.

6. On 19th June 2012, Officer Jennings wrote to Sadika Vale stating that he would have to raise an assessment if he did not receive a response within 10 working days.

7. On 11th July 2012, Sadikas (part of Sadika Vale) wrote to HMRC apologising for the delay and promising a further response in the first week in August.

8. On 6th October 2012, Officer Jennings sent a reminder to Sadikas.

9. On 30th October 2012, Officer Jennings wrote to Sadikas stating that he would have to raise an assessment if he did not receive a response within 10 working days answering the issues raised in his letter of 16th December 2011.

10. On 8th November 2012, Sadikas wrote to HMRC promising a full reply by 22nd November 2012.

11. On 1st February 2013, Officer Jennings sent a reminder to Sadikas offering a further visit if that would help to progress matters.

12. On 28th March 2013, Sadikas wrote to HMRC in reply to Officer Jennings letter of 16th December 2011 and including a copy of the Licence Agreement between the Appellant and Gazel ('the Agreement').

13. On 8th October 2013, Officer Jennings wrote to Sadikas stating that he had referred the Agreement to HMRC's Policy Team.

14. On 11th October 2013, Officer Jennings wrote to Sadikas setting out HMRC's view that the accommodation offered at NOA was holiday accommodation within Item 1(e) of Group 1 of Schedule 9 of the Value Added Tax Act 1994 ('VATA 1994') and that therefore rent received by the Appellant under the Agreement was subject to VAT at the standard rate.

15. On 15th November 2013, Officer Jennings wrote to Sadikas requesting a response within 10 days to his letter of 11th October 2013, failing which he would raise an assessment based on the Appellant having received rents of £2,000 per week during the period 26th June 2010 to 1st July 2012.

16. On 28th November 2013, Officer Jennings wrote to the Appellant stating that he was raising an assessment in respect of output tax on the rent received, setting out the basis of his assessment and calculations and stating that a Notice of Assessment would follow "in due course" and that the Appellant should respond within 30 days of the letter if he disagreed with the assessment.

17. On 28th January 2014, HMRC issued a Notice of Assessment.

18. On 19th February 2014, Sortax Acountants ('Sortax') wrote to HMRC explaining they now acted for the Appellant and requesting time to review the matter. They stated that their initial view was that the Appellant should reissue invoices to Gazel subject to output tax and that Gazel should claim the corresponding input tax, but that there were certain matters which required further investigation, including the the joint ownership of the property by the Appellant's wife, a major refurbishment on which input tax had not been claimed and Gazel's claim for input tax.

19. On 29th October 2014, Officer Jennings wrote to Sortax stating that he was unable to give further consideration to the points raised until the assessment issued on 28th January 2014 for £30,848 was paid.

Relevant law

20. Under section 4(1) and (2) of VATA 1994, VAT is charged on a supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him, unless it is an exempt supply.

21. Under section 25(1) VATA 1994, a taxable person is to account for and pay VAT in respect of supplies made by him and the acquisition of goods by him, by reference to such periods, at such time and in such manner as may be determined by regulations.

22. Under section 73(1) of VATA 1994, where a person fails to make any returns or where is appears to HMRC that returns are incorrect or incomplete, HMRC may

assess the amount of VAT due from him to the best of their judgment and notify it to him.

23. Under section 77(1)(a) of VATA 1994, an assessment shall not be made more than four years after the end of the relevant accounting period.

24. Exempt supplies of goods and services are set out in Schedule 9 of VATA 1994. Item No. 1 of Group 1 of Schedule 9, VATA 1994 lists as an exempt supply "the grant of any interest in or right over land or of any licence to occupy land…other than…(d) the provision in an hotel…or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering…(e) the grant of any interest in, right over or licence to occupy holiday accommodation...".

Appellant's submissions

25. The Tribunal took the grounds set out in the Notice of Appeal as being the Appellant's submissions. They were as follows:

> "This is a case where we think merely a warning would have been sufficient, rigid formalities were applied instead during VAT inspection and thereafter. This approach has resulted in a huge loss of time and resources on both sides, HMRC and the client.
>
> Our client, Mr El-Baghdadi, and his accountants at that time, Sadika Vale Limited, hosted a compliance check visit by HMRC's Local Compliance Officer, Mr Peter Jennings of Trinity house, Oxford, on 12th December 2011. Our client volunteered some information at the onset that they, he and his accountants at the time, were unsure as to how to treat a business property income located at 200 Woodstock Road, Oxford call "NOA Residences" or simply "NOA". This income amounted to £2,000 per week was received by our client from 26 July 2010 until 20 June 2012, de-registration from VAT took place on the same day. Our client assumed this income as property/rental income as defined under ITA07. Under this assumption tax invoices were not issued and hence output VAT was not accounted far in our client's record. Similarly the Tenant, Oxford Gazel Hotels Limited, also a VAT registered business never made an input VAT claim on these weekly payments in their VAT returns.
>
> Mr Jennings acknowledged this voluntary disclosure in his letter dated 16 October 2011, copy attached, and referred the matter to HMRC Policy Team which took a long time to reply. Finally in his letter dated 11 October 2013, copy attached, Mr Jennings re-classified the property as 'furnished holiday accommodation' as under ITTOIA05 and as such find receipts of its lease rentals subject to standard rate of VAT as under VAT legislation. Briefly describing, the property 'Noa' consists of 12 self-catering apartments with each having its own fully equipped kitchen and facilities like; fridge/freezer, washing machine and microwave. As mentioned above our client's VAT de-registration

took place on 30 June 2012. Since re-classification advice was not received on time and therefore tax invoices were not issued either.

Point to be noted that under-declaration of output VAT in our client's records was compensated by a corresponding over-declaration for the same transaction in an adjoining VAT period in his tenant's VAT record. Which sufficiently warrant the application of 'Nil net tax' relaxation rule.

We are, therefore, unsure of the objectives of HMRC with regards to the issuance of Notice of Assessment dated 28 January 2014."

26. In box 8 of the Notice of Appeal, the Appellant requested the following result:

"We believe the honourable Tax Chamber would take notice of red-tape behaviour on the part of the HMRC officials with regards to the VAT assessment made in this case. We also believe that the Tax Chamber would notice the unjustifiable proportionality of the amount of time spent on this case by the HMRC Officials and the amount of time lost, costs and stress that this whole process has caused to our client along with potential benefit to the Revenue, which is Nil.

We believe the assessment of VAT under-declaration, as in this case, is a myth and therefore we request the assessment to be withdrawn."

HMRC's submissions

27. The onus was on the Appellant to show that HMRC's assessment was incorrect. He had not done so. There did not appear to be any dispute that the supply was taxable. The supplies were subject to VAT at the standard rate therefore VAT was required by law to be charged on them.

28. There was no provision in the legislation to "issue a warning" or to allow a taxable person not to pay the VAT that has been found to be due.

29. Whether an amount of output tax may be balanced out by a corresponding amount of input tax for another taxpayer was not relevant. VAT legislation is concerned with the tax position of the individual taxpayer.

30. The 'nil net tax concession' was not relevant here and in any event the Tribunal did not have jurisdiction over the administration of concessionary treatment.

31. The assessment was made in the best judgment of Officer Jennings within the time limits set out at law. In making the assessment, Officer Jennings had adopted the most favourable approach for the Appellant by treating the amounts received by him as being inclusive of VAT at the prevailing rate.

32. HMRC concluded by submitting that since the assessment was properly made, the appeal should be dismissed.

Discussion and findings of fact

33. We note that the Agreement appears to be incomplete as it refers to schedules that have not been provided. Based on the Agreement as it appears in the hearing bundle, we find that:

34. Under the Agreement, the Appellant was entitled to receive £2,000 per week from Gazel during the period 26th June 2010 to 1st July 2007 when he was registered for VAT.

35. The Agreement grants Gazel the right to occupy the property during a period of five years for the purposes of carrying on a business.

36. The Agreement constitutes the grant of a licence to occupy land, which is an exempt supply under Item No. 1, Group 1, Schedule 9, VATA 1994 unless one of the exceptions to the exemption applies.

37. The possible exceptions which may apply in this case have been identified as those in subsections (d) and (e).

38. Subsection (d) relates to the provision of sleeping accommodation in a hotel and we have seen or heard no evidence that NOA is a hotel.

39. Subsection (e) relates to "the grant of any interest in, right over or licence to occupy holiday accommodation". Officer Jennings concluded, in his letter of 11th October 2013, that NOA consisted of 'holiday accommodation'. Based on Officer Jennings' statement in his letter of 16th December 2011 that NOA is described as consisting of "12 standard and luxury self-catering apartments", his conclusion that this is holiday accommodation does not seem unreasonable. We have seen no evidence that the Appellant disputes this categorisation.

40. We understand the Appellant's grounds of appeal to be:

(1) That HMRC should have issued a warning rather than an assessment;

(2) That the Appellant believed the income to be property/rental income as defined in the Income Tax Act 2007, as opposed to income from furnished holiday accommodation under Income Tax (Trading and Other Income) Act 2005; and

(3) That any under-declaration of output tax by the Appellant is matched by a corresponding over-declaration of input tax by Gazel, meaning there has been no overall net loss of tax revenue.

41. We must agree with HMRC that they have not acted improperly in raising an assessment. The legislation provides that where HMRC believe VAT has not been accounted for correctly they may issue an assessment. We accept that HMRC believed the Appellant had incorrectly accounted for VAT and that they issued an assessment in accordance with the rules and time limits set out in sections 73 and 77 of VATA 1994.

42. The Tribunal has no jurisdiction in these circumstances to require HMRC to issue a warning in lieu of an assessment.

43. We must also agree with HMRC that each taxpayer's affairs must be looked at separately and therefore the question of whether another taxpayer, Gazel, could have made a corresponding claim for input tax, is not relevant to the question of whether the Appellant accounted correctly for output tax.

44. Further, the Tribunal has no discretion over HMRC's administration of concessionary treatment.

45. Finally, as to whether the supply in question is exempt as a grant of a licence over land or falls within the exception to that exemption for furnished holiday accommodation, the Appellant has not presented any evidence to show that NOA does not consist of furnished holiday accommodation or that HMRC were unreasonable in categorising it as such.

Conclusion

46. The appeal is dismissed.

47. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE:13 FEBRUARY 2017