Neutral citation number: [2022] UKFTT 00327 (TC)

FIRST-TIER TRIBUNAL
TAX CHAMBER

Case number: TC08588

[By remote video/telephone hearing]

Appeal reference: TC/2019/01646

VAT – whether supplies made pursuant to lease assessable – in part – whether input tax recoverable – in part

Heard on: 23rd August 2022
Judgment date: 07th September 2022

Before

TRIBUNAL JUDGE AMANDA BROWN QC
JAMES ROBERTSON

Between

MAJID AND MIAH PROPERTIES

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Md Shahabuddin of S Uddin & Co

For the Respondents: MS Donovan, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The present appeal concerns:

   (1) VAT assessments raised by HM Revenue & Customs (**HMRC**) on 20 November 2016 against the partnership trading as Majid & Miah Properties (**Appellant**) in the amount of £8,664 for periods 11/15 to 08/17 in respect of amounts by way of output tax considered to have been under declared in connection with the occupation of a property at 350 Higher Walton Road, Preston, Lancashire, PR5 4HT (**Property**) by Mehfil (Preston) Ltd (**Mehfil**) pursuant to a lease dated 6 August 2015 (**Output Tax Assessments**)

   (2) VAT assessments raised by HMRC on 9 October 2017 against the Appellant in the amount of £30,446 for periods 11/12, 02/13, 08/13 – 08/14 and 05/15 to 11/15 in respect of input tax said to have been over claimed for various reasons (**Input Tax Assessments**).

2. With the consent of the parties the form of the hearing was by video using the Tribunal Video Platform. It was expedient and in the interests of justice for a video hearing to be held. The Tribunal was provided with a bundle of documents of 268 pages, an authorities bundle, and a number of additional documents provided on behalf of the Appellant by email dated 22 August 2022. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

3. The Appellant partnership was registered for VAT from 20 January 2010 on the basis that it intended to make taxable supplies by letting the Property to Mehfil. The partners of the Appellant were also directors of Mehfil. The Appellant had purchased the Property and, on 8 March 2010, exercised an option to tax, such that any supplies made in connection with it would be subject to VAT thereby also entitling the Appellants to claim input tax in connection with expenditure incurred on the purchase and refit of the Property for use, by Mehfil, as an Indian restaurant.

4. The refit of the Property took some time and no supplies were made in connection with it for some considerable period during which input tax was claimed.

5. On 6 August 2016 the Appellant and Mehfil signed a fifteen-year commercial lease of the Property with a commencement date of 3 August 2015. Pursuant to the lease rent was due at £500 per week (£2166.67 per month) from 1 September 2016. The terms of the lease provided for the Mehfil to be responsible for the repair and renewals of the interior of the Property, The Appellants were responsible for the repairs to the structure of the Property.

6. On 28 July 2016 HMRC visited the Appellant's agent at the agent's premises and examined the Appellant's VAT records. At that visit HMRC identified a schedule of input tax claims to which HMRC considered the Appellant had no entitlement. There were various reasons given for this lack of entitlement: 1) claims were made against pro forma and not VAT invoices; 2) the invoices were not in the name of the Appellant; 3) the supplies were those more apposite to the business of Mehfil than that of the Appellant.

7. The Appellant's representative confirmed that Mehfil had gone into occupation of the Property in accordance with the terms of the lease. However, HMRC considered that the rent commencement date of 1 September 2016 was a typographical error, and that rent was, in fact

due from 1 September 2015. HMRC concluded that output tax had been under declared by the Appellant on rental received.

8. Absent a satisfactory explanation for the under declaration of output tax or the over claim of input tax the Input Tax and Output Tax Assessments were duly raised as recorded in paragraph [1] above.

9. By correspondence dated 16 February 2018 the Appellant sought to contest the Output Tax assessment in full. Of the Input Tax Assessments the Appellants contested £13,054 accepting that some of the disallowed input tax was proper to Mehfil rather than the Appellant. Of the contested sum the Appellants contended the VAT concerned the redevelopment and fit out of the Property.

THE LAW

10. There was no dispute between the parties as to the law by refence to which this appeal is to be determined.

11. The Appellant accepted that HMRC has the power to assess pursuant to section 73 Value Added Tax 1994 (**VATA**) to the best of their judgment where VAT returns are incorrect or incomplete.

12. The Appellant accepted that in order to give rise to a claim to input tax the supplies on which the VAT was charged had to be supplies made to the Appellant for use in its business and must be supported by an invoice or some other evidence which supported the claim.

13. In connection with the output tax assessment VAT will be due where there is a supply made for which a tax point has arisen in a period which has been the subject of one of the assessed periods i.e. 11/15 to 11/17.

14. The basic tax point rule for services, provided under s6(3) VATA is that the time of supply is when the services are performed.

15. Regulation 90 Value Added Tax Regulations 1995 provides that where services are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplies at the earlier of the date on which payment is received by the supplier or each time the supplier issues a VAT invoice relating to the supplies. Thus where there is no payment or invoice no time of supply arises in connection with a continuous supply of services. There are anti avoidance provisions found in regulation 94B which triggers an annual tax point between connected parties where the recipient of the supply is not entitled to full input tax recovery.

16. Section 84(5) VATA provides that where it is found that the amount of an assessment is less than it ought to have been and the Tribunal gives a direction specifying the correct amount the assessment shall have effect as an assessment of the amount specified in the direction.

EVIDENCE AND FACTS FOUND

17. The Tribunal had the benefit of a bundle of documents and oral evidence from Mr Majid and Ms Kotak (the reviewing officer at HMRC). The Tribunal accepted Mr Majid's evidence as honest. Ms Kotak was not directly involved in the making of the assessments but was nevertheless helpful to the Tribunal. From the evidence received the Tribunal finds the following facts:

(1) Mr Majid and his partner Mr Miah purchased the Property with the intention of fitting it out fully as an Indian Restaurant which was then to be let to Mehfil.

(2) When the Appellant business was established they were both inexperienced and had little concept of how to manage the two business entities. No meaningful

differentiation was made between the two businesses when ordering supplies and supplies were often delivered to premises other than the Property. The Appellant partners also used their wider family to help secure supplies for the development and refitting of the Property and these family members did not differentiate between the two entities.

(3) The Appellant engaged Stuart Ashton, an un-VAT-registered builder to carry out the works to the property. Mr Ashton would advise them, at least periodically, to make purchases, using his trade accounts, of building supplies. Other builders were also used and a similar model for purchases of supplies was adopted. Where the Appellant funded these purchases by paying the suppliers directly they considered themselves to be the recipient of the supplies and claimed the VAT even where the invoices were issued in the name of the builders in question.

(4) When the lease was signed the Appellant intended for Mehfil to have a rent-free period for a year in order that the business could establish itself profitably and hence the rent commencement date was 1 September 2016. That date was not a typographical error.

(5) The relationship between the partners deteriorated and Mehfil only actually traded for the period from 1 September 2015 through to February 2017. Within that period the restaurant was closed due to flooding. The Tribunal accepts the evidence of Mr Majid that there were other short, but not material, periods of closure due to the deteriorating relationship between the partner/directors.

(6) After Mehfil closed in February 2017 the Property was empty until February 2018 when a new tenant was found.

(7) On 25 January 2016 Mehfil made a claim for a flood recovery grant to Lancashire County Council. Pursuant to that application Mehfil applied for compensation in respect of loose electrical appliances and consumables together with a hot water boiler and tank, dumb waiter lift, and electrical circuit boards together with the cost of replastering and redecorating. In response to the question "please briefly state what outputs you hope to achieve though this grant" the grant application stated: "we are hoping to meet our projected weekly target of at least £6,000 - £8,000 as this is a 260-seater business and the potential is huge, we spent 5 years from purchasing to refurbish and the grant will enable us to take this business to its full potential." (emphasis added) The statement as to anticipated turnover was "hoped" and aspirational it was not a statement that turnover had reached that level prior to the grant application. The claim made was also consistent with the respective tenant and landlord obligations under the lease.

(8) Whilst the Appellant's business bank accounts were not available Mr Majid was clear that no rent payments were ever made under the lease. The first 12 months were a rent-free period granted to allow Mehfil to establish itself. However, even after that date the difficulties between the directors meant that the restaurant was under performing and could not afford to make the rental payments which were waived from September 2016 through to closure in February 2017.

(9) The Tribunal finds, on the balance of probabilities, that the lease was terminated when Mehfil ceased to trade in February 2017.

OUTPUT TAX ASSESSMENTS

18. HMRC have assessed the Appellant in respect of output tax they consider was under declared on the basis that there was a liability for Mehfil to pay rent from 1 September 2015 through to November 2017. This was so despite Ms Kotak accepting that, by reference to Trip Advisor there was no evidence that Mehfil had traded beyond February 2017. Ms Kotak

considered that the rent commencement date in the lease was a typographical error and, by reference to the flood grant application it was apparent that Mehfil was trading at a level which would have permitted the payment of £500 per week in rent. Interestingly, as it is a matter of public record, Ms Kotak did not confirm whether Mehfil was VAT registered. VAT registration might have indicated a level of trade which supported HMRC's position on the affordability of the rents. Ms Kotak also referenced the terms of the lease which provided for the forfeiture of the lease on non-payment of rent which had apparently not been exercised, implying that rent had been paid.

19. As indicated above Mr Majid was clear, and the Tribunal accepts that Mehfil was given a 1 year rent free period but, in any event, did not pay any rent.

20. Ms Donovan did not cross examine Mr Majid on the forfeiture clause despite being reminded by the Tribunal that all aspects of HMRC's case must be put to him and that any aspect of his evidence which was not the subject of cross examination would be accepted.

21. On the basis of the evidence the Tribunal concludes that there was a continuous supply of services under the lease agreement but for the first 12 months there was a rent-free period in respect of which no VAT would have been due. Rent was due from 1 September 2016 to 1 February 2017 but was not paid and as such there was no tax point arising under regulation 90. However, on the basis of the finding that the lease was terminated in February 2017, the Appellant would have become liable under the basic tax rules to VAT on the rent which was due on the 6 rental payments which had fallen due after 1 September 2016.

22. HMRC have assessed for those rental payments month by month in periods 11/16 and 02/17. They have also assessed for the rent-free period.

23. The Tribunal determines that the assessments in periods 11/15 – 08/16 are not due because of the rent-free period. No VAT is due in period 11/16 because no tax point arose in that period. For 02/17 VAT on the 6 months rent which had become due should have been taxed. HMRC only taxed for 3 months rent. The Tribunal directs that the assessment for 02/17 be increased to £2166. No VAT was due for periods 05/17 – 08/17 as the lease had come to an end in February 2017.

24. As such the only period for which the output tax is due is 02/17 in the sum £2166. The remaining periods are set aside.

INPUT TAX ASSESSMENTS

25. In order to succeed in respect of the uncontested elements of the input tax assessments the Appellant must show that it was the recipient of the supplies in question and that either they hold a valid invoice or that HMRC have unreasonably refused to accept alternative evidence supporting the claim to input tax.

26. The Appellant produced a detailed schedule explaining why the uncontested input tax should be recoverable.

27. As regards the supplies in which the invoices were addressed to the builders it was claimed it was plain that the supplies related to the redevelopment and fit out and as such were made to the Appellant. HMRC however, resisted these claims on the basis that such supplies were stated to have been made to the builders. Mr Majid was not cross examined on his statement that Mr Ashton was not registered for VAT, and it would therefore have made sense for the Appellant to order building supplies in order that the VAT could be recovered. Despite the invoices being issued in Mr Ashton's name the Tribunal is prepared to accept that the purchases were made through the agency of Mr Ashton who would not and could not have claimed input tax and it is therefore reasonable to allow, on the basis of alternative evidence, recovery of the VAT in respect of:

(1) The invoice from Travis Perkins in period 02/14 - £444.06

(2) The invoice from Buildbase in period 02/14 - £1,293.10

28. There was no evidence as to the VAT status of the other builders to whom invoices were raised, as such those builders may have recovered the VAT. The VAT on invoices to John Oldfield and RN Builders are therefore properly assessed.

29. There were a group of invoices where were addressed to Mehfil by the structural engineers who undertook the work on the Property. Given the terms of the lease and the dates of the supplies (in 2012) it is highly implausible that the supplies were made to Mehfil. The Tribunal considers on the balance of probabilities that the supplies were in respect of the structure/fabric of the building and whilst the invoices are in the name of Mehfil they can be accepted as alternative evidence of a supply to the Appellant. These invoices total £560.00 in period 11/12, £110.00 in period 02/13 and £650.00 in period 08/13.

30. For a significant proportion of the other invoices which were addressed to Mehfil it was not clear to what they really related and/or why, given that they were addressed to Mehfil all such input tax is therefore properly assessed.

31. Similarly for invoices addressed to extraneous third parties and pro forma invoices.

CONCLUSION

32. The Tribunal therefore directs that the assessments be amended such that the following sums are assessed:

Period	Input tax	Output tax
11/12	£0	
02/13	£0	
08/13	£0	
11/13	£330	
02/14	£2,171	
05/14	£2,591	
08/14	£1,526	
05/15	£14,728	
08/15	£4,728	
11/15	£1,286	£0
02/16		£0
05/16		£0
08/16		£0
11/16		£0
02/17		£2166
05/17		£0
08/17		£0

33. The Appeal therefore succeeds in part.

DIRECTION

34. Pursuant to section 84(5) VATA the output tax assessment for period 02/17 shall have effect as an assessment in the amount of £2,166.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

AMANDA BROWN QC
TRIBUNAL JUDGE

RELEASE DATE: 07TH SEPTEMBER 2022