Neutral Citation: [2023] UKFTT 00080 (TC)

Case Number: TC08713

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/01118

VAT – claim for overpayment on the basis that reduced rate for domestic fuel should have applied to sales of coal – whether sufficient evidence to support claim– no – appeal dismissed

Heard on: 1 September 2022
Judgment date: 25 January 2023

Before

TRIBUNAL JUDGE ANNE FAIRPO
MR IAN PERRY

Between

ADRIAN MCKIERNAN T/A AMK FUELS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs N Robinson

For the Respondents: Mr D Ryder, litigator of HM Revenue and Customs' Solicitor's Office]

DECISION

1. The hearing was held using the Tribunal video hearing platform. 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.

Introduction

2. This is an appeal against HMRC's refusal of the appellant's claim for a repayment of VAT totalling £61,106. The claim relates to certain VAT periods within the period January 2016 to December 2019.

Background

3. The appellant, Mr McKiernan, owns and operates a small shop in Enniskillen which sells coal, fuel and a small number of household items and confectionary. He registered for VAT with effect from 1 December 2015.

4. In early 2019 HMRC arranged to visit the business to check his VAT returns for the previous four years. The visit took place on 11 February 2019. During the visit it became apparent that Mr McKiernan kept very basic records. In particular, he did not keep till rolls, sales or stock records. He recorded purchase invoices but did not provide any sales invoices.

5. With regard to coal sales, Mr McKiernan advised HMRC that sales varied from a few bags to tonne sales and, as with other sales, no sales invoices were provided and no sales records were kept. The business accounted for VAT on the sales at 20% and calculated sales (and hence the VAT due) by applying a mark-up to the purchase invoices received in the period. He did not specify any particular rate or amount of VAT in sales to customers.

6. HMRC advised Mr McKiernan that sales of up to one tonne could be charged at a reduced rate of 5% under the domestic de minimis rules, and subsequently sent him the relevant public note guidance.

7. Following a second visit, HMRC summarised the issues identified with regard to the lack of records being kept. Mr McKiernan's representative agreed that in future the daily gross takings would be recorded and record keeping would be improved. With regard to the coal sales in particular, Mr McKiernan's representative confirmed in July 2019 that no records were kept which could support the application of the reduced rate of VAT to sales on the basis that sales were de minimis. The representative also advised that till rolls were still not being retained.

8. HMRC advised that, if there was no documentary evidence regarding the coal sales then it would not be possible to apply the reduced rate of VAT to previous sales and they would remain liable to VAT at 20%.

9. On 23 July 2019 HMRC issued a penalty on the basis of careless behaviour for the VAT period ended 12/18. This penalty was suspended, following the agreement of suspension conditions. One of these conditions was that Mr McKiernan accepted that coal sales would be charged at the standard rate of 20% where there was no evidence to support the reduced rate. The penalty was cancelled in November 2019 although it is not entirely clear from the information in the bundle provided to the Tribunal why it was cancelled.

10. In January 2020, Mr McKiernan began to keep records of coal sales, noting the date of sale, number of bags sold, the car registration plate of the customer and the price paid by the customer.

11. In March 2020, Mr McKiernan's representative wrote to HMRC to ask that HMRC re-consider their position not to accept that sales of coal in earlier VAT periods could be accounted for at the reduced rate. He acknowledged that no records had been kept but asked that HMRC "look at the situation from a lenient and sympathetic point of view".

12. HMRC concluded that, given the lack of any records, the sales of coal would need to remain subject to VAT at 20%.

13. Mr McKiernan's representative asked for a statutory review. As no appealable decision had been issued, HMRC confirmed that they were unable to review the position. Their letter advised that the correct procedure when making a claim for overpaid output tax was to file an Error Correction Notice (ECN) for each relevant period and pointed out the online guidance. The letter advised that, if an ECN were submitted, then a rejection of the claim could be appealed under s83(1)(t) VATA 1994.

14. On 15 September 2020, Mr McKiernan submitted ECNs for a number of VAT periods during the period 01/16 to 12/19 (inclusive), claiming the repayment of overpaid VAT which is the subject of this appeal. The claim was refused on 2 November 2020 on the basis that, in the circumstances, HMRC considered that no overpayment had occurred in the relevant period.

15. Following an attempt to resolve the dispute by ADR, the matter was appealed to this Tribunal on 17 March 2021.

Evidence

16. Mr McKiernan explained that his business was very close to the border between Northern Ireland and the Republic of Ireland and that he sold to local customers on both sides of the border, as the VAT and coal costs in Northern Ireland were lower than in the Republic. The sale price was influenced by that charged by local competing businesses, and he sold coal at a price inclusive of VAT. He did not provide sales invoices to customers and did not indicate the amount or rate of VAT charged on coal. He had treated VAT as a business expense and had been unaware that there was a reduced rate of VAT available for domestic coal sales until the HMRC visit in early 2019, when an officer at the visit pointed it out. He had relied on a family member to advise him on VAT and did not realise that they also lacked relevant knowledge.

17. Mr McKiernan stated that, whilst there might have been an occasional sale of one tonne of coal, there had been no sales in excess of one tonne. This was because one tonne of coal would be a single wrapped pallet and so additional bags would have had to have been added to a pallet to sell more than a single tonne. The majority of his sales were to regular customers who bought a few bags, which would fit in the boot of a car. He did not sell coal on a wholesale basis.

18. Mr McKiernan accepted that the records he kept were not of the standard required by HMRC but explained that this had been the first VAT visit since he had taken over the business and he was willing to implement recommended changes and did so. He had been given the business in December 2015 by a friend, to whom he now paid rent for the site. He had not been given any guidance by the previous owner on how to deal with VAT.

19. Mr McKiernan submitted that HMRC had turned down his claim on the basis that he had no records. However, it was HMRC that had first told him that he may have overpaid VAT and that the returns should be reviewed to see whether it was possible to establish an overpayment. HMRC had also seen his business records and so knew what was, or was not, available. Mr McKiernan submitted that he could not change the lack of records for earlier periods and so it was only open to him to use the current information available to show that coal sales had been within the one tonne limit.

20. Mr McKiernan asked the Tribunal to consider if the position adopted by HMRC was within the spirit of fairness referred to in the Taxpayer's Charter that everyone should pay the right amount of tax. He submitted that an error had been made when the original returns were submitted, as they accounted for VAT at the standard rate, as a result of lack of knowledge of the law.

21. HMRC contended that, as there were no contemporaneous records, the reduced rate could not be applied. Officer Cunningham, who had carried out the first visit, confirmed that he had experience in dealing with retail fuel stations where coal sales are accounted for at the standard rate but had not previously come across a business with a total absence of sales records.

22. Officer Cunningham agreed that he had advised Mr McKiernan at the first visit that there was a possibility that he was overpaying VAT but that the important part of the advice was that evidence would be needed to confirm this. He was offering the business the opportunity to produce whatever records had been kept. At the first visit, it was clear that the business records were incomplete as no sales records were provided It was only after the second visit that it was confirmed that there were no sales records.

23. Officer Cunningham confirmed that he would have raised assessments at the standard rate if the business had claimed the reduced rate in its VAT returns as there was no evidence to support the use of the reduced rate.

Submissions and discussion

Relevant law

24. A repayment of overpaid VAT may be claimed under s80(1) VAT Act 1994 which provides:

> "Where a person –
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period
>
> (whenever ended, and
>
> (b) in doing so, has brought into account as output tax, an amount that was not output tax due,
>
> The Commissioners shall be liable to credit the person with that amount"

25. Regulation 37 of the VAT Regulation 1995 requires that any claim under s80 shall state the amount claimed, the method by which that amount as calculated, and shall do so by reference to the documentary evidence in the possession of the claimant.

26. Group 1, Item 1 of Schedule 7A of the VAT Act 1994 provides that a reduced rate (currently 5%) can be applied to supplies for qualifying use of "coal, coke or other solid substances held out for sale solely as fuel"

27. Note 3 of Group 1 states that "qualifying use" means domestic use. Note 5 of Group 1 states that a supply of not more than one tonne of coal or coke held out for sale as domestic fuel will be treated as being made for domestic use. Note 6 of Group 1 states that a supply in excess of one tonne will be for domestic use only if the coal is supplied for use in specific types of structure (including a dwelling).

28. VAT Public Notice VAT 701/19: Fuel & Power expands upon the information in Group 1 and the Notes, including the following points:

29. Paragraph 3.2.1- Supplies for domestic use

> “Supplies of fuel and power for genuine domestic use are eligible for the reduced rate. The provider must be certain that the supply is to a dwelling or certain types of residential accommodation”

30. Regulation 31 of the VAT Regulations 1995 sets out the records which taxable person is required to keep, including all business and accounting records. Regulation 32 of the VAT Regulations 1995 requires that every taxable person must keep and maintain a VAT return which records VAT payable and VAT allowable.

Whether sufficient evidence to support the overpayment claim

31. There was no dispute that there were no contemporaneous records available for the period covered by the ECNs. Mr McKiernan had kept records from the beginning of January 2020 and submitted that these supported the reduced rate of supplies of coal and should be treated as sufficient evidence to enable the earlier supplies to be subject to the reduced rate.

32. HMRC considered that the business had failed to maintain records to support a claim to the reduced rate and that he had provided no credible explanation as to why the earlier supplies should be retrospectively subject to the reduced rate. Despite HMRC visits earlier in 2019 it was not until January 2020 that Mr McKiernan had kept adequate records.

33. The coal sales records kept from January 2020 and provided to the Tribunal consist of hand-written schedules noting the number of bags sold, the registration number of the car of the customer purchasing the coal and the value of the sale. The Tribunal bundle included five days of sales for each of January 2020 (2-6 January 2020) and February 2020 (1-5 February 2020) and summary sheets of sales for January and February 2020. The January summary sheet states that 1295 bags of coal were sold. The February summary sheet states that 1318 bags of coal were sold.

34. In the hearing, Mr McKiernan explained that the delay in starting to keep records was because he had a newborn child and had had medical issues. He considered that HMRC had not taken this into account. He was also out of his depth at working out the type of system involved and had had little support from his accountant at identifying what was appropriate. He had been quoted £14,000 for a record keeping system, which was unaffordable.

35. HMRC noted that they had taken Mr McKiernan’s health into consideration and had asked whether he was happy to continue at the first visit, when the point had been raised. He had not raised health and well-being concerns after the first visit.

36. HMRC also noted that, by the time of the first visit in 2019, Mr McKiernan had had three years in which to check VAT record-keeping requirements and to check whether he was accounting for VAT appropriately.

37. Whilst we have sympathy with Mr McKiernan’s family and medical situation, we note that he nevertheless continued to run the business during this period and so consider that he was not unduly prevented from keeping records.

38. Whilst a substantial and expensive record keeping system was no doubt inappropriate, there was no explanation as to why Mr McKiernan could not have started to keep the hand-written records earlier than January 2020.

39. Mr McKiernan had found it confusing that the penalty was cancelled, given that the record-keeping conditions were not being implemented, and thought that the suspension conditions had also been cancelled when the penalty was cancelled. Whilst we accept that Mr McKiernan believed this, the cancellation was stated in an email to be made on the basis that he continued to adhere to the suspension conditions. Whilst the position is not a model of clarity, the penalty cancellation does not remove the necessity for a business to keep

appropriate VAT records and, in particular in this context, to keep records showing that the requirements for a reduced rate of VAT are met. The cancellation of the penalty also does not mean that Mr McKiernan became able to claim a reduced rate of VAT without appropriate records for those periods.

Best judgement argument

40. The VAT returns for the periods covered by the ECNs were completed (in this respect) on the basis of marking up the coal purchases made and applying a single sterling to euro exchange rate, and then accounting for VAT at 20% on the resulting figure. The ECN repayment calculations were calculated in the same way, applying the reduced 5% rate of VAT instead of 20%. Mr McKiernan submitted that he should be able to apply best judgement in calculating the ECNs, as HMRC would have had to do so in calculating an assessment if he had in fact accounted for VAT at the reduced rate on sales.

41. We do not agree. There is statutory provision which allows HMRC to use best judgement, and no equivalent statutory provision for taxpayers. Instead, taxpayers are required to keep records in order to support their returns; if they do not do so, then they have to deal with the consequences. The fact that the statute allows HMRC to use best judgement where there are insufficient records kept by a taxpayer is a mechanism to ensure that HMRC can raise an assessment. It does not follow that a taxpayer should be able to use the same mechanism in order to claim a relief for which they have insufficient records.

Consideration of the records and evidence

42. Examining the records provided, on the summary sheets provided for January and February 2020, there are calculations of the total weight of coal sold, calculated by multiplying the number of bags sold by 44kg. It is not clear why the summary sheets calculate the weight of coal sold by reference to 44kg bags; there is no other reference to 44kg bags anywhere in the Tribunal bundle nor was any reference to that made in oral evidence. We consider that this was an error and the reference should have been to bags of 40kg, as evidenced in the purchase invoice from Beatty Fuels referred to below, so that the aggregate amounts sold in each of those months was lower than calculated on the sheets. We note this to indicate the lack of clarity as to those amounts, rather than because it materially affects our decision.

43. In oral evidence Mr McKiernan stated that he purchased 16-18 tonnes of coal per week, receiving approximately 680 bags of 25kg each. We note that 680 bags at 25kg each would amount to 17 tonnes.

44. The Tribunal bundle contains a single invoice for coal purchases. This is an invoice from Beatty Fuels dated 19 March 2019 for the supply of 680 bags of 40kg each of coal (made up of various type of coal). The invoice also includes a charge for 17 pallets. Given that the supply is for 680 bags and 17 pallets, it follows that there are 40 bags to a pallet (and we note that each coal type on the invoice was supplied in multiples of 40) so that each pallet contained 40 bags of 40 kg, which amounts to 1.6 tonnes of coal per pallet.

45. The information on this invoice from Beatty Fuels is included in a sheet completed in handwriting which seems to be the VAT calculation for the business for March 2019. This sheet includes details of another smaller purchase (approximately 60% of the 19 March 2019 invoice) from Beatty Fuels on 28 March 2019. HMRC visit report notes indicate that the business only purchased coal from Beatty Fuels. It is not possible to extrapolate the number of bags purchased on 28 March 2019 from the amount as the invoice for 19 March 2019 includes various types of coal with different unit prices per bag.

46. We were not provided with any evidence as the amount of coal purchased by the business in January and February 2020 other than Mr McKiernan's oral evidence that he purchased about 680 bags of coal per week.

47. 680 bags of coal of 25kg each per week would indicate purchases of approximately 70 tonnes of coal per month, considerably in excess of that sold, and there was no indication that coal was being stockpiled in the business.

48. It is possible that Mr McKiernan was confused between the number of bags and the weight - there are 25 bags of 40kg in a tonne, such that his reference to 680 bags of 25kg may have been intended to refer to 680 bags of 40kgs, which would also be consistent with the Beatty invoice provided and the various customer statements that they purchased a number of 40kg bags of coal per purchase. However, he also noted that 680 bags amounted to 16-18 tonnes, which is consistent with 25kg bags. 680 bags of 40kg each would be approximately 27 tonnes.

49. The information in the bundle (including photographs) clearly showed that Mr McKiernan simply opened the pallets delivered to him and sold the coal in the bags in which it arrived. He did not repackage the coal into smaller bags.

50. If the coal was sold in bags of 40kg, there would have been 25 bags to a one tonne sale. Throughout his evidence at the hearing, Mr McKiernan was clear that he considered that he sold coal in bags of 25kg, with 40 bags to a tonne. However, as noted above, the invoice from Beatty Fuels makes it clear that the bags supplied weighed 40kg so that there would be 25 bags to a tonne.

51. Regardless of the bag sizes, Mr McKiernan's evidence that he purchased 680 bags of coal per week, and the evidence that he sold 1295 bags in January 2020 (a month of, presumably, high demand for coal), would mean that he sold only half of the coal purchased. This seems implausible and so we consider that his evidence as to purchases must be mistaken.

52. Mr McKiernan stated that he did not make sales in excess of one tonne because that would require him to sell more than 40 bags, which would exceed the number of bags in a pallet and he had not sold amounts in excess of a pallet. We have considered above the inconsistency as to the number of bags in a pallet, and the weight of bags sold. We note, as set out above, from the Beatty Fuels invoice that a single pallet of coal would weight 1.6 tonnes. We find that Mr McKiernan's assertion that a sale of one tonne would require a sale of more than one pallet of bags is mistaken. As such, his evidence that he had never sold more than a single pallet of coal does not preclude any sales of more than one tonne of coal.

53. Mr McKiernan also considered that it would require that the driver held a particular type of licence to be able to use a trailer to take more than one tonne of coal, reducing the number of people who might qualify to make such a purchase, although this statement was not supported by any evidence.

54. We take judicial note that a person who passed their driving test before 1 January 1997 is permitted to drive (with a standard licence) a vehicle and trailer combination with a maximum authorised mass of 8.25 tonnes. For those who passed their test between 1 January 1997 and 18 January 2013, the standard licence permits driving a vehicle and trailer combination where the maximum authorised mass of the combination is 3.5 tonnes and the laden trailer weight does not exceed the unladen weight of the towing vehicle.

55. Mr McKiernan also stated that he knew his customers and knew that all of the sales were for domestic use. We consider that this was an unsupported belief, as there was no evidence that he had made any enquiries as to the purpose of sales, particular the sales of larger amounts which he accepted had taken place.

56. Given the points made above as to the inconsistency between evidence of purchases and evidence of sales, and the unclear evidence as to the number and weight of bags purchased, we do not consider that it is possible to take the evidence supplied (including the oral evidence, and the January and February summary records of sales) as sufficient evidence that the overpayment claimed in the ECNs for earlier periods is accurate or as sufficient evidence that all of the sales made in those period met the requirements for the reduced rate to apply.

57. Mr McKiernan also submitted that the presumption of continuity applied by HMRC in other cases should be applied in his case; for the reasons set out above, we do not accept that the evidence overall and the 2020 records provide sufficient evidence to support a claim for the reduced rate of VAT on sales made in earlier periods, even if the presumption of continuity could be applied in favour of the taxpayer. Given this conclusion we have not considered whether the presumption could be so applied.

58. We wish to make it clear that we consider that all of this arises from confusion and a lack of records, such that the evidence overall is unreliable as to history. We do not believe that there was any intention to mislead.

Decision

59. The law is clear that a person seeking relief from the standard VAT rate must have evidence to support their claim. In this case, we do not consider that there is enough evidence to support Mr McKiernan's claim for repayment of overpaid VAT.

60. Mr McKiernan contended that HMRC's position was that every sale was therefore in excess of a tonne, and that this was arbitrary denial of relief. We consider that this mis-states the position: VAT law requires that a VAT-registered business accounts for the standard rate of VAT on each sale of fuel unless a taxpayer has appropriate evidence to show that they can account for VAT at a reduced rate. This does not deem coal supplies to be in excess of a tonne, it simply means that there is insufficient evidence to show what those supplies were.

61. Mr McKiernan also noted that he had only received a warning letter in respect of the lack of records kept under the Registered Dealers In Controlled Oil provisions, and no assessment had been raised. He asked why HMRC treated coal sales differently. HMRC contended that these were different regimes and could not be equated.

62. We do not think the position with regard to RDCO is relevant. Not only are the regimes different, a refusal to accept an unsupported claim for overpayment is not the same as deciding not to raise an assessment.

63. With regard to Mr McKiernan's contention that HMRC's refusal goes against the spirit of fairness that all taxpayers should pay the right amount of tax, we note the following points. Firstly, it is well established in case law that this Tribunal has no general supervisory jurisdiction in respect of HMRC and so cannot consider, in the absence of any statutory provisions, whether a decision made by HMRC which is in accordance with the law is fair. Indeed, it seems that this appeal has come about precisely because HMRC have tried to be fair - they made Mr McKiernan aware of a reduced rate which he could use in future if he maintained appropriate records and gave him the opportunity to review what records he had to see whether these could support a claim for overpayment for earlier periods.

64. Secondly, for the reasons given above, we find that the standard rate of VAT in this case is the right amount of tax. The reduced rate is only available to those businesses who keep contemporaneous records which demonstrate that they meet the requirements for the reduced rate. HMRC is not imposing a higher VAT rate on Mr McKiernan, as seemed to be suggested at various times in the hearing. We do not agree with Mr McKiernan that the use of standard rate in the original returns was an error; given the lack of records, he was not entitled to claim

the reduced rate in those returns. It would hardly be fair to businesses which do keep appropriate records for non-compliant businesses to be allowed to use a reduced rate where they have failed to keep records to support that reduced rate.

Conclusion

65. For the reasons set out above, we find that there is insufficient evidence to support the claim for overpayment of VAT. The appeal is dismissed.

Right to apply for permission to appeal

66. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

Release date: 25 JANAURY 2023