



**TC05475**

**Appeal number: TC/2015/06650**

*VALUE ADDED TAX – whether appellant should have registered for VAT –yes -  
date from which it should have registered – later date than that decided by HMRC.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**OMID KHAZAEI**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS  
LESLIE BROWN**

**Sitting in public at City Exchange, Leeds on 3 October 2016**

**Mr Syed Naveed Hassan of Kirtley Qureshi & Co, Chartered Accountants, for  
the Appellant**

**Mr Bernard Haley, Presenting Officer, for the Respondents**

1. On 12 October 2016 the Tribunal released a decision containing a summary of the findings of fact and reasons for that decision. The appellant has asked the Tribunal for full written findings and reasons so that he may apply for permission to appeal. This decision contains those findings and reasons. We should add, with the exception of the law, that it is little different from the 12 October decision.

2. This was an appeal by Mr Omid Khazaei (trading as Al Capone's) against a decision of HMRC that he should have registered for VAT from 1 September 2004. At the time of the decision he was not registered, and never had been.

### **Evidence & Facts**

3. We had a witness statement and oral evidence from the appellant and we also heard from his brother, Mr Amin Khazaei. We also had a witness statement and oral evidence from Mr Steve Rimmer, an officer of HMRC who conducted much of the investigation into the affairs of the appellant.

4. We also had a bundle of papers from HMRC and one from the appellant which broadly duplicated each other.

5. From the documents and the evidence of the witnesses we find the following facts.

(1) The appellant took over a takeaway shop in October 2003 which traded as Al Capone's selling pizzas and kebabs. The previous owners of the business were not at the time of sale registered for VAT but they had been at some time previously.

(2) Between the time of acquiring the business and until 2010 the appellant had accounts prepared by an accountant in Blackburn for the purpose of making an income tax (self-assessment) return to HMRC. On those returns the figure of turnover for the business was shown as:

Year ended 31 October	Turnover £
2004	44,322
2005	40,501
2006	40,664
2007	41,269
2008	43,556
2009	50,009

(3) The accountant had died in 2010, and the appellant was told to give estimates of his figures for later periods to the accountant's nephew who had taken over the business. The appellant had told the nephew that the figures had not changed much. Subsequent income tax returns showed the following turnover:

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Year ended 31 October	Turnover £
2010	42,914
2011	51,147
2012	60,120
2013	64,353
2014	64,305

(4) On Friday 9 August 2013 two HMRC officers visited the appellant's takeaway at close of business. They conducted a "cash up" which disclosed £755 in the till and in boxes, of which £120 was a float. The appellant said he had no business records, and he was asked to start keeping them.

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(5) On Friday 28 February 2014 there was a further visit by HMRC officers (including Mr Rimmer) at which the total of "meal bills" (including post-it notes) showed £466. At that visit the appellant told the officers that the business was not seasonal. He also said that some of the post-it notes related to previous days' trading.

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(6) The appellant was also asked to keep self-invigilation records of takings for the month of March 2014. During that period HMRC officers made 6 test purchases. Of these 6, 2 were reconciled exactly with the self-invigilation sheets, 2 were accepted as recorded though there was some rounding down of pence figures and 2 were missing.

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(7) Business records for the period 10 August 2013 (the day after the first visit) and 11 March 2014 showed that the sales day book entries did not match with the self-invigilation sheets: there were very few counter notes and delivery notes and there were gaps in purchases (no döner meat purchase records between 16 September and 2 December 2013).

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(8) On Friday 13 June 2014 HMRC officers (including Mr Rimmer) conducted, with the appellant's permission, an all day invigilation. This showed sales of £580 including "Just Eat" orders. This compared with figures for other Fridays in the appellant's records showing an average of £260 and a maximum of £329.

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(9) In November 2014 a limited company was formed, owned by Mr Amin Khazaei, to take over the business of the appellant. This company had been registered for VAT on the advice of accountants from 1 January 2016. The first

two returns for the company, those from January to April and May to July 2016 showed turnover of c£37,000 and c£30,000.

5 (10) Mr Rimmer issued his final decision on the question of registration on 31 March 2015. His conclusion was that the appellant ought to have registered for VAT from 1 September 2004.

(11) This decision was upheld on review on 8 October 2015, and on 5 November 2015 the appellant appeal to this Tribunal.

6. The facts set out above were not in dispute. There was however disagreement about some matters on which we make findings of fact below.

10 7. There was disagreement between the parties about whether the trade was seasonal. We find that the shop is located in a part of Blackpool that is far from the sea front and any hotels or B&Bs and that the trade was not seasonal.

15 8. The appellant also claimed that the takings on 13 June 2014 were not typical as Blackpool “was gripped with World Cup fever”. We find as a fact that no home nations were playing on that day and that it is unlikely that the prospect of a take away meal in front of Mexico v Cameroon would have given rise to extra sales, though we accept that Spain v Netherlands would have had more interest, but not so as to cause a major increase in takings.

20 9. Although HMRC characterised the amounts found in “cash-ups” (net of floats) as takings we do not find as a fact that cash takings for those days was the figure found in the cash-ups.

25 10. There was also a dispute about the likely percentages of takings represented by sales of döner kebabs and pizzas respectively. Business economics exercises had been done by both parties. We are not in a position to make any findings of fact about this question.

## **The law**

11. The law is in the Value Added Tax Act 1994 (“VATA”) the relevant parts of which are:

### **“Section 3 Taxable persons and registration**

30 (1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.

(2) Schedule[ ] 1 ... shall have effect with respect to registration.

### **Schedule 1**

#### **Liability to be registered**

35 1—(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—

(a) at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £[a figure which has changed over the years]; or

...

5 (3) A person does not become liable to be registered by virtue of sub-paragraph (1)(a) ... above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed [a figure slightly lower than that in  
10 sub-paragraph (1)(a)].

...

15 (7) In determining the value of a person's supplies for the purposes of sub-paragraph (1) ... above, supplies of goods or services that are capital assets of the business in the course or furtherance of which they are supplied and any taxable supplies which would not be taxable supplies apart from section 7(4) shall be disregarded.

...

20 (10) A person is "UK-established" if the person has a business establishment, or some other fixed establishment, in the United Kingdom in relation to a business carried on by the person.

#### **Notification of liability and registration**

5—(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.

25 (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

30 (3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered.

#### **Section 83 Appeals**

35 (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

(a) the registration or cancellation of registration of any person under this Act;”

#### **The submissions**

12. The appellant argued that:

40 (1) HMRC's four different calculations of suppression ratios showed wildly different percentages

(2) HMRC had not taken into account that trade in Blackpool was seasonal

(3) on the invigilation day takings were artificially high because of the World Cup

5 (4) on HMRC's figures the profits being made were very substantial whereas the appellant was not a rich man owning a house on mortgage and a car on finance

10 (5) it is irrational to use takings figures and suppression ratios back to 2004 because the appellant had to work hard for many years to develop the business and the figures had taken no account of boom or recession and that to use Just Eat figures as a basis for calculating turnover before 2013 (when it started) was also irrational.

(6) only visiting on Fridays, the best day of the week, gave a false impression.

15 13. HMRC argued that whichever of the suppression ratios was used the result would be that turnover was in excess of the registration threshold from 2004. The appellant was keeping no records, the trade was not seasonal as he suggested, and the comparisons between actual takings recorded on a Friday was compared only with other Fridays as shown in the records the appellant did start keeping. Even when the appellant was self-invigilating, at least one-third of test purchases were omitted.

### Discussion

20 14. Our task in a case such as this is simply to decide whether it is more likely than not that the appellant's turnover in all the periods starting with 1 September 2004 was above the registration threshold at any particular time. Our jurisdiction is a full review one as the appeal was made under section 83(1)(a) VATA, a provision not mentioned in section 84 of that Act which contains qualifications of our jurisdiction. We can therefore, if we find that 1 September 2004 was not the correct date, vary or  
25 quash HMRC's decision.

15. We consider that it is more likely than not that the turnover of the business was running above the threshold at the time of the first visit by HMRC in August 2013 and at all relevant times after that. We say this for the following reasons:

(1) We have found as a fact that trade is not seasonal

30 (2) We have found as a fact that the invigilated takings on 10 June 2014 were not exceptional or caused by World Cup Fever

(3) We have found as a fact that two out of six test purchases were suppressed in a period when the appellant was self-invigilating

35 (4) The results of the announced invigilation show takings substantially above both the average for *Fridays* [our emphasis] and the highest figure for *Fridays* in the appellant's records

(5) Record keeping was non-existent before the first visit and deficient even after the appellant had been told to keep records

40 (6) There were no till records, and purchases were made from cash in the till and other cash boxes

(7) The turnover from the same business recorded by the successor company in 2016 showed admitted figures running substantially above the threshold

(8) If the lower of the suppression ratios found in §15(3) and in §15(4) is used, the result is the same. (We have not considered the other two ratios calculated by HMRC – see §10.)

16. We do not however consider that it is appropriate for HMRC to effectively apply the lowest suppression percentage as determined in 2013 or 2014 as far back as 2004 on a uniform basis. This is because we had evidence from HMRC that the predecessor business had at the time of the acquisition been deregistered for VAT having previously been registered. We also consider it is likely that “Just Eat” had a beneficial effect on turnover.

17. We think it is unlikely that the Commissioners of Customs and Excise would have allowed a continuing business to deregister without carry out some checks that the turnover had fallen below the then threshold. We also consider it likely that had HMRC had doubts about the appellant’s first year’s turnover in its income tax return it would have compared his figures with those of the predecessor. We had no evidence that the income tax returns of the appellant had been investigated.

18. If we assume that the reported turnover by the appellant was not out of line with the predecessor’s figures and given we had evidence from the appellant and his brother that the appellant had worked very hard in the first few years to increase the business and turnover, so that it was capable of generating the kind of turnover figures shown by the successor company in 2016, we think it more likely that turnover increased from the initial figure, probably fairly gradually at first and then with better growth.

19. Because of the absence of records for years before 2013 it is not possible to be at all precise about when turnover might have crossed the threshold. On a straight line basis from a figure of c£44,000 in 2004 to a figure on an annualised basis of £115,000 in 2016 (based on seven months turnover of £67,000) we would place the breach of the threshold around the end of 2007. But in the light of what we say in §§14 to 16 we would say that is likely to have been later. We therefore decide that the appellant should have registered for VAT from 1 January 2009.

20. We make it clear that we are not required to make findings about what the turnover actually was in any period, and so we make none. Our decision means simply that we consider it more likely than not that turnover crossed the threshold so as to render the appellant liable to register from 1 January 2009.

21. We were not hearing appeals against assessments. We were told that no assessments had been raised. If and when they are then the appellant has, as far as we can see, full rights of appeal and may argue that turnover was not in fact above the threshold, though the appellant would of course have to produce convincing evidence of that fact to any Tribunal. It may also of course dispute the amounts of any assessments even if it accepts that the turnover was above the threshold.

22. We add here, because it disturbed us somewhat, that Mr Haley had submitted that any assessments that might be raised could not be appealed until the relevant returns had been filed. We asked him for his authority for this statement and he told us it was s 84(2) VATA. We see however that that subsection, which did indeed have the effect that Mr Haley said it had, was repealed by paragraph 221 of Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order (SI 2009/56) with effect from 1 April 2009. We hope that this Tribunal has heard the last of this suggestion.

23. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**RICHARD THOMAS  
TRIBUNAL JUDGE**

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**RELEASE DATE: 7 NOVEMBER 2016**