



[2019] UKFTT 549 (TC)

TC07343

VAT – one or two businesses – held two distinct businesses under separate ownership

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/01680

BETWEEN

CHARLES JOHN CATON

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE SARAH ALLATT
MS JANET WILKINS**

Sitting in public at Taylor House on 1 July 2019

Mr Dhiren Doshi for the Appellant

Mrs K Ellis, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal considers whether the business of a cafe, run by the Appellant, is separate from the business of a restaurant which is run by his wife, or whether they should be treated as one business for the purposes of VAT registration.

THE APPEAL

2. This is an appeal against a decision (and associated penalty) that Mr Caton was liable to be registered for VAT from 1 December 2016 to 31 July 2016.

3. The issue is whether the Waterfront Restaurant and the Commonwealth Cafe were, during the period in question, separate businesses with individual turnovers for VAT registration purposes, or were they one single business for which Mr Caton was sole proprietor in which case the turnover from both should be combined.

4. The Appellant submits that they are separate businesses with the cafe run by Mr Caton and the restaurant run by Mrs Caton.

5. The Respondents contend that the Appellant was a sole proprietor for the period 1 December 2009 to 31 July 2016 making taxable supplies in both the cafe and restaurant business.

6. The onus falls on the Appellant to show the Respondents have been unreasonable in their decision.

THE FACTS

7. We heard evidence from Mr Caton, Mrs Caton and also from Mr Keehne of HMRC. We were also provided with (minimal) evidence in the bundle.

8. The following facts are agreed:

9. Mr Caton has run the Commonwealth Cafe for a number of years.

10. His wife, known as KC, is from the Philippines and when she first came to the UK her English was not that good and she was very shy. However, she has always been a very good cook and she wanted to make some money so when the opportunity arose, in 2009, she opened a restaurant in adjoining premises.

11. To start with the operations did not share common areas. However, the toilets that their customers use are public toilets and the restaurant guests had to leave the premises to use them, so in around 2014 some alterations were made to the premises, paid for by Mr Caton, to allow access to the toilets from both the cafe and the restaurant. As a result of these alterations, the cafe and the restaurant share a washing up area.

12. There are two tills, one for the restaurant and one for the cafe.

13. The cafe is open all week. The restaurant opens on Sundays for a carvery, and on Tuesday to Friday 12-3 the restaurant sells 'specials' through the cafe.

14. There are two leases, and both are in the name of Mr Caton.

15. The restaurant has an alcohol licence and that is in Mr Caton's name.

16. The restaurant and the cafe both order the majority of their food from the same wholesaler (Bookers).

17. In 2015 Mr Caton responded to a questionnaire issued by HMRC reporting himself as the sole proprietor of the restaurant business and his wife as an employee.

18. There were reviews of both the cafe and the restaurant on TripAdvisor that were responded to by Mr Caton, calling himself the owner.
19. The website for the restaurant and the cafe suggests that they are one business run by the couple together. 'The Watermill Restaurant and Grill within the historic Merton Abbey Mills venue, was opened in June 2009 by John and KC. The couple had been running the adjacent Commonwealth Cafe...[since 2000]'
20. We found all three witnesses to be honest and reliable. Mr Keehne explained he had visited the premises twice. He had not spoken to Mrs Caton. Mr Caton had always maintained in meetings that Mrs Caton was the owner of the restaurant. When asked for documents minimal information had been provided by Mr Caton.
21. Mr Keehne told us that based on the leases, alcohol licence and bank account all being in the name of Mr Caton, together with the premises not being entirely separate and the details on the website, it is his view that the businesses are in fact one combined business.
22. Mr Caton told us that although he had helped his wife set up the business, this was in the nature of helping her as her husband. He explained that as she was not a British citizen it was far harder for her to get an alcohol licence and that was why he had obtained the licence.
23. He told us that the website had been created to promote the restaurant. He could not afford two websites, one for the cafe and one for the restaurant. He had answered TripAdvisor reviews as Mrs Caton's English was poor.
24. Mr Caton confirmed that his self assessment return contained profits of the cafe only. He confirmed that the staff for the cafe were separate from those of the restaurant, and that Mrs Caton did not work for the cafe. Mr Caton said that he had always told HMRC that the leases, utilities etc were in his name but that Mrs Caton ran the restaurant separately.
25. Mr Caton confirmed that on weekdays, when the cafe sells 'specials' from the restaurant, these are marked separately on the till so the cafe and the restaurant know which sales are which.
26. Similarly Mr Caton explained that the food order is split so that the cafe and the restaurant know which has ordered which food, and therefore who needs to pay for it.
27. Mr Caton uses an accountant to complete his tax return and his income tax return shows income from the cafe only.
28. Mrs Caton told us that she had over the past few years gone to courses to improve her English but when she first came to the UK she was very reliant on her husband. She wanted to set up the restaurant to 'do her own thing rather than rely on John'. Mrs Caton explained that she was in charge of the restaurant. She chose what to cook. She set the prices in the restaurant, firstly by looking at how a chain doing similar meals charged, and then as time went on she adjusted the prices to ensure she was making a profit. She explained that she employed two staff, and also that her son, who has Down's Syndrome, does the washing up.
29. Mrs Caton was very clear that the profit of the restaurant is her money, and that if in any week the restaurant made a loss, she would pay for that out of money previously saved.
30. She explained that the restaurant takes both cash and card payments. The card payments go into Mr Caton's bank account. She pays Mr Caton for the rent, rates and utilities, normally offsetting these against the takings from cards that are already in his bank account.
31. Mrs Caton told us the approximate number of people the restaurant served, and how this varied, and approximately how much they spent per head.

32. Mrs Caton told us she did not work in the cafe apart from very occasionally to help out for example if someone was sick.
33. From the bundle, we also know that:
- (1) there are separate pools of tips for the cafe staff and the restaurant staff.
 - (2) When Mr Caton was asked about restaurant staff he did not know their names

THE LAW

34. Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax provides that “‘Taxable person’ shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”.

35. Paragraph 1 of Schedule 1 to the Value Added Tax Act 1994 (“VATA”) provides that:

(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 the registration threshold. ...

36. Paragraph 1A of Schedule 1 to VATA provides that:

(1) Paragraph 2 below is for the purpose of preventing the maintenance or creation of any artificial separation of business activities carried on by two or more persons from resulting in an avoidance of VAT.

(2) In determining for the purposes of sub-paragraph (1) above whether any separation of business activities is artificial, regard shall be had to the extent to which the different persons carrying on those activities are closely bound to one another by financial, economic and organisational links.

37. Paragraph 2 of Schedule 1 to VATA provides that:

(1) Without prejudice to paragraph 1 above, if the Commissioners make a direction under this paragraph, the persons named in the direction shall be treated as a single taxable person carrying on the activities of a business described in the direction and that taxable person shall be liable to be registered under this Schedule with effect from the date of the direction or, if the direction so provides, from such later date as may be specified therein.

(2) The Commissioners shall not make a direction under this paragraph naming any person unless they are satisfied—

(a) that he is making or has made taxable supplies; and

(b) that the activities in the course of which he makes or made those taxable supplies form only part of certain activities, the other activities being carried on concurrently or previously (or both) by one or more other persons; and

(c) that, if all the taxable supplies of the business described in the direction were taken into account, a person carrying on that business would at the time of the direction be liable to be registered by virtue of paragraph 1 above.

SUBMISSIONS AND DISCUSSION

38. We were referred to a number of cases by both parties. HMRC pointed to the decisions in *Burrell (trading as The Firm) v Commissioners of Customs and Excise* [1997] STC 1413 and *Mr D Harris t/a Fellows Sandwich Bar and Mrs M Harris t/a Fellows Bistro* [2007] LC 761. The Appellant drew our attention to *Belcher* [2017] UKFTT 0427 (TC) which has a summary of a number of other cases including the Court of Justice of the European Union in *Christine Nigl and others v Finanzamt Waldviertel (C-340/15)*.

39. Each case clearly turns on the facts, but some common themes can be drawn out. The High Court in *Burrell* held “In deciding whether two businesses were carried on separately a tribunal should examine the substance and the reality and could only conclude that there were separate taxable entities if the so called businesses were sufficiently at arm’s length from one another, and had normal commercial relationships each with the other’

40. In *Harris*, the sandwich bar and the bistro opened at near identical times, served the same menu, with the same prices and used the same cooking facilities, with the cooking done by one of the two proprietors only. The businesses had started operating at the same time, having been purchased as a single business.

41. We are satisfied that the facts here are sufficiently distinct from the facts in *Harris* that the decision in that case is not persuasive.

42. The decision of the European Court in *Nigl* says that the principle focus of the definition of ‘taxable person’ is independence (assessed objectively) in the pursuit of an economic activity (para 27). The necessary objective assessment of independence is to be carried out by examining ‘whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with the carrying-out of those activities’ (para 28).

43. It is agreed that where the parties are husband and wife, due to the help that a husband may give to a wife, or vice versa, HMRC should not expect the relationship between two businesses to be wholly at arm’s length or to reflect normal commercial practices.

44. The facts in *Belcher* were that a husband and wife ran, from their home, a ladies hair salon (run by the wife) and a barbers (run by the husband). They filed income tax returns as a partnership. They had shared utilities and a music licence but there were separate tills, separate pools of customers, and each of the husband and wife bore separately the economic risk of running, respectively, the barbers shop and the salon. In *Belcher*, this Tribunal held that there were separate businesses.

45. We turn now to the facts in this case. We have extremely limited evidence on paper, and we bear in mind that Mr Caton has not been forthcoming with HMRC in supplying information. He says he has given all the paperwork he can, since he lost a number of documents in a break-in to the restaurant in 2015, which was reported to the police. HMRC point to the leases, the liability insurance and the alcohol licence, which are all in Mr Caton’s name, together with the fact he signed a questionnaire stating that he was sole proprietor of the restaurant, and the fact that the washing up area is shared, and say that these show that there was only one business. They also say that the fact that Mrs Caton did not have a bank account and therefore card takings from the restaurant went into Mr Caton’s bank account further bolsters their case, as do the reviews on TripAdvisor that were answered by Mr Caton.

46. The appellants point to the fact that there were separate staff in the restaurant and the cafe. Those for the cafe were hired by Mr Caton, and are his responsibility, and those for the restaurant were hired by Mrs Caton and are her responsibility. They point to the fact that the

cooking is done completely separately, by different people using different cooking areas. The menus are completely different, and when the cafe sells the restaurant 'specials' they are rung up on the till with a marker that shows they are restaurant sales. They point to the fact that although the majority of the food is ordered from the same place, there are separate orders, one for the cafe and one for the restaurant (even though these orders are placed at the same time and paid for using Mr Caton's bank account). Mrs Caton decides on the menu for the restaurant and the prices. She keeps the cash generated from the sales in the cafe, and this is not banked in Mr Caton's account. Depending on the ratio of cash sales to card sales in any given month, she may need to pay some of it to Mr Caton for the rent, rates etc, but any surplus she keeps.

47. We find it extremely surprising, in this case, that HMRC have never met with Mrs Caton or, in correspondence, asked her for any details. Mr Caton and HMRC have both told us that he has consistently maintained from the first meeting the fact that Mrs Caton runs the restaurant. We find it impossible that HMRC could be in possession of facts sufficient to make a reasonable decision on this case without hearing from Mrs Caton.

48. HMRC set particular store by the fact that Mr Caton filled in a questionnaire with his details, said that he was a sole proprietor and gave the restaurant as the business. He also included his wife as an employee of the business, along with other staff who were employed in the cafe but not the restaurant, but did not include the restaurant staff. The takings which he gave on the same form were those for the cafe but not the restaurant.

49. It is clear that this form was not filled in as diligently as it could have been. However, it is also clear that this form does not, regardless of the address given as the restaurant address, contain the details of either the restaurant alone or the restaurant and the cafe combined, as the employees are those of the cafe alone, but also include Mrs Caton.

50. We now turn to the TripAdvisor reviews. We were provided with 8 in all, two of which had a reply from Mr Caton, calling himself the manager. This does not seem very significant, and were in 2016 when all parties agree Mrs Caton's English was not as strong as it is now. It is also clear from the reviews that the customers very clearly identified Mrs Caton as the main figure in the restaurant. Two of the reviews mention her by name, and none mention Mr Caton. Another feature of the TripAdvisor reviews is that customers clearly distinguish between the cafe and the restaurant and regard them as separate.

51. We note that all the leases, insurance and the alcohol licence were in Mr Caton's name, and his bank account alone was used for the card takings. As Mrs Caton is not a British citizen, there were considerably more hurdles to her being able to obtain an alcohol licence than there were for Mr Caton. We bear in mind that these are factors that point to the businesses at the very least not being run on arm's length terms. However, we also bear in mind that the parties are husband and wife, and that therefore fully arm's length terms are not expected.

52. We now turn to the operation of the businesses. The food for the restaurant and the cafe was ordered separately, from the same supplier (mainly) with the meat for the restaurant being ordered from a different supplier. The menus were completely separate, and Mrs Caton had sole control of the menu in the restaurant. The staff were different (apart from Mrs Caton helping in the cafe should there be staff illness or another unexpected event). The opening hours were different. The takings were either rung up on separate tills (on a Sunday) or with separate identifiers on the same till (weekdays). The pool of customers were different, with customers viewing the businesses as separate.

53. Mrs Caton kept the profits of the restaurant and made good any losses. The businesses were started at separate times. The kitchen premises were partly shared, but the extent of that sharing appeared minimal and incidental to the main operations of each.

54. We consider the facts that point to the businesses being run and owned as two separate operations are significantly stronger than facts that point to a joint ownership. We further consider that without speaking to, or otherwise hearing from, Mrs Caton, HMRC could not be in possession of the full facts on which to base their decision.

55. We therefore allow the appeal and it follows that the associated penalty is quashed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

**SARAH ALLATT
TRIBUNAL JUDGE**

RELEASE DATE: 28 AUGUST 2019