TC04333

Appeal number: TC/2013/01142

VAT – retail schemes –applicability of "catering adaptation" to trader – conditions not met – whether trader told by revenue authority it could use apportionment scheme – no- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

R. MCDONALD AND A. MCDEVITT t/a THE PICNIC BASKET **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MR MICHAEL SHARP FCA

Sitting in public at 45 Bedford Square, London on 19 September 2014

Stephen Soulsby, accountant for the Appellant

Lisa Fletcher, HMRC Officer, for the Respondents

DECISION

Introduction

1. The appellant, a small café business, appeals against a VAT assessment under s73 Value Added Tax Act 1994 ("VATA 1994") in the amount of £28,963 for the VAT periods 06/08 to 06/11. The appellant had been making its returns on the basis that its percentage of standard rated sales were in the region of 30% of turnover. However, HMRC upon further investigation and after having made invigilation visits to the appellant came to the view the percentage of standard rated sales was around 90%. The appellant argues that it prepared its returns in the way that it did because of a telephone conversation which took place between the appellant's accountant and an HMRC employee in 2004 to the effect that the appellant was advised that it could use an apportionment scheme for retailers to calculate the VAT on the supplies it made by reference to the proportion of its purchases which were standard-rated.

2. HMRC argue that approvals to use retail apportionment schemes needed to be given in writing; that no such approval was given in writing by HMRC and so the appellant was not entitled to operate such a scheme. In any case they disagree that a telephone call took place between the appellant's accountant and one of their employees as no record could be found of it. The most relevant scheme would have been a scheme known as a catering adaptation (as apportionment schemes were not permitted for retailers of catering supplies such as the appellant) and even if approval were to have been given for such a scheme the appellant did not comply with the scheme's conditions regarding sampling and producing a calculation which was fair and reasonable. HMRC's assessment which was based on percentage calculations of standard rated supplies observed on two invigilation visits was made in best judgment, was correct and should be upheld.

3. The appellant in turn argues that HMRC's record-keeping is unreliable, that their conclusion that no approval to use the apportionment scheme was incorrect and that it is unfair to penalise the appellant because HMRC could not find a record of the telephone conversation which the appellant's accountant says took place.

Evidence

4. We heard evidence from the appellant's accountant and representative at the hearing, Mr Stephen Soulsby and from Mrs McDonald who is one of the two partners who run the café business. Both witnesses were cross examined by HMRC and answered the Tribunal's questions.

5. Mrs McDonald's evidence principally concerned the day to day operation of the appellant's business and also her presence at various meetings with HMRC officers and their conduct of the invigilation visits. We found her to be a credible witness.

6. Mr Soulsby's evidence covered his role as the appellant's accountant and in particular the matter of the conversation he said took place with an HMRC employee

in 2004. While his credibility was not impugned we found his evidence on this latter point to be unreliable for the reasons set out at [61] below.

7. We had before us a bundle of documents containing correspondence between the parties. HMRC did not call their witness, Nick Turner, and while we do not therefore place any reliance on his witness statement we were able to make various findings as to the letters he wrote and sent and what was stated in such letters. At the hearing the appellant sought, with no objection from HMRC, to put in additional documents to which HMRC did not object. These were two letters dated 15 May 2014 and 20 June 2014 (further detail of which is set out at [37]). In the course of his evidence Mr Soulsby also produced his file note of his conversation with an HMRC officer which is said to have taken place in 2004 (further detail of which is set out at [30]).

Procedural background

8. A Notice of Assessment in the sum of £38,087 for periods 09/07 to 03/11 plus interest was issued by HMRC in November 2012. The assessment was amended in June 2013 to £28,963 for periods 06/08 to 06/11 to reflect the fact some of the periods fell outside of the statutory four year time limit.

Law

9. In order to put the factual issues and parties' arguments in context it is convenient to first set out the relevant law.

10. The appeal before us relates to an assessment under s73 VATA 1994 which provides:

> "73 Failure to make returns etc
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

11. In so far as is relevant to the scheme the appellant argues it had been told by HMRC it could operate, regulation 67 of the VAT Regulations 1995 provides:

> "(1) The Commissioners may permit the value which is to be taken as the value, in any prescribed accounting period or part thereof, of supplies by a retailer which are taxable at other than the zero rate to be determined by a method agreed with that retailer or by any method described in a notice published by the Commissioners for that purpose; and they may publish any notice accordingly.
>
> …"

Public notices 727 point of sale, apportionment schemes and the catering adaptation

12. We were referred to the Public Notice in operation in the time period in issue which was published in March 2002 which was made under the above provision. The notice provided information about the retail schemes available for VAT registered businesses that were unable to account for VAT in the normal way by taking the details of standard and zero rate supplies from invoices issued to customers. The notice set out the details of various schemes including a Point of Sale scheme (which usually entails a till system which distinguishes between goods sold at different rates of VAT) and an Apportionment scheme whereby the proportion of value of purchases for re-sale at different VAT rates is applied to sales (so that as stated in the example given, if 50% of the value of goods bought for retail sale are 50% then 50% of takings would be treated as standard rated). At 3.7 of the Public Notice, it was explained in a statement that was expressed to have the force of law that the trader cannot use the apportionment scheme (amongst other things) for "supplies of catering". Paragraph 8.1 explained that an adaptation for catering is necessary because food bought at zero rate often becomes standard-rated when sold in the course of catering.

13. The Notice goes on to explain that while the trader will normally use a Point of Sale scheme the catering adaptation can be used as an alternative to such a scheme where the user satisfies various conditions which are that:

(1) that the user can satisfy HMRC that it is unable to operate the Point of Sale scheme,

(2) that the user has reasonable grounds for believing that the tax exclusive value of its taxable retail catering sales (standard and zero-rated sales) will not exceed £1 million in the next 12 months; and

(3) that the use of the adaptation produces a fair and reasonable result in any period.

14. The note goes on to explain the procedure for accessing the adaptation.

> "8.5 How do I start to use the adaptation?
>
> **This paragraph has the force of law**
>
> If you wish to use the adaptation and meet the conditions detailed in paragraph 8.3 you must notify your local VAT Business Advice Centre. Generally we will do no more than acknowledge your letter. You may begin to use the adaptation as soon as you receive our acknowledgement."

15. Under 8.6, to use the catering adaptation the person must maintain a record of "DGT" (daily gross takings). Further detail on DGT is set out in paragraphs 4.4 to 4.6 of the Notice.

16. Paragraph 8.8 contains requirements as to the method of calculation. The user must be able to satisfy HMRC whey they visit that the adaptation gives a fair and reasonable result in any period. The paragraph requires that the requirement is based on a sample of sales for a representative period which is to take account of the nature

of the business and of hourly, daily and seasonal fluctuations. A new calculation must be carried out in each tax period.

Background Facts

17. The appellant is a partnership trading under the name "the Picnic Basket". It was registered for VAT on 1 March 2004.

18. On the basis of Mrs McDonald's evidence we were able to find the following facts. The café is located in a small sea-side town with three main shopping streets, and it was on the least busy of the three just off of the seafront. The way in which the café is set up now does not differ materially from how the café was set up during the relevant periods under appeal. The main room of the café can seat roughly 20-22 customers. There is a counter towards the back. Behind the café area there is a room about half the size which contains the kitchen and a small dishwashing area. At the front of the café there is a bistro table with two chairs. This was not used very often for those eating and was mainly used for those who wanted to smoke. Mrs McDonald and her business partner Mrs McDevitt work at the business along with three part-time staff. There is always one person in the serving area, and one in the kitchen. At weekends there is a third person who starts later in the day. The busiest days were Fridays and Saturdays. The café is open at 7am until 2.30pm Monday to Saturday. On Sunday it opens at 9am and stops serving at 2pm. The customer profile was diverse and varied according to the time of day. In the mornings the customers tended to be tradesmen. At lunch time locals from other shops would come in to get sandwiches or main meal. Customers could also phone ahead for orders and then come in and take their order away.

19. The café does a main meal every day and does a roast dinner on Sunday. Monday to Friday this would be something which was freshly cooked e.g. liver and bacon or cottage pie. The breakfast section of the menu contains eggs, bacon etc. cooked breakfasts. Also offered are burgers, omelettes, jacket potatoes, salads, egg and chips, nuggets and chips and sandwiches which are prepared to order. A lot of the sandwich orders came from other shop owners. In the summer and school holidays families would also order sandwiches to take down to the beach.

20. The café offered a selection of hot drinks: tea, coffee, hot chocolate, and cold drinks including two flavours of milkshake. There is a large glass fronted chilled cabinet which stocks coca cola cans, and drink cartons. The café did not tend to sell too many drinks as the shop next door which was a news agent sold them more cheaply.

21. In terms of seasonality summer is the busiest season because of the café's location by the sea-side, but even through October to May there was a steady flow of trade. When it was cold and wet it was a lot quieter and there was little passing trade.

22. The café did not have a credit card machine and took payments in cash. Customers were generally happy to pay in cash.

VAT and dealings with HMRC

23. It is not in dispute that as regards any approval by HMRC to use a retail scheme that no letter was sent by the appellant requesting the operation of a retail scheme and that no written acknowledgement was received from HMRC in relation to any such scheme.

24. Mr Soulsby gave oral evidence that in 2004 he spoke to a person named Victoria at HMRC. He says that during the course of the telephone conversation he made it clear what the nature of the business was and that not all of the business purchase invoices carried VAT. He says he then asked whether his client (the appellant) was allowed to use the apportionment scheme when calculating quarterly VAT based on information he had given earlier in the conversation that not all the purchase invoices carried VAT. He says Victoria responded confirming that it was fine to use the apportionment scheme in this case.

25. HMRC were unable to find a record of Mr Soulsby's conversation or to locate the employee whose first name was Victoria. It is a matter of dispute between the parties as to whether this conversation took place and we deal with this at [57] onwards below.

26. According to Mr Soulsby the VAT calculations were, following the advice he said was given, performed by applying the proportion of purchase invoices subject to standard rate VAT to turnover. Mrs McDonald was told to fill the VAT returns by him accordingly.

27. In early 2011 the appellant was selected for a VAT compliance visit. On 17 March 2011 HMRC (Mr Turner) visited Mrs McDonald at her home where the café's business records were kept. Mr Soulsby was also present and advised that the appellant was using a retail scheme for catering purposes with HMRC approval.

28. On 8 April 2011 Mr Turner of HMRC wrote to the appellant and asked for details of the telephone conversation where HMRC were said to have given permission to the appellant for it to operate the retail scheme for catering purposes.

29. Mr Soulsby replied on 4 May 2011 as follows:

> " A review of my records has revealed that the name of the person I spoke to from your offices, regarding the operation of the retail shcme for my above named client, was Victoria.
>
> It was confirmed to me by Victoria that it would be fine to use the retail scheme for catering purposes, therefore this is the scheme currently being used by my client…"

30. The Tribunal asked Mr Soulsby what records he was referring to when he said he had reviewed his records. He produced a document which stated the following:

> "SJS TELECOM WITH HMRC
>
> RE: THE PICNIC BASKET VAT REGISTRATION

SJS TELEPHONED HMRC ON 04.02.2004 IN ORDER TO CLARIFY THE CORRECT SYSTEM TO BE USED BY "THE PICNIC BASKET" WHEN PREPARING VAT RETURNS.

SJS SPOKE TO AN OPERATIVE CALLED VICTORIA.

SJS EXPLAINED THAT "THE PICNIC BASKET" WAS A CAFÉ/RESTAURANT, WHICH OFFERED BOTH EAT IN AND TAKE AWAY FOOD, AND THAT NOT ALL OF THE PURCHASE INVOICES CARRIED INPUT VAT.

SJS ENQUIRED WHETHER IT WOULD BE APPROPRIATE FOR "THE PICNIC BASKET" TO USE AN APPORTIONMENT SHCEME WHEN CALCULATING THE OUTPUT VAT ON TURNOVER.

VICTORIA CONFIRMED THAT GIVEN THE DESCRIPTION OF THE BUSINESS, THE APPORTIONMENT SCHEME WAS AN APPROPRIATED SCHEME TO USE.

SJS – 04.02.2004"

31. Mr Turner replied on 10 June 2011 to say that he would carry out a full review of HMRC's electronic folder to identify any information held on HMRC's records. On 12 July 2011 he responded saying that the information provided was used to carry out a full review and no trace was found. He stated that:

> "examination of the [appellant's] use of the catering adaptation does not produce a fair and reasonable result in any period for HMRC and I will have to assess for the under-declared VAT arising from unsatisfactory use of the catering adaptation…therefore after our recent meeting, examination of the records, trade class and check of your VAT returns submitted we would expect the actual standard rated percentage of the total DGT to be in the region of 80% for each quarter."

32. HMRC issued an assessment bearing a calculation date of 11 July 2011 in the sum of £30,677 for VAT periods 09/07 to 03/11. Further correspondence ensued between HMRC and Mr Soulsby and on 19 October 2011 Mr Soulsby asked for the assessment to be reviewed. HMRC's review on 18 January 2012 concluded that there was no record of any agreement that the appellant could use the catering adaption and drew attention to the various requirements in relation to such adaptation which had not been met. The review concluded the assessment had not however been raised in best judgment.

33. HMRC (Officers Turner and Wilkinson) conducted invigilation visits at the appellant's premises on 23 July 2012 taking till readings at 10.05am and 2.30pm. The weather was hot and sunny. They carried out a further invigilation on 31 July 2012 when the weather was cold and wet. They took till readings at 11.05 am (a "z" reading of the records for the past week) and at 2.05pm an "x" reading was taken (of the

subsequent sales). HMRC's analysis of the readings over the period 24 July 2012 to 30 July 2012 suggested that the average percentage of standard rated sales was in the region of 90%.

34. HMRC accordingly raised an assessment calculated on the basis of this percentage. In June 2013 the amount of assessment was revised downwards to the amount now under appeal to reflect the fact that some of the periods which HMRC had sought to assess fell outside the statutory four year time limit.

35. Mr Soulsby also referred to various occasions where it is said HMRC's Officer Nick Turner conducted himself inappropriately. When Mr Turner visited the appellant in March 2011 its is alleged that Mr Turner started the meeting by saying "it is my job to find at least £500 of duty here today…". Mr Soulsby also says that when Mrs McDonald asked Mr Turner if he would like some tea, Mr Turner is said to have asked whether she had put poison into it. These complaints together with Mr Soulsby's claim that he had received verbal permission to operate a retail scheme were investigated by HMRC who reported their findings that the complaints could not be upheld in a letter dated 20 June 2013. In that letter the HMRC officer offered to contact a colleague in the National Advice Service (NAS) to see if there was any other way of tracing the telephone call Mr Soulsby said took place in 2004. Mr Soulsby was asked for details of the number he had rung, the surname of Victoria, the exact date of the call and the call reference. Mr Soulsby did not respond. At the hearing Mr Soulsby told us he had not been given a reference number.

Appellant's arguments

36. The appellant does not suggest the amount of the assessment was wrong. The appellant's case rests on the argument it has been unfairly penalised because Mr Soulsby was told on the telephone by a person at HMRC that it was fine for the appellant to use an apportionment scheme.

37. Mr Soulsby argues that HMRC's records are inaccurate and that their systems did not function properly. He referred to other occasions where HMRC's record keeping had fallen short, in particular:

(1) Mr Turner had asked Mr Soulsby for a form 64-8 (authority to act) even though this had been provided back in 2001 when Picnic Basket had first become a client of Mr Soulsby's.

(2) Incorrect instructions were given by different departments of HMRC. Despite being told on the telephone by Mr Turner that the disputed assessments were not being collected, the appellant received a visit from HMRC's debt collection department for unpaid VAT in an amount which exceeded the charged assessments and penalties.

(3) In a letter dated 15 May 2014 from HMRC (Complaints Service Reply (PAYE & SA) to Mr Soulsby in relation to a client it is reported that Mr Soulsby stated that an original 2011-12 return was submitted in paper format in August 2012 and mislaid in HMRC's offices. The letter then states:

> "I do not dispute that you sent it but I cannot establish if it was undelivered or received and later lost. If it was the latter then I am very sorry."

(4) In a letter dated 20 June 2014 from HMRC to Mr Soulsby in relation to the same client above the following statement is contained:

> "I would like to apologise for the fact that the initial appeal was rejected due to us believing form 64-8 had not been submitted when in fact you sent it in 2010."

(5) Mr Turner had admitted that there were problems with the new computer system HMRC had put in 2010 and that data had got lost.

(6) In 2006 Mr Soulsby received a telephone call asking for another copy of a 2003/4 partnership tax return and was told this was needed because HMRC had lost the previous one.

(7) An HMRC letter had referred to an incorrect address of its offices in Bootle.

(8) The FTT case of *Whitefield Golf Club & others v HMRC* UKFTT 458 – shows documents were lost and destroyed by HMRC.

38. Having proceeded on the basis the appellant was told it could use the apportionment scheme it is unfair, the appellant says, to be charged the output tax. Given the Public Notice the HMRC officer ought to have explained to Mr Soulsby who was seeking guidance what to do. He was not instructed to contact the VAT Business Advice centre as suggested by the notice and was not given any reference number.

39. The appellant has built up a successful business employing five people in difficult economic times. Imposing the assessment in the order of £30,000 would bring into question whether the business could continue. The appellant accepts that the POS (Point of Sale) system is to be used from March 2011 but does not accept assessments based on VAT periods before that date.

40. The assessment should be reduced to zero. The appellant had taken reasonable steps to ensure the correct VAT scheme had been used. The advice given by HMRC had been misleading and not complete.

HMRC's arguments

41. HMRC dispute that the telephone call took place. They say it is not HMRC's policy to give approval over the phone. Approval to operate any concessionary scheme would need to be applied for in writing and approval to use the scheme would be given in writing not verbally.

42. The use of the retail scheme for catering purposes was incorrect as conditions for the use of the scheme had not been met.

43. If the appellant had been operating the scheme it would have been required to retain a record of its Daily Gross Takings. It is a requirement that the scheme when being operated must give a fair and reasonable result (paragraph 8.8 of Public Notice 727). The appellant has to have retained the records required by the scheme or carried out the sampling of their actual sales in order to operate the scheme. HMRC assessed for under declared output tax as they are entitled to do so under paragraph 8.4 of Public Notice 727.

44. Even if approval to use a catering adaptation had been given the appellant was not operating the scheme correctly leaving themselves open to assessments being raised.

45. HMRC expect 80% standard rated sales for a café. The invigilation carried out over two different days in a two week period showed the café was actually making around 90% standard rated sales.

46. The assessment was made to best judgment and the method for calculating the amount made appropriate use of information gathered on visits to the appellant's premises.

Discussion

Issues

47. We should say at the outset that although the appellant was invited by the Tribunal to consider whether there was anything about the invigilation visits which revealed a percentage of standard rate sales which was atypical the appellant did not have any arguments to make on this. The issue in this case is therefore whether the appellant was entitled to use the catering adaptation or an apportionment scheme, or if it is not whether there is some means of reducing the assessment to zero as the appellant argues because of the unfairness of HMRC not being able to find a record of the verbal approval to use the scheme which is said to have been given.

Was Picnic Basket eligible to use the apportionment scheme or the catering adaptation?

48. There was no evidence before us which suggested that the appellant was eligible under the terms of Public Notice 727 to use either the apportionment scheme or the catering adaptation described in that notice.

49. The appellant's business as a café involves supplies of catering. It therefore falls outside of the conditions for use of the apportionment scheme (see [12] above) and the applicability of that scheme cannot be a ground for altering the assessment.

50. In relation to the catering adaptation there are several conditions which the appellant was not able to demonstrate it had complied with. In particular it had not satisfied HMRC that it was unable to operate the Point of Sale scheme. It had not satisfied HMRC that the use of the adaptation produced a fair and reasonable result in

any period in that no sampling exercise of sales for a representative period which took account of the nature of the business and of hourly, daily and seasonal fluctuations had been carried out.

51. The appellant did not comply with the catering adaptation conditions and that adaptation does not provide a ground for cancelling or reducing the VAT assessment.

52. HMRC also argue the catering adaptation could not have been applied on the basis that no approval could have been given because no acknowledgement to use the catering adaptation was given to the appellant by HMRC in writing.

53. It is clear from the wording of the Public Notice that the request by the trader to use the scheme was anticipated to come in in writing. The wording of the Notice however is not explicit on what form the acknowledgement from HMRC would take. Even though HMRC may have a policy of only giving such acknowledgements in writing the terms of the Public Notice do not preclude the acknowledgement being in some form other than writing. Having said that, there is no suggestion the appellant did write in so to that extent its case is not within the approval.

54. The appellant's main argument is that it is unfair to be subject to the VAT assessment just because HMRC cannot find a record of the telephone conversation in which it said approval to use an apportionment scheme was given.

55. Although the appellant has framed its argument in this way the appellant's argument could better be understood as either suggesting that the telephone conversation amounted to an agreement to a particular bespoke method by HMRC under Regulation 67 of the VAT Regulations or that the conversation gave rise to a legitimate expectation on the appellant's part such that it would be so unfair so as to amount to an abuse of power for HMRC to have made the assessment it did.

56. Whether it is necessary to explore either of these lines of argument (and the Tribunal's jurisdiction in relation to the latter one) is however first dependent on resolving the issue of whether the assurance which the appellant relies on was given as a matter of fact.

Disputed fact – did the phone conversation between Mr Soulsby and HMRC take place?

57. Mr Soulsby made much of the fact that there were other instances where HMRC's record on record keeping and retrieval was not robust. In our view the examples Mr Soulsby referred to go as far as indicating that it is *possible* that records may not be kept by HMRC or that if they are kept that they may be lost. However it does not go as far as establishing any wider proposition that records of telephone conversations with HMRC are more likely not to be kept than they are to be kept, or if such records are kept that they are more likely to be lost than not. The most we can take away from these points in the appellant's favour is that the fact HMRC could not locate a record of the phone conversation does not mean the conversation did not take place. It is possible that if the conversation happened it was not recorded, or that if it

was not recorded it was deleted, or if it was recorded that the means of search were unsuccessful at retrieving it. Beyond Mr Turner's letter which states that searches were made of HMRC's electronic folder we do not have any evidence as to what such a search entailed, or of HMRC's record keeping systems, how reliable they are, and what if any other searches in addition to the one that Mr Turner performed could have been made.

58. However it is important to note that the burden of proof in relation to establishing that the phone conversation took place and what was said in it lies on the appellant. It must show by the evidence before the Tribunal that it is more likely than not that the conversation took place as described.

59. Mr Soulsby gave oral evidence of the conversation. He referred to his letter of 4 May 2011 to HMRC and produced his file record (see [29] and [30] above).

60. The letter of 4 May 2011 from Mr Soulsby indicates to us that Mr Soulsby's recollection, quite understandably, given the length of time that had passed was from a review of his records rather than a recollection made afresh without recourse to his records. Mr Soulsby's oral evidence at the hearing reflected pretty much verbatim the terms of the record he produced and again we think his recollection is not a fresh recollection but one which is made by reference to the record.

61. Our difficulty with this evidence is that we do not think the note of conversation is a reliable record of a conversation which is said to have taken place in 2004. It is telling that the note refers specifically to conversations with HMRC at a time when there was no such entity in existence (the Commissioners for Revenue and Customs Act 2005 which gave rise to the entity HMRC did not come into force until April 2005). It therefore seems improbable to us that the note was written in 2004 and given VAT enquiries could only have been handled by HMRC officers by the middle of 2005 it seems more probable that the note was written at some point after that date at which time VAT enquiries would have been handled by the new entity HMRC as opposed to HM Customs and Excise.

62. The oral evidence that a conversation took place was based on a record that was not contemporaneous or near-contemporaneous. It was written at best at least a year or so after the conversation it purports to record and carries little if any weight in our view. (We also note that despite having the record with the specific date of the purported conversation the record was not shown to HMRC and the specific date was not referred to them either despite a specific date appearing on the record. We infer from this that Mr Soulsby was himself not particularly confident as to the accuracy of his record). As discussed above the absence of an HMRC record of the conversation is not conclusive. It is however more consistent with a conversation not having happened than not. The appellant has not established on the balance of probabilities that the phone conversation said to have taken place did take place. Further there was no evidence before us to suggest that a conversation with a similar content had taken place at a later date. That being the case, we are unable to make any finding of fact that Mr Soulsby was told by HM Customs and Excise or subsequently HMRC that the appellant could use an apportionment scheme and the appellant's argument that it is

"unfairly penalised" by HMRC's (or indeed HM Customs and Excise's) advice, or the lack of HMRC or HM Customs and Excise keeping a record of the advice does not get off the ground.

63. The appellant has referred to various complaints about the conduct of the matter by Mr Turner (see [35]). These matters have we understand been followed up through HMRC's complaints process. The issue of whether the statements were said or not is, in our view, of negligible relevance at best to this appeal and we do not therefore make any findings of fact in relation to them. Although not argued by the appellant if such comments were made it might be argued by the appellant that Officer Turner's assessment was made arbitrarily or capriciously such that there would be issues as to whether the assessment had been made in best judgement.

64. However having considered the letter which accompanied the assessment and what we were told about the manner in which the invigilation visits were carried out by Mrs McDonald we are satisfied the assessment was made in best judgment. Even if the comments were made by Mr Turner, and acknowledging that whether they caused offence is a question of subjective impression, those comments were more likely, given their content and the context in which they were said, in our view to disclose ill-judged attempts at making conversation or at humour rather than a malign predisposition against the appellant. Mrs McDonald confirmed that another officer in addition to Mr Turner was present at the invigilations and Mrs McDonald took no issue with how the invigilations were conducted. The assessment was made on the basis of those invigilations.

65. In relation to the appellant's complaint that the HMRC operative Mr Soulsby says he spoke to should have alerted him to the applicable conditions for use of the catering adaptation, we were unable to make a finding of fact that the conversation said to have taken place with Victoria did in fact take place. But, in any case Public Notices as the name suggests are published notices freely available to the public. As a professional adviser there was all the more reason that Mr Soulsby would be taken to be aware of them or that if he was not aware of them that he would have sought out any relevant provisions relevant to his client's circumstances without being prompted by HMRC. We fail to see how it is incumbent on HMRC to notify a professional adviser of a public notice and how that can result in any unfairness which gives rise to a remedy before this tribunal.

66. In relation to the impact of the imposition of the VAT assessment on the future running of the business this is not a relevant factor to the issue before us which is whether the assessment is correct or not.

67. There is nothing on the evidence before us to suggest that the assessment has not been validly imposed as a best judgment assessment or that its amount is incorrect. The percentage rate is consistent with what Mrs McDonald told us about the café and the predominance of standard rated supplies being made. As we have said, despite clarification being sought from the Tribunal as to whether the appellant had any points to make on the matter the appellant made it clear its appeal was purely on

the significance of the phone conversation said to have taken place with a person called Victoria.

68. There is no ground accordingly upon which we are able to overturn or reduce the assessment under appeal.

69. The assessment is upheld and the appeal is dismissed.

70. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 19 March 2015