



TC05661

Appeal number: TC/2016/02133

VALUE ADDED TAX - Takeaway business - Assessed as liable for registration but no longer liable - Assessment raised - Whether assessment to best judgment? - Yes - Whether assessment should be adjusted? - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR CHUN WAH LOK **Appellant**
(also known as **MR DANIEL LOK**)
(trading as 'NEW LANE HOUSE FISH AND CHIPS')

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS MARY AINSWORTH**

Sitting in public at the Tribunals Service, Alexandra House, 14-22 The Parsonage,
Manchester M3 2JA on Monday 28 November 2016

Mr Lok appeared in person

Mr Sellars, an Officer of HMRC, appeared for the Respondents

DECISION

1. Mr Lok owned and operated a takeaway business in Bolton. It was originally known as 'Lok's Chinese Takeaway', then 'New Lane House Fish and Chips', and then 'Egerton Chippy'. Whilst HMRC repeatedly refer, in their Statement of Case, to Mr Lok in the plural ('they'), Mr Lok was for these purposes a sole trader.

2. On 14 October 2015, and following a protracted investigation, HMRC decided that Mr Lok was 'Liable but no longer liable' ('LNLL') to be registered for VAT for the period 1 March 2010 to 12 May 2013.

3. That was on that basis of HMRC's determination that Mr Lok's true turnover during that period exceeded the annually adjusted thresholds for mandatory VAT registration, which were:

- | | | |
|-----|---------------|---------|
| (1) | 1 May 2009: | £68,000 |
| (2) | 1 April 2010: | £70,000 |
| (3) | 1 April 2011: | £73,000 |
| (4) | 1 April 2012: | £77,000 |
| (5) | 1 April 2013 | £79,000 |

4. HMRC decided that, because Mr Lok had not registered for VAT when he should have done, and had not made any returns of VAT from 1 March 2010 to 12 May 2013, that he was liable to pay the net amount of VAT in respect of the whole of that period, which was calculated at £34,989.

5. HMRC also decided that Mr Lok was liable to pay HMRC a penalty in the sum of £5,248.

6. Mr Lok requested a statutory review on 19 October 2015.

7. On 30 March 2016, the decision of 14 October 2015 was upheld on review.

8. By a Notice of Appeal dated 11 April 2016, Mr Lok appeals against the sum of £34,989.

HMRC's case

9. In summary, HMRC's case is that it undertook several visits to Mr Lok's premises between 2 November 2012 and 7 August 2014 in order to establish his turnover. Those visits were not always announced in advance. They included test purchases, both to see whether the test purchases were recorded on self-invigilation sheets (and, if recorded, were recorded accurately) and also to gather information as to portion sizes. The latter is a matter of significance in this appeal.

10. HMRC's case was that it established that a series of potato purchase documents were a complete record, and on the basis of them, and an analysis of 'meal slips', concluded that potato chips represented about 10% of the total sales. That was then used as the principal factor from which an estimate of the gross turnover could be calculated.

Mr Lok's case

11. In summary, Mr Lok's case was that chips did not represent 10% of the total sales. He did not agree HMRC's calculation of his total sales between 1 March 2010 and 1 May 2013.

12. He argued that four months used at a later stage to establish the chip sale percentage should have been averaged out to produce a figure of 15.63% for chip sales as a proportion of overall sales.

13. He also said that he achieved only 20 portions of chips per bag, and that, when this was grossed-up on a 15.63% basis, his annual turnover was in fact below the registration threshold.

The evidence

14. We heard oral evidence from Mr Lok and Officer Andrew Kirkby.

15. In addition to the oral evidence we were provided with a bundle of documents (in two parts, coming to 299 pages) which, in addition to the witness statements (we took Mr Lok's long letter of 18 October 2016 as such) included copies of correspondence between the parties, notes of meetings, the Notice of Appeal and HMRC's Statement of Case.

16. Although Mr Lok said in October 2015 that he had used the services of an accountant (who he named) from February 2010, there was no direct evidence from the accountant.

Our jurisdiction

17. Mr Lok is the Appellant and the burden of proof is on him. He must show us, to the appropriate standard of proof, that HMRC's decision was wrong.

18. We proceed on the basis that Mr Lok is appealing both against HMRC's decision to make the assessment and also, if that part of his appeal fails, against the amount of the assessment.

19. The burden of proof is on Mr Lok.

20. In relation to the decision to make the assessment, Mr Lok must establish that HMRC acted in a way which was unreasonable in a public law sense. In broad terms, he must show that HMRC arrived at a conclusion which was so unreasonable, perverse or irrational that no reasonable decision-maker, properly informed, could have arrived at it.

21. If HMRC were right to make an assessment, then we go on to consider the appeal against the amount of the assessment. Mr Lok must show us, again to the appropriate standard of proof, that the amount is wrong.

22. We remind ourselves that the standard of proof placed on Mr Lok is the ordinary civil standard - the balance of probabilities.

23. In relation to matters of disputed fact, we also remind ourselves of the valuable remarks made by Lord Hoffmann in the Supreme Court In *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35:

"If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

Findings of Fact

24. On the basis of the evidence we make the following findings of fact.

25. In 2006/7 the business was owned by the Appellant's wife, Mrs Liang. Her self-assessed turnover for that year was £73,491 which was in excess of the VAT registration threshold. Mr Lok told us, and we accept, that his wife's turnover was in excess of the threshold and that she had been fined.

26. Mr Lok took over the business in 2009.

27. On Friday 2 November 2012 Officers Andrew Kirkby and Rimmer of HMRC's Hidden Economy Team undertook an unannounced visit to the business, towards cashing-up time, at about 10.50pm. There were no customers in the shop. There was no till, only a cash box. Meal slips were handwritten and kept on torn pieces of newsprint. The cash (including £66.50 taken by card) was £629.90. There was a very minor discrepancy with the meal slips, which totalled £627.50.

28. On 13 December 2012 Officer Kirkby received records from Mr Lok's accountant, including weekly total sheets from 5 December 2010.

29. Officer Kirkby reviewed meal slips from 2 September to 30 September 2012. He calculated that 10.39% of overall sales were from chips. He rounded that down to 10%. That analysis appears at page 180 of the bundle.

30. Having done that, Officer Kirkby reviewed potato purchases for 11 successive weeks from 8 September 2012 to 17 November 2012. Over that period, 132 bags were bought. Each bag weighs 55lbs (24.94kg). The average was $132/11 = 12$ bags x 55lbs = 660lbs = 299kg per week raw weight.

31. On 28 March 2013 Mr Lok was also asked to produce meal slips from 2 December 2012 onwards.

32. Mr Lok did not immediately provide those documents. On 25 April 2013 HMRC issued a Notice to Provide Information under Schedule 36 of the *Finance Act 2008*.
33. On 15 May 2013 a meeting took place between Mr Lok and Officer Kirkby. Mr Lok told Officer Kirkby that he had ceased to trade on the preceding Sunday, 12 May 2013. Mr Lok said that on 16 May 2013 a Mr Pang and his wife had taken over the business and renamed it 'Egerton Chippy'. Mr Lok did not go back to trading there until 16 November 2013.
34. On 20 June 2013, HMRC requested more information from Mr Lok, including certain missing copies of bank statements.
35. Mr Lok did not provide those documents. On 22 July 2013 HMRC issued a further Notice to Provide Information under Schedule 36 of the *Finance Act 2008*.
36. Mr Lok went back to the business on 16 November 2013.
37. A further meeting took place between Mr Lok and Officer Kirkby on 16 December 2013. Mr Lok is noted as having agreed, in that meeting, that 'about 10%' of his turnover was in chips.
38. At a visit on 6 February 2014 it was established that Mr Lok achieves 48lb (87% = 21.77kg) of raw potatoes after peeling and chipping from a 55lb bag.
39. Between 6 February 2014 and 17 March 2014 Mr Lok completed a series of self-invigilation sales sheets, recording the time of sales and the price.
40. On 13, 14, 23 and 27 February 2014, there were trial purchases of two regular and two large portions of chips. The portion sizes were generous. Regular chips weighed 475 and 500gms (averaging 487.5gms) Large chips weighed 620 and 640gms (averaging 630gms).
41. One of those purchases was not recorded on the self-invigilation sheets.
42. There was a visit to the premises on 7 August 2014.
43. 1lb (454g) of chipped raw potato went into the fryer and was cooked. There was a weight loss through cooking. The resulting weight was 260 grammes, or about 57% of the raw weight. About 43% was lost through cooking.
44. HMRC therefore expected that Mr Lok would get, from each 55lb (24.94kg) bag, about 21.77kg (peeled weight) \times 58% = 12.62kg per bag (= 27.8lbs) of cooked chips from a bag of potatoes = approximately 27 portions. This was rounded down to 25 portions.
45. Officer Kirkby reviewed further potato purchases: for five months and two half months in 2013, and for five months in 2014. Removing the half-months there were 424 bags over 10 months = an average of 9.8 bags per week \times 25lbs = 245lbs of cooked chips per week, or about 250 1lb portions, or about 25 portions a bag.
46. The daily gross takings on Wednesday 6 August 2014 were £174.20, which was 54% higher than the average Wednesday calculated from 40 weeks' worth of Wednesday meal slips in 2012 and 2013.

47. Officer invigilation that evening saw no wastage, saw that chips were being cooked to order and none were being thrown away.
48. Mr Lok ceased to trade on 10 August 2014.
49. Officer Kirkby set out his calculation and methodology in his long letter of 19 September 2014.
50. He calculated an annual turnover of £138,240 for the year 6 April 2012 to 5 April 2013.
51. He calculated turnover figures for earlier years: the lowest of which was £123,446 for year ending 5 April 2010.
52. All the figures comfortably exceed the threshold for compulsory registration.
53. There was a meeting on 2 October 2014. Mr Lok said, for the first time, that he was wasting 1-2 portions of chips (=1-2lbs) per hour due to overheating and 3-4 portions (=3-4lbs) were left unsold at the end of each night.
54. Mr Lok did not agree that the 10% figure in relation to chip sales was correct. He and Officer Kirkby agreed that Officer Kirkby would revisit that figure, analysing four months' worth of meal slips: March and April 2013; and June and July 2014. Those periods were agreed with Mr Lok as fair and representative.
55. On 7 January 2015 Officer Kirkby wrote a long letter setting out the recalculations he had done.
56. The total recorded takings for chips in March and April 2013 were £1,349.20, against total recorded takings of £10,491.55, so chips represented 12.85% of the recorded takings. Calculated out from the known potato purchases from January 2013 to April 2013, and giving an allowance for 2 portions of waste per bag, and applying a figure of 12.85% chip sales to turnover gave annual turnover of £93,478: i.e., **above** the VAT threshold.
57. The total recorded takings for chips in June and July 2014 was £1,782.90, against total recorded takings of £9,656.85 so chips represented 18.46% of the recorded takings. Calculated out from the known potato purchases from December 2013 to May 2014, and giving the same allowance for 2 portions of waste per bag, and applying a figure of 18.46% chip sales to turnover gave annual turnover of £74,985: i.e., **below** the VAT threshold.
58. The Officer remarked:
- "As the percentage of chips was found to be lower in 2012 so I would expect the turnover to be higher in the earlier years I propose to use the 2012/13 figure of £93,478 and RPI to establish the earlier years turnover as demonstrated in my letter 19 September 2016"
59. Having seen that analysis, Mr Lok responded on 27 April 2015, adopting a new figure of 20 portions of chips per bag as against HMRC's figure of 25 portions. It is not clear where Mr Lok's portion figure came from.

60. Mr Lok also then sought to adjust the portion price to £1.30, and, even though he said that this had been introduced at some date after 16 May 2013, he applied it to the figures for March and April 2013.

61. By virtue of these suggested modifications to the parameters of the calculation, he arrived at a maximum turnover figure for the year ending April 2014 of £71,798.23: i.e., below the threshold.

Discussion

62. When Mr Lok's wife owned the business, it was turning over well in excess of the VAT threshold. We were not pointed to any change in working practices which would have resulted in that turnover reducing from about £74,000 in 2008 to £47,256 in the year ending 5 April 2010 (an approximate £27,000 or 36% reduction).

63. Mr Lok put before us professionally prepared, but unaudited, accounts for the years ending 5 April 2011 and 5 April 2012. Those show sales below the threshold for compulsory registration. However, we are unable to give any weight to those accounts. There was no evidence from the accountants. Moreover, and as the accounts state, the accountants had not verified the accuracy or completeness of the accounting records or the information and explanations given to them, and therefore did not express any opinion on the accounts. The accountants' working papers and/or the documents upon which the accounts had been prepared were not put before us in evidence.

64. We reject Mr Lok's evidence that the cash takings on 2 November 2012 was 'a very lucky night...seem to be winning the lottery'. We also reject his earlier account, given on 15 May 2013, that takings were high that night since it was 'Bonfire Night'. Friday 2 November 2012 was not Bonfire Night, which fell on the following Monday. Officer Kirkby recorded, and we accept, that there were no local firework displays on the Friday night. We also accept HMRC's evidence that there were no customers in the shop at 10.50pm (10 minutes before closing).

65. The pattern which emerges, from both the November 2012 visit and the August 2014 visit, is that cash takings were (in November 2012) high and (in August 2014) significantly higher than the 40-week average of a Wednesday night's takings. We do not consider that to have been simple luck or coincidence. We consider that the Officer had reasonable grounds to suspect that the declared turnover was potentially less than the true turnover.

66. The note of 16 December 2013, recording a figure of about 10% for the proportion of chip sales, records Mr Lok's *own* assessment, which was put forward to Officer Kirkby before Officer Kirkby had even told Mr Lok what HMRC's assessment was. We also note that Mr Lok signed that note at the end agreeing its contents. He did not make any amendments to it, nor list any concerns.

67. We do not consider that Mr Lok has succeeded in proving, even to the appropriate standard, that any other figure is correct.

68. We find that the menu which the Officer was shown that day was not the same as the menus placed in evidence before us, which showed the prices of chips (from 'Lok's Fish and Chips') as £1, and from 'New Lane House' as £1 and £1.50.

69. We accept HMRC's position as to the number of portions of chips to be obtained from one bag, allowing for and adopting HMRC's figures for (i) the wastage occasioned by peeling and preparation; and (ii) the shrinkage occasioned by cooking.

70. The number of portions was 24. In fact, HMRC had arrived at a higher figure by a careful process, including making and weighing a series of test purchases, but Officer Kirkby agreed with Mr Lok's position, which was 24.

71. The number of portions was not 20. There is simply no evidence that a 55lb bag would produce only 20 portions. That figure was advanced only at a very late stage by Mr Lok, when he had already agreed that 24 was the right figure.

72. In terms of wastage, the best evidence which we have, and which we accept, is that neither Officers Greenwood nor Shih observed any wastage during their invigilation visit on 6 August 2014, between 5 and 7.30pm. During that time, the chip fryer was replenished 5 times. Their note, which we accept, was that chips were being cooked to order, and there were none left behind when they left.

73. We reject Mr Lok's claim that he was wasting 1-2 portions per hour. We are simply unable to accept that figure. This is for the following reasons:

(1) Mr Lok has not advanced any evidence to support his contention, and it is contrary to what the officers saw;

(2) HMRC has already made an allowance for wastage (being 2 portions from every 24) although they considered, on the basis of their own observations (in our view, reasonably) and as a matter of fact, that there was no wastage;

(3) On the footing that the portions purchased, when weighed, were about 500g (or 1lb) each, then 2 portions is 1.0 kg (2lbs). 1.0kg chip wastage per hour over an evening's opening (5-9.30pm), if the advertised opening times were stuck to, would equate to 4.5kg of chips wasted over each 4.5 hour opening slot. 4.5kg of cooked chips is just under 10lbs. Each bag produces about 27lbs of cooked chips. $10/27 = 37\%$ wastage of cooked chips.

74. The figure is simply not credible. Moreover, it becomes even less credible when one factors in the 3-4 portions said to have been unsold each night = another 3-4lbs. The result would be that up to 14lbs of cooked chips are wasted per day, which is the equivalent of over half a bag.

75. We have considered the visit reports and cross-referenced these with the self-invigilation sheets.

76. Officer Bone visited on 27 February 2014. He bought some chow mein and chips for £7 at about 5.30pm. No such purchase is recorded on the invigilation sheet. The customer ahead of Officer Bone bought something for 'just under £10'. There is no purchase recorded for 'just under £10'. Indeed, there is nothing above £6.60 on the relevant part of the sheet. Hence, we find that Officer Bone's purchase (which would have been equivalent to about 7% of that day's recorded takings) was omitted; and that the other purchase was either omitted entirely, or understated.

77. In relation to the inspection visit on Wednesday 6 August 2014, the actual float (£62) does not match the recorded float (£68).

78. In either event, in our view, the invigilation sheets cannot be safely relied upon as evidence of true receipts.

79. Officer Kirkby was reasonable and accommodating in his dealings with Mr Lok. It seems to us that he was going out of his way to be as fair as he properly could, and to give Mr Lok the benefit of legitimate doubt.

80. One example of this was that, on 20 April 2015, Officer Kirkby revisited the potato purchase figures at Mr Lok's insistence. Officer Kirkby not only continued to exclude figures for half-months but he also removed the figure for May 2014.

81. That left undisputed potato purchase figures for nine months as follows:

- (1) Jan 2013 42 bags
- (2) Feb 2013 42
- (3) Mar 2013 46
- (4) April 2013 52
- (5) Dec 2013 52
- (6) Jan 2014 36
- (7) Feb 2014 44
- (8) Mar 2014 36
- (9) April 2014 54

82. Those amount to 404 bags over 9 months. The officer calculated this out over 11 months. This was done over 11 months rather than 12 so as to introduce, for Mr Lok's benefit, and at his insistence, a 4 week holiday allowance although HMRC had not observed any such holiday in the business records. That gave 493.77 bags. Even at 20 portions per bag (Mr Lok's figure) = 9875.40 portions at £1.30 grossed-up at 15.63% (Mr Lok's figure) gives a figure of £82,137 which was above the VAT threshold.

Best judgment

83. Section 73(1) of the *VAT Act 1994* reads:

"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."

84. The element of guess-work and the almost unavoidable inaccuracy in a properly made 'best of judgment' assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows (i) that they are wrong and also (ii) shows positively what corrections should be made in order to make the assessments right or more nearly right.

85. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015 the Court of Appeal said that 'best judgment' simply means '*to the best of their judgment on the information available*': see Para [10]. In that case, the Court of Appeal also expressly approved the decision of Woolf J (as he then was) in *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290:

"What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them" (at p 292)

86. In our view, the assessment was made to best judgment.

87. We consider that Officer Kirkby, over a lengthy and deliberative process, and not affected by any caprice or malice, worked carefully to establish reliable figures. His process of reasoning was entirely rational:

- (1) The potato purchase figures were not in dispute. They were a firm empirical footing upon which other calculations could be made;
- (2) The wastage from peeling and preparation was not in dispute: it had been demonstrated at the business;
- (3) The shrinkage of chips in the fryer was not in dispute: it had likewise been demonstrated;
- (4) The portion sizes could not realistically be disputed: they had been established from test purchases.

88. Officer Kirkby did not insist dogmatically on the application of HMRC's own guideline figure for the number of portions of chips which could be obtained from a 55lb bag. He was prepared to consider the evidence of the test purchases, and to work from that.

89. Officer Kirkby also applied a reduction for wastage, which worked entirely in Mr Lok's favour, although, on a strict view, Officer Kirkby did not need to do so when HMRC itself had not observed any wastage.

90. Latterly, Officer Kirkby also extended a further concession, which was to treat the trading year as 11 months and not 12 months, even though there was no reliable evidence that such a working pattern was being operated. That was also entirely to Mr Lok's benefit.

91. Mr Lok had himself agreed the figure of 10% proportion of chip sales.

92. Mr Lok suggested to Officer Kirkby in cross-examination that the figures were 'rigged'. Officer Kirkby rejected that. He said that his calculations were based on his observations and the records presented to him, making allowances for wastage and holidays. We agree that was the approach he took. We reject the suggestion that the figures were 'rigged'.

93. In his oral evidence before us, Mr Lok asserted that the bags of potatoes which he used, White Maris Pipers, could contain bad or rotten potatoes, which caused further wastage. He said that he had complained about this, but he had not changed his supplier. However, he produced no further evidence on the point. But, even if he was losing as he said 1-2 lbs in each bag, he was losing (at most $2/55 = 3.6\%$, which is less than one portion).

94. Mr Lok sought to attack the basis upon which the 10% figure had been arrived at, for instance by its segregation of 'chips part' from 'meals with chips'. However ultimately we do not consider those attacks sufficiently well-demonstrated to discharge the burden placed on Mr Lok in an appeal of this kind.

95. Accordingly, the appeal against the assessment is dismissed.

The amount of the assessment

96. In our view, Mr Lok's arithmetical arguments, looked at objectively, were simply attempts, long after the event, to move a succession of individual factors in his favour, one by one, until he reached the point where he was able to produce an arithmetical outcome below the registration threshold.

97. He did that even when the figures had been agreed: such as 24 portions per bag. Having agreed a figure of 10% for chip sales, he then latterly sought to qualify that by restricting it to week-end sales only. We reject those qualifications. Mr Lok has not proved them.

98. His approach was evidentially not substantiated. There were no audited accounts and reliable self-invigilation sheets had not been kept.

99. Therefore, for those reasons, and also adopting the reasons which we have already articulated above in relation to the fact of the assessment, we do not consider that the Appellant has succeeded, even on the balance of probabilities, in demonstrating that the assessment should have been in some other sum.

100. Accordingly, and treating the appeal as one against the sum of the assessment, we dismiss the appeal.

Decision

101. The appeal is dismissed. The assessment is confirmed.

102. 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.

**Dr Christopher McNall
TRIBUNAL JUDGE**

RELEASE DATE: 14 FEBRUARY 2017