

B E T W E E N:

A SUBHA, M UDDIN & M MUSTAK

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

**Tribunal: Mr Paul W de Voil (Chairman)
Mr R K Battersby
Ms Rosaling Rudd JP**

Mr James Mackie, VAT Consultant, for the Appellant

Mr Hugh McKay of Counsel, instructed by the Solicitor's Office of HM Customs and Excise, for the Respondents

Sitting in public in London on 15 and 16 January 2001

Decision: 26 February 2001

DECISION

1. A Subhan, M Uddin and M Mustak, trading as Jube Raj, appeal against notices of assessment to value added tax totalling £22,996 for the period 10 September 1994 to 30 June 1999, and against notices of assessment to civil penalty in the sum of £2,853 for the period 10 September 1994 to 30 April 1995 and in the sum of £19,536 for the period 1 May 1995 to 30 June 1999 (there having been partnership changes).
2. We were asked to decide the question of the validity of the assessments to VAT as a preliminary point. The taking of preliminary points of law is normally to be discouraged - it tends to lengthen proceedings rather than shorten them - but on this occasion various practical considerations, such as the release of a large number of Customs witnesses who would not be needed if the preliminary points succeeded, persuaded us that the preliminary point should be heard first. We accordingly put out of our minds any bearing which the evidence we heard might have on the quantum of the assessment or the amount of mitigation of the penalty to be allowed.

The facts

3. Mr Mackie did not call any of his clients as witnesses; since they could not have assisted us with the preliminary point of law we draw no conclusions whatever from this. We did hear evidence, which we accepted, from the following:-

Mr Richard Ian Forsyth, the officer at Reading office who made the assessment

Mr David Gavin Manson, the acting manager of the Fraud team at Reading office

Mr Michael John Derry, a Band 9 assurance manager at Reading office

From their evidence, and from the documents put in, we find the following facts.

4. The Appellants traded in partnership as a take-away food shop from premises in Reading. The level of takings declared on the VAT returns was thought by the local office to be low; the suspicions of the officers had also been aroused in connection with another business run by one of the partners. In a joint exercise with the Inland Revenue a series of test purchases for both collected and delivered orders was undertaken between 30 September 1998 and 18 March 1999. In addition the front of the premises was covertly observed on 2 and 3 October 1998 to ascertain the level of collected meals. It was not found feasible to observe deliveries as these were dealt with at the rear of the premises.
5. On 12 November 1998 Mr Forsyth and a colleague visited the premises and spoke to Mr Mustak and (for a short time) to Mr Uddin. The accountant for the business, Mr Hossain, was also present. From the record of the meeting it appears to have proceeded along the lines of a normal control visit, with the usual questions about business systems and records, no mention being made of observations or test purchases. The business records were apparently uplifted and examined at the VAT office; from various analyses it was considered that takings had been under-declared and that the declared takings represented 74.39% of the actual takings.
6. Further analysis and investigation was undertaken. More test meals were purchased; more receipts and business records were asked for. Some were provided, some not; some missing records had to be obtained from the Inland Revenue; the records for 1 September 1996 to 30 April 1997 never turned up at all.
7. The matter was made more complicated by the question of dishonest evasion, which was relevant for two reasons:-
 - (i) assessments could not be made for more than three years back unless dishonest evasion was proved;
 - (ii) if the imposition of a penalty for dishonest evasion was in contemplation, the imposition of a simple misdeclaration penalty

needed to be “inhibited”, with certain consequences for the completion of form 641.

Mr Manson of the Fraud team became involved - although the documents show that he had been in contact with Mr Forsyth in connection with this case as early as 14 October 1998. Notice No.730 was issued in July 1999. In October 1999 one of the Appellants, who had now taken specialist advice, signed a statement admitting suppression and hence dishonest evasion, and submitted it together with a schedule showing a much lower level of suppression than that suggested by Mr Forsyth’s calculations. No agreement could be reached about the extent of the suppression or the true figure of takings; eventually Mr Manson suggested to Mr Forsyth in January 2000 that the time had come to make the necessary assessments.

8. The figures on which Mr Forsyth based his assessments were in the event those which he had arrived at in October and November 1998. However, he needed to satisfy himself that the figures based on the busiest days of the week also applied to the other days of the week, and that the figures based on suppressed collections also applied to suppressed deliveries - hence the further test purchases and the requests for further records. The final pieces of actual evidence were not in his hands until March 1999 at the earliest.
9. When Mr Manson and Mr Forsyth decided in January 2000 that nothing was to be gained by further negotiations with the Appellants and their representative, Mr Forsyth completed forms 641, which are headed “Officer’s Assessment”. He signed those forms on 18 January 2000 and had them arithmetically checked by an officer of a lower grade, who entered his name and the same date. Then, since the cash team at Reading office, for their own purposes, kept a notebook entitled “Assessments made”, he recorded the assessments in that notebook, which was then seen by the officer in charge of the office, who added the words “Sat[isf]ied both assessments made”, signed it and date-stamped it.
10. Mr Forsyth then discovered he had made an error of transposition. He corrected the original form 641 in manuscript, obliterating the original entries, and recorded the “amended and revised” figures (not, this time, obliterating the original figures) in the team notebook, adding his date-stamp, on 26 January 2000.
11. We now come to another complicating factor: the “counter-signatory” block at the bottom of the form 641. In certain circumstances, the form 641 needs to be counter-signed before it can be put into the computer whence it will eventually issue in the shape of a form 655 “Notice of Assessment”, the figures on which will find their way on to the trader’s ledger. Mr Mackie, who is well versed in Customs procedure, suggested that the complexity of the supporting schedules would be one reason for a counter-signature; we merely comment that the schedules here are simpler than most of those which this Tribunal has to examine. However, the real reason for the counter-signature in this case was that one of the sets of figures which Mr Forsyth had entered on the 641’s indicated that misdeclaration penalty was to be inhibited (see

paragraph 7 above); this is one of the reasons specifically given on the form for a counter-signature. In the event, the 641's were not counter-signed until May 2000, when the Fraud team had finally decided that dishonest evasion penalties were to be sought and that therefore the inhibition of the misdeclaration penalty should stand.

The Facts

12. Section 73 of the VAT Act 1994, so far as relevant reads:-

(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

....

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following -

- (a) (a) 2 years after the end of the prescribed accounting period;
or
- (b) (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,..."

13. We were referred to the following cases:-

Pegasus Birds Ltd v. Customs & Excise Commissioners [2000] STC 91

Classimoor Ltd v. Customs & Excise Commissioners (1995) Decision No.13336

Lazard Brothers & Co Ltd v. Customs & Excise Commissioners (1995) Decision No. 13476

The Royal Bank of Scotland Group Plc v. Customs & Excise Commissioners (1999) Decision No.16418

Conclusions

14. We have two questions to answer:-

- (a) When was the assessment made?

(b) Was this within the 1-year time limit of section 73(6)(b)?

15. Taking first the question of when the assessment was made, we find that it was made on 18 January 2000, the date on which Mr Forsyth decided on the amount to be assessed, entered it on forms 641 which he signed and had checked, and then entered it in his Team's notebook, where the officer in charge of the office signed and date-stamped his note of satisfaction.
16. The fact that Mr Forsyth then found he had made a transposition error, amended the forms 641 in manuscript on 26 January 2000 and made amending entries (date-stamped) in the notebook, does not alter the situation; the assessment had been made on 18 January and was amended on 26 January. Nothing turns on this in any case.)
17. But, says Mr Mackie, the letter notifying the assessments was not issued until 24 May 2000. Section 73(1) directs the Commissioners to assess the VAT and notify it; does this not suggest a single operation rather than two separate operations? In our view which appears to be supported by a considerable body of precedent, it does not. Assessment and notification cannot in the nature of things be simultaneous; at least a tiny spark of time - presumably we have to say "nanosecond" now - must elapse between the two operations. The statute does not say how long the interval may be. It might have been better if it had done so, just as it might have been better if it had told us how an assessment was to be made and what constituted the making of it. It does not do so, and we must interpret the words as we find them.
18. It is suggested that the decision of the Edinburgh Tribunal in the *Royal Bank of Scotland* case is authority for a contrary view. With regret, we find ourselves unable to follow that decision, which appears to us to be contrary to the weight of authority. We do, however, find ourselves in entire agreement with the last two sentences on page 9 of that decision. We would go further; we find it not just manifestly unsatisfactory but monstrously offensive that the Commissioners can write to a trader on 24 May telling him, in effect, that he has been assessed on 18 January - a date of which he has no knowledge whatever - and that he is liable to pay interest with effect from that date - interest which he might have wished to avoid by making a payment on the assessment. However, we cannot use our natural repugnance as an aid to the interpretation of the statute.
19. Since the statute does not give any indication of when an assessment is taken to have been made, we must go on the natural meaning of the words; Mr Forsyth made his assessment when he came to his decision, just as this Tribunal made its decision when its members agreed on what that decision was to be, even though this then had to be followed by drafting, dictation, typing, checking, re-typing, signing and release. The forms 641 and the notebook provide ample evidence of Mr Forsyth's having made his decision.
20. We attach no importance to the late counter-signature, which was concerned merely with authorising the release of the 641's for input. It is unfortunate that it was so late, partly because of the division of responsibilities between the

cash team and the fraud team and the pressure of other work on the members of both those teams. It might also perhaps be thought unfortunate that notices of assessment should not be issued until all questions of penalties have been decided, rather than issuing them as soon as the assessment has been made, leaving penalties to be decided later. However, that is a question of the Commissioners' powers of care and management, and not for us to decide.. Any suggestion in the *Royal Bank of Scotland* case that an assessment is not finally made until it has been (if so required) counter-signed must, we feel, be regarded at the least as obiter.

21. So we come to the second question: Was is January 2000 within the 1-year time limit? Mr Mackie says it was not; when the assessment was made it was based on evidence and deductions from that evidence which were in existence in October or November 1995. Mr Forsyth could have made his assessment then. Indeed he could - but it would not have been an assessment in accordance with the statute, since it would not have been made to the best of his judgment; he judged that further investigation was necessary. As it turned out, that further investigation produced nothing to alter his original view, but it might well have done so. In particular, in a case like this, an assessment made without having given the trader or his representative any chance to comment on the figures could hardly have been to best judgment. When section 73(6)(b) talks about justifying the making of the assessment, it does not say "any old assessment" - it says "the assessment" i.e. the assessment which that particular officer, having used his best judgment, has decided to make.
22. Even if we were entitled to review the soundness of Mr Forsyth's judgment and the reasonableness of his opinion, we should find no fault with them; he was fully entitled to make his further investigations, which fell well within the spirit of the *Van Boeckel* and *Rahman* decisions.
23. We accordingly, with considerable reluctance, and with no great admiration either for the statute or for the Conimissioners' practice in these cases, (or, for that matter, with the delays which have been allowed to plague this matter throughout its history) find ourselves compelled to dismiss the appeal on the preliminary point. Mr Mckay does not ask for costs, but reserves his position on the substantive appeal, when a considerable number of Customs witnesses might be necessary.