



Value Added Tax – under-declaration of Output Tax – whether additional assessment made to best of judgment – expert evidence relating to “cash ups” – notification of assessment – relevance of reference in assessment to accounting period described as 00/00 – whether subsequent explanation of accounting periods came too late

[2010] UKUT 111 (TCC)
Appeal number: FTC/15/2010

UPPER TRIBUNAL

TAX AND CHANCERY

QUEENSPICE LIMITED

Appellants

and

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

Respondents

TRIBUNAL: The Honourable Lord Pentland

Sitting in public in Edinburgh on 28 July and 1 September 2010 and 21 February 2011

**Duncan Hay of Messrs Denholm Hay Associates LLP, South Queensferry, for
the Appellants**

**Garry Borland, Advocate, instructed by HM Revenue and Customs, Solicitor's
Office, Edinburgh for the Respondents**

Introduction

1. This is an appeal against a decision by the First-Tier Tribunal (“the Tribunal”) (Mr Kenneth Mure QC, Mrs Helen M Dunn LL.B and Mr S A Rae LL.B) refusing the appeal by Queenspice Limited (“the Appellants”) against an assessment made by the Respondents for VAT in the sum of £106,504 in respect of under-declaration of output tax during the period from March 2002 to May 2008. The Appellants traded as a restaurant business at 1 High Street, South Queensferry.
2. Having heard evidence *inter alia* as to certain investigations carried out on behalf of the Respondents by its officers, the Tribunal found a number of facts to be established. Those which are pertinent for present purposes may be summarised as follows. The Tribunal held that the total declared turnover of the Appellants for the 39 week period from November 2007 to May 2008 (“the relevant period”) was £164,045, giving a weekly average declared turnover of £4,206. The true weekly turnover during that period was, however, probably about £6,972.60; this figure was extrapolated from “cash ups” conducted by two of the Respondents’ officers (Mr Paul Rarity accompanied by Mr John Shearer) at the restaurant on Friday 19 October 2007 and Saturday 30 August 2008. The Tribunal found that throughout the relevant period the Appellants had under-declared turnover by a factor of at least 65 per cent. The Tribunal held also that the assessment issued by the Respondents and the methodology underlying it were reasonable and had been calculated to the Respondents’ best judgment on the basis of the information available to them as at 30 August 2008. During the relevant period the Appellants were held to have knowingly and dishonestly under-declared their turnover for VAT. The Respondents were found to have correctly calculated the further VAT due to be paid by the Appellants in the sum of £106,504.

Permission to Appeal

3. The Appellants applied for permission to appeal under rule 39(1) of the 2009 Rules (the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I 2009 No. 273)). The reasons given by the Appellants for appealing made reference to the overriding objective of the rules as stated in rule 2, namely to enable the Tribunal to deal with cases fairly and justly. It was said that the Tribunal could not have applied rule 2 correctly for two reasons. Firstly, the Appellants had led expert statistical evidence to prove that cash ups carried out on only two days could not provide a sufficient basis for finding that turnover had been under-declared for a period of 6 years. This expert evidence had not been challenged, yet the Tribunal had ignored it. Secondly, it was said that the Respondents had failed to comply with rule 2(4); this, of course, places a duty on parties to help the Tribunal to further the overriding objective and to co-operate generally with the Tribunal. The ground of appeal referred to the Respondents' explanation that they were unable to produce evidence of expenses claims made by their officers in connection with visits to the restaurant because all such evidence had been lost. It was said that the Tribunal had been supplied with simple calculations showing that the probability of losing all data from all sources was ten thousand million to one against.
4. By a decision dated 18 January 2010, the Tribunal judge (Mr. Mure QC) decided not to review the Tribunal's decision because he was not satisfied that there had been any error of law. He granted permission to appeal on the grounds set out in the Application for Permission to Appeal.

The Appeal Hearing on 28 July 2010

5. The first point raised by Mr Hay on behalf of the Appellants at the hearing of the appeal on 28 July 2010 was one for which he accepted that permission to appeal had not been granted. Despite this difficulty, Mr Hay submitted that he was entitled to argue the point because it was referred to in his skeleton argument. Moreover, the point had been advanced on behalf of the Appellants before the Tribunal and it would, Mr Hay submitted, be unduly legalistic and inflexible to prevent the Appellants from raising it again in the present appeal. As stated in the first paragraph of the Appellants' skeleton argument, the point was this: "the

assessment 00/00 was not related to a defined Accounting period”. Mr Hay sought to develop the point by contending that the first period to which reference was made in the Statement of Account which had been sent with the Notice of Assessment simply did not exist. Nor did the dates which had been left blank. It followed that the entire assessment had to be treated as invalid and indeed as a nullity since it was meaningless to refer to a non-existent period and to a period whose parameters are stated to be defined by dates which have been left blank. An assessment framed in this way was unenforceable and should not be given effect. In support of this line of argument, Mr Hay referred to the Inner House case of *The Commissioners for Her Majesty’s Revenue and Customs v The Raj Restaurant and others* [2009] STC 729 and, in particular, to paragraphs 26 and 27 of the Opinion of the Court delivered by Lord Reed. There it had been emphasised that an assessment had to be linked to and correspond with one or more prescribed accounting periods. The present assessment clearly did not correspond to any accounting period because it referred to a period of time which was meaningless and non-existent. There was nothing to prevent the Respondents from producing an assessment for the correct dates as these were obviously known to them. The Tribunal had misdirected itself in law by failing to give effect to the Appellants’ argument on the point.

6. In response to Mr Hay’s first point, Mr Borland on behalf of the Respondents submitted that it was incompetent for the Upper Tribunal to entertain this issue since permission to appeal had not been granted in respect of it. Even if it was competent for the point to be considered, it was unfair for it to be dealt with since no proper notice of it had been given to the Respondents in the skeleton argument. After some discussion, Mr Borland moved for an adjournment so that he could obtain full instructions from the Respondents to enable him to respond to the substance of the argument. Mr Hay did not oppose an adjournment for this purpose and I accordingly granted Mr Borland’s motion to that effect. The remainder of the first day of the hearing was taken up with the other arguments advanced by Mr Hay and with Mr Borland’s response to them. I shall now address those arguments.

The Tribunal’s approach to the expert evidence led by the Appellants

7. The second argument advanced by Mr Hay on the first day of the appeal was that the Tribunal had misdirected itself in law by ignoring the expert evidence of a statistician led on behalf of the Appellants, Dr Iain McLaurin. His evidence was that a sample of 2 (i.e. the evidence of the Respondents' officer, Mr Rarity as to the cash ups he carried out on 2 evenings) could not be used as a sound basis for extrapolation of the turnover of the restaurant over a period of 6 years. To seek to rely upon a sample of 2 offended against an absolute mathematical rule and the Respondents' methodology on this critical aspect of their case was, therefore, fundamentally flawed. The Respondents had chosen neither to refute Dr McLaurin's evidence nor to lead expert statistical evidence of their own to counter it. The result was that Mr Rarity's evidence had been fatally undermined. The Tribunal should have rejected it as unsound.

8. In response, Mr Borland supported the reasoning of the Tribunal on this issue. The Tribunal had not ignored Dr McLaurin's evidence. They had considered it, but had preferred the evidence of Mr Rarity, as they were fully entitled to do. Under reference to *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 and subsequent authority, Mr Borland submitted that the issue for the Respondents was not one of mathematics or statistics, but rather one of making a value judgment honestly and in good faith on the basis of such material as they had before them. The Tribunal had found as a fact that Mr Rarity's calculations of turnover and under-declaration were accurate and reliable and were based on his considerable experience of this type of business. Accordingly, there was no basis for interfering with the Tribunal's findings in this respect.

9. In my opinion, the Appellants' attack on the Tribunal's approach to the evidence of Dr McLaurin is misconceived and must be rejected. As Woolf J (as he then was) explained in *Van Boeckel* the task of the Respondents under what is now section 73(1) of the Value Added Tax Act 1994 ("the 1994 Act") is to make an assessment of tax to the best of their judgment. The very use of the word "judgment" makes it clear that the Respondents are required to exercise their powers in such a way that they make a value judgment on the material before them. Clearly they must make their judgment honestly and in good faith. It must

be borne in mind that the primary obligation is on the taxpayer to make a return himself. It follows that the Respondents do not have to carry out exhaustive investigations; they have only to consider the material which is before them in a fair way and to come to a decision which is reasonable and not arbitrary as to the amount of tax which is due.

10. In *Commissioners of Customs and Excise v Pegasus Birds Ltd* [2004] STC 1509 Carnwarth LJ observed (at para. 10) that the word “best” where it is used in the phrase “to the best of their judgment” has to be understood in a context in which the taxpayer’s records may be incomplete so that a fully informed assessment is unlikely to be possible. Rather than implying a higher than normal standard, the word “best” accordingly recognises that the result may necessarily involve an element of guesswork. It means simply to the best of the Respondents’ judgment on the information available. Generally, the burden lies on the taxpayer to establish the correct amount of tax due (see para. 14).
11. I note also that in the case of *Buttigieg t/a the Cottage Cafe* (6 June 2008) the VAT and Duties Tribunal held that an assessment was made to the best of judgment despite the calculation being based on only a single day’s invigilation and being applied to a three year period (see para. 75). The same conclusion was reached by Dyson J (as he then was) in *Akbar and others (trading as Mumtaz Paan House) v Customs and Excise Commissioners* [2000] STC 237 at p. 249.
12. Applying these principles to the present case, I consider that there is no merit in this ground of appeal and that it must be rejected. It is wrong to say that the Tribunal ignored Dr McLaurin’s evidence. On the contrary, it is clear from the decision that the Tribunal took full account of it. This can be seen, for example, from paragraphs 5 and 6 of the decision where Dr McLaurin’s evidence is summarised; the Appellants took no exception to this summation of his views. Then on page 7 of the decision the Tribunal records the submission made by Mr Hay to the effect that Dr McLaurin’s evidence had to be accepted in preference to that of Mr Rarity because a two day sample was “wholly insufficient”. Finally, in paragraph 18 the Tribunal acknowledges that Mr Rarity’s calculations of turnover and consequential findings of under-declaration were controversial

and therefore had to be scrutinised with care. Reference is made to the leading cases of *Van Boeckel* and *Pegasus Birds Ltd*; it is clear that the Tribunal correctly understood that an assessment required to be made to best judgment in the sense that it had to be prepared in good faith and on the basis of the available information. Having made it clear that it understood the applicable legal framework, the Tribunal then went on to evaluate the evidence given by Mr Rarity on the one hand and that of Dr McLaurin on the other. It observed that Dr McLaurin's approach was a theoretical one. That was undoubtedly correct since he made it clear in his evidence that he had not inspected any of the business books or other trading records relating to the Appellants' business and that he had no relevant experience of restaurants or the catering industry. In marked contrast to that lack of relevant experience, the Tribunal noted that Mr Rarity had 26 years experience of Customs and Excise work and had recently specialised in the investigation of VAT evasion, including such evasion in the restaurant trade. On the basis of his extensive practical experience, Mr Rarity was satisfied that it was reasonable to assume that half of the weekly turnover of a restaurant business, such as that operated by the Appellants, would be generated on Friday and Saturday nights. He carried out cash ups on a Friday night and a Saturday night in October 2007 and August 2008. Based on his experience, he considered that the figures he obtained from the cash ups allowed him to make an estimate of the true weekly turnover for the restaurant. Comparing that estimate with the declared turnover, it was evident that there had been an under-declaration of turnover of around 65 per cent. This evidence may be contrasted with the lack of comparable evidence in the Northern Irish case of *Ross (t/a G & G Mobile Stone Crushing) v HMRC* (6 May 2008 - unreported), which Mr Hay cited to me. That case concerned the assessment of aggregates levy pursuant to paragraph 2 of Schedule 5 to the Finance Act 2001. In my view, *Ross* is clearly distinguishable from the present case: it concerned an entirely different type of business and revolved around competing evidence as to the adequacy of sampling techniques for quarried aggregates. I note also that in *Ross* the Tribunal heard detailed evidence from the quarry operator himself. In the present case, there was no evidence led from the management or staff of the restaurant. In the circumstances, I find the case of *Ross* to be of no assistance for present purposes.

13. In my opinion, there can be no doubt that the Tribunal was entitled to take the view that the assessment made by Mr Rarity was a reasonable one, that it was one made to the best of his judgment and in good faith and that it was made on the basis of such material as he had available to him. In addressing those questions, the Tribunal correctly applied the law, as it has been laid down in the authorities to which I have already referred. Mr Hay submitted that because Dr McLaurin had given expert evidence that a sample of two days' cash ups could not ever be used as a sound statistical basis for extrapolating turnover over a period of six years and because this view had not, he said, been challenged by the Respondents, the Tribunal had no option but to reject the approach adopted by Mr Rarity and to accept that of Dr McLaurin. In my opinion, Mr Hay's arguments on this point break down at a number of stages. Firstly, I do not accept that the Tribunal was bound to accept the expert evidence given by Dr McLaurin in preference to the testimony of Mr Rarity. It seems to me that the Tribunal was presented with two competing views as to the appropriate means of estimating the true amount of the Appellants' turnover. Dr McLaurin's view was a theoretical one, based on what Mr Hay characterised as a pure or absolute rule of mathematics or, more precisely, of statistics. On the other hand, Mr Rarity based his approach on his experience as a VAT investigator and his understanding of the restaurant trade. The Tribunal's task was to adjudicate between these two approaches and to decide which of them (if either) to prefer. The Tribunal was satisfied that Mr Rarity had taken a fair and balanced approach resulting in a reasonable estimate of the true level of turnover. They were quite entitled, as it seems to me, to accept Mr Rarity's evidence in preference to that of Dr McLaurin, even though the latter was an expert statistician. As the Tribunal says in paragraph 20 of the decision, for this type of business they considered that direct experience provided the necessary skills for the estimation of profits. That is a finding of a factual nature and it cannot, therefore, be disturbed in the present appeal. Mr Hay's submission that the views of Dr McLaurin had to prevail simply because he was an expert in statistics is, I consider, unsound.

14. Secondly, the approach urged on the Tribunal by Mr Hay (and renewed before me) is erroneous because it fails to acknowledge that, properly understood, the

Respondents' task under section 73(1) of the 1994 Act is not, as he contended, of a strictly mathematical or statistical nature at all; no doubt, any calculations forming part of the assessment have to be arithmetically accurate, but the power given to the Respondents under statute is to make an estimate or an assessment to the best of their judgment on such information as is available to them. This necessarily allows the Respondents a substantial margin of error. They are entitled to make what one might describe as an educated guess. They are not required to carry out exhaustive investigations. Here the Tribunal has come to the conclusion that Mr Rarity's calculation was fair and was based on a proper application of his knowledge and experience to the information he had obtained about this particular business from the two cash ups. That was a conclusion at which the Tribunal was quite entitled to arrive, in my opinion. It was open to the Tribunal to accept the assessment as a reasonable one; having done so their conclusion, which is essentially factual in nature, cannot be disturbed on an appeal to the Upper Tribunal.

15. Thirdly, it seems to me that Mr Hay's approach to the case failed to attach sufficient importance to the well-established rule that the primary obligation is on the taxpayer to make a return himself and hence the Respondents are not required to do the work of the taxpayer for him. It is a notable feature of the present case that the Tribunal was not given the opportunity to hear any evidence from the restaurant's management or staff as to the true level of turnover of the business or in support of the figures contained in the Respondents' VAT returns. Instead the Appellants chose to limit their case to statistical evidence of a highly theoretical nature. In the circumstances, the Tribunal was well-entitled to accept the Respondents' estimate on the basis of Mr Rarity's evidence.
16. For these various reasons, I conclude that Mr Hay's challenge to the Tribunal's decision to accept the evidence of Mr Rarity in preference to that of Dr McLaurin falls to be rejected.

Alleged suppression of evidence by the Respondents

17. At the continued hearing on 1 September 2010 Mr Hay said that he did not intend to insist on this line of argument. I will, therefore, say nothing more about it.

Accounting Period “00/00”

18. At the continued hearing Mr Borland responded to the arguments advanced by Mr Hay to the effect that the assessment was invalid because it was not related to a defined accounting period.

19. Firstly, Mr Borland accepted, under reference to rules 5(2) and 5(3)(d) of the Upper Tribunal Rules (SI 2008/2698), that it would be competent for me to entertain Mr Hay’s argument on this aspect even though permission to appeal had not been granted in respect of it. He said that I would have to make a specific direction to permit this to be done. At my suggestion, Mr Hay made the appropriate motion asking for such a direction to be granted. I am not myself entirely sure that this degree of formality is necessary, but for the avoidance of doubt I shall record that I am willing to make such a direction since the Respondents have been given sufficient time to respond fully to the line of argument in question and cannot, in the circumstances, be said to have been prejudiced by the fact that permission to appeal on the point was not given. I have now heard full submissions on both sides and it seems to me to be appropriate for the Upper Tribunal to entertain the issue and rule on it.

20. I am satisfied that Mr Hay’s argument on this aspect is untenable. My reasons are as follows.

21. The relevant statutory provision is section 73(1) of the 1994 Act, which provides:

“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.”.

22. In *House (trading as P & J Autos) v Customs and Excise Commissioners*, [1994] STC 211, at p 223h-j, May J (as then was) recorded a submission made by counsel for the taxpayer, as to the requirements for a proper notification under the previous (and identical) statutory provision to section 73(1) of the 1994 Act, as follows:

“It is next necessary to consider whether the notification in this case was, as Mr Cordara (counsel for the taxpayer) contends, deficient in form so that it did not give rise to an enforceable obligation to pay the tax notified. He contends that the taxpayer should, as he puts it, have it served to him on a plate; that it is not permissible to look outside the notice of assessment; and that the minimum requirements of a valid notification are that it should state the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates.”

23. May J dealt with this submission at p 226g-h where he said:

“Although the commissioners choose to use printed forms headed “Notice of Assessment”, there is in my judgment no magic about such forms. They are not required by statute or regulation which prescribe no particular formality at all. All that is required is that the commissioners should make an assessment to the best of their judgment and notify it to the taxpayer. There is perhaps an understandable tendency to merge the assessment with the notification and to look only or mainly at a single document if it is called notice of assessment. But there appears to be no reason why notification should not be given by letter, nor any reason why in this case the letter dated 24 May 1990 should not be seen as, or part of, due notification. That letter states the amount of the assessment and refers to the schedules

for the details of the build up of the amount. I do not see why a notification cannot be contained in more than one document provided that it is clear which document or documents are intended to contain the notification and that that document or those documents contain in unambiguous and reasonably clear terms the substantial minimum requirements to which Mr Cordara has referred”

24. The judgment of May J was unanimously upheld by the Court of Appeal: see [1996] STC 154.

25. In my opinion, the following points may be taken from the judgment of May J in *House*.

- (i) Like its predecessor, section 73(1) of the 1994 Act lays down no particular formalities in relation to the form, or timing, of the notification of the assessment.
- (ii) A notification pursuant to section 73(1) can legitimately be given in more than one document.
- (iii) In judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer’s name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates.

26. The position is summarised in *De Voil Indirect Tax Service*, volume 2, page 5-109, where it is said that:

“Where tax is assessed by reference to prescribed accounting periods, the notification must contain in unambiguous and reasonably clear terms the period of the assessment. This may be ascertained from letters and schedules in addition to the formal notice where they form (part of) the notification [citing *House* as authority]. Thus, an

assessment is unenforceable if no period is stated on the notice unless the relevant prescribed accounting periods are identified in a letter or schedules forming (part of) the notice so that the assessment period can be readily deduced despite the absence of a clear statement setting out the beginning and end of the period [again citing *House*]"

27. I would refer also to certain observations made in *Courts plc v Customs and Excise Commissioners*, [2005] STC 27, a case involving an assessment made pursuant to section 73(1) of the 1994 Act. Jonathan Parker LJ (with whom Hooper and Pill LJJ agreed), emphasised at paragraph [106] that:

“The statutory requirement for notification of an assessment to the taxpayer demonstrates that in enacting section 73 [of the 1994 Act] Parliament regarded the process of making the assessment itself as an internal matter for the commissioners. However, given that the time limits in s 73(6) apply to the making of the assessment, it is clearly important that the commissioners’ internal procedures in relation to the making of assessments should, so far as practicable, be standardised; and that in relation to any particular assessment the process which has been followed, and the date or dates on which the various steps comprised in that process were taken, should be readily verifiable by contemporary documentary evidence ... The absence of any statutory time limit within which an assessment, once made, must be notified to the taxpayer means, in theory at least, it is open to the commissioners to delay notification for some considerable time ... However, it is clearly undesirable that that should occur, and the commissioners’ policy of not relying on any earlier date for the making of an assessment than the date on which the assessment was notified to the taxpayer ensures that no unfairness will be caused to the taxpayer in this respect.”

28. Two points, as it seems to me, may be taken from this. First, the passage makes it clear - as has been made clear in the past - that (i) the assessment of the amount of tax considered to be due pursuant to section 73(1), and (ii) the

notification thereof to the taxpayer, are separate operations: see also the Court of Appeal in *House*, supra at p 161d-e, per Sir John Balcombe. Secondly, Jonathan Parker LJ also makes clear that the 1994 Act does not prescribe a time limit in respect of notification. This is consistent with the principle that notification can be validly given by means of the provision of several documents, issued over time and taken together.

The relevant documents in the present case

29. A document headed “Notice of Assessment”, with the date of calculation noted as 8th September 2008, was produced as Respondents’ Production 40 (see the second page thereof).
30. That document contains the name of the taxpayer in this case, namely, Queenspice Ltd. The amount of tax due is stated as £106,504. The reason for the assessment is stated as being that the correct amount of VAT was not declared for the periods shown.
31. Enclosed with the document entitled “Notice of Assessment” were (i) a document headed “Officer’s Assessment”, dated 4th September 2008 (see Respondents’ Production 40, first page), and (ii) a schedule headed “Details of Assessment(s)” (Respondents’ Production 40, pp 3-6). Each of these two documents contains an entry, relative to accounting periods, of “00/00”.
32. In response to the documents sent to the Appellants, their representatives, Denholm Hay, Associates (“DHA”), first wrote to the Respondents claiming an inability to pay due to “hardship” (see DHA’s fax sent on 19th September 2008; Respondent’s Production 41) and then queried the basis of calculation of the assessment (see DHA’s fax sent on 29th September 2008; Respondents’ Production 43).
33. The Respondents advised the Appellants’ representatives how the amount of the assessment had been arrived at by letters dated 14th October and 17th November 2008 (see, respectively, Respondents’ Productions 45 and 46).

34. This included notification, in terms which were clear and unambiguous, of the precise accounting periods used for the purposes of the assessment and an explanation of the “00/00” entries employed in the documentation. In particular, the Respondents stated in their letter of 17 November 2008 that “for assessment purposes, periods 05/02 to 11/05 inclusive were grouped together as period ‘00/00’”. It is, therefore, clear that as a matter of fact the assessment was made in respect of defined accounting periods and that these were accounting periods that pertained to the Appellants.

35. In my opinion, in the present case, notification of the assessment (in the amount of £106,504) for the purposes of section 73(1) of the 1994 Act was given by the Respondents by means of:

- The document headed “Notice of Assessment” dated 8th September 2008 (Respondents’ Production 40, second page thereof).
- The document headed “Officer’s Assessment”, dated 4th September 2008 (Respondents’ Production 40, first page thereof).
- The schedule headed “Details of Assessment(s)” (Respondents’ Production 40, pp 3-6 thereof).
- The Respondents’ letter dated 14th October 2008 (Respondents’ Production 45).
- The Respondents’ letter dated 17th November 2008 (Respondents’ Production 46).

36. I conclude that, when taken together, these documents set out, clearly and unambiguously, the four matters which I have identified, at paragraph 25 (iii) above, as being the necessary elements of a valid notification.

37. I should mention at this point that at the continued hearing on 1 September 2010 Mr Hay argued, for the first time, that no account could be taken of the explanation tendered in the Respondents’ letter of 17 November 2008 because this only came after the Appellants had intimated their intention to appeal

against the assessment (the appeal was served on 6 October 2008). The argument was that intimation of the appeal acted as a “cut off” preventing the Respondents from notifying (or completing notification) to the Appellant pursuant to section 73(1) of the 1994 Act. Mr Borland sought a further adjournment in order to consider the point and, in the absence of opposition, I granted this. When the case called again for a further brief hearing on 21 February 2011, Mr Borland referred to a number of authorities which clearly showed that the taking of an appeal did not operate as a barrier to notification of the assessment. These authorities were: *Grunwick Processing Laboratories Ltd v Customs and Excise Commissioners*, [1986] STC 441; *Sher Ali, t/a The Bengal Brasserie v C & E Comrs*, (2000) VAT Decision, 16952, unreported; and *De Voil Indirect Tax Service*, paragraph [V5.138], where it is said that:

“An assessment is not invalidated, it is merely unenforceable unless and until it is duly notified, and a failure to notify can thus be rectified. Such rectification may take the form of the inclusion of a copy of the assessment in a statement of case sent to the appellant.”

38. In response to Mr Borland’s argument on the “cut-off” point, Mr Hay said that he could not disagree with the Respondents’ analysis on the issue. I need not, therefore, say any more about that particular aspect of matters. Mr Hay then advanced some further short submissions in support of his contention that the assessment was unenforceable because it made reference to a non-existent accounting period. These amounted to a reiteration of his earlier argument.

39. In the circumstances, I have no difficulty in holding that the Appellants were validly notified of the relevant four matters pursuant to section 73(1) of the 1994 Act. In particular, by the Respondents’ letter of 17 November 2008 they were clearly and unambiguously informed that, for the purposes of the assessment, accounting periods 05/02 to 11/05 inclusive were grouped together as period “00/00”. I find that the Appellants were accordingly notified of exactly what the effect of the assessment was and as to the time periods to which it related.

40. Finally on this branch of the case, it will be recalled that at the hearing on 28 July 2010, the Appellants sought to rely upon the *Raj Restaurant* case (see paragraph 5 supra).

41. In my judgment, the *Raj* case is irrelevant to the matters under consideration in the present case. The case concerned an assessment which purported to have been made under reference to accounting periods which it turned out were not, in fact, accounting periods of the taxpayer at all: see the opinion of the Extra Division at paragraphs [20]-[24]. The present case is quite different. Here the assessment, as a matter of fact, relates to accounting periods that were accounting periods of the Appellants. Moreover, the *Raj* case did not discuss, as it was not at issue in the case, the requirements relative to notification pursuant to section 73(1) of the 1994 Act. In the result, the case is not relevant for the purposes of the present appeal.

Conclusion

42. I shall accordingly refuse the appeal and affirm the decision of the Tribunal.

43. Parties were agreed that expenses should follow success. Since the appeal has been unsuccessful, I shall award expenses in principle to the Respondents, subject to their making an application in accordance with the Rules.

Lord Pentland

Upper Tribunal (Tax and Chancery Chamber)

Release Date: 16 March 2011