TC04820

Appeal number: TC/2014/05977

VAT – interest following official error – Section 78(1)(a) Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

AVICENNA CENTRE FOR CHINESE MEDICINE LTD **Appellant**

- and -

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

TRIBUNAL: Judge Rachel Mainwaring-Taylor
Mrs Jane Shillaker

Sitting in public at Fox Court, London on 6th August 2015

Mr Tim Brown for the Appellant

Mrs Lynne Ratnett of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant carries on a business involving the supply of herbal teas, which are prescribed to customers following a consultation with a practitioner of traditional Chinese medicine. Until 2014, the Appellant accounted for VAT on these supplies at the standard rate. Following the case of Dr Xu Hua in December 1995, HMRC accepted that herbal teas of this nature supplied in this way should be zero-rated. The Appellant successfully claimed repayment of the overpaid VAT from HMRC, subject to the four year cap. The Appellant sought interest from HMRC under section 78(1)(a) of the Value Added Tax Act 1994, claiming its overpayment was due to reliance on incorrect advice from HMRC amounting to official error. HMRC denied official error and refused the claim for interest under this head. The Appellant appeals this decision.

Background

2. The Appellant registered for VAT with effect from 1st July 1994, originally as a partnership called 'Chinese Herbal Supplies' with a declared main business activity of 'supply of herbal medicines'. In 2011 a TOGC took place, with a new limited company registration known as 'Avicenna Centre for Chinese Medicine Limited'. The main activity of this registration was 'skincare products'. The registration remains extant.

3. On 7th July 1994 the Respondents wrote to the partnership in response to a request for advice concerning the liability of its supplies, stating:

> "Page 3 of Notice 701/31/92 indicated that supplies by herbalists are neither zero-rated nor exempt. Therefore any supplies by a 'Chinese acupuncture and herbal doctor' are standard rated. If the actual 'doctor' is statutorily registered, as mentioned in section 4 of the notice, then his services may be exempt.
>
> If the partnership's suppliers have been given a ruling that various herbs are standard rated, the onward sales will also be standard rated."

4. On 27th May 2004 the Respondents visited the Appellant as part of a VAT audit. The report of the visit states that "in depth checks were made of sales and purchases for period 06/01 to 03/04. No irregularities were found and no assessment raised". The report makes no mention of whether the Respondents looked at the liability of the Appellant's supplies.

5. On 30th January 2014 the Appellant wrote to HMRC regarding the liability of its supplies of Chinese herbal teas. The Appellant had in the past accounted for VAT on these supplies at the standard rate, but noted from HMRC guidance at VFOOD1640 that such supplies are zero-rated. The Appellant stated that it had tried to clarify the VAT liability position of herbal teas with HMRC over the years but had only just come across the above-mentioned guidance. The Appellant asked when the guidance was added to HMRC's website, when and how the public was notified of this change and when the change was included in the VAT update notes. The Appellant also

stated that it received a VAT visit years ago and the officer did not tell it that herbal teas fell under the zero rate. The Appellant believed that it had overpaid for several years and wanted to know how the visiting officer could have failed to advise them of the correct rate of VAT to use.

6. On 5th March 2014 the Respondents visited the Appellant. The Appellant intended to submit a claim to recover the overpaid output tax and stated that unjust enrichment did not apply to this situation. The Appellant requested that the Respondent confirm when the guidance at VFOOD1640 was issued and confirm a Tribunal decision covering this issue in *Dr Xu Hua, reference LON/95/2069*.

7. On 11th March 2014 the Appellant wrote to HMRC, stating that it traded in Chinese herbal teas made up on prescription and had for many years accounted for output tax on these supplies, based on insufficient or incomplete evidence from HMRC. The Appellant had recently discovered guidance stating that Chinese herbal teas were eligible for zero-rating, therefore it had zero rated supplies since the beginning of the period 12/13. The Appellant also believed that HMRC guidance to which it referred had been published as far back as 2009 and the decision in *Dr Xu Hua* was published in 1995. The Appellant believed that guidance at VFOOD1640 was not available to the public, only to HMRC staff. The Appellant claimed to have been misdirected every time it contacted HMRC or had interaction with HMRC and cited the visit carried out on 27th May 2004, where the officer said he was there to help the Appellant choose the right VAT codes for its transactions but made no mention of the fact that herbal teas were eligible for zero rating. The Appellant stated that this resulted in it continuing to wrongly pay output tax for a further ten years. In 2008 the Appellant's representative contacted HMRC's enquiry line and was again told that the supplies were standard rated.

8. The Appellant felt that it had suffered substantially as a business because of what it perceived to be incorrect advice given by the Respondents. The Appellant therefore made a claim to recover all output tax paid since 1995 plus interest and stated that the claim would not enrich it unjustly.

9. On 6th May 2014 the Respondents paid the Appellant £303,404 in respect of overpaid output tax in the periods 03/10 to 09/13. The Appellant had claimed for earlier periods but these claims were rejected under the four year capping regulations.

10. On 21st May 2014 the Respondents referred the matter to their Complaints Team to reconsider the misdirection issue raised by the Appellants.

11. On 6th June 2014 the Respondents issued a review conclusion letter advising that the decision to disallow the voluntary disclosure in respect of periods 03/95 to 12/09 should be upheld.

12. On 12th June 2014 the Appellant wrote to the Respondents asking for interest to be paid on the amount repaid on 6th June 2014 and to include in the review a request for interest on the amount not repaid due to capping.

13. Also on 12th June 2014 the Respondents' Complaints Team wrote to the Appellant regarding its assertion that it had been misled by the Respondent on liability of its supplies. The Respondents had examined the report of the visit carried out in May 2004 and found no mention in that report of a discussion of the liability on the sale of herbal teas. In addition, they stated that the visiting officer had since left HMRC and given the length of time that had passed such notes as he may have made would now have been destroyed. Without further evidence, the Respondents stated they were not able to uphold the Appellant's claim. The capping provisions applied and HMRC would not repay VAT falling to periods over four years old.

14. On 19th June 2014 the Respondents wrote to the Appellant regarding its request for statutory interest under section 78 of the Value Added Tax Act 1994 (VATA 1994). While HMRC hoped to process a repayment within 30 days of receipt, they would not consider there to be undue delay unless it was not made within 45 days. The Appellant's claim was received on 11th March 2014. Based on the 45 days repayment should have been made by 25th April 2014. It was actually made on 6th May 2014. HMRC therefore calculated interest of £45.72 was due to the Appellant. The Respondents invited the Appellant to advise whether they wanted the claim processing under section 78 VATA 1994.

15. On 4th July 2014 the Appellant telephoned HMRC saying it wanted interest paid on the whole amount of £303,404. HMRC advised that a decision could not be made until the outcome of the complaint was known.

16. On 30th August 2014 the Appellant wrote to the Respondents pointing out that section 78 VATA 1994 was not limited to undue delay, but also applied to any error by HMRC. The Appellant believed that HMRC had made an error in advising it of its liability to VAT and accordingly applied for interest to be paid on the whole amount repaid.

17. On 6th October 2014 the Respondents wrote to the Appellant stating that their letter of 12th June was their final response, they did not accept HMRC had made an error and statutory interest would be paid only in the sum set out in the letter of 19th June 2014.

18. On 3rd November 2014 the Appellant lodged an appeal with the Tribunal.

19. On 12th November 2014 the Appellant wrote to the Respondents stating that since HMRC had paid it interest of £45.72 against its wishes, it would accept this sum as a small part payment on account of interest outstanding on the sum repaid in May 2014.

Matters in dispute and evidence

20. The issue before this Tribunal is whether, as the Appellant claims, interest is due to it under section 78(1)(a) of the Value Added Tax Act 1994 by reason of official error having resulted in the Appellant overpaying output tax.

21. The Respondents maintain that interest is only due under section 78(1)(d) of the Value Added Tax Act 1994, by reason of HMRC having taken more than 45 days to repay the overpaid tax.

22. Mrs Pia Al-Khafaji gave oral evidence. We found her to be a straightforward and honest witness.

23. HMRC produced no witness evidence. We heard submissions from Mrs Lynne Ratnett who appeared for HMRC and further information was provided by Mrs Rita Parely, also from HMRC, who assisted her.

Relevant Legislation

24. The relevant parts of section 78 of the Value Added Tax Act 1994 read as follows:

> "(1) Where, due to an error on the part of the Commissioners, a person has-
>
> (a) accounted to them for an amount by way of output tax which was not output tax due from him [and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him] or…
>
> …(d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,
>
> then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section".

25. Under section 83(1) (s) VATA 1994 an appeal may be made to the Tribunal with respect to any liability of the Commissioners to pay interest under section 78 or the amount of interest so payable.

26. Under Schedule 8, Group 1, Part II of the Value Added Tax Act 1994 "Food of a kind used for human consumption" is listed as a zero-rated supply (General Items, Item 1), except for "Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages" (Excepted Items, Item 4) other than "Tea, mate, herbal teas and similar products, and preparations and extracts thereof" (Items Overriding the Exceptions, Item 4).

Case Law Authorities

CGI Pension Trust Ltd MAN/98/85Z (VTD 15926)

27. In this case the tribunal expressed the test for official error as having two parts:

> "(1) whether there was an error, or errors, by the Commissioners within s. 78(1) of the 1994 Act; and
>
> (2) if so, was it due to the Commissioners' error that CGI did not claim its input tax entitlement at the proper time?".

Dr Xu Hua [1996] BVC 4233 (LON/95/2069)

28. Dr Xu Hua was a medical practitioner who operated a 'Chinese Herbal and Homeopathic Clinic'. In the course of her business, she would first see a client for a consultation at which she took a pulse reading, checked the client's tongue and obtained a medical history from him or her. Depending on her judgment of the client's state of health, Dr Xu Hua would then make a list of suggested ingredients, which the client would take to an assistant, who would make up a bespoke preparation, to be taken as a tea. The consultation and the tea were separately charged for and VAT was charged at the standard rate on the consultation charge.

29. The Tribunal considered that whilst a substance might be a food when supplied in one manifestation but not food when supplied in another, in cases where this occurred there was a significant difference between the product in its normal state as a food and in its other state (as a capsule or tablet). The Tribunal was of the view that the product supplied would be categorised as food, leaving aside the manner of its supply, because it had nutritive value, was made up of substantially the same ingredients as sachets of herbal tea sold commercially and was consumed as part of an individual's normal daily diet. It went on to find that there was nothing in the wording of Group 1 of Schedule 8 of VATA 1994 that required a substance of a kind used for human consumption to be classified or excluded from being classified as food by reason of the means of supply or the purpose for which the supply is made. Therefore, notwithstanding that the teas were sold in a bespoke preparation for a medical or therapeutic purpose, they were zero-rated under Schedule 8, Group 1 of VATA 1994.

Avco Trust plc (VTD 16251)

30. In this case the tribunal found that there was "no duty upon the Commissioners to search for errors in a taxpayer's affairs and advise him how to correct such errors". However, "if they are specifically asked for advice or a ruling, then they are under a duty to give that advice; or if they offer advice having noticed a mistake, then they are committed to that advice, and if it is wrong there may be an error within the meaning of section 78".

Newton and Newton MAN/92/1160 (VTD 11372)

31. The Tribunal stated that "the burden to determine the correct amount of [VAT] to be paid or reclaimed is a burden to be borne by the taxpayer. The Commissioners' Officers are not conducting an audit of a taxpayer's accounts when they carry out an inspection visit. Their function is to verify the returns submitted on the basis of the information supplied to them. They are not required to conduct an in-depth investigation. It is not unreasonable for a taxpayer to expect an inspecting Officer to give guidance when requested or when a problem is obvious to that Officer".

32. In this case the Tribunal found that there had been no error by HMRC on the facts before it: the Officers could not have been expected to consider all the assets of the business and how they were financed or provided and there was no evidence that

the Officers were aware of the particular arrangement relating to leased equipment on which the case turned.

HMRC Guidance referred to

33. The relevant parts of HMRC guidance VFOOD1640 – liability of herbal teas read as follows:

> "There is a specific relief for herbal teas in item 4 of the items overriding the exceptions. Nevertheless there is often confusion as to how these preparations should be treated for VAT purposes.
>
> The main point to remember is that the items overriding the exceptions relate to items which would otherwise fall within the exceptions. Therefore, to be zero-rated as a herbal tea, a product must first be food and then also be a beverage.
>
> In the case of Dr Xu Hua (LON/95/2069), a practitioner of Chinese herbal medicine, the tribunal found that the teas supplied on prescription were eligible for zero-rating even though they were for a medical or therapeutic purpose. They were made up of ingredients found in commercial brands of herbal teas, had some nutritive value and were drunk as part of a patient's normal daily diet. That they were supplied for a medicinal purpose should not prevent the teas being treated with the same liability as the pre-packaged teas.
>
> Following this decision, supplied of herbal teas, even when they are prescribed for a medical reason, have been accepted as zero-rated."

34. HMRC guidance VSIM3100 states that there is no statutory definition of official error in section 78 of the VATA 1994 and refers to clarification of the term's meaning in the case of *CGI Pension Trust Ltd MAN/98/85Z (VTD 15926)* (see below). Guidance at VSIM3200 refers to the cases of *Avco Trust plc (VTD 16251)* and *Newton and Newton MAN/92/1160 (VTD 11372)* in relation to official errors by HMRC.

35. Further HMRC guidance at VSIM6100, VSIM6200 and VSIM6300 deals with the period for which statutory interest is due and the extent of HMRC's liability.

36. HMRC guidance, at VFOOD7700 – Excepted items: beverages and herbal teas, reads as follows:

> "Item 4 of the items overriding the exceptions zero-rates alternatives to ordinary tea in the form of mate (dried leaves of the plant Ilex Paraguayensis), herbal teas and similar products, and preparations and extracts from them. HMRC interprets this provision to relate to herbal drinks taken as beverages, to slake the thirst and so on under the Bioconcepts definition rather than for medicinal purposes."

37. Public Notice 701/14 lists some examples of non-alcoholic beverages that are zero-rated (at 3.7.2 Non-alcoholic beverages). There are two columns: one headed 'zero-rated' and the other 'standard-rated'. Under the zero-rated column appears "tea,

mate, herbal teas…" and under the standard-rated column appears "purgative and laxative "teas", such as senna, and similar medicinal teas".

Submissions

38. In order to claim interest under section 78(1)(a) VATA 1992, the Appellant had to show that there was an error by HMRC and that it was as a result of this error that the Appellant overpaid output tax.

39. The Appellant claimed that:

(1) HMRC wrongly advised that the Appellant that the supply of herbal teas was standard-rated in correspondence in June/July 1994;

(2) Mrs Al-Khafaji asked the HMRC Officer who visited on 27th May 2004 specifically about the appropriate rate of VAT for the herbal teas supplied and was given the wrong advice;

(3) Mr Ogilvie, the Appellant's accountant, telephoned HMRC on 28th April 2008 to check the appropriate rate for the teas and was again given the wrong advice; and

(4) HMRC's guidance was incorrect and misleading, not having been clearly updated following the Dr Xu Hua case.

40. The Respondents argued that:

(1) there had been no error by HMRC;

(2) it is for the VAT registered person to determine the liability of its own supplies;

(3) it is not for HMRC to inform individual traders of the contents of the Value Added Tax Acts;

(4) HMRC had no duty to inform individual traders of the outcome of the Dr Xu Hua case;

(5) information about the Dr Xu Hua case was available to the general public on the HMRC website (Notice 701/14 issued on October 1997) but the Appellant had failed to find it;

(6) there is no indication from Mr Flood's written report of his visit in 2004 that there was an error on the part of HMRC and that the Appellant was specifically misadvised.

Correspondence in June/July 1994

41. Mr Brown referred the Tribunal to the following correspondence.

42. Letter dated 9th June 1994 to HMRC from Clarke-Walker accountants asking for guidance on VAT rates on a no names basis, citing in particular the following paragraph:

"In addition would you advise us, if and when the partnership business (Chinese Herbal Medicine Supplies) exceeds the VAT registration limit, which we anticipate to be imminent, would it have to register for VAT. We understand from a recent telephone conversation with your general enquiries department that if the herbal supplies are based upon prescriptions issued by the practising Chinese Herbal Medicine Doctors, then the supplies would be treated as zero-rated."

43. HMRC's response dated 16th June 1994 requesting further information and Clarke-Walker's reply dated 28th June 1994 containing such information and giving the name of the client.

44. HMRC's letter dated 7th July 1994 and in particular the third paragraph stating that: "Notice 701/31/92 indicates on page 3, that supplies by herbalists are neither zero rated nor exempt. Therefore any supplies by a "Chinese acupuncture and herbal doctor" are standard rated. If the actual "doctor" is statutorily registered, as mentioned in para 4, his services may then be exempt as detailed in the note on "scope", in para 3".

45. HMRC's further letter dated 19th August 1994 (referring to Clarke-Walker's letter of 27th July, which was not included in the bundle) stating that the case would not be considered further under Schedule 1, para 1 of the Value Added Tax Act 1983, referring back to the third and fourth paragraphs of the 7th July letter, and concluding: "It must follow that any supplies of "herbs" by the partnership to Mr Khafaji are taxable at standard rate".

46. Mr Brown noted that this correspondence pre-dated the Dr Xu Hua case.

Inspection on 27th May 2004

47. Mr Brown referred the Tribunal to the VAT Audit Report for the visit on 27th May 2004, which mentions "lower than expected output tax" under audit preparation, indicating that output tax must have been specifically looked at in the context of the inspection as well as recording that Mrs Al-Khafaji was interviewed during the inspection and that "in depth checks [were] made".

48. Mrs Al-Khafaji's written witness statement was taken as evidence in chief, and she confirmed its contents and veracity under oath, subject to the correction of a date: she had been a partner in the business since 1993, not 1989.

49. Mrs Ratnett cross-examined Mrs Al-Khafaji, asking her to explain when and how she had sought clarification from HMRC and why she had waited so long before following this up. Mrs Al-Khafaji said she had always been of the opinion that the teas should be treated as food and so had raised this with Mr Flood on 27th May 2004. She had later asked Mr Ogilvie to follow this up and searched online herself. She had not been in charge of maintaining the accounts in the early years of the business. When she took over this responsibility she had raised the VAT rate with the company accountant, who told her the standard-rating was correct. She had raised it again with

Mr Flood when he visited, carefully laying out the facts for him, and again been told the teas were standard-rated.

50. When Mrs Ratnett queried the accuracy of Mrs Al-Khafaji's memory of the visit which took place over ten years ago, she explained that it was the only VAT inspection they had had. She had been nervous beforehand and remembered vividly the inspection and her conversations with Mr Flood.

51. On re-examination by Mr Brown, Mrs Al-Khafaji confirmed that the only way the herbs were ever sold was as teas and that the business made no other taxable supplies at the time of the visit in 2004. She said that Mr Flood had asked her about the exact nature of the business and she had explained that they ran a clinic where a number of practitioners of traditional Chinese medicine saw customers and prescribed combinations of herbs to be taken as teas.

Call on 28th April 2008

52. Mr Brown referred the Tribunal to a document headed 'Contact Centre Enquiry BTJ18411', which was added to the bundle as page 21A and provided the following record of Mr Ogilvie's call to HMRC on 28th April 2008:

> "Caller's client will sell herbs as medicine what is VAT liability?
>
> Advised caller to look at PN 701/14 section 3.1 and 701/38 section 4 and 4.4. My opinion is standard-rated although they may want written ruling".

53. He then referred to the Appellant's correspondence with HMRC and in particular HMRC's review letter of 22nd January 2015, which, he contended, demonstrated the confusion and inconsistency within HMRC with regard to the VAT liability on herbal teas and HMRC's failure to refer the Appellant to the correct up to date guidance and to advise correctly on the appropriate rate of VAT.

54. Mrs Ratnett contended that the answer given on the telephone on 28th April 2008 was the correct one for the question asked: liability to VAT on herbs sold as medicine. She pointed out that the call record made no mention of tea.

HMRC guidance

55. Mr Brown submitted that HMRC's guidance was confusing and incorrect, citing the following as evidence:

> (1) Herbal teas had been listed as an item overriding the exceptions to zero-rating since at least 1983 (being included in the Value Added Tax Act 1983 and now contained in Item 4 to Group 1 Schedule 8 VATA 1994);
>
> (2) Following the Dr Xu Hua case in 1996, supplies of herbal teas, even when they were prescribed for a medical reason, should have been accepted by HMRC as zero-rated;
>
> (3) HMRC's advice to taxpayers at the relevant time was contained in Notice 701/14 (May 2002) in section 3.7 – Drinks, where herbal teas were

listed in a 'zero-rated' column, but, confusingly, 'medicinal teas' were listed in the adjacent 'standard-rated' column;

(4) HMRC's current guidance (Manual VFOOD7700) states that HMRC interprets the zero-rating provision as relating to herbal teas drunk to slake the thirst rather than for medicinal purposes.

56. Mr Brown also referred the Tribunal to HMRC's letter of 22nd January 2015, which stated that "notice 701/14 Food… [was not amended]… until an update to the October 1997 version was issued in April of 1999. Prior to the update, the notice stated medicinal herbs were always standard rated. The Update added 'Except when in the form of herbal teas'". The letter also acknowledged that "the guidance available in Notice 701/38 Plants and Seed was misleading with regard to your particular circumstances and makes no distinguishing reference to Chinese herbs prescribed as herbal teas as quoted in the Dr Xu Hua case" and noted that although there was "some overlap" between notices 701/14 Food and 701/38 Plants and seeds, "because the principle established in the Dr Xu Hua case was about the liability of a drink" it was only the former notice that needed to be amended.

57. Mrs Ratnett referred to VFOOD1640 and pointed out that although Mrs Al-Khafaji said she had discovered it in February 2014, it was published on 13th March 2009. Mrs Al-Khafaji responded that she had asked for advice in 2004 and 2008 and had reasonably relied on the advice she received from HMRC, but kept checking and questioning the position because it seemed illogical to her.

Discussion and findings of fact

58. The issue before the Tribunal is whether there was an error by HMRC as a result of which the Appellant accounted for an amount of output tax which was not output tax due from it (section 78(1)(a) of VATA 1994 and *CGI Pension Trust Ltd MAN/98/85Z (VTD 15926)*) .

59. The onus is on the Appellant to prove this on the balance of probabilities.

60. It is accepted that supply of herbs to be taken as teas by the Appellant ought properly to have been zero-rated following the case of Dr Xu Hua and that therefore, in applying the standard rate up to 2014, the Appellant accounted for an amount of output tax which was not output tax due from it. The overpaid tax has been repaid, subject to the four year cap.

61. The Appellant has therefore to demonstrate that this overpayment occurred as a result of an error by HMRC.

62. The Appellant asserts that such an error was made by HMRC in the following manners:

(1) in advice contained in correspondence in 1994;

(2) in Mr Flood's failure to advise the Appellant of the correct VAT rate during the course of his visit in 2004;

(3) in advice given to Mr Ogilvie by telephone in 2008; and

(4) through inconsistent and out of date guidance on HMRC's website.

63. In *Newton and Newton*, the tribunal found that it is in the first instance the taxpayer's responsibility to determine the correct amount of VAT he pays; HMRC's role when carrying out an inspection visit is to check the returns submitted on the basis of the information provided to them, not to carry out an audit of the taxpayer's business and they are under no obligation to carry out an in-depth investigation. However, "it is not unreasonable for a taxpayer to expect an inspecting officer to give guidance when requested or when a problem is obvious to that officer".

64. Similarly, in the case of *Avco Trust plc*, the tribunal found that there was no duty on HMRC to advise taxpayers of errors in their affairs, but if a taxpayer specifically asked for advice HMRC were under a duty to give it and, the if advice so given is wrong there may be an error within the meaning of section 78(1)(a) VATA 1994.

Correspondence in 1994

65. This correspondence does contain a clear request for advice from the Appellant and a clear statement from HMRC in response that the Appellant's supplies are standard-rated. It is unfortunate that the letter of 27th July 1994 was missing. In the absence of the complete correspondence we cannot determine the level of information provided to HMRC about the way the business operated. However, as acknowledged by Mr Brown for the Appellant, this advice predates the Dr Xu Hua decision, before which HMRC treated such supplies as standard-rated.

Visit of 2004

66. We were presented with evidence from Mrs Al-Khafaji in the form of her witness statement that she had discussed in detail the way the business operated with Mr Flood and that he had confirmed they were correctly applying the standard rate of VAT. This advice was not correct at the time (following the Dr Xu Hua case). We found Mrs Al-Khafaji to be a credible witness. HMRC put forward no evidence to counter Mrs Al-Khafaji's version of events.

67. Whilst HMRC may not be obliged to conduct an in depth investigation during an inspection visit, Mr Flood's report refers to "in depth checks" being carried out. We asked Mrs Ratnett if she could explain what was meant by 'in depth checks' in the context of a VAT inspection. Mrs Parely offered some clarification, noting that in her experience it would usually involve checking sales and purchase invoices tallied with VAT returns, but as she was not the inspecting officer in this particular case, this amounted to speculation and we were not able to take it into account.

Telephone call of 2008

68. The only evidence of this call is the brief record cited above. This document records only a short question as to the VAT liability on the sale of "herbs as medicine", a referral to Notices 701/14 and 701/38, an opinion that such supplies are

standard-rated and a suggestion that the taxpayer may wish to seek a written ruling. This is insufficient evidence to establish that HMRC gave incorrect advice which the taxpayer was entitled to rely on. Further, on the evidence such as it is:

(1) the mention of the possibility of a written ruling and the words "in my opinion" indicate that the answer given was not intended to be definitive advice; and

(2) the question recorded is about the sale of herbs as medicine, not teas.

HMRC guidance

69. It appears from the evidence presented, in particular HMRC's review letter of 22nd January 2015, that HMRC's guidance in the form of notice 701/14 Food was not updated following the Dr Xu Hua case until April 1999, so it was incorrect during a period of roughly three and a quarter years. The overlap between this notice and notice 701/38 Plants and seeds does appear confusing. The further guidance contained in the VAT manual was not available to the public until 2009. However, HMRC guidance and manuals do not constitute specific advice given to an individual taxpayer.

Conclusion

70. We find that whilst HMRC do not ordinarily have a duty to advise a taxpayer of his liability to VAT, this changes if a taxpayer specifically asks them for such advice. In this case, during the inspection visit of 27th May 2004, Mrs Al-Khafaji specifically asked Mr Flood for advice on the Appellant's VAT liability on the supply of herbal teas. She explained to him the process by which the teas were supplied. He confirmed that the Appellant was accounting for VAT correctly. In doing so he erred. The Appellant continued to account for VAT at the standard rate in reliance on this incorrect advice. Therefore, the Appellant is entitled to interest under section 78(1)(a) VATA 1994.

71. 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.

RACHEL MAINWARING-TAYLOR

TRIBUNAL JUDGE
RELEASE DATE: 11 JANUARY 2016