[2016] UKFTT 470 (TC)

# TC05222

**Appeal numbers: TC/2015/04008**

***Value Added Tax - penalties - underlying VAT assessment not appealed - application for leave to appeal out of time - delay in lodging notice of appeal - Value Added Tax Act 1994, s 83 - factors to be weighed in exercise of Tribunal's decision - guidance in Data Select considered - merits of case a primary consideration - personal liability of director for penalties - s 61 VATA - Schedule 24 Finance Act 2007 Part 4 - application refused***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ANDREW HOLMES** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**Sitting in public at Kings Court, Royal Quays, North Shields on 03 February 2016**

**Mr Andrew Holmes, the Appellant in person**

**Mrs Elizabeth McIntyre, Officer of HM Revenue and Customs, for the Respondents**

DECISION

## The Applications

1. This is an application by Andrew Holmes ('the Appellant"), for an extension of time in which to lodge an appeal against decisions by the Respondents ('HMRC') to claim from the Appellant personally penalties totalling £138,236.54.

2. VAT assessments totalling £167,319.82 were issued in June 2013 to Caterers Friend Limited (Company number 05270935) ('CFL'), of which the Appellant was the principle director. The Company was wound up on 15 October 2013 following a voluntary member's liquidation, leaving the VAT unpaid.

3. The underlying issue in respect of the VAT assessments was whether CFL, as claimed by HMRC, failed to declare all taxable alcohol sales and purchases on its VAT return declarations for the period of assessments, (2004-13). HMRC say that CFL systematically under-declared VAT on alcohol sales from incorporation in 2004 throughout its whole trading life, until being wound up in 2013. The assessments were not appealed by CFL.

4. HMRC assert that the behaviour of the Appellant was deliberate, and that as principle director of the Company he acted dishonestly by knowingly withholding and failing to declare VAT due to HMRC for the periods of assessment. HMRC say that as a consequence and because the Company had been wound up, the Appellant is personally responsible for the penalties under s 60 VATA of £57,506 and under Finance Act 2007, Schedule 24 of £80,730.54.

5. HMRC apply for the Appellant's application to be struck out on the grounds that it is out of time and there is no merit in the substantive appeal.

## Background

6. CFL was incorporated on 27 October 2004 as a Private Limited Company. The proposed principle economic activities of the Company were recorded at Companies House as the processing, preserving and wholesale sale of fruit and vegetables, dairy products, eggs and edible oils and fats juices, mineral water and soft drinks. Shortly after the Company was set up it also started to wholesale alcohol products.

7. The Company traded from Sotherby Road, Middlesbrough. Its Directors were named as Andrew Holmes and his son Jonathan Holmes. The Company's last annual accounts filed at Companies House were for its for year ending 31 October 2011.

8. In 2011, CFL had rendered VAT repayment returns, which were suspended pending verification checks. On 20 September 2011, HMRC VAT Officers visited the premises of CFL. Books and records (including data disks) were uplifted. The data disks were analysed and large VAT account errors became apparent. HMRC say that a stock reconciliation, adjusted for opening and closing stock figures provided by CFL, revealed across the board discrepancies on all alcohol lines sold.

9. On 19 October 2011, the discrepancies were discussed with Mr Holmes, the Appellant, who provided HMRC with purchase invoices supporting the VAT repayments. A further visit was undertaken on 18 January 2012. Electronic copies of spreadsheets were obtained and copies of all purchase invoices were provided with a VAT value over £1,000.

10. In May 2012, HMRC contacted CFL requesting copy sales invoices and other primary documentation which related directly to the suspended VAT repayment claim. There followed a period of correspondence, further meetings, and exercises undertaken in an attempt to reconcile the VAT account.

11. CFL's financial year-end was 31 October. A full year's stock reconciliation exercise was analysed with HMRC uplifting all sales, purchase and opening and closing stock information for the period 1 November 2010 to 31 October 2011. Source documents were provided by CFL. The sales, purchases and stock invoices were scheduled on a spreadsheet and analysed by individual lines. The analysis revealed wide ranging discrepancies between purchases made and sales declared on all lines sold.

12. On 21 September 2012 HMRC notified the Appellant that there had been a significant volume of high value unexplained sales invoices with the description "Goods non-VAT", which were in fact not goods non-VAT. A stock reconciliation exercise undertaken by HMRC revealed that the correct VAT liability appeared to be significantly understated.

13. On 31 January 2013, the Appellant wrote to HMRC responding to some, but not all, of the concerns raised. The letter (on the Company's letter headed notepaper) was however signed by Mr E Hillman of Hillman & Co, Chartered Certified Accountants.

14. On 5 February 2013, a PN160 meeting (a meeting during a VAT investigation where HMRC consider there is evidence of dishonest conduct, allowing the tax payer the opportunity to disclose any irregularities in his VAT affairs) was held between the Appellant, Mr Hillman and Officers of HMRC. The Appellant admitted that certain products had not been shown in the sales declared ledger and that "Goods Non-VAT" had been used in error rather than that of "Goods Vatable".

15. The Appellant advised that he had been involved in an accident and had been unable to work for several months. He said that the sales manager made the error, and as the sales manager was a salaried employee, he would not have benefitted from the error. The Appellant conceded however that there were clearly errors, and that CFL had underpaid VAT. HMRC formed the view that the VAT under declarations were deliberate and concealed.

16. On 25 March 2013, Mr Hillman wrote to HMRC putting forward possible explanations for some of the VAT underpayments. He conceded that there were *"massive discrepancies between individual stock lines"*, and that CFL appeared to have *"sold more stock than it had available",* but asserted that the discrepancies could be explained by reference to two areas:

- 'Oranjeboom' lager had been miscoded as Holsten Pils, with the result that that there had been significant under recorded sales of Oranjeboom, and a corresponding over recorded sale of Holsten Pils.

- There were significant differences between what was delivered and what was invoiced. Goods were originally booked in from delivery notes, but when matched to invoices any discrepancies were then adjusted on the stock record. This led to more stock being available than was actually recorded

17. Mr Hillman maintained that this demonstrated why the records indicated that there had been more sales than stock available. He suggested a settlement figure of £4,997.67 output tax.

18. On 27 March 2013, HMRC responded to Mr Hillman, and argued that the purchase invoices reviewed did not support his arguments regarding miscoding of Oranjeboom. Holsten Pils and Oranjeboom were purchased on the same invoices at different times of the stock reconciliation year under review. It was not logical that staff coded Oranjeboom as Holsten Pils on the computer system again and again throughout the year. Sales invoices for Oranjeboom had been raised throughout the year, with the Oranjeboom product code, and it was not credible that a product code for the purchases was non-existent. HMRC said that it was not credible that a large trader such as CFL would receive a delivery note, then an invoice with vastly different quantities of alcohol on both documents for the same supply, but not investigate the difference thoroughly prior to paying for the received goods.

19. HMRC concluded, following the analysis of CFL's alcohol purchases and sales in the financial year end to 31 October 2011, and a full years stock reconciliation, that there were serious across the board discrepancies on the lines of alcohol bought and sold, when compared to the taxable purchases and taxable supplies declared on corresponding VAT returns. HMRC considered that CFL had been making taxable supplies outside the VAT account, and/or mis-describing standard-rated supplies of alcohol as zero-rated supplies. Although the Appellant conceded there had been inaccuracies, he disputed the level of inaccuracies and that the inaccuracies were as a result of deliberate behaviour.

20. HMRC said that they proposed to make a best judgment assessment based on primary evidence, including sales invoices used in the stock reconciliation which had been verified as accurate via third party visits by HMRC to customers of CFL.

21. On 3 May 2013, HMRC issued a pre-assessment letter, with an assessment schedule. In the final stock reconciliation analysis (sent with the assessment), where sales exceeded purchases, a value for each alcohol line was established from purchase invoices and this was multiplied by the quantity of sales that exceeded purchases to establish an under declared opening stock figure as at 31 October 2010.

22. The under declared sales (calculated from purchases exceeding sales) quantified at 31 October 2011 and the understated opening stock at 31 October 2010 (calculated from sales exceeding purchases), were averaged for one year and assessed on the basis of presumption of continuity from CFL's effective date of VAT registration in November 2004 to 31 January 2013 at a rate of 6.42% output tax under declared per period. The 6.42% rate was applied to output tax declared for each VAT period, and assessed accordingly.

23. On 13 May 2013, HMRC issued six letters informing the Appellant that VAT repayment returns rendered for periods 07/11, 10/11, 01/12, 07/12, 10/12, 01/13 would be adjusted to reflect the inaccuracies discovered and analysed throughout the VAT intervention as follows:

| | |
|---|---|
| 07/11 additional tax due | £8,146.23 |
| 10/11 additional tax due | £5,750.72 |
| 01/12 reduction of VAT credit | £5,840.54 |
| 07/12 additional tax | £4,761.47 |
| 10/12 reduction of VAT credit | £4,153.56 |
| 01/13 reduction of VAT credit | £3,570.30 |

Net VAT assessed as undeclared - £32,222.82

24. On 12 June 2013, HMRC issued the Notice of Assessment (V655) at £135,097 for the period 15 November 2004 through to 04/12.

25. Total net VAT considered under declared was £167,319.82

26. HMRC say that before the assessments were made, CFL was offered the opportunity of considering the calculations, furnishing any further information they considered relevant and commenting upon the method adopted in arriving at the proposed assessment. The Appellant on behalf of CFL provided no rational explanation or alternative calculations. HMRC consider that CFL had not discharged the burden upon it to show that HMRC were not entitled to raise the assessment, or that the assessment has not been calculated to best judgment.

27. HMRC say that CFL did not supply any information, documentation or material to enable HMRC to conclude that the assessment should not be sustained or should be reduced. They undertook all reasonable investigations and made a bona fide judgment on the information available. The assessment issued was reasonable, not arbitrary and assessed to best judgment.

28. On 25 June 2013, HMRC issued a civil evasion penalty to the Appellant under the provisions of s 60 VATA 1994, at £57,506. HMRC assert that he acted dishonestly, by knowingly withholding and failing to declare VAT due to HMRC, from 15 November 2004 through to 31 January 2009 (02/05 - 01/09), resulting in £71,891 under declared VAT.

29. The penalty was of an amount equal to the tax believed to have been evaded but, under s 70(1) of VATA 1994, was reduced. HMRC allowed for disclosure and cooperation given during the course of the investigation, and reduced the penalty to £57,506, being 80% of the amount of VAT believed to have been evaded.

30. The period within the Appellant could request a review of the assessments by HMRC expired on 2 July 2013. Shortly after that, HMRC commenced debt recovery proceedings in respect of the VAT assessments.

31. On 6 September 2013, HMRC issued a notice of penalty assessment under schedule 24 of the Finance Act 2007 and on 8 September 2013, issued 'deliberate and concealed' penalty assessments at £80,730.54 for the period 1 February 2009 through to 31 January 2013. HMRC considered the inaccuracies to be prompted, deliberate and concealed. The penalty assessments covered periods 04/09 through to 01/13, and the potential lost revenue was £94,977. HMRC allowed a disclosure reduction of 15%, and therefore the penalty assessments were issued at 85% of the potential lost revenue at £80,730.54.

32. HMRC say that the conduct giving rise to the penalty is attributable in whole to the Appellant's behaviour. HMRC say that he was the senior director in CFL and instrumental in the key decisions of the business. Crucially this included close involvement in the finalisation of the VAT return figures. Therefore, in accordance with s 61 of VATA 1994 and under schedule 24 of the Finance Act 2007, the penalties are recoverable from him personally.

33. CFL lodged an out of time notice of appeal against the VAT assessments with the Tribunal Service on 28 August 2013. The Appellant said that it was appealing against a VAT assessment of £143,176.63. It was unclear why the Appellant was appealing that figure, as it did not represent the total amount of assessments. However, HMRC had also been seeking to recover outstanding PAYE which may have been included in the figure.

34. The Appellant's grounds of appeal were that:

i. "HMRC have relied upon 'source' documents that may have resulted in significant duplication.

ii. Sales invoice source documents have been produced after the event. The descriptions on some of these invoices differ from the original invoices because of code reassignments. This appears to have caused significant under declarations which does not reflect the reality of the position.

iii. The computerised stock and invoice system together with the manual systems and controls are appropriate to the size of the operation and is a valid basis for the preparation of the VAT returns."

35. A winding up order was made against the Appellant company on 15 October 2013

36. On 7 November 2013, after a further exchange of correspondence and telephone conversations between HMRC and the Appellant, HMRC agreed to a late statutory review of both the assessments and the penalties, following which the Appellant would have a further 30 days to appeal the matter if he disagreed with the reviewing officer's conclusions. Because HMRC were not able to undertake a review whilst an appeal to the Tribunal was pending, they asked the Appellant to withdraw CFL's appeal against the assessments on the understanding that the business would take up the offer of a review instead.

37. On 13 November 2013, HMRC wrote to the Appellant to say that HMRC had 45 days within which to conduct the review and notify the Appellant of the conclusions.

38. On 17 December 2013, HMRC requested an extension of time to complete their review suggesting a review completion date of 28 February 2014.

39. On 20 January 2014, the Tribunal received a letter from the Appellant confirming that the Company wished to withdraw its appeal, stating that in the event of the Company being dissatisfied with the outcome of HMRC's review conclusions it reserved the right to appeal to the Tribunal.

40. The Tribunal notified the Appellant that the Company had 28 days from the date of its withdrawal of the appeal to apply to the Tribunal for the case to be reinstated.

41. On 3 March 2014, HMRC requested a further extension of time to the statutory 45 day time limit to complete the review suggesting a review completion date of 30 March 2014.

42. On 1 April 2014, HMRC advised the Appellant that it had been unable to conclude its review by 30 March 2014 and requested a further extension to 13 June 2014.

43. On 12 June 2014, HMRC wrote to the Appellant with their statutory review conclusions, upholding the assessment and penalty decisions, with a summary of events and full explanation. The Appellant was advised that if the Company did not agree with the conclusions, an appeal could be lodged with the Tribunal within 30 days, that is by 12 July 2014.

44. On 7 July 2014, the Appellant replied to HMRC saying that their summary was inaccurate and disputing their conclusions. The Appellant said that he would write to HMRC within 28 days *"giving full details of why this is the case. Furthermore I shall require a full response as to why certain factors have been ignored. In the event that you are not prepared to review your decision please accept this letter as formal notice that they intend to appeal to*

*an independent Tribunal. Please provide me with the necessary paperwork to launch such an appeal."*

45. On 11 July 2014, HMRC replied to the Appellant explaining that the Appellant Company was not entitled to a further review and that if he was dissatisfied with the review he may appeal to the Tribunal service, and that any appeal should be lodged no later than 12 July 2014.

46. Nothing further was heard from the Appellant until 16 April 2015, shortly after HMRC had commenced debt recovery and bankruptcy proceedings. The Appellant wrote to HMRC asking that they accept his letter as a formal request to appeal *"as per our original request dated 7 July 2014"*.

47. HMRC responded on 14 May 2015, saying that the Appellant's notice of appeal was out of time and that any appeal should have been lodged with the Tribunal service no later than 12 July 2014.

48. The Appellant replied that as he had heard nothing further following his letter of 7 July 2014, he had assumed that HMRC was taking no further action.

49. On 13 July 2015 the Appellant lodged a notice of appeal on behalf of CFL with the Tribunal, saying that he disputed an 'assessment to VAT' of £138,236, (which in fact was the total amount of penalties rather than the total amount of the VAT assessments of £167,319.82). It is assumed that the Appellant intended to appeal the penalties, but the stated grounds of appeal were, confusingly, the same as those lodged with the previous notice of appeal against the assessments, received by the Tribunal service on 28 August 2013.

50. The Tribunal Service replied to the Appellant saying that it was unable to accept the appeal of the Company as it had entered into liquidation in 2013. The Tribunal Service also queried the nature of the Company's appeal and requested a copy of the VAT assessment decision letter.

51. The Appellant responded on 12 August 2015 saying that he was aware that CFL had been wound up in 2013, confirming that it was the penalty raised against himself that he wished to appeal.

52. The Tribunal Service replied that the Appellant's appeal was out of time but noted that although it included an application for permission to make a late appeal, HMRC had the right to object to the application.

53. On 2 November 2015 HMRC notified the Tribunal that they objected to the Appellant's application for an extension of time within which to appeal.

**Relevant legislation**

54. The relevant legislation is as set out below:

*VATA 1994*

Section 83 of VATA 1994 permits an appeal against a decision of the Commissioners in VAT repayment claims. Section 83 provides, so far as relevant, as follows:

> "(1) An appeal under section 83 is to be made to the Tribunal before -

(a) the end of the period of 30 days beginning with -

(i) in a case where P is the Appellant, the date of the document notifying the decision to which the appeal relates....

(6) An appeal may be made after the end of the period specified in subsection (1).... if the Tribunal gives permission to do so."

*S 61 VATA – evasion liability of directors*

"(1)Where it appears to the Commissioners—

(a) that a body corporate is liable to a penalty under section 60, and

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),

the Commissioners may serve a notice under this section on the body corporate and on the named officer."

*Schedule 24 Finance Act 2007 Part 4 Miscellaneous*

Companies: officers' liability

"19. (1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership "officer" means - (a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)), (aa) a manager, and (b) a secretary."

## Procedural rules

55. The relevant procedural rules are contained in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules")

56. Rule 2 of the 2009 rules sets out the 'overriding objective' of the Tribunal:

"2 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

57. Rule 5 of the 2009 rules contains the Tribunal's case management powers:

"(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

(b) …."

58. Rule 20(4) of the 2009 Rules states:

"(4) If the Appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by an extension of time allowed under rule 5(3)(a) (power to extend time)--

(a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal."

**Appellant's case**

59. At the hearing of the application Mr Andrew Holmes, the Appellant, and Mr Jonathan Holmes attended.

60. The Appellant said that having received HMRC's review letter in June 2014 it had always been his intention to appeal. He explained that HMRC had opened an investigation into the Company's VAT returns, its PAYE record and his own tax affairs, but that in his opinion there had only been a few minor discrepancies. He had injected his life savings into

the Company. He did not feel that HMRC had acted fairly and the statutory review letter was entirely inaccurate.

61. He was however unable to provide any detailed or substantive argument in support of his grounds of appeal other than to refer to correspondence from his accountants to HMRC (see paragraphs 6-18 above and also paragraphs 64 and 67 below) which set out reasons which, in their opinion, showed why the VAT assessments were inaccurate and the penalties unwarranted.

62. The Appellant accepted that the VAT assessment had not been appealed and his accountant's concession in correspondence with HMRC that there had been massive discrepancies between individual stock lines. However, he said that the penalties which he appealed were based on a disputed (albeit unappealed) VAT assessment. As his accountants had argued, when all the stock discrepancies were evened out the error rate was marginal (2.15%). He accepted that amongst other discrepancies there had been a significant number of alcohol items identified as 'Goods non-VAT' and that the Company appeared to have sold more stock than it had purchased. He said that his accountants had put forward their explanations for the stock discrepancies but these had not been fully taken into account by HMRC.

63. The Appellant's reference to his accountant's 'explanations' was their assertion that errors in wrongly categorizing and mis-posting stock was due to lack of training and supervision of staff. New procedures had later been put in place to eradicate these errors. The accountants had argued that the overall effect of these errors was not material to the quality of the accounts, as the annual stock take corrected the quantities going forward.

64. A letter from Hillmans accountants of 25 March 2013 summarised the Appellant's case as follows:

> "Our client has provided us with all the relevant source documentation from which we have identified two areas which have given rise to the discrepancies.
>
> a) Oranjeboom/Holsten Pils coding. Items purchased as Oranjeboom appear on the stock records as Holsten Pils. The reason for this is the code was re-used during the year. The consequence of this was to retrospectively change the heading on the stock and movement reports. The result being a massive under sale of Holsten Pils and a corresponding over sale of Oranjeboom. Opening stock take records support this view and invoices from AF Wholesale confirm the allocation of purchases.
>
> b) Whilst we have been able to tie up the delivery notes to invoices, there are significant differences between what was delivered and what was invoiced. Again this relates to AF Wholesale the primary supplier of beers and some wines. Goods were originally booked in from the delivery notes. However, when matched to invoices, where a discrepancy arose, the stock figure was altered to agree to the invoice in order that the said invoice could be cleared and paid. The consequence of this approach was not appreciated by our clients and has in fact led to more stock being available than was actually recorded. Our analysis indicates that AF wholesale have given a 10% volume discount, although this figure seems to be variable. An analysis of the invoice delivery discrepancies is attached for your perusal.
>
> On review of your analysis provided on 21 September 2012 we wish to draw your attention to the following points:

a) Your analysis takes no account of misposting between products as noted in (3) above, a more reasonable approach would have identified a coding error between Oranjeboom and Holsten Pils, this is a more plausible answer and supported by the evidence than the conclusion you have reached.

b) Your analysis has ignored stock write offs which can occur for a number of reasons. These include 'out of date stock', damaged stock, clerical errors and theft, to name but four.

c) If the approach you have adopted in respect of over sales, was followed to its logical conclusion, then the stock 'acquired' to make those 'over sales' would have been subject to input VAT. The overall effect would be the difference between the input VAT and the Output VAT. Your analysis seems to ignore the input position entirely.

In conclusion I believe we have demonstrated that whilst the records indicate that there have been more sales than stock available, this is in fact explained when you drill down to the individual delivery notes which are available for your inspection. Lack of training and or supervision has resulted in the discrepancies across the individual product lines, most of which occurred whilst Mr Andrew Holmes was incapacitated."

**HMRC's case**

65. Mrs McIntyre for HMRC argued that CFL had never provided a reasonable explanation for the discrepancies in its VAT returns. With regard to the Appellant's application before the Tribunal for an extension of time within which to appeal the penalties, no acceptable explanation for the inordinate delay in submitting an appeal had been offered. Nor had the Appellant explained the basis on which he was appealing the penalties and in particular an explanation as to how he proposed to appeal the penalties when the VAT assessment on which those penalties were determined had never been appealed.

66. With regard to the VAT assessments, HMRC had responded to CFL's accountant's letter on 27 March 2013 saying:

"The main thrust of your letter disputing the HMRC stock reconciliation of Caterer's Friend Limited is misposting of alcohol product lines purchased, by poorly trained staff, particularly Holsten pils and Oranjeboom. Indeed this misposting explanation is the recurring theme in points 2-5a of your 25th March 2013 letter. HM Revenue and Customs carried out a stock reconciliation on individual lines to ascertain the credibility of the VAT returns rendered by Caterer's Friend Limited. The stock reconciliation tries to demonstrate differences across nearly all alcohol lines bought, with significant differences on many of the lines. These include sales of alcohol when none was evidenced as being bought and also purchases of alcohol on which it appears sales have not always been declared.

I cannot accept your misposting explanation for the following reasons:

With regards the highest value misposting which allegedly sees Oranjeboom posted as Holsten Pils I enclose purchase invoices from AF Wholesale UK Limited and Prestwick & Wright dated 16 February 2011 and 04 June 2011 respectively (copies enclosed). These invoices demonstrate both Holsten Pils and Oranjeboom were purchased on the same invoices at different times of the stock reconciliation year under review. These invoices do not support your explanation that Oranjeboom is coded as Holsten Pils as both items will have been recorded on the Caterer's Friend system and given an individual product code. If this is not the case you will have to demonstrate how the staff came to the conclusion that throughout the year they were to record Oranjeboom as Holsten Pils on the computer system.

The subsequent sales of Oranjeboom has been demonstrated throughout the stock reconciliation year under review. It is not logical that (on the same computer system) sales invoices with the Oranjeboom product code have been raised, but the same product code is not in existence/used for the purchase of this product.

In point 3 of your letter dated 25 March 2013 you mention the misposting of Echo Falls White Zinfandel. My stock reconciliation shows minimal differences in the analysis of the sales and purchases of Echo Falls White Zinfandel (2 cases).

Caterer's Friend Limited sell alcohol to numerous retail outlets in the North East and beyond. It is impractical to believe that clients would accept goods (where output tax was due to be charged and was charged) which is invoiced as one brand of alcohol yet is delivered under a different brand. It is also not normal commercial practice.

AF Wholesale delivery notes and Invoices

Caterer's Friend Limited is a large trader with numerous employees and a significant turnover. It is not logical that a company which (for the same supply) receives a delivery note, then an invoice, with vastly different quantities of alcohol on both documents, would then not investigate the differences thoroughly prior to paying for the received goods. Mr. Holmes has stated on a number of occasions that a delivery note (if received from a client) is reconciled not only to the purchase invoice but to an internal purchase order prior to payment. Indeed it is not commercial practice for a company to receive a high value consignment of goods (in this case alcohol) and not carry out rigorous internal checks prior to payment.

A review of the AF Wholesale purchases has been carried out with the 10% adjustment made as referred to in point 4b of your letter. The trader would actually be assessed for marginally more if this volume discount is taken into account.

Wastage. The subject of wastage regarding alcohol has been discussed with Mr. Holmes and the following has been noted.

Mr. Holmes has stated in my visit to his premises of 13/09/2012 that the damage to alcohol stock during deliveries to clients has been negligible. This is logical given the robust nature of the product.

Mr. Holmes has stated he employs "stock monitors" to ensure correct loads are on the vans used by delivery drivers. Mr. Holmes does not believe that if the vans are over-stocked that the drivers would return the excess stock — hence the reason for the stock monitors.

Mr. Holmes stated that there has been only one incident reported to the police in the last 3 years regarding a break-in at the premises. There was damage to the building but stock theft/damage was minimal. Mr. Holmes went onto say he believed the theft of diesel was his biggest concern. A final observation is the premises at Hamilton House are heavily CCTV patrolled.

No allowances have been made for out of date alcohol because alcohol does not have a short shelf life. The purchase invoices produced on my visit consistently demonstrate the main alcohol lines being repurchased throughout the year. This would indicate that it sold quite quickly and definitely before it had a chance to go out of date.

Mr. Holmes family form a reasonable proportion of the workforce.'

67. Following this exchange of correspondence, no further information or documentation to contradict HMRC's conclusions was provided to HMRC by CFL, Mr Holmes or his

accountants. As a result HMRC gave notice of the assessments on 3 May 2013, the assessments being issued on 6 June 2013.

68. In response to questions from Mrs McIntyre, the Appellant said that he had left matters to his accountants. He had been 'firefighting'. He operated as a fruit merchant and had been working from 5.00am to 5.00pm every day and the investigations into the Company's affairs had taken up an inordinate amount of his available time.

69. The Appellant agreed that he had put CFL into liquidation because the Company could not pay the VAT assessment.

70. He also agreed that in his letter of 7 July 2014 he said that he would write to HMRC within 28 days giving full details of why he considered the VAT assessments to be inaccurate, but had not done so and that his notice of appeal and application to appeal out of time had been prompted by HMRC commencing bankruptcy proceedings in March 2015.

71. The grounds for HMRC's objection to the Appellant's application and their counter application for it to be struck out, are that under Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") the Appellant is required to bring his appeal within the time limits provided for under s 83G VATA 1994.

72. HMRC contends that the Appellant failed to prosecute his appeal with reasonable diligence. The appeal should have been lodged by no later than 11 July 2014 and was therefore made over a year and a month out of time.

73. Furthermore, the underlying VAT assessment was not appealed. Therefore HMRC seek a strike out under the provisions of Rule 8(3)(c) of the 2009 Rules on the grounds that there is no merit in the appeal.

74. Mrs McIntyre referred to Mr Justice Morgan's decision in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 TCC where he said:

> "33. . as a general rule, when a court or Tribunal is asked to extend a relevant time limit, the court or Tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) How long was the delay? (3) Is there a good explanation for the delay? (4) What will be the consequences for the parties of an extension of time? And (5) what will be the consequences for the parties of a refusal to extend time? The court or Tribunal then makes its decision in the light of the answers to those questions.
>
> 35. The Court of Appeal has held that, when considering an application for an extension of time……, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see Sayers v Clarke Walker (a firm) [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 3095; Smith v Brough [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the Value Added Tax and Duties Tribunal to the High Court: see Revenue and Customs Comrs v Church of Scientology Religious Education College Inc [2007] EWHC 1329 (Ch), [2007] STC 1196.
>
> 36. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA."

75. Mrs McIntyre also referred the Tribunal to *Obhloise Benjami Ogedegbev HMRC* [2009] UKFTT 364 (TC) where Sir Stephen Oliver said

"7. While this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally. Moreover, there must be at least an arguable case for making the appeal. In the present circumstances I cannot see that the Appellant has even an arguable case.

8. The combination of the facts that the appeal was lodged many months late and that the appeal had no realistic chance of success persuade me that the Appellant's application for an extension of time should be refused."

**Conclusion**

76. The Appellant accepts that he received HMRC's review decision letter of 12 June 2014 and the 30 day period within which to lodge an appeal with the Tribunal expired on 12 July 2014 ( s 83G(1) of VATA 1994).

77. There is no right of appeal against that decision but the taxpayer may appeal to the Tribunal within thirty days of HMRC's decision and if out of time apply to the Tribunal for permission to make a late appeal. Section 83G(1)(a)(i) VATA 1994 and s 83G(6) VATA provides that an appeal can be brought after the relevant time limit "if the Tribunal gives permission to do so".

78. Time limits are generally to be adhered to unless good reason can be shown why they should be overridden. HMRC do not accept that there is a reasonable excuse for the delay.

79. It is necessary for the Tribunal to take into account the overriding objective of the 2009 Rules and actively exercise its discretion under rule 5(3) of the 2009 Rules, for which purpose a balancing exercise must be conducted, taking into account all relevant circumstances and the factors set out above in *Data Select,* including the arguable merits of each party's case, if appropriate.

80. I will address in turn, each of the factors referred to in *Data Select*.

(1) What is the purpose of the time limit? Generally the purpose of adherence to time limits is finality and certainty. It is necessary for HMRC to operate and enforce the taxation system. Time limits also promote the efficient organisation of the Tribunal system. With particular reference to the CPR rules, time bar provisions are intended to maintain the interests of the proper administration of justice, although this factor is more generally referable to an application for an extension of time in the course of litigation where one party has not observed, to the possible detriment of another, a time limit previously agreed to.

(2) How long was the delay? The Notice of Appeal was not lodged until over a year after the review decision on 12 June 2014.

(3) Is there a good explanation for the delay? The appeal was prompted by HMRC taking debt enforcement and bankruptcy proceedings against the Appellant. The Appellant has provided no explanation for the late appeal other than that, because of the passage of time, he thought HMRC were taking no further action. He was aware of the time limit within which an appeal had to be made. On 7 July 2014 he had written to HMRC to say that he would, within 28 days provide "full details of [why he considered the summary contained in HMRC's review letter of 12 June 2014] was inaccurate," adding that if necessary he intended to appeal to an independent Tribunal.

He appears to have initially misunderstood his position, in that the VAT assessment had not been appealed, but he nonetheless argued in his Notice of Appeal that the VAT assessment was disputed. He clarified this later by confirming that he was appealing the decision to hold him personally responsible for the penalties, and was not seeking to appeal the assessment against CFL out of time. Prior to that the Appellant appeared content to waive CFL's right to appeal the assessment, possibly on the basis that he could allow the Company to be wound up.

(4) What will be the consequences for the parties of an extension of time? HMRC did not indicate any particular prejudice suffered if the application to appeal out of time is allowed. There may of course be a general prejudice in having to revisit the Appellant's assertion that penalties should not be paid by him, but that prejudice is not, on its own, so significant as to outweigh the other factors and determine the application in favour of HMRC. However, the Appellant did not appeal the VAT assessments nor seek an extension of time within which to appeal. Following their brief exchange of correspondence in March 2013, no further information or argument was offered by CFL or by its accountants to contradict HMRC's conclusions. To that extent the merits of Appellant's appeal are questionable. Almost inevitably penalties follow a VAT assessment based on errors in VAT returns caused by carelessness or dishonesty, yet the Appellant has put no argument forward as to why the penalties of £57,506 imposed on him under the provisions of s 61 of VATA 1994, and of £80,730.54 under schedule 24 of the Finance Act 2007 should not apply, or why those penalties should be reduced or not be payable. It is difficult to see what useful purpose would be served by allowing an extension of time to appeal the penalties when the underlying VAT assessment on which the penalties have been based has not been appealed.

(5) What will be the consequences for the parties of a refusal to extend time? If the application is refused, then the penalties are payable by the Appellant, but that is the necessary consequence of the VAT assessments not being appealed and penalties being appealed out of time with no reasonable explanation for the delay.

81. Generally, an extension of time is the exception rather than the rule. Further, in the overall context of the history of the matter with particular reference to the overriding objective and the lack of any significant merit in the substantive appeal, I consider that that this is not a case in which in the interests of justice I should exercise the Tribunal's discretion to permit the appeal to be made after the expiry of the statutory time limit.

82. Accordingly HMRC's application to strike out is granted and the application for permission to appeal out of time is refused.

83. 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.

**MICHAEL CONNELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 5 JULY 2016**