[2021] UKFTT 0277 (TC)

TC08222

VAT – Input tax – disallowed – best judgement assessments under section 73 VAT Act 1994 for periods 06/12 to 03/15 – insufficient evidence provided to support input tax claimed in returns – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06585 (V)

TIMOTHY LOCK
Trading as Woodborough Hall

Appellant

and

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE RUPERT JONES
ANN CHRISTIAN

The hearing took place on 26 May 2021. With the consent of the parties, the form of the hearing was video on Tribunal Video Platform, due to Covid 19 restrictions. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. Further written submissions and evidence were received from the Appellant and HMRC between 23 June and 23 July 2021.

The Appellant appeared in person
Ms Laura Castle, HMRC litigator, appeared for the Respondents

DECISION

Introduction

1. The Appellant appeals the decision of HMRC on 20 May 2016 to issue assessments in the total amount of £85,083 covering periods 06/12 to 03/15. The assessments relate to input tax disallowed by HMRC for which the Appellant has been unable to produce evidence to support the amounts reclaimed on the original VAT returns. These are appealable matters pursuant to section 83(1)(p) of the Value Added Tax Act 1994 ("VATA 1994").

2. The assessments concern the following periods and the following amounts:

Date of issue	**Legislation**	**Description**	**Amount**
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 06/12	£9,273
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 09/12	£17,803
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 12/12	£4,388
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 03/13	£1,073
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 06/13	£8,190
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 09/13	£6,055

09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 12/13	£7,654
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 03/14	£323
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 06/14	£6,064
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 09/14	£13,802
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 12/14	£7,081
09/05/16	Section 73(1) VAT Act 1994	VAT assessment for disallowed input tax periods 03/15	£3,377
Total		**£85,083**	

3. As a result of the post hearing submissions and evidence filed by the Appellant on 23 June 2021, on 9 July 2021 HMRC withdrew its assessments for the period 06/12 and 12/12 so that the appeal no longer concerns those two periods. As a result of further evidence filed by the Appellant on 21 July 2021, on 23 July 2021, HMRC decided that the assessments for periods 03/13 will be reduced by £714.21 and 09/12 will be reduced by £4,027.80. Therefore, the total sum now under appeal is £66,679.99.

Issues in the appeal

4. The primary issue in the appeal is whether the Appellant has provided sufficient evidence to discharge the burden upon him to prove that the input tax claimed on the VAT returns was likely in fact to have been incurred.

5. The second issue is whether HMRC have correctly raised best judgement assessments under s.73 VATA 1994 in relation to input tax in the absence of evidence to support the original amounts reclaimed in periods 09/12 to 03/15. Best judgement means that given a set of conditions or circumstances, HMRC must take any necessary action and produce a result that is deemed to be reasonable and not arbitrary; in other words best judgement is not the equivalent of the best result or the most favourable conclusion. It is a reasonable process by which an assessment is successfully reached.

6. Therefore a further issue is whether the best judgement assessments have been correctly calculated.

7. The issues are encapsulated in the recent judgment of the Upper Tribunal in *Kingsley Douglas v HMRC* [2021] UKUT 163 (TCC):

> '6. At [93] and [94] of the Decision, the FTT correctly set out the principles to be derived from the cases on "best judgment" assessments as follows:
>
> "93. It is a well-established principle following *Van Boeckel* that an assessment is made to best judgement if HMRC "fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due." *Van Boeckel* also endorsed the concept that the officer making the assessment: "must not act dishonestly, or vindictively or capriciously, because he must exercise judgement in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of the assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guess work."
>
> 94. Once this threshold is passed, the burden falls on the taxpayer to establish on the balance of probabilities that the assessment is excessive. In *Tynewydd Labour Working Men's Club and Institute Limited v Customs and Excise Commissioners* [1979] STC 570 it was stated that: "… any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. There should be no difficulty in the way of the Appellant assuming this burden. The facts and figures are known to him, and if he does not understand the Commissioners' case, the rules provide for the Commissioners to give a proper explanation.""
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> 7. Thus, it can be seen that the case law establishes that there are two distinct questions for a tribunal in considering an appeal in respect of a best judgment assessment. The first is whether HMRC have assessed the amount of VAT due "to the best of their judgment". The second is whether the tribunal has grounds for changing the quantum of the assessment.'

Facts

8. We heard oral evidence from Officer Mee on behalf of HMRC and Mr Lock and Mr Ullyat for the Appellant who were each cross examined. We make the following

findings of fact on the balance of probabilities indicating where matters were in dispute and our reasons for making such findings.

9. The Appellant, Mr Timothy Lock, runs a business offering wedding supplies and events and trades as Woodborough Hall. The business is a firm - a partnership with his wife.

Evidence of Officer Mee

10. We accept the evidence of Officer Mee as being reliable and established on the balance of probabilities.

11. Officer Mee first visited the business premises of the Appellant, Woodborough Hall, on 23/06/2015 to enquire into the input tax claimed to be deducted on the VAT returns for the periods 12/11 to 03/15.

12. She met Mr Lock at 10.30am. The first part of the interview was conducted with Mr Lock downstairs in the bar area. Mr Lock then gave her a tour of the premises before they completed the interview in the upstairs office. Mr Lock's accountant, Mr Ullyat was present for the second part of the interview.

13. During the second part of the interview Officer Mee was told by Mr Lock that primary records were retained to support the input tax claimed. She was told by Mr Ullyat that the hard disks from both computers had burnt out, which meant that access to the Sage records was lost. She was told that there was no Sage backup and the cloud backup was also lost. She was told that the VAT detailed reports were not printed off. This meant the audit trail between the VAT returns and primary records did not exist.

14. Due to the lack of audit trail Officer Mee was unable to check any VAT returns on the visit date. She asked Mr Lock to reconstruct the Sage records for the period covering 01/04/2014 to 31/03/2015. Mr Lock agreed to do this and they agreed that she would return on Wednesday 23/09/2015 at 10.30am to check the returns. The date and time was noted in her notebook.

15. Officer Mee issued a letter dated 29/06/2015 which confirmed the second visit date 23/09/2015.

Second Visit and Schedule 36 Notice

16. Officer Mee visited the business premises on 23/09/2015. She arrived at 10.10am. Neither Mr Lock nor Mr Ullyat arrived for the meeting. Mr Lock phoned the business premises whilst she was waiting and she spoke with him on the phone. Mr Lock stated that he could not make the meeting, and his accountant Mr Ullyat was sick and had not completed the work. Mr Lock requested a further two to three weeks to finish the work. She told Mr Lock she would issue an information notice pursuant to Schedule 36 Finance Act 2008 which allowed him a further 30 days to provide the information.

17. Officer Mee issued a Schedule 36 notice dated 24/09/2015 which set a deadline of 26/10/2015. The letter stated that she would collect the records from the business premises on 26/10/2015 at 11.00am.

Third Visit

18. Officer Mee visited the business premises on 26/10/2015 at 11am. Neither Mr Lock nor Mr Ullyat arrived for the meeting. A manager was present and she requested access to the office to uplift the records. She was told by the manager that the office was locked and the accountant had the records. The manager spoke to Mr Lock and Mr Ullyat on the phone but she was not given the opportunity to speak with either of them. She was told by the manager that Mr Ullyat would call her back. She waited until 11.40am but no call was received.

19. Mr Lock phoned Officer Mee at the office at 15.00 on 26/10/2015. Mr Lock apologised for not being at the premises and stated that he was still trying to contact his accountant. She stated that she would send out a VAT assessment and a second Schedule 36 notice. Mr Lock asked what he needed to do. She advised Mr Lock to obtain another accountant if Mr Ullyat was too sick to complete the work. She also told Mr Lock he could give his records to HMRC and they would rebuild the returns which would put the VAT assessment and Schedule 36 notice on hold. She told Mr Lock the case would proceed forward until the records were received. Mr Lock asked about penalties and she told him that HMRC had not reached the penalty stage and it had not been considered.

Pre-assessment Letter and Schedule 36 Notice

20. Officer Mee issued a pre-assessment letter dated 26/10/2015 with a VAT assessment amount of £257,506. This was to disallow the input tax from return periods 12/11 through to 03/15 for failing to provide evidence for input tax claims. She also issued a second Schedule 36 notice dated 26/10/2015. This notice charged a £300 initial penalty and set a deadline of 26/11/2015 for the requested records.

Schedule 36 Notice (Daily Penalties)

21. Officer Mee issued a third Schedule 36 notice dated 30/11/2015. This charged £1,240 daily penalties and set a deadline of 30/12/2015 for the requested records. She attempted to phone Mr Lock and Mr Ullyat on 04/01/2016 at 09.30 to chase up the records. She was unable to speak to them and did not receive a call back.

First VAT Assessment

22. Officer Mee issued a VAT assessment notice dated 05/01/2016 with a VAT assessment amount of £257,506. Mr Lock had claimed £257,512 of input tax in the return periods 12/11 to 03/15. This assessment disallowed the input tax claimed in those returns for failure to provide evidence.

Case Review

23. Officer Mee received an email from Mr Lock dated 03/02/2016 requesting an appeal. She sent an email dated 04/02/2016 and stated that she would review the case first. She

issued a letter to Mr Lock dated 10/02/2016 which set out why the appeal to change the VAT assessment was refused.

Records Received

24. Mr Lock phoned Officer Mee on 24/02/2016 at 14.00 and stated that he would be bringing his records to the HMRC office on 25/02/2016. Mr Lock brought 11 boxes of records to HMRC's office on 25/02/2016. She issued a letter to Mr Lock dated 31/03/2016. This letter set out what records were missing from the 11 boxes and set out what other records were still required. She issued a letter to Mr Lock dated 08/04/2016. This letter set out that cash notes had been found in the records.

Second VAT Assessment

25. Officer Mee issued a VAT assessment letter dated 09/05/2016 for £336,859 for the periods 12/11 to 03/16. This assessment was for input tax and output tax based on the difference between what was claimed and what was evidenced by the records. It included an additional assessment which was also calculated against periods 06/15 to 03/16.

26. She sent an email to Mr Lock on 23/05/16 stating that an attempt was made to return his records on 18/05/2016 but the premises were empty.

Case Review

27. Officer Mee received an email from Mr Lock dated 07/06/2016 requesting an appeal. She sent an email dated 08/06/2016 and stated that she would review the case first. She issued a letter to Mr Lock dated 21/06/2016 which set out why the appeal to change the VAT assessment was refused.

Third VAT Assessment

28. Officer Mee issued a VAT assessment letter dated 27/06/2016 to Mr Lock for £303,079. The 03/16 return had been submitted so the additional VAT assessment was withdrawn against this period.

Appeal Request

29. Officer Mee received an email from Mr Lock dated 21/07/2016. This email requested that she reconsider the appeal and stated that evidence could be supplied to support the original return submission.

30. She sent a letter and email to Mr Lock dated 12/08/2016 requesting that the outstanding records be sent to her to support the appeal. No response was received. She sent an email to Mr Lock dated 07/09/2016 stating that she would submit the case to the Review Team. She sent an email to Mr Lock dated 20/09/2016 stating that the case had been rejected by the Review Team because he had not supplied the records or specifically requested an Independent Statutory Review. The email set out Mr Lock's options.

Records Received

31. Mr Lock then sent Officer Mee the following emails with records attached:

Email dated 05/10/2016 at 13.06 with 2 attachments;
Email dated 14/11/2016 at 07.09 with 6 attachments;
Email dated 14/11/2016 at 09.36 with 3 attachments;
Email dated 05/12/2016 at 07.30 with 13 attachments;
Email dated 08/12/2016 at 08.03 with 6 attachments;
Email dated 08/12/2016 at 09.02 with 6 attachments;
Email dated 09/12/2016 at 08.50 with 12 attachments;
Email dated 09/12/2016 at 14.46 with 4 attachments;
0 Email dated 15/12/2016 at 07.35 with 3 attachments;

32. Officer Mee sent an email dated 05/10/2016 to Mr Lock acknowledging the receipt of the records received on the same date and querying the figures. She sent an email to Mr Lock dated 01/12/2016 setting out what VAT adjustments would be made to the assessment and why. The email also set out what data would be disregarded and 'why.

33. She sent an email to Mr Lock dated 10/01/2017 requesting to see a list of specific purchase invoices and advising that some of the purchase ledgers had still not been received.

34. She received an email dated 26/01/2017 from Mr Lock acknowledging her email dated 10/01/2017.

Fourth VAT Assessment (Amended)

35. Officer Mee issued a VAT assessment letter dated 12/01/2017 to Mr Lock for £214,356. The remaining additional assessments after period 03/15 were withdrawn as the relevant returns had been submitted. The output tax assessments against some of the periods was withdrawn, and the input tax was recalculated.

36. She received an email from Mr Lock dated 06/04/2017 in which he queried the finalised calculations for the assessment.

37. She issued a letter to Mr Lock dated 07/04/2017. This advised that the case was closed.

Letter of Appeal

38. Officer Mee received an undated letter of appeal from Mr Lock (stamped as received on 28/04/2017).

39. She sent an email to Mr Lock dated 04/05/2017 asking if he required a Tribunal appeal or an independent statutory review. A second email was sent the same date asking why the request was outside of 30 days. A third email was sent the same date with the attached sale and purchase ledgers recreated by HMRC on Mr Lock's records.

40. She received an email from Mr Lock dated 08/05/2017. In this email Mr Lock stated that he did not receive the assessment letter of 8 February 2017. There was no assessment letter dated 08/02/2017.

41. Officer Mee sent an email to Mr Lock dated 11/05/2017 chasing up whether he wanted an appeal or review. She received an email from Mr Lock dated 11/05/2017 which queried the process of appeal. She sent an email to Mr Lock dated 11/05/2017 which explained the process in applying for an independent statutory review. She received an email from Mr Lock dated 15/05/2017 confirming an independent statutory review.

42. She sent an email to Mr Lock dated 17/05/2017 asking that he send in his calculations to support the review request.

43. She received an email from Mr Lock dated 23/05/2017 stating he would ask his accountant to send the calculations.

44. Officer Mee received an email from Mr Lock dated 31/05/2017 with attached calculations. She sent an email from Mr Lock dated 01/06/2017 confirming the case would be submitted to the Review Team. The case was submitted on 06/06/2017. She sent an email to Mr Lock dated 19/06/2017 to seek confirmation on whether the VAT assessment or penalty was under review. She received an email from Mr Lock dated 23/06/2017 confirming that he wanted both assessment and penalty to be reviewed.

Review Amendments

45. Officer Mee sent an email to Mr Lock dated 16/08/2017 stating that the VAT assessment and penalty would be amended in accordance with the recommendations made by the Review Officer.

Fifth VAT Assessment (Amended)

46. She issued a VAT assessment letter to Mr Lock dated 29/08/2017 amending the assessment to £189,908. The VAT assessment against periods 12/11 and 03/12 were withdrawn as out of time. She sent an email to Mr Lock dated 12/09/2017 with some recommendations for suspension conditions. She received an email from Mr Lock dated 19/09/2017 agreeing to the suspension conditions.

47. She issued a penalty amendment letter to Mr Lock dated 19/09/2017 which withdrew the penalties against periods 12/11 and 03/12 and suspended the careless penalty against the remaining periods.

Alternative Dispute Resolution

48. Officer Mee attended an Alternative Dispute' Resolution meeting with Mr Lock and his agent Mr Ullyat on 10/01/2018 Mr Lock agreed to provide more records to HMRC.

VAT Assessments (Amended)

49. Following a review of the additional records provided by Mr Lock Officer Mee issued a VAT assessment letter dated 06/03/2018 amending the assessment to £115,714. This assessment was based on averages as set out below and provided a greater allowance of input tax without supporting primary document evidence.

50. Officer Mee issued a VAT assessment letter dated 23/03/2018 amending the assessment to £99,712. This assessment was reduced as she had incorrectly included periods 03/12 and 06/15 to 06/16 in the assessment dated 06/03/2018. These periods were taken out of the calculation.

Best Judgement VAT Assessments – methodology of calculation

51. The best judgement VAT assessment letter was issued on 23/03/2018 for £99,712. It covered return periods 06/12 to 03/15. These assessments disallowed input tax due to a lack of primary document evidence for input tax claims and included an output tax assessment against period 03/14.

52. The input tax assessments were based upon viewed purchase invoices listed in ledgers prepared by HMRC and additional lists supplied by Mr Lock.

53. In the prepared ledgers nil VAT was recorded against supermarket receipts as HMRC's administrative staff could not see a VAT breakdown. The gross amount from the receipts was recorded in the ledgers. To make an allowance of VAT on the supermarket purchases, a sample check of the receipts showed that 50% of the purchases had VAT on them for such things like alcohol, soft drinks and sundry items. The other 50% was for food items which do not incur VAT on them. The gross supermarket sales were totalled and then VAT was calculated on 50% of the total.

54. This approach was undertaken to save time.

55. Once the ledgers were completed, the VAT was totalled in each return period. The input tax evidenced against periods 09/13 to 03/15 was very low. Officer Mee made the decision to allow an average input tax to reduce the VAT assessment and to be as fair as possible to Mr Lock.

56. Periods 03/12 to 06/13 had the highest levels of input tax ranging from £9,382.23 in period 09/12, to £13,613.00 in period 12/12. An average input tax was calculated based on these totals: Total input tax for periods 03/12 to 06/13 was £70,844.78 which was divided by the number of periods (6) to obtain an average of £11,814.13.

57. This average was applied to periods 09/13 to 12/14. The input tax allowed against period 03/15 was reduced to reflect the steadily declining sales. As the output tax declared against periods 09/13 to 12/14 was only 87.11% of that declared against periods 03/12 to 06/13, the input tax £10,291.29 allowed against period 03/15 was 87.11% of that allowed against periods 09/13 to 12/14.

58. The output tax assessment against period 03/14 for £14,629 was based on the larger disparity between £25,152 output tax declared in the return and the estimated output tax of £39,781. The estimated output tax is supported by £28,858 merchant acquirer data and £10,923 estimated cash takings. The estimated cash was based upon the split between cash and card from the 2012 Z-readings. The 2012 Z—readings were chosen as this was the most complete year supplied by Mr Lock. The card was calculated at 72.54% of the total takings and cash was calculated at 27.46%.

59. A recent check of the split between cash and card from the 2012 Z—readings showed that cash should have been 31.09% of the total. The 27.46% used was incorrect due to Officer Mee's error in calculating that percentage manually rather than using the spreadsheet functions. This error has resulted in the cash being underestimated by £2,650 in Mr Lock's favour.

The assessments revised

60. On 18 February 2021, HMRC notified the Appellant and Tribunal that they would not be defending the assessment in relation to output tax for period 03/14 in the amount of £14,629 which reduced the total assessments to £85,083.

Cross examination of Officer Mee

61. In terms of communication with Mr Lock and Mr Ullyat, Officer Mee could not speak for why they may have missed letters or meetings but had sent letters and agreed times with them.

62. She did not accept Mr Lock's suggestion that he had dropped off 16 boxes of records and information to HMRC and only 13 had been returned. She did not accept that 3 or 4 critical files of material had gone missing while under the care of HMRC. On 31 March 2016 Mr Lock had dropped off the boxes of records and she sent a letter specifying that 11 boxes had been delivered to HMRC. The boxes had been kept in a locked cabinet and no one else had touched them other than her and two support staff she had asked to go through them. When Mr Lock came to collect them, the two support staff knew where the records were and after they had been returned. They checked in the cabinet that every box which had been received had gone and was returned to Mr Lock. They only received 11 boxes – the boxes were put on some shelving and they were the only boxes there – they had the entire shelving to themselves.

63. Officer Mee did not accept that when the boxes were returned the paperwork came back all jumbled up as if they had fallen from the shelf. They had not been in chronological order when received by HMRC – the papers were already mixed up. She did not do most of the sorting and processing of the documents as this was done by the two HMRC support staff – but the paperwork did not look like it was good in order, rather it was all mixed up.

64. Officer Mee did not accept that all the missing invoices, documents and purchase ledgers were in the initial boxes of records dropped off with HMRC. It was possible the HMRC support team missed some records when processing them but they said they

went through all the boxes. She did some checks herself and when she sent out the letter to Mr Lock in March 2016 highlighting there were a number of records missing, she was satisfied there were gaps in some of the evidence provided for the return periods. She did not check every single piece of paper but she made sample checks and did not consider she had received all the information requested.

65. When Officer Mee issued the assessments in May 2016, she was not aware that there was a demand made by HMRC in April 2016 in respect of various taxes due because it was carried out by a different department in HMRC. She was not aware of the demand and the VAT debts she assessed were not included in the winding up petition made by HMRC on 13 August 2016 in the sum of £274,931.83. She was not also aware of Mr Lock's settlement of the petition and its dismissal on 23 November 2016 and his later payment of the sums sought in respect of overdue taxes in December 2016.

66. She could not confirm that HMRC had said to Mr Lock's solicitor that the sums sought in the winding up petition represented the total indebtedness of Woodborough Hall for all taxes to HMRC. She could not comment on the winding up petition except that the sums sought in the petition from the Woodborough Hall (the partnership of Timothy and Beatriz Lock) in respect of VAT were:

a) Approximately £27,000 in VAT surcharges under section 76 of the VATA 1994 for 30/6/13 to 31/12/15;
b) Approximately £110,000 in VAT due on returns under section 25 of the VATA 1994 for the period 30/6/13 to 31/3/15; and
c) Approximately £43,000 for automatic central assessments under section 73 of the VATA 1994 for the periods 30/6/15 to 31/12/15.

67. She could not comment on the email sent by Mr Lock's former solicitor, Carl Mifflin of Howes Percival solicitors dated 18 November 2016 which Mr Lock voluntarily disclosed and waived privilege in respect of during the hearing.

68. That email stated:

> Paul, Tim and Graham
> I attach my draft email to the Bank and would be grateful for your confirmation that this can be sent. You will note that I have sought their confirmation that receivers will not be appointed as, obviously, Paul will not want to inject funds to discharge the petition if the Bank are simply going to appoint receivers. I have also highlighted the preference to seek administration rather than the Bank appointing receivers if, for any reason, the Bank cannot provide the assurances we are seeking.
> I have spoken to HMRC and the total amount required to discharge the indebtedness to HMRC across the three petitions, including costs, is £284,706.50. I would suggest, if possible, that Paul lodges this sum with my firm's client account so that I can inform HMRC and Santander that we are holding the funds to discharge the petition but obviously we will not release those funds without Paul's express agreement and, in particular, having confirmed on Friday that no supporting creditors on the petition have come forward (at present none have according to HMRC but we will need to check again with them regularly throughout next week). Andrew will forward our account details shortly.
> I look forward to hearing from you as a matter of urgency in light of the fact that the Bank have a meeting at 2pm to discuss this.
> Kind regards.

69. Officer Mee accepted that during the course of her enquiries the total assessments had been reduced from £330,000 to £85,000 but she has been diligent in assessing the relevant information as it was presented to her and reducing the assessments accordingly. She did not feel that when she was able to get hold of Mr Lock and Mr Ullyat and could not say whether they were unresponsive to her requests but she did have to resort to sending emails because she felt then she got the best responses and there were missed meetings and missed responses to letters. She did receive email responses when asking for purchased ledgers and received a number of emails of October to November 2016 and following ADR in February 2018.

Mr Lock's evidence

70. Mr Lock did not file any witness statement prior to the hearing but the Tribunal permitted him to give the following oral evidence. We accept his evidence as fact on the balance of probabilities except where we give our reasons for finding it to be unreliable.

71. Mr Lock's was a small family run business hosting weddings with limited resources – they shared a large site with four buildings all referred to as Woodborough Hall. Given there were four separate buildings with the same address, there was a 25% success rate when post was sent by mail, they preferred email. This explained the missed meetings and communications with HMRC.

72. Mr Lock relied on two key matters.

73. The first was that the business believed it had reached a settlement with HMRC in 2016 in relation to all outstanding taxes and it was important it remained in business despite the pressures of the pandemic because it was contributing £250,000 to the exchequer. This further historic debt was putting a £85,000 millstone around the business and should have been included in the original settlement.

74. HMRC had applied for a winding up petition in relation to the business – and put all outstanding debts in relation to all taxes due as at £282,000 on 13 August 2016. This was settled in full on 5 September 2016 and the VAT assessments for the periods now assessed should have formed part of that agreement. Mr Lock's lawyer, Mr Mifflin of Howes Percival had asked for all outstanding indebtedness of all types and the fact that HMRC failed to include the assessments was not Mr Lock's problem. Mr Lock believed that HMRC were bound by the settlement agreement and relied on the email sent by Mr Mifflin as set out above.

75. Mr Lock believed the email chain in which the partner of his solicitors responsible for dismissing the petition confirmed on 18 November 2016 (11 months after Officer Mee's assessment) had sought a full accounting of indebtedness from HMRC. Although Mr

Lock may not know what was required, he believed Mr Mifflin as a tax specialist panel member would know exactly what to ask of HMRC, and in this that he and his partners would not pay if there were additional credits, acknowledged by HMRC also, and their petition supports that. Graham Wolloff was appointed as a licensed administrator/ receiver in the event that was the direction the partners went if the costs were too great.

76. Mr Lock believed that if HMRC had included the further VAT assessment of over £300,000, as originally calculated in the petition, this would have changed his view as to agreeing a settlement as the total indebtedness to HMRC would have made been just over £600,000. Mr Lock entered into agreement with HMRC in November 2016 in good faith and would have acted differently and potentially accepted the winding up petition. Instead, he decided that making a settlement payment was a painful but acceptable cost to continue to run the business. It would have been questionable that he would have ever agreed a total debt of £600,000 or even only the extra £85,000 of VAT assessments in addition to the £282,000 he had agreed to pay by way of settlement.

77. However, the Tribunal is satisfied that the VAT debts included in the settlement of August 2016 did not include the VAT assessments now raised and HMRC was not bound by any agreement as including the assessments. There is insufficient evidence presented that there was any written or oral agreement between Mr Lock and HMRC that the settlement of the winding up petition would bind HMRC not to seek any further sums in respect of taxes due. There is no evidence from HMRC or the solicitors to justify Mr Lock's belief that HMRC had agreed to settle all outstanding due taxes and could not pursue any further VAT assessments. We are satisfied that Mr Lock's belief is honest but mistaken. The VAT debts included in the winding up petition were for different periods or on a different basis than the VAT assessments which are the basis of this appeal.

78. In relation to the winding up the petition the payment in question was to pay for proceedings up to and including in April 2016 but this did not include all the VAT indebtedness. The settlement payment was in respect of section 73 VATA 1994 assessments for later periods 06/15 onwards than those under appeal. There were also section 25 VATA 1994 assessments in respect of VAT returns filed for earlier years but in respect of which the business had made no payments. The settlement payment figure did not include any assessments for the disallowance of input tax as now under appeal. We are satisfied that HMRC were not bound by any agreement from raising the assessments that they did notwithstanding the settlement payment in November 2016.

79. The second key point is that Mr Lock believed that he delivered 14 or 15 boxes of records to HMRC and they lost much of the relevant information and documents in support of his case. Mr Lock believed he had delivered all the papers which were in order and each folder was in sequence and all the information was properly filed.

80. He believed HMRC support staff must have dropped and mixed up the boxes because he received 3 boxes fewer back from HMRC than were sent – only 11 boxes were

returned by HMRC. Mr Lock believed HMRC lost 20% of the business's records and data so that neither HMRC nor he could rebuild the records completely.

81. The Tribunal does not accept this evidence. It is likely that HMRC did not lose any of the Appellant's records. First, we accept Officer Mee's evidence on this topic as to how the material was stored securely by HMRC and the paperwork provided was not ordered but already mixed up. Second, Mr Lock only suggested there had been one missing box in correspondence with HMRC and did not raise missing documents as one of his grounds of appeal to the Tribunal.

82. Mr Lock believed that the VAT assessments were not for money originally due to HMRC. He understood the process and shared HMRC's frustration that records were not originally available and he did not plan for the business's computers to fail. He bought a system that brought with it a back-up and an all in one unit but the whole system failed and he could not get information out of it.

83. He accepted that these were very unhappy circumstances - it was very unlucky for the business's computer system to fail and the back-up drive not to be available. Mr Lock then had to reconstruct four years' worth of work to evidence the input tax through obtaining copy invoices and there was no help available from SAGE. Mr Lock thought that the fact that HMRC had moved from alleging an initial VAT debt of £335,000 which it ended up reducing to £85,000 was an indication that they had been moving in the right direction. He did not think that HMRC would have done this unless it was correct. He accepted Officer Mee had been very patient and fair throughout the whole process.

84. Mr Lock believed that all the primary records, the business could rely upon for the relevant VAT periods were sent to Officer Mee – with all the resources they had they were unable to rebuild in a timely manner all the records. He employed an accountant, David Ullyatt, for only 2.5 hours a week – he needed help for the business to rebuild the VAT returns. He apologised that the business could not substantiate all the primary records for the input tax claimed but it had not been helped by 15 months of sitting at home during the pandemic. Mr Lock could not do much in terms of chasing business for fresh copy of purchase and sale invoices but based on their estimations all the VAT claimed had been incurred and substantiated.

85. In relation to input tax Mr Lock believed he had used purchase invoices and chased receipts and did not feel HMRC had taken into account the full value of the input tax. He could point to the full calculations – there were months when HMRC had underestimated the business's input tax. Mr Lock and Mr Ullyat had found it hard to reconcile all the information and he had been loyal to Mr Ullyat as his accountant across a long period of time, during some of which Mr Ullyat was not available to assist. They were in a better position to show that they had rebuilt the books and nothing was missing – and Mr Lock believed that Mr Ullyat could establish this.

86. While the Tribunal has sympathy for the troubles the business suffered with an IT failure and Mr Ullyat's illness, the Tribunal does not accept all of Mr Lock's evidence. We accept that he was honestly attempting to assist us and HMRC but he was mistaken in some of his beliefs and had not always acted in an objectively reasonably way.

87. He and Mr Ullyat had had at least four years, since 2015 or early 2016, to try to reconstruct their VAT records and chase businesses for copy purchase or sales invoices or receipts and to reconstruct the purchase ledgers. They had failed to do this well before the pandemic started in March 2020. Further, the burden was upon Mr Lock to do this and if Mr Ullyat was unable to assist he could and should have employed another accountant during this time. While it was accepted by HMRC that the business had suffered a computer system failure, the Tribunal is satisfied there was a substantial amount of missing records which were not provided to HMRC.

88. The burden was upon Mr Lock to provide sufficient evidence to support the input tax claimed for the relevant VAT periods remaining in dispute and he had not done so. Indeed, he delegated the responsibility in large part to HMRC to try to reconstruct the VAT records of the business and they had taken reasonable steps to do so having offered to do it on his behalf. HMRC had adopted a reasonable approach to assessing the evidence, establishing what was missing and calculating the assessments.

89. Mr Lock believed they were able to demonstrate to a couple of VAT quarters that they had been diligent in the filing of records and claims for input tax. However, the Tribunal is satisfied that he did not do so for all of the VAT periods in dispute - all of those periods for which HMRC continue to maintain assessments.

90. In cross examination, Mr Lock accepted that he had been running the business at Woodborough Hall since October 2007and was legally required to keep VAT records to support returns submitted. He accepted it was his responsibility to submit accurate returns supported with evidence but pointed to the mitigating circumstances where he no longer had access to either the computer upon which SAGE was loaded and his accountant, David Ullyatt had been ill so was less able to support the reconstruction effort.

91. Mr Lock did not accept he had provided no purchase ledgers to support the VAT claims apart from those for periods 06/12 and 12/12. He suggested he had provided all purchase ledgers in primary material delivered to Officer Mee on 26 June 2015 but the rest had been lost by HMRC. We do not accept this evidence for the reasons set out above. We do not accept that everything required, all primary records to establish the claims to input tax for all the periods was provided to Officer Mee.

92. There was no schedule provided on behalf of the Appellant which showed all purchase invoices or receipts to support total figures for the purchase ledgers or spreadsheet which would supports the input tax claimed on the VAT returns. The only purchase ledgers provided were for periods 06/12 and 12/12.

93. As Mr Lock stated, he was not accountant but a chef. He did not know the difference between accounting terms and for these questions he trusted Mr Ullyat and to provide all documents HMRC asked for.

94. The Tribunal is satisfied that he honestly but mistakenly believed that some time or other the business had provided to HMRC all the purchase ledgers and all figures and spreadsheets to back up the VAT returns but could not identify these in the documents when asked.

95. Mr Lock stated that the purchase records were all inputted on SAGE originally – they had lost their computer system and then had to rebuild them. He believed that all their primary records were dropped off to HMRC: the – invoices and receipts and till records – Z records – everything that went out - till receipts, z readings, and invoices purchases and sales and cash receipts and bank records and such. These were provided for all the periods – originally period 2011 to 2015 and HMRC were left with a huge task to schedule out all purchase invoices and rebuild the records. The Tribunal is satisfied that Mr Lock's understanding was mistaken and they had not been so provided.

96. Mr Lock accepted that he had allowed HMRC to do this because it would take much longer for Mr Ullyat to rebuild the records and Officer Mee offered for HMRC to rebuild that – as she had support staff.

97. He accepted there had been some flood damage at the premises – and a major claim for over a quarter of a million pounds attracting £57,833.40 in VAT had been made. There was one particular invoice for £9,638.90 in VAT which he had been unable to provide any documentary evidence in support of although he believed it was in the primary evidence provided to HMRC. He did not know the difference between purchase ledgers and invoices - he did not realise they are not the same thing. As far as he was aware, he had provided everything necessary.

98. As we have found above, we do not accept that all relevant and sufficient evidence to substantiate the input tax claims was provided to HMRC.

99. Mr Lock accepted it was not correct to say, as he had volunteered, that he had rendered all VAT returns and paid them to date. He had not in fact returned and paid all quarterly VAT submissions. He had not rendered any VAT returns for periods 2016 to 2017 and HMRC raised central assessments, the returns for 2018 to 2019 were all late and there was an outstanding debt back to June 2015. There were further returns for VAT periods from 2019-20 which had not been filed. While this had no bearing on assessment under appeal, it did undermine Mr Lock's suggestion, which he had volunteered, that his affairs with HMRC were all in order. We accept Mr Lock was not expert in record keeping and not an accountant and only stated the position as far as he was aware, but he was under a duty to keep his VAT affairs, and that of the business, in order.

100. Mr Lock did not accept he had been given a receipt for the11 boxes of records delivered to HMRC as the correspondence from HMRC had suggested and he had never

seen the letter before. This was because much correspondence was never received by post as the location shares address with three other large house which all call themselves Woodborough Hall. He accepted that in his request for an appeal originally filed, he had only referred to one missing box and he wrote this letter on 28 April 2017. But he stated that someone had then handwritten on this letter – '13 boxes uplifted, 2 failed and 15 boxes returned'. Mr Lock believed no one knows how many boxes were sent and returned – there were missing boxes and files when returned. He also accepted that his notice of appeal filed refers to 14 boxes of records but his understanding is that it was 16 boxes. He stated that either way it was close to 10% of his records which had gone missing as a result of HMRC's actions. He also accepted he had not mentioned about missing records in the grounds of appeal to the Tribunal.

101. The Tribunal does not accept this evidence for the reasons set out above – we are satisfied that HMRC did not lose any of Mr Lock's records from the business.

102. Mr Lock believed he could yet contact companies in order to obtain outstanding copy invoices to substantiate the input tax claimed such as for the flood repairs. There would be evidence of the IT and computer problems and failure they had suffered. Looking back as to why he had not made the VAT returns and submissions, he did not know what happened there. If HMRC or the Tribunal required evidence from the IT company regarding the computer problems and the evidence regarding flood repairs Mr Lock said he would yet be able to obtain it.

Mr Ullyat's evidence

103. Mr Ullyat was an honest witness who tried his best to assist the Tribunal.

104. He stated that since the computer records had been destroyed he had started reconstructing the records from the sales and purchase invoices and till records and done it completely apart from the years 2013/2014 for which he could not find all the purchase invoices when they were returned. He had tried to recreate purchase and sales invoices and cash receipts but not for the years 2013-14 year as they were incomplete and he did not have a full set of purchase invoices. He could not speak for the years 2013/1-4 – but otherwise the records match up to VAT returns as claimed.

105. For the VAT quarters 06/12 and 12/12 he had prepared ledgers where the total of the invoices tally with the cash receipts and come to the total submitted on the VAT returns matches the VAT returns for period 06/12 it was £25,106.15 and for 12/12 – input tax claimed was £18,001.67.

106. He accepted that there was a period when VAT returns were not submitted for the business and when he tried to file them electronically but it was not possible. He was not sure this period related to. He accepted in cross-examination that the ledgers and schedules for periods 06/12 and 12/12 were the only ones he had prepared. He had not prepared ledgers for any of the other VAT periods or at least where he did them for the other VAT quarters apart from 13-14. He did not have the purchase invoices – from April 13 to March 2014.

107. In respect of the VAT periods under appeal he produced ledgers for 06/12 and 12/12. He created them over a period of time and passed them to Mr Lock. He accepted that HMRC did not have any other schedules other than the two in the bundle in respect of 06/12 and 12/12. He also accepted that HMRC had not been provided with the purchase invoices for those periods to justify the schedules.

108. He stated that all purchase invoices were in the records which Mr Lock took to Officer Mee – for the whole periods – for 2011/2012 onwards – and these were produced after the records were returned – and that enabled him to complete the summary. He stated that HMRC not seen the missing purchase invoices such as flood damage but they had to have been present. He could produce all the invoices – they could be produced but not at the minute. He thought they had been produced. His understanding is that the invoices went with all the rest in the invoices to HMRC.

109. However, the Tribunal has already rejected the evidence suggesting all relevant primary records had been given to HMRC but had been lost by them for the reasons set out above.

Post hearing reduction in the assessment

110. As indicated above, and pursuant to a direction of the Tribunal at the conclusion of the hearing, Mr Lock served further evidence (namely purchase invoices) upon HMRC and the Tribunal on 23 June and 21 July 2021. This led to HMRC withdrawing their assessments for periods 06/12 and 12/12 and reducing the assessments for periods 03/13 by £714.21 and 09/12 by £4,027.80. Therefore, the total sum now under appeal is £66,679.99.

Procedural Background to the appeal to the Tribunal

111. On 24 September 2015, Officer Mee issued a notice to provide information and produce documents in accordance with Schedule 36 Finance Act 2008 ("FA 2008"). On 26 October 2015, Officer Mee attended the Appellant's premises to collect the records. The Appellant nor their accountant attended. Officer Mee was informed by the Appellant's manager that the records were with the accountant. Officer Mee was informed that the accountant would contact her, however no contact was received.

112. On 26 October 2015, a Penalty Notice was issued on the basis that the Appellant had not provided documents in accordance which Schedule 36 FA 2008. On 26 October 2015, a pre-assessment letter was issued to the Appellant. This notified the Appellant of their liability to an assessment in the amount of £257,506.00. A letter was also forwarded to the Appellant's accountant.

113. On 30 November 2015, a Penalty Notice for daily penalties accrued was issued in accordance with Schedule 36 FA 2008.

114. On 5 January 2016 the Notice of VAT Assessments was issued to the Appellant in the amount of £257,506.00. This was issued in accordance with section 73 VATA 1994. The assessment was the result of disallowed input tax on the basis that the Appellant held insufficient records to show their entitlement. On 5 January 2016, a notice of an agent acting (64/8 notification) dated 25 November 2015 was received where the Appellant instructed KSA group to act on their behalf. On 12 January 2016, Officer Mee contacted Ms Lloyd of KSA Group to ask whether the Appellant could provide their records.

115. On 3 February 2016, the Appellant appealed the assessment to HMRC. Officer Mee replied to acknowledge the appeal on 4 February 2016. On 10 February 2016, Officer Mee replied to the Appellant's appeal and offered a review by another HMRC officer or an appeal to the Tribunal.

116. On 25 February 2016, the Appellant provided some records to HMRC. On 29 February 2016 the VAT assessment was withdrawn on the basis that the records had been received. On 31 March 2016, Officer Mee wrote to the Appellant acknowledging the records received on 25 February 2016 but advising that not all records requested under Schedule 36 FA 2008 had been provided.

117. On 9 May 2016, Officer Mee issued an assessment to the Appellant in the amount of £336,859.00.

118. On 7 June 2016, the Appellant appealed the new assessment to HMRC. A reply was sent on 8 June 2016 which acknowledged the appeal. On 21 June 2016, Officer Mee replied to the Appellant's appeal and notified the Appellant of their appeal and review rights.

119. On 27 June 2016, the VAT assessment was amended to account for the submission of the Appellant's 03/16 return. The assessment was amended to £303,079.00.

120. On 21 July 2016, the Appellant requested a review from an officer not involved in the case. On 12 August 2016, Officer Mee sent a letter to the Appellant which informed them that, as the indicated that they can supply relevant documentary evidence, this would need to be received before the review team look at their request. On 2 September 2016, the Appellant wrote to Officer Mee advising their accountant had been preparing documents to send to HMRC next week. On 20 September 2016, Officer Mee informed the Appellant that the review team rejected the case as it was not clear whether the Appellant was requesting an independent statutory review.

121. Throughout October to December 2016 the Appellant produced further documents.

122. On 12 January 2017, Officer Mee reduced the assessment to £214,356.00 having received further information from the Appellant.

123. On 28 February 2017, a penalty explanation letter was sent to the Appellant. The penalty was categorised as careless in accordance with Schedule 24 Finance Act 2007 ("FA 2007"). The penalty totalled £56,268.39. On 30 March 2017, the Notice of Penalty Assessment was issued to the Appellant.

124. In a letter received on 28 April 2017 the Appellant appealed the assessment and penalty to HMRC. Following confirmation of the appeal from the Appellant, on 15 May 2017 the Appellant requested a statutory review. On 2 August 2017, HMRC issued a review conclusion letter. The review varied the VAT assessment to £189,908.00 and the penalty to £49,850.80 on the basis that assessments had been raised for two periods outside of the time limit. On 29 August 2017, the amended assessment was issued.

125. On 31 August 2017, the Appellant appealed the assessment and penalty to the Tribunal.

126. On 19 September 2017, the amended penalty was issued. On 19 September 2017, the Appellant agreed suspension conditions with Officer Mee in order to suspend the penalty. On 29 September 2017, the Appellant was accepted into the Respondents' ADR process. On 6 March 2018, following ADR negotiations, Officer Mee reduced the VAT assessment to £115,714.00.

127. On 23 March 2018, the assessment was amended to £99,712.00 as some periods were incorrectly included in the previous assessment.

128. On 11 April 2018, the Appellant was sent a letter which confirmed that, as the assessment had been reduced, the penalty had been reduced to £23,930.88. The penalty remained suspended and the Appellant was not liable to pay any of the amount. On 7 January 2021, the penalty was cancelled following confirmation from the Appellant he had met the suspensions conditions previously agreed.

129. In February 2021 the total Assessment was reduced to £85,803 and on 23 July 2021 HMRC reduced it further to £66,679.99. in the circumstances described above.

Law

130. Section 73 of the Value Added Tax Act 1994 ('VATA 1994') provides:

73Failure to make returns etc.

(1)Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the

Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

……..

131. Section 83 VATA 1994 provides:

83Appeals.

(1)Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

……

(p)an assessment—

(i)under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

(ii)under subsections (7), (7A) or (7B) of that section; or

(iii)under section 75;

or the amount of such an assessment;

…….

132. Paragraph 6 or Schedule 11 to VATA 1994 provides:

Duty to keep records

6(1)Every taxable person shall keep such records as the Commissioners may by regulations require, and every person who, at a time when he is not a taxable person, acquires in the United Kingdom from another member State any goods which are subject to a duty of excise or consist in a new means of transport shall keep such records with respect to the acquisition (if it is a taxable acquisition and is not in pursuance of a taxable supply) as the Commissioners may so require.

(2)Regulations under sub-paragraph (1) above may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3)The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases).

(4)The duty under this paragraph to preserve records may be discharged—

(a)by preserving them in any form and by any means, or

(b)by preserving the information contained in them in any form and by any means,

subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

(4A)In relation to a relevant taxable person, a duty under this paragraph to preserve records relating to a relevant taxable supply must be discharged by at least preserving the information contained in the records electronically.

…….

5)The Commissioners may by regulations make further provision about the form in which, and means by which, records are to be kept and preserved.

…….

133. Regulation 29 of the VAT Regulations 1995 ("VAT Regs 1995") provides:

29. —(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a)a supply from another taxable person, hold the document which is required to be provided under regulation 13;

…..

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a), (b), (c), (d), (e) or (f) above, such other documentary evidence of the charge to VAT as the Commissioners may direct.

(3) Where the Commissioners are satisfied that a person is not able to claim the exact amount of input tax to be deducted by him in any period, he may estimate a part of his input tax for that period, provided that any such estimated amount shall be adjusted and exactly accounted for as VAT deductible in the next prescribed accounting period or, if the exact amount is still not known and the Commissioners are satisfied that it could not with due diligence be ascertained, in the next but one prescribed accounting period.

134. Regulation 31, VAT Regs 1995 provides:

Records

31. —

(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a)his business and accounting records,

(b)his VAT account,

(c)copies of all VAT invoices issued by him,

(d)all VAT invoices received by him,

(e)documentation received by him relating to acquisitions by him of any goods from other member States,

(f)copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(g)documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(h)documentation relating to importations and exportations by him, and

(i)all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him.

……

135. The burden of proof lies upon the Appellant to establish that the assessments raised are invalid, incorrectly calculated or are otherwise not correct. The standard of proof is the civil standard - the balance of probabilities.

Appellant's grounds of appeal

136. The Appellant's grounds of appeal contained in the Notice of Appeal to the Tribunal can be summarised as follows:

- The charges arose principally as a result of the removal by their officer of all input tax, despite providing the primary records to HMRC.
- While this is the primary issue there are also several other arbitrary calculations and estimates despite provision of supporting documentation such as till receipts and bank statements.
- The supporting documentation is held in 14 filing boxes of information which are available to reference if required.
- The Appellant's input tax is calculated as values from purchase invoices and cash receipts for goods purchased.
- The HMRC calculations do not take into account the full value of the input tax.

Appellant's submissions

137. Mr Lock submitted that the assessments and penalties were made by HMRC in error and after the fact in relation to a winding up petition applied for by HMRC for outstanding taxes up to and including the 13th August 2016 for £282,048 which was paid in full on 5 December 2016 in good faith as settlement of his tax affairs as they related to Timothy Lock trading as Woodborough Hall.

138. He submitted that the Appellant's position and argument had not changed since its original appeal, when he disputed the original penalty of £56,268.39 and assessment totalling £336,859.00 dated 7 June 2016 and subsequent adjustments and calculation which he now understood to be an estimated assessment of £85,083 without penalties as of 2021.

139. Mr Lock submitted that the HMRC calculations did not take into account the full value of the input tax and in some instances the output tax assessed is different from the actual values, on occasion considerably underestimated. The summary of the

business's calculations as provided in the HMRC shows output tax calculated from sales figures as per till Z readings and additional invoices. The input tax calculated as values from purchase invoices and cash receipts for goods purchased.

140. He submitted that it is difficult to reconcile the information provided by HMRC which does not equate to his takings or outgoings and full payment of monies owed to HMRC was made following their winding up petition on August 31 to the value of £282,048 including fees for which he received confirmation of settlement from HMRC on 5 December 2016. This additional assessment amount after the fact would have had a material effect on the decision to pay that significant sum at considerable cost and detriment of the business which had overreaching implications and an impact on the business's trading for years afterwards.

141. The Appellant's calculation and appeal therefore is that all amounts as submitted by HMRC have been settled in full for the period and that any additional erroneous estimated calculation by HMRC should be removed. He invited the Tribunal to decide that the full amount of charges applied after the fact should be removed as HMRC have already done in regards to the penalties.

142. Mr Lock submitted that he had arrived at this point due to several unhappy circumstances outside its control but had aimed to comply with and supply all documentation as required. This had been significantly hampered both by illness of his accountant and the provable complete loss of the business's computer system and records at the time on its main and back up drive which had taken much longer to rebuild from primary records then expected, the files being with HMRC from 25/02/2016 and returned months later on 02/06/2016 disordered, in smaller HMRC filing boxes and with a critical box missing.

143. Mr Lock submitted that it was not a big business with very limited resources, it employed less than 5 hours a week of independent accounting time, if an error was made he would of course accept and pay for that, however it was in his view a simple matter of fully excluding the business's input values all of which have now been reconciled.

144. The Appellant's business accountant, Mr Ullyat was confident the business had fully substantiated all its returns to date with appropriate records, which had all been filed and account for the full liability correctly without the additional assessment. Mr Lock hoped that the matter could be resolved at appeal and that the officer concerned would reconsider the calculations if supporting documentation was provided. He had therefore also written to them separately for what he felt was a comparatively simple matter of principally reapplying input tax, as HMRC had already removed the erroneous penalties and made full adjustment to recognise their court mandated payments at the end of 2016 to settle matters and show that no amount is therefore owed for the period assessed to end March 2015. The Appellant sought the correct values for assessment input tax and other calculations to be applied, thereby reducing the business's liability on these figures to £0.

145. The Appellant also appreciated the ongoing patience, assistance, and guidance that Officer Mee as an officer of HMRC had provided the business to date and her proactive help in resolving matters without further cost in these difficult trading conditions following recessions and over a year of pandemic. Mr Lock submitted that HMRC should not wish to put him out of business for the sake of £85,000. He was looking for some level of mitigation HMRC had arrived at the figure by degrees. He was a running a business he was in the kitchen and dealing with clients and in addition dealing with the tax affairs. He had actively entered into communications with HMRC including at the ADR – he was engaging with the process. He believed he had done everything HMRC had asked. He had not received all HMRC's communications by post and email but had tried to work together with them. He tried to provide everything. If further proof was required for the various elements he asked for a further 28 days to satisfy HMRC and the Tribunal by providing further documents if they were required.

Discussion and Decision

146. The Appellant was under a legal duty at all times to keep and preserve records to evidence the input tax claimed in his VAT returns. Schedule 11, 6(1) VATA 1994 requires every taxable person to keep such records as the Commissioners may require by regulations and in line with Schedule 11(6)(3) there is a requirement to preserve such records for six years. Regulation 29(2) of the VAT Regs 1995 confirms that at the time of deducting input tax a person should hold the required documentation. Regulation 31(1)(d) of the VAT Regs 1995 require the taxable person to keep records of all VAT invoices received by them. The Tribunal is satisfied that the Appellant has not retained adequate records of their purchases to support the deduction of input tax as required by law.

147. HMRC undertook a visit to the Appellant as long ago as 2015 and found that the business did not have a VAT account or schedules of sales and purchases. This was said to be due to the Sage back up of their records not being available because hard discs on both computers had been burnt out, hard copies of the ledgers were not available and the cloud back up was lost.

148. Following the issue of a Schedule 36 Notice, HMRC were eventually presented with eleven boxes of records by the Appellant and in order to check the accuracy of the returns rendered they had to schedule out all the purchase invoices that had been retained. For the reasons set out within our factual findings, we are satisfied that HMRC did not lose any documents provided by the Appellant but any missing documents were the responsibility of Mr Lock who failed to provide them.

149. Officer Mee found that there were differences between the purchase records provided to support input tax deduction and the amounts of input tax reclaimed on their original VAT returns.

150. Over a protracted period of time, the five years since HMRC's enquiries first began in 2015, the Appellant provided further information which allowed HMRC to make amendments to the extent of the assessments. Some of this information was provided post alternative dispute resolution ("ADR"). However, the Tribunal is

satisfied that neither full nor sufficient evidence to support the Appellant's deduction of input tax has ever been presented to HMRC nor the Tribunal for the VAT periods remaining in dispute despite the Appellant's continuous suggestion that this would be forthcoming.

151. It is worth highlighting that purchase VAT accounts or ledgers were provided by the Appellant showing how the input tax was calculated but for only two VAT periods namely periods 06/12 and 12/12. Even for these periods, the invoices to support the total deduction of input tax are incomplete. Notably the main differences looked to be in relation to substantial purchases for 'flood damage repairs' and 'extraction' works. Officer Mee emailed the Appellant on 10 January 2017 addressing this issue. The Tribunal is satisfied that these are not 'run of the mill' expenses and that providing the evidence of such purchases should not have presented a problem for the Appellant. Eventually, when the Appellant was given one final chance to provide further documents after the hearing, HMRC has withdrawn its assessments in relation to periods 06/12 and 12/12 and reduced the assessments for periods 03/13 by £714.21 and 09/12 by £4,027.80. Therefore, the total sum now under appeal is £66,679.99.

152. However no equivalent purchase ledgers or accounts, or sufficient invoices or receipts were provided for the remaining VAT periods. We are satisfied that insufficient evidence was provided to HMRC to evidence all the VAT input tax claims for these periods and HMRC acted reasonably in making best judgement assessments in relation to them.

153. Officer Mee was left with no alternative but to consider the evidence she did obtain from the Appellant to make assessments using best judgement. In doing so she considered the following:

• HMRC scheduled out all the purchase invoices they received from the Appellant. These schedules were totalled for each VAT period and compared to the VAT returns rendered. From this is was evident there were significant differences.

• Periods 03/12 to 06/13 appeared to be the most complete record of purchases. Officer Mee used this information to assess the difference in input tax for periods 06/12 to 06/13 (note that period 03/12 was out of time).

154. Officer Mee then considered the other periods namely 09/14 to 12/14 and noted the purchase invoices totals were far lower than the periods 03/12 to 06/13. On this basis Officer Mee calculated an average of input tax to be reclaimed using the periods 03/12 to 06/13 which were considered to be more complete records. This then led to a comparison being made between the average input tax figure expected compare to the input tax reclaimed on the original VAT returns. An assessment was then raised for the difference.

155. With regard to VAT period 03/15 Officer Mee noted that sales from 03/15 to 06/16 were declining so she worked a percentage of the decline in sales and applied this to the average input tax figure. This figure was then compared to the original input tax reclaimed in period 03/15 and an assessment raised for the difference.

156. We are satisfied that HMRC utilised a reasonable methodology in calculating the best judgement assessments. Any assessments for VAT must satisfy the best judgement criteria. This means that given a set of conditions or circumstances, HMRC must take any necessary action and produce a result that is deemed to be reasonable and not arbitrary; in other words best judgment is not the equivalent of the best result or the most favourable conclusion. It is a reasonable process by which an assessment is successfully reached. We are satisfied that HMRC complied with their obligations.

157. In *Georgiou (t/a Marios Chippery) v Customs & Excise Commissioners* [1996] BVC 236, the Court of Appeal held that the Tribunal had used the right test in deciding that HMRC had assessed to the best of their judgement by using the evidence before them at the time of making the assessment. The Tribunal is satisfied that this is exactly what Officer Mee has demonstrated as detailed in our fact finding above.

158. The meaning of the phrase *"to the best of their judgment"* and principles inherent in the HMRC's requirement to exercise best judgment were considered in the case of *Van Boeckel v Customs & Excise Commissioners* [1981] STC 290. To summarise, the principles adopted in *Van Boeckel* are that:

- "The Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide";
- "There must be some material before the Commissioners on which they can base their judgment";
- "The Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due"; and
- "The Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax due".

159. The basic principles have been refined in a number of cases. In *Rahman t/a Khayam Restaurant v Commissioners for C & E* [1998] STC 826 Carnwath J considered the decision of *Van Boeckel* and stated that:

"I have referred to the judgment [of Woolf J] *in some detail, because there are dangers in taking Woolf J's analysis of the concept of "best judgment" out of context. The passages I have underlined show that the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required: for example, that the assessment has been reached "dishonestly or vindictively or capriciously"; or is a "spurious estimate or guess in which all elements of judgment are missing"; or is "wholly unreasonable". In substance those tests are indistinguishable from the familiar Wednesbury principles* […] *Short of such a finding, there is no justification for setting aside the assessment."*

160. In the case of *Commissioners of Customs & Excise v Pegasus Birds Ltd [2004] EWCA Civ 1015* Carnwath LJ observed that "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. The word "best" recognises that the result may involve an element of guesswork and that it was the best of the Revenue's judgement on the information available.

161. The Tribunal is satisfied that the remaining assessments meet the best judgement criteria. The Appellant has failed to produce evidence to support figures provided on the VAT returns in dispute. The Appellant originally relied on it taking longer than expected to re-build records and obtain copies of primary records as a primary appeal ground and this conflicts with the new and inconsistent appeal ground which is the suggestion HMRC have lost their records.

162. In either event, the Appellant has had more than sufficient time to rebuild his records, however they come to be incomplete. Five years have now passed but not all values have been reconciled as the Appellant suggests – no sufficient evidence, incomplete invoices and missing purchase ledgers have been provided for the relevant VAT periods. The Appellant was still claiming in July 2019 that documents would be provided but they have not been.

163. Despite Mr Lock's claims that ledgers have been provided to support input tax deduction they were not in bundle provided on 16 February 2021, nor the subsequent documentation provided after the hearing. Any important documents he wanted to rely upon should have been provided to HMRC and the Tribunal. Even if Mr Lock has evidenced the loss of computer data, this would have been unlikely to make any difference to the evidence provided to HMRC because evidence from SAGE would be a summary of all purchases that added up to the total claimed but not the primary evidence of such purchases. In any event, this primary evidence was not provided for the remaining periods in dispute. The Appellant has had more than a reasonable amount of time to obtain fresh or further primary evidence which he has not done.

164. The schedule to the winding up petition against the Appellant – the demand for unpaid taxes of various types totalling over £274,000 in April 2016 – which was settled and paid later in 2016 did not include the VAT assessments under appeal. It included s.73 VAT assessments for periods after 03/15 and to s. 25 assessments based on figures not paid even though they were including in the VAT returns as due to HMRC. There has been no double counting or overpayment in HMRC raising these assessments. The petition debt was based on the original VAT returns as rendered but not paid or surcharges for non payment of amounts returned or for central assessments for returns not filed in respect of later VAT periods, not on the denial of input tax now in dispute.

165. Further, we are not satisfied that HMRC agreed with Mr Lock to be bound by any settlement agreement not to pursue other unpaid taxes. No sufficient evidence has been presented of HMRC stating or agreeing this orally or in writing – even if HMRC could bind itself in this regard. The demand and winding up petition for a total debt assessed at a certain point in time in regards to various taxes owed but did not prevent further assessments being made later in time. We are satisfied therefore that the raising of assessments by HMRC in respect of the VAT periods in dispute does not constitute

an abuse of process and is not prevented by any of the principles of legitimate expectation, issue estoppel or res judicata.

166. We are therefore satisfied HMRC correctly raised input tax assessments for periods in dispute - £85,083 - using their best judgment in the absence of sufficient evidence to establish the input tax claimed. Those assessments are now reduced to the £66,679.99. for periods 09/12 to 03/15.

The post hearing submissions and evidence

167. HMRC objected to the Tribunal providing further time to the Appellant to provide documents at the end of the hearing because he had made promises over protracted time and repeatedly failed to provide information. Ms Castle submitted it was not reasonable to give Mr Lock any further time to produce the information. Nonetheless, the Tribunal gave Mr Lock a further 28 days after the hearing to provide any further documents or information which he did on 23 June 2021. He was given a final further opportunity to provide documents by 20 July 2021 in light of representations he made. He produced purchase invoices for periods 06/12, 12/12, 03/13 and 09/12.

168. HMRC had the opportunity to consider the further information provided by the Appellant and confirmed on 9 and 23 July 2021 that they were satisfied having now received a selection of purchase invoices that the assessments in periods 06/12 and 12/12 could be withdrawn and the assessments for periods 03/13 would be reduced by £714.21 and 09/12 will be reduced by £4,027.80. Therefore, the total sum now assessed is £66,679.99.

169. In respect of the other periods under appeal, the Tribunal and HMRC have received only purchase listings, reconciled purchased ledgers, but with no supporting primary evidence such as invoices and receipts etc. In order to consider these periods further HMRC reasonably decided they would need to see a selection of purchase invoices which have not been previously provided by the Appellant. In this respect, the matters under appeal have not really been progressed apart from highlighting the exact purchase invoices that HMRC have not seen and therefore HMRC's position remained the same. Ms Castle attached a copy of the selected invoices HMRC would require the Appellant. Most of these invoices he was unable to produce.

170. The Appellant had a final further 56 days after the hearing to provide HMRC with the requested information to support deduction of input tax following the hearing. Mr Lock again failed to provide sufficient information which the Tribunal is satisfied is representative of his conduct throughout the lifetime of HMRC's investigation and the appeal process which has spanned six years.

CONCLUSION

171. We repeat our sympathy for the circumstances in which Mr Lock found himself personally and that of his business. He has acted honest and actively tried to assist HMRC and the Tribunal. Nonetheless, he has not been able to evidence the input tax

claims he made for the relevant periods remaining in dispute. He has had more than a reasonable amount of time in which to do so but provided insufficient evidence to support the returns filed. He has not always helped himself in the process of HMRC's enquiries. Even though he believes he has, we are satisfied he has not always acted in an objectively reasonable way – the manner in which a reasonable and prudent taxpayer who found themselves in his circumstances would act.

172. Therefore, the Tribunal finds that HMRC have correctly raised assessments under s.73 VATA 1994 in relation to input tax totalling £66,679.99 using best judgement in the absence of evidence to support the original amounts reclaimed in periods 09/12 to 03/15.

173. For the reasons set out above, the Tribunal dismisses the appeal.

174. 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.

TRIBUNAL JUDGE RUPERT JONES

RELEASE DATE: 30 JULY 2021