Neutral Citation: [2023] UKFTT 00474 (TC)

Case Number: TC08834

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video]

Appeal reference: TC/2017/02577

VAT – appeal against assessments – s 73 VATA 1994 –- assessments for earlier years made outside statutory time limit – appeals against those assessments allowed – remaining assessments upheld - appeal against a penalty for deliberate and concealed inaccuracy and a penalty for deliberate inaccuracy- para 19 Sch 24 FA 2007 – penalties upheld

Heard on: 5 July 2022
Judgment date: 02 June 2023

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
MEMBER MICHAEL BELL

Between

MAXXIM RESIDENTIAL DESIGN LIMITED

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Paul Evans, director of the Appellant

For the Respondents: Ms Siobhán Brown, litigator of HM Revenue and Customs' Solicitor's Office

With the consent of the parties, the form of the hearing was video using the Tribunal video hearing system. 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.

DECISION

INTRODUCTION

1. The Appellant appealed against a decision of the Respondents ("HMRC") to raise assessments for the VAT periods 03/13 to 06/14 and to assess the Appellant to penalties under Schedule 24 Finance Act 2007 ("Sch 24") for the VAT periods 03/13 to 06/14. HMRC raised the assessments as they had found evidence of false invoices used to make claims to input tax in the VAT period 06/14 and had reasons to believe that that practice began when the business changed in 03/13 and ceased to make regular taxable supplies. The Appellant was assessed to penalties as HMRC considered that the actions were as a result of deliberate behaviour.

2. Personal Liability Notices ("PLNs") were issued to the Appellant's director, Mr Paul Evans, on 3 March 2016. The PLNs have not been appealed to the Tribunal. This was brought to Mr Evans' attention on previous occasions and in the Tribunal's interlocutory decision of Judge Mosedale dated 15 January 2019 at [81]:

> "Personal liability notices
>
> 81. The appeals lodged with the Tribunal were lodged by the appellant company. It appears Mr Evans has never lodged an appeal against the personal liability notices served on him. The failure to appeal the PLNs was drawn to Mr Evans attention in July 2017 and he is reminded of it again."

We are satisfied that that Personal Liability Notices have not been appealed to the Tribunal and they are not considered further.

EVIDENCE

3. We were provided with an electronic hearing bundle and a supplementary bundle that contained the documents relied upon by the parties and to which we were referred. The hearing bundle also contained the witness statements of Mr Evans and Mr Sandberg. Mr Evans provided a witness statement purporting to be on behalf of two Appellants: Maxxim Residential Design Limited (TC/2017/02577) and P Evans (TC/2017/02599). The appeal under TC/2017/02559 was an application to close an enquiry. On 15 January 2019, the Tribunal struck out the appeal as there was no open enquiry into Mr P Evans. At the hearing, both Mr Evans and Mr Sandberg gave evidence and were cross-examined.

4. Mr Sandberg is an HMRC VAT Assurance Officer and that at the time of the enquiry was part of a team carrying out pre-repayment credibility checks. We found Mr Sandberg to be a straightforward and honest witness. Mr Sandberg's evidence was largely unchallenged and we have incorporated his evidence in the findings of fact below.

5. Mr Evans' written witness statement was of little assistance to the Tribunal as it largely consisted of repeatedly stating in response to each paragraph of HMRC's Statement of Case either that "The Appellant is unable to either confirm or deny the allegation" or "it is not admitted". The blanket denial and/or refusal to admit extended to the Appellant's Notice of Appeal: it was even "not admitted" that the Appellant had submitted an appeal to the Tribunal dated 21 March 2017. We found much of Mr Evans' evidence to be unreliable and lacked credibility for the reasons we have set out below.

BURDEN OF PROOF

6. The burden of proof is on HMRC to show that the assessments were made to the Commissioners' best judgment in accordance with Section 73 of the VAT Act 1994. If they do so, the burden passes to show that the assessments are incorrect. The burden of proof is on HMRC so show that the penalties have been correctly charged and that the behaviour leading

to the inaccuracy by reference to which the penalties have been charged was "deliberate". The standard of proof is the ordinary civil standard of the balance of probabilities.

FINDINGS OF FACT

7. On the basis of the evidence, both written and oral, we find the material facts to be as follows. We have begun with the facts which were not disputed or challenged, followed by disputed findings of fact.

FINDINGS OF FACT NOT IN DISPUTE

8. Maxxim Residential Design Ltd was incorporated on 29 February 2008 and the nature of trade stated as architectural activities. The effective date of registration for VAT was 1 April 2008. The sole director and company secretary of the Appellant throughout the relevant period is Mr Paul Evans.

9. The Appellant submitted repayment returns for the periods 03/13 to 06/14 inclusive. The repayment returns for the periods 03/13 to 03/14 were paid to the Appellant on submission of the returns. The repayment return for the period 06/14 for £11,179.22 submitted on 8 July 2014 was selected by computer for checking before payment was released.

10. Mr Sandberg has been employed by HMRC since 12 July 1993 as an Assurance Officer. At the time that the Appellant's VAT return for the periods 06/14 was selected for checking, Mr Sandberg was part of a team carrying out pre-repayment credibility checks. He was allocated the Appellant's returns for checking in July 2014.

11. On 17 July 2014, Mr Sandberg attempted to contact Mr Evans by telephone to request records in order to verify the 06/14 VAT return for the Appellant and R.J. Architecture Limited ("RJA"). In Mr Evans' words, RJA is an associated company that operated on the Welsh side of the Severn river and the Appellant company operated on the English side of the Severn river. Mr Sandberg was unable to contact Mr Evans by telephone and sent an e-mail to Mr Evans requesting the information.

12. Mr Sandberg telephoned Mr Evans on 23 July 2014 and requested copies of the purchase listing and the six highest value purchase invoices. Mr Evans confirmed that the documents would be sent via e-mail the next day.

13. A list containing the highest value invoices for each month in the quarter was e-mailed by Mr Evans to Mr Sandberg on 24 July 2014. A further request for detailed listing and the six highest value purchase invoice was made on the same day.

14. On 25 July 2014, Mr Sandberg received an e-mail from Mr Evans attaching the purchase listing spreadsheet for both companies. The suppliers were not detailed and each entry gave a generic description of each supplier but no name. On the same date, Mr Sandberg requested via e-mail the purchase invoices.

15. On 1 August 2014, Mr Sandberg received from Mr Evans purchase invoices related to the Appellant's purchase listing spreadsheet. On 4 August 2014, Mr Sandberg raised, via e-mail, queries in respect of the purchase invoices that he had received from the Appellant. He requested a clearer copy of the ACD (Landscape Architects) Ltd ("ACD") Invoice no. 17048 as the bottom of the invoice containing details of the company address and VAT number was illegible and confirmation as to which office generated the invoice together with their telephone number and VAT registration number. The e-mail pointed out that in respect of the Avis Car Hire invoices that VAT charged on cars hired for over 10 days is subject to a 50% restriction to take account of the car being made available for any private use and that input tax had been overclaimed in the sum of £196.30. Mr Sandberg stated that as this was a relatively small amount, that Mr Evans should make an adjustment to the input tax claim in the next return and

ensure that the 50% reduction is applied in the future. Mr Evans was also asked to confirm the current projects that the Appellant was involved in and when it was anticipated that the projects would be invoiced and declared in VAT returns.

16. On the same date, Mr Evans replied to Mr Sandberg via e-mail. He confirmed ACD's company and VAT registration numbers, apologised for the error in respect of the Avis Car Hire invoices as he was not aware of the 50% reduction and confirmed that an adjustment would be made to the input tax claim in the next return and would ensure that the 50% restriction would be applied going forward. The Appellant's current projects were confirmed as: Thornhill, Cardiff; Ammanford; Wokingham; Slough and several land feasibility studies. Mr Evans anticipated that the projects would be declared on the next VAT return.

17. Mr Sandberg proceeded to conduct supplier checks on several of the invoices. A supplier check is done by HMRC to verify invoices that are provided by a taxpayer in response to pre-repayment credibility checks. The supplier named on the invoice is contacted by HMRC and requested to confirm to whom the invoice was issued and the value of the invoice. Mr Sandberg performed a supplier check on invoice number 17048 dated 26 June 2014 issued by ACD to the Appellant and invoice number TEC321797 dated 28 April 2014 issued by RPS Consulting Services Limited ("RPS") to the Appellant (together the "Disputed Invoices").

18. Mr Sandberg's unchallenged evidence was that ACD confirmed to Mr Sandberg that the invoice that they issued to the Appellant under invoice number 17048 was dated 26 June 2014, was for £250 plus £50 VAT and related to "Arboriculturist Feasibility work in respect of Land off Wernoleu Road, Ammanford", whereas the invoice provided by the Appellant to HMRC under the same invoice number, 17048, dated 26 June 2014 was for Landscape Architect fees relating to Excalibur Drive, Thornhill Cardiff in the amount of £14,808.33 plus VAT of £2,961.67.

19. Mr Sandberg's unchallenged evidence was that RPS confirmed to Mr Sandberg that the invoice that they issued under invoice number TEC321797 to the Appellant dated 27 April 2012 was for £400 plus £80 VAT and related to "Fees for the Period April 2012 for work carried out by Emma Fortune, Senior Planner", whereas the invoice provided by the Appellant to HMRC under the same invoice number was dated 28 April 2012 in respect of "Urban Design Fees relating to Land off Fford Glowyr, Ammanford" in the sum of £13,825 plus VAT of £2,765. E-mails from Mr Sandberg to ACD and RPS requesting the copy invoices (together the "Copy Invoices") together with their respective replies attaching the invoices were not included in the hearing bundle, only the Copy Invoices provided by ACD and RPS were included in the hearing bundle. Whilst we considered this to be unsatisfactory, this evidence was unchallenged and we find as fact that the Copy Invoices were the invoices provided by ACD and RPS in response to Mr Sandberg's supplier checks. We have made further finding of fact in respect of the Disputed Invoices below.

20. On 6 August 2014, Mr Sandberg e-mailed Mr Evans to request five specific invoices (three in respect of the Appellant and two in respect of RJA) stating "Could you please send me copies of these invoices + proof of payment."

21. On 8 August 2014, Mr Evans e-mailed Mr Sandberg and stated:

> "We have now looked in detail at both vat returns you are requesting information on.
>
> We have discovered there are errors in the return and information provided and we would like to revise the returns before any repayment is made.
>
> Please could you confirm this is possible, and if so we will resubmit the returns immediately."

22. On the same date, Mr Sandberg replied to request a meeting to examine the records of the Appellant and RJA, stating "During this meeting we would be able to discuss any errors that have been made and how to address them." On 11 August 2014, Mr Evans agreed to a meeting on 19 August 2014 at 1 Bell Street, Maidenhead, Berkshire SL6 1 BU, the principal place of business of RJA as stated on the VAT register.

23. On 12 August 2014, Mr Sandberg e-mailed Mr Evans to confirm that a colleague, Mr Reed, would be accompanying him at the meeting. Mr Evans replied stating "Out of curiosity, who is Mr Reed?" and Mr Sandberg confirmed that "Roger Reed is a colleague who is an assurance officer, as I am, working out of the Staines office." Mr Evans further replied asking "What is an assurance officer?"

24. On 13 August 2014, Mr Sandberg e-mailed Mr Evans and confirmed which records he wanted to examine at the meeting. He did not answer Mr Evans previous question but we find that no answer was necessary as Mr Sandberg had previously stated that Mr Reed was an assurance officer just as he was. Mr Sandberg confirmed that he would not be in the office until Tuesday, 19 August 2014 but would be contactable by e-mail before that date.

25. On 14 August 2014, Mr Evans e-mailed Mr Sandberg stating that "he was very concerned" about the inclusion of the word "Official" at the end of the subject matter line of Mr Sandberg's e-mail correspondence and requested that he "explain the implications of the inclusion of the word "OFFICIAL" in the correspondence" and he would "appreciate an explanation before we meet".

26. On 18 August 2014 (the day before the arranged meeting), Mr Sandberg received an e-mail from Mr Evans stating:

> "As I have not had a reply to my email below, and until I have an explanation for the word "OFFICIAL" below, the meeting is postponed tomorrow.
>
> As soon as I have an explanation we will rearrange the meeting if necessary, although perhaps a quicker way of dealing with this if for the VAT form 652 to be sent to VAT Error Correction Team [address provided].

27. On 19 August 2014, Mr Sandberg e-mailed Mr Evans and confirmed that, as he had not received a reply to his earlier e-mail of the same date (which confirmed that the word "Official" was a security "tag" and that this had been present on every previous e-mail sent to Mr Evans), he assumed that the meeting was cancelled. The e-mail further stated:

> "As I have not been able to examine the records for both Maxxim Residential Design Ltd and. R J Architecture Ltd, in order to verify the input tax claims, and you had previously advised me that there had been errors made, I will have no alternative but to reduce the input tax claimed by both companies to £Nil for the 06/14 VAT Returns."

28. On 28 August 2014, Mr Sandberg and Mr Reed made an unannounced visit to the 1 Bell Street address for the purpose of examining the business records of the Appellant and RJA. Mr Sandberg and Mr Reed were informed by the receptionist that Mr Evans was not present and she was unable to contact him via telephone. The ground floor of 1 Bell Street contained serviced offices.

29. On 12 September 2014, Mr Evans e-mailed Mr Sandberg stating:

> Your email below [19 August 2014] referred to reducing the input tax claimed by both companies to £Nil for the 06/14 VAT returns, and we said that we would amend the returns under a form 652 to the VAT Error Correction Team.
>
> We have not heard anything - please advise as we thought this was all resolved?

30. On 16 September 2014, Mr Sandberg e-mailed Mr Evans to advise him that he and Mr Reed had made an unannounced visit on 28 August 2014 to 1 Bell Street and that he had written to both companies on 28 August 2014 to request production of their business records. On 17 September 2014, Mr Evans e-mailed Mr Sandberg:

> "Yes no problem, I understand you were out of the office.
>
> My receptionist did inform me that you called, but I am sorry but we didn't arrange to meet at that time, because you were away prior to that as well.
>
> I am mostly out on site at the moment, and I do apologise for missing you. It is by no means intentional. It's very difficult to meet at the moment as I said previously we are working on a couple of large projects, and I occasionally pick up email hence the delay in my reply to you.
>
> My understanding of our last emails is that you were going to reduce input tax to NIL for the 06/14 returns, and we were making amendments on a Form 652 as confirmed below.
>
> Has this been done? as I have not seen anything come back from you regarding this?. [sic]Perhaps you can also send me another copy of the letter by email if that is ok?"

31. On 4 November 2014, Schedule 36 Notices were sent to both the Appellant and RJS by post, the deadline for provision of the information was 4 December 2014. The letters were sent via TNT Fully Tracked Service to both the registered address (40 Bloomsbury Way, Lower Ground Floor, London WC1A 2SE) and the address contained in the VAT register (Venture House, Arlington Square, Bracknell RG12 1WA). Both letters were returned as "undeliverable" and delivery was attempted twice. The Schedule 36 Notices were also sent by e-mail, a "read receipt" was received by Mr Sandford. On 5 December 2014, Mr Evans e-mailed Mr Sandberg to confirm that he was arranging for the information to be e-mailed to him.

32. On the 19 December 2014, as no information or correspondence had been received in response to the Schedule 36 letters, the Appellant was issued with a £300 penalty. The Notice enclosed with the penalty stated that in order to avoid further penalties, the Appellant should provide the information and documents requested by no later than 23 January 2015.

33. No further contact was made by Mr Evans and as all the previous addresses used by the Appellant were no longer in use, the Appellant was registered as a missing trader and the issue of all VAT returns was suspended with effect from 25 October 2015.

34. On 28 October 2015, Mr Sandberg disallowed all the input tax claimed in the 06/14 return and issued a VAT assessment for the tax periods 03/13 to 03/14 disallowing the input tax claimed in these periods. Mr Sandberg believed that he had discovered false invoices were used in support of the 06/14 VAT return and determined, using best judgment, that similar action may have taken place in the earlier returns as no records or documentation had been received to support the input tax claimed in earlier returns and analysis of the returns showed that from January 2013 the sales appeared to have ceased. He issued an assessment for under declaration of tax to disallow the VAT claimed in the 03/13 to 03/14 VAT return periods.

35. On 30 October 2015, Mr Sandberg sent a letter to Mr Evans by e-mail and by post to the three addresses that HMRC held for the Appellant inviting him to a meeting on 24 November 2015 at Forum House, Staines, to discuss the errors in the Appellant's VAT return for the period 06/14. Mr Evans did not attend the scheduled meeting.

36. Following the discovery of the errors and the disallowed input tax in VAT return periods 03/13 to 06/14, HMRC, on 1 February 2016, issued to the Appellant a penalty explanation and

penalty explanation schedule setting out the details of the amount of penalty due to be charged in accordance with Schedule 24 for the period 06/14:

(1) The behaviour was considered deliberate and concealed as the Appellant made errors in the input tax claim. Two invoices were found to be false. No other invoices were submitted for examination despite requests. Input tax had also been over claimed on car hire invoices.

(2) No explanation was put forward to explain this and no detailed records were provided; however following initial enquiries Mr Evans admitted errors had been made and he wished to submit a corrected VAT return. Subsequently contact was lost and HMRC were unable to contact Mr Evans.

(3) The disclosure was considered prompted because HMRC were not told about the inaccuracy before it was discovered or were about to discover it.

(4) The penalty range for a deliberate and concealed inaccuracy with a prompted disclosure is from 50% to 100%.

(5) A 15% reduction was allowed for the quality of the disclosure.

(a) Telling us about it – admitted that the return was incorrect but provided no further information. 10% allowed.

(b) Helping us understand it – no assistance was provided in quantifying the error. 0% allowed.

(c) Giving us access to the records – minimal information provided following requests for information and documentation. 5% allowed.

(6) HMRC did not consider that there were any special circumstances which would lead to a further reduction in the penalty.

(7) The penalty percentage chargeable was 92.5%.

(8) The potential lost revenue was £11,179.20.

(9) The penalty charged was £10,340.76.

37. On the same date, 1 February 2016, HMRC issued a penalty explanation and a penalty explanation schedule to the Appellant which provided details of the amount of penalty due to be charged in accordance with Schedule 24 for the periods to 03/13 to 03/14. The behaviour was considered deliberate as errors were found in the 06/14 VAT return and despite several requests no information or records were provided to verify the earlier VAT returns. It appeared from the previous five VAT returns that similar errors may have been made in the returns and that consequently these errors were deliberate. No argument was put forward to change this opinion which was based on best judgement. The disclosure was considered prompted because HMRC were not told about the inaccuracy before it was discovered or were about to discover it. The penalty range for a deliberate inaccuracy with a prompted disclosure is from 35% to 70%. No reduction was allowed for the quality of the disclosure as no requested information was provided. HMRC did not consider that there were any special circumstances which would lead to a further reduction in the penalty. The penalty percentage chargeable was 70%, the potential lost revenue for all five periods was £12,456 and the penalty charged was £8,719.20.

38. The Notices of Penalty Assessment were issued on 3 March 2016

39. PLNs were issued to Mr Evans as Mr Sandberg believed that the Appellant was about to become insolvent. This belief was based on the fact that Appellant had been registered as a missing trader as none of the addresses for the Appellant held by HMRC were in use and the

Appellant had not submitted any VAT returns since the 06/14 return. The failure to submit VAT returns had resulted in the Appellant's VAT registration being cancelled with effect from 25 October 2015.

40. On 29 March 2016, the Appellant requested a review/appeal of the matter as it had advised Mr Sandberg that it had identified errors in its return and that Mr Sandberg would on this occasion change the return to nil but at no point had it been agreed or discussed that all of the Appellant's returns for entire 2013/14 period would be reduced to nil.

41. On 7 April 2016, HMRC wrote to the Appellant to clarify whether the Appellant was requesting an independent review or wishing to make an appeal to the Tribunal. The Appellant in its letter dated 6 September 2016 addressed to Enforcement and Insolvency thanked Mr Kahn for enclosing a copy of HMRC's letter dated 7 April 2016 which the Appellant stated did not appear to have been received and confirmed that they were requesting an independent review.

42. On 27 January 2017, Mr Sandberg replied stating that he had been forwarded the Appellant's request for an independent review and replied to the Appellant's questions regarding claims made by HMRC about the Appellant's solvency. Mr Sandberg stated:

> "The reasons why I believed that the company was likely to become insolvent, and why I believed that the company had ceased trading and that the company's VAT registration had been cancelled are as follows:-
>
> 1) On 21/04/15 the Registrar of Companies gave notice that the company would be struck off the register and the company would be dissolved, although this strike action was subsequently suspended.
>
> 2) The Abbreviated Balance Sheet as at 31st March 2015 showed negative nett liabilities and also showed that the Director's Loan Account was overdrawn.
>
> 3) Following the adjustment made to the 06/14 VAT return, the subsequent VAT returns for 09/14 & 12/14, and the Final VAT return were all submitted together on 10/08/16 and were Nil returns, showing no sales or purchases.
>
> 4) The trading address at Venture House, Arlington Square, Bracknell RG12 1WA was not being used on 17/07/14 when I first tried to make contact to verify the 06/14 VAT return – when I phoned the number I was told that the company was not known at this telephone number nor at this building. I also tried phoning the Swansea office on 01792 482483 (the number we had on file) but this number was not in service. Subsequently the business address was changed to the registered address at 40 Bloomsbury Way, London WC1A 2SE. I also accessed the company website at this time but this showed a message stating that the website was under construction, and it does not appear to have been active since.
>
> 5) The VAT registration for Maxxim Residential Design Limited was cancelled on 25/10/15 and no attempt appears to have been made to have the registration reinstated.
>
> After considering the above points I used best judgement principles to arrive at my decision."

43. On 22 February 2017, HMRC concluded their review and upheld the assessments and the decision to issue penalties to the company officer.

44. On 21 March 2017, the Appellant submitted a Notice of Appeal to the Tribunal.

DISPUTED FINDINGS OF FACT

DISPUTED INVOICES

45. Mr Evans, in his oral evidence, did not accept that the Disputed Invoices had been sent by him to Mr Sandberg as the copy e-mail dated 1 August 2014 contained in hearing bundle did not show any attached documents. Furthermore, the ACD invoice numbered 17048 was illegible and no reliance could be placed upon it. We find as fact that Mr Evans did send the Disputed Invoices to Mr Sandberg for the following reasons. On 25 July 2014, Mr Evans e-mailed Mr Sandberg a detailed list of purchases for the period 1 April 2014 to 30 June 2014. Mr Sandberg replied on 30 July 2014 stating: "I need to see the following invoices" and requested specifically copies of invoices in respect of the Appellant: "Car Hire Invoices – VAT £429.83, Architectural Consultant – June – VAT £2,961.67, Urban design Consultant – VAT £2,765.00". The Architectural Consultant and Urban design Consultant invoices were selected by Mr Sandberg as they were the Appellant's two highest value claims.

46. Mr Evans e-mailed on 1 August 2014 stating: "Please find attached invoices for Maxxim … In terms of the car hire invoices, you will see that there is a claim for VAT in March, but was included in this VAT return … The submission figures were based upon agreed rentals with AVIS". Mr Sandberg's response on 4 August 2014 timed at 12.47 e-mail did not state, as commonly occurs, that the attachments had not been attached to the e-mail. On the contrary, it stated: "I have just a couple of queries/comments concerning the invoices that you sent me" and then proceeded to refer to the ACD (Landscape Architects) Ltd Invoice number 17048 as being illegible at the bottom of the invoice and the Avis car hire invoices: documents that Mr Evans had stated were attached to his e-mail dated 1 August 2014. Mr Evans' reply of the same date timed at 13.31 did not query Mr Sandberg's reference to the 17048 Invoice nor that the entire document was illegible and he could not provide the information requested but provided the information requested stating: "Thanks for the email below, here is further information as requested." We accept that the e-mail chain in the hearing bundle does not show the attachments but we consider it clear from the e-mail chain that the Disputed Invoices were attached to Mr Evans' e-mail dated 1 August 2014. We note that Mr Sandberg's e-mail to Mr Evans dated 30 October 2015 refers to attached letters but similarly the printed copy of the e-mail does not show the attachments suggesting that the e-mails contained in the hearing bundle were printed in HTML and not plain text.

NOTIFIED HMRC OF ERRORS

47. Mr Evans' evidence was that it was he that had notified HMRC of the errors and that HMRC had acted unfairly and disproportionately when, following that notification, it proceeded to raise assessments and imposed penalties. Mr Evans' evidence was that he had "raised the alarm bell" when he had stated in his e-mail dated 8 August 2014 "We have discovered there are errors included on the return and information provided and we would like to revise the returns before any repayment is made." Mr Evans submitted that the evidence shows that there was no motivation to get the money back, the Appellant wanted to correct the error. Mr Evans evidence was that HMRC had only found the evidence after he had disclosed the error. Ms Brown submitted that it was clear from the e-mails that, when they were looked at in context, that Mr Sandberg had already identified errors and was requesting information and documents to verify the claims. It was only after Mr Sandberg had made the request on 6 August 2014 for specific documents that Mr Evans stated that there were "errors" in the return and information provided. We agree with Ms Brown's submissions and find as fact that whilst Mr Evans did notify HMRC of the errors in the returns and information provided, HMRC were notified because Mr Evans believed that they had discovered or were about to discover the errors. When the e-mails are looked at in context it is clear that Mr Evans only stated that there were errors once it was clear that Mr Sandberg was enquiring into the returns and was

requesting copies of documents that would clearly identify the inaccuracies. In addition, Mr Evans did not identify or provide any further details of what the “errors” were.

AGREEMENT TO ADJUST ERRORS IN NEXT RETURN

48. Mr Evans’ evidence was that Mr Sandberg had agreed that the Appellant could correct the errors by adjusting the next return. Mr Sandberg later changed his position and did not allow Mr Evans to amend the return and then proceeded to “use a sledgehammer to crack a nut” by “nilling the returns” rather than sticking to what had originally agreed. Ms Brown submitted that it was clear from the correspondence and Mr Sandberg’s evidence that at no stage had it been agreed that identified errors could be addressed by the Appellant amending its return. Mr Sandberg had agreed that the Appellant could adjust the amount overclaimed for the Avis car hire but that was only in respect of the Avis car hire invoices and on the basis that: “As this is a relatively small amount, could you please make an adjustment to the input tax claim on your next Return”. On 19 August 2014, Mr Sandberg e-mailed Mr Evans stating:

> “As I have not been able to examine the records for both Maxxim Residential Design Ltd and. R J Architecture Ltd, in order to verify the input tax claims, and you had previously advised me that there had been errors made, I will have no alternative but to reduce the input tax claimed by both companies to £Nil for the 06/14 VAT Returns.”

49. We find as fact that there was no agreement that the Appellant could adjust the errors in the next VAT return. It is clear from the correspondence and documents that Mr Sandberg had agreed that an adjustment could be made to the next return to correct the overclaimed VAT in respect of the Avis car hire invoices but that was on the basis of the minimal amount of VAT involved. Mr Sandberg was clear in his evidence (which was accepted) that the agreement was solely made in respect of the Avis car hire invoices and that form VAT652 Notification of errors in VAT returns could not be used as the net value of the errors exceeded £10,000.

CANCELLATION OF MEETING

50. Mr Evans’ evidence was that he had not attended a meeting with Mr Sandberg to discuss the errors as he was not happy that Mr Sandberg’s colleague, Mr Reed, would be attending. Mr Evans considered this to intimidating and “mob handed” and that HMRC were trying to get him to attend a meeting for ulterior purposes. The use of the word “Official” in the e-mail confirming Mr Reed’s attendance reinforced the feeling of intimidation. Mr Evans obtained the advice of an accountant who advised him not to have the meeting and that HMRC had no legal right to require a meeting in respect of a VAT return. Ms Brown submitted that Mr Sandberg’s e-mail dated 8 August 2014 accurately stated the purpose of the meeting: “it would be best to arrange a meeting so I can examine the records of both companies … During this meeting we would be able to discuss any errors that have been made and how to address them”.

51. Mr Sandberg’s evidence and e-mails confirmed that he would be accompanied by Mr Reed as this was standard HMRC practice to ensure that HMRC officers did not attend premises alone. The “Official” security designation had been present on all previous e-mails sent to Mr Evans. We find that Mr Evans has not provided any credible explanation as to why the meeting to discuss the errors and examine the Appellant’s records was cancelled. Mr Evans did not provide any evidence of the advice allegedly received from the unnamed accountant advising him not to attend the arranged meeting or any subsequent meetings with Mr Sandberg and Mr Reed. In our view, at the very least, an accountant would have sought confirmation from Mr Sandberg of the purpose of the meeting before advising his client. We did not accept this evidence as plausible. We similarly do not accept that the word “Official” in the ‘Subject Matter’ of the e-mail from Mr Sandberg would have led Mr Evans to conclude that Mr Sandberg had not been honest about the purpose of the meeting and that a malign hidden agenda was the reason for requesting the meeting. The “Official” security designation had been present

on all previous e-mails to Mr Evans and was the default security classification when communicating with taxpayers by e-mail.

CHANGE IN THE BUSINESS

52. Mr Evans' evidence was that the Appellant's business did not operate on a straight line and that there were "good times and bad times". There was no output tax as the business was not doing as well as it had previously. In response to questions from the Tribunal, Mr Evans stated that the Appellant's customer base had changed but not the nature of the work, a consultancy that does architectural designs, had not changed. Mr Evans did not agree that for the period 03/13 to 03/14 the Appellant had no work as the Appellant's business had grown significantly since 2008 and during that period, the Appellant may have been supervising construction projects and had a limited turnover during that period. He stated that the reason the Appellant's income for the period 03/13 to 03/14 was almost zero was because the Appellant had not been paid for consultancy work done during that period and that payments made were on a staged basis which was dependent upon how long each phase of work lasted.

53. We find during the period 03/13 to 03/14 the nature of the Appellant's business had significantly changed with little or no taxable supplies made during that period. The burden of proof is on the Appellant to demonstrate the receipt of a taxable supply in order to exercise the right to make a claim to input tax. Mr Evans stated that he had not refused to supply records but was simply refusing to meet with Mr Sandberg and Mr Reed but the outcome was the same: no records evidencing the receipt of taxable supplies for the period 03/13 to 03/14 were provided to HMRC.

THE LAW

54. There was no dispute between the parties concerning the relevant law which we summarise below.

55. In this appeal, HMRC have denied input tax claimed by the Appellant. "Input tax" is defined in Section 24(1) VATA as VAT on the supply to a taxable person of any goods or services used, or to be used, for the purposes of his business.

56. In addition, in order to claim VAT as input tax Section 24 VATA states that the taxpayer must provide such evidence as may be specified in regulations or HMRC may direct. Regulation 13 of the VAT Regulations 1995 ("VAT Regs") requires a taxable person to issue a VAT invoice whenever a taxable supply is made to another taxable person in the UK. At the time of completing a VAT return and claiming input tax a taxable person must hold the VAT invoice(s) relating to the claim (Regulation 29(2)(a)) although HMRC has discretion under Regulation 29 to permit alternative evidence to VAT invoices to be relied upon.

57. Section 26 of the VATA sets out that a taxable person is entitled to credit for so much of the input tax as is allowable under regulations as being attributable to identified supplies which in the case of the Appellant are taxable supplies. A "taxable supply" is defined in section 4 VATA as being a supply which is not exempt.

58. Regulation 29(2) of the VAT Regulations 1995 requires that the taxpayer, at the time of claiming deduction of input tax, provide HMRC with evidence to support such a claim.

59. The VAT legislation prescribes detailed record-keeping requirements. Those requirements include the obligation to keep business and accounting records, a VAT account and copies of all invoices issued and received by a taxable person (Regulation 6 of the 1995 Regs).

60. By virtue of section 73(1) VATA, where it appears to HMC that tax returns made by a taxpayer are incomplete or incorrect, HMRC may assess the amount of VAT due from him to the best of their judgment and notify it to him.

61. Section 73 VATA

> “73 Failure 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.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person-
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.”

62. Assessments under VATA s 73(1) "shall not be made later than" the time limits set out in VATA s 73(6), namely:

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

63. Schedule 24 Finance Act 2007

The penalty provisions of schedule 24 work as follows (all references below and in 58 to paragraphs are to paragraphs of schedule 24):

> (1) A penalty is payable by a person (P) who gives HMRC a VAT return and (a) the return contains an inaccuracy which amounts to or leads to an understatement of a liability to tax and (b) the inaccuracy was careless within the meaning of para 3 or deliberate on P's part (para 1).
>
> (2) The level of the penalty depends on whether the inaccuracy was careless or deliberate and, if deliberate, if it was concealed or not. Whether an accuracy is concealed or not depends on whether or not P makes arrangements to conceal it (for example by submitting false evidence in support of an inaccurate figure) (para 3).
>
> (3) Where applicable the maximum penalty is 30% of the potential lost revenue for careless action, 70% of the potential lost revenue for deliberate but not concealed action and 100% of the potential lost revenue for deliberate and concealed action (para 4).
>
> (4) The potential lost revenue in respect of an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment (para 5).
>
> (5) There is a reduction in the penalty where a person discloses an inaccuracy by (a) telling HMRC about it, (b) giving HMRC reasonable help in

> quantifying the inaccuracy or (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. The level of reduction depends in part on whether the disclosure is "unprompted" or "prompted".
>
> The disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered it or are about to discover the inaccuracy and otherwise is prompted (para 9).
>
> (6) Where a person has made a disclosure HMRC must reduce the percentage of penalty which would otherwise apply to a percentage that reflects the quality of the disclosure provided that it cannot be reduced below the specified minimum. Where the penalty is deliberate the minimum is specified as 20% where the disclosure is unprompted and 35% where it is prompted (para 10).
>
> (7) HMRC may also reduce a penalty if they think it right because of "special circumstances" (under para 11).
>
> (8) HMRC may suspend all or part of a careless inaccuracy penalty (under para 14).
>
> (9) Where a penalty due under the above provisions 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. An officer for this purpose includes a director (para 19)."

Case law

64. The approach to a "best judgment" assessment was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) ("Fio") in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC):

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC)".

65. The first stage is for the Tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the Tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):

> "In such cases … the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary."

66. Chadwick LJ observed at [43] that instances of a failure to exercise best judgment would be rare. As he stated at [36]:

> "… But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment."

67. Where the Tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the Tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the Tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.

68. In *Van Boeckel v Customs and Excise Commissioners* [1981] AER 505 ("*Van Boeckel*") the High Court (Woolf J as he then was) considered the application of best judgment.

> "... It should be recognised … that 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 judgement is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgement' envisage, in my view, is that 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 which is due."

69. The Court of Appeal in *Customs & Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015, approved the approach of Woolf J. The Court of Appeal proceeded to provide guidance to the Tribunal when faced with "best of their judgment" arguments and confirmed that the Tribunal's primary task is to find the correct amount of tax on the basis of the material before it and in all but very exceptional cases this should be the focus of the hearing; any mistake which the Tribunal considers that HMRC has made in its assessment may still be to best judgment if it is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; and an assessment which appears to be unreasonable or wholly unreasonable may still be the result of an honest and genuine attempt to assess the VAT properly due. At [38] Carnwath LJ stated:

> "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment."

70. The question of how HMRCs are entitled, or required, to deal with returns was addressed by Lightman J in the case *of R (on the application of UK Tradecorp Ltd) v Customs and Excise Commissioners* [2004] EWHC 2515 (Admin)

> [18] The commissioners are under a duty to conduct a reasonable and proportionate investigation into the validity of claims for a refund and repayment and a duty to act proportionately both in respect of the investigation and in dealing with the taxable person's claims generally. See *R (on the application of Deluni Mobile Ltd) v Customs and Excise Comrs* [2004] EWHC 1030 (Admin) (Deluni). The duty to investigate is applicable both to the claim to the refund and repayment and to the question whether there is a right to set-off (or indeed a claim for a further payment from the taxable person). The duty embraces an obligation to keep all investigations under review. The commissioners are entitled to take a reasonable time to investigate claims prior to authorising deductions and repayments and what is a reasonable time within which to complete an investigation must depend on the particular facts:

> *Strangewood* [1987] STC 502 at 505. The availability and proper exercise of the commissioners' powers of investigation are essential to maintain the fiscal neutrality of VAT and prevent refunds being made to parties not entitled to them. The postponement of repayment of input tax pending the outcome of the investigation is, as a matter of principle and subject to questions of proportionality, entirely compatible with the Sixth Directive. Whilst the burden of proof is upon the taxable person to establish that the investigation of his unadmitted and unadjudicated claim and the failure to make a part or interim payment is unreasonable or disproportionate, the burden is on the commissioners to justify non-payment of it once the claim is admitted or established and the period of investigation of any cross-claim."

71. Lightman J further considered the measures and steps that HMRC are entitled to take for the protection of the Exchequer:

> "[33] The first reason is that there is authority binding on me to this effect. I have in mind the decisions of Neuberger J in *Capital One Developments Ltd v Customs and Excise Comrs* [2002] STC 479 and of Moses J in GSI. Neuberger J held that there was a critical distinction between an unadjudicated claim to input tax and an admitted or established claim; that the decision in *Molenheide* proceeded on the basis that the Belgian authorities in that case had admitted the claims and had merely raised a cross claim; and that the protection from derogation afforded to admitted or established claims did not extend to claims which were neither admitted nor adjudicated upon. Moses J cited with approval and followed that line of reasoning. The second reason is the line of reasoning having reference to the terms of the Sixth Directive and the decision in *Genius* which I have set out above. The third is practical common-sense. It must surely be incumbent on the taxpayer to satisfy the commissioners of his entitlement to a deduction. Fiscal neutrality requires that this should be so and that repayments should not be made to taxable persons who have or show no such entitlement. Surely it cannot be sufficient merely to make a claim to be entitled or treated by the law as entitled or have the same protection."

72. In *Georgiou (t/a Marios Chippery) v CCE*, [1996] STC 463, the Court of Appeal held that the Tribunal had used the right test in deciding that HMRC had assessed to the best of their judgment by using the evidence before them at the time of making the assessment.

SUBMISSIONS

73. Mr Evans submissions on behalf of the Appellant are summarised as follows.

74. It was accepted that the Appellant had not received repayment of input tax from HMRC, HMRC have gone too far in issuing assessments made to best judgement and penalties when the appropriate course of action would have been to make an adjustment to the Appellant's return. The Appellant had accepted that it had made errors but HMRC had refused to cooperate with the Appellant and had acted in a heavy-handed way.

75. It was accepted that a meeting with HMRC had not taken place but a meeting for the purpose of an adjustment of a VAT return was unnecessary. It was the Appellant that had alerted HMRC of the errors in the return and the 15% reduction for the quality of the disclosure did not adequately reflect that position. Once the errors had been brought to HMRC's attention no further documents or records were provided as they were not required. An adjustment to the 06/14 return could have been made using form VAT652 and this course of action had been agreed by Mr Sandberg who then resiled from that agreement. It was clear that the Appellant had engaged with HMRC and it had not been necessary to raise assessments to best judgment

nor impose penalties for human error. The Appellant was not a missing trader and this fact would have been plain to any reasonable person.

76. Ms Brown's submissions on behalf of HMRC are summarised as follows.

77. During the course of HMRC's checks into the 06/14 VAT repayment claim, records were requested to support the claim for £11,179.20. The Appellant provided listings and amounts but as these did not contain sufficient detail, copies of specific invoices were requested. The two invoices provided by the Appellant were subsequently found to be invalid invoices. When a repayment return is found to be in error HMRC are under a duty to conduct a reasonable and proportionate investigation into the claims for a refund and repayment. As repayment claims had also been made by the Appellant for the periods 03/13 to 03/14, HMRC sought to examine the Appellant's business records.

78. The meeting scheduled for 19 August 2104 for the purpose of examining the Appellant's business records was cancelled by Mr Evans and a subsequent unannounced visit on 28 August 2014 for the purpose of examining the Appellant's business records was unsuccessful as Mr Evans was not present and not contactable by telephone. The Appellant failed to produce documents in accordance with a Schedule 36 Notice and HMRC subsequently raised "best judgment" assessments for the periods 03/13 to 03/14 inclusive as no supporting documents had been provided and Mr Sandberg had reason to believe that the practice of creating fraudulent invoices began when the business changed and ceased to make taxable supplies. HMRC took into account and applied and considered all credible information, knowledge and documentation when calculating the assessment. Likewise, HMRC correctly charged penalties in accordance with Sch 24 when it considered the inaccuracies identified in the VAT returns for the period 06/14 and the periods 03/13 to 03/14.

79. In the event that the Tribunal finds that the behaviour was not deliberate, HMRC submit that the penalty remains chargeable for non-deliberate behaviour calculated at £3,736.80 for the periods 03/13 to 03/14 inclusive and £3,102.22 for the period 06/14 on the potential lost revenue with the same reduction given for the quality of disclosure.

Discussion

The issues to be determined are whether the assessments for 06/14 and for the periods 03/13 to 03/14 had been made to HMRC's "best judgment" in accordance with s 73 VATA and whether the behaviour was "deliberate" within the meaning of Sch 24; and if not, whether it was careless; and whether any resulting penalty should be further reduced under Sch 24, para 9 as a result of the "quality of the disclosure".

Best judgment

80. As the above case law makes clear, the Tribunal must consider the "best judgment" assessment in two stages.

81. The first stage is whether HMRC had fairly considered all the material before them and on that material, had come to a decision which is reasonable and not arbitrary as to the amount of tax due. We are satisfied that Mr Sandberg fairly considered all the material before him. We have found as fact that the Disputed Invoices were provided to HMRC by Mr Evans and that there was a significant change in the business with none or minimal taxable supplies made in the period 03/13 to 06/14; the assessments were on the basis that similar action may have taken place in the earlier returns when there was a significant change in the business. We accept that the assessments were made to Mr Sandberg's best judgment.

82. The second stage is for the Tribunal is to consider all the available evidence (including evidence not available to HMRC at the time when the assessments were made) and determine the correct amount of tax.

83. As stated above at [616], it is for the Appellant to provide evidence to rebut HMRC's assessments for the VAT periods 03/13 to 06/14. Mr Sandberg calculated the assessments in reliance upon the change in business from 03/13 as the sales appeared to have ceased and the fraudulent activity began. No evidence was provided to the Tribunal to rebut HMRC's assessments and we find there is no evidential basis on which to set aside or reduce the assessments.

WHETHER ASSESSMENTS IN TIME

84. The assessments were made on 28 October 2015 for the VAT period 03/13 to 06/14. S73(1) VATA requires that these assessments "shall not be made later than" the time limits set out in VATA s 73(6), namely:

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

85. In *Pegasus Birds v HMRC* [1999] STC 95 ("*Pegasus Birds*"), Dyson J set out six principles to be used in deciding whether "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment" has come to their knowledge of HMRC. These are:

> "1. The Commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in section 73(6)(b) is actual, and not constructive knowledge: *C&E Commissioners v Post Office* at p755. In this context, I understand constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii) *Heyfordian Travel Ltd v Customs and Excise Commissioners* [1979] VATTR 139, 151; and *Classicmoor Ltd v Customs and Excise Commissioners* [1995] V&DR 1 at 10.1.27.
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury*: *Classicmoor* paras 27 to 29; and more generally *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941, 952D-H.
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act."

When Pegasus Birds was considered by the Court of Appeal, Dyson J's decision was upheld albeit without expressly referring to the above principles.

86. HMRC's Statement of Case was silent on the issue of time limits, HMRC's skeleton argument asserted that the assessments had been "issued within legislative time limits". It is clear that the assessment made on 28 October 2015 for the VAT periods 12/13, 03/14 and 06/14 were within the time limit in s73(6)(a) at [62] above.

87. In issue were also the assessments for the periods 03/13, 06/13 and 09/13 which fell outside the two year time limit within s73(6)(a). In respect of the time limit within s73(6)(b) VATA Mr Sandberg's unchallenged evidence was that on 4 August 2014 he discovered what appeared to be false invoices and he subsequently examined earlier returns as he considered that similar action may have taken place in previous returns. The accepted evidence was that no additional information or documents had been provided by the Appellant to HMRC. Examination of the earlier returns confirmed that the claims to input tax began in the periods 3/13 to 3/14 when there was a significant change in the Appellant's business with no or minimal sales in those periods. We considered whether Mr Sandberg's analysis of the earlier returns in October 2015 was the "last piece of evidence of these facts to sufficient weight to justify making the assessment was communicated the Commissioners". We agree with the conclusions of the VAT Tribunal in *Lazard Brothers & Co v HMRC* (1995) VAT Decisions 13476 which, following a review of the authorities, concluded:

> "The Tribunal does not consider that the making of calculations upon facts in the possession of the Commissioners comes within the terms of evidence of facts sufficient to justify the making of the assessment. The making of the assessment is the exercise of the Commissioners' judgment upon the facts."

88. In our view, the assessments issued on 28 October 2015 for the VAT periods 03/13, 06/13 and 09/13 were on the basis of information provided to HMRC by ACD and RPS on or about 4 August 2014, therefore HMRC had been provided with "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment" and therefore the assessments for VAT periods 03/13, 06/13 and 09/13 were out of time.

89. Accordingly, we confirm the assessments for VAT periods 12/13, 03/14 and 06/14 but set aside those for the earlier periods.

PENALTIES

WHETHER PENALTIES SHOULD BE REDUCED BECAUSE ASSESSMENT FOR EARLIER PERIODS INVALID.

90. The Tribunal (Judge Redston and Ms Gordon) in *Albany Fish Bar Ltd v HMRC* [2021] UKFTT 0221 (TC) considered whether a penalty should be reduced because it had found invalid assessments for earlier period. At [139] to [157], the Tribunal conducted a detailed analysis of the law to determine whether the penalty should be reduced in consequence of the invalid assessment. The Tribunal stated:

> 139. We have set aside the assessments for the periods before 10/15, because they were not made within the time limit prescribed by VATA s 73(6).
>
> 140. Mr Brown referred to para 4, which required penalties to be calculated as a percentage of the PLR, which was defined by para 9 as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment". Mr Brown submitted that as the corrective assessments for periods prior to 10/15 were out of time, there was no "additional amount due or payable", and that the penalty should be reduced in consequence. Mrs Spence submitted that that the penalties should not be set aside, but did not provide a reasoned argument to support that position. We therefore considered the law for ourselves, as set out below.
>
> 141. We began by noting that the statutory phrase is "due *or* payable", not "due *and* payable", which occurs frequently in tax statutes. As far as we could establish, Sch 24 was the first time the phrase had been used. That the wording was not accidental is indicated by the fact it has reappeared with some regularity in the context of both

penalties and certain anti-avoidance provisions (see FA 2008, Sch 41; FA 2009, Sch 55 and 56; FA 2013, Sch 43C in relation to the former, and FA 2016, Sch 18 and FA 2017, Sch 27 in relation to the latter).

142. We have already agreed with Mr Brown that there are no additional amounts "payable" by the Company in relation to the earlier periods. The issue is therefore whether there was an amount "due". In *Re Airedale Garage Co Ltd*, *Anglo-South American Bank Ltd v Airedale Garage Co [1933] 1 Ch 64 at 78–79*, Lord Hanworth MR said, albeit in a different statutory context:

> "I think the words 'due and payable' in s 264 of the Companies Act [1929] are meant to refer to a liability in respect of which there had to be a payment …"

143. In other words, "due" means that there is a liability and "payable" that "there had to be a payment". It is well established that there is a difference between a liability to tax, its assessment and its payment. In *Whitney v IRC [1926] AC 37 [1926] AC 37 52*, Lord Dunedin said:

> "There are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

144. From this it would follow that by using the phrase "due *or* payable" Parliament did not limit the issuance of penalties to situations where extra tax was actually payable, but allowed penalties to be issued also where there only was a liability.

145. The Company had a liability to VAT in each quarter since 08/10 which was higher than that which it had reported. Mr Morgan assessed the Company to that extra VAT, but the assessments for the earlier periods have been set aside because they were out of time. However, as Lord Dunedin said, that does not change the fact that the Company was *liable* to pay VAT on its lunchtime sales, even though the earlier assessments have been set aside, so that the tax is not payable.

146. We then considered the structure of Sch 24 to see whether it supported a reading of the word "due" as meaning "liability", and noted the following:

(1) Para 1 provides that a penalty "is payable" when a person deliberately or carelessly gives HMRC an inaccurate document with the intention that HMRC should rely on it. This establishes a person's liability to a penalty is confirmed by, para 13(1), which begins "when a person *becomes liable to a penalty* under paragraph 1". Thus, by giving HMRC inaccurate VAT returns from 2010 onwards, the Company was liable to a penalty.

(2) Para 13(1) also provides that when a person is so liable, HMRC shall "assess the penalty; (b) notify the person and (c) state in the notice the tax period in respect of which the penalty is assessed". Nothing in that paragraph ties the issuance of a penalty to the validity of a supplementary assessment of the underpaid tax.

(3) Para 13(2) says that a penalty assessment "(a) shall be treated for procedural purposes in the same way as an assessment to tax … ; (b) may be enforced as if it were an assessment to tax and (c) may be combined with an assessment to tax". Again, none of these provisions make the issuance of a penalty conditional on the validity of a corrective assessment.

(4) Para 13(3) says that HMRC must issue the penalty assessment within 12 months of either (a) the end of the period within which an appeal could be brought, or has been determined, against "the decision correcting the inaccuracy" or (b) "if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected". These time limit provisions therefore only take effect if HMRC either issue a corrective assessment to collect the underpaid VAT, or, if there is no such assessment, the taxpayer himself corrects the inaccuracy.

(5) We considered whether this provision carried the necessary implication that penalties could only be raised if the tax position had been corrected, either by a valid

assessment, or by the taxpayer himself. However, we decided that this was not the position, because:

(a) nowhere in the Schedule does it state that a penalty can only be raised if the tax position was corrected, and as a matter of statutory interpretation, that purpose cannot be narrowed by a provision dealing only with time limits;

(b) para 13(3) itself makes clear that a penalty can still be levied even if the taxpayer corrects the inaccuracy, and it follows that penalties are not conditional on corrective assessments;

(c) para 13(2) provides that the normal procedural rules apply to penalties issued under the Schedule, "except in respect of a matter expressly provided for by this Act ". If neither of the two time limit provisions in paragraph 13(3) bite, because there has been neither a valid corrective assessment nor a self-correction, the normal VAT time limits therefore apply. In a case of deliberate evasion of VAT, this would be 20 years (VATA s 77(4) and (4A)).

147. We also considered the Explanatory Notes for Sch 24. In *Westminster City Council v National Asylum Support Service [2002] UKHL 38*, Lord Steyn said at [5]:

"Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have."

148. The Notes say this about the term "PLR":

"'Potential lost revenue' is a new phrase which replaces the concept of 'tax difference' used in direct taxes whereby the penalty was applied to the difference between the tax per the return and the correct tax due. It is intended to have broadly the same effect except to remove some of the ambiguity for example where the inaccuracy relates to overstated tax deducted at source. It also replaces the concept of 'VAT which would have been lost' and 'VAT evaded or sought to be evaded' in the current regime."

149. That explanation provides further support for the view that the purpose of Sch 24 is to enable HMRC to issue penalties which relate to the "difference between the tax per the return and the correct tax due": in other words, that the penalties relate to a tax liability which was not shown on the submitted return.

150. Finally, we considered the Court of Appeal's judgement in *Ali (t/a Vakas Balti) v HMRC [2006] EWCA Civ 1572 (Tuckey, Arden and Lloyd LJJ)*, which came to the same decision on similar facts by reference to the previous VAT penalty legislation. By the time that case reached the Court of Appeal, the position can be summarised as follows:

(1) Mr Ali ran a restaurant, and had failed to register for VAT even though his turnover was above the relevant threshold;

(2) HMRC issued an assessment, and later purported to increase that assessment. At the VAT Tribunal hearing, HMRC accepted that the amended assessment was invalid, and that they were now out of time to issue a supplementary assessment.

(3) HMRC had also issued a civil evasion penalty under VATA s 60, which was linked to the VAT they had sought to collect by that invalid assessment.

(4) The High Court set aside that penalty on the basis that Mr Ali could not have evaded VAT which was not due from him.

151. At the Court of Appeal Lloyd LJ, giving the leading judgment, said at [48]:

" … it may not be the most attractive proposition for the Commissioners to say that they should be able to make a penalty assessment for a higher amount of evaded tax when they could have, but did not by error, even by incompetent error, raise a tax assessment for the corresponding amount. On the other hand, if it is a case of error, and if the Commissioners can satisfy the burden of proof on them of showing that the taxpayer's conduct was dishonest, it is not obvious that the

> taxpayer should escape not only liability for the amount of tax which was really due from him, but also the separate sanction for his dishonest conduct."
>
> 152. Lloyd LJ then referred at [49] to the fact that VATA s 60 "speaks of tax evaded, as well as of tax sought to be evaded" and said "this shows that a penalty may be levied even if the taxpayer has succeeded in evading liability for the tax which should have been due".
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> 153. At [51] he said:
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> > "There is no express provision in the 1994 Act which links the amount of tax evaded, for the purposes of section 60 , to the amount of tax found to be due, upon a return (if any), an assessment and (if there is one) an appeal … [the alternative reading] would prevent the Commissioners from making a civil evasion penalty assessment in a type of case in which that would not be consistent with the intention of the Act . Thereby, it would limit significantly the scope for using the civil evasion penalty as a sanction for dishonest conduct in relation to VAT."
>
> 154. Arden LJ issued a concurring judgment, referring at [57] to the exact same situation in which HMRC find themselves in the instant appeal (emphases added):
>
> > " … actual evasion can also occur if a person has failed to make a return or made an incorrect return, and the <u>Commissioners acquired sufficient knowledge of that fact to raise an assessment in</u> accordance with the requirements of the 1994 Act but <u>failed to do so within the period allowed for this by</u> sec 73(6) …There is nothing in sec 60 to limit the circumstances in which evasion arise to those in which no error on the part of the Commissioners occurred."
>
> 155. She continued by saying that this outcome "does not lead to an absurd or unfair result. It would not be absurd for Parliament to have concluded as a matter of policy that penalty assessments should be disconnected from the final determination of the VAT due". She supported that statement by reference to the then current legislation, but also said "it may be seen as unfair that taxpayers should have the benefit of [HMRC's] errors where there has been dishonesty" and concluded that "there is no basis for reading into sec 60 a requirement that the amount of the penalty be fixed only by reference to the amount of the VAT finally determined to be due".
>
> 156. Although Sch 24 introduced a new concept, PLR, which the Notes on Clauses say replaced the concept of "VAT evaded or sought to be evaded", there is no indication in either the wording of the new penalty provisions, or in those Notes, that Parliament intended to introduce "a requirement that the amount of the penalty be fixed only by reference to the amount of the VAT finally determined to be due". That would be a significant change from the earlier penalty position, and if it had been intended, we think it likely that the Notes would have referred to it.
>
> 157. For all those reasons, we find that the penalty is not to be reduced because the assessment of the earlier periods has been set aside.

91. We agree with the decision of the Tribunal in *Albany Fish Bar* and adopt their reasoning. Accordingly, we find that the penalty is not to be reduced because the assessments for VAT periods 03/13, 06/13 and 09/13 were out of time.

WHETHER DELIBERATE AND CONCEALED.

92. The penalty for the period 06/14 was charged under Sch 24 on the basis that the behaviour had been deliberate and concealed. Ms Brown submitted that the behaviour was considered deliberate and concealed as the Appellant had made errors in the input tax claim and two invoices provided in support of the input tax claim were found to be false. At [45-46] above we found as fact that Mr Evans had supplied the false invoices to HMRC. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) ("Auxilium") the Tribunal held at [63] that:

> "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document".

93. Sch 24 does not define "deliberate and concealed" but gives the example of "submitting false evidence in support of an inaccurate figure". Accordingly, we find that the behaviour was deliberate and concealed.

WHETHER DELIBERATE AND PROMPTED

94. The penalty for the period 03/13 to 03/14 ("Earlier Returns") was charged under Sch 24 on the basis that the behaviour had been deliberate as errors were found in the 06/14 VAT returns and HMRC considered that it appeared from the VAT returns for the Earlier Returns that similar errors had been made and the errors were deliberate. The disclosure was considered prompted as HMRC were not told about the inaccuracies before they were discovered or were about to discover it. The Tribunal in *Auxilium* at [64] emphasised that the test for determining whether a deliberate inaccuracy occurred was a subjective test and that the question was not whether a reasonable taxpayer might have made the same error or even whether the taxpayer failed to take all reasonable steps to ensure that the return was accurate, "it is a question of knowledge and intention of the particular taxpayer at the time". As stated at [31-32] above, despite requesting information and records to verify the Earlier Returns, no information was provided by Mr Evans nor was any explanation or evidence put before the Tribunal to explain the Earlier Returns. At [9] above, we found that Mr Evans submitted the Earlier Returns and, at [52-53] above, we found that the Appellant's business did change during the VAT period 03/13 to 03/14. Accordingly, we find that the inaccuracy in the Earlier Returns was a deliberate inaccuracy and that Mr Evans did knowingly and intentionally provide inaccurate documents to HMRC. At [47] above, we found that the disclosure was prompted as Mr Evans believed that HMRC had or were about to discover the errors.

REDUCTION FOR DISCLOSURE

95. Sch 24, paragraph 10 provides that a penalty for deliberate and concealed behaviour is a maximum of 100% and a minimum of 50% of the Potential Lost Revenue ('PLR') and for deliberate but not concealed is a maximum of 70% and a minimum of 35% of the PLR. Sch 24, paragraph 9 provides for mitigation of the penalty within the 50% or 35% band depending on the "quality" of the person's disclosure divided into "telling", "helping" and "giving".

96. The behaviour in respect of the VAT return for period 06/14 was considered deliberate and concealed with prompted disclosure. Mr Sandberg mitigated the penalty by 15% on the basis that the Appellant admitted to HMRC that the return was inaccurate but provided no further information (10% reduction), for providing minimal information following requests to information and documentation (5%) and nil for helping HMRC understand it. The overall penalty was reduced by 7.5% (15% of the available band of 50%) providing a penalty percentage of 92.5%.

97. The behaviour in respect of the Earlier Returns was considered deliberate with prompted disclosure. The disclosure was considered prompted because HMRC were not told about the inaccuracies before they were discovered or were about to be discovered. No reduction was given for the quality of the disclosure as the requested information was not provided by the Appellant such that the penalty was 70% of the PLR and HMRC did not consider that there were any special circumstances which would reduce the penalty.

98. Mr Evans submitted that insufficient weight had been given to the fact that he had disclosed the errors and, on that basis, the penalties should be dismissed. Ms Brown submitted that sufficient weight had been given the limited disclosure and assistance provided by the Appellant and that was reflected in the reduction given or the absence of a reduction. We agree

with Ms Brown. We found at [47] above that the disclosure was prompted as Mr Sandberg had already identified the errors and that no further details were provided by the Appellant as to what the “errors” were. We find that that the reductions given by Mr Sandberg fairly represent the limited disclosure and assistance given by the Appellant.

CONCLUSION

99. For the reasons set out above, we confirm the assessments for VAT periods 12/13, 03/14 and 06/14 but set aside those for the earlier periods. The penalties of £10,340.76 and £8,719.20 are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

100. 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.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 02nd JUNE 2023