Neutral Citation: [2024] UKFTT 00788 (TC)

Case Number: TC09278

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/05628

PROCEDURE – application for permission to introduce a new ground of appeal – assessment to VAT pursuant to s 73 VATA – statutory appeal stayed behind Judicial Review proceedings – new 'best judgment' ground being judicial review type of challenge – no real prospect of success – inordinate delay without sufficient explanation – application REFUSED

Heard on: 3 July 2024
Judgment date: 29 August 2024

Before

TRIBUNAL JUDGE HEIDI POON

Between

1ST ALTERNATIVE MEDICAL STAFFING LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Robin Odong, Director, and Mr Seun Ajayi in attendance

For the Respondents: Ms Eleni Mitrophanous KC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

The video hearing took place on Tribunal designated platform. 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. The hearing was therefore held in public

DECISION

INTRODUCTION

1. The Appellant is in the business of providing nursing staff to its clients, and had historically charged VAT on the commission element of the fee invoiced. The Respondents ('**HMRC**') are of the view that the Appellant is liable for VAT on the full value of the fee charged to its clients, and not just on the commission (or margin) of its supply.

2. By notice dated 29 July 2016, HMRC issued assessments pursuant to section 73 of the VAT Act 1994 ('**VATA**') in relation to seven VAT periods 09/14, 12/14, 03/15, 07/15, 10/15, 01/16, 04/16 in the overall quantum of £265,590, which has been adjusted downwards to £221,325 as the sum now in dispute.

3. On 10 July 2017, the Appellant lodged a notice of appeal against the VAT assessments. The appeal was stayed pending on separate proceedings in relation to the Appellant's judicial review claim.

4. On 15 August 2023, the Tribunal issued directions to require the Appellant to confirm and clarify its position in relation to its grounds of appeal. In response, the Appellant lodged an application dated 28 August 2023 (the **'Application**') for permission to add a new ground of appeal. HMRC opposed the application to adduce the new ground of appeal.

5. The interlocutory hearing was for the sole purpose of determining whether the Appellant should be permitted to adduce the new ground of appeal under the heading. The Appellant was formerly represented, but it does not have representation for this interlocutory hearing.

BACKGROUND

6. It has been seven years since the Notice of Appeal was first lodged in July 2017. The procedural history of this appeal is important background to the current Application. It is expedient to outline the grounds of appeal that had been advanced at various stages in the protracted history of this appeal.

Grounds stated in Notice of Appeal

7. Morrisons Solicitors LLP was the representative for the Appellant in lodging the Notice of Appeal of 10 July 2017, wherein the grounds of appeal were stated under one main heading in bold typeface: '*Exemption under Group 7 of Schedule 9*'. Under this broad heading, the Notice of Appeal continued by referring to, *inter alia*, Schedule 9 provisions, VAT Notice 701/2, and the following two references:

(1) HMRC Notice 701/57 on 'Nursing Agencies Concession' (the '**NAC**'), at paragraph 6.3, which states:

> 'However if the employment business maintains the direction and control of its health professional staff to make a supply of medical care directly to a final consumer, then the employment business is providing medical services rather than merely a supply of staff. In these circumstances, the business is making an exempt supply of health services.'

(2) 'A letter from HMRC VAT enquiries team to another taxpayer' (HB/90-redacted):

> 'Our internal guidance VATHLT2360 confirms that HMRC accepts that the exemption will apply, irrespective of the staffing issue, where a "nursing agency" supplies a registered nurse under Item 1(d), Group 7, Schedule 9 of VATA 1994, or an unregistered nursing auxiliary who is directly supervised by a registered nurse, or who are supplied to a hospital or similar institution,

> as described in Item 4, Group 7, Schedule 9 of VATA 1994, and where they perform services which are directly part of the care made to the patient.'

Application to 'refine' grounds of appeal

8. By email dated 19 April 2018, the Appellant, together with Delta Nursing Agency Ltd ('**Delta Nursing**' or 'Delta'), applied to the Tribunal to 'refine' its grounds of appeal, whereby:

> (1) Ground 1 is that their supplies were exempt under Group 7 Schedule 9 of VATA.
>
> (2) Ground 2 is that the Appellant had a legitimate expectation that it may retrospectively rely on the NAC in circumstances where HMRC had previously expressed the view that Delta Nursing, (in common ownership with the Appellant) was acting as an agent in a letter dated 14 January 2004 (the '**2004 Letter**').

9. In response, HMRC applied for the conjoined appeals to be struck out, on the basis that *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) is the authority which establishes that the First-tier Tribunal ('**FTT**') has no jurisdiction to hear an argument based on legitimate expectation.

Hearing to determine applications

10. A hearing on 12 November 2018 before the FTT (Judge Gillett) took place to determine the Appellant's application (joined with Delta) to amend its grounds and HMRC's strike-out application of the proposed amendment. The Appellant was represented by Michael Firth, of counsel, on instruction by Morrisons Solicitors. In a decision released on 31 January 2019, the FTT granted the Appellant's application to amend its grounds, which are recorded in the FTT decision as follows.

> '[10] The appellants' original grounds of appeal were:
>
> > "The appellants maintain the direction and control of their health professional staff and the supply therefore falls to be treated as exempt under Group 7 Sch 9 VATA 1994, in accordance with para 6.3 of HMRC Notice 701/57, as a supply of medical services."
>
> [11] They now seek to add a further ground of appeal:
>
> > "In accordance with EU law the appellants have a legitimate expectation that they may rely on the letter from HMRC dated 14 January 2004."'

11. The 2004 Letter is not included in the Hearing Bundle ('**HB**') for the present proceedings. From the FTT decision of 31 January 2019, the 2004 Letter was related in terms as follows:

> '[5] … a letter from HMRC, dated 14 January 2004, addressed to Delta, which states that Delta is liable to account for VAT on the commission element because it is acting as agent rather than principal because the staff were not Delta employees. The same letter confirms that Delta's supplies of nursing staff, but not support staff, would be treated as exempt if Delta acted as principal.'

12. The FTT refused HMRC's strike-out application against the proposed amendment to the grounds of appeal, having heard Mr Firth's argument on the jurisdictional issue that:

> (1) The cases of *Total Technology (Engineering) Limited v HRMC* [2012] UKUT 418 (TCC) and *BAT Industries Plc v HMRC* [2017] UKFTT 558 (TC)('*BAT*') showed that the First-tier Tribunal could consider EU law based on concepts of proportionality and legitimate expectations in appropriate circumstances.

(2) The relevant principle in the Appellant's case concerns EU principle of legitimate expectations, which was thought to be within the jurisdiction of the FTT in *BAT*, and is to be distinguished from *Noor* where the Upper Tribunal considered the application of UK public law principle of legitimate expectations.

HMRC's appeal to the Upper Tribunal

13. HMRC applied for permission to appeal against the FTT decision and was refused by Judge Gillet. As respects the NAC, the FTT made clear in its refusal decision that:

> 'Since the NAC is a concession I fully accept that the tribunal has no jurisdiction to consider whether or not it should be applied, and nothing in my decision was intended to imply the contrary.'

14. HMRC successfully applied to the Upper Tribunal ('**the UT**') for permission to appeal against the FTT's decision of 31 January 2019. In the application to the UT for permission to appeal, HMRC highlighted that the Appellant's amended ground on legitimate expectation had changed from its iteration in the email application of April 2018, which was in reliance on the NAC, to direct reliance on the letter from HMRC to Delta Nursing dated 14 January 2004.

15. The UT appeal was listed to be heard for 16-17 June 2020 but was vacated and stayed on 20 February 2020 pending the determination of a claim for judicial review that had been brought on 26 July 2018 by the Appellant in conjunction with Delta Nursing ('**the JR Claim**').

Judicial Review proceedings

16. The JR Claim was made on the grounds that the assessments to the Appellant and Delta were issued in breach of: (a) a legitimate expectation arising out of a letter written to Delta by HMRC on 14 January 2004, and (b) a legitimate expectation that the NAC could be relied on.

17. In the JR Claim proceedings, the Appellant and Delta were represented by Mr Firth, and HMRC as defendants were represented by Ms Mitrophanous KC. The High Court dismissed the JR Claim in its judgment *R(oao First Alternative Medical Staffing Ltd and another) v Revenue and Customs Commissioners* [2021] EWHC 882 (Admin), wherein the assessment on Delta was recorded as in the total sum of £1,865,246 for the periods 03/13 to 09/16. (Delta has since gone into liquidation.)

The 2004 Letter

18. The High Court's decision records at [7] that the 2004 Letter followed from a visit by a VAT officer to Delta's premises and a file note by the officer indicates that Delta was unsure whether it was acting as an agent or principal. The 2004 Letter (cited at [8]) by the officer referred to Delta 'acting as "agent" for the employment of temporary staff rather than as a "principal" i.e. where staff are your employee'. The court rejected this ground of claim for reasons, inter alia, as stated at:

> '[32] I cannot accept that the 14 January 2004 letter could give rise to a reasonable expectation in a reasonably prudent economic agent that a business operating as Delta operated would be regarded as supplying nursing staff as an agent between 2013-16, … The letter did clearly state that position as at the date that it was written, but HMRC published a range of materials over the subsequent years which contradicted, or were at least inconsistent with, the position adopted in the letter. A reasonably prudent trader in the position of Delta would have been aware long before 2013, if necessary through taking specialist advice (a) that HMRC no longer stood by the analysis in the 14 January 2004 letter that Delta would only be a

> principal if it employed its nursing staff, and (b) that Delta did not fulfil the criteria adopted by HMRC as indicative of agent status …'
>
> [42] … it was not unfair for HMRC to depart from the position stated in the 14 January 2004 letter, and certainly not unfair to the required very high level [set out in *R (Hely-Hutchison) v HMRC* [2017] EWCA Civ 1075]. The short point is that the assessments under challenge covered periods which fell a minimum of nine years after the letter and four years after the first of a series of publications which made clear to the informed reader that the position stated in the letter regarding agent status was no longer regarded by HMRC as correct. …'

Reliance on the NAC

19. On the ground of claim in reliance on the NAC, the High Court decision records at [19] that HMRC did not dispute that 'the Claimants at all material times satisfied the eligibility criteria set out in the NAC', but it was submitted that:

> '… the NAC cannot apply to the Claimants because they did not choose to apply it at the time that relevant services were supplied (but only relied upon it retrospectively, when it appreciated that HMRC was not proposing to require it to account for VAT on the basis that it had been supplying staff as a principal).'

20. Further, the Claimants' reliance on HMRC's different application of the NAC in the case of another taxpayer, Global Care Link Ltd ('**GCL**') which appears to have been permitted to invoke the NAC retrospectively was rejected by the High Court for reasons stated at [66]:

> 'The Claimants relied upon the treatment of GCL … in order to contend that it was a breach of EU law principle of equal treatment not to permit them to invoke the NAC retrospectively. The facts surrounding the treatment of CGL are sparse. However, … if HMRC did permit retrospective reliance upon the NAC, that was not a correct interpretation of what the concession permitted. The material point for the purposes of the principle of equal treatment is that the principle cannot be used to compel an authority which acts in error to promulgate and perpetuate that error by applying it to others (see, for example, *Sub One Ltd v HMRC* [2014] STC 2508, per McCombe LJ at §90: "there is no EU law right in a taxpayer … to be treated in the same way as other taxpayers who secured an historic windfall due to a misapplication of law")."

Whether retrospective reliance on the NAC

21. The High Court rejected the JR Claim. Permission to appeal was refused by the High Court, while partial permission was granted by the Court of Appeal in relation to the issue whether the Appellant and Delta could rely on the NAC by invoking it retrospectively. It was common ground that the Appellant had acted as principal (rather than as agent) and the Appellant sought to rely on the NAC retrospectively to exempt its supplies a matter of domestic law, and on legitimate expectation and legal certainty grounds under EU law.

22. In *R (oao First Alternative Medical Staffing Ltd and another) v Revenue and Customs Commissioners* [2022] EWCA Civ 249, the Court of Appeal dismissed the Claimants' appeal, holding that the NAC could not be relied on as a matter of either domestic or EU law because:

> '[39] … the NAC would be understood by the ordinarily sophisticated taxpayer as requiring a choice to be made in relation to each supply at the latest by the time the client is invoiced in respect of that supply. That is

> because the choice to exempt a supply requires positive action by the taxpayer. To "exempt" a supply means not to charge or account for VAT on it. The positive action required by the taxpayer is to exclude, rather than include, VAT when invoicing its client. The choice 'to exempt' a supply is therefore one that has necessarily to be made at the time of the supply.'

Conclusion of the JR Claim

23. The JR Claim proceedings came to an end when permission to appeal to the Supreme Court was refused on 28 October 2022. In summary, the judgments on the JR Claim held that the Appellant could not rely on either a domestic law or EU law legitimate expectation based on the 2004 Letter; it could not rely on the NAC or a legitimate expectation arising from the NAC; and it could not complain of breach of legal certainty, or of unequal treatment arising from its reliance on a letter to another trader, Global Care Link Ltd.

HMRC's application for directions

24. Upon the conclusion of the JR proceedings, HMRC sought confirmation from the Appellant and Delta whether they still intended to pursue their statutory appeals. Delta (in liquidation) withdrew its appeal as confirmed by the appointed liquidators, but the Appellant failed to confirm its position.

25. On 9 June 2023, HMRC applied to the Tribunal for directions to require the Appellant to state whether it intended to pursue its statutory appeal and, if so, which of its previously identified grounds of appeal (if any) it intended to pursue. In their application, HMRC identified the Appellant's grounds of appeal that had been advanced so far in terms as follows.

> (1) Ground 1: the Appellant's supplies were exempt under Group 7 of Sch 9 to VATA (per Notice of Appeal in July 2017).
>
> (2) Ground 2: the reference of the NAC to the Appellant's case (per Notice of Appeal).
>
> (3) Ground 3: that under EU law the Appellant had a legitimate expectation that it could rely on the NAC retrospectively, particularly in view of the 2004 Letter from HMRC to Delta (per application in April 2018 to 'refine' its grounds).
>
> (4) Ground 4: in accordance with EU law the Appellant had a legitimate expectation that it could rely on the 2004 Letter (as pursued at the November 2018 hearing, being a different legitimate expectation ground from Ground 3 as 'refined' in April 2018).

26. In that application, HMRC explained that the sole ground on which the Appellant could pursue its appeal before the Tribunal was Ground 1; that Ground 2 was in fact not a ground at all and had been substituted by Ground 3; in turn Ground 3 had been substituted by Ground 4. Further, and in any event, all of Grounds 2, 3 and 4 could not be pursued in the light of the judicial determinations in the Appellant's failed JR Claim. Further HMRC's UT Appeal, which was stayed and concerned the question whether the FTT had jurisdiction to consider Ground 4, became academic in view of the JR decisions and could be withdrawn once the Appellant confirmed that it was not seeking to pursue Ground 4 (in any form) before the Tribunal.

27. By Order of Judge Bailey dated 15 August 2023, the Tribunal directed the Appellant to confirm which of its previously identified grounds of appeal (if any) it now intends to pursue.

Appellant's application to amend grounds of appeal

28. By notice dated 28 August 2023 under the heading 'Application to Amend its Grounds of Appeal' lodged by Mr Micheal Firth, who had acted as counsel for the Appellant

throughout the JR proceedings, the Appellant's position was confirmed (at paragraphs 2 to 4) as follows:

> '2. The Appellant no longer pursues the grounds of appeal based on legitimate expectation (in reliance on either HMRC's representation that the Appellant was an agent or in reliance on the nursing agencies concession).
>
> 3. The Appellant maintains that its supplies were exempt under VATA 1994, Schedule 9, Group 7.
>
> 4. The Appellant also submits that the assessment against it was not raised to best judgment.'

29. The Application continues to set out the following two grounds that the Appellant now seeks to advance in pursuing the appeal.

(1) Under the heading of 'Exemption' – a claim that its services were exempt under Items 4 and/or 9 of Group 7 of Schedule 9 VATA (the '**exemption'** ground) at paragraphs 5 to 20 of the Application.

(2) Under the heading of 'Best Judgment' (the new '**best judgment'** ground) at paragraphs 21 to 25 of the Application in terms as follows:

> '21. The Appellant respectfully submits that the assessment on the Appellant (dated 29 July 2016 and relating to period from 09/14 to 04/16) was not made to best judgment.
>
> 22. An assessment is not made to best judgment where HMRC have acted perversely:
>
> > "… The circumstances in which the FTT can decide that the assessment was not raised to the best of the Commissioners' judgment, and therefore should not have been made at all, are very limited, essentially being restricted to cases where the Commissioners have acted perversely or in bad faith. ...." (*Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115 (TCC), §11).
>
> 23. The Appellant does not suggest that HMRC acted in bad faith.
>
> 24. In this case, the officer looked at the Appellant's corporation tax returns and made a fundamental error in believing that a taxpayer had to "apply for an exemption" which, on the basis that the Appellant had not done that, meant that VAT was chargeable:
>
> > "In response to the point made on page 2, paragraph 6 of the above-mentioned letter, I wish to clarify that I thought you had to apply for an exemption if you were making exempt supplies, but I now realise you do not have to. This would only apply to the taxpayers making zero rated supplies who would like to be exempt from registering for VAT."
>
> 25. The Appellant submits that it was irrational for the officer to leap in and raise assessments based on such a serious failure to understand a basic VAT concept. That point is heightened given that HMRC were under no pressure to do so.'

HMRC's response to the Application

30. By notice dated 13 September 2023, HMRC notified the Tribunal of their withdrawal of the UT Appeal, and set out their response to the Appellant's Application to amend its grounds of appeal, whereby:

(1) The Notice of Appeal lodged on 10 July 2017 included a claim that the Appellant's supplies of healthcare staff were exempt from VAT under Group 7, Sch 9 VATA; the claim referred to Items 1(d), 4 and 9 of Group 7. Item 1(d) is no longer relied on by the Appellant; HMRC do not object to Items 4 and/or 9 being pursued as a ground of appeal.

(2) The addition of the ground that the assessment was not made to 'best judgment' is a new ground, and HMRC object to the Application for permission to amend.

Appellant no longer relied on Item 9

31. Having considered HMRC's objection to a new ground being added, the Tribunal issued directions on 31 October 2023 to require the Appellant to provide (a) further and better particulars of its grounds of appeal as respects its supplies being exempt pursuant to Item 4 and/or Item 9 of Group 7 Schedule 9 to VATA, and (b) an explanation for the delay in seeking to amend its grounds of appeal to include the 'best judgment' ground.

32. By letter dated 19 November 2023, Mr Odong wrote in response to the directions, wherein the Appellant withdrew its reliance on Item 9. As regards an explanation for the delay of bringing the 'best judgment' ground, Mr Odong stated that:

> 'The above matters … were always within the scope of instructions and perhaps within the reasonable response throughout. In the interest of justice, however, we would surmise that the previous legal representatives would offer their best efforts to provide the analysis required in the circumstances. … We do not believe that the Respondent would suffer any prejudice …'

HMRC's objections

33. In response to the Appellant's letter of November 2023, HMRC applied on 5 December 2023 for a hearing for the Application to be considered, together with a set of proposed case management directions.

The lateness of the Application

34. HMRC submit that the Application is made 'extremely late' and no explanation has been put forward. In the context of appeals under section 83G VATA having to be brought within 30 days of the date of assessment, the Application made on 28 August 2023 was an extremely long delay of over six years. Further, there had been other opportunities to amend grounds:

(1) The Appellant applied to amend its grounds in 2018, which resulted in a hearing in November 2018, and did not seek to rely on the new Best Judgment ground at that stage.

(2) There was a live Appeal at the UT regarding this matter and it was open to the Appellant to introduce the new ground but it failed to do so.

(3) The Appellant has been engaged in litigation in relation to HMRC's decisions and assessments (albeit by way of judicial review) for years, and had ample opportunity to amend its grounds but had failed to do so.

(4) The conclusion of the JR proceedings was on 22 October 2022, and it took nearly a further year before the Application to seek to add the 'best judgment' ground.

(5) It is notable that the Appellant has only made its Application, following the Tribunal Order of 15 August 2023 to clarify its position.

The context of the text relied on for the new 'best judgment' ground

35. The Appellant's Application cites the putative text as from HMRC without giving any reference. HMRC have identified the text as part of a letter dated 4 November 2016 from an 'investigator', Officer Adeoye (the '**Officer**'). The letter is addressed to a Mr Ahmed (Accountant to the Appellant) with the heading of the Appellant's business name and its VAT registration number.

> 'I refer to your letter dated 3rd October 2016 and our subsequent conversation on 24th October 2016.
>
> In response to the point made on page 2, paragraph 6 of the above mentioned letter, I wish to clarify that I thought you had to apply for an exemption if you were making exempt supplies, but I now realise you do not have to. This would only apply to the taxpayers making zero rated supplies who would like to be exempt from registering for VAT.'

36. The cited text in the Application is the second paragraph of the 4 November 2016 letter, which makes express reference to page 2 of a separate letter dated 3 October 2016 (sent by Mr Ahmed, the Appellant's accountant).

Correspondence leading to the November 2016 letter

37. Included in the Bundle is the correspondence that HMRC have compiled that led to the November 2016 letter cited in the Application.

(1) 5 January 2016 – the Officer wrote to the Appellant suggesting a date for a visit to check its VAT returns and PAYE returns.

(2) 18 January 2016 – Mr Odong for the Appellant responded that due to ongoing medical treatment, he would not be able to meet the Officer and would not be in contact until 19 February at the earliest.

(3) 15 April 2016 – The Officer wrote to Mr Odong again setting out that she had telephoned on 7 April 2016 but was told that Mr Odong had stepped out of the office, that she had left a message to call her back, but that her call had not been returned.

(a) Further, the Officer set out that it appeared from the Appellant's Corporation Tax return that the Appellant ought to have been registered for VAT since 2011.

(b) The Officer requested evidence to show when the VAT threshold had been exceeded and a list of the taxable supplies made during that period.

(c) The Officer set out that unless such evidence was received by 16 May 2016, she would take steps to pro rata the turnover figures and backdate the effective date of registration accordingly.

(d) The Officer also noted that the 03/14 VAT return was still outstanding and asked for that to be filed without further delay.

(4) 14 June 2016 – The Officer wrote to Mr Odong again noting that he had not replied to her and that she would be taking the following action:

(a) backdate the Appellant's effective date of registration to 1 November 2010;

(b) all its sales would be treated as standard rated in the absence of the provision of any records by the Appellant resulting in an assessment of £303,028.

(5) 8 July 2016– a different HMRC Officer (Wheelband) wrote to the Appellant stating that its effective date of registration had been changed to 1 November 2010.

(6) 29 July 2016 – the Officer issued a notice of assessments made for the periods 09/14 to 04/16 amounting to £265,590.00.

(7) 3 August 2016 – Mr Odong wrote to Officer Wheelband stating that his letter had been sent to the wrong address and only found on 5 August 2016 and asking for future correspondence to be sent to its accountant. Mr Odong also disputed the new effective date of registration and asked that new information be taken into account. This was said to be that Notice 701/57 para 6 had not been taken into account and that it showed that the Appellant was excluded from having to register.

(8) 8 August 2016– Mr Odong wrote to the Officer stating that the Officer's letter was sent to the wrong address and asking for future correspondence to be sent to its accountant. Mr Odong asked for the decision to assess to be considered again on the basis that he was not 'aware of any examination of our records by officer(s) of HMRC' and that the company believed that there had been an error.

(9) 8 August 2016 – the Appellant's accountant (Ahmed & Co) wrote to Officer Wheelband stating that the letter should be treated as a formal appeal to 'postpone collection of VAT, surcharge, interest £380,031.99 for the period from 30-06-2014 to 14-04-2016 on the ground that this amount is estimated and our client has *claimed exemption in a separate letter* to you under HMRC VAT Notice 701/57 Paragraph 6' (emphasis added).

(10) 19 August 2016 – the Officer responded to the Appellant's accountant stating that the Appellant had not granted access to any business records and had failed to reply to telephone calls and letters of 28 January 2016, 15 April 2016 and 14 June 2016 resulting in assessments to best judgment. The Officer asked for the provision of further information, including when the Appellant had applied for exemption and what HMRC's response had been, which part of Notice 701/57 para 6 was being referred to and the related relevance and seeking access again to the Appellant's records and the VAT return for 03/14.

(11) 3 September 2016 – the Appellant's accountant wrote to the Officer setting out that Mr Odong could not grant access to records in January 2016 due to his medical treatment, that some letters had not been received but that the assessment notice had been received and responded to and that Mr Odong had no record of receiving any phone calls. It was said that the Appellant would be happy to facilitate an assessment of its records and that a date of availability would have to be considered in that regard and that the Appellant was relying on the NAC.

(12) 23 September 2016 – the Officer set out fully the actions she had taken in terms of correspondence and telephone calls and that it was the Appellant's responsibility to inform HMRC of any change of address. The Officer pointed out that she had still not been sent any evidence in relation to the NAC and proposed a date for inspection of the Appellant's business records (25 October 2016).

(13) 3 October 2016 – the Appellant's accountants wrote to say the proposed date was inconvenient (without proposing an alternative date) and that in terms of evidence it had supplied part of Notice 701/57 and explained that reliance on the NAC did not require any application for any exemption and indeed that the Appellant ought not to have accounted for any VAT at all.

(14) 4 November 2016 – the Officer stated that she wished to clarify that she had thought an exemption had to be made for exempt supplies but that this would not apply. As regards the NAC and para 6.5 of Notice 701/57, the Officer stated that evidence

would have to be provided that the conditions were met and that she considered that the only way to examine the Appellant's liability was to arrange a visit and suggested another date (28 November 2016).

(15) 28 November 2016 – the Officer attended the Appellant's accountant's offices. Mr Odong was not present it was said due to medical reasons but its accountant (Mr Ahmed) was present. The visit report notes that Mr Ahmed was unable to answer a number of questions asked and that he stated that there were no exempt supplies; some records were supplied but that the 'staffing placement procedure' was missing; that the Officer explained that the NAC could not be applied retrospectively and that the 03/14 VAT return was still outstanding.

(16) 22 December 2016 – Following the visit on 28 Nov 2016 which Mr Odong did not attend and which took place at the Appellant's accountant's office with sight of only some records, the Officer wrote to the Appellant's accountant explaining that the assessment would stand, and that the NAC could only be applied prospectively rather than retrospectively.

DISCUSSION

38. The case management powers under rule 5 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 conferred on the Tribunal to decide whether or not to give permission to a party to amend its grounds of appeal are to be exercised with the overriding objective to deal with cases fairly and justly under rule 2.

Case law on permission to amend grounds

39. In considering an application to amend grounds of appeal, the principles applied in relation to the Civil Procedure Rules in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) were adopted by the Upper Tribunal in *Denley v HMRC* [2017] UKUT 340 (TCC), and in *Asiana Limited v HMRC* [2019] UKFTT 267 (TC) and *CBD Flower Shop v HMRC* [2023] UKFTT 00107 (TC).

40. An application to amend grounds of appeal is in effect an application for relief from sanctions, and in this regard, case law principles enunciated in *Martland v HMRC* [2018] UKUT 0178 and *McEnroe v HMRC* [2021] UKFTT 94 (TC) are equally relevant.

41. In *Quah Su-Ling* Mrs Justice Carr stated the general principle in considering the merit of the proposed amendment as follows:

> '[36] An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which in inherently implausible, self-contradictory or is not supported by contemporaneous documentation.'

42. In relation to 'very late applications to amend', Mrs Justice Carr referred to a number of authorities at [37] of *Quah Su-Ling* and gave a helpful summary at [38].

> 'Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> (a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between justice to the applicant f the amendment is refused, and injustice to

> the opposing party and other litigants in general, if the amendment is permitted;
>
> (b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> (c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> (d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> (e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that he payment of costs may not be adequate compensation;
>
> (f) it is incumbent on a party seeking the indulgence of the court to allowed to arise a late claim to provide a good explanation for the delay;
>
> (g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and the courts enable them to do so.'

43. Where there is a delay in application for a relief from sanction, the relevant principles are set out at [44] to [46] of *Martland* and summarised below:

(1) When considering applications for permission to appeal out of time, the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be, following the three-stage process: (a) establish the length of delay; (b) the reasons for the delay; and (c) evaluation of 'all the circumstances of the case'.

(2) The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

(3) In doing so, the FTT can have regard to the obvious strength and weakness of the applicant's case; this goes to the question of prejudice. It is important not to descend into a detailed analysis of the underlying merits of the appeal. Citing Moore-Brick LJ in *R(Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 at [46]:

> '… In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play

> when it comes to balancing the various factors that have to be considered at stage 3 of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.'

Case law on 'best judgment' test

44. In *Rahman (trading as Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 1881 ('*Rahman*'), where the challenge was that the VAT assessment was not made to 'best judgment', Chadwick LJ, in giving the lead judgment, set out the 'two-stage approach' in considering the statutory basis of a 'best judgment' assessment as follows:

> '[5] Section 83(p) of the 1994 Act provides both for an appeal "with respect to … an assessment under 73(1)" and for an appeal "with respect to … the amount of such an assessment". That distinction reflects the two distinct questions which may arise where an assessment purports to have been made under s 7391) of the Act. First, whether the assessment has been made under the power conferred under that section; and, second, whether the amount of the assessment is the correct amount of VAT for which the taxpayer is accountable.
>
> [6] The first of those question itself contains two elements: (i) whether the pre-condition to the exercise of the power is satisfied – that is to say, has there been a failure to make returns, keep records or afford facilities for inspection, or has it appeared to the commissioners that returns which have been made are incomplete or incorrect – and (ii) whether the assessment made by the commissioners was made "to the best of their judgment".
>
> The first of those elements is, I suspect, rarely in dispute; but the second element – the need for "best judgment" – has led tribunals to adopt what has been described as a "two-stage approach" to appeals under s 83(p) of the Act. It has become the practice for tribunals to consider, first, whether – on the material available to the commissioners at the time when the assessment was made – the assessment satisfies the "best judgment" test.
>
> It is only if that test is satisfied that the tribunal goes on to consider, as a second stage in the appeal, whether the assessment should be varied – or, as the taxpayer is likely to contend, reduced – by reference to additional material not available to the commissioners or in the light of explanation or argument advanced on the appeal. ….' (Sub-paragraphing added)

45. At stage-one of the 'best judgment' test, the tribunal's jurisdiction is supervisory, as established by principles enunciated in *Van Boeckel v C&E Comrs* [1981] STC 290, and *Rahman v C&E Comrs* [1998] STC 826 ('*Rahman 1*'), and summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v C&E Comrs* [2010] UKUT 115 (TCC) ('*Mithras*') as follows:

> '[11] The principles established in *Van Boeckel* and *Rahman 1* indicate that the FTT's jurisdiction when considering whether an assessment was raised to the best of the commissioners' judgment is akin to a supervisory, judicial review type jurisdiction. The FTT does not have a true appellate function in that it cannot set aside the assessment on the basis that it disagrees with the Commissioners' decision to make the assessment. The circumstances in which the FTT can decide that the assessment was not raised to the best of the Commissioners' judgment, and therefore should not have been made at all, are very limited, essentially being restricted to cases where the Commissioners have acted perversely or in bad faith. Cairnwath J in *Rahman 1* indicated that the "kind of case is likely to be extremely rare" and that in the normal case "it should be assumed that the Commissioners have

made an honest and genuine attempt to reach a fair assessment": see page 835 of [*Rahman 1*] judgment.'

46. At stage-two of the 'best judgment' test, the tribunal's jurisdiction is fully appellate in relation to the quantum of the assessment, as described in *Koca v C&E Comrs* [1996] STC 58, where Latham J (as he then was) after referring to the *Van Boeckel* criteria, went on to say:

> 'But the tribunal has a further function. In determining the appeal the tribunal may have evidence before it which makes it clear that although the assessment was perfectly proper on the information available to the Commissioners nonetheless it should be reduced to give effect to that further evidence, or even further argument based on the material originally before the Commissioners. This function has been clearly recognised in a number of cases, including *Van Boeckel*: see page 64 of the judgment.'

47. In *Mithras* the Upper Tribunal observed the distinction of the tribunal's jurisdiction at the two stages of the 'best judgment' test after a review of the relevant authorities as follows:

> '[16] The observations extracted from the decisions in *Koca* and *Rahman 1* emphasise the point that in an appeal against the amount of an assessment, the Tribunal is not restricted to any kind of quasi-supervisory function which involved referring to the Commissioners' judgment on quantum at the time the Commissioners made their assessment. The Tribunal's function is truly appellate, in that it can consider further information or argument at the hearing of the appeal and reduce the amount of the assessment, thereby substituting its own view on quantum for that of the Commissioners.'

48. In *Rahman 1* Carnwath J indicated that in a normal case, the principal concern of the tribunal should be to ensure that the amount of the assessment, with a note of caution:

> 'In principle there is nothing wrong in the tribunal considering the validity of the assessment as a separate and preliminary issue, when that is raised expressly or implicitly by the appeal, and, as part of that exercise, applying the *Van Boeckel* test. There is a risk, however, that the emphasis of the debate before the tribunal will be distorted. If I am right in my interpretation of *Van Boeckel*, it is only in a very exceptional case that an assessment will be upset because of a failure by the commissioners to exercise best judgment. The danger of the two-stage approach is that it reverses the emphasis.' (p836)

Prospect of success of the new ground

The factual basis

49. The supposed factual basis for the new ground of appeal is stated at paragraph 24 of the Application in terms as follows:

> (a) 'the officer looked at the Appellant's tax returns and made a fundamental error in believing that a taxpayer had to "apply for an exemption"; and
>
> (b) 'on the basis the Appellant had not done that, meant VAT was chargeable'.

50. From the background leading to the notice of assessment, it is clear that at no point in time was the basis of the assessment founded on whether or not the Appellant was required to apply for an exemption. The obtainable facts from the correspondence are the following.

(1) The Officer issued the assessment on the basis that the Appellant was making sales prior to 15 February 2014 (the date on which it had registered for VAT), without providing any explanation at all for this to HMRC, and without engaging with HMRC

in order for its records to be inspected. (See correspondence leading up to the assessment and reiterated by the Officer in her letter of 19 August 2016.)

(2) In particular, the assessment was notified to the Appellant in July 2016, months *before* the letter of 4 November 2016 on which the Appellant relies for its new 'best judgment' ground.

(3) The Appellant's accountant had himself stated on 8 August 2016 that the Appellant had 'claimed exemption in a separate letter'. The Officer then asked on 19 August 2016 for the provision of further information including when the Appellant had applied for exemption and what HMRC's response had been.

(4) The Appellant's accountant stated in his letter of 3 October 2016 that it was relying on the NAC, which did not require an application for any exemption, in terms as follows:

> '… we confirmed and explained that, in accordance with the above legislation [the NAC], our client is not required to apply for any exemption documentation and is also not required to receive any response from HMRC, with regard to exercising and applying the VAT concession to its circumstances.'

(5) It was in response to the accountant's statement that reliance on the NAC did not require any application for exemption that the Officer stated in the 4 November 2016 letter that she had wrongly thought an exemption had to be applied for.

51. The issue as to whether an application for exemption was relevant to the Appellant would appear to have been introduced by the Appellant's accountant, first on 8 August 2016 by stating that the Appellant had 'claimed exemption', and then on 3 October 2016, to state that the Appellant could rely on the NAC, and an application for exemption was asserted to be not in point. The Officer's response of 4 November 2016 was to acknowledge the explanation offered by the Appellant's accountant on 3 October 2016 on the alleged premise that the Appellant could rely on the NAC without having to apply for VAT exemption.

52. Whereas contrary positions had been put forward by its accountant for the Appellant as regards the exemption application, the Appellant now seeks to stake the new 'Best Judgment' argument on a response by the Officer which was in essence an acknowledgement of the explanation provided for the contrary positions by the Appellant's accountant.

53. From the substance and chronology of the correspondence outlined above, I conclude that the critical fact (namely the Officer's reply of 4 November 2016) upon which the allegation of it being 'such a serious failure to understand a basic VAT concept' is plainly unsupported by a proper reading of the Officer's reply in the context of the correspondence.

54. In any event, the VAT assessments had not been raised by reference to whether the Appellant had or had not applied for exemption. The claim that it was 'irrational' for the Officer 'to leap in and raise assessments based on such a serious failure to understand a basic VAT concept' (paragraph 25 of the Application) would appear to have ignored or misunderstood the Officer's reason for raising the VAT assessments.

55. It is surprising that the Appellant, being legally represented, should have put forward the new ground on such tenuous basis. As a matter of fact, the new 'best judgment' ground is devoid of the necessary factual basis for it to be meaningfully argued, and therefore has no real prospect of success.

Tribunal's jurisdiction as regards 'best judgment' assessments

56. In view of the fact that the Appellant is no longer represented, for the basis upon which the new 'best judgment' ground is staked to be put forward to the Tribunal beyond the express wording in the Application, I would go on to consider the potential relevance of the stated ground from the case law perspective.

57. The relevant case law refers to the two-stage approach for considering the potential issues in a 'best judgment' challenge. Whilst not suggesting that HMRC acted in bad faith (paragraph 23 of the Application), the Appellant's challenge on 'best judgment' ground is that the Officer had 'acted perversely', and 'it was irrational' for the Officer 'to leap in' to raise the assessment. The Appellant's 'best judgment' ground is therefore a judicial review type of challenge relevant to stage-one considerations. The Appellant's 'best judgment' ground is not formulated in a way seeking to engage stage-two considerations as regards quantum of the assessment.

58. Given that the new 'best judgment' ground is a judicial review type of challenge seeking to engage the quasi-supervisory jurisdiction of the tribunal, (rather than the full appellate jurisdiction the tribunal has for quantum-related issues), I am of the view that there is no reasonable prospect of this ground succeeding for the following reasons.

(1) The tribunal does not have a true appellate function for judicial review considerations, and cannot set aside the assessment under appeal even if the tribunal hearing the appeal were to disagree with the Officer's decision to make the assessment.

(2) A successful 'best judgment' challenge of the judicial review type is 'extremely rare' as in the normal case 'it should be assumed that the Commissioners have made an honest and genuine attempt to reach a fair assessment': the presumption of regularity.

(3) *Rahman 1* cautions against the 'danger' of reversing the emphasis of its jurisdiction in the two-stage process of consideration, whereby the tribunal were to become unduly drawn on stage-one issues (over which it has no full appellate function) at the expense of its full appellate function at stage-two in relation to the quantum aspect of an assessment.

59. In any event, the stated new 'best judgment' ground by reference to the Officer's response in the letter of 4 November 2016, when properly contextualised, would appear to be a round-about way of raising the judicial review challenge as to whether the Appellant could have relied on the NAC, since the discussion of whether an exemption application was required was ultimately traced back to the Appellant's accountant invoking the NAC as dispensing with the exemption application. To the extent that the JR Claim proceedings had comprehensively settled the claim whether the Appellant could have relied on the NAC, the new 'best judgment' ground, which is essentially framed as a judicial review challenge, has no prospect of success.

Inordinate delay

60. Even if I were to put aside the issue of merits of the new 'best judgment' ground, and consider the Application simply as a procedural matter, the Application would still be refused. The Appellant lodged its Notice of Appeal seven years ago in July 2017, and the long procedural history of the appeal has afforded the Appellant innumerable opportunities to apply to amend its grounds of appeal. I have special regard to the following:

(1) The assessment was confirmed on review (with a reduction to £221,325) by letter dated 14 June 2017. The review officer had sought a meeting for the provision of any further information, but an arranged meeting had been postponed by the Appellant.

(2) As set out in HMRC's review decision, the Appellant's accountant had supplied limited records; stated that the Appellant acted as agent (rather than principal); and its legal representatives had then put forward a series of arguments against the assessments, including the basis whereby the NAC should apply to the Appellant's supplies, and all of these arguments were rejected on review.

(3) Crucially, there was no complaint that the assessment had not been made to best judgment because it had been based on any view as regards the need to apply for an exemption, which is now the Appellant's new ground of appeal.

(4) Further, the Appellant had in April 2018 applied to 'refine' its grounds of appeal, and did not seek to include the 'best judgment' ground at that point.

(5) As HMRC submit, that the Appellant had been in litigation with HMRC for a protracted period of time including the course of the JR proceedings, and had not sought to argue the 'best judgment' ground until recently.

61. Mr Odong's explanation for the inordinate delay was to say: (a) that the 'best judgment' ground was 'always within the scope of instructions'; (b) that it would be in the interest of justice to allow the Application; (c) that HMRC are not prejudiced.

62. It might be that the 'best judgment' ground was 'always within the scope of instructions' to the Appellant's representatives, but that does not detract from the fact that the new 'best judgment' ground as formulated in the Application, and particularised by reference to HMRC Officer's letter of 4 November 2014, has not been hitherto mooted as a ground of appeal.

63. I am not persuaded by Mr Odong's pleading that it is in the interest of justice to allow the Appellant's Application. I have regard to the fact that up to 28 August 2023 when the Application was lodged, the Appellant had been legally represented throughout the course of this appeal, and through the JR proceedings. The Appellant's legal advisers must have weighed up the merits of the various possible grounds of appeal that would be in the best interest of the Appellant to advance at different stages of the long litigation history of the current appeal.

64. To allow this Application will invariably delay the hearing of the substantive appeal further and will be injurious to the interest of justice. The new 'best judgment' ground as formulated would seem, ultimately, to trace back to the issue whether the Appellant could rely on the NAC to dispense with the exemption application. In my view, it is prejudicial to HMRC to have to expend further resources to defend against the new 'best judgment' ground as a judicial review type of challenge, especially when the issue of the Appellant's reliance on the NAC had already been conclusively determined in the Appellant's JR Claim by the High Court and Court of Appeal, which have full judicial review function that this tribunal lacks.

DISPOSITION

65. The Application by the Appellant to introduce the new 'best judgment' ground of appeal is refused. Directions are issued to accompany this Decision for the statutory appeal to progress to a substantive hearing.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

HEIDI POON
TRIBUNAL JUDGE

Release date: 29th AUGUST 2024