Neutral Citation: [2024] UKFTT 00929 (TC)

Case Number: TC09325

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/08235

VALUE ADDED TAX – registration – legitimate expectation – jurisdiction of tribunal to determine legitimate expectation issue - whether legitimate expectation created when HMRC advised taxpayer not to collect VAT – yes – impact on validity of assessment – appeal allowed

Heard on: 19 July 2024
Judgment date: 17 October 2024

Before

TRIBUNAL JUDGE MALCOLM FROST
DEREK ROBERTSON JP

Between

TREASURES OF BRAZIL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Daiane Brambila, Director of the Appellant

For the Respondents: Anne-Laure Ragatt, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against an assessment for underdeclared VAT for the period 12/22.

2. For the reasons set out below, the appeal is allowed.

3. With the consent of the parties, the form of the hearing was video. 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.

THE FACTS

4. The documents to which we were referred were a hearing bundle of 488 pages. Ms Daiane Brambila, Director of the Appellant gave evidence and was cross examined.

5. From that evidence we find the following facts.

6. The Appellant company is a trading business selling jewellery and bags. It was incorporated on 14 March 2022.

7. In September 2022, Ms Brambila considered that the increasing turnover of the business meant that the threshold for mandatory VAT registration would be met in the relatively near future. Ms Brambila therefore instructed her accountant (Ms McCormick) to apply for voluntary VAT registration.

8. Ms McCormick, applied for VAT registration on 21 September 2022, requesting an effective start date of 1 October 2022.

9. Ms McCormick received an email response on 21 September 2022 from HMRC (the "Instruction Email") stating:

> "We've received your application. So we can process it, you need to email us copies of your identity documents. For information on how to do this, sign in to 'Register for VAT' online and view your existing applications.
>
> What happens next
>
> After we get copies of your documents, we'll write to you with a decision on your application. This usually takes us about 30 days.
>
> You should wait until your VAT registration is confirmed before you:
>
> • get any software
>
> • charge customers for VAT
>
> From HMRC VAT team"

10. Relying on the statement that "You should wait until your VAT registration is confirmed before you charge customers for VAT", Ms McCormick advised Ms Brambila that the Appellant only needed to start collecting VAT once she had received the confirmation of the registration from HMRC along with a VAT number.

11. HMRC sought additional evidence of Ms Brambila's identity as a director on 21 September 2022, which was provided by Ms McCormick on the same day.

12. Throughout October and November 2022, Ms. McCormick followed up with HMRC for updates on the VAT registration application.

13. On 16th December 2022, Ms McCormick notified Ms Brambila that she had received an email indicating HMRC was processing the VAT registration.

14. The letter from HMRC confirming VAT registration with effect from 1 October 2022 was dated 10 October 2022. HMRC accept that the date on the letter was incorrect. HMRC's systems indicate that the letter was issued on 17 December 2022. Ms Brambila gave evidence that the letter was not in fact received until 28 December 2022. We accept Ms Brambila's evidence and find accordingly.

15. No explanation has been provided as to why it took almost three months to process the VAT registration.

16. As soon as Ms Brambila had the VAT number, she immediately updated the Appellant's systems and website and started charging VAT on sales.

17. On 7 February 2023 the VAT return for period 12/22 was submitted. The return did not account for any VAT on sales. However, the return did seek credit for input tax of £4,502.02. The overall return therefore sought repayment in the sum of £4,502.02.

18. When asked why the Appellant had not charged output VAT from 1 October 2022 but had nonetheless sought to recover input VAT from that date, Ms Brambila said that the registration was effective from 1 October 2022 and she considered that it was unfair that she should be penalised for HMRC's poor communications and was entitled to the VAT back.

19. Correspondence then ensued in which HMRC sought more details about the return, and the Appellant provided full details of sales and purchases in the relevant period.

20. On 23 May 2023, HMRC wrote to the appellant stating that the output VAT figure should be adjusted from zero to £14,256.95 and the input VAT figure from £4,502.02 to £7,744.93. This resulted in the net VAT due from the appellant being £6,512.02. The letter was stated to be an assessment under section 73 of the VAT Act 1994 ("VATA").

21. The Appellant appealed against that assessment.

THE LEGISLATION

22. Paragraph 9 of Schedule 1 of VATA allows for a person to be voluntarily registered as follows:

> "9 Entitlement to be registered
>
> Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he—
>
> (a) makes taxable supplies; or
>
> (b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,
>
> they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him."

23. We note in passing that the request in the present case was made on 22 September 2022 requesting an effective start date of 1 October 2022. The legislation does not appear to allow for registration to be effective at some point in time after the day the request is made – which would imply that the registration should have been effective from 22 September 2022 rather than 1 October 2022. However, nothing appears to turn on the point.

24. The consequence of being registered is that the Appellant becomes a taxable person obliged to account for VAT pursuant to ss 1, 3 and 4 of VATA.

25. HMRC's assessment power is to be found in s 73 VATA and provides (so far as is relevant):

> "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."

26. The right of appeal to this Tribunal is governed by s 83 VATA. That section includes a long list of matters with respect to which a right of appeal is available. The scope of the appeal right, and the jurisdiction of the Tribunal, differs between the various matters listed, as determined by case law. We have included a selection of the items in the extract below in order to illustrate the variations in appeal rights.

> "83 Appeals
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—
>
> (a) the registration or cancellation of registration of any person under this Act;
>
> (b) the VAT chargeable on the supply of any goods or services or, subject to section 84(9), on the importation of goods;
>
> (c) the amount of any input tax which may be credited to a person;
>
> ...
>
> (o) a decision of the Commissioners under section 61 (in accordance with section 61(5));
>
> (p) an assessment—
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or
>
> (ii) under subsections (7), (7A) or (7B) of that section;
>
> or the amount of such an assessment;
>
> ..."

27. It can readily be appreciated that an appeal against "the amount of input VAT which may be credited" (which implies the need to determine a specific figure) is of a different quality to an appeal against "a decision of the Commissioners" (which implies consideration of the decision in question, and therefore the legality of that decision) and of a different quality again to an appeal against "an assessment".

28. The present appeal is under s 83(p), an appeal against HMRC's assessment that £6,512.02 of VAT was due from the Appellant.

THE ISSUES

29. The Appellant does not dispute that the law may well require that VAT be accounted for from the date on which the registration takes effect. However, Ms Brambila relies on the clear statement from HMRC that VAT should not be charged.

30. HMRC correctly identified this as a matter of legitimate expectation but argue that the Tribunal does not have jurisdiction to consider such matters.

31. This gives rise to three issues to be determined.

(1) Does this Tribunal have jurisdiction to consider matters of legitimate expectation in the present appeal?

(2) Did the Appellant have a legitimate expectation?

(3) If the Appellant did have a legitimate expectation, what is the effect on the assessment?

32. We take each point in turn.

DOES THIS TRIBUNAL HAVE JURISDICTION TO CONSIDER MATTERS OF LEGITIMATE EXPECTATION IN THE PRESENT APPEAL?

33. HMRC rely on the case of *HMRC v Noor* [2013] UKUT 071 (TCC) to suggest that this Tribunal does not have jurisdiction to consider matters of legitimate expectation. Ms Ragatt, for HMRC drew our attention to paragraph [87] in which the Upper Tribunal held:

> "in our view, the F-t T does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax…. legitimate expectation is a matter for remedy for judicial review in the Administrative Court; the FtT has no jurisdiction to determine the disputed issue in the context of an appeal under section 83."

34. However, the position has evolved somewhat since the decision in *Noor*.

35. In particular, in *KSM Henryk Zeman SP z oo v HMRC* [2021] UKUT 182 (TCC) ("*Zeman*") the UT considered that it was clear from the list of appealable items in s 83 VATA that the FTT did not have a general supervisory jurisdiction. However, that was not the same thing as saying that a taxpayer may not in at least certain of the cases described in s 83(1) defend themselves by challenging the validity of a decision on public law grounds. The starting point was that they should be able to. The question which arose was whether the statutory scheme expressly or by implication excluded the ability to raise a public law defence.

36. In relation to s 83(1)(p) (the provision engaged in the present case) the Upper Tribunal in *Zeman* began by looking at the wording of the section itself (at [71] et seq):

> "[71] In the present case, the relevant statutory language provides that if certain conditions are fulfilled, the Commissioners 'may assess the amount of VAT due … to the best of their judgment' (s 73(1)), and if they do then an appeal shall lie to the tribunal 'with respect to' the assessment or its amount (s 83(1)(p)).
>
> [72] The word 'may' is permissive, not mandatory. It must follow that an assessment is made not by operation of the statute but by a discretion exercised by HMRC. We prefer a construction of s 73(1), and therefore of s 83(1)(p), which recognises and gives effect to that word. We therefore respectfully disagree with the approach adopted in *Gore* at [30] and [44] (see [65] and [67] above), which treats the word 'may' as descriptive of a separate enforcement function and attributes no weight or meaning to it in the context of s 73(1) looked at on its own terms.
>
> [73] A taxpayer has a right of appeal to the tribunal 'with respect to … an assessment … under section 73(1).' Although made in a different context, and indeed in the context of statutory language which is narrower than that in s 83(1)(p) (see [39] above), we agree with the comments of Sales J in *Oxfam* at [63] as to the ordinary and natural meaning of the phrase 'with respect to'. As a matter of language, it defines the scope of the tribunal's appellate jurisdiction not by reference to any particular legal regime or type of law, but instead by reference to the subject-matter of the subsection."

37. The UT also considered the relevant policy considerations (at [82]):

> "[82] In such circumstances, it seems to us there are good policy reasons for not adopting a construction of s 83(1)(p) which strictly limits the appellate jurisdiction of the FTT in the manner identified in the *Gore* decision at [30] (see [65] above), and which therefore excludes consideration of a legitimate expectation argument. We refer again to the comments of Sales J in *Oxfam* quoted at [39] above. Were one to adopt such a restrictive approach, there would be an obvious risk of duplication, delay and potential injustice given the potential for disputes to arise as to which forum any particular challenge should be brought it."

38. The UT then concluded firmly that legitimate expectation issues could be considered in an appeal under s 83(1)(p), as follows (at [84]):

> "[84] Coming back then to where we started our analysis, the critical question in this case (see *Beadle* at [44]) is whether the relevant statutory scheme expressly or by implication excludes the ability to raise a public law defence of legitimate expectation (again, see *Beadle* at [44]). For all the reasons given above, we do not consider that s 83(1)(p) does exclude that ability. On the contrary, on the facts of this case and given the broad subject-matter of s 83(1)(p), we see strong reasons for thinking that it would be artificial and unworkable to exclude a defence based on the public law principle of legitimate expectation from the tribunal's appellate jurisdiction. We therefore consider that the FTT did have jurisdiction to determine that question in this case."

39. We are in complete agreement, and are in any event bound by, this decision.

40. It has been suggested (see *Queenscourt Ltd v HMRC* [2024] UKFTT 460 (TC)) that the Upper Tribunal's decision on the question of jurisdiction was *obiter* and not binding. With the greatest respect to our colleagues, we differ from that view.

41. In *Zeman*, the Upper Tribunal first decided that the taxpayer did not in fact have a legitimate expectation, before considering the question of whether or not the First-tier Tribunal would have had jurisdiction to consider such issues.

42. The fact that the Upper Tribunal decided the question of whether or not the taxpayer had a legitimate expectation at an early stage in its reasoning meant it did not need to consider the jurisdiction question. However, despite not needing to, the UT did in fact go on to consider the jurisdiction point.

43. Therefore, the entire decision of the Upper Tribunal was (i) that the First-tier Tribunal had jurisdiction but (ii) that there was no legitimate expectation. If the Upper Tribunal had decided there was no jurisdiction then the legitimate expectation question would have itself been redundant. The jurisdiction point was therefore a constituent part of the decision made. We do not consider that the fact that the Upper Tribunal could have chosen not to determine the jurisdiction question means that it is open to this Tribunal to treat the jurisdiction question as *obiter*.

44. We are supported in that view by authorities such as *Jacobs v LCC* [1950] A.C. 361, (at p369 per Lord Symonds):

> "there is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which *ex facie* decided two things would decide nothing."

45. In any event, even if the Upper Tribunal's analysis in the *Zeman* case were not binding upon us, we consider that it is a correct statement of the law.

46. As such, we conclude this Tribunal does have jurisdiction to consider the Appellant's legitimate expectation argument.

DOES THE APPELLANT HAVE A LEGITIMATE EXPECTATION?

47. The principles the Tribunal should apply in determining whether the Appellant had the required legitimate expectation are those set out by the High Court in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Limited* [1990] 1 WLR 1545 at [1569]:

(1) The first requirement is that the taxpayer should put all their cards face upwards on the table.

(2) The second requirement is that "the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification".

48. In addition, the Appellant can only rely on legitimate expectation if HMRC's conduct is "conspicuously" unfair or "so outrageously unfair that it should not be allowed to stand" (see *R v Inland Revenue Commissioners ex parte Unilever Plc* [1996] STC 681 at [697]).

Cards face-up

49. The first *MFK* requirement (that the taxpayer should put all their cards face-up) is not a contentious issue in this case. The Appellant had made an application for VAT registration and had completed all the necessary paperwork. All relevant information had been supplied. There was nothing unusual about the Appellant's application that ought to have been brought to HMRC's attention.

50. The Appellant was not seeking specific guidance from HMRC as to collection of funds to cover any VAT liability. The Instruction Email was given entirely voluntarily by HMRC.

51. The Appellant therefore complied with the first MFK requirement. The Appellant provided the information it would be expected to provide, and HMRC voluntarily sent the Instruction Email.

Clear ambiguous and devoid of relevant qualification

52. In relation to the second *MFK* requirement, HMRC drew our attention to a number of pieces of HMRC guidance on VAT registration. This guidance might be argued to either call into question the "clear, unambiguous and devoid of relevant qualification" nature of the statement made by HMRC, or the question of whether it would be unfair for the Appellant to rely on it.

53. We set out the relevant guidance here and discuss it below.

54. Firstly, HMRC drew our attention to the notes that accompany the VAT1 form used to make an application for VAT registration. The notes for question 6 on the form relating to voluntary registration include the statement:

> "The VAT registration date is important. It's a fixed date from which you must account for output tax on all your taxable supplies."

55. Secondly, HMRC put in evidence the guidance on how to register for VAT on the gov.uk website, which states:

> "You cannot include VAT on your invoices until you get your VAT number but you can increase your prices to account for the VAT you'll need to pay to HMRC."

56. Thirdly, HMRC noted that VAT Notice 700/1 "Who should register for VAT" states in paragraph 5.1 (under the heading "Keeping records and charging VAT — when to start"):

> "You may wish to increase your prices to include VAT. Do not show VAT as a separate item on any invoices you issue until you've received your registration number. You can explain to your VAT-registered customers that you'll be sending them VAT invoices later. Once you've got your registration number, you should send them the necessary invoices showing VAT within 30 days.
>
> If you've asked for voluntary registration, you should start keeping records and accounting for VAT from the date you're registered. This will normally be the registration date you asked for."

Discussion

57. We would agree that HMRC's VAT Notice sets out a sensible process for applicants for voluntary registration to follow: prices should initially be increased so as to collect funds to cover a VAT liability, but these amounts cannot be formally invoiced as VAT until registration has been completed.

58. However, this guidance, and the other pieces of guidance HMRC have drawn our attention to, must be contrasted with the content of the Instruction Email sent to the Appellant's accountant. This is in the following terms:

> "You should wait until your VAT registration is confirmed before you:
>
> • get any software
>
> • charge customers for VAT "

59. As a starting point, we consider that the guidance provided in the Instruction Email would supersede any statements set out in more general guidance. This is simply because a specific statement provided to a taxpayer by HMRC must necessarily be expected to be more targeted to the individual taxpayer's circumstances and to override any more general guidance.

60. Furthermore, only the text in the VAT1 (being the form that the Appellant's accountant must have completed in order to register) can actually expected to have been seen by the Appellant (or Appellant's agent). A taxpayer should not be expected to compare instructions received directly from HMRC with guidance on GOV.UK and in HMRC's notices in order to try and discern whether there is ambiguity or an alternative interpretation.

61. As a result, we consider that any apparent qualification or ambiguity introduced by the VAT notice or GOV.UK guidance must be disregarded and notes to question 6 of the VAT1 given only limited weight in comparison to the statements in the Instruction Email.

62. In any event, in our view, even when read in concert with HMRC's guidance, the instruction given by HMRC in the Instruction Email is clearly intended to contradict and override that guidance.

63. The reason we take this view is threefold.

64. Firstly, the Instruction Email says (emphasis added) "You should wait until your registration is confirmed before you charge customers *for* VAT"

65. The wording here is curious. The phrase "charge customers for VAT" connotes not only a restriction on invoicing amounts of actual VAT, but also a prohibition on charging an amount equal to that VAT. This appears to be in direct contradiction to the suggestion in the VAT notice that prices should be increased in anticipation of VAT.

66. If the text simply said to not "charge customers VAT" (omitting the word 'for'), then it would appear to only refer to VAT in the formal sense, rather than funds on account of it. It might be said that omitting the word 'for' and requiring a taxpayer not to "charge customers VAT" was consistent with the suggestion in the VAT notice that VAT should not be added as a separate item on invoices but that prices could be increased to include VAT. However, by saying not to "charge customers *for* VAT", the prohibition appears to go further and indicates that any price rise to cover VAT is also not permitted.

67. Secondly, our view is fortified by the fact that the Instruction Email does not cross-refer to any other guidance or provide any detail or qualification. It appears to be intended to stand alone as a direct instruction for the taxpayer to follow pending further guidance.

68. Thirdly, we give weight to the first limb of the Instruction Email, this states:

> "You should wait until your VAT registration is confirmed before you get any software".

69. The direction not to "get any software" is strange. It appears to be an instruction to the taxpayer to not prepare for the impending VAT registration by obtaining suitable software. There seems to be no obvious reason why HMRC would not wish a taxpayer to start taking appropriate steps to prepare for registration.

70. A taxpayer could therefore reasonably infer that there is an intention by HMRC to have the taxpayer refrain from preparing for VAT registration pending some further step or other instruction. Indeed, a fully-informed taxpayer (who might be aware of the VAT notice) could reasonably assume that the Instruction Email is suggesting that they should not take the steps outlined in the notice until instructed to do so.

71. Taken together, we consider that the two limbs of the Instruction Email amount to a clear, unambiguous and unqualified instruction not to collect VAT, or any sums "for VAT".

72. We therefore find that the Appellant had a legitimate expectation that they were required not to collect any VAT (or sums on account of VAT) pending registration.

WHAT IS THE EFFECT OF LEGITIMATE EXPECTATION ON THE ASSESSMENT?

73. Having found that the Appellant had a legitimate expectation, we now go on to consider what effect that expectation has on the assessment under appeal.

74. As noted above, the Appellant can only rely on legitimate expectation if HMRC's conduct is "conspicuously" unfair or "so outrageously unfair that it should not be allowed to stand".

75. In the context of tax, some guidance on the approach to unfairness was given by the Court of Appeal in *HMRC v Hely Hutchinson* [2017] EWCA Civ 1075. The question in that case was whether HMRC could resile from previously published guidance, but it has some application to the present case.

76. Firstly, the Court of Appeal noted at [37] that part of the context to be taken into account is that the law imposes on HMRC a duty to collect tax and that taxpayers must expect to pay the right amount of tax.

77. Secondly, the Court referred (at [44]) to the observation of the Court of Appeal in Samarkand Film Partnership No 3 v HMRC [2017] STC 926 at [115] that:

> "Experience shows that the cases where such a claim has succeeded, at any rate in the field of taxation, are relatively few and far between. This is in my view hardly surprising. There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers"

78. Therefore, there is a high level of unfairness needed to displace the presumption that HMRC should not be impeded in collecting the tax that Parliament has decided ought to be paid.

79. How are we to determine whether the appropriate threshold has been reached? In *Finucane* [2019] UKSC 7 the Supreme Court in referred (at [56]) with approval to the guidance given by the Court of Appeal in *R v Northern East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57] that,

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

80. This Tribunal must therefore conduct a balancing exercise between the requirements of fairness and the overriding public interest in HMRC being able to collect tax due by law.

81. In this regard, we give significant weight to the unique nature of VAT. Unlike other taxes imposed in the UK, the trader is generally regarded as merely collecting tax to be economically borne by others. See for example *Totel v Revenue and Customs Commissioners* [2018] UKSC 44 at [23]:

> "VAT is a tax of which the economic burden falls upon the ultimate consumer, but which is collected by the trader from the consumer, and accounted for by the trader to HMRC. By contrast, taxpayers seeking to appeal an assessment to income tax, CGT and SDLT are being required to pay, from their own resources, something of which the economic burden falls on them, and which they have not collected, for the benefit of the revenue, from anyone else."

82. In the present case, the Appellant would normally be expected to have added VAT to the prices charged to customers and thereby collected VAT pass to HMRC. That collection did not take place as a direct result of HMRC giving express instruction not to collect any amount for VAT.

83. By later issuing the Appellant with an assessment for VAT, HMRC effectively require the Appellant to fund the VAT from its own resources. This is contrary to the normal role a trader plays in the administration of VAT.

84. In terms of the financial impact of our decision, the amount of VAT involved is small and the non-collection of such sums causes no real prejudice to the public purse. In contrast, the loss of such sums would have a serious impact on a fledgling business.

85. The total output VAT being around £14,000 at a time when the total turnover of the business was of the order of £100,000, the VAT liability represented around 14% of the annual turnover.

86. In these circumstances, we consider it right to overturn the general assumption that HMRC are entitled to collect the tax legally due. We consider that as a result of the legitimate expectation they had created, HMRC were not legally entitled to raise an assessment to the extent that it sought to collect output tax that they had instructed the Appellant not to collect. The assessment must therefore be set aside.

87. We have considered whether we ought not to set aside the assessment on the basis that there might be disruption in a wider class of cases with facts materially similar to the present

case ("an opening of the floodgates"). We do not believe that there is a significant risk of such disruption. Firstly, this because the amount of time between the registration application and the registration was particularly long, giving rise to a higher than normal risk of material amounts of VAT going uncollected. Secondly, it is open to HMRC to avoid future difficulties by revisiting the content of emails that it sends to applicants to ensure the advice given is in line with what HMRC actually wish a trader to do (whether by reference to VAT notices or otherwise).

88. Another point we have considered is whether it would be appropriate to amend the assessment in order to also unwind the input tax that the Appellant had recovered. By our permitting the Appellant to retain the £4,502 input tax credit whilst not obliging the Appellant to account for any output tax, we arguably enable the Appellant to obtain a windfall.

89. However, in doing so we would be denying credit for input tax that the Appellant is entitled to as a matter of law. Although we can give effect to a legitimate expectation in relation to the output tax position, we do not consider that we have jurisdiction to take steps to bring about a generally equitable outcome by denying legitimate input tax credit.

90. Furthermore, we are far from convinced that it would be improper or inequitable for the Appellant to retain such a windfall. As Ms Brambila noted in her evidence, the issue was entirely caused by HMRC's poor communications, the Appellant was entitled to the input tax back and there is no principled basis as to why the Appellant should be penalised for HMRC's actions.

91. We therefore conclude that the appeal should be allowed and the assessment set aside.

CONCLUSION

92. For the reasons set out above we find that:

(1) The Tribunal has jurisdiction to consider a legitimate expectation argument in this case.

(2) The Appellant had a legitimate expectation that it was not required to collect VAT pending registration.

(3) In the circumstances HMRC's assessment is conspicuously unfair and cannot stand.

93. The appeal is therefore allowed and the assessment set aside.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

94. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 17th OCTOBER 2024