



TC02856

Appeal number: TC/2010/08055

VALUE ADDED TAX – whether appellant should be allowed to amend her grounds of appeal to raise the issue of whether she was the correct taxable person to assess rather than her husband – decided that the amendment should be allowed – appellant registered for VAT in respect of the business – whether the appellant or her husband ought to have been the person registered – whether the appellant or her husband owned and carried on the business – evidence considered – found that the appellant owned and carried on the business – whether the assessments on the appellant which had been made to the best judgment of the assessing officer were nonetheless in too high an amount – found on the evidence that they were – amount assessed reduced – appeal allowed in part accordingly

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAROLINE ROSEN

Appellant

and

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
LESLIE HOWARD**

Sitting in public at Bedford Square, London on 9 November 2012

Michael Firth, Counsel, for the Appellant

Gloria Orimoloye, Advocate, HM Revenue & Customs, for the Respondents

DECISION

Introductory

5 1. The appellant, Caroline Rosen (“Mrs Rosen”), appeals against assessments to value added tax (“VAT”) made on 13 November 2000 pursuant to section 73 VAT Act 1994 (“VATA”) in the amount of £14,030 plus interest accruing.

2. Although the appeal to the Tribunal was made (in 2010) outside the time limit applicable for appealing, the Respondents (“HMRC”) do not take the point that it
10 should be struck out for that reason, recognising that HMRC were responsible in part for the delay in the appeal being made. Insofar as is necessary, the Tribunal formally extends the time for appealing to the extent necessary to cause the appeal to have been made in time.

3. The assessments appealed against cover 10 periods from September 1997 to
15 February 2000. They were made following assurance visits made in 2000 to the business in respect of which Mrs Rosen was registered for VAT by Officer Ms Paula Edmunds on behalf of HMRC. The business was a light haulage business called ‘Eitherway Express’ whose activities were the delivery (by Mrs Rosen’s late husband, Martin Rosen (“Mr Rosen”)) of items by van (or lorry) from London to Manchester
20 and other destinations (and sometimes vice versa) in return for payment. At those visits Officer Edmunds met and dealt with Mr Rosen. Mr Rosen died on 10 April 2012.

4. Officer Edmunds uplifted the business records available, which she described as
25 ‘limited’ and checked them to ascertain the reliability of the VAT returns which had been made. She reached the view that the returns were incomplete or incorrect and decided to make assessments on a ‘best judgment’ basis. The assessments made on 13 November 2000, which are the subject of the appeal, were the result.

Mrs Rosen’s application to amend her grounds of appeal

5. The grounds of appeal as stated in the notice of appeal were that ‘basically based
30 on scientific evidence it was not possible for the client to earn these monies’ – that is, Mrs Rosen sought to attack the assessments and the quantum assessed, in the appeal.

6. However, on 26 April 2012, shortly after Mr Rosen had died, the Chartered
Certified Accountant acting for Mrs Rosen, Mr David Gordon (“Mr Gordon”),
applied to the Tribunal to amend the grounds of appeal to include, as the first ground,
35 that Mrs Rosen did not make the supplies which HMRC have sought to tax nor did she carry on the business in the course of which the supplies were made. Mrs Rosen seeks to amend her grounds of appeal so that she can argue that the business never belonged to her and she never made the supplies that were made in the course of it – the business having belonged at all relevant times to Mr Rosen and he having been the
40 person who made the supplies that were made in the course of it. The Tribunal was told that Counsel was only instructed to represent Mrs Rosen in November 2011 and had not been involved in settling the original grounds of appeal.

7. At the hearing on 9 November 2012, Mrs Orimoloye, for HMRC, resisted the application to amend the grounds of appeal on the grounds of prejudice to HMRC. Her case was that Mrs Rosen, and those advising her, had been aware of all the relevant facts supporting an appeal against the assessments for many years, and in particular since before the original grounds of appeal were settled in 2010, but had chosen to apply to amend the grounds of appeal only after Mr Rosen had died. The prejudice which she submitted would be suffered by HMRC, if the application to amend was allowed, would be that they would be deprived of the opportunity to cross-examine Mr Rosen – in particular to ask him whether or not he forged Mrs Rosen’s signatures on the VAT returns and correspondence. She also submitted that (as it is put in her Skeleton Argument) ‘the burden of proof rests with Mrs Rosen to demonstrate why she left it until Mr Rosen’s passing before amending the grounds of appeal’.

8. We will allow the application to amend Mrs Rosen’s grounds of appeal. Our function, in accordance with the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (“the Rules”) is to deal with cases fairly and justly (rule 2). Mr Firth submitted (and we accept) that we should follow Peter Gibson LJ’s guidance in *Cobbold v London Borough of Greenwich* [1999] EWCA Civ 2074 and allow an amendment which will enable the real dispute between the parties to be adjudicated upon, and he further submitted (and we accept) that the amendment would not prejudice HMRC nor would it harm the public interest in the efficient administration of justice.

9. In particular, Mr Firth submitted that the fact that Mr Rosen was dead and could not be cross-examined was not a matter that prejudiced HMRC. Mrs Rosen would not be relying on any evidence given by Mr Rosen and so there would have been no occasion to cross-examine him even if he had still been living and able to give oral evidence at the hearing of the appeal. There would have been no obligation at all on Mrs Rosen to call Mr Rosen to give evidence if he had still been living and, as Mr Firth put it, ‘the prerogative of the taxpayer to decide which witnesses to call is matched by the burden of proof being placed on him [or her] in relation to questions of fact’. The burden of proof was in any event on Mrs Rosen to show that she was overcharged by the assessments and HMRC would not be prejudiced in that regard by not being able to cross-examine Mr Rosen.

10. We accept these submissions made by Mr Firth. Mrs Rosen is under no obligation to show an acceptable reason why she left the application to amend until after Mr Rosen’s death. The question is simply one of whether the amendment would in reality prejudice HMRC in their conduct of the appeal (i.e. in their defence of the assessments). Officer Edmunds has given evidence of her dealings with Mr Rosen, and, indeed, HMRC rely on that evidence to support the assessments made on Mrs Rosen. HMRC would have had no right to cross-examine Mr Rosen if Mrs Rosen had not called him to give evidence and she was under no obligation whatever to do so. The Tribunal cannot see that HMRC needed the evidence of Mr Rosen to support the assessments made on Mrs Rosen. HMRC are relying on the fact that Mrs Rosen was the person registered for VAT in respect of the business, having signed the VAT registration form and they allege that she was indeed involved in the business.

HMRC are not prejudiced by the fact that Mr Rosen is no longer available to give oral evidence.

5 11. Nor is there, as far as the Tribunal can see, any advantage to Mrs Rosen in Mr Rosen's not being available to give oral evidence. Officer Edmunds's evidence is that:

'Mr Rosen informed me that he was actually the person trading and his wife had registered the business in her name only'

and, further, that:

10 'Mr Rosen is actually the sole proprietor although the business is actually registered in his wife's name. This was done on the advice of their solicitor',

and, further, that:

'there were no employees declared to me at the time [of the assurance visit]. Mr Rosen worked alone. The registered sole proprietor, Mrs Rosen, worked as an aerobics teacher for the local council full time.'

15 12. This evidence is, obviously, not sought to be contradicted by Mrs Rosen. In the circumstances, there appears to the Tribunal to be no gap in the evidence which only Mr Rosen could have filled. Even if there were such a gap, the gap would not prejudice HMRC, since the burden of proof in the appeal is on Mrs Rosen.

20 13. HMRC had notice of Mrs Rosen's application to amend her grounds of appeal some 7 months before the appeal hearing, and Mrs Orimoloye had prepared to meet the case on the basis that Mrs Rosen's application was allowed, and her Skeleton Argument addressed the argument that it was Mr Rosen, not Mrs Rosen, who made the supplies in issue. In all the circumstances, the Tribunal finds that HMRC would suffer no prejudice from the application to amend being allowed and that allowing the
25 application would enable what has emerged as being the real dispute between the parties to be adjudicated upon. For these reasons we have allowed Mrs Rosen's application to amend her grounds of appeal.

The issues in the substantive appeal

30 14. Following our decision to allow Mrs Rosen's application to amend her grounds of appeal, the issues in the substantive appeal are:

1. Whether Mrs Rosen (or alternatively Mr Rosen) made the supplies to which the assessments appealed against relate and carried on the business in the course of which they were made;
2. Whether, if the supplies were made by Mrs Rosen, the amount assessed by
35 Officer Edmunds was too high.

The substantive appeal – the facts relevant to the first issue – the ownership of the business

15. Besides a bundle of documents, and bundles, respectively, of output and input invoices, we had before us witness statements made by Mrs Rosen and Mr Gordon and Officer Edmunds, with exhibits. We heard oral evidence from all three witnesses. We accept the evidence as we recount it below except to the extent that the contrary appears elsewhere in this Decision and find facts accordingly.

16. As stated above, Officer Edmunds made assurance visits in 2000 to the business in respect of which Mrs Rosen was registered for VAT (Mrs Rosen had been registered for VAT from 20 March 1995 and remained so registered until the cancellation of her registration on with effect from 1 March 2003).

17. An application for registration for VAT had been made in the name of Mrs Rosen 'Caroline Ruth Rosen T/A Eitherway Express' by Martin Cordell & Co., Accountants of London E3, under cover of a letter dated 10 April 1995. The application form apparently bore Mrs Rosen's signature. It bore the answer "Yes" to the question: "Have you made any taxable supplies yet?" and gave 20 March 1995 as the date of "my first supply". It bore the answer "Yes" to the question: "Has the value of your business's taxable supplies in the last 12 months or less exceeded the registration limit?". The application indicated that Mrs Rosen expected to make taxable supplies in the next 12 months to the estimated value of £60,000. The application bore, above what was apparently Mrs Rosen's signature, the declaration: "I declare that the information entered on this form and contained in any accompanying documents is true and complete". The form contained Mrs Rosen's name and address and a description of "your main business activity" as "Lorry Driver" and a statement that "your trading name" was "Eitherway Express".

18. The evidence given in Mrs Rosen's witness statement was that it was Mr Rosen and his solicitor who had decided that the registration should be in her name rather than Mr Rosen's. The statement went on: 'I do not know the specific details because I had no involvement, but I think it was something to do with the fact that [Mr Rosen] had recently been divorced and also because he had been bankrupted'.

19. The evidence given in Mrs Rosen's witness statement was that Mr Rosen had been to the solicitor 'to sort it out' and that she could not remember whether or not she had signed the application, but that, having seen the copy of the form for the application for VAT registration exhibited by HMRC (including an enlargement of the part that appeared to show her signature) 'whilst the quality is poor I do not think that it is my signature on the form'. The statement went on: 'As can be seen from my driving licence [which she exhibited] I sign my name "C Rosen" rather than "Caroline Rosen"'. The statement added that 'to me [the signature on the form] looks like [Mr Rosen's] handwriting' and that the bank account details given on the form were not Mrs Rosen's bank account details and must have related to Mr Rosen's bank account or one of his bank accounts. The statement also added that Mrs Rosen was aware that the VAT registration was in her name, but that she could not remember whether she found that out 'before or after it happened'.

20. Mrs Rosen was cross-examined on this evidence and her oral evidence was extremely vague, evasive and unhelpful. She said that she thought she knew that she

was registered for VAT but was not aware of the details and that she did not know when she had become aware that she was registered for VAT. She said she had no recollection of the form of application for VAT registration. However she was definite in cross-examination that her name and address had been completed on the form in Mr Rosen's handwriting (these details were given in capital letters) and that the declaration on the form was in Mr Rosen's handwriting and the signature was not hers, that Mr Rosen had written her name, and that she could not think who else would have done it. It was put to Mrs Rosen that HMRC's case was that she had signed the form. She agreed, in answer to a question from Mrs Orimoloye, that she supposed she was alleging that Mr Rosen had forged her signature on the form.

21. As to the advice of the solicitor that the VAT registration should be in Mrs Rosen's name, Mrs Rosen's oral evidence was that she did not know who the solicitor had been and that she did not know how she had found out that a solicitor had given this advice or why she had put the fact that there had been advice from a solicitor in her witness statement. She could only speculate that 'maybe [Mr Rosen] mentioned it'. She stated in oral evidence that nevertheless she was sure that a solicitor had given the advice and 'they [Mr Rosen and the solicitor] decided between them. I don't know. I can't remember. It's correct.'

22. The evidence given in Mrs Rosen's witness statement was that Mr Rosen and his accountant, Mr Lonis, had completed the VAT returns. She referred to 18 VAT returns for the business, all of which were in her name and contained a declaration to be signed by her or someone on her behalf that 'the information given above is true and complete'. 12 of the 18 returns appear to have been signed by her, but her witness statement evidence in relation to some of them was that the signature was definitely not hers, in relation to others that she was not sure, and in relation to others that she could not read the bad copies to give a view as to whether or not the signature was hers. Three of the 18 returns were made in her name but were not signed at all. Three of the 18 returns were made in her name and were definitely signed by Mr Rosen (see: paragraph 36 below).

23. When asked in cross-examination how she knew that Mr Rosen and Mr Lonis had completed the VAT returns she said: 'Because they did'. When asked what evidence she had supporting that response, she said: 'Don't know what you mean'. When asked whether they completed the returns in her presence she said: 'No'.

24. In relation to two of the returns, for periods 05/97 and 05/99, which appeared to have been signed "C. Rosen" and as to which Mrs Rosen's evidence had been that she was not sure whether the signature was her signature, it was put to her that HMRC's case was that those returns bore her signature. She replied: 'I don't know'.

25. When it was put to her in cross-examination that HMRC's case was in relation to the rest of the returns that they (HMRC) could only go on the assumption that they were signed (if they were signed at all) by her, she said: 'I can't remember signing anything'.

26. Mrs Rosen's witness statement contained the evidence that if she did sign any of the VAT returns 'it will only have been because [Mr Rosen] put it in front of me and asked me to sign – I don't think I would have understood what I was signing'. She stated in relation to this in cross-examination: 'If I did, I don't know'. When asked in cross-examination: 'Was there any point when your husband got you to sign documents?', she replied: 'I don't know. I can't remember.'

27. She repeated this response, when asked why she had said in her witness statement that if she had signed any VAT returns it would have been because Mr Rosen had put them in front of her and asked her to sign.

28. She was asked whether in 18 years of marriage Mr Rosen had ever put a document before her to sign. She responded: 'Don't know. Can't remember'.

29. When it was put to her that it was HMRC's case that she was aware of the VAT registration in her name and that she did sign the relevant documents. She responded: 'I don't know'.

30. Mrs Rosen's witness statement evidence was that sometimes she would get letters through the post from HMRC, which were addressed to her. She would open them and then ask Mr Rosen what to do. He had told her to tell HMRC to talk to her accountant and she had done so. She was on several occasions asked to sign the letter of reply and did so, not necessarily even reading it as she assumed that Mr Rosen 'knew what he was doing'. In response to the question in cross-examination: 'Do you recollect seeing VAT correspondence addressed to Mrs C Rosen?', she said: 'Can't remember – sometimes opened letters addressed to me'. When later referred to the passage in her witness statement mentioned in this paragraph and asked whether it was correct, she responded 'I can't remember. Maybe I did. I suppose I did.'

31. Mrs Rosen acknowledged in cross-examination that she had 'had help' in writing her witness statement.

32. Mrs Rosen was shown a copy of a letter dated 4 September 2001 in the bundle. The copy was unfortunately incomplete. The letter was handwritten on paper printed with Mrs Rosen's then-current address and was addressed to a Mr Carvell, who the Tribunal was told was an officer in HMRC's debt management unit. The part of the letter which was in evidence read as follows:

'Dear Mr Carvell,

Ref: 656 7709 91 [the registration number under which Mrs Rosen was registered for VAT]

Further to my husband's telephone conversations with you, I am writing to confirm that we are in the process of retrieving all our books back from our accountant. As soon as these are to hand we will contact you so that a final figure can be worked out.

I would point out, whilst writing, that we believe the figure to be a lot lower than the amount estimated.

PTO'

33. Mrs Rosen was asked in cross-examination if the handwriting in the letter was her own. She replied: 'Don't know if the handwriting is mine. I'm not sure.' It was put to her that HMRC's case was that the handwriting was her own.

5 34. At the assurance visit on 22 May 2000, Officer Edmunds met and dealt with Mr Rosen. Officer Edmunds was informed by Mr Rosen at that meeting that he was
10 actually the person trading, although his wife had registered the business in her name only, and further, that Mr Rosen was actually the sole proprietor although the business was actually registered in his wife's name, and that this had been done on the advice of their solicitor. Mr Rosen further informed Officer Edmunds that there were no employees and that he (Mr Rosen) worked alone.

15 35. Mr Rosen informed Officer Edmunds that the main business activity was the delivery of women's clothing on behalf of catalogue companies and Next clothing. There was a lorry (registration number M607 VMF) used for the purposes of the business. Mr Rosen told Officer Edmunds that he issued sales invoices on the
20 completion of each job. We were shown a large file of copy typewritten invoices which did not show the name or address of the supplier but were numbered and dated, bore the name and address of the customer, indicated the light haulage work done, the pricing mechanism (generally on a piecework basis) is explained and VAT is added to the total. Mr Rosen told Officer Edmunds that he received payment by cheque on a
25 weekly and monthly basis and that the cheques were paid into a NatWest Business Account. We were shown a copy, which we take to be typical, of a sales invoice. It is in the name of 'Eitherway Express', bears the VAT number of Mrs Rosen's registration, and carries the legend: 'Please make cheques payable to M. Rosen'.

30 36. We were also shown a large file of copy purchase invoices. Where these gave a customer's name, they were often made out to 'Eitherway Express' or 'Eitherway'. Sometimes they were made out to 'Eitherway Express (Caroline Rosen)' – these invoices related to servicing of the lorry which was registered in Mrs Rosen's name – and sometimes they were made out to 'Eitherway Express Ms C R Conway t/a' – these invoices related to the purchase of diesel fuel. We were not told whether Ms C
35 R Conway was a name under which Mrs Rosen went, but we think it more likely than not that it was. Some invoices were addressed to 'Mr M Rosen' or 'Mr M J Rosen', and these were mainly invoices from Vodafone in respect of mobile phone use. Some invoices were addressed to 'Mr M Rosen c/o Eitherway Express' – these invoices were for items such as tyres. Invoices for the collection of vehicles were addressed to
40 'Martin Rosen, Eitherway'. One remittance advice, from a men's fashion store (The Byrite Company) was addressed to 'M Rosen t/a Eitherway Express'. Cellnet invoices for mobile phone use were addressed to 'Miss C Conway' at the Rosens' address. Phone bills from BT were addressed to 'Mrs C Rosen'. An invoice for a mobile phone was addressed to 'Rosen Caroline Mrs'. Invoices from Shell UK Oil Products Limited for petrol and diesel were addressed to 'C Conway, Eitherway
45 Express'. Invoices for sundry catering equipment and clothing were addressed to 'Scott Rosen' at the Rosens' address. Travelodge invoices were addressed to 'Mr M Rosen' in respect of overnight stays. Mr Rosen's signature on the Travelodge invoices is the same as the signature on the VAT returns rendered on behalf of Mrs Rosen for the periods 08/02, 11/02 and 02/03. Martin Cordell & Co (Accountants)

issued an invoice addressed to 'Caroline Ruth Rosen'. Jeremy Fear & Co (Solicitors) issues an invoice addressed to 'Martin Jeffrey Rosen Esq' in respect of their costs in relation to a vehicle inspectorate interview.

5 37. After Officer Edmunds had issued her assessment, a letter was received (on 20 February 2002) by HMRC's Debt Management Unit at Croydon, which apparently bore Mrs Rosen's signature and asked for an extension of time to ascertain the correct figure of tax due.

10 38. The lorry (called in Mrs Rosen's witness statement 'the van') was registered in her name. Mrs Rosen's evidence in her witness statement was that she was only 'recently' informed of this and that she suspected that Mr Rosen had registered the van in her name for the same reasons that he put the VAT registration in her name. Her witness statement evidence is that she does not remember signing any documents relating to the van and that 'if I have, it will only be because [Mr Rosen] put them in front of me and asked me to sign them'. The hire purchase instalments in relation to
15 the lorry (or van) were paid by Mr Rosen using the income from the business.

39. In cross-examination, Officer Edmunds was asked whether she had queried with Mr Rosen why the business was registered for VAT in Mrs Rosen's name. She replied that he had said that he was liable for debts to the Inland Revenue and in respect of child support payments and had been advised that he should not register the
20 business in his own name and so he had registered the business in Mrs Rosen's name.

40. There was a second assurance visit by Officer Edmunds, on 18 September 2000. On that occasion she again saw Mr Rosen, but her evidence was that during the first visit (on 22 May 2000), Mrs Rosen had come in half way through the visit. Mrs Rosen confirmed that she had been introduced to Officer Edmunds.

25 41. Officer Edmunds said that at the time she raised the assessment, the issue of who owned the business 'was not [her] main concern'. Her main concern had been trying to arrive at the correct amount of VAT payable. When asked in cross-examination whether she had had the impression that Mrs Rosen had had anything to do with the business, she replied that the impression she had gained was that 'they were in it
30 together – she was registered and he was driving the lorry'.

42. Mr Gordon's witness statement evidence was that Mr Rosen had come to see him for the first time in 2003 with a view to his taking over the conduct of his tax and accounting affairs, and in particular correspondence with HMRC over the present matter. He had regarded Mr Rosen throughout as his client, rather than Mrs Rosen.
35 He knew that Mrs Rosen was the person in whose name the business was registered for VAT but he regarded this as a matter of mere formality. He had not met Mrs Rosen in relation to the present matter until 26 February 2012, but at that meeting the 'focus' has been on Mr Rosen. His witness statement evidence was that it was clear to him from all his conversations with Mr Rosen about the business, that Mrs Rosen
40 had nothing to do with it.

43. A letter (to be considered as a ‘formal appeal’) sent by Mr Gordon to Officer Edmunds on 31 May 2007 was put to him in examination in chief. The relevant parts of the letter were as follows:

5 ‘It is accepted that the Rosens are incredibly difficult to deal with. They seem to have a psychological block on dealing with matters that were originally straightforward.

...

The facts not in dispute between us, I believe, are as follows:

1. The Rosens run the Van Taxi business.

2. They gave their records to their accountant to prepare the Returns.

10 ...

5. The Rosens worked only for two or three reputable companies so there were no ‘cash’ deals.

...

We know the Rosens had no other VAT relevant business. In fact, Mr R, who has always been the driver does not exactly work all hours. His real life is training kids’ football clubs.

15 ...

Incidentally, we point out that Mrs Rosen was also working elsewhere, on PAYE, and that from time to time some of her money went into the “Business” account.’

20 44. Mr Gordon explained his repeated use of the phrase “the Rosens” as ‘my method of writing’ and ‘just a turn of phrase’. Mr Gordon said that he was not meaning to imply that Mrs Rosen had anything to do with running the business.

45. Mr Gordon confirmed that, before he had been instructed, the VAT returns had been prepared by Mr Lonis. He had never prepared VAT returns for the business.

25 46. A letter dated 22 July 2003 from Mr Gordon’s office (written by his associate, a Mrs Wolff) referring to Mrs Rosen as the firm’s ‘client’ was put to Mr Gordon in cross-examination. He responded saying: ‘technically the tax payer was Mrs Rosen. My associate had to say that [her] client is technically Mrs Rosen’.

30 47. On Mr Gordon’s advice to Mr Rosen that ‘what was going on could not continue’, a limited company, Eitherway Express Limited, was formed to take over the business. However the business by that time was ‘falling apart’ and the company never traded. This development took place after the cancellation of Mrs Rosen’s VAT registration in 2003.

The parties’ submissions on the first issue – the ownership of the business

35 48. Mr Firth, on behalf of Mrs Rosen, submitted that the charge to VAT on supplies of goods or services is on the person making the supplies in the course or furtherance of a business carried on by him, and makes reference to section 4, VATA. He contended that Mrs Rosen made no supplies and did not carry on the Eitherway

Express business. Mr Rosen carried on the business and made the supplies – therefore the assessments on Mrs Rosen were not competent.

49. He submitted that who makes supplies and who carries on the business in the course of which supplies are made are matters that have to be decided on the basis of the economic reality, citing the judgment of the Court of Justice in *HMRC v Loyalty Management UK Limited* [2010] STC 2651 at [39].

50. He submitted that HMRC's VAT Registration Manual recognised that an assessment can sometimes be made in the wrong name because the wrong person is named on the register and that in those circumstances the assessment must be withdrawn. In his submission this is what has happened in this case.

51. Mr Firth referred us to a list of matters to be considered in deciding who made particular supplies in the Tribunal's decision in the appeal of *Fengate Developments v Customs and Excise Commissioners* (Decision 18308 at [64]), which included: who are the parties to contracts by which the supplies were made?; who, from the viewpoint of the customer, is the person assumed to be making the supplies?; who sets the price for the supplies?; to whom are payments made for supplies?; against whom would the customer claim in the event of default?; and so on. He submitted that the answers to all these questions indicate that Mr Rosen, not Mrs Rosen made the supplies. He further submitted that this conclusion follows from the evidence of what Mr Rosen told Officer Edmunds at the first assurance visit, and he prays in aid the passage from HMRC's Statement of Case which read: '[Officer Edmunds] established that although the registered person was Mrs Rosen, it was in fact her husband, Mr Rosen, who ran the business, carried out the haulage service and completed the records'.

52. Mr Firth cited *Roland Parsons and Geraldine Ann Parsons v Customs and Excise Commissioners* (a decision of the VAT and Duties Tribunal, 17137) in which the ownership of the business was regarded as the key to determining who made the supplies in issue. He also cited *Parker and Parker v Customs and Excise Commissioners* (Decision 16350) in which the Tribunal had looked at who ran a business on a day to day basis as the key to determining who made the supplies in issue. In that decision, the Tribunal had stated:

'... as part of the substance and reality, we consider that we should not expect relationships between husband and wife to be wholly at arm's length or commercial. That fact that Mrs Parker helped in her husband's part [of the operations carried on on the same premises by both husband and wife], particularly on the financial side, we do not regard as strong evidence against the separation of the businesses'.

53. He also cited *Prottey and Brampton v Customs and Excise Commissioners* (Decision 16730) in which the views of the parties as given in evidence had been taken to be decisive on the question of who owned the business in issue. The Tribunal said:

'We are ... quite satisfied from the very straightforward way in which Mrs Prottey gave evidence, and the actual evidence she gave, that as far as she was concerned the Lord Nelson was her business and her business alone. Mr Brampton had made it clear in cross-examination

that if there was no money in the tin he did not get paid. At no time in his evidence did he indicate that he had any share in the Lord Nelson's profit. The appeal is therefore allowed. The assessment is not sustainable because there are separate businesses.'

54. Mr Firth submitted that the facts of the case are as simple as they appear: this is a case of a VAT registration in the wrong name due to incorrect advice from a solicitor. He contended that this is the conclusion to be drawn from the evidence adduced on behalf of Mrs Rosen and also the evidence of Officer Edmunds.

55. In particular, he submitted that Mr Rosen did not carry on the business as Mrs Rosen's agent. He cited *Customs and Excise Commissioners v Johnson* [1980] STC 624 at 629, *Customs and Excise Commissioners v Plantiflor Ltd* [2002] STC 1132 at [28] – [29], and *Spearmint Rhino Ventures (UK) Ltd v HMRC* [2007] STC 1252 at [39]. He contended that there was no agreement, express or implied, that Mr Rosen would represent Mrs Rosen when he made the supplies and there was nothing to indicate that Mr Rosen was not acting as principal in his dealings with customers of the business. He submitted that the only facts that point towards Mrs Rosen's involvement in the business are that the VAT registration was in her name and that Mr Rosen registered the lorry (or van) in her name, and that these facts were clearly insufficient and did not constitute any economic reality.

56. Mr Firth also submitted that Mrs Rosen was not in partnership with Mr Rosen, citing *Richard J Burrell t/a The Firm v Customs and Excise Commissioners* (VAT Tribunal Decision 14215B and upheld on appeal at [1997] STC 1413) and *Saywell v Pope* 53 TC 40.

57. He also submitted that Mrs Rosen did not employ Mr Rosen and that Mrs Rosen was not acting as Mr Rosen's agent in relation to his VAT affairs.

58. Mrs Orimoloye, for HMRC, submitted that notwithstanding the admitted fact that Mr Rosen ran the business, Mrs Rosen, as the person registered for VAT in respect of it is the person who made the taxable supplies. Mrs Orimoloye's case was that Mrs Rosen knew exactly what she was doing at all times from the time when the solicitor made the suggestion that she register for VAT in relation to the business until the time of Mr Rosen's death. She also prayed in aid Mr Gordon's correspondence with HMRC which explicitly recognised that Mrs Rosen, as well as Mr Rosen, was involved in the business. She pointed to the fact that Mrs Rosen did not raise the point that she had been registered by mistake despite correspondence relating to VAT arriving at her address from HMRC over a period of 12 years. She submitted that the case law on which Mr Firth sought to rely related to fundamentally different facts to the present case and ought not to be of assistance to the Tribunal. She reminded the Tribunal that the burden of proof in displacing the assessments was on Mrs Rosen.

Discussion and Decision on the first issue in the substantive appeal

59. From the evidence we find as a fact (which was not disputed) that Mr Rosen, and not Mrs Rosen performed the physical functions involved in making the supplies made in the Eitherway Express business. He drove the van (or lorry) and he made the arrangements with customers and suppliers.

60. The issue for us to decide is who made the taxable supplies as a matter of VAT law and we agree with Mr Firth that this has to be decided having regard to the economic and legal reality and is really the same question as who owned or carried on the business.

5 61. Although we accept Mr Firth's submission that the question of who made a particular supply is not determined by the private individuals involved, the ownership of a business is nonetheless a matter to be determined from the evidence as to the relationship between the various persons or entities in contention to be regarded as the owner – in this case Mrs Rosen and Mr Rosen.

10 62. We regard Mrs Rosen's evidence both in her witness statement and given orally as to the nature of the relationship between herself and Mr Rosen with regard to the ownership of the Eitherway Express business as being vague, self-serving and unreliable. Our impression of the evidence Mrs Rosen gave, and the way she gave it was wholly unlike the impression formed of Mrs Prottey's evidence in *Prottey and*
15 *Brampton*. We place very little reliance on Mrs Rosen's evidence.

63. It is however clear that Mrs Rosen did indeed realise that she had at least some responsibility *vis-à-vis* HMRC (or HM Customs & Excise before them) in relation to VAT in connection with the Eitherway Express business. She said she thought she was registered for VAT and had become aware of that fact, though she could not say
20 when. She denied that she had filled in or signed the form of application for VAT registration, but we find that either she did sign the form or that Mr Rosen signed the form for her either with her acquiescence or subsequent approval. She made no attempt at any time after becoming aware that she was registered for VAT to contact HMRC to rectify what was argued on her behalf to have been a mistake. She did not
25 actually deny signing any of the VAT returns. All she could say to some of the signatures is that she did not know whether she had signed the returns and that she could not remember signing anything. We accept that Mr Rosen probably did complete the returns, but we find that he usually presented them to Mrs Rosen for her signature, and when he did so, she signed the returns, knowing what she was doing,
30 because they are really self-explanatory and we find that Mrs Rosen is a person of intelligence. Mr Rosen, of course, himself signed the three returns referred to in paragraph 36 above, but he ostensibly did so on behalf of Mrs Rosen because the forms clearly stated that the declaration was required to be made by Mrs Rosen or by someone on her behalf.

35 64. Even if Mrs Rosen did not understand what she was signing (which we doubt) we would not regard that fact as material. We echo the Tribunal in *Parker and Parker*, when they said that, as part of the substance and reality, they would not expect relationships between husband and wife to be wholly at arm's length or commercial. We find that the relationship between Mr Rosen and Mrs Rosen was one in which
40 Mrs Rosen placed confidence in Mr Rosen in business and financial affairs and that if he asked her to sign a document which was a VAT return and she did not understand the document, she would have signed it anyway, being confident that Mr Rosen was in order in requesting her signature and relying on his knowledge of the document and its effect.

65. We take the same approach to the application for registration for VAT. We find on the balance of probabilities that she did in fact sign the document. But, even if she did not, she made no effort, once she (admittedly) found out that the VAT registration was in her name, to inform HMRC of any ‘mistake’ or to take any steps whatever to correct any such ‘mistake’.

66. An application for registration for VAT is, of course, an important document which should not be filled in or sent to HMRC carelessly. HMRC are entitled to take such an application at face value, and are under no obligation whatever to investigate whether it has been submitted to them on the basis of any ‘mistake’. HMRC’s efficient maintenance of the register of taxable persons depends on their ability and entitlement in all but exceptional circumstances to rely on the information given to them when a VAT registration is applied for. If it were otherwise a chaotic situation would result.

67. None of the cases cited by Mr Firth, *Parsons and Parsons*, *Parker and Parker* or *Prottey and Brampton* involved a suggestion that a VAT registration had been applied for by mistake (nor did *Ishag Salama t/s Izzy Store v HMRC* [2011] UKFTT 762 (TC) – another decision cited by Mr Firth). We accept that a VAT registration can be applied for by the ‘wrong’ person by mistake and that HMRC have procedures to deal with that circumstance. But we find that on the facts of this appeal Mrs Rosen’s VAT registration was not applied for by mistake. The VAT registration for the Eitherway Express business was applied for in Mrs Rosen’s name (and not Mr Rosen’s name) advisedly, because Mr Rosen anticipated problems if the VAT registration was in his name. This was confirmed by Officer Edmunds’s evidence of what Mr Rosen had told her.

68. In those circumstances, we must examine the evidence to determine what the legal relationship (as a matter of substance and reality) was between Mr and Mrs Rosen as regards the Eitherway Express business.

69. An important part of the evidence (though by no means all of it) consists in the application for registration for VAT and the VAT returns. In all of these documents, Mrs Rosen was effectively telling HMRC that she was the taxable person in relation to supplies carried out in the course of the Eitherway Express business. It would require convincing evidence to displace the impression given by these documents.

70. We do not regard Officer Edmunds’s evidence – that Mr Rosen had told her that he was the person actually trading and that Mrs Rosen had registered the business in her name only, and that Mr Rosen was actually the sole proprietor of the business, and that he worked alone while Mrs Rosen had another unconnected full time job – as convincing evidence to displace the impression given by the application for VAT registration and the VAT returns, that Mrs Rosen was the relevant taxable person.

71. As Mr Firth submitted, the relevant question is who owned the business, not who did the physical work in it. Although we accept Officer Edmunds’s evidence that Mr Rosen told her that he was actually the sole proprietor of the business, we do not accept that he understood by that that Mrs Rosen did not own the business as a matter

of law – he recognised that she was the registered person for VAT purposes. There has been no evidence to the effect that Mr Rosen had any particular knowledge of the relevant law in this area, and we consider it more likely than not that what he was telling Officer Edmunds was that he treated all the profits of the business as his own.

5 We also know that apart from the VAT registration being in Mrs Rosen’s name, the registration of the van or lorry was also in her name.

72. There is additional documentary evidence of Mrs Rosen’s participation in the business, which is wholly consistent with her being properly the registered person in relation to it. There is the letter (which we find was written by her) to Mr Carvell

10 dated 4 September 2001, in which she confirms that ‘we are in the process of retrieving all our books back from our accountant’. There are the many purchase invoices for goods or services which mention Mrs Rosen, or Ms Conway, which we find to be another name under which she went. There is the letter asking for an extension of time received on 20 February 2002 by HMRC’s Debt Management Unit

15 which, we find, was written by her.

73. We also have regard to Mr Gordon’s correspondence with Officer Edmunds on 31 May 2007 in which he refers to the facts that ‘the Rosens run the Van Taxi business’ and that ‘the Rosens worked only for two or three reputable companies’ and that ‘the Rosens had no other VAT relevant business’ and that ‘Mrs Rosen was also working

20 elsewhere’ as being ‘not in dispute’ with HMRC. This is evidence showing Mrs Rosen’s real participation in the business such as was consistent with her legal ownership of it. We do not accept that the import of these comments is explained away by Mr Gordon’s suggestion that it was just a method of writing or turn of phrase. We find that these comments accurately record what Mr Gordon believed was

25 the fact.

74. We conclude that the legal relationship between Mrs Rosen and Mr Rosen in relation to the Eitherway Express business was that she was the legal owner of the business but that Mr Rosen carried out the physical light haulage business activities and took for himself all, or perhaps almost all, the profits. The form of invoice by

30 Eitherway Express, which did not state the legal identity of the supplier beyond giving the trading name and (Mrs Rosen’s) VAT registration number, and requested cheques for the amounts invoiced to be made payable to Mr Rosen is entirely consistent with our analysis.

75. Although we accept that the relationship we have found to be subsisting between

35 the parties was not wholly arm’s length or commercial, we do not regard this as surprising in the context of parties to a long subsisting marriage. In legal terms, Mr Rosen was Mrs Rosen’s agent, perhaps undisclosed, and the agreement between Mr and Mrs Rosen to that effect can, we find, be inferred from the totality of the evidence before us. We prefer this conclusion, as a matter of economic and legal substance and

40 reality, to the conclusion urged upon us by Mr Firth, that Mr Rosen carried on the business on his own behalf and the VAT registration was in the wrong name due to incorrect advice from a solicitor.

76. It follows that we hold that Mrs Rosen made the supplies in issue in the course of carrying on the Eitherway Express business and that the assessments on her are competent.

The facts relevant to the second issue – whether the amount assessed was too high

5
77. On examining the business records she had obtained, Officer Edmunds selected the one period that appeared to her to be the most complete (05/99) and used this period as a representative period in the absence of other records. She attempted to build up the VAT account from the sales and purchase invoices provided. The result
10 of her exercise showed that the declared output tax in that period was lower than the output tax she had found to be due by an examination of the sales invoices (£1,443.24 as against £2390.22) and the declared input tax in that period was higher than the input tax she had found to be due by examination of the purchase invoices (£1204.69 as against £747.20). The output tax due but not declared for the period was £946.98,
15 while the excess of input tax claimed over the amount deductible was £457.49 – leading to a total insufficiency of £1403 VAT for the period.

78. Officer Edmunds attempted a bank reconciliation for the period December 1999 to February 2000, from the bank statements available, to compare the result to the VAT return made for the period 02/00. It showed bankings of £11,686 as against declared
20 sales of £9,706.

79. Officer Edmunds wrote to Mrs Rosen on 4 October 2000 informing her of her findings with regard to period 05/99 and saying that unless Mrs Rosen could provide her with adequate documentation she would have to issue an assessment based on her findings and that the assessment would cover the ‘last 3 years (12 periods)’. No
25 response was received to that letter and Officer Edmunds later issued an assessment covering 10 periods (not 12, because 02/97 and 05/97 were by then out of time to assess) in the amount of £14,030 (being 10 x £1,403).

80. Mr Firth’s recalculations, based on the invoices exhibited to the Tribunal suggest that the figure assessed is, in fact, an underestimate of the under-declared output tax
30 by a factor of some 2.7%. However he suggests that the assessments ought not to be increased on this account because the factor of 2.7% is a fair reflection of the bad debts suffered by the business.

81. As to the input tax, Mr Firth’s recalculations, based on the invoices exhibited to the Tribunal, suggest that the over-deduction of input tax, assumed by Officer
35 Edmunds to be £4570 (10 x £457.49) was in fact overstated and that the correct figure for the over-deduction of input tax was £2,897.63. Officer Edmunds accepted that this adjustment ought to be made – it has the effect of reducing the amount of VAT assessed from £14,030 to £12,357.63.

The second issue – the parties’ submissions

40 82. Mr Firth accepts, on the basis that we conclude – as we have – that assessments on Mrs Rosen are competent, that HMRC (Officer Edmunds) exercised best judgment in making the assessments appealed against. He submits that we should reduce the

amount assessed from £14,030 (before interest) to £12,357.63 (before interest) on the basis outlined above.

5 83. Mrs Orimoloye submitted that the quantum of the assessment was a matter which was difficult to address and asked that the Tribunal not make a decision on quantum but leave it to the parties to determine.

The second issue – our decision

10 84. We have, however, concluded that the overriding objective of the Rules to deal with a case fairly and justly, and, in particular to deal with it in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and the resources of the parties (see: rule 2(1) and (2)(a)) would best be applied by our deciding now to uphold the assessment but to reduce the amount of VAT assessed from £14,030 to £12,357 on the basis outlined above. We accept Mr Firth’s submission that the amount assessed as undeclared output tax ought not to be increased for the reasons he gave (see: paragraph 80 above).

15 85. We so decide and allow the appeal in part accordingly.

Applications for permission to appeal this Decision

20 86. 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.

25

**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 3 September 2013

30