TC06853

Appeal number: TC/2017/06329

VAT - appeal against decision to register and for assessment made under section 77 (4) VAT Act 1994 - jurisdiction - timing and best judgment - evidence to challenge decision and assessment - appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEIL EDGELL **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR SIMON BIRD

Sitting in public at Bristol on 16 October 2018

The Appellant in person

Mr Les Bingham, Officer of HMRC for the Respondents

Introduction

1. This case concerns the appellant's liability for VAT and a penalty. The amount of VAT is £45,287.93. The amount of the penalty is £6,114.00.

2. HMRC have assessed the appellant to these on the basis that he should have registered for VAT with effect from 1 October 2008.

3. The appellant appeals against that decision, its corresponding assessment and the penalty. The notice of appeal to the Tribunal suggests that his appeal was slightly out of time. HMRC have not taken a point on this. If it is late, we exercise our discretion to admit the appeal out of time.

Summary of the legislation.

4. A person who makes taxable supplies is liable to register for VAT. He must notify HMRC of that liability within 30 days of the end of the month in which he satisfies the turnover tests for registration. HMRC are then obliged to register him for VAT with effect from that date. Failure to notify such liability renders a taxpayer liable to a penalty of up to 15% of the VAT for which the appellant is liable to pay for the period during which he should have been registered (the "**relevant VAT**"). If HMRC wish to recover the relevant VAT from a taxpayer, they must assess him to the best of their judgment. They must also assess the penalty. A taxpayer has a right of appeal against certain assessments. A taxpayer may be exonerated from a penalty if he can establish a reasonable excuse for failing to register. An assessment for failing to notify liability to register must be made within 20 years of the end of the relevant accounting period. However it cannot be made more than one year after HMRC have evidence of the facts which in their opinion justifies the making of the assessment (the "**one year rule**").

Jurisdiction

5. As mentioned above, the taxpayer has a right of appeal against certain assessments. But not all. He cannot appeal against an assessment which is visited on him in respect of a period in which he has made no return. That applies to Mr Edgell. However he can appeal against HMRC's decision that he is liable to be registered for VAT, and against the penalty. Furthermore, he can appeal against the "making of an assessment on the basis set out in section 77(4)" – see section 83(1)(r) VAT Act 1994 ("**VATA**").

6. The assessment in this case is made under section 77(4) VATA. In his skeleton argument Mr Bingham contended that there was no right of appeal against the assessment in this case. But at the hearing, he was less certain. We did not hear full argument on the interaction between the appeal right under section 77(4) VATA and its apparent conflict with the right to make an appeal against an assessment but only where a return has been made.

7. It seems to us that the appeal right against any assessment made under section 77(4) VATA may be restricted to a challenge about the time within which it was

issued rather than the amount of the assessment. But it is not entirely clear. However, on the basis of *Burgess & Brimheath* v HMRC [2015] UKUT 578, HMRC must establish that the assessment was a valid assessment given the appellant's right to challenge an assessment made on the basis of section 77(4) VATA. And so HMRC must show not only that it was made within the 20 year period but it was also made in accordance with the one year rule and it was made to best judgment.

8. The parties cannot confer on us a jurisdiction which we do not have. It is our view that the appeal rights in section 83(1)(r) VATA do not extend to the amount of an assessment. Only to the 20-year time limit. But we do not think that for all practical purposes it matters whether the appellant may appeal against the assessment and against the decision to register. Once HMRC have established that the assessment has been made to best judgment, the onus is then on the taxpayer to show that the decision to register is wrong. If we decide (as we do in this case) that the turnover figures on which the decision to register was wrong, that then requires a recalculation of the date on which the liability to register arose. And that might have a knock-on effect on the amount of the assessment and the penalty. So the effect is the same. If the date of registration affects the assessment, then it seems to us that the assessment cannot stand in the amounts originally contended for.

Best Judgment

9. In *Van Boeckel v The Customs and Excise Commissioners* [1981] STC 290, Mr Justice Woolf (as he was then) stated

> "In my view, the use of the words "best of their judgment" does not envisage the burden being placed on the Commissioners of carrying out exhaustive investigations. What the words "best of their judgment" envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them. "

10. In *Pegasus Birds Limited v Commissioners of HM Customs & Excise* [2004] EWCA Civ 1015 ("*Pegasus*"), Lord Justice Carnwath cited, with approval, an extract from the case of *Rahman (No. 2)* [2003] STC 150.

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

11. And later on in his judgment, Lord Justice Carnwath gave guidance to this Tribunal. He said (at paragraph 38)

"In the light of the above discussion, I would make four points by way of guidance to the tribunal when faced with "best of their judgment" arguments in future cases:

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

(vi) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment" grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.

(vii).....

(viii)....."

Facts

12. The appellant gave oral evidence. Mr Carl Shedden ("**Mr Shedden**"), an officer in the Trading Standards section of South Gloucestershire Council ("**Trading Standards**"**)**, gave oral evidence for the respondents. We were provided with a bundle of documents. From this evidence we find the following facts:

(1) On 7 June 2011 the appellant was brought to the attention of South Gloucestershire Council's Trading Standards service by BMW UK alleging that he was selling counterfeit BMW car accessories on eBay and on his own websites. The complaint was allocated to Mr Shedden. Test purchases were made by BMW who then examined and confirmed that the items purchased were counterfeit. Further test purchases were made by Trading Standards officers from the website eBay where the appellant was predominantly supplying counterfeit BMW car accessories under his eBay username.

(2) The appellant also purchased a number of items from the local BMW dealer in Bristol which, when examined, included a few items which were identified as genuine and which were returned to the appellant towards the end of March 2014.

(3) In the course of his investigation, it became apparent to Mr Shedden that the appellant used both his address and his mother's address to run his business. Search warrants were served on both premises and various items including computers, labels and labelling machines and padded envelopes were detained.

(4) Following the execution of the warrants in November 2011 and subsequent searches, Mr Shedden's colleague, Samantha Robinson, made a further test purchase of a BMW gear knob, which proved to be counterfeit.

(5) The second warrant was obtained and executed in March 2012 and further car accessories, predominantly BMW, were detained.

(6) During execution of one of the foregoing warrants, all of Mr Edgell's business records which he kept in A4 and A5 notebooks, were seized by Trading Standards who subsequently destroyed them.

(7) Information supplied by eBay was analysed by Samantha Robinson ("**Mrs Robinson's Summary**") who produced PayPal summaries which Mr Shedden exhibited to his witness statement. These summaries, and the figures contained in them, were accepted by the court and not disputed by Mr Edgell at the time of his prosecution, on 18th February 2014. He pleaded guilty to 27 charges under the Trade Marks Act and 3 benefit fraud charges at Bristol Crown Court. He also asked for a further 10 Trade Mark Act offences to be taken into account relating to further items taken from his house under the March 2012 search warrant.

(8) During 2014 HMRC became aware of this prosecution, and the value of the counterfeit goods which had been allegedly sold by the appellant and their value being £427,421.91.

(9) The respondents view was that despite the value of the sales the appellant did not appear to have been registered for VAT, and so during 2016 commenced an investigation into whether he should be so registered.

(10) The appellant confirmed that he had not been registered at any time during the period in question. He provided the respondents with turnover figures (in a letter to them of 3 July 2016) which he contended supported this. However the appellant was unable to produce any records either to prove the turnover figures that he had provided, nor to disprove the value of sales used in the Trading Standards prosecution. On 8 December 2016 HMRC wrote to the appellant to inform him that they considered that he should have been registered for VAT and that they intended to use the sales figures of £427,000 as the basis for calculating the date from which he should have been registered.

(11) In cases of this sort where no application has been made by a taxpayer for cancellation of registration, as an administrative concession HMRC will cancel registration from the date on which trading ceased. In this case they have taken that date as 29 February 2012.

(12) It was HMRC's view that the appellant had started trading in January 2008. This is based on information obtained from Trading Standards. In their view there were 49 months between this date and February 2012, and they divided the sales figures of £427,000 by that number of months to arrive at a notional monthly turnover figure of £8,714.28.

(13) Using this basis, HMRC calculated that the appellant's turnover had exceeded the then prevailing registration limits of £64,000 at the end of August 2008 and was therefore required to be registered for VAT with effect from 1 October 2008.

(14) In their letter of 23 January 2017 HMRC informed the appellant they considered the net amount due from him was £45,287.93. This is made up of an amount of output tax £53,279.91 from which was deducted an amount of input

tax of £7,991.98 which was calculated as 15% of the output tax and which HMRC considered to be reasonable in the absence of any records.

(15) This assessment was confirmed by the respondents on 25 January 2017 who, at the same time, also told the appellant that he was liable to a penalty of £6,793.

(16) On 7 February 2017 HMRC wrote to the appellant to notify him that the penalty had been reduced to £6,114 to reflect mitigation of 10%.

(17) Further correspondence then passed between the parties, the appellant continuing to dispute the value of sales notified to the respondents by Trading Standards along with the amounts of both the assessment and penalty, and on 13 April 2017 HMRC carried out a review of all aspects of the case.

(18) Having completed that review HMRC upheld the decision that the appellant was required to be registered for VAT the period from 1 October 2008 to 29 February 2012 and that the assessments and penalty had both been calculated correctly.

(19) The appellant appealed to this tribunal on 20 August 2017.

The Assessment – timing and best judgment

13. As mentioned above, we have jurisdiction to consider the assessment and whether it was made in time. It is our view that this includes a consideration not only of the 20 year time limit in section 77(4) VATA but also the one year rule and whether the assessment was made to best judgment.

14. It is clear to us that the assessment was made within the 20 year time limit set out in section 77(4) VATA.

The one year rule

15. It is equally clear based on the findings of fact made above, that HMRC was aware of the Trading Standards investigation, and the level of sales of counterfeit goods, during 2014.

16. So the question then arises as to whether the evidence of these facts (namely the the Trading Standards investigation and the value of counterfeit goods) was sufficient in HMRC's opinion to justify the making of the assessment at the time that they became aware of those facts. If so, and although the appellant has not taken this point, the assessments are out of time since they were notified to the appellant on 25 January 2017 which is clearly more than 12 months after HMRC became aware of the Trading Standards investigation and the value of the counterfeit goods.

17. It is HMRC's position that they were not in a position to raise the assessment until at least 14 October 2016 – "the date given to the appellant to provide further information regarding his liability to be registered".

18. We have reviewed the correspondence which passed between the parties

between April 2016 and August 2017. This correspondence shows that during the first half of 2016, HMRC was seeking further information from Mr Edgell about his turnover, along with justification, if any, as to why he should not have registered for VAT. For example, on 20 May 2016 he was given "a further 30 days" to contact PayPal to obtain monthly sales figures which were needed to complete a turnover template which had been given to Mr Edgell by HMRC on 29 April 2016. He was warned that if he failed to get this information HMRC would set the average sales figures which they had received from the Trading Standards investigation, across a period of trading starting on 4 January 2008 and ending on 18 March 2012.

19. On 3 July 2016 the appellant returned the turnover form, duly completed ("I have filled out your form as best I can").

20. There was further correspondence about this completed template during the Summer and Autumn of 2016, the essence of which was HMRC trying to clarify the value of the transactions which the appellant had identified in the completed template.

21. One aspect of this concerned records from PayPal which both parties were trying to obtain but neither was able to do so.

22. And so on 8 December 2016 HMRC wrote to the appellant indicating that they intended to proceed to use the sales figures of £427,000 for the period from January 2008 to February 2012 as the basis for their decision regarding the date on which the appellant should have registered for VAT.

23. The assessment was subsequently notified to the appellant in January 2017.

24. Is our view that notwithstanding HMRC might have been aware of the value of the sales of counterfeit goods for which the appellant had been prosecuted, during 2014, they were making a genuine attempt during 2016 to identify whether those sales sale figures were appropriate as a basis for computing the VATable turnover which is the important issue when considering the date on which a trader should be registered for VAT. They were seeking to give the appellant every opportunity to supply alternative figures, along with corroborating evidence as to why those alternative figures were a better indication of his VATable turnover. The appellant supplied such figures but was unable to provide satisfactory corroboration to HMRC. And so HMRC based their assessment on the Trading Standard's figures. It was only once they had been through the dialogue with the appellant, during 2016, that HMRC were in a position to make a best judgment assessment both as regards the obligation to register and in the amount of VAT arising because of that failure to register.

25. In light of the above, we hold that the assessment and the decision that the appellant should have registered with effect from 1 October 2008 were made within the relevant statutory time limits.

Best Judgment

26. We also think that the assessment has been made to HMRC's best judgment. The threshold is a low one. HMRC simply have to show that they have come to a

reasonable decision based on the material before them. They have done this. They have used the numbers from the Trading Standard's investigation. They have given the appellant ample opportunity to provide alternative figures and for evidence on which those alternative figures were based. They have made an honest attempt to make a reasoned assessment of the VAT payable.

27. Given, too, that the decision to register the appellant with effect from 1 October 2008 underwrites the assessment, it is inherent in this best judgment assessment that the decision regarding registration is also made to best judgment. For the reasons given above, we think that it was.

Mrs Robinson's Summary

28. Mrs Robinson's Summary exhibited to Mr Shedden's witness statement comprised a number of tables which summarised transactions undertaken by the appellant. She had analysed, and provided a summary of, the eBay transactions undertaken by the appellant. These transactions were divided into those relating to car etc on the one hand, and other transactions undertaken via eBay on the other. As regards the car etc transactions, she summarised the number of transactions on a "marque by marque" by basis. For example, she summarised the number of transactions of BMW accessories as 15,268 and a corresponding gross amount received of £313,706.40. Her summary was that 18,521 of car accessories were sold for which the appellant had received £368,031.08. She also identified sales of other items made within eBay (such as Microsoft product and CD's/DVD's). She also identified sales made by the appellant outside of eBay and identified a number of refunded transactions. Her analysis was that the appellant's turnover (or total receipts) during the relevant period was £427,421.91. She also analysed outgoing payments and transactions. Her view was that the total outgoing payments over that period were £327,332.45. She also analysed bank account deposits and withdrawals and her view was that £163,421.28 had been withdrawn by the appellant during the relevant period.

29. Save as set out below, Mrs Robinson's Summary was not challenged by the appellant and we find the figures set out in that document as facts.

Discussion

30. We start by making two preliminary points.

31. Firstly, even if the appellant's appeal rights against the assessment are limited to a challenge that it was not made within 20 years rather than it was made for an incorrect amount, any challenge to the decision regarding the date on which he should have been registered will inevitably have an effect on any assessment based on that decision.

32. Under section 73(9) VATA, "where an amount has been assessed and notified [under section 73(1) VATA] it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered

accordingly, unless or except to the extent that, the assessment has subsequently been withdrawn or reduced".

33. If we find that the date of registration is wrong then it seems to us that we can direct that the assessment is altered to take into account the correct date on which the appellant should have been registered.

34. Secondly, it is clear that if an appellant is to displace a best judgment assessment, it is up to him to provide alternative figures which are more likely than not to be correct.

35. As was said in *Pegasus:*

> "14. Generally, the burden lies on the taxpayer to establish the correct amount of tax due.
>
> "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* [1990] 63 TC 515, 522-3 PC, per Lord Lowry)"."

36. It is our view that, given the fact that the assessment is based on the date of registration, an appellant who challenges that date must also provide evidence on the basis of which we can say that it is more likely than not that the decision to register the appellant with effect from a certain date (in this case 1 October 2008) is wrong; and we can also go on to say what the correct date should be (or direct that HMRC recalculates on the basis of figures which the appellant has established to our satisfaction are more likely than not to be correct).

37. The appellant did not mount a serious challenge to much of the evidence given by Mr Shedden nor to the veracity of Mrs Robinson's Summary.

38. However the appellant did challenge four categories of the PayPal receipts.

(1) CD/DVD's - £6,303.00.

(2) Miscellaneous - £4,933.53.

(3) Shopping cart unidentified - £25,960.92.

(4) No reference - £17,013.83

39. He has explained to us that some of the items sold (for which payment was made via PayPal) were personal items. He has identified the CD/DVD's, some old sofas, five cars and a printer or two as falling into this category. But he gave no evidence as to the price that he received for these.

40. This is unsurprising given that his records which were contained in A4 and A5 notebooks were confiscated by Trading Standards in the course of their investigation, and then destroyed following the appellant's prosecution.

41. However, in July 2016 he did send to HMRC a monthly breakdown (which he admitted to being a best guestimate) of the amounts which he thought he had received as payment for the items he had sold. This totalled about £91,000 so there is some (albeit somewhat imprecise) evidence from the appellant of what the correct figure should be.

42. HMRC's explanation for the "Shopping cart unidentified" amount is that it reflects payments made for transactions which took place outside eBay. For example via the appellant's website. We accept that explanation. However, HMRC's explanation as to the transactions underlying the receipts for "Miscellaneous" and "No reference" were less convincing.

43. We accept the appellant's evidence that the CD's/DVD's were personal sales.

44. As regards the remaining PayPal receipts questioned by the appellant (as above), we accept that some part of them reflects personal items. Obviously if sales of the sofas/cars/other items etc amounted to a serious undertaking earnestly pursued, then any receipts for them might be subject to VAT as they were made in the course of furtherance of business.

45. As mentioned above, the appellant must do more than just pick holes in HMRC's figures. He must show positively what corrections should be made to make the figures right or nearly right.'

46. On the basis that:

(1) The appellant has given evidence regarding personal transactions (which we accept); and

(2) The breakdown provided to HMRC in July 2016 is of the amounts that he thought he had received as payments for the counterfeit items he had sold;

It is our view that it is (just) more likely than not a value of £10,000 should be attributed to the items set out at [38] above.

Reasonable excuse

47. As mentioned at [4], if the appellant can establish a reasonable excuse for failing to register then he can be excused from the penalties. The appellant provided no evidence as to why he had failed to register for VAT with effect from 1 October (or at all) and so we find that the appellant has no reasonable excuse for failing to register.

Decision

48. Accordingly, we direct that HMRC recalculate the date on which the appellant was liable to register for VAT, his VAT liability and his liability to a penalty on the basis that his turnover was £417,000 for the period 4 January 2008 to 29 February 2012 and not £427,000.

49. Save to the extent that the assessment and the penalty are reduced as a result of the foregoing recalculation we dismiss the appeal.

Appeal rights

71. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 07 DECEMBER 2018