Neutral Citation: [2022] UKFTT 305 (TC)

Case Number: TC08577

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/06290

Value Added Tax – whether assessment issued out of time one year after evidence of facts sufficient in the opinion of HMRC to justify the making of the assessment came to their knowledge – section 73(6)(b) VATA – appeal dismissed

Heard on: 23 August 2022
Judgment date: 25 August 2022

Before

JUDGE GUY BRANNAN
MS GILL HUNTER

Between

NOTTINGHAM FOREST FOOTBALL CLUB LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Colin Smith, The Independent Tax and Forensic Services LLP

For the Respondents: Ms Esther Hickey, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Nottingham Forest Football Club Limited ("the Appellant") against an assessment to VAT for the period 08/15 in the amount of £345,561 issued by the Respondents ("HMRC") on 29 April 2019.

2. Although in the Appellant's original grounds of appeal the quantum of the assessment was contested, at the hearing only one issue was in dispute. That issue was whether the assessment was time-barred by section 73(6)(b) VATA under Value Added Tax Act 1994 ("VATA").

3. In short, the issue is whether the assessment was made within one year after evidence of the facts, sufficient in the opinion of HMRC to justify the making of the assessment, came to their knowledge: section 73(6)(b) VATA. For convenience, we shall refer to this test as the "knowledge of the facts" test. HMRC argue that their knowledge of the facts was only complete on 9 May 2018 whereas the Appellant argues that HMRC had the necessary knowledge of the facts on 20 April 2018.

THE EVIDENCE

4. The evidence in this case comprised an electronic bundle of approximately 250 pages and two witness statements put forward on behalf of HMRC.

5. The first and lengthier witness statement was that of Mr Bell, an officer of HMRC. Mr Bell conducted the examination of the Appellant's VAT returns and issued the assessment in respect of the period 08/15 ("the assessment"). However, we were informed at the hearing that Officer Bell had retired from HMRC at some time after making his witness statement and before the hearing. In accordance with their usual policy, HMRC did not ask a retired former member of staff to give evidence. Instead, the second and shorter witness statement was given by Mr Pickerill, an HMRC officer who had reviewed the assessment issued by Officer Bell. Mr Pickerill gave oral evidence and was cross-examined.

6. No witness gave evidence on behalf of the Appellant.

7. Prior to the hearing, the Appellant made an application that no weight should be attached to Officer Bell's witness statement on the basis that he was not being made available for cross-examination. At the hearing, Mr Smith, representing the Appellant, did not object to Officer Bell's witness statement being admitted to evidence, but complained that there were a number of issues which, had he had the opportunity, he would have put to Officer Bell in cross-examination. In the event, Officer Bell's witness statement largely recited or was mainly corroborated by documentary evidence and, moreover, did not seem to be disputed by the Appellants to any material extent. It was the documentary evidence upon which both parties focused at the hearing.

8. Prior to the hearing, we had received no explanation why Officer Bell would not be attending to give evidence. We do not think it is satisfactory for HMRC to put forward a witness statement of a witness who is unable to attend the hearing without some explanation as to why the witness is not able to attend. We make no criticism of Ms Hickey, representing HMRC, who only became involved in this appeal on the evening before the hearing, taking the place of a colleague who was suffering from illness.

THE LAW

9. As we have explained, the central issue in the appeal is whether HMRC were time-barred from issuing the assessment. The statutory provision, section 73(6) VATA relevantly provides as follows:

> "(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge…."

10. Section 73(6) VATA was considered by Dyson J in *Pegasus Birds v Customs and Excise Commissioners* [1999] STC 95 at 101-102:

> "**The legal principles to be applied**
>
> 1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act."

11. In the Court of Appeal in *Pegasus Birds* ([2000] STC 91) Aldous LJ said this about section73(6) at [11]:

> "Subsection (6) is to protect the taxpayer from tardy assessment, not to penalise the commissioners for failing to spot some fact which, for example, may have become available to them in a document obtained during a raid. Against that background, sub-s (6)(b) is clear. The relevant evidence of facts is that which was considered, in the opinion of the commissioners, to justify the making of the assessment. The one-year time limit runs from the date

> when the facts constituting the evidence came to the knowledge of the commissioners. That was the construction adopted by the tribunal and the judge. It accords with similar views expressed in other cases in respect of similar provisions in earlier legislation."

12. Mr Smith also referred to this Tribunal's decisions in *Albany Fish Bar & Anor v HMRC* [2021] TC 08170 and *Temple Retail Ltd v HMRC* [2014] UKFTT TC 702. However, these decisions appear to be applications of the principles set out in *Pegasus Birds* rather than any new statement of principle.

THE FACTS

13. As is well known, the Appellant is a football club based in West Bridgford, Nottingham, currently playing in the Premier League, although during the times material to this appeal the Appellant was playing in the Championship.

14. On 16 April 2018 Officer Bell visited the Appellant to discuss how the business operated and what accounting systems were used.

15. Officer Bell again visited the Appellant on 20 April 2018 to examine invoices and to download general ledger data. A back up memory stick containing data from the Appellant's previous accounting system, Sage, was then collected by Officer Bell on 9 May 2018.

16. These dates are important because HMRC argues that the knowledge of the facts test was only satisfied at the earliest on 9 May 2018 when Officer Bell received the memory stick containing the Sage data. The Appellant, however, argues that the knowledge of the facts test was satisfied earlier, on 20 April 2018, when Officer Bell downloaded the general ledger data.

17. On 11 May 2018 Officer Bell emailed Mr John Taylor, Head of Finance at the Appellant, indicating the matters into which he wished to look:

> "Thanks for confirming your agreeing to the email protocol and for providing the SAGE back up. I attach a spreadsheet[1] showing the accounting entries posted to the NAVISION accounting system that I would like to take a look at – Tab1 for Sales and Tab 2 for Purchases."

18. Navision was the Appellant's accounting software which replaced Sage. It was not clear from the evidence when Navision started to be used and when Sage ceased to be used by the Appellant.

19. Officer Bell emailed the Appellant on 24 May 2018 to query the 08/15 quarter VAT return. Officer Bell indicated that the Appellant may have under-declared output tax (£88,125) and over-declared input tax (£258,409). The total sum of the under and over declarations was £346,534, owed to HMRC. The email read as follows:

> "I have been looking at the 08/15 VAT period and trying to establish what has happened.
>
> The actual VAT declaration for this period was:
>
> £237,128 Output tax
>
> £585,305 Input tax
>
> £348,177 Repayment to NFFC
>
> These figures are also shown on the 'Q1 HMRC ONLINE SUBMISSION' PDF file dated 06/10/15 in the file The figures seem to have been taken from

[1] The spreadsheet was not included in the evidence.

the Navision 'VAT STATEMENT' dated 05/10/15 which is only the top sheet without any supporting breakdown.

An Error Correction Notice (ECN) was then submitted on 02/11/15 for £126,984 underdeclared output tax.

This then made the Return figures:

£364,112 Output tax

£585,305 Input tax

£221,193 Repayment to NFFC

The Navision Day Book Reports 'NAV REPORTS – DAY BOOK VAT ENTRY SALES and DAY BOOK VAT ENTRY PURCHASES' for the period dated 05/10/15 shows the tax to be:

£452,237 Output tax

£326,896 Input tax

£125,341 Payment to HMRC.

These figures compare favourably with the Trial Balance report 'POST Q1 ADJUSTMENTS TB' 03/11/15 which shows output tax (VAT Nominal Account 3302) and input tax (VAT Nominal Account 3301) to be:

£451,782 Output tax

£326,796 Input tax

£124,986 Payment to HMRC

It looks as if the differences are:

Output tax – true output tax of £452,237 taken from the Navision Day Book Sales report less £237,128 originally declared less £126,984 Error Correction Notice giving a difference of £88,125.

Input tax – true input tax of £326,896 taken from the Navision Day Book Purchases report less £585,305 originally declared giving a difference of £258,409

In total the difference between what should have been declared and what has been declared is £346,534 – under-declared output tax of £88,125 and overclaimed input tax of £258,409.

I suspect when the original declaration was made the tax was taken by using the figures from the VAT Nominal Accounts 3302 and 3301 and purchases also included a previous settlement figure in error.

There is a report dated 03/11/15 'ADJUSTED VAT STATEMENT' which results in the ECN figure of £126,984 but includes some figures under the heading 'HMRC Q4 and Q1 Movement to Report' which don't seem to make any sense.

Can you have a look at the reports please and then we can discuss when I come over next."

20. On 1 August 2018 Mr Taylor, emailed Officer Bell stating that the Appellant only owed £109,810 to HMRC, as they had not received a full repayment of VAT of £348,177.47, previously declared on the 08/15 return. The Appellant stated that, instead, it had only received £109,810.49. The email stated:

"…I have looked into this and it seems things got into a pickle.

> From what I can see from the club records the following took place:
>
> VAT return submitted (010615 – 310815) £348,177.47 repayment position to NFFC (Output £237,128.47, Input £585,305.94).
>
> The club then realised an error due to a system change (sage to nav) which was logged with our system provider and HMRC (Julie Johnson VAT Specialist), I have a copy of the e-mail if required. New VAT return created:
>
> £452,237 output, £327,867 input = £124,370.31 payable to HMRC.
>
> This is when things go a bit odd:
>
> HMRC physically paid the club £109,810.49 on the 09/11/15, I have no record as to why (if you want to see a bank statement then let me know), from what I can see the club didn't receive £348,177.47 as per the incorrect VAT return.
>
> The club then paid HMRC £126,984.86 on the 13/01/16 which was slightly higher than the liability mentioned above as I guess the club made a few adjustments to the return.
>
> From the above it looks like the VAT position is correct, and the club need to return the £109,810.49 to HMRC?
>
> Let me know if you agree with the logic, we can discuss next week when you are on site in more detail if required."

21. On 2 August 2018 Officer Bell explained that £238,366.98 of the repayment had been used to offset a PAYE debt with the result that the Appellant had, in fact, received repayment in full.

22. In an email dated 10 September 2018 the Appellant advised Officer Bell that it was unable to find any paperwork relating to the set off in relation to the PAYE liability. The Appellant could find no trace of the transfer on the online statement but said it would check in storage to see if any paperwork could be located.

23. However, the Appellant was unable to find any supporting paperwork and provided HMRC with a reconciliation of PAYE payments, showing all periods matching a payment to its business bank account.

24. The Appellant also provided a VAT reconciliation for the 08/15 VAT return. The Appellant believed that the VAT sum owed to HMRC was £124,370.

25. On 18 April 2019 Officer Bell e-mailed a copy of a PAYE letter to the Appellant. The letter was dated 26 November 2015 and it confirmed that £238,366.98 had indeed been offset from the VAT repayment in order to pay a PAYE liability of the Appellant. On 26 April 2019 Officer Bell e-mailed the Appellant stating that VAT due to HMRC was, therefore, £348,177.

26. Officer Bell stated that an assessment would be raised for the under-declared VAT if the Appellant agreed the figures.

27. On 26 April 2019 the Appellant e-mailed Officer Bell and indicated that it agreed to the under-declaration figures.

28. A notice of VAT assessment was issued to the Appellant on 29 April 2019, in the sum of £345,561.

29. Notwithstanding the apparent agreement on the quantum of the assessment, on 19 June 2019 the Appellant's agent notified the intention to appeal the assessment.

30. This was followed on 11 July 2019 by confirmation that a formal statutory review was required. The conclusion of the review was carried out and notified to the Appellant on 28 August 2019. The conclusion of the review was to uphold Officer Bell's assessment.

31. Mr Pickerill confirmed that HMRC had come into possession of the Sage data on 9 May 2018. Mr Pickerill also accepted that the reference in paragraph 8 of Officer Bell's witness statement to HMRC receiving possession of the General Ledger on 20 April 2018 was probably a reference to the Navision data handed over on 20 April 2018 – he believed that this was confirmed by HMRC's Caseflow data system.

32. Mr Pickerill also confirmed that the third paragraph of the email of 11 May 2018 was referring to data from Navision (handed over to HMRC on 20 April 2018).

33. Mr Pickerill was asked whether it was likely that Officer Bell had prepared the spreadsheet attached to the email of 11 May 2018 from the Sage data picked up on 9 May 2018 or whether it was more likely to have been compiled from then Navision data collected on 20 April 2018. Mr Pickerill accepted that to compile the spreadsheet from the data collected on 9 May would have been a "short turnaround." However, he considered that he would only be speculating as to whether the data came from that collected on 20 April rather than that collected on 9 May. Mr Pickerill also said that it would be speculation on his part to claim that the Sage data had no relevance to the assessment.

SUBMISSIONS AND DISCUSSION

34. It was common ground that, in accordance with the decision of Dyson J in *Pegasus Birds*, the burden of proof lay upon the Appellant to show that the assessment was made outside the time limit specified in section 73(6)(b) VATA.

35. We should make it clear that there was no suggestion of any kind of wrongdoing by the Appellant. It was apparent that the Appellant's error arose innocently from the change in its accounting systems. No penalty was charged by HMRC.

36. Mr Smith submitted that the emails of 11 May and 22 May indicated that Officer Bell had all the information he needed to make an assessment and that that information was derived from the Navision accounting system handed over to HMRC on 20 April 2018. Therefore, the one-year period prescribed by section 73(6)(b) VATA expired on 20 April 2019. Consequently, the assessment issued on 29 April 2019 was time-barred.

37. Ms Hickey submitted that the one-year period only started to run from 9 May 2018. She noted that Officer Bell considered that the time period started on 24 May 2018 when he sent the email to the Appellant having analysed the data which he had obtained.

38. Mr Smith suggested that the Sage data did not relate to the 08/15 period. But there was no evidence to this effect. Similarly, Ms Hickey suggested that the reference in Officer Bell's email of 24 May 2018 to VAT Nominal Accounts 3302 and 3301 were references to Sage. She said that Sage used four-digit reference codes. Again, there was no evidence to support this suggestion. Accordingly, we have disregarded the suggestions made by Mr Smith and Ms Hickey in relation to the Sage data.

39. It was conspicuous that the Appellant did not provide witness evidence to clarify the data that was in the possession of Officer Bell. Such a witness could easily have confirmed, for example, whether the Sage data was irrelevant to the 08/15 period and whether the reference codes related to Sage data. But no such evidence was forthcoming.

40. Instead, we are left with the documentary evidence which, in our view, does not demonstrate that the Sage data was irrelevant to Officer Bell's knowledge of the facts before 9 May 2018. On the evidence, therefore, it is impossible for us to conclude that the evidence

of the facts, sufficient in the opinion of Officer Bell to justify the making of the assessment, came to his (and therefore HMRC's) knowledge on 20 April rather than 9 May 2018. In other words, the Appellant has failed to discharge the burden of proof on the balance of probabilities. It follows, therefore, that the assessment was not time-barred by section 73(6)(b) VATA.

41. For these reasons, we dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

GUY BRANNAN
TRIBUNAL JUDGE

Release date: 25 AUGUST 2022