TC04486

Appeal number: TC/2013/5228

VAT – appellant convicted of cheating the public revenue- appeal against assessment for VAT arising out of same facts - upheld – appeal against assessment to penalty for later period - upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

MONICA BIRCHAM **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
GILL HUNTER

Sitting in public at Royal Courts of Justice, Strand on 8 April 2015. Further to directions issued at the hearing, further submissions received on 30 April from HMRC and on 2 May from the appellant.

The appellant in person

Mrs R Paveley, HMRC officer, for the Respondents

DECISION

1. The appellant appeals against a VAT assessment dated 8 April 2013 for £79,454.32 and against a penalty assessed on 17 June 2013 of £2,485. The VAT assessment related to VAT periods 07/05 to 10/11 and the penalty assessment related to period 01/12.

Adjournment application

2. Ms Bircham applied at the outset for an adjournment. She gave two grounds. Firstly, she was hopeful of obtaining pro bono representation. Secondly, she wanted a large bundle of documents admitted to the hearing and Mrs Paveley for HMRC had not had time to read them. HMRC did not object to the application.

3. Although Ms Bircham had brought nothing with her to back up what she said, it was her case that she had made an attempt in December 2014 to obtain legal advice from Streatham Citizen's Advice Bureau but they had been unable to help her. She had then approached Stockwell Legal Advice Centre in February 2015 but they had also been unable to help. Then in March 2015 she had contacted a lawyer who had passed on her details to a pro bono unit. She had heard from the pro bono unit that they might be willing to take on her case but had not yet done so and certainly were unable to help her with today's hearing.

4. The Tribunal rejected Ms Bircham's application. Even accepting the facts were as presented, Ms Bircham had been very slow to approach anyone for help. The Notice of Appeal was lodged by her in mid-2013. Yet she had not pursued the possibility of assistance until after she had received the Notice of Hearing letter dated 7 November. Even then she had been very slow to approach anyone.

5. Her explanation for why she had done little in between November 2014 and March 2015 to obtain assistance was that she was being investigated for an alleged criminal offence involving housing benefit (and for which a lawyer on legal aid has been acting for her since August 2014) and also eviction proceedings had been initiated against her although they are currently stayed and she is not homeless.

6. We did not consider that these grounds were an adequate explanation of her failure to make earlier approaches to obtain help with this appeal bearing in mind she lodged it in mid-2013. Her actions in leaving the matter so late virtually guaranteed she would not have anyone to represent her at this hearing and she must therefore accept her choice and continue unrepresented.

7. So far as the bundle of documents she wished to rely on at the hearing was concerned, we find that Ms Bircham had filed a list of documents listing many of the items as far back as August 2014. However, she had never provided HMRC with a copy of any of the documents. Her case was that she had posted them recorded delivery to HMRC. Nevertheless, she had been unable to give the reference number of the package to HMRC when asked. She was aware HMRC had never received the

package as Mrs Paveley had emailed and written to her on a number of occasions about it. Ms Bircham had only replied to the initial query and had ignored the subsequent ones. Her explanation for this was that she said she could not afford to photocopy and re-sent the bundle a second time.

8. Even if we accept Ms Bircham's account of the matter, it is not an explanation, let alone an adequate explanation, of why she did not respond to Mrs Paveley and in particular explain to her why she had not re-sent the bundle a second time, thus allowing Mrs Paveley to make alternative arrangements to obtain a copy of it.

9. We considered that Ms Bircham was the cause of the fact the documents had not been considered in advance by HMRC and that therefore she ought not to obtain an adjournment because of her failure to provide a copy of the bundle, as she had repeatedly been asked to do. The hearing could proceed with the bundle excluded. We refused the application for adjournment of today's hearing on the basis of the missing documents.

10. However, we then adjourned the hearing for an hour to enable Mrs Paveley to read the bundle and decide whether or not she would object to its admission. When we re-convened the hearing at 12.40pm, Mrs Paveley informed the Tribunal that she had read the bundle and had no objection to Ms Bircham relying on the contents of it. We admitted it.

Out of time appeals

11. It seems both the appeal against the assessment and against the penalty were made out of time. The appeal against the assessment was out of time as Ms Bircham lodged the papers with the Tribunal on 6 August 2013 following HMRC's review decision on 5 July 2013; moreover these papers failed to deal with hardship. This was rectified but it made the lodging of the appeal even later. Ms Bircham did not request a review of the penalty decision but notified the Tribunal on 20 December 2013 that she had intended the earlier appeal against the assessment to include an appeal against the penalty.

12. Mrs Paveley had no objection to the appeal being lodged late. We admit it. The appeal papers were technically deficient but this was remedied and otherwise the appeal was only very slightly late.

The evidence

13. The facts were largely not in dispute, and these facts we recite below. Where the facts were in dispute, we set out below the reasons for the findings of fact we make. We had evidence from both Ms Bircham and Mrs Paveley.

14. Ms Bircham: Ms Bircham had been convicted of cheating the public revenue on a plea of guilty and admitted to us that she had inflated her VAT returns and forged VAT invoices to deflect HMRC from discovering this. Therefore, on the one hand, her conviction and admissions gave us cause to doubt whether we could rely on

what she said to us; on the other hand, she was prepared to be honest with the Tribunal about what she had done. We also took into account that in two letters to HMRC she had claimed she ceased trading in 2008 but she later retracted that in another letter and before the Tribunal; she also told us she destroyed all her invoices but we note that she had kept copies of all her VAT returns. Overall, our conclusion was that we did not consider her evidence reliable.

15. In particular, she suggested in response to a question by the Tribunal that she had had genuine business expenditure of about £50,000: we doubted that the true figure was anywhere near as large. There was no documentary evidence to support this figure and in the criminal proceedings she had accepted it was a 'small' figure and £50,000 was not mentioned. It was in any event clear to us that £50,000 was just a figure she plucked from the air on the spur of the moment. And for the reasons explained at §71 below, we were also unable to accept her claim that there had been an agreement reached when she entered her guilty plea that HMRC would not assess the VAT.

16. Mrs Paveley: Mrs Paveley was the presenting officer and had not come to the hearing expecting to give evidence. Nevertheless, she did give evidence, albeit only on a few points and then it amounted to repeating what others had told her. We discuss the extent to which we accepted this evidence below at §§49-52.

17. Apart from the oral evidence of Ms Bircham and Mrs Paveley, we relied on the documents in front of the Tribunal, including both the bundle provided by Mrs Paveley and the bundle provided by Ms Bircham. From all of these sources we make the following findings.

The facts

18. Ms Bircham registered for VAT as a sole proprietor sometime in 2004. She was also the director of a company which was registered for VAT, although the company's registration is only relevant as background in this appeal, as the only assessments under appeal were those on Ms Bircham personally. We note in passing that the company (acting by Ms Bircham) had appealed the VAT assessments on it but this appeal was struck out when it became clear that the company had ceased to exist. HMRC have taken no steps to restore the company to the register.

19. Ms Bircham put in quarterly VAT repayment returns over the years of her registration. As we have said, she accepted at the hearing that these returns were 'inflated': they included in them amounts as input VAT which she had not incurred. Indeed, as we have already said, she accepted at the hearing that she had forged invoices before a VAT inspection in 2012 in order to back up her inflated VAT returns.

20. Following the VAT inspection, the VAT officer was suspicious of the validity of her returns, and those made by her by the company of which she was director, and the matter became a criminal investigation. Ms Bircham was charged and pleaded

guilty to one offence of cheating the public revenue. She was convicted and given a suspended prison sentence of 18 months.

How the VAT assessment was calculated

21. At the tribunal hearing one of the issues was by how much Ms Bircham had inflated her VAT returns. Mrs Paveley's unchallenged evidence, which we accept, was that HMRC had calculated the over-claimed 'input VAT' simply by adding up the amount reclaimed in Ms Bircham's VAT returns over the years. In other words, HMRC assumed that all the money paid to Ms Bircham represented false VAT refund claims. HMRC ascertained this figure by referring to the VAT returns for the previous four years. For earlier years, HMRC had no records, but they obtained the information from Ms Bircham's bank statements. HMRC obtained the bank statements under a production order against her bank.

22. HMRC did not produce at the hearing the bank statements nor the production order. We did have a schedule which Mrs Paveley believed had been prepared by an HMRC officer from the appellant's bank statements. Ordinarily, we would be very wary of accepting the validity of a schedule the origin of which even the party which relied on it could not vouch for. However, Ms Bircham's bundle included a copy of all her VAT returns. Comparing these to the schedule proved that the schedule was accurate in so far as Ms Bircham was concerned. We had no way of checking the half of the schedule which applied to the Company, but considered – to the extent it was relevant - that this half of the schedule was more likely than not to be accurate as the other half had been proved to be accurate.

23. The schedule showed that the total of Ms Bircham's and the company's VAT net reclaims from 09/04 to the end of 2011 amounted to £156,544.76. It showed that the total of Ms Bircham's net reclaims alone in that period amounted to £76,526.29. That £76,526.29 was the amount for which Ms Bircham was assessed.

24. Some of the returns (those for 10/05, 01/09 and 01/10) did show small amounts of output tax owing although always less than the input tax claimed: but these amounts of output tax do not affect the correctness of the assessment as that had assessed only the net amount of the reclaims.

The true amount of Ms Bircham's input tax

25. Ms Bircham's case was that some of the £76,526.29 was input tax to which she was properly entitled as incurred on purchases actually made in the course of her business. The transcript of her sentencing hearing, which was included in her bundle, showed that HMRC had accepted that the business had not initially been set up with fraudulent intent and that an unquantified part of the amount assessed represented VAT to which she would have properly been entitled. Nevertheless, the transcript also recorded that HMRC did not consider her expenditure exceeded £22,000 and that Ms Bircham herself accepted that she was entitled only to a 'small portion' of the amount she had claimed on her VAT returns. In the hearing before us, as we have

said at §15 above, she suggested her expenditure might have been as much as £50,000, but we did not consider this reliable for the reasons already stated.

26. The documentary evidence before us gave no support for any figure. Ms Bircham admitted she kept no records, and told us that she had destroyed any that she had. She did produce to us a document which she said was the text of an email from a person she had dealt with as a supplier which indicated that she had incurred an unspecified amount of expenditure on printing on bottles. However, it was not clear whether the business which incurred the expenditure was Ms Bircham trading in her own capacity or her company; and no figure was mentioned. It was not even clear the expenditure was subject to VAT as the document did not indicate whether the supplier was VAT registered.

27. In any event, we would have concerns with accepting at face value documentary evidence provided by Ms Bircham bearing in mind she was convicted of an offence the commission of which included forging false invoices. But the documentary evidence summarised in the above paragraph, even if we accepted it was genuine, did not prove anything relevant: in particular it did not prove that Ms Bircham had incurred any business expense in her own capacity, and certainly it did not prove that a particular sum of VAT had been incurred.

28. We do not accept she incurred expenditure of £50,000; we also do not accept she incurred expenses of £22,000. There was no finding of fact to that effect in the criminal proceedings (there were no findings of fact in that she pleaded guilty). So far as the sentencing hearing was concerned, HMRC accepted that there may have been expenses in the order of £22,000 but we saw no evidence of these, let alone evidence which would allow us to quantify them.

The law

29. Ms Bircham challenges the assessment by HMRC to recover from her the amounts which she claimed and received in 'input tax' from HMRC from July 2007 to October 2011.

Correctness of assessment

30. The assessment itself did not specify under which provision it was made. It seems to us it could have been made under either s 73(1) or (2) of the Value Added Tax Act 1994 and so we treat it as made under both. S 73(1) permits HMRC to assess to their best judgment where:

> "…it appears to the Commissioners that such returns are …incorrect, they may assess the amount of VAT due from [the taxpayer]…."

S 73(2) permits HMRC to assess where:

> "…there has been paid or credited to any person –
>
> (a) as being a …refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited…."

31. Only an assessment under s 73(1) is required to be to best judgment. This distinction is immaterial in this case where our finding is that the assessment was to best judgment. Having no evidence of any quantifiable amount of true input tax, it seems to us HMRC could only have done what they did, which was to assess to recover all tax repaid to Ms Bircham.

32. Nevertheless, we must go on to address the question whether the assessment was correct and should be upheld. Ms Bircham's case is that the assessment is clearly not correct as even HMRC accepted that she did have some genuine input tax.

33. But that is not the test for whether the assessment is correct. The law is that the assessment is correct save to the extent that the taxpayer can quantify it to be wrong. This general principle which applies to direct and indirect taxes was expressed by Lord Lowry in *Biflex Caribbean Ltd* [1990] UKPC 35 at page 10:

> "…assessments, … 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. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer."

This was put even more succinctly by Latham CJ in *Trautwein* (1936) 56 CLR 63 at page 87, a case in the Australian High Court, but cited with approval by Lord Lowry in *Biflex:*

> "There is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself [from liability to an assessment] by the simple and relatively unskilled method of losing either his memory or his books."

34. For Ms Bircham to displace the assessment in whole or part she would need to satisfy us of an amount by which the assessment was excessive. So while HMRC accept, and we do too, that there was *some* genuine input tax, we have no idea how much it was. Ms Bircham admits that she did not keep her business receipts. So her genuine input tax cannot be quantified. Therefore, despite the acceptance by everyone that there would have been *some* genuine input tax, nevertheless as a matter of law the assessment for £76,526.29 is correct and is enforceable.

Form of the assessment

35. The assessment was broken down into accounting periods for the 11 periods from and including 04/09 to 10/11. The amount assessed for each accounting period was shown separately and totalled £43,384. We do not consider that the form of the assessment can be challenged in so far as this £43,384 is concerned.

36. We have in fact referred to it as an "assessment" but we find in fact that it was a series of assessments. Each accounting period was separately assessed, where each period was separately stated with the amount assessed for that period. These 11 assessments were all notified to the taxpayer in a single document. That document was headed "notice of assessment(s)" and so did not even purport to amount to a single assessment.

37. That this is a valid method of assessing is clear from the High Court decision in *International Language Centres Ltd* [1983] STC 394 at 396 where Woolf J said:

> "The references which I have made so far to a global sum should not be regarded as indicating that it is not possible to include within one single document a series of assessments for different periods. Those series of assessments may in themselves be either for an individual accounting period or for a series of periods. If they are for a series of periods, they must be able to be justified as being mini-global assessments."

38. However, the assessment for the periods 7/05 to and including 01/09 was referred to on the Notice of Assessments as being for period "00/00". It was not broken down into individual accounting periods although HMRC actually did know the correct periods as they had the bank statements from which it had been possible to calculate which repayment related to which period, even though at the time of the prosecution they no longer possessed copies of the VAT returns. It was indicated to us that HMRC's computer system did not permit period by period assessments for periods more than 4 years ago and this was the reason for the global "00/00" assessment.

39. We find it was clear that the global period to which the "00/00" related was 07/05 to 01/09 as that was stated in the letter of 8 April 2013. Nevertheless, in so far as the assessment related to period "00/00", was it a valid assessment?

40. An assessment for period "00/00" was considered by the Upper Tribunal in the case of *Queenspice* [2010] UKUT 111 (TCC), where a number of periods were assessed together under s 73(1) VATA as period "00/00". Lord Pentland said:

> "**25(iii).** In judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates."

41. He concluded that an assessment for period 00/00 was valid if in the same or another related document the periods to which the assessment actually related was made clear: see §§34-36. The validity in principle of a global assessment was also upheld in *International Language Centres Ltd* and the earlier Court of Appeal case of *S J Grange Ltd* [1979] STC 183.

42. A comment by Woolf J in *International Language* suggests that HMRC should not issue a global assessment when they could issue individual assessments, but our

reading of that is that that is a matter of good practice rather than law. It does not affect the validity of the global assessment in this appeal. But if HMRC make global assessments, they must live with the consequences as to time limits as explained in that case. On the facts of this case, it makes no difference (as explained below).

43. In conclusion, both s 73(1) and (2) gave HMRC the authority to issue the assessments in this case, so the all of the assessments were valid even though one of the assessments was for period "00/00". This is because the period of the 00/00 assessment was set out in a related document (the covering letter). The other prerequisites of an assessment set out in *Queenspice* were also met in either the Notice of Assessments or the letters of the same date: they stated the taxpayer's name, the amount of tax due and the reason for the assessments. The formalities for an assessment were met by the assessments in this case.

Timing of the assessment

44. We turn to consider whether the assessments were made in time.

45. Two sets of time limits apply to an assessment under s 73: the time limits in s 73 itself and the time limits in s 77.

46. <u>s 73 timelimits:</u> S 73(6) provides as follows:

> "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….."

47. The assessments were made in April 2013 and so, except in relation to the last three periods assessed, was out of time under two year rule in s 73(6)(a); however, the two time limits in s 73(6) are alternative, so the failure to be within the two year rule only matters if the remaining assessments were made more than 'one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge…"

48. Mrs Paveley's case was that HMRC did not know exactly how much to assess until HMRC received the copy bank statements from Ms Bircham's bank showing how much input tax had been credited to her account for the periods more than four years ago for which HMRC no longer retained copy VAT returns.

49. Since HMRC relied on the date they received the information from Ms Bircham's bank, it was very odd that HMRC produced no documentary evidence of that date. All we had at the hearing was Mrs Paveley's hearsay evidence that she had been told by someone in HMRC's criminal investigations unit, whose name she could

not recollect, that the bank provided the information shortly after 28 August 2012, which was the date she was told the bank was issued with a production order.

50. This evidence was unchallenged at the hearing, and while we considered it very unsatisfactory that we were asked merely to rely on such vague, hearsay evidence, we were satisfied that HMRC did not receive the records from the bank more than one year before the date of the assessment. This was because the compliance visit to Ms Bircham which triggered the entire process which culminated in the assessment took place on 14 February 2012. It was very unlikely that the bank would have been both issued with and responded to a production order within 7 weeks of the date of the visit, so we accept as more likely than not the evidence that the assessments were within one year of receipt of the information from the bank.

51. We note that in the event, when we asked for further submissions on the issue of timing of the most recent 11 assessments (see §55 below), Mrs Paveley did produce after the hearing a copy of the production order. It was, as she had said at the hearing, dated 28 August 2012.

52. It was also unchallenged hearsay evidence from Mrs Paveley that it was the bank statements which the HMRC officer concerned had considered to be the facts sufficient to justify the assessment. However, we accept that evidence. We accept that for periods more than 4 years earlier, HMRC no longer had copies of the returns and therefore was not in a position to issue the assessment, based on the amounts repaid, until they did receive the information from the bank.

53. We note in passing that it may have been reasonable for the officer concerned to have formed the view that, in a case where the assessment relies on 'deliberate' behaviour, as this one does to the extent it goes back beyond four years, as explained below, the conviction for fraudulent behaviour was the last piece of the jigsaw. In that case, the assessment would have to be within one year of the date of the conviction and, as the conviction was March 2013, the assessment raised in April 2013 was clearly in time.

54. We were concerned that the evidence recited above at §52 only applied to the earlier periods and that the assessments for the most recent 11 periods might not have depended on information from the bank or the conviction. These were the series of assessments which were assessed period by period rather than as period 00/00 (see §§35-37). The bank statements were unnecessary to quantify the input tax as HMRC had copies of the VAT returns for those periods; the conviction was irrelevant to those periods as they were within the normal 4 year time limit under s 77 (discussed below). So it seemed to us that HMRC may have been able to assess these periods earlier than they did. The s 73(6) time limit applies to each assessment individually.

55. The question which we referred for further submissions after the hearing was whether, in respect of 8 periods 04/09 to and including 01/11, HMRC had sufficient information in their opinion to assess Ms Bircham before 8 April 2012 (in other words one year before the date on which they actually did assess Ms Bircham).

56. The visit took place in February 2012 and information was provided by Ms Bircham after that meeting. But at the hearing we had no evidence at all on what was the last matter in the opinion of the officer which allowed him to assess for those 8 periods and whether it was obtained before or after 8 April 2012. So, with only the evidence from the hearing, the matter would have been determined by who had the burden of proving the matter.

57. We consider that it is for the appellant to satisfy us that the assessments were out of time. As we have already said, the law is that it is for the appellant to satisfy the Tribunal that an assessment is incorrect (§§33-34). As we had no evidence on this at the hearing, we were not satisfied that these 8 periods were assessed late.

58. We gave the appellant an opportunity to try to satisfy us the assessments were late. Her reply was that she considered the assessments ought to have been made within a year of HMRC receiving her false VAT returns. We cannot agree. There was nothing on the face of the returns to indicate to HMRC that they were false.

59. HMRC's submissions after the hearing on this point was that the bank statements were essential to those 8 assessments as well as the earlier global assessment because the statements showed not only the input tax reclaimed but also showed no payments out to would-be suppliers. This had given HMRC real cause to doubt the validity of the input tax claims and therefore to issue the assessments. Mrs Paveley also produced evidence that HMRC had received witness statements from persons, from whom Ms Bircham had claimed to have received invoices, stating that the invoices were false. The last of these was received in September 2012. So if we were to take this evidence into account it would not affect the decision we would have reached on the evidence at the hearing: Ms Bircham failed to show that the eight assessments were made more than a year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, came to their knowledge.

60. Therefore, none of the assessments have been shown to be late under the time limits in s 73.

61. <u>S 77 timelimits</u>

62. So the assessments were 'in time' so far as s 73 was concerned; but they must also be in time so far as s 77 is concerned. S 77 VATA provides as follows:

> "(1) Subject to the following provisions of this section, assessment under s 73 ….shall not be made –
>
> (a) more than 4 years after the end of the prescribed accounting period…"

Secion 77(4) however provides:

> "In any case falling within (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period….."

63. In other words the 'normal' time limit is four years, but that 4 years is extended to 20 years in some cases. Those cases are set out in s 77(4A) and the one which is relevant here is (a):

> "a case involving a loss of VAT brought about deliberately by P…."

64. As we have already said, the assessments in so far as they were period by period, were within the normal 4 year time limit and cannot be challenged as out of time under s 77. The assessment for the global period 00/00 was for a period which was more than four years after the end of the accounting periods concerned although well within the 20 years. For that element of the assessment to be valid, therefore, it must be 'a case involving loss of VAT brought about deliberately by P".

65. So we have to determine whether the loss of VAT was brought about deliberately by Ms Bircham. 'Deliberately' has been given the meaning of 'intentionally'. See *Duckitt v Farrand* [2000] OPLR 167 AB 1 TAB 9 page 4 line 18-19 and *Margaret Findlay* [2013] UKFTT 564 (TC). It is therefore possible that its meaning is wider than 'dishonestly', see *Templeton Insurance Ltd and another v Brunswick and others* [2012] EWHC 1522 (Ch) at 43 and *Bilal Jamia Mosque* [2013] UKFTT 324 (TC) at 88.

66. The precise meaning does not matter: we have been satisfied that Ms Bircham not only over-claimed input tax intentionally, she did so dishonestly. She did so deliberately.

67. We are satisfied of this because, firstly, she was convicted of the offence of cheating the public revenue arising out of the exact same facts in respect of which she has been assessed. Secondly, because she pleaded guilty to this offence. Thirdly, she admitted to it at the hearing before us; in particular she admitted that she 'inflated' her input tax claim and that she had forged VAT invoices to support her inflated VAT returns.

68. Our conclusion therefore is that the entire assessment was in time under s 77.

The appellant's defences

69. In some of her letters, the appellant questioned whether HMRC could assess her for tax when she had been convicted of an offence in relation to that exact tax. The answer to this is that HMRC can: a person can be punished for making a false VAT return while at the same time required to refund the VAT falsely reclaimed.

70. At the hearing she repeated a claim also made in her letters which was that her solicitor had informed her that HMRC had agreed at the time she entered her guilty plea that they would not collect the VAT owing. She had no documentation to support this claim.

71. We reject this defence for two reasons. The first is one of fact. We simply do not accept that there was any such agreement. It is undocumented and such an agreement is improbable because it would have been wrong for HMRC to make such

an agreement. While plea bargaining is not unlawful when it is uncertain whether a conviction could be secured, it seems to us it would be very wrong for HMRC to give up tax in return for an admission that the appellant was liable to it. That is not plea bargaining but offering a financial inducement for a guilty plea: we think it improbable HMRC would have done this. It is also improbable that her counsel would have agreed to any kind of bargain without it being documented. We consider it more likely that the appellant was simply mistaken. She may have been told that a guilty plea would mean that she would not be assessed to a civil penalty (which is true) and has therefore simply confused an assessment to tax with an assessment to a penalty.

72. The second reason we reject this defence is one of law. Her claim at root is that HMRC should not have assessed her for the over-claimed tax because they agreed they would not do so in return for her guilty plea. Even if we accepted that the facts were as she has stated them to be, and we do not, her defence is that HMRC acted wrongfully in assessing her.

73. It is clear that this Tribunal has no oversight over HMRC's behaviour and in particular it has no power to discharge a penalty in circumstances where the Tribunal considers that, although the taxpayer is liable to the tax under the statute, HMRC should nevertheless not have issued the assessment as a matter of public policy or under the exercise of its discretionary powers. A recent iteration of this limit on the Tribunal's jurisdiction is *Hok* [2012] UKUT 363 (TCC).

74. A third defence put forward by the appellant was that she had had an earlier VAT inspection in 2007 and the officer had not found anything amiss, and indeed had, on her case, agreed that her returns up to that point were correct. We do not accept this defence as a matter of fact.

75. This is because we do not accept that the officer concerned had agreed that her returns were correct up to that point. All Ms Bircham could show us was an email, which even if we accepted it as valid, was a request by the officer for more information. It did not give Ms Bircham the assurance she said that it did. We do not go on to consider whether such an argument could in law amount to a valid defence to the assessment.

Conclusion

76. We dismiss the appeal against the tax assessments. We find they were in the correct figures, in a correct form, and made within the applicable time limits. There is no valid defence to them.

The penalty

77. On the same day as the assessments were notified to her, HMRC also notified Ms Bircham that they were reducing her claim in her VAT return for input tax of £3,555.00 in period 01/12 to nil. It was this claim which had apparently triggered the VAT inspection on 14 February 2012 which led to the chain of events culminating in Ms Bircham's conviction and this hearing.

78. Ms Bircham has not appealed that decision.

79. On 6 June 2014 she was notified that HMRC intended to charge a penalty of £2,485.00. The letter asked her to notify HMRC by 20 June 2013 of any relevant information which they could take into account in setting the level of the penalty. A schedule to that letter explained that the penalty was levied at 70%, on the basis that there was prompted disclosure but no reduction for the 'telling', 'helping' and 'giving' of information.

80. The assessment of the penalty was notified to her on 17 June 2013 (three days before the deadline for Ms Bircham to provide information). The penalty was stated to be £2,485.00 and was stated to be assessed for period 01/12.

Liability to the penalty

81. The penalty is imposed under Schedule 24 of the Finance Act 2007 which provides as follows:

> **Error in taxpayer's document**
>
> 1(1) A penalty is payable by a person (P) where
>
> (a) P gives HMRC a document of a kind listed in the Table below, and,
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –
>
> ….
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

82. VAT returns are documents of a kind listed in the Table.

83. We find that Condition 1 was satisfied in relation to Ms Bircham's return for 01/12. As Ms Bircham admitted, she inflated her input tax claims. We find the entire amount claimed was wrongly claimed as no evidence was produced of any entitlement to any input tax in that period. Moreover, we note that Ms Bircham did not appeal HMRC's decision to reduce the reclaim to nil (see §78).

84. The schedule does not define 'deliberate'. We have already dealt with whether Ms Bircham's actions were deliberate at §§65-67 above in relation to earlier periods. We make the same findings for the same reason in period 01/12. Ms Bircham acted deliberately in making inflated VAT reclaims.

85. HMRC were therefore correct to assess a penalty under this Schedule. Does Ms Bircham have any defences to the assessment?

Was the assessment to the penalty valid?

86. As we have already stated, Ms Bircham could be assessed for the tax the fraudulent claim of which gave rise to her conviction. Being required to repay the tax is entirely consistent with a conviction for unlawfully obtaining it. Punishment is distinct from restitution. However, Ms Bircham cannot be punished *twice* for the same offence. So HMRC cannot impose, and have not tried to impose, a civil sanction for VAT dishonestly obtained by Ms Bircham for the periods covered by the assessments.

87. It is HMRC's position that the conviction, however, did not relate to period 01/12. It might have been easy for the Tribunal to decide to which periods the conviction related had HMRC put in evidence the certificate of conviction, but for some unexplained and difficult to understand reason, they did not do so.

88. The only record of what precisely Ms Bircham was convicted is contained in the transcript of the sentencing hearing provided by Ms Bircham. This showed that the Judge commenced his sentencing remarks with:

> "…over a period of eight years up to 14 February of last year [2012], you [ie Ms Bircham] cheated the Revenue by fraudulently claiming VAT repayment totally £156,544.76 when you were not entitled to the whole of that sum."

89. So far as the sum of £156,544.76 is concerned, the schedule to which we referred at §§22-23 showed that this was the total of the amounts reclaimed by Ms Bircham and the company of which she was director up to the end of 2011. It does not include the sum of £3,555 which Ms Bircham claimed in her 01/12 return; and it only refers to cheating the public revenue and not an attempt to cheat the public revenue which was all her false VAT return in 01/12 amounted to as it was never paid by HMRC. On the other hand, the judge does refer to the offence being committed up to 14 February 2012. The VAT return for 01/12 was dated 10 February 2012.

90. So the evidence before us of what Ms Bircham was convicted is ambiguous: the above sentencing remarks might be read as meaning that the conviction did not relate to period 01/12 but it is not entirely clear.

91. We consider that while the burden is on HMRC to show that Ms Bircham was liable to the penalty, it is for Ms Bircham to establish any defence to that penalty. A claim that she has already been punished for the same offence is a *defence* and therefore it is something that Ms Bircham must prove. As the evidence in front of us is ambiguous, we find that Ms Bircham has not shown that her conviction related to period 01/12. The conviction cannot therefore be a defence to the imposition of the penalty.

92. No other defence to the penalty was suggested.

Amount of the penalty

93. HMRC assessed the penalty at 70% of the false input tax reclaim. Paragraph 4 provides the percentages should be as follows:

> **Amount of penalty – standard amount**
>
> (1) The penalty payable under paragraph 1 is
>
> (a) …
>
> (b) for deliberate but not concealed action, 70% of the potential lost revenue, and
>
> (c) for deliberate and concealed action, 100% of the potential lost revenue.

94. Paragraph 3 defines 'concealed' as being where P 'makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure). However, while Ms Bircham was convicted of an offence which including forging false invoices to support her inflated VAT returns that was, it seems, only for the period up to the end of 2011; and while she admitted to us that she forged invoices, it was not clear that that admission related to the period 01/12. So we proceed on the basis that the false VAT return for 01/12 was not supported by forged invoices and that the maximum penalty is 70% and not 100%.

95. The potential lost revenue is defined in paragraph 5(2)(b) as the amount which would have been repaid by HMRC if they had not corrected the inaccuracy in the return by reducing it to nil. That was £3,555 and 70% is the amount assessed: £2,485.

96. However, the 70% can in some cases be reduced. Paragraph 9 provides that the 70% penalty can be reduced to a figure not below 35% if there is 'prompted' disclosure which means that, although it was made at a time when P had reason to believe HMRC had or were about to discover the error, P told HMRC about it, or gave help in quantifying the error, or allowed HMRC access to records.

97. HMRC gave Ms Bircham no reduction under these provisions. The assessment records that 'prior to the criminal case, Ms Bircham has not assisted'. However, as the 01/12 period did not appear to be a part of the criminal case, this seems an odd test for HMRC to apply. We also note that the penalty was imposed 3 days before the date set by HMRC for Ms Bircham to comment on it; but while that was regrettable, Ms Bircham did not satisfy us that she would have responded and further, by that point, the inflated reclaim had already been quantified.

98. It is for Ms Bircham to satisfy us that she was entitled to a reduction. And we saw no evidence that she had told HMRC about the error, given help with quantifying it or allowed HMRC access to records. Indeed, it was her case that she did not have records as she had destroyed invoices.

99. HMRC considered in their letter dated 6 June 2013 whether there were any special circumstances which could lead to a reduction in penalty and decided that there were not. HMRC gave Ms Bircham the opportunity to respond, and then, as we

have said, imposed the penalty before the period for a reply expired. While this might technically give the Tribunal the right (under Paragraph 17(3)(b)) to consider the question of special circumstances afresh, we do not interfere with HMRC's conclusion as there appear to be no special circumstances to justify a reduction in penalty. As this was a penalty for deliberate behaviour, suspension of the penalty could not be considered: paragraph 14(1).

100. We uphold the penalty at 70%.

101. The entire appeal stands dismissed.

102. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 15 JUNE 2015