TC07682

VAT – best judgment assessments - whether made to best judgment – whether single global assessment or multiple assessments - whether out of time - s73(1) VAT Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01462

BETWEEN

SEAN CONVERY **Appellant**

-and-

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

TRIBUNAL: JUDGE ALEKSANDER
PATRICIA GORDON

Sitting in public at Royal Courts Justice, Belfast on 3 February 2020

Danny McNamee of McNamee McDonnell, solicitors, for the Appellant

Mary Hendrick, litigator, of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Mr Convery against a review decision contained in a letter dated 23 January 2018. Mr Convery was originally assessed to VAT for periods 9/13 to 3/16 totalling £102,168. This was reduced on review to VAT for periods 3/15 to 3/16 totalling £46,440. The reduction was on the basis that the amounts assessed for the periods 9/13 to 12/14 were out of time, and were therefore cancelled. In addition, Mr Convery was assessed to penalties for deliberate non-declaration of VAT. The penalties are not subject to any appeal.

2. Mr Convery claimed that he should not have to pay the amount of VAT in dispute on grounds of hardship, and this claim was accepted by HMRC.

3. Mr McNamee represented Mr Convery and Ms Hendrick represented HMRC. Witness statements were filed in respect of Mr Convery and Ms Heather McMullan, the HMRC assessing officer and decision maker. We heard oral evidence on oath from both Mr Convery and Ms McMullan. In addition, a bundle of documentary evidence was before us.

BACKGROUND FACTS

4. For the most part, the background facts are not in dispute, and we find them to be as follows.

5. Mr Convery was a sole trader who was engaged in the supply of vehicle repairs and haulier services. It is a matter of dispute when he ceased to trade.

6. There was a joint enquiry into both income tax and VAT liabilities of Mr Convery. This appeal relates solely to the VAT aspects of the enquiry. For the periods 12/13 to 9/16, Mr Convery had filed electronic VAT returns showing no inputs or outputs, in other words “nil” returns.

7. Several attempts had been made between September 2013 and June 2014 by various HMRC officers to arrange a meeting with Mr Convery, but all appointments made to meet him were cancelled. On 9 July 2015, Ms McMullan wrote to Mr Convery asking that he provide HMRC with copies of all his income tax self-assessment and VAT records by 17 August 2015. As Mr Convery did not respond to this letter, Ms McMullan issued an information notice under Schedule 36, Finance Act 2008, requiring Mr Convery to produce these documents by 21 September 2015. Mr Convery failed to comply with the information notice, and an initial penalty and subsequently daily penalties were levied as a result of his non-compliance.

8. On 17 July 2015, an HMRC officer, who had visited one of Mr Convery’s customers, sent Ms McMullan copies of two invoices issued by Mr Convery to that customer.

9. The invoices were handwritten onto printed forms. Mr Convery’s undisputed evidence was that (a) he purchased numbered VAT invoice forms (pre-printed with his details) in books of 100 invoices; and (b) the handwriting on the invoices was not his, as the invoices were not prepared by him, but were prepared by Henry Lee. The first invoice was dated 12-2-15 and numbered 20141 and was for a supply of services of £300, on which £60 VAT was charged. The second invoice was dated 4-3-[15] and numbered 20268. It was also for a supply of services of £300, on which £60 VAT was charged.

10. There was a dispute as to whether the date of the second invoice was 4-3-15 or 4-3-13, as the handwriting (at least on the copy included in the bundle) is not the clearest. Mr Convery’s evidence was that the date of the second invoice was 4-3-2013. In his view, the last digit of the date was a "3". As it was Mr Lee who had prepared the invoices, Mr Convery was not able to confirm from his own knowledge when the invoices were actually issued, but he agreed with a

question from Mr McNamee that as the invoices were taken from different invoice books, it was possible that the second invoice was completed earlier than the first invoice.

11. Ms McMullan's evidence was that the date of the invoice was 4-3-2015. Her evidence was on the basis that the last digit of the date was not entirely clear. However when she compared the way in which the "3" was written in the date, and in the body of the invoice (where a "3" appeared as a line item for the supply of £300, as the sub-total before VAT (£300), and in the invoice total including VAT (£360)), the top of the "3" s in the body of the invoice had a very clear curve to them, whereas the last digit of the date had a flat top. She also noted that the invoice number of the second invoice was subsequent to the number of the first invoice. She therefore decided that the second invoice was dated 4-3-15. In addition, she noted that both invoices were sent to her following a visit to the customer in 2015, and it was therefore probable that the visiting officer had taken copies from the customer's 2015 VAT records.

12. We did not have the benefit of any expert handwriting evidence. But we preferred the evidence of Ms McMullen to that of Mr Convery. We agree that the "3"s used in the body of both invoices have a distinctive curve to them, whereas the last digit of the date in the second invoice has a flat top. We also accept Ms McMullen's evidence relating the circumstances in which she received the invoices. We also note that Regulation 14(1) of the VAT Regulations 1995 require invoices to include a sequential number, so there is a statutory requirement that invoice 20268 must have been issued after invoice 20141. It also seems to us highly unlikely that invoices would have been taken from the middle of separate invoice books at random. We also note that, as discussed below, Mr Convery's representative accepted in correspondence that the invoice was issued in 2015. We therefore find that the second invoice was dated in 2015 and not 2013.

13. Because of Mr Convery's failure to comply with the information notice, these two invoices are the only information that HMRC received in relation to supplies made by Mr Convery during the periods that are the subject of this appeal.

14. Ms McMullen calculated the amount of Mr Convery's undeclared VAT on the following basis

(1) Using the VAT flat rate scheme for haulage transport, which makes an allowance for input VAT incurred by the business

(2) That the period between the two invoices in 3 weeks

(3) On the basis that sequentially numbered invoices are issued in this period, then 129 invoices would have been issued in that 3-week period.

(4) This is an average of 43 invoices per week

(5) Allowing £30 output VAT per invoice - to take account of some invoices being for less than £300

(6) Therefore, in one year 43 x 48 invoices (52 weeks, less 4 weeks holiday) = 2064 invoices @ £30 VAT per invoice = £61,920 VAT/annum = £15480 VAT/quarter.

15. Ms McMullen then grossed up these amounts to determine the value of the supplies inclusive of VAT, and then applied 10% VAT under the flat rate scheme to calculate the VAT due for each VAT quarter. A schedule showing this calculation was sent to Mr Convery on 30 January 2017, asking him for any comments by 28 February 2017.

16. On 3 March 2017 Mr Hegarty (Mr Convery's then representative), wrote to HMRC. In his letter Mr Hegarty says:

> From my initial discussions with Mr Convery I have gathered that there have been some errors made in his vat returns during the period covered in your enquiry. He accepts that some invoices have been issued over this period and acknowledges the transactions as per the information mentioned in your letter. Mr Convery has instructed me to attempt a reconstruction of his returns for the period under review but I am at the very early stages of this exercise.

17. We note that Mr Hegarty's letter implicitly accepts that both invoices were accurate and were dated in 2015. Mr McNamee disputes that this is what was meant by Mr Hegarty's letter, but we find that the meaning is clear, and that Mr Hegarty was instructed by Mr Convery that the invoices represented supplies made by him in 2015, and that there were other undeclared supplies made in the period under review.

18. On 15 March 2017, Ms McMullan wrote to Mr Convery notifying him of VAT assessments in accordance with the calculation provided in January.

19. The core of her letter is as follows:

> Dear Mr Convery
>
> **Notice of VAT assessments**
>
> I believe that you have not declared or we have not assessed the correct amount of VAT due for the periods shown below. I explained this in my letter dated 30 January 2017.
>
> I have made assessments of VAT due under section 73 of the VAT Act 1994. This letter is our notice of those assessments.
>
> **Details of assessments**

Period	**From**	**To**	**Net VAT due to HMRC for this period**	**Net VAT due from HMRC for this period**
09/13	01/07/2013	30/09/2013	£9,288.00	
12/13	01/10/2013	31/12/2013	£9,288.00	
03/14	01/01/2014	31/03/2014	£9,288.00	
06/14	01/04/2014	30/06/2014	£9,288.00	
09/14	01/07/2014	30/09/2014	£9,288.00	
12/14	01/10/2014	31/12/2014	£9,288.00	
03/15	01/01/2015	31/03/2015	£9,288.00	
06/15	01/04/2015	30/06/2015	£9,288.00	
09/15	01/07/2015	30/09/2015	£9,288.00	
12/15	01/10/2015	31/12/2015	£9,288.00	
03/16	01/01/2016	31/03/2016	£9,288.00	

> **Summary**
>
> As a result of these assessments, the total VAT due is £102,168.00

[...]

20. On 24 March 2017, Ms McMullan replied to Mr Hegarty's letter of 3 March 2017, confirming that the VAT assessments had been issued, and that the notice sent to Mr Convery gave guidance on what he needed to do if he disagreed with the assessments.

21. On 5 June 2017, Mr Hegarty replied saying that he had been instructed that Mr Convery's business premises were raided by HMRC and the police in July 2013 when all his business records were removed for examination. Mr Hegarty also stated that Mr Convery ceased to trade in June or July 2015.

22. There was further correspondence, which culminated in a statutory review. The review decision was communicated to Mr Convery by a letter dated 23 January 2018. The reviewing officer cancelled the assessments for the periods 09/13 to 12/14 on the basis that they were out of time. The assessments for the periods 3/15 to 3/16 (totalling £46,440) were upheld.

23. Mr Convery now appeals against these assessments.

24. The basis of Mr Convery's appeal are that the assessments notified on 15 March 2017:

(1) Amount to a "global assessment", and as part of the period covered by the assessment was out of time, the whole assessment is invalid; and

(2) Were not issued to the "best judgment" of HMRC.

GLOBAL ASSESSMENT

25. Mr McNamee submits that the letter dated 15 March 2017 was the notification of a global assessment. Following the decision of this tribunal in *John Cozens v HMRC* [2015] UKFTT 482, if any part of the global assessment is out of time, then the entirety of the assessment is out of time.

26. Mr McNamee noted that Ms McMullan calculated the amount of VAT due on an annualised basis, and then allocated the VAT due equally to each quarter - the same amount is allocated to each quarter, and no period is treated individually, differently, or separately – and that this basis of calculation supported his submission that there was a single global assessment. Mr McNamee raised the rhetorical question that if the notification made in March 2017 was not notification of a global assessment, then what is?

27. We disagree. We agree with Ms McMullan's evidence that VAT global assessments are very unusual. Mr McNamee, during the course of submissions, acknowledged that HMRC are entitled to raise assessments on the basis of individual VAT accounting periods, but to notify them to the taxpayer in a single notice. We find that this is precisely what happened in this case. The notice clearly sets out the amounts assessed for each VAT accounting period, and the notification letter makes it clear that multiple assessments have been made. We acknowledge that subsequent correspondence does talk of an "assessment" in the singular, and refers to the aggregate amount assessed, but this is probably for ease of reference, and does not detract from the original notification being a notice of multiple assessments.

28. We do not consider that anything turns on the fact that equal amounts were assessed for each VAT quarter (at least as regards whether the assessments are multiple or a single global one).

BEST JUDGMENT

29. Section 73(1), VAT Act 1994 provides that:

> [...] where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount due [...] to the best of their judgment [...]

30. There is a considerable body of case law on what amounts to "best judgment". Woolf J (as he then was) set out in the case of *Van Boeckel* [1981] STC 290 the principles that HMRC need to apply when exercising their best judgment. These can be summarised as follows:

(1) HMRC should not be required to do the work of the taxpayer;

(2) HMRC must perform their function honestly and above-board;

(3) HMRC should fairly consider all the material before them, and come to a decision which is reasonable and not arbitrary based on that material; and

(4) HMRC's decision cannot be plucked from the air, there must be some material on which it is based.

31. The decision in *Van Boeckel* was considered by the Court of Appeal (England) in two decisions: *Rahman (t/a Khayam Restaurant) v CEC* [2002] EWCA Civ 1881 and *CEC v Pegasus Birds* [2004] EWCA Civ 1015.

32. In *Rahman,* the court held that a mistake by HMRC would not invalidate an assessment

> The relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable (*per* Chadwick LJ).

33. In *Pegasus Birds* the court held that the primary task of the Tribunal is

> to find the correct amount of tax, so far as is possible, on the material properly available, the burden of proof resting on the taxpayer.

34. Mr McNamee does not submit that Ms McMullan (or any other HMRC officer) acted in any way which was capricious or arbitrary. Rather, his submission is that the two invoices are not enough material (in the absence of any other information) on which a "best judgment" assessment can be properly based.

35. Mr McNamee submitted that Mr Convery ceased to trade in 2013 as a result of illness, and that it was because Mr Convery was ill that he did not engage with HMRC during the course of their enquiry, or was able to provide Mr Hegarty (his then representative) with further information. Mr Convery did not accept that the two invoices were properly issued in respect of supplies made by him, they were prepared by Mr Lee, and Mr Convery knew nothing about them.

36. Mr McNamee submitted that HMRC's calculation could not have been prepared to their best judgment given the paucity of the information available to them, and HMRC had produced no other evidence that Mr Convery was trading in the periods subject to this appeal. Even if the two invoices did represent supplies made by Mr Convery in 2015, they only evidenced supplies of £600 and output VAT of £120 - against which credit would need to be given for input VAT.

37. Ms Hendrick submits that HMRC used all the information available to make their assessment to their best judgment. If the information was limited, this was because of the failure of the taxpayer to provide information to HMRC.

38. We find that Ms McMullan made an honest and genuine attempt to make a reasoned assessment of the tax payable by Mr Convery based on the very limited information available to her. We find that at no time did Ms McMullan act capriciously or arbitrarily.

39. The reason that Ms McMullan only had two invoices as the material available to her was because Mr Convery at no time engaged with HMRC in their enquiries. He cancelled every meeting that was arranged to see him, and he did not comply with any information requests or

the information notice. No additional documentary evidence was submitted on behalf of Mr Convery for us to consider at the hearing of this appeal.

40. We are not impressed with the submissions that Mr Convery did not know anything about the two invoices because they had been prepared by Mr Lee. Mr Lee was not called to give evidence, and no reasons were given as to why Mr Lee was not available to give evidence.

41. Nor do we believe Mr Convery that he was too unwell to be able to engage with HMRC's enquiries or to provide his representative, Mr Hegarty, with information relating to his business. The content of Mr Hegarty's letters indicates that Mr Hegarty was able to discuss Mr Convery's business with him, and in no way, indicates that Mr Convery was so unwell that it would be impossible for Mr Hegarty to work with him. Whilst we have no reason to disbelieve Mr Convery's oral evidence that he is not well, we heard no evidence about the extent of his illness nor its impact on his daily life. Nor was any medical evidence submitted (such as a report from Mr Convery's GP or specialist hospital doctor).

42. Mr McNamee submitted that as HMRC had raised penalty assessments for deliberate conduct, there must be an inference on the part of HMRC that Mr Convery's conduct was fraudulent. In line with the cases on MTIC (missing trader intra-Community) frauds, he submits that the burden of proof therefore would shift to HMRC to justify the amounts assessed. In our view this shows a fundamental misunderstanding of MTIC cases, where the person being assessed is not the defaulting trader, but another trader in the supply chain. In those cases, the burden of proof rests on HMRC to show that the person assessed either knew or ought to have known of the fraud in the supply chain. These are very different circumstances from this appeal, where the person being assessed is the defaulting trader. Where HMRC are assessing the defaulting trader, then the burden of proof rests on the trader to displace the assessment. (Of course, in the case of appeals against penalties, the burden of proof does lie with HMRC to show that the penalty requirements are satisfied, but Mr Convery does not appeal against penalties).

43. We therefore find that the assessments made by Ms McMullan were made to her best judgment. We find that calculated the amount assessed honestly and above-board, fairly considering all the material available to her, and she came to a decision that was reasonable and not arbitrary.

CONCLUSIONS

44. We dismiss the appeal and uphold the assessments (as amended following review).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE

RELEASE DATE: 22 APRIL 2020