NCN: [2020] UKFTT 0281 (TC)

TC07765

VALUE ADDED TAX - Procedural Issues - Whether to vacate the hearing on medical grounds? - No - Striking out Appellant? - No - Permission to amend outline of case? - Yes - Best judgment assessments - Whether to best judgment? - Yes - Comments on Mutual Assistance and Administrative Co-operation with the Republic of Ireland's Revenue Commissioners - Schedule 24 penalties - Whether conduct deliberate? - Whether (in relevant instance) concealed? - Yes - Appeal dismissed

Appeal number: TC/2018/02301

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR PADRAIG DALY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS PATRICIA GORDON

Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, 2nd floor, Chichester Street, Belfast BT1 3JF on 11 and 12 December 2019

Miss C McCreesh, a Solicitor, of McNamee McDonnell Solicitors, Newry, appeared for the Appellant

Mrs S Spence, an HMRC Litigator, of HMRC Solicitors' Office and Legal Services, Belfast, appeared for the Respondents

DECISION

1. This is our decision in relation to Mr Daly's appeal, made by way of a Notice of Appeal dated 23 May 2018, against HMRC's decisions (made on various dates) to make a series of assessments as follows:

(1) 15 March 2017 - period 02/13 - £11,808 (amended from £30,808)

(2) 13 June 2017 - period 05/13 - £25,790

(3) 24 August 2017 - period 08/13 - £21,340

(4) 1 December 2017 - period 11/12 - £13,077

(5) 1 December 2017 - period 11/13 - £2,619

(6) 18 January 2018 - £290,177

2. All these assessments were made by HMRC's Officer Mulholland. The assessments resulted from decisions to:

(1) Disallow input tax due to no evidence being produced to substantiate purchases;

(2) Require output tax on sales treated as supplied in the Republic of Ireland for which no evidence was produced; and

(3) Require output tax on the sale of coal purchased in the Republic of Ireland.

3. The assessments were all 'best judgment' assessments made under section 73(1) of the Value Added Tax Act 1994:

> "Where a person has failed to make any returns required under this Act ... or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him".

4. On 8 February 2018 Officer Mulholland issued a Notice of Penalty Assessment under Schedule 24 of the Finance Act 2007, relating to the above assessments, in the total sum of £351,462.30.

5. All these decisions, both in relation to the assessments and the penalties, were upheld (with one variation, being the allowance of the input tax on a vehicle and cancellation of the associated penalty, for period 02/13, bringing the total penalties to £339,159.80) at departmental review on 7 March 2018.

6. At the beginning of the hearing, we heard and determined, in succession, three preliminary applications, the details of which are set out below. We told the parties of our decisions at the hearing, and that full reasons for each of those decisions would follow. These are those reasons.

The Appellant's Application to vacate / postpone the hearing

7. On 3 December 2019, Mr Daly applied (by way of a short email from his solicitors) to vacate the hearing date, on the ground of ill-health. The email said that Mr Daly would be unable to attend the hearing on 11 December 2019. Mr Daly relied on a 'Private Fit Note' dated 2 December 2019, relating to an assessment by a private GP on that same day. It certified that Mr Daly was not 'fit for work' because of what was described as 'work-related stress' and said that would be the case for 2 weeks. The certificate did not state whether Mr Daly would need to be assessed or not again at the conclusion of that period.

8. On 6 December 2019, the chair of this panel of the Tribunal, Judge McNall, considered that application on the papers. He ordered that it should be considered at the beginning of the hearing in Belfast on 11 December 2019.

9. In his written reasons (which were released to the parties at the time) for adopting that course of action, he set out the guidance given by the High Court in *Decker v Hopcraft* [2015] EWHC 1170 (QB) as to the approach to be adopted when faced with an application to adjourn on medical grounds.

10. He wrote:

> "As matters stand, I am not satisfied that the Private Fit Note genuinely establishes an inability on the part of Mr Daly to take part in the hearing scheduled for next week ... The Tribunal must scrutinise the medical evidence in support of an application to adjourn. Such evidence should clearly identify the medical attendant (which the Note does), and give details of his familiarity with the party's medical condition (including all recent consultations) (which the Note does not), should identify with particularity what the patient's medical condition is (which the Note arguably does not), and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process (which the Note does not), should provide a reasoned prognosis (which the Note arguably does not) and should give the Tribunal some confidence that what is being expressed is an independent opinion after a proper examination.
>
> If (as is said) this is 'work-related stress' (and I do not know what work Mr Daly does, or what features of his work have occasioned this stress at this particular time, but not sooner) the Note does not give any indication as to what changes are being made in Mr Daly's work so as to mitigate that stress: none of the four boxes are ticked. I also note that the doctor does not indicate any need to re-assess Mr Daly at the end of the fortnight.
>
> Even if there were not a presently undetermined application to strike-out the appeal, I am not presently satisfied, on the basis of the evidence placed before me, that Mr Daly cannot participate in the hearing next week so as to justify postponement. Nothing is said as to whether any adjustments can be made to accommodate Mr Daly."

11. Mr Daly was not present at the hearing, but was represented. The Application was pursued on his behalf by Miss McCreesh.

12. No further evidence, over and above the Private Fit Note already referred to, was presented. Miss McCreesh acknowledged that there were difficulties with the Fit Note, and how it answered to the requirements for such evidence set down by the High Court

in *Decker*. She explained that her firm was experiencing difficulties with getting instructions from Mr Daly. She had not spoken with Mr Daly. She told us that both she and her principal Mr McNamee and a secretary had tried to speak to Mr Daly on 5 or 6 occasions, during office hours, on what she believed was a mobile number, but there had been no answer and no ability to leave a voicemail message.

13. However, she had sufficient instructions to continue with the case, and was not applying to come off the record.

14. HMRC opposed the application.

15. We decided to dismiss the application to postpone the hearing for the following reasons:

> (1) The medical evidence was insufficient, for the several reasons already set out in writing on 6 December 2019. Despite those indications, provided to the Appellant and his representatives, and which were intended by the Tribunal to give some indication of the legal guidance which the Tribunal was likely to adopt and apply, the Appellant had not sought to file any further medical evidence;
>
> (2) It was the Appellant's responsibility to communicate and keep in touch with his solicitors;
>
> (3) Although the Appellant had emerged to give instructions on 2 December 2019 - being the provison of the Private Fit Note (and, alongside that, what must have been communication of his wish that an application be made on his behalf to vacate the hearing) - he had thereafter, without any explanation, and we were told, had not been in touch with his solicitors. Therefore, and as far as anyone could say, Mr Daly had no knowledge - one way or the other - as to the Tribunal's response to his application. In the circumstances explained to us, as described, he did not even know that his application had not been considered on the papers and was going to be considered on 11 December;
>
> (4) Postponement would not serve any obvious purpose when the Appellant's engagement with his own appeal had been sketchy throughout;
>
> (5) Postponement would not self-evidently further the overriding objective.

16. Reason (1), in and of itself, would have been sufficient to have refused the application to postpone. The reasons overall, taken cumulatively, were such that the application was hopeless and should not succeed.

HMRC's Application to strike-out

17. On 2 December 2019, HMRC applied to strike-out the Appeal.

18. We also heard this application at the beginning of the hearing, and decided to dismiss it, for reasons set out in more detail in this decision.

19. Objection was taken to the (undated) Outline of Case which reads, in full, as follows:

> "The Appellant in this matter denies any liability for the VAT over the periods assessed. The Appellant states that he is entitled to both the amounts of input and output tax as set out in his returns. The Appellant states that he has never made

any "off record" sales as alleged and the Appellant will place the Respondent on strict proofs (sic) as to the factual basis of their assessment, which basis is fully denied."

20. The Outline of Case is self-evidently an outline in the true sense of the word. It does not descend to any level of particularity.

21. We decided to refuse HMRC's application to strike-out the appeal. The principal reason for this was that the application - regardless of any merit - was made at far too late a stage.

22. The Outline of Case, as set out in full above, was just the latest in a series of documents which, over the course of the preceding 18 or so months, could have attracted an application for unless orders and/or for strike-out, but (for reasons which were not made clear to us) did not.

23. The very first document of this kind is the Grounds of Appeal dated 23 May 2018 (i.e. almost 18 months earlier) which simply said (in full): "The Appellant is not liable in fact or law for the VAT assessment or the subequent penalty herein." It is arguable that does not set out any ground of appeal at all. A bald assertion of non-liability is arguably not a *ground* of appeal. It is no more than the expression of a *wish* to appeal.

24. Nonetheless, the Tribunal entertained the appeal without requiring better particulars. HMRC's Statement of Case dated 23 July 2018 remarked "the Appellant's Grounds of Appeal are so inadequate as to render its Notice of Appeal liable to be struck out if properly amplified grounds are not provided." There was certainly force in those remarks. There is a bare minimum below which properly constituted Grounds of Appeal cannot fall. Even if these Grounds are not below that line, then they are surely, on any view, not far from it. All they aver, in an entirely bald way, devoid of any genuine information of any kind, is that the Appellant is not liable 'in fact or in law'. Nothing is said about the facts, or sort of facts, which render the Appellant not liable. Likewise, nothing is said about the law, or principle, which render the Appellant not liable. But the Tribunal was not invited to consider the matter of its own initiative, and HMRC did not actually make any such application, even though HMRC could have done. In an adversarial context, HMRC had a decision to make in relation to the Grounds of Appeal, and clearly decided to do nothing.

25. Mr Daly's Witness Statement dated 16 November 2018, and served in purported compliance with the Tribunal's directions (released on 13 September 2018) did not materially improve matters. The direction providing for Witness Statements said that the statement should set out 'what that evidence will be'.

26. Mr Daly's witness statement reads, in full:

> "The decision of the Officer not to exercise his discretion to allow full VAT in relation to the other secondary material which clearly demonstrated that all of the sales and purchases in this matter occurred as indicated in the returns was unreasonable. Any defects in relation to documentation provide (sic) were not the fault of myself or my business. I received and accepted all documentation in good faith".

27. Mr Daly's witness statement does not refer to, or exhibit, any documents, and this is consistent with his List of Documents, which does not list any documents other than the Notice of Appeal, the Statement of Case, 'interparty correspondence', and 'Witness Statements' (sic). There is very little by way of 'evidence' in the witness statement. It refers to 'defects' in 'documentation', but does not identify any single defect in relation to any single document.

28. Its brevity apart, there is at least one further peculiarity of this witness statement (which was served on the very last day for compliance). Rule 11(3) provides that a representative can do anything for an Appellant except sign a Witness Statement. The witness statement is not signed with a 'wet' signature by Mr Daly. His name is typed, by someone, on the signature line. Notwithstanding the absence of a 'wet' signature, or any explanation (at least, in the papers before us) as to why Mr Daly did not sign his witness statement with a writing instrument (nor indeed any explanation as to why, if he could not do so on 16 November 2018, he did not sign any further copy at any stage in the 13 months between 16 November 2018 and the hearing) then that is the totality of his evidence which Mr Daly instructed his solicitors to file on his behalf in advancing his case in relation to several hundreds of thousands of pounds of assessments and penalties.

29. HMRC's response to that was to give notice, on 19 November 2018, that it 'formally objected' to the witness statement. It is not clear what function HMRC's Notice was intended to serve, or what notice it was actually seeking to give, since the Tribunal was not actually being asked by HMRC to consider exercising any of its case-management powers. HMRC conspicuously did not apply for an unless order, nor for any other form of procedural sanction. It remains a mystery how HMRC proposed to advance the 'formal objection' to Mr Daly's witness statement.

30. HMRC also suggested that they would require Mr Daly to attend the hearing to give evidence and to be available for cross-examination.

31. There matters reposed for over a year until a flurry of activity just before the hearing - Mr Daly's application for a postponement crossing with HMRC's application to strike-out his appeal. Although coincidence does not always mean causation, there is at least a suspicion in our minds that these two applications were to some degree inter-dependent.

32. Be that as it may, we considered HMRC's application discretely. As said, it was far too late. There may well have been a good basis for an application in response to the Grounds of Appeal - HMRC indeed intimated that they might do something, but did not. There may have been such a basis in response to the witness statement - here, HMRC did do something, in terms of its 'formal objection' (sic) but did not seek to engage the Tribunal's case-management powers.

33. For any party to leave an application to strike-out until virtually the eve of the trial, when the basis for the application is not actually something new, but has been perfectly plain for well over a year, is imprudent. It can also give the appearance of opportunism. Had the application been earlier and/or in relation to the Grounds of Appeal or Witness Statement, the Tribunal might have been prepared to accede to it, or could have required better Grounds or supplementary evidence. But here it was not fair or just to accede to the application so late in the day.

The Appellant's application to rely on his amended Outline of Case

34. The last minute flurry of activity did not end there.

35. On 9 December 2019 - i.e. two days before the hearing - the Appellant's representatives wrote as follows: the Appellant had "indicated that his VAT number and trading identity were hijacked by other persons. We would ask the Tribunal to note the reference to 'oral orders' as regards the trading for which the Appellant has been assessed ... The repeated attempts by the Respondent to have this matter struck out we say are indicative of the failings in proof that underlie the assessment in this matter."

36. Of course, this is not evidence. An assertion in a solicitor's letter is not a species of admissible evidence. Nor is this something which Mr Daly had ever put in his Notice of Appeal, or witness statement or (even if not in a document formally described as a witness statement) which he had supported with a Statement of Truth.

37. We leave on one side when the Appellant did actually give these instructions to his solicitors, bearing in mind that he had applied to vacate the hearing on 3 December 2019 and subsequently, as we were told, had rendered himself incommunicado. It must therefore be the position that, as at 3 December 2019, the Appellant's solicitors knew that the Appellant's position was that his VAT number had been hijacked, but, for some reason, did not communicate it to the Tribunal until 9 December 2019. We are also bound to note that this had emerged onto two days before the final hearing in an appeal which, by that point, had been on foot for 18 months or so.

38. The averment here is one of 'hijack' - that is to say, the Appellant apparently says that, insofar as his VAT number and 'trading identity' were used, they were not used by him, but by someone else without his authority or approval.

39. On 10 December 2019 HMRC responded, complaining (yet again) that the Appellant had not set out his case properly. But, more importantly, HMRC responded substantively as follows:

> "Bord na Mona Fuels provided several hundred invoices issued by them to the Appellant ... the Document Bundle already contains a selection of around 47 of these... The Respondents will show in evidence already contained in the Document Bundle that several of these invoices feature vehicle registration numbers that have been linked to the Appellant's business records."

40. HMRC went on to submit, and to apply for permission to rely on "an additional small selection of a further 24 Bord na Mona invoices .... which also feature vehicle registration numbers that have been linked to the Appellant's business records."

41. We were prepared to allow the Appellant, through Ms McCreesh, to advance, in the hearing, a case of 'hijack' as outlined in the amended Outline of Case. The Appellant's case of 'hijack' is a case that *none* of the transactions involved him. That is consistent, just about, with the Outline which says that "the Appellant states that he has never made *any* "off record" sales as alleged." (emphasis added by us). The Appellant's case in this regard is that, whoever was using the VAT number and making the trades at Bord na Mona and Coyle Fuels, it was not him.

42. Against that background, we were also prepared to allow HMRC to rely on the materials annexed to its submissions of 10 December 2019. Although we were initially troubled by the fact that HMRC had in its possession more invoices from Bord na Mona than had been included in the Bundle, we were satisfied that Officer Mulholland had clearly set out the true position in her witness statement (7 November 2018, i.e., just over a year before the hearing) where she referred to copies of invoices provided by Bord na Mona, and said "As these run to several hundred pages, I produce a selection of them at Exhibit DM12." She had made clear that there were several hundred pages of these, and Mr Daly and his representatives would have known - because they had been told - that those exhibited to the witness statement were only a selection. Nothing stopped them asking to see more, but they did not.

43. Although HMRC's List of Documents was (perhaps) less clear than in could have been in its reference simply to 'invoices from Bord na Mona' (and without giving the quantity of these) there was no prejudice to the Appellant. Indeed Ms McCreesh did not indicate to us that she required any adjournment in order to consider the full suite of these Bord na Mona documents. That chimes with Mr Daly's position that none of the trades with Bord na Mona were him, but all were with someone else - a hijacker.

The appeal

44. With those preliminary matters dealt with, we can now turn to our consideration of the underlying appeal.

45. HMRC's case is that the assessments arise in the following three broad categories of circumstance:

(1) Disallowed input tax on fuel purchases from J A Mills & Son, due to false evidence being produced to substantiate purchases: **'the Mills Assessments'**;

(2) Output tax due on supplies wrongly treated as supplied in the Republic of Ireland to O'Dwyer Transport and Warehousing Ltd, where no evidence has been provided to support RoI supplies or HMRC checks revealed supplies did not take place: **'the O'Dwyer Assessments'**

(3) Output tax due on off-record purchases/sales of solid fuel purchased in the Republic of Irelamd from (i) Bord na Mona Fuels Ltd and (ii) Coyle Coal Ltd: '**the Bord and Coyle Assessments'**

46. No point is taken as to the formal validity or timing of any of the assessments.

47. There was no real dispute before us as to the relevant law and principles governing best judgment assessments. In *Van Boeckel* [1981] STC 290, Woolf J (as he then was) set out the principles which HMRC need to apply when exercising their best judgment. In summary, these are:

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

(2) HMRC must perform their functions 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.

48. In *Van Boeckel*, Woolf J made the following remarks, which are of particular relevance in the circumstances of this appeal:

> "...it should be recognised, particularly bearing in mind the primary obligation ... of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things, frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. 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."

49. *Van Boeckel* was considered and upheld by the Court of Appeal of England and Wales in *Rahman (t/a Khayam Restaurant)* [2002] EWCA Civ 1881 and *Pegasus Birds* [2004] EWCA Civ 1015.

50. The Appellant (and not HMRC) bears the burden (albeit only to the civil standard) of proving that the assessments were not to best judgment or are otherwise flawed in some material respect.

51. Even where the Applicant personally does not give evidence, the application of these principles still entitles an Appellant to challenge and test HMRC's case, to cross-examine the decision-maker, and to draw the Tribunal's attention to the documentary evidence. We should say that Ms McCreesh took full (and entirely proper) advantage of the ability to test the evidence, and make such submissions as appropriate, and she performed those tasks in a way which was thorough, incisive, and courteous.

52. In relation to the Penalty Assessments, HMRC bears the burden (albeit to the same standard, namely the balance of probabilities) of showing that the penalties are lawfully imposed and calculated.

53. We have already referred to the brevity of the Appellant's witness statement and disclosure.

54. HMRC relied on evidence from Officer Deirdre Mulholland, contained in a witness statement dated 7 November 2018 which annexed a lengthy exhibit, coming to just over 300 pages.

55. Officer Mulholland is a highly experienced officer. At the time of the events in issue, Officer Mulholland had been working for HMRC for about 40 years, and had been an officer of HMRC's VAT and Excise Oils Assurance Team for about 3 years.

She gave gave oral evidence. We permitted her to give supplementary evidence in chief, she was cross-examined for just over an hour, and re-examined.

56. Having had the opportunity to assess Officer Mulholland give evidence, and to assess her answers in the face of some searching questions, which were designed to interrogate her decision-making process and the sufficiency and integrity of the evidence which she had considered, and having had the opportunity to measure her oral evidence against the documentary evidence, we have no doubt that there was no caprice or arbitrariness in her decision-making, nor any defect in reasoning or application of the evidence which she had which undermined the best judgment assessments. We shall consider particular points in more detail below.

57. On the basis of the evidence which we have read and heard, we make the following findings of fact.

The background

58. The Appellant applied on 11 October 2007 to be registered for VAT. He described his business as haulage.

59. On 16 September 2016, the Appellant applied to cancel his VAT registration on the basis that he was changing his status from a sole trader to a limited company.

60. On 20 October 2016, Officer Mulholland made a pre-arranged visit to the Appellant's accountants, McAllister and Co.

61. On 4 November 2016, HMRC requested further information from McAllister.

62. There followed a series of requests from HMRC, by email and letter, between 5 December 2016 and 24 November 2017.

63. HMRC made a series of assessments.

The Mills Assessments

64. The Mills Assessments relate to HMRC's view that no evidence had been provided to substantiate input tax on purchases of fuel from J A Mills and Sons in Co Tyrone over a number of VAT periods.

65. At the meeting on 20 October 2016, Officer Mulholland raised queries about a number of issues. One of these was the purchase of large quantities of fuel from J A Mills & Son. She had not been able to reconcile the payments for diesel from the cheque stubs for 08/13. Moreover, some of the invoices were undated and/or without sequential numbers.

66. On 4 November 2016, she wrote and asked for further evidence substantiating the input tax claimed on the fuel purchases for periods 02/13, 05/13, 08/13, and 11/13.

67. On 13 February 2017 (i.e., over 3 months later, and despite being chased on 20 December 2016), HMRC received copies of invoices from the Appellant's accountant in support of Mr Daly's purported purchases from J A Mills and Son. Those carry handwritten details on pre-printed templates. The templates carry a box for 'Customer's Order Nr / Vehicle Reg / Driver / Received by', none of which are completed. The

invoices are to 'P Daly' and 'P Daly Transport', but without (e.g.) Mr Daly's VAT number. The transactions are large - often several thousand liters of DERV, costing thousands of pounds. Many of the invoices are undated.

68. On 15 February 2017, Officer Mulholland (equipped with the copy invoices which she had received from the Appellant's accountant) carried out a verification visit to J A Mills and Son.

69. At the visit, HMRC's position in relation to the Mills Invoices hardened. HMRC now came to form the view that the invoices which it had seen were not authentic:

(1) Mr J Mills told HMRC that P Daly, Daly Transport or PD Transport were not customers of theirs;

(2) HMRC checked J Mills' debtors' ledger, and no accounts were held for P Daly, Daly Transport or PD Transport;

(3) Genuine invoices from J Mills uplifted by HMRC were A4 (landscape) and typewritten. The ones coming from the accoutant were smaller, portrait and handwritten;

(4) J Mills did not deal in 'Bio Diesel', 'Petrol 4 Star', or 'Lubricating Oil', all of which are set out in the list of 'Product's on the invoices provided to HMRC by the taxpayer.

70. So, and over and above the inadequacies with the paperwork already identified during the initial visit to the accountants, HMRC also formed the view that those copy invoices (despite being passed from the taxpayer to his accountants) were not produced by J A Mills and Sons at all.

71. It is very striking that the Appellant has said nothing at all as to the Mills Invoices. There is no evidence at all from Mr Daly at all as to his dealings with J A Mills and Son. The Appellant is, in this regard, completely silent. He relies only on the documents produced by his accountants during the visit on 20 October 2016. He has maintained that silence despite HMRC raising a number of assessments for significant sums, and imposing penalties.

72. We accept Officer Mulholland's evidence. We are satisfied that her evidence is accurate and truthful when she says that when she visited Mills, there was no account for Patrick Daly or PD Transport, and that she was satisfied that the invoices were false.

73. We are also satisfied that the assessments raised in this regard were to best judgment.

74. It seems that Officer Mulholland spoke to Mr Mills' son, and not Mr Mills (Sr). But we do not consider that makes a difference. Mr Mills (Jr) was someone who was present at the business, who was holding himself out (and who Officer Mulholland reasonably took to be) as someone who could speak with knowledge and authority about the Mills business, and its books and records. We accept her evidence was that Mr Mills (Jr) was "fully conversant with the business."

75. Although Officer Mulholland did not ask whether Mr Mills Jr was in the business in 2014, we accept her evidence that he was nonetheless clear and unequivocal when he said that the invoices which he was shown were "not my invoices". HMRC were

entitled to regard that as accurate and truthful, were entitled to believe him, and were entitled to treat that statement as being made in relation to the Mills business.

76. We accept that Mills kept a computerised ledger, and Officer Mulholland presented Mills with paper invoices, but Mr Mills would have known of the existence of his own computerised system, and did not himself raise the point. We accept that it was reasonable for Officer Mulholland to have taken what she was told at face value, and that it was reasonable, on that basis, for her to form the view that the invoices could not be relied upon.

77. It goes almost without saying that nothing stood in the way of the Appellant, through his representatives, either approaching Mr Mills themselves to obtain evidence from him, or, if that were not forthcoming, asking the Tribunal to consider using its extensive powers to require Mr Mills to produce documents or information or even attend the Tribunal to give oral evidence.

78. Officer Mulholland was also challenged on the basis that there was alternative evidence, over and above the invoices, which she could have used so as to assess the Appellant's position. Reliance here was placed on an email from Padraig Matthews ACA CTA, a Tax Director of J M McAllister & Co Ltd to Officer Mulholland dated 1 March 2017. That attached 'a list of payments made to J A Mills during the period 1 December 2012 to 31 July 2013 totalling £194,136'. The actual list was not placed before us, and no attempt was made to produce a further copy during cross-examination. Officer Mulholland's evidence was that it was a list of cheque numbers and amounts, but she could not reconcile these with the cheque stubs which she had seen because those just had amounts written on them, without any payee or dates.

79. We accept her oral evidence. It is consistent with her email of 8 March 2017 where she had responded asking for further evidence to substantive the input tax deduction. She wrote "During my visit I noted several of the cheque nos listed but no payee was recorded on the cheque stubs." Officer Mulholland added: "The original cheques returned from the bank would provide the necessary evidence as would supplier statements validating payments." Despite Officer Mulholland's clear indication of the evidence which she was prepared to consider, the Appellant did not provide her (or the Tribunal) any original cheques returned from the bank, nor any supplier statements validating payments. Nor was there any evidence before us as to these being sought.

80. In our view, Officer Mulholland's position, on behalf of HMRC, in relation to the list of 1 March 2017 was reasonable. She was not provided, despite request and a clear steer, with any further, alternative, evidence so as to justify revisiting her conclusion based on the invoices. We agree that the Appellant had not provided HMRC with any alternative evidence to prove that those supplies are taxable or that input tax is deductible.

81. The appeal against the Mills Assessments is dismissed.

The O'Dwyer Assessments

82. During her visit on 20 October 2016, Officer Mulholland raised a query in relation to haulage services said to have been provided in the Republic of Ireland for which no supporting documentation was held. She asked the accountant to clarify whether the

service was wholly provided in the Republic of Ireland, and asked for evidence as to how payment was made, and bank charges for changing Euros.

83. On 4 November 2016, Officer Mulholland asked for evidence regarding services declared as performed in the Republic of Ireland for O'Dwyer Transport and Warehousing Limited (a company registered in the Republic of Ireland) in periods 11/12, 02/13, 05/13, 08/13, and 11/13. She wrote "can you clarify and provide evidence that the haulage services were wholly performed in Republic of Ireland e.g. VAT registration nos for customers, how payment was made, bank charges for changing Euros, expenses, worksheets, etc"

84. No such information was ever provided to HMRC by the Appellant or his representatives.

Mutual Assistance

85. In tandem, HMRC requested assistance from the Revenue Commissioners of the Republic of Ireland.

86. On 13 April 2017, the Revenue Commissioners told HMRC:

(1) They had called O'Dwyer on 14 February 2017. O'Dwyer checked their records and none of the invoices produced by Mr Daly to HMRC were actually received by O'Dwyer;

(2) Padraig Daly had worked for O'Dwyer, but the last invoice on record from was 31 July 2012.

87. The natural inference from what the Revenue Commissioners told HMRC was that no services were performed by the Appellant for O'Dwyer in the periods 11/12 onwards. A further inference must be that the invoices produced to HMRC by Mr Daly were not authentic.

88. It was submitted on behalf of the Appellant (although it nowhere featured as part of his evidence or his case) that we could not safely rely on information and material emanating from the Revenue Commissioners of the Republic of Ireland.

89. We disagree. The information and material is not provided informally, as a casual favour, or by way of inter-governmental courtesy, but is provided pursuant to high-level EU legislation (Regulation 904/2010/EU on Administrative Co-operation), put into effect between two Member States and their respective Revenue authorities. Although the information is not collected, first-hand, by Officers of HMRC, it is provided officially, openly, and in response to formal inquiry. It is admissible, and relevant.

90. As such, we are entirely satisfied that Officer Mulholland (and, through her, HMRC) was entitled to rely on the information and materials received from the Revenue Commissioners, and was entitled to take that information into account when exercising her judgment as to whether to assess.

91. Officer Mulholland was pressed in cross-examination in regard to the fact that she had not asked for copies of invoices from O'Dwyer to be uplifted. We do not consider that this fundamentally undermines the integrity of Officer Mulholland's approach to this issue. We accept her evidence that she had obtained the details, from a

reliable source - namely, her official counterparts on the other side of the border - and that the details and dates which she had were normally enough to verify invoices through a trader's books and records. This is a rational and conventional approach.

92. Again, we note the silence of Mr Daly on these assessments - whether in his Grounds of Appeal, or his Witness Statement.

93. However, in cross-examination, Miss McCreesh asked Officer Mulholland, expressly on instructions "that O'Dwyer has his own reasons for saying that work was not completed." But there is no evidence before us to support this. It is not something which Mr Daly was prepared to say, and put his signature to, in his Grounds of Appeal, his Witness Statement, or the Outline of his Case. It is not even something asserted in correspondence. It amounts to no more than an hint or insinuation of something, made in relation to Mr O'Dwyer. We reject it.

94. We are wholly satisfied that Officer Mulholland, on the evidence available to her, was entitled to conclude and assess as she did in relation to the O'Dwyer Assessments. The Appeal in this regard must be dismissed.

The Bord and Coyle Assessments

95. Bord na Mona ('**BnM**') is a substantial business in the Republic of Ireland dealing in fuel and peat.

96. As early as 4 November 2016, Officer Mulholland asked Mr Daly's accountants to confirm whether Mr Daly had purchased any goods or services from other members of the European Union "e.g. Republic of Ireland."

97. There was no answer to that enquiry.

98. In tandem, HMRC sought information from the Revenue Commissioners in relation to supplies from 09/12 to 06/16 in the amount of 1.295m Euros.

99. On 9 June 2017, HMRC received a lengthy response from the Revenue Commissioners. HMRC were told that supplies of fuel (mainly peat briquettes) were made to P Daly, with verbal orders, and no written order or pre-ordering. Payment was always said to be in cash. BnM provided copies of invoices to the Revenue Commissioners, who passed them on to HMRC. The Revenue Commissioners also remarked that invoices produced through SAGE would be posted to Mr Daly on a regular basis; and invoices produced through Oracle would have been automatically emailed to Mr Daly to an address provided by him: i.e., BnM's position was that Mr Daly would have had the invoices.

100. We have already dealt with HMRC's selection of invoices from BnM, and we are satisfied that HMRC's decision to disclose only a selection of invoices was always clear, not concealed, and could easily have been interrogated by the Appellant. Moreover, we are satisfied that there was no ill-intent or intent to mislead. Officer Mulholland was challenged on the footing that the details of the (non-disclosed) BnM invoices appeared only on a print-out; but there was no application for disclosure of the other invoices. In any event, the Appellant's argument that none of these related to him.

101. For the same reasons already set out above in relation to the O'Dwyer Assessments, we dismiss the argument that we should disregard or give only limited weight to the information and material coming from the Revenue Commissioners.

102. The prima facie evidence is that the sales being made by Bord na Mona were being made to the Appellant. There was a direct link between the supplies and Mr Daly. Several of the lorries regularly involved were his.

103. We do not consider that any of the challenges made to Officer Mulholland's evidence succeed in undermining the evidence provided to HMRC by the Revenue Commissioners. In cross-examination, Officer Mulholland was challenged in relation to a number of matters including her knowledge of BnM's ID verification procedures, or their procedures for recording vehicle registration numbers. But, and with respect to the Appellant and his representatives, and bearing in mind the incidence of proof in this regard, those were matters which, if geniunely in issue, could have should have been raised and explored by the Appellant at some point during the appeal.

104. A challenge was also advanced on the basis that BnM's own invoices did not have a contact phone number for the customer and an email address, and were thereby said to be in want of accordance with what was said to be the relevant Republic of Ireland legislation, namely Chapter 2 Part 9 of the *VAT Consolidation Act 2010*. In the Courts and Tribunals of the United Kingdom, evidence as to foreign law is normally a matter for expert evidence, and no such evidence was adduced, by either party.

105. Nonetheless, and even if the point were a good one, it does not in our view materially undermine the weight to be given to the documents acquired from BnM by the Revenue Commissioners. Even if technically non-compliant with the requirements of the legislation in the Republic of Ireland (ultimately being a matter between BnM and the Revenue authorities in Ireland), the documents are commercial documents of a conventional kind, from a well-known trader, provided via the process of cross-border co-operation. Officer Mulholland's view was that the records 'appeared in order, and all looked real'. That was a rational and intelligible approach, and we agree.

Hijack

106. In this regard, the Appellant's (belatedly advanced) argument on hijack engages. Given the prima facie position, it is for the Appellant to prove hijack; not for HMRC to disprove it.

107. We have already noted the paucity of the Appellant's evidence. Mr Daly thereby puts himself at a significant disadvantage. That was attributable to him and him alone. HMRC played no part in restricting the evidence he could have given. We regret that we do not accept that Mr Daly's true intention was to come and give detailed oral evidence as to this alleged hijack, but (for some unknown reason) was holding this back from his witness statement. His representatives, who have acted for him throughout this appeal, are extremely experienced and entirely conversant with the role of witness statements.

108. We are invited to consider one BnM statement of account, dated 30 September 2012, which is made out to 'Brendan Daly', albeit at the same address as Mr Daly, and with the same BnM internal account number (D1004). It was suggested to us that "there was a possibility that Brendan Daly hijacked Padraig Daly's VAT number." Officer

Mulholland accepted that this was possible. But in our view this does not mean that the assessment was not arrived at by way of best judgment, nor that we should set the assessment aside. It remains the Appellant's task to persuade the Tribunal, simply on the balance of probabilities, that the assessment was capricious or arbitrary or otherwise in bad faith. We revert to the remarks of Woolf J in *van Boekel*, set out above.

109. Close examination of the document shows that there are serious factual and legal difficulties with the Appellant's approach in this regard:

(1) Padraig Daly, the Appellant, does not say anywhere - even in his amended Outline of Case - that he believed his VAT number to have been hijacked by "Brendan Daly", despite the name Brendan Daly appearing on that document and Mr Daly and his advisers having had many months to consider it;

(2) We do not know who Brendan Daly is, although he shares the same address with Padraig Daly. Padraig Daly could reasonably have been expected to say who Brendan Daly was, and has not done so;

(3) The BnM account number (D1004) is the same;

(4) The 'Brendan Daly' statement of account is only one in a whole series of statements of account made out to Padraig Daly;

(5) Seven of the transactions on the 'Brendan Daly' Statement of Account (30 September 2012) also appear on the 'Padraig Daly' Statement of Account for the next month (31 October 2012). There was no suggestion that any of those transactions had not been paid by Padraig Daly and/or had been paid by someone other than Padraig Daly and/or that Padraig Daly was unaware of them;

(6) D1004 carries various iterations of names including Padraig Daly Transport. There was clearly a degree of variation in the clerical treatment of account D1004 at the BnM end.

110. We are satisfied that it was reasonable for Officer Mulholland to rely on the information obtained by the Revenue Commissioners, and the records which they had uplifted and sent to her.

111. We are satisfied that the supplies said by BnM to have been made were in fact made by BnM to Mr Daly, and not to someone else who had hijacked his VAT number.

112. We reject the argument that there was a hijack. We accept HMRC's conclusion that the Appellant was buying and selling off-record commercial quantities of solid fuel and using his VAT UK registration number to obtain the solid fuel zero-rated from the Republic of Ireland.

113. We are satisfied that the assessments made in relation to Bord na Mona were made to best judgment, and we dismiss the appeal in that regard.

Coyle

114. In relation to the supplies of solid fuel made by Andrew Coyle Coal Limited in Buncrana Co Donegal, HMRC relies on information obtained from the Revenue Commissioners on 1 December 2017.

115. On 4 November 2016, HMRC asked for information about purchases made in the Republic of Ireland, but was not provided with any information.

116. HMRC asked the Revenue Commissioners about supplies made by Coyle to Padraig Daly (whose VAT number was given) in 12/14, 03/15, 12/15, 03/16, and 06/16. HMRC's request was "What goods were supplied?" The Response is set out in an extracted form (being extracted from the relevant sections of the form which is sent). In summary:

(1) The things sold were various kinds of coal;

(2) Drivers came to pick up the palletised goods at Coyle's yard. Coyle presumed that the drivers were employed by Padraig Daly;

(3) The goods were sold to Padraig Daly;

(4) The goods were ordered over the phone by Padraig Daly;

(5) Payment was taken in cash, with two cheques, and one direct debit transfer;

117. Alongside this, is a Statement of Account for the period 1 August 2015 to 30 April 2017 to Padraig Daly Transport as well as a series of copy invoices.

118. It was not clear to us whether any issue of hijack was being advanced in relation to Coyle. But, if it is, we reject it. There is no evidence to support such a conclusion.

119. HMRC's position here is the same as in relation to BnM: Mr Daly was buying substantial quantities of solid fuel, zero-rated, in the Republic, and then selling the goods in the United Kingdom.

120. It is very clear that Mr Daly was buying coal from Coyle. For example, the invoice from Coyle's Coal Lrd to Padraig Daly Transport dated 27 February 2016 gives the same mobile and landline phone numbers for Mr Daly as he himself had given on his application to be registered for VAT in 2007. Mr Daly transferred £6,928 to Coyle on 15 June 2016.

121. The substance of the challenge in this regard is 'how were the Revenue Commissioners satisfied that the goods had left the Republic of Ireland?" This challenge does not succeed. The taxpayer has never even admitted making those purchases: but, as we have found, he did.

122. The taxpayer remained completely silent when asked by HMRC about purchases in the Republic of Ireland. There was no record of these transactions - coming to tens of thousands of pounds - in his books and records. It was only detective work by HMRC which revealed the trades. HMRC has set out, extensively and in detail, its position in relation to these transactions. Even then, the Appellant, facing assessments and penalties amounting to a sum in the region of £3/4m, has chosen not to say anything. Mr Daly has never produced a shred of evidence supportive of the position that goods now known to have been bought by him in the Republic of Ireland stayed there.

123. Officer Mulholland was satisfied, relying on what she had been told by the Revenue Commissioners, that the goods had been exported to the United Kingdom. That was a rational assessment, made in good faith. The assesments were made to best judgment. Accordingly, the appeal against these assessments must be dismissed.

The Penalty Assessments

124. Having now dealt with the assessments, which we have upheld in full, we must now move to consider the penalties.

125. HMRC's position in relation to the penalty assessments is as follows:

126. In relation to the Mills Assessments:

(1) The behaviour was deliberate. The invoices were false. Consequently, the Appellant knew when he submitted his VAT returns that he was making an inaccurate declaration;

(2) The disclosure was prompted because the taxpayer did not tell HMRC of the inaccuracy before it was discovered;

(3) The penalty range is 35-70%

(4) A 15% deduction for 'giving' has been applied;

(5) The penalty percentage is 64.75% of Potential Lost Revenue.

127. In relation to the O'Dwyer Assessments:

(1) The behaviour was deliberate. Inquiry with the Revenue Commissioners showed that the services had not been provided. Consequently, the Appellant knew when he submitted his VAT returns that he was making an inaccurate declaration and generated false invoices to conceal the same;

(2) The disclosure was prompted because the taxpayer did not tell HMRC of the inaccuracy before it was discovered;

(3) The penalty range is 35-70%

(4) A deduction of 10% for 'giving' has been applied;

(5) The penalty percentage is 66.5% of Potential Lost Revenue.

128. In relation to the BnM and Coyle Assessments:

(1) The behaviour was deliberate and concealed. The purchases were not declared on the VAT returns and there was no evidence of these purchases in the taxpayer's books or records. Consequently, the Appellant knew when he submitted his VAT returns that he was making an inaccurate declaration;

(2) The disclosure was prompted because the taxpayer did not tell HMRC of the inaccuracy before it was discovered;

(3) The penalty range is 50-100%

(4) No deduction for telling, helping, or giving has been applied;

(5) The penalty percentage is 100% of Potential Lost Revenue.

129. In relation to the penalties imposed arising from the Mills Assessments, and in the light of our detailed findings of fact set out above (and without repeating the same here):

(1) We are satisfied that the calculation is arithmetically correct;

(2) We are satisfied that the Appellant's behaviour was deliberate;

(3) The disclosure was prompted;

(4) We consider that the deduction applied should not be interfered with (although it is certainly arguable that the deduction applied was over-generous)

(5) Accordingly, the penalties imposed arising from the Mills Assessments are upheld in full.

130. In relation to the O'Dwyer Assessments, and in the light of our detailed findings of fact set out above (and without repeating the same here):

(1) We are satisfied that the calculation is arithmetically correct;

(2) We are satisfied that the Appellant's behaviour was deliberate;

(3) The disclosure was prompted;

(4) We consider that the deduction applied should not be interfered with;

(5) Accordingly, the penalties imposed arising from the O'Dwyer Assessments are upheld in full.

131. In relation to the BnM and Coyle Assessments, and in the light of our detailed findings of fact set out above (and without repeating the same here):

(1) We are satisfied that the calculation is arithmetically correct;

(2) We are satisfied that the Appellant's behaviour was deliberate;

(3) We are satisfied that this is a case of concealement;

(4) The disclosure was prompted;

(5) We consider that there is no arguable case that any deduction should be applied;

(6) Accordingly, the penalties imposed arising from the BnM and Coyle Assessments are upheld in full.

132. There is no evidential basis upon which any deduction for special circumstances should be applied.

Outcome

133. For the above reasons, the appeal is dismissed in its entirety.

Dr Christopher McNall

TRIBUNAL JUDGE
RELEASE DATE: 30 JUNE 2020