Neutral Citation: [2024] UKFTT 00747 (TC)

Case Number: TC09265

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard at Taylor House Tribunal Centre, London

Appeal reference: TC/2022/12064

VAT – best judgment – Corporation Tax – loss of appeal rights – penalties – deliberate inaccuracy – appeal dismissed

Heard on: 39 May 2024
Written submissions: 7 June, 29 June 2024
Judgment date: 15 August 2024

Before

TRIBUNAL JUDGE RUDOLF KC
JOHN WOODMAN

Between

SPROWSTON FOOD AND WINE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr S Buttar, Accountant

For the Respondents: Mr T Brown, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant is Sprowston Food and Wine Limited ('Sprowston'). The Respondents are the Commissioners for His Majesty's Revenue and Customs ('HMRC').

2. This is an appeal to the First-tier Tribunal ('the Tribunal') by Sprowston against HMRC's decision to issue (a) revised VAT assessments in the sum of £23,032.00 through VAT periods 09/13 to 06/18, under section 73 (1) of the Value Added Tax Act 1994 ('VATA') and (b) penalties for deliberate behaviour in the sum of £14,514.56, under Schedule 24 (1) of the Finance Act 2007 ('FA'). This was by way of personal liability notice on the sole director of Sprowston.

3. In this case the VAT assessments have been based upon HMRC's corporation tax calculations. Those concluded that for the director of Sprowston to meet unaccounted expenditure and personal drawings there must have been an under declaration of VAT by reference to unaccounted for sales.

PREAMBLE

4. Before the hearing we received a 535-page bundle containing the relevant documentation. This included witness statements from Officer Harvey, a VAT Tax officer at HMRC, Officer Valladares, an officer in the Technical and Specialist Compliance Team and the director of Sprowston Mr Balasingham. We also received a 288-page bundle containing legislation and authorities. There were also skeleton arguments on both sides.

5. At the invitation of the Tribunal, HMRC went first. The Respondents opened and called Officers Valladares and Harvey. Mr Buttar, on behalf of Sprowston, then called Mr Balasingham. All witnesses were cross-examined.

6. We directed written closing submissions and were grateful to receive them from HMRC drafted by Mr Brown, and from Mr Buttar thereafter. Mr Buttar attached some documentation that was not before the Tribunal at the hearing. We did not invite HMRC to respond to this and we are prepared to admit the material *de bene esse*.

7. We thank both Mr Brown and Mr Buttar for the way they presented their respective cases orally and in writing.

THE RIVAL CASES

8. We set out shortly here the rival cases. Given the interplay between the Corporation Tax position and VAT in this case it is of assistance to understand the positions taken by both parties at the outset.

9. HMRC submit:

(1) The assessments were raised in time by reference to section 73 (6) and 77 VATA and the receipt of the former accountant's letter in June 2021 and the 20 year period afforded by deliberate inaccuracy

(2) The wording Officer Harvey's letter dated 20 January 2022 was unclear. But it was not, nor could it have been, an agreement that the VAT would be settled if the Corporation Tax was. The amended Corporation Tax discovery assessments decision dated 4 July 2022 directly referred to the additional turnover which was remaining unchanged.

(3) HMRC used best judgment in raising the VAT assessments.

(4) HMRC have shown the penalties were appropriate based upon deliberate inaccuracy.

10. Sprowston submit:

(1) The time limits in section 73 VATA have been breached. Officer Harvey became involved on 16 July 2019. As a result the assessments should have been made on or before 15 July 2020 with any extension for COVID limited to three months namely 15 October 2020. However, they were issued on 23 June 2021.

(2) Officer Valladares' evidence is not reliable or credible as he gave evidence that the increased turnover figures had not been challenged when that was not so, for example, Mr Balasingham's letter of 24 May 2021. Further, that the final Corporation Tax assessments did not reflect any increase in turnover. Additionally, that as no determination against whether the turnover reflected wages has been made by the Tribunal Officer Valladares was wrong to say that it was.

(3) That it is unfair they have not been permitted to appeal the increased turnover by way of the Corporation Tax assessments.

(4) Corporation Tax profits are based upon turnover and the starting point for that and VAT is turnover.

(5) HMRC have not met the required standard to show the inaccuracies were deliberate so to be able to sustain the deliberate penalties. If there are penalties these should be assessed as 'careless' and reduced to 18%.

FINDINGS OF FACT

11. As we have said we heard from three witnesses. We accept that Officers Harvey and Valladares were honest witnesses who gave their evidence to us in a helpful way, making concessions as appropriate.

12. We found Mr Balasingham's evidence limited. We accept he did not accept the case against him insofar as the turnover figures upon which the VAT assessments were based upon. We also accept he did not accept that his behaviour was deliberate insofar as the imposition of the penalty was concerned. However there was no detail beyond those assertions. Overall, we derive little assistance or evidence in his favour from what he said.

13. We make the following findings of fact based upon the evidence we heard, and the documents supplied to us. These findings are those that are necessary for our decision.

14. Mr Balasingham arrived from Germany where he had lived for 23 years in 2008 with his wife and three children. He learned English and sought to set up a business. He found an accountant and began his business. His (previous) accountant would give the answers to HMRC on his behalf and when he requested certain records back from HMRC they were not given.

15. Sprowston has one director namely Mr Balasingham. Sprowston registered for VAT effective 1 August 2013. The business activity was registered as a general store predominantly selling food, drink or tobacco products.

16. On 9 October 2018 Officer Valladares opened a compliance check into Sprowston's corporation tax return for period end 30 June 2017.

17. After making investigations using bank statements, he discovered expenditure going through Sprowston which could not be accounted for by Mr Balasingham's remuneration or any director's loan account. Officer Valladares concluded for tax years 2014, 2015, 2016 and 2017 that sums had been used from Sprowston to pay Mr Balasingham's mortgage, car lease

and other personal expenditure. Mr Balasingham had also been using stock in a personal capacity. This was communicated to Sprowston by letter dated 10 April 2019.

18. On 28 May 2019 after receiving submissions from Sprowston's then agents Officer Valladares made adjustments to the estimated turnover. On 26 June 2019 Sprowston's then agent again wrote to Officer Valladares with further information. That included a report into Mr Balasingham's health.

19. In evidence Officer Valladares told us the final figures for the additional sales he had arrived at which he shared with Officer Harvey for VAT compliance on 16 July 2019 were:

> *accounting period ended 30 June 2014 £38,299*
>
> *accounting period ended 30 June 2015 £40,465*
>
> *accounting period ended 30 June 2016 £39,115*
>
> *accounting period ended 30 June 2017 £34,308*

20. The drawings from the company were treated as director's remuneration and allowable expenses. On that basis as the increase in turnover was directly matched by the allowable expense of remuneration (taxed to Income Tax and National Insurance Contributions) there was no increase in corporation tax which is solely based upon profits. Only the turnover aspect is relevant to VAT.

21. Officer Valladares took the offer of information from the previous accountant as a tacit acceptance that there was an inaccuracy in the turnover. If the figures were not agreed, then they were in his view at the time capable of being agreed.

22. There appears to be an outstanding appeal to the Tribunal about whether what Mr Balasingham received was wages or not. That appears to be confirmed by the material supplied to us after the hearing. Those figures have never been agreed by Sprowston or Mr Balasingham and, for the reasons given below (see paragraph [37]), not subject to any Tribunal decision.

23. Officer Harvey confirmed her first involvement as 16 July 2019 when Officer Valladares provided that information to her. On 25 July 2019 HMRC carried out a test purchase at Sprowston given concerns about the turnover. The test purchase officer recorded:

> *Called at the above address which is a large double fronted convenience store just off the inner ring road in a good position for passing trade. On entering I noted that the shop sold alcohol, cigarettes, newspapers, confectionery and a wide selection of food and household items. I purchased a Bounty bar for 75p and noted that the till consisted of a touch screen computer screen on which the assistant tapped in the items. There was also a keyboard attached to the screen although I was unable to see the manufacturers name as the equipment was hidden behind other items. However, there was a dual sided digital read-out, and this had a manufacturer's name of Partner.*

24. After further investigations on 18 September 2019 Officer Valladares shared the further information he had with Officer Harvey. A site visit, by a notice of inspection under paragraph 10 of Schedule 36 of the Finance Act 2008, took place which confirmed that the till at Sprowston was not recording VAT correctly.

25. We accept that Mr Balasingham had an accident in 2019 and entirely accept the medical record submitted by him at the hearing (which we do not set out), and for which we express out sympathy. However, it does not have a bearing upon the events up to 2018 nor whether the behaviour in relation to any inaccuracy was deliberate or not.

26. On 7 February 2020 HMRC's data analysis reported on the till:

I found that the customer had sales under the Department called DEFAULT that included items like tobacco and alcohol and some of these also zero rated.'

27. On 11 June 2020 Officer Harvey recorded that the wrong VAT codes were being used for certain sales, resulting in an underdeclaration of sales. After concluding that a number of standard rated items were being recorded as zero rated, on 21 July 2020 Officer Harvey decided that there had been a suppression of takings since Sprowston's incorporation and that this was deliberate.

28. There was a pause for COVID. Thereafter throughout the rest of 2020 and into 2021 further discussions took place between Officer Harvey and Sprowston's then agent as well as between Officer Harvey and Mr Balasingham. On 18 November 2020 they spoke. Although Mr Balasingham was in the shop serving at that point he was able to answer a number of Officer Harvey's questions including telling her that all income was put through the till.

29. On 9 March 2021 Sprowston's then agent wrote to Officer Harvey providing a number of documents that had been requested and indicating:

Our client uses till reports to workout net sales figures and he provides us daily takings book.

30. Officer Harvey told us:

... following a letter ... on 9 March 2021 the acting accountant, I was advised that an apportionment calculation was carried out on sales figures provided by Mr Balasingham 'using till reports to work out net sales figures and he provides us daily takings book'. Full calculations of previous returns were provided. These calculations showed apportionment resulted in 85% of Sales being recorded as Standard Rated with 15% of sales Zero Rated. I was satisfied with this calculation and the miscoding of stock items was no longer a risk to the VAT declarations.

31. On 21 March 2021 Sprowston's then agent wrote to HMRC informing them they were no longer acting for Sprowston. That was received by HMRC on 4 August 2021.

32. On 29 April 2021 a 'pre-decision' letter was sent to Sprowston indicating that 85% of sales were standard rated. That figure was the accepted figure from Sprowston's then agent.s From that VAT calculations were made for the tax years 2014, 2015, 2016, 2017 and 2018. That stated:

If I do not hear from you by 28 May 2021, I will assume that you agree with my calculations which are based on figures from Mr Valladares's review.

33. In the letter to Sprowston's agent enclosed with the above, Officer Harvey stated:

According to submitted returns and your apportionment calculations your clients' standard rated sales on average represent 85% of turnover. I have used this percentage figure to calculate additional VAT due.

Additional Turnover

As you are aware my colleague Mr Valladares has informed your client that he intends to increase your level of turnover declared on your Corporation Tax return each year as follows:

Year Ending 30/06/2014	*£51,380*
Year Ending 30/06/2015	*£41,187*
Year Ending 30/06/2016	*£43,774*

Year Ending 30/06/2017 £43,450

Using the Retail Price Index, I have calculated that for the year ending 30/6/2018 this would equal an additional £44,918 of sales.

Personal Use

My letter dated 13 January 2021 explained the following:

'With regards to the figure used of £25 per week, my colleague Mr Valladares wrote to you on 2 July 2019 and stated that he has established your client had been receiving goods for his personal use to the value of £250 per month for the year ending 30/6/2016. I must advise you that based on this revised figure I intend to raise assessments under Section 73 (1) VATA 1994 as follows:

Year Ending 30/6/2016

For each of the 4 periods 09.15 to 06.16 as follows:
Revised 3 months @ £250 per month = £750.00
Less
Declared 13 Weeks @ £25 per week = £325.00
Undeclared Personal Purchase Balance = £425.00

Year Ending 30/6/2017

Although the Retail Price Index shows that your clients' personal purchases would have increased in value, I intend to use the same £250 per month as a basis for my calculations and intend to raise assessments as shown above.

I have used this same figure for all years

I will be raising an assessment in respect of these additional sales as shown on the table below.

Year Ending	Net Increase to Turnover	Plus Personal Use @ £425 a quarter x 4	Net Additional Sales	x 85% Vatable Sales	VAT Due @ 1/5	VAT Due per quarter
30/06/2014	£51,380	£1,700	£53,080	£45,118	£9,024	£2,256
30/06/2015	£41,187	£1,700	£42,887	£36,454	£7,288	£1,822
30/06/2016	£43,774	£1,700	£45,474	£38,653	£7,728	£1,932
30/06/2017	£43,450	£1,700	£45,150	£38,378	£7,676	£1,919
30/06/2018	£44,918	£1,700	£46,618	£39,625	£7,924	£1,981

34. The assessments under section 73 VATA were made to the best judgment of Officer Harvey. The correspondence also enclosed HMRC factsheet 9. That is headed ***Penalties for inaccuracies in returns and documents***. On the second page it informs the taxpayer:

2 Determining our view of the 'behaviour'

When there is an inaccuracy, we'll work with you to find out what caused it. We refer to this as the 'behaviour' … There are 4 different types of behaviour.

…

Deliberate

This is where you knew that a return or document was inaccurate when you sent it to us. Examples of deliberate inaccuracies include deliberately:

- *overstating your business expenses*
- *understating your income*
- *paying wages without accounting for Pay As You Earn and National Insurance contributions.*

35. On 18 May 2021 Officer Valladares wrote:

To simplify matters, I propose to set the adjustment for the accounting period ended 30 June 2014 against the adjustment for the accounting period ended 30 June 2015, making the required adjustments;

accounting period ended 30 June 2015 £864
accounting period ended 30 June 2016 £3,679
accounting period ended 30 June 2017 £6,812
accounting period ended 30 June 2018 £4,718

This makes the assessable profits/losses for each of these four years;

accounting period ended 30 June 2015 £1,945 + £864 = £2,809
accounting period ended 30 June 2016 £3,720 + £3,679 = £7,399
accounting period ended 30 June 2017 (£11,624) + £6,812 = (£ 4,812)
accounting period ended 30 June 2018 (£19,080) + £4,718 = (£14,362)

I propose to issue discovery assessments for the accounting periods ended 30 June 2015 and 30 June 2016 on that basis, and trust that I have clarified the position to your satisfaction.

36. On 21 May 2021 Officer Harvey held discussions with colleagues and concluded that because of the cash analysis, the lack of admission of inaccuracy and that there was sole responsibility the appropriate penalty was one that was based upon deliberate behaviour.

37. On 24 May 2021, that is before Officer Harvey's deadline for disagreement, Mr Balasingham wrote disagreeing with the Officer Valladares's original turnover figures. He said he was waiting for the final figures which had not arrived by the time he wrote to Officer Harvey (see letter dated 18 May 2021 above) before making an appeal.

38. On 9 June 2021 Sprowston de-registered for VAT.

39. On 23 June 2021 Officer Harvey gave notice of the VAT assessments under section 73 VATA in the total sum of £39,640.00. Sprowston was given the options of appealing to the Tribunal or seeking an independent review.

40. On 1 July 2021 Officer Harvey concluded that the deliberate penalties should be extended to include an officer's personal liability. That was because she considered the risks with regards to this case, taking into consideration that Mr Balasingham had not engaged with the VAT check and had not advised HMRC of the change of ownership / sale of the business. Officer Harvey concluded due to the Corporation Tax review it was decided that there had been additional sales to cover expenses and savings accrued. Further that Mr

Balasingham was responsible for ensuring information passed to his accountant was accurate, which he failed to do. Mr Balasingham also knew that the underdeclared turnover was being spent personally. Additionally, no reason for the discrepancy has been offered or substantiated and there was a risk that the Mr Balasingham would dissolve the company. There had already been a deregistration for VAT applied for on the basis that the company has ceased trading.

41. On 6 July 2021 Officer Harvey amended the VAT assessments by making a reduction to £38,192.00 as she was not pursuing the personal use aspect of the VAT assessment (although the corporation tax assessments where the VAT was allowed would not be adjusted). That was to Sprowston's benefit.

42. On 11 July 2021 Officer Harvey wrote to Sprowston about the penalties HMRC intended to charge. Mr Balasingham had not been invited to make comments upon this before it was issued. That showed a non-suspended figure of £20,837.36. The letter explained the following:

Stage 1: The penalty range. The penalty will fall within a range. This range will depend on our view of the following: • **behaviour** - the behaviour which led to the inaccuracy, **and** • **disclosure** - whether the disclosure was unprompted or prompted	We consider that the behaviour was deliberate. This is explained below. Following a Corporation Tax review it has been found that all omissions relate to transactions made by, and for the benefit of, the sole director. He would have been fully aware of the additional sales but did not include these sales on his VAT returns. The disclosure was prompted because you did not tell us about the Inaccuracy before you had reason to believe that we'd found out about it, or were about to find out about it. For this deliberate Inaccuracy with a prompted disclosure, the minimum penalty percentage is 45% and the maximum penalty percentage is 70%. **This means that the penalty range is from 45% to 70%.**

43. After additional calculations the final penalty was assessed at 57.5% of the VAT assessment for tax periods 1/7/13 to 30/6/15 and 52.5% for tax periods 1/7/15 to 30/6/18.

44. On 13 August 2021 Officer Harvey issued a 'personal liability notice' under paragraph 19 (1) of Schedule 24 of the Finance Act 2007 for the penalties which would become due by him if Sprowston failed to pay them.

45. On 1 September 2021 Mr Balasingham sought an independent review against the personal liability imposition of the penalties by Officer Harvey.

46. On 7 September 2021 Sprowston sought an independent review of Mr Valladares corporation tax discovery assessments.

47. On 21 September 2021 Officer Harvey replied to Mr Balasingham informing that there was no right of appeal against a personal liability imposition, but that Sprowston could seek to appeal or require an independent review in writing with reasons as to why it disagreed with Officer Harvey.

48. On 27 September 2021 Mr Balasingham indicated he would be appealing against the closure notices shortly in relation to both VAT and Corporation Tax.

49. On 14 October 2021 Mr Buttar wrote to Officer Harvey with signed permission to represent Sprowston and Mr Balasingham. In November 2021 there was an exchange of correspondence.

50. On 19 December 2021 Mr Buttar wrote to Officer Valladares. He stated (in part):

VAT

My understanding is that the VAT liability, which you have kindly explained in your email, is based on HMRC's proposals in respect of the Corporation Tax adjustments. As such, if alternative Corporation Tax amounts are agreed; VAT liabilities will be adjusted automatically. Please do correct me if this is not the case.

51. On 17 January 2022 Officer Valladares issued HMRC's view of the matter on the Corporation Tax position as the discovery assessments and closure notices for year-end 30 June 2015 and 30 June 2016 had been appealed.

52. On 20 January 2022 Officer Harvey replied to Mr Buttar's letter of 19 January 2021 and issued HMRC's view of the matter in relation to VAT. In it she stated (in part):

VAT Liabilities

As previously stated, I can confirm that the VAT liabilities are based on the Corporation Tax adjustments. Your agent, Mr Buttar has asked me to confirm if alternative Corporation Tax amounts are agreed, will the VAT liabilities will be adjusted accordingly. I can confirm that this is the case, and any liabilities will be reviewed in line with the Corporation Tax.

53. That was unfortunate. It does not constitute an unequivocal agreement to settle the VAT position. The last line makes clear there will be a review. In any event the Corporation Tax position was neutral as the increase turnover was matched by increased allowable expenses. The adjustments included those so although that reply suffered from a lack of clarity it was no more than that.

54. Officer Harvey further stated:

Deliberate Inaccuracy

I can confirm that this was based on the following:

You,

- *are the sole owner and director of the business and as such had sole responsibility for the business*
- *provided trading information to your accountants JK Associates this included sales and expenses incurred*
- *authorised your agents' calculations and submission of your VAT returns*
- *did not tell your agent that the business was paying your personal expenses, and only you could have arranged that*

55. Further:

Personal Trauma

I note the comments made by Mr Buttar in his letter. I am sorry to hear about your previous trauma but must refer you to Mr Valladares letter of 18 January 2022 and the fact that this has not been brought to our attention previously.

56. Both views of the matter provided the options to appeal or seek an independent review.

57. Sprowston elected a review.

58. On 15 March 2022 an officer of HMRC who had no prior involvement wrote to Sprowston acknowledging the request for the reviews.

59. On 22 March 2022 Mr Buttar wrote to Officer Harvey enquiring about how the conclusion about the deliberate nature of the inaccuracies was said to have been arrived at.

60. On 24 March 2022 Officer Valladares replied to Mr Buttar that as there was now an independent review, those findings were awaited.

61. On 8 June 2022 Mr Buttar wrote to HMRC about the cash position in relation to corporation tax of Sprowston.

62. On 1 July 2022 an officer who had no prior involvement wrote to Sprowston with the outcome of the independent review in relation to VAT. In it the VAT assessments were reduced from £38,192.00 to £26,584.24 and the deliberate penalties from £20,837.36 to £14,514.56. The best judgment of Officer Harvey was upheld in a staged analysis (see documents bundle page 419-431). The deliberate nature of the penalties was left in place.

63. In relation to special reduction the officer said:

> *Special reduction*
>
> *Paragraph 11 of Schedule 24 FA07 refers to special reduction. In Barry Edwards [2019) UKUT 131, the tribunal considered that the correct approach to considering special reduction was to simply consider whether the circumstances in question are sufficiently special to justify a reduction in the penalty. Officer Harvey considered special reduction in the Penalty Explanation Letter of 11 July 2021 but determined that it was not appropriate.*
>
> *In their letter of 19 December 2021, your agent stated:*

64. At this point the officer accurately set out what was said about Mr Balasingham's troubled history and health which might have impacted upon his behaviour. He continued:

> *Having reviewed all correspondence regarding this matter, including your agent's comments detailed above, I do not believe that this can be considered to be sufficiently special, to justify a reduction in the amount of the penalties.*

65. On 4 July 2022 a different officer replied to Mr Buttar's letter of 8 June 2022 regarding the turnover calculations for the discovery assessments in relation to Sprowston's corporation tax. Mr Buttar succeeded in persuading HMRC to his position. In it the officer wrote:

> *I agree that cash analysis done on this occasion does not necessarily show that cash was insufficient. While there are no trade creditors in the company accounts, cash analysis provided in the letters of 10 April 2019 and 28 May 2019 do not account for other positions on the balance sheet, including other creditors. Adjustment for available cash required should not be made based on this cash analysis and turnover should only be uplifted by specifically identified unaccounted expenses and drawings.*
>
> *Calculation of additional sales needed in order to raise funds sufficient to meet unaccounted expenses and drawings were explained in officer Mark Valladares' letter dated 28 May 2019 and these have remained unchanged, therefore revised additional turnover figures are as follows:*
>
> *Additional sales for period ended 30 June 2014 £38,299*
>
> *Additional sales for year ended 30 June 2015 £40,465*
>
> *Additional sales for year ended 30 June 2016 £37,381*
>
> *Additional sales year ended 30 June 2017 £34,308*

Discovery assessments for the accounting periods ended 30 June 2015 and 30 June 2016

Due to our agreement regarding cash analysis, amending the decision and removing available cash required from the uplifted turnover, based on the method of calculations explained in officer Mark Valladares' letter dated 18 May 2021, there are no longer any additional amounts assessable for Corporation Tax purposes.

As a result, we are withdrawing the Corporation Tax discovery assessments raised for the accounting periods ended 30 June 2015 and 30 June 2016 on 26 May 2021 in amount of £172.80 and £735.80 respectively and the related inaccuracy penalty issued on 9 July 2021 totalling £522.44.

I will now amend the discovery assessments to revert the computations to the original figures and will cancel the related inaccuracy penalty. There are no longer any appealable decisions to review regarding Corporation Tax.

The appeal has been settled by agreement under Section 54 as permitted by Section 49A(4) of the Taxes Management Act 1970.

A copy of this letter has been sent to your client. (emphasis added).

66. However, that success, left Sprowston unable to appeal the Corporation Tax position as the Corporation Tax assessments are made upon profits not turnover. Sprowston and Mr Balasingham did not agree the increased turnover that was found by Officer Valladares; their argument here that the cash analysis was deficient was accepted.

67. We do not accept Mr Balasingham's evidence that there was no increase in turnover as a result of this decision by HMRC. That is to misread what is said (as we emphasise in paragraph [65]) above.

68. On 1 February 2023 Mr Buttar received HMRC's documentation showing the Corporation Tax calculations. Each of them show the calculations based upon profit.

69. On 6 March 2023, the VAT assessments were revised upward from the independent review to a final figure of £23,032. The penalties were left unchanged.

70. On 7 March 2023 Officer Harvey wrote to Mr Buttar making clear HMRC's position that the letter on 4 July 2023 only settled the Corporation Tax not the VAT.

71. Sprowston was still aggrieved by HMRC's decisions on VAT and appealed to the Tribunal.

THE LAW

72. The law does not appear to be any dispute. The starting proposition is that the value of consideration in money for supplies of goods is that value together with VAT (section 19 (2) VATA)).

VAT assessments under section 73 VATA

73. Section 73 (1) VATA states:

73 Failure to make returns etc.

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by 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. (emphasis added)

74. Subsection 6 states:

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment. (emphasis added)

75. Section 77 (4) and (4A) state:

(4) In any case falling within subsection (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 or the importation or event giving rise to the penalty, as appropriate (subject to subsection (5)).

(4A) Those cases are—

(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),

(b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT,

(c) a case involving a loss of VAT attributable to a failure by P to comply with a notification obligation, and (d) a case involving a loss of VAT attributable to a scheme in respect of which P has failed to comply with an obligation under paragraph 6 of Schedule 11A or an obligation under paragraph 17(2) or 18(2) of Schedule 17 to FA 2017. (emphasis added)

76. In Van Boeckel v The Commissioners of Customs and Excise [1981] STC 290 ('Van Boekel) Woolf J (as he then was) said (at pages 292-293):

Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them.

Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, 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.

77. In CA McCourtie v The Commissioners of Customs and Excise [1992] Lexis Citation 802 ('McCourtie') the Tribunal decided that this would mean HMRC should gather the facts objectively and intelligently interpret them, any calculations should be arithmetically sound, and any sampling technique should be representative.

78. As Taylor J (as then was) put it in Schlumberger Inland Services Inc v Customs and Excise Commissioners [1987] STC 228 in agreeing with Woolf J:

I would add that the assessor is not required to possess and deploy the deductive powers of Sherlock Holmes and the clairvoyance of Madame Arcarti.

79. If best judgment has been used the next question is whether the tax payer can show it is more likely than not that the assessment is excessive. In Tynewydd Labour Working Men's Club and Institute Ltd v Customs and Excise

Commissioners [1979] STC 570 Forbes J stated:

... any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. There should be no difficulty in the way of the Appellant assuming this burden. The facts and figures are known to him, and if he does not understand the Commissioners' case, the rules provide for the Commissioners to give a proper explanation.

Penalties

80. Paragraph 1 (1) Schedule 24 of the FA states (in part):

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—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

81. Paragraph 3 states:

Degrees of culpability

3 (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure). (emphasis added)

82. Paragraph 11 states:

Special reduction

11 (1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

83. In Barry Edwards [2019] UKUT 131 (TCC) the Upper Tribunal said in relation to special circumstances (albeit under different legislation, but of which there is no material difference):

72. In our view, as the FTT said in Advanced Scaffolding (Bristol) Limited v HMRC [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in Crabtree v Hinchcliffe at page 731D-E when considering the scope of "special circumstances" as follows:

"the respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".

73. The FTT then said this at [101] and [102]:

> *"101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning. 20*
>
> *102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of 25 the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."*

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration.

The Tribunal's decision making

84. Drawing the threads together we derive the following for the purposes of our approach:

(1) Have HMRC issued assessments that were in time by reference to sections 73 and 77 VATA? If so,

(2) Were the assessments made to the best judgment of HMRC as set out in Van Boeckel and McCourtie? If so,

(3) Has Sprowston proven so it is more likely than not that the assessments were excessive? If not,

(4) Have HMRC shown the inaccuracies were deliberate (but not concealed)? If not, should there be any different type of penalty and, if so, in what amount?

(5) Is there any reason for a special reduction in any penalty?

85. We were referred to a number of first instance decisions, but these are inevitably heavily fact dependent. We will apply the principles above to our findings of fact.

DISCUSSION AND ANALYSIS

86. We address the arguments raised before us which we have set out above at paragraph []. We have set out the facts at some length so we are able to be relatively brief with our discussion.

1. The time limits in section 73 VATA have been breached. Officer Harvey became involved on 16 July 2019. As a result, the assessments should have been made on or before 15 July 2020 with any extension for COVID limited to three months namely 15 October 2020. However, they were issued on 23 June 2021.

87. In our judgment the time limits have been observed. Until the letter from the ex-agent of Sprowston arrived on 9 March 2021 Officer Harvey did not have much to on beyond the figures Officer Valladares supplied her regarding turnover. The figures used by the accountant upon which Sprowston's VAT returns were based were central to Officer Harvey.

Had she not waited and issued assessments shortly after July 2019 no doubt considerable criticism would follow. Instead, she gathered further evidence.

88. Section 73 (6) (2) (b) VATA states that an assessment may be made:

> *one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge*
>
> Here, there is no doubt that Officer Harvey's assessments were issued within the year that this sub section gives HMRC to raise the assessment. Further as there was a deliberate inaccuracy there is 20 years available.

2. Officer Valladares evidence is not reliable or credible as he gave evidence that the increased turnover figures had not been challenged when that was not so, for example, Mr Balasingham's letter of 24 May 2021. Further, that the final Corporation Tax assessments did not reflect any increase in turnover. Additionally, that as no determination against whether the turnover reflected wages had been made by the Tribunal Officer Valladares was wrong to say that it was.

89. We do not accept that Officer Valladares evidence is not credible or reliable because he said that the increased turnover had not been challenged. He told us that he thought it had been agreed there was an undeclaration of turnover and the figure would be agreeable. When it wasn't he accepted turnover had been challenged for example in the letter of 24 May 2021. As to the wages when it was put to him that there was an outstanding Tribunal, he simply said *I cannot answer that*.

3. That it is unfair they have not been permitted to appeal the increased turnover by way of the Corporation Tax assessments.

90. There is nothing unfair about this. Insofar as it impacts upon this Tribunal it was open to Sprowston to put accurate figures of turnover before us if HMRC's are said to be incorrect. That was not done.

4. Corporation Tax profits are based upon turnover and the starting point for that, and VAT is turnover.

91. Whilst that is correct as a statement, it does not affect this case. The Corporation Tax was assessed by Officer Valladares and thereafter a colleague in Sprowston's favour on profits. No more. The increased turnover was matched by the allowable expenses.

92. Whilst therefore turnover is the starting point for both tax questions it does not provide the same answer as different considerations are in place.

93. Having considered the arguments of Sprowston we turn to whether HMRC have demonstrated best judgment.

94. In our judgment they have. HMRC are not required to do the work of the taxpayer. They performed their task honestly and above board. There can be no suggestion that Sprowston did not have the opportunity at all stages in terms of the assessments to put forward everything they wanted to or could. Once in possession of all the information as can be seen from our findings of fact HMRC considered that material and came to a decision.

95. Officer Valladeres was fully entitled to come to conclusions about turnover based on the expenditure from the company bank account which could not be explained absent under declaration. From those figures and accepting Sprowston's previous accountants' explanations about the level of standard rated goods for VAT purposes, Officer Harvey was entitled to come to the conclusions she did about the level of VAT owed. It was reasonable and not arbitrary based as it was on the material before her. That included bank statements,

till reports, and information from the previous accountants. Officer Harvey viewed them objectively and intelligently. She always explained her reasoning.

96. The alterations in the independent review do not alter that where the reviewer identified calculation errors and these were taken into account in Sprowston's favour. Those were principally based upon the application of 20% by Officer Harvey rather than 1/6 as the review pointed out. Additionally, Mr Buttar's points about cash were taken on board and adjustment made. Although Officer Harvey's calculations were not arithmetically sound, they were corrected in the review.

97. Overall, in our judgment, HMRC have acted with best judgment.

98. Turning to whether Sprowston have shown the figures were excessive they have not. Such excess as there has been was cured at the independent review. Nothing was put before us to displace the amounts in the VAT assessments the subject of the appeal.

5. HMRC have not met the required standard to show the inaccuracies were deliberate so to be ablet to sustain the deliberate penalties. If there are penalties these should be assessed as 'careless' and reduced to 18%.

99. We do not accept Mr Balasingham's evidence that HMRC have not shown any 'error' was deliberate. The inaccuracies here relate directly to matters that Mr Balasingham had direct control over as the director of Sprowson and the expenditure, such as mortgage payments, directly benefitted him.

100. We are satisfied that HMRC have shown it is more likely than not that Mr Balasingham as the sole director of Sprowston knew that Sprowston was paying his mortgage and other personal expenses. Although his former accountants corresponded with HMRC it was Mr Balasingham who provided them with the underlying documentation in order to do so. That contained material that underdeclared Sprowston's turnover. Beyond denying it, no explanation has been offered. HMRC accepted that it was not based upon the till zero rating goods when they should have been standard rated as that was corrected by the previous accountants in the submissions of the VAT returns. The only explanation left is that over six years the accountants were not put in the full picture and deliberately so. It can only have been as a result of a decision that was thought about. The coincidence of carelessly failing to declare the full amount of turnover when such personal payments were made is too much.

101. The personal liability notice was entirely properly made in the circumstances outlined.

102. As to any special reduction, although this has not been argued we consider it as we must. We can only interfere if HMRC's decision was flawed in a public law sense. For the reasons given in the review we detect no public law flaw. HMRC were entitled to take the view that the information asserted did not amount to a reason to apply a special reduction within the test set out in Barry Edwards.

CONCLUSION

103. For those reasons the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

104. 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.

NATHANIEL RUDOLF KC
TRIBUNAL JUDGE

Release date: 15th AUGUST 2024