Neutral Citation: [2025] UKFTT 00067 (TC)

Case Number: TC09412

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/06644

VALUE ADDED TAX – assessments made under VATA 1994, s 73 – suppression of sales – whether to best of HMRC's judgment – yes – whether trader was entitled to use the VAT margin scheme for second-hand vehicles – no – whether the assessment should be reduced, in absence of records, to take account of two associates who had been buying vehicles at auction on the trader's account – no – previous agent had produced a disclosure report but appellant believed resulting VAT liability was too high – whether the amount of the assessment should be amended – yes but only in respect of estimated percentage of sales involving a part-exchange – appeal otherwise dismissed

Heard on: 25 November 2024
Judgment date: 24 January 2025

Before

TRIBUNAL JUDGE RACHEL GAUKE
IAN SHEARER

Between

ROSCOE NOONAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Peter Grant, Grant Whittaker and Co

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

DECISION

INTRODUCTION

1. The Appellant, Mr Noonan, appeals against an assessment made on 30 July 2020 under section 73 of the Value Added Tax Act 1994 (VATA 1994) for VAT under-declared during the long VAT period lasting from 1 April 2008 to 31 July 2018. The amount of VAT due to HMRC under the assessment was £600,832.46.

2. HMRC also issued penalties in connection with this case, but Mr Grant confirmed at the outset of the hearing that the penalties are not under appeal.

3. Having reviewed the evidence and listened to the submissions of both parties, we have decided that HMRC should recalculate the VAT assessment on the basis that 5%, rather than 25%, of Mr Noonan's sales in the relevant period involved the receipt of a part-exchange vehicle.

4. In all other respects, for the reasons set out below, the appeal is dismissed.

HEARING AND EVIDENCE

5. The hearing was conducted by video link on Microsoft Teams. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

6. We had a 524-page document bundle which included the notice of appeal and HMRC's statement of case, Tribunal procedural documents, other relevant documentation including meeting notes and correspondence, extracts from Mr Noonan's self-assessment tax returns, legislation and case law. We also had a 358-page supplementary bundle, the majority of which was made up of documents provided on behalf of Mr Noonan and prepared by Mr Noonan's former agents, Gerald Edelman. HMRC's skeleton argument was provided to us during the hearing.

7. Mr Noonan attended the hearing, gave evidence in person and was cross-examined.

8. From HMRC, we had two witness statements from the officer who produced the disputed VAT assessment, Officer Richard La Roche, one dated 2 June 2023, the second dated 5 December 2023. By the time of the hearing, Officer La Roche had retired and so he did not attend in person. We had a further witness statement, dated 13 December 2023, from Officer Stephen Bradstreet, adopting both of the witness statements of Officer La Roche. By the time of the hearing Officer Bradstreet, too, had retired and so did not attend in person. We therefore had a fourth witness statement, dated 29 October 2024, from Officer Malik El-Alawa, adopting all three earlier witness statements (the two from Officer La Roche and the third from Officer Bradstreet). Officer El-Alawa attended the hearing, gave evidence in person and was cross-examined.

LATE APPEAL

9. We noted that the appeal to the Tribunal was late, in that HMRC's review conclusion letter was sent on 20 May 2021, and the appeal was made on 19 September 2021. The review conclusion letter stated that the statutory appeal period was 30 days from the date of the letter, but that in light of the Covid-19 pandemic, HMRC would not object to late appeals made to the Tribunal within three months of the end of the 30-day appeal period. This three-month period expired on 19 September 2021, the date on which the appeal was made.

10. The Tribunal must give permission for the appeal to be made late. In considering whether to do so we must establish the length of the delay, the reasons for it, and then evaluate all the circumstances of the case, balancing the reasons for the delay and the prejudice caused to both parties by granting or refusing permission.

11. In this case the delay lasted three months. Mr Grant confirmed that the reason the appeal was made late, on 19 September 2021, was that the review conclusion letter had appeared to give Mr Noonan until this date to make his appeal. HMRC made no objection to the late appeal.

12. In the circumstances of this case, we consider that it is in the interests of justice to allow the appeal to be made late, and we grant permission accordingly. In reaching this decision we have taken into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

FINDINGS OF FACT

13. We make the following findings of fact based on the documentary evidence in the bundles and on the oral evidence we heard at the hearing, including evidence given under cross-examination. We make further findings of fact on the specific issue of whether Mr Noonan kept a stock book in the relevant period in the section of this decision below headed "Mr Noonan's profit margin".

14. Mr Noonan operates as a sole trader, with a business as a second-hand car dealer. In the period between April 2008 and April 2014, Mr Noonan purchased most of his cars from West Oxfordshire Motor Auctions ("WOMA").

15. During the same period, Mr Noonan allowed two associates to purchase vehicles using his account at WOMA. We have been able to make only limited findings of fact concerning these two associates, and we return to this topic as part of our discussion below.

16. On 21 October 2013, HMRC opened an enquiry into Mr Noonan's self-assessment return for 2011-12. As a result of the enquiry, Mr Noonan's agents at the time (Jackson Feldman) submitted a revised account increasing the amount of car purchases for 2011-12 from the £39,581 shown in the self-assessment return, to £80,623.

17. On 22 August 2014, HMRC wrote to Mr Noonan, informing him that they were beginning an investigation under Code of Practice 9 ("COP 9"), and were offering him the opportunity to make a disclosure under the Contractual Disclosure Facility ("CDF"). HMRC's letter explained that under the CDF, Mr Noonan was being offered the opportunity to make a full disclosure of all losses brought about by his deliberate and non-deliberate conduct, and that if he made a full disclosure, HMRC would not start a criminal investigation into any deliberate conduct he disclosed.

18. The information accompanying HMRC's letter explained that a person who accepts the opportunity to make a disclosure under the CDF must first make an "outline disclosure", to be followed, in more complex cases, by a more detailed "disclosure report". The outline disclosure would include a description of the behaviour that resulted in the loss of tax, and if possible an estimate of the amount of tax underpaid. The disclosure report should enable HMRC to make an accurate assessment of the amount of underpaid tax, and should include full supporting documents including a statement of assets and liabilities, a certificate of bank accounts operated and a certificate of credit cards operated.

19. On 22 October 2014, Mr Noonan accepted the offer to make a disclosure under the CDF, and an outline disclosure was made on 18 November 2014. The outline disclosure, which was signed by Mr Noonan, included the following statement:

> "Since approximately April 2008, I have not included in the takings of my car dealing business a number of car sales and purchases. When I advised my accountant of the sales figure to include in the accounts, I told him to exclude a number of bankings which I said were gifts from family and friends which I am unable to verify. In March/April 2010, my late sister asked me to look after some of her savings which were transferred into my account with Santander. I then used this account to buy and sell motor cars, the details of which were not included in my accounts.
>
> "I have benefited from not registering for VAT and not therefore paying VAT on the profit margin and from paying insufficient tax due to the underdeclared profits."

20. In his outline disclosure Mr Noonan estimated his underpaid income tax, Class 4 national insurance contributions and VAT as a total amount of £40,000. On 2 February 2015, HMRC accepted the validity of the outline disclosure and indicated that they would continue their investigation.

21. Mr Noonan appointed different agents, Gerald Edelman Chartered Accountants ("Edelman"), to prepare a disclosure report on his behalf. A meeting took place on 13 May 2015 between Edelman and HMRC (including Officer La Roche), at which Mr Noonan was not present. At the meeting, Mr Deval Patel of Edelman confirmed that Mr Noonan had not previously kept a stock book. Mr Patel understood that Mr Noonan had now started to keep a stock book but they had not seen this themselves. Mr Patel also indicated that he had been unaware of the record-keeping requirements of the VAT margin scheme for second-hand vehicles and had been working on the basis that this scheme was available to Mr Noonan.

22. A further meeting between Edelman and Officer La Roche took place a year later, on 13 May 2016, to discuss the progress Edelman had made in preparing the disclosure report. They had calculated sales on the basis of bank accounts, and purchases on the basis of invoices from WOMA.

23. HMRC's note of this meeting records Mr Patel as saying that "Mr Noonan thought that he may have on occasion purchased cars on behalf of friends but could not specifically recall".

24. At both meetings, and in a subsequent letter sent by HMRC to Edelman on 17 May 2016, HMRC explained to Edelman that because Mr Noonan had not kept a stock book, he was not entitled to calculate his VAT using the second-hand margin scheme. As a result, VAT would be due on the total amount of his sales, subject to any allowable input tax.

25. During a further meeting between HMRC and Edelman on 1 November 2016, Mr Patel suggested that the profit margin in the draft disclosure report may be artificially high due to Mr Noonan buying cars at auction for friends, and these being paid for by those friends. Officer La Roche responded that a few cars would not have had a material effect on business results.

26. On 4 November 2016, Officer La Roche received a telephone call from Mr Patel at Edelman. Mr Patel said that he had met Mr Noonan to finalise the disclosure report, but that Mr Noonan was not willing to sign it off. Mr Patel had therefore prepared a further report, calculating VAT only on the profit margin. Officer La Roche again advised that Mr Noonan was not entitled to use the margin scheme and that HMRC would seek VAT on the full amount of sales. As a result, the position shown on the report would not be acceptable to HMRC. Mr Patel said that Mr Noonan was not willing to pay VAT on the full amount of sales.

27. Around April 2017, Mr Noonan appointed a new agent, Mr Grant (who represented Mr Noonan at the hearing), to replace Edelman.

28. On 9 June 2017, HMRC issued Mr Noonan with an information notice under Schedule 36 to the Finance Act 2008, asking him to provide the disclosure report prepared by Edelman and the supporting documentation. Penalties were later issued for failure to comply with this notice. HMRC has not, to date, received a signed disclosure report from Mr Noonan.

29. On 12 December 2017, Officer La Roche spoke to Mr Grant on the telephone. The officer told Mr Grant that from HMRC's perspective, the best way forward would be for Mr Noonan to provide the report to HMRC, together with the books and records that supported it. The officer asked if Mr Grant was preparing any figures to submit to HMRC, and he said that he was not.

30. Officer La Roche also wrote to Mr Noonan on a number of occasions, including on 22 February 2018, reminding him of his obligation to engage with the COP 9 process and the consequences of not doing so.

31. On 7 June 2018, HMRC compulsorily registered Mr Noonan for VAT with effect from 1 April 2008.

32. On 21 October 2018, Mr Noonan submitted a VAT return for his first VAT period, which ran from 1 April 2008 to 31 July 2018. The return showed a net VAT liability of £356.23. Mr Grant has since accepted, on behalf of Mr Noonan, that this figure mistakenly related only to the last three months in the period.

33. On 30 November 2018, HMRC issued a further information notice under Schedule 36 to the Finance Act 2008, asking him to provide detailed business records for periods to April 2014. The requested information was not provided.

34. Officer La Roche then proceeded to seek information from third parties: from Barclays, Santander, and WOMA. WOMA provided a schedule of all purchases by Mr Noonan from April 2008 to April 2014.

35. Information was also provided by Barclays and Santander, but in the event the officer did not use this information for the purposes of calculating the VAT assessment.

36. The VAT "best judgment" assessment was issued on 30 July 2020, showing output tax of £672,729.33 and input tax of £71,540.64, giving a net VAT liability of £601,188.69. Taking account of the £356.23 previously accounted for, the amount of VAT shown as due on the assessment was £600,832.46.

37. HMRC subsequently reviewed and upheld their decision. The review conclusion letter was issued to Mr Noonan on 20 May 2021. Mr Noonan appealed to this Tribunal on 19 September 2021.

38. On 10 November 2023, Mr Grant sent an email with a number of attachments to HMRC's Solicitor's Office, requesting that these be forwarded to the Tribunal. These included "income and expenditure accounts" that had been prepared by Edelman for the years ending 5 April 2009 to 5 April 2014 inclusive. HMRC understood these to have been prepared by Edelman as part of their work on the disclosure report, as outlined above, before they ceased to act for Mr Noonan in 2017. An accompanying email from Edelman indicated that the amount of VAT they had calculated to be due for the years in question was £79,887.

HMRC'S METHODOLOGY

39. We begin with some observations about the evidence available to us concerning the methodology adopted by HMRC when calculating the VAT assessment.

40. It was of course unfortunate that Officer La Roche, who made the VAT assessment, was not available to give oral evidence to the Tribunal about the approach he had adopted. However, as the officer had retired we accept that this was unavoidable.

41. As described above, Officer El-Alawa adopted the witness statement of Officer La Roche (and of Officer Bradstreet) and attended the hearing to give oral evidence.

42. We derived little assistance from the statements in Officer El-Alawa's witness statement to the effect that he would have reached the same conclusions as Officer La Roche, as it is the task of the Tribunal to decide whether the assessment was made to the best of HMRC's judgment.

43. We did, however, find Officer El-Alawa's oral testimony helpful in explaining, by reference to the documentary evidence in the bundle, the methodology adopted by Officer La Roche in calculating the assessment. It was clear that, in preparing for the hearing, Officer El-Alawa had thoroughly studied the underlying documentation. We accept Officer El-Alawa's evidence in relation to HMRC's methodology, firstly because it is entirely in accordance with the detailed documentary evidence, and secondly because the methodology itself was not in dispute.

44. We also accept the accuracy of Officer La Roche's witness statement in so far as it describes the way in which he calculated the assessment, for essentially the same reasons: it accords with the documentary evidence and, although he was not present to be cross-examined, Mr Noonan did not dispute the accuracy of the officer's witness statement as regards the steps he had taken to arrive at the assessment.

45. It is important to emphasise in this context that there was no dispute about how HMRC had calculated the amount of VAT that was due. Mr Noonan's case was, instead, that this methodology did not produce the right result.

46. Based, therefore, on the documentary evidence, on the oral evidence of Officer El-Alawa, and on the witness statement of Officer La Roche, we find that the methodology adopted by HMRC in calculating the VAT assessment was as follows.

47. Officer La Roche based his estimate of the value of the sales made by Mr Noonan in the period 5 April 2008 to 31 July 2018 on the records provided by WOMA. These records covered the period from 6 April 2008 to 5 April 2014 and set out all the vehicles purchased through WOMA on Mr Noonan's account in that period, together with the amounts he had paid for those vehicles. The total purchases made by Mr Noonan at WOMA in that period came to £1,142,876.13, of which £37,999.78 was VAT.

48. Officer La Roche then referred to Mr Noonan's self-assessment tax returns for the periods in which these had been submitted. These were 2006-07 to 2012-13 inclusive, plus 2017-18 and 2018-19. From these returns he noted the figure given for the turnover of Mr Noonan's business (ie the total amount of his sales), and the figure given for the cost of goods bought for re-sale or goods used (ie the total amount of his purchases). For each year he calculated the difference between the sales and the purchases, and expressed this as a percentage mark-up. Having calculated this mark-up for all of these periods (2006-07 to 2012-13 inclusive, plus 2017-18 and 2018-19) he then calculated their average, resulting in a figure of 83.49%.

49. It was common ground that Mr Noonan's self-assessment tax returns understated the true figures for the amounts of his sales. For the purposes of the VAT assessment Officer La Roche referred to these returns only to calculate the average percentage mark-up.

50. Officer La Roche applied this average mark-up, of 83.49%, to the purchase figures provided by WOMA, to produce an estimate of the amount of Mr Noonan's sales for the period from 6 April 2008 to 5 April 2014.

51. Officer La Roche did not have purchase figures for the years after 2013-14. He therefore estimated Mr Noonan's sales for each of the four tax years 2014-15 to 2017-18 by taking the WOMA purchases figure for 2013-14, increasing it by reference to the retail prices index (RPI) for the relevant year, and then applying the 83.49% average mark-up. The figure for the period 6 April 2018 to 31 July 2018 was similarly estimated using RPI, but pro-rated to reflect this being a period of less than a year.

52. The estimated sales figure for the five days from 1 April 2008 to 5 April 2008 was a pro-rated portion of the actual turnover figure provided in Mr Noonan's 2007-08 tax return.

53. Officer La Roche then added a further amount to the estimated sales figures to reflect the fact that in some instances Mr Noonan would have received vehicles from his customers in part-exchange, and would have sold those on. This further amount was to reflect the assumption that these part-exchange vehicles would have resulted in additional sales; the officer did not add anything to the amounts he estimated Mr Noonan to have made by selling the vehicles he bought through WOMA, as he judged that the value of the part-exchange vehicles would have been included in the estimated 83.49% mark-up. He assumed that the part-exchange vehicles would be of lower value than those acquired through auction, so estimated that Mr Noonan would have sold them for an average amount of £1,500 per vehicle.

54. Officer La Roche estimated that 25% of Mr Noonan's sales involved part-exchange vehicles. According to the officer's witness statement, during "the Section 9A enquiry", Mr Noonan had suggested that 20-30% of his sales involved part-exchange vehicles, so Officer La Roche took 25% as the mid-way point.

55. The turnover produced by these calculations was allocated to the relevant years, and the appropriate VAT rate (which changed at various times between 15%, 17.5% and 20%) applied, to produce an estimated amount of output VAT for the entire period from 1 April 2008 to 31 July 2018. The resulting figure was £671,312.67.

56. For the period from 6 April 2008 to 5 April 2014, Officer La Roche gave credit for the input tax shown in the records provided by WOMA as having been payable by Mr Noonan during that time. The amount of input tax was relatively low: £37,999.78 for the whole six-year period, which was 3.33% of the total car purchases. The figure is low because most vehicles were purchased from sellers, such as private individuals, who did not have to charge VAT.

57. For the period from 6 April 2014 to 31 July 2018, the officer applied the figure of 3.33% to the sales that had been estimated for that period using RPI, in the manner described above. This resulted in estimated input tax of £32,480.43. Added to the figure for the period from 6 April 2008 to 5 April 2014, Officer La Roche gave credit for total input tax, for the whole VAT period from 1 April 2008 to 31 July 2018, of £70,480.21.

58. The resulting VAT assessment, having subtracted estimated input tax from estimated output tax, was in the amount of £600,832.46.

RELEVANT LAW

59. The legal principles relevant to this decision are set out below.

Best judgment assessments

60. Section 4 of the Value Added Tax Act 1994 (VATA 1994) provides that VAT is chargeable on taxable supplies of goods and services made in the UK by a taxable person in the course of their business. A taxable supply means a supply of goods or services made in the UK that is not an exempt supply for VAT purposes, and a taxable person means a person who is, or is required to be, registered for VAT.

61. A person who is established in the UK becomes liable to be registered for VAT when the value of their taxable supplies in the previous year exceeds the VAT registration threshold. The VAT registration threshold is set by Parliament and has increased through time.

62. Taxable persons must file VAT returns, and are required to keep records for this purpose. Under VATA 1994, s 73, where a person fails to keep records, or it appears to HMRC that their VAT returns are incomplete or incorrect, HMRC may assess the amount of VAT due to the best of their judgment. An assessment under VATA 1994, s 73 must be made within four years of the end of the accounting period concerned.

63. As to whether an assessment is made to the best of HMRC's judgment, Woolf J in *Van Boeckel v C&E Comrs* [1981] STC 290 ("*Van Boeckel*") (at p292f–293a) said:

> "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 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 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."

64. The approach that should be adopted by the Tribunal to a "best judgment" assessment under section 73(1) VATA was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC), in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC) as follows:

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman*

(t/a Khayam Restaurant) v Customs and Excise Commissioners [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115 (TCC) (Judge Sir Stephen Oliver QC).

15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):

> "In such cases…the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary".

16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:

> "…But the fact that a different methodology would, or might, have led to a different - even to a more accurate - result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment."

17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.

18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):

> "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." "

65. In relation to the burden of proof in this appeal, we have been guided by the following statements of Carnwath LJ in the Court of Appeal decision in *Khan v HMRC* [2006] EWCA Civ 89, at [69]:

> "The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> > "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessment right or more nearly right" (*Bi-Flex Caribbean Ltd v*

> *Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC ["*Bi-Flex*"] per Lord Lowry).
>
> This was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd*…"

The second-hand margin scheme

66. The second-hand margin scheme gives traders an option, where certain conditions are met, to calculate VAT on the margin between buying prices and selling prices. It is normally only applicable where no VAT was charged when the goods were acquired. Use of the margin scheme is subject to strict and precise compliance obligations. Where those obligations are not met, VAT is required to be accounted for on the full selling price of the goods.

67. VATA 1994, s 50A enables the Treasury to implement margin schemes. Article 8 of the Value Added Tax (Cars) Order 1992 makes provision for a margin scheme for second-hand cars. The article states that a person may use the scheme "subject to complying with such conditions (including the keeping of such records and accounts)" as HMRC may direct in a notice. These conditions are contained in certain paragraphs of VAT Notice 718/1 which have the force of law. The conditions include detailed record-keeping requirements, one of which is that the trader must keep a stock book. At the times relevant to this appeal, the relevant paragraph of VAT Notice 718/1, or its predecessor VAT Notice 718, set out certain detailed information that was required to be included in a stock book.

DISCUSSION

68. Mr Noonan accepts that he owes additional VAT to HMRC and has not disputed HMRC's decision to register him for VAT. The dispute concerns the amount of VAT that is due.

Best judgment

69. Mr Noonan did not argue that HMRC had failed to exercise their best judgment in making the assessments, or that HMRC had acted capriciously, improperly or in bad faith.

70. We are satisfied that Officer La Roche exercised his best judgment in making the assessment. He had material before him on which to base the assessment, namely the records from WOMA and Mr Noonan's self-assessment tax returns. The correspondence and evidence shows that he carefully considered this material before making the assessment, and the decision he reached was reasonable and not arbitrary.

71. We therefore proceed to consider whether the amount assessed is correct. We remind ourselves that for this purpose we can consider all available evidence, including material not available to HMRC when the assessment was made.

72. We have also kept in mind the burden of proof in "best judgment" cases, as expressed in the extract from *Bi-Flex* set out above, which is that the assessment is prima facie right and remains right until the taxpayer shows that it is wrong, and also shows positively what corrections should be made to make the assessment right or more nearly right.

Mr Noonan's criticisms of HMRC's methodology

73. In his notice of appeal, Mr Noonan's grounds of appeal refer to some attached emails. From these emails and other correspondence in the bundle, and from Mr Grant's submissions in the hearing, we understood his main grounds of appeal to be as follows.

(1) Estimating Mr Noonan's sales on the figures from WOMA gives too high a number because these figures include cars that were purchased at WOMA by Mr Noonan's two associates. Cars purchased by the two associates should not be included in the estimate of Mr Noonan's own sales.

(2) HMRC were wrong to estimate that 25% of his sales involved the acquisition of a vehicle in part exchange. The true figure is nearer 5%.

(3) HMRC have greatly over-estimated his profit margin. He incurs significant costs in preparing cars for re-sale, including on paintwork, electrical or mechanical repairs, valeting, advertising, fuel, and MOTs.

74. We address these grounds of appeal in turn, before addressing some further points raised by Mr Noonan in his submissions.

The WOMA records and Mr Noonan's two associates

75. As we have set out above, HMRC estimated Mr Noonan's sales figures by taking WOMA's records of the vehicles purchased on Mr Noonan's account, and applying a mark-up.

76. We accept it to have been established as a fact that during at least part of the VAT period to which the assessment relates, Mr Noonan allowed two associates to buy cars using his account at WOMA. This was confirmed in an email sent by Paul Kourellias of WOMA to Mr Noonan on 7 July 2021, of which we had a copy in the bundle. In this email Mr Kourellias said he was unable to identify vehicles purchased on Mr Noonan's account which may have been purchased by persons other than Mr Noonan, and stated:

> "I do recall a long period of time when 2 other people were using you trade account with your consent that, but as the vehicles were purchased by them in your name our records will only show yourself as the purchaser."

77. The associates' names were Mr Rusinov and Mr James. Mr Noonan explained that Mr Rusinov ran a car washing business outside the auction premises, while Mr James had been introduced to him by Mr Noonan's sister. Mr Noonan's sister, in turn, had met Mr James while she was receiving hospital treatment, and Mr James had been a fellow patient in the same hospital.

78. Mr Noonan told us that his arrangement with these two associates was in the nature of a favour by him to them, for which he received no commission. He explained that as the WOMA account was in his name, he would pay for the vehicles to be acquired by the associates, and they would pay him back at cost. Mr Noonan thought that these refunds would be in his bank statements.

79. Mr Noonan submitted that the vehicles acquired by his associates should be excluded from the list of vehicles purchased on his account at WOMA, and for HMRC to have included these vehicles resulted in estimated sales that were greatly in excess of the true figures.

80. Mr Noonan said that he had not kept any records of the vehicles acquired by his associates. He had suggested in correspondence that the effect of including the vehicles was

that HMRC's estimated sales figures were inflated by around 60%. When he was asked at the hearing how he had calculated this percentage, Mr Noonan said that Mr James bought fewer cars than him and Mr Rusinov bought more, and so the 60% was a "rough estimate".

81. Mr Noonan suggested that the only way he could have worked out which vehicles were acquired by the associates was by comparing the WOMA records with his sales invoices. Any vehicle acquired by him would have a corresponding sales invoice, and so it could be deduced that any vehicle for which there was no sales invoice must have been acquired by an associate. However, Mr Noonan explained that in 2012 these invoices were destroyed in a flood, and so it was not possible to carry out this comparison.

82. Mr Noonan also explained that he had gone to considerable lengths, in connection with HMRC's investigation and the VAT assessment, to track down Mr Rusinov and Mr James, so that they could confirm that what he was saying was correct. Unfortunately, Mr Noonan has lost touch with both of these individuals, and was unable to locate them. We therefore had no statements or evidence from these associates.

83. For the Tribunal to reduce the amount of the VAT assessment, it is not sufficient for Mr Noonan to demonstrate that the assessment is incorrect: he must also demonstrate what corrections are needed to make it right, or more nearly right. The case law to which we have referred above makes clear that a best judgment assessment will almost unavoidably include inaccuracies, and that it is not HMRC's role to do the work of the taxpayer to determine the amount of tax that is correctly due.

84. The problem, from Mr Noonan's perspective, is that the Tribunal has not been provided with any credible amounts by which HMRC's estimated sales figures should be reduced to take account of the vehicles acquired by the associates. The figure of 60% is not supported by any evidence beyond Mr Noonan's approximate recollection, and he was unable to recollect with any certainty even when his connection to these individuals ceased.

85. Mr Noonan's own account at the hearing of the nature of his acquaintance with the associates did not convince us that during the period under assessment they had a car dealership business on a similar scale to his own. Indeed he implied that Mr Rusinov's business activity was primarily car washing, which had continued after he had moved away to Bedfordshire and lost contact with Mr Noonan.

86. We considered whether we should reduce the sales figure by some percentage less than 60%, to reflect the vehicles acquired by the associates. We concluded that we should not do so, for the following reasons.

87. We do not consider that it would be appropriate for the Tribunal to choose a percentage reduction when this figure would be wholly arbitrary. As we have already stated, it is for Mr Noonan to tell us how much the reduction should be, and to support this with evidence. As he has not done so, it is not for us to substitute a figure of our own.

88. We are also mindful that, while we have accepted that the associates bought vehicles using Mr Noonan's account at WOMA, we have received no submissions concerning the correct legal analysis, from a VAT perspective, of this arrangement. If, for instance, the correct analysis is that he acquired the cars as an undisclosed agent, then for VAT purposes Mr Noonan would be regarded as both receiving, and making, a supply of those cars. We make no findings on this point, but note that it is possible that VAT was correctly due from Mr Noonan in respect of vehicles acquired by associates on his account.

89. Another factor which we consider weighs against the acquisitions by associates being on the scale suggested by Mr Noonan, is that Edelman did not appear to be aware of this during their meeting with HMRC on 13 May 2016. At this stage, Edelman were preparing the

disclosure report on Mr Noonan's behalf, based largely on bank records. HMRC records Mr Patel of Edelman as having stated that all bank deposits were being treated as sales unless it was obvious they were not business related. If Edelman were excluding large numbers of deposits because these were refunds from Mr Rusinov and Mr James, we would have expected them to have mentioned this. Instead, the meeting note merely records Mr Patel saying that Mr Noonan may on occasion have purchased cars on behalf of friends.

90. We do not place a great deal of weight on this meeting note because it was not verbatim and Mr Noonan himself was not present at the meeting. Mr Noonan told us that Mr Patel had misunderstood and that the purchases were not on behalf of friends. We would not, therefore, regard this note on its own as conclusive evidence that the sales figure should not be reduced to take account of acquisitions by the associates, but it is a factor.

91. We also consider that it is relevant, when considering the correct amount of the assessment, to have in mind that there are at least two respects in which HMRC's assessment may be too low.

92. The first is that HMRC based their estimate of Mr Noonan's sales exclusively on the vehicles purchased on his account at WOMA, when Mr Noonan told us, in his oral evidence, that he had also bought vehicles elsewhere, albeit "only occasionally". It is therefore an established fact that Mr Noonan sold some vehicles in addition to those he had bought at WOMA (and in addition to those he had acquired through part-exchange when selling vehicles bought at WOMA), although we do not know how many.

93. The second respect in which HMRC's assessment may be too low is that the assessed period begins in April 2008, when there is evidence that he should have been accounting for VAT at an earlier time. His self-assessment tax return for 2007-08 shows that his turnover in that year was £68,286, and at that time the VAT registration threshold was £64,000. Even according to his own tax return, therefore, it is likely that Mr Noonan should have been accounting for VAT before April 2008.

94. In conclusion on this point, we do not consider that it would be right for us to reduce the VAT assessment to reflect the fact that Mr Noonan's two associates purchased vehicles using his WOMA account.

The period from 6 April 2014 to 31 July 2018

95. We note that the WOMA records only cover the period from 6 April 2008 to 5 April 2014. At the hearing, Officer El-Alawa was not able to tell us why HMRC had not obtained WOMA records for any later periods. Mr Noonan said that over time he had started attending WOMA auctions less regularly, and that in later periods he had bought most of his vehicles elsewhere. This suggests that the WOMA records would have been a less useful proxy to estimate his total purchases in these later years.

96. As noted above, for the remainder of the period covered by the VAT assessment (6 April 2014 to 31 July 2018), HMRC estimated Mr Noonan's purchases by taking the WOMA figure for 2013-14 and increasing it by reference to RPI.

97. We observe that most of the period in respect of which HMRC used RPI to estimate Mr Noonan's purchase figures post-dated the beginning of HMRC's COP 9 investigation, and that therefore Mr Noonan should have been keeping proper records so that HMRC would not need to make an estimate. However, Mr Noonan did not submit that he had any records that should be used instead of HMRC's estimate for this period. Neither did he suggest that his trade had declined in these years. We note in this context that the turnover figures in his self-assessment tax returns for 2017-18 and 2018-19 are broadly in line with the turnover figures in his returns

for 2008-09 to 2012-13, suggesting that there was not an appreciable decline in his trade over this period.

98. In the absence of submissions to the contrary, we consider that it was reasonable for HMRC to estimate Mr Noonan's turnover for the period from 6 April 2014 to 31 July 2018 using RPI, and do not consider that we should amend the VAT assessment to estimate the turnover for that period on any other basis.

Part-exchange vehicles

99. We have set out above that Officer La Roche estimated that 25% of Mr Noonan's sales involved receiving a vehicle in part-exchange, and that he would have sold those part-exchange vehicles for an average of £1,500 each.

100. As to the source of the 25%, Ms Hickey directed us to the officer's witness statement. This said that "during the Section 9A enquiry", which we understood to mean the enquiry into Mr Noonan's self-assessment return for 2011-12, Mr Noonan had suggested that 20-30% of his sales involved part-exchange vehicles. Officer La Roche therefore took 25% as the mid-way point between 20% and 30%.

101. We note that the covering letter that Office La Roche sent with the VAT assessment on 30 July 2020 states that "you have previously advised my colleague that 20-30% of your sales involved a part exchange vehicle being accepted".

102. It was not clear to us when Mr Noonan had originally provided the 20-30% figure. Ms Hickey said that it would have been during a meeting, and that the notes of that meeting had not been provided to the Tribunal, as they would be in HMRC's income tax records rather than their VAT records. It does not appear to have been mentioned in the meeting on 13 May 2015, as we did have a detailed note of that meeting, and in any event Mr Noonan was not present on that occasion.

103. Mr Noonan told us that he may have given Edelman (his previous agents) the figure of 20-30%, but that he now thought this was not accurate and that having reviewed his records he now believes the true figure to be around 5%. We understood him to have formed this view based on the figures from his current trade, whereas the relevant figures are those relating to the period covered by the VAT assessment. However, we had no reason to believe, and neither Mr Noonan nor HMRC suggested, that the percentage of sales that involved a part-exchange vehicle had changed over the years in which Mr Noonan has operated his business.

104. We must therefore decide between a figure given to us by Mr Noonan in the hearing, and a figure based on what Mr Noonan may have told his agent around ten years ago and of which we have no direct contemporaneous evidence.

105. In these circumstances we prefer the figure given to us by Mr Noonan in the hearing. We therefore direct HMRC to reduce the VAT assessment so that the portion of Mr Noonan's sales that involved a part-exchange vehicle is estimated at 5% rather than 25%.

106. We have noted that Officer La Roche estimated that each part-exchange vehicle was sold for £1,500. We could not see any basis on which this figure had been chosen, other than that it was less than the average values of the cars which Mr Noonan bought at auction. However, Mr Noonan has not disputed this figure or suggested that a different figure should be used instead, and so we have not changed the figure of £1,500 used by HMRC as the average price for which Mr Noonan sold part-exchange vehicles.

Mr Noonan's profit margin

107. We consider that much of the dispute about the amount of the VAT assessment concerns whether Mr Noonan can use the margin scheme for second-hand cars. This question accounts for much of the difference between the amount of VAT that HMRC says is due from Mr Noonan, and the amount that Mr Noonan considers it would be fair for him to pay.

108. We recorded above Mr Noonan's submission that HMRC have greatly over-estimated his profit margin. In emails provided to the Tribunal, Mr Noonan notes the 83.49% mark-up rate used by Officer La Roche in the VAT assessment, and states that this is far in excess of the true profit he makes, which he estimates to be nearer 20-25%. Mr Noonan states that he doubts Officer La Roche has taken account of the expenses he incurs in preparing cars for re-sale, including on paintwork, electrical or mechanical repairs, valeting, advertising, fuel, and MOTs.

109. It is clear from the evidence that HMRC repeatedly explained to Mr Noonan and to his agents that traders can only use the margin scheme for second-hand cars if they comply with strict record-keeping requirements, which included keeping a stock book which records certain information set out in VAT Notice 718/1.

110. If a car dealer is not entitled to use the margin scheme for second-hand cars, they must account for VAT under the normal rules for businesses that buy and sell goods. This includes, broadly speaking, accounting for the correct amount of VAT on all their sales (output tax), with credit being given for VAT paid by the trader on business-related purchases (input tax).

111. Therefore a critical question in this appeal is whether Mr Noonan kept a stock book in the period to which the VAT assessment relates (1 April 2008 to 31 July 2018). In his oral evidence Mr Noonan confirmed that he has never provided a stock book to HMRC. Mr Grant submitted that Mr Noonan has been keeping a stock book "since the investigation began". However, we cannot accept this submission as evidence that Mr Noonan kept a stock book for any portion of the relevant period.

112. Factors that indicate Mr Noonan did not keep a stock book during the relevant period are as follows.

(1) Mr Noonan gave oral evidence at the hearing. If he had kept a stock book in this period, it would have been very straightforward for him to tell us this himself.

(2) The stock book was not produced in evidence and has never been provided to HMRC.

(3) At the meeting on 13 May 2015, Mr Patel of Edelman confirmed that Mr Noonan had not previously kept a stock book. Mr Patel understood that Mr Noonan had started to keep a stock book but they had not seen this themselves.

(4) For the great majority of the relevant period, Mr Noonan was not registered for VAT. He has not disputed that he should have been registered, and HMRC registered him compulsorily on 7 June 2018. It is, in our view, inherently improbable that Mr Noonan would have been complying with the record-keeping requirements of VAT Notice 718/1, while failing to register for VAT.

113. Having considered these factors, we find on the balance of probabilities that Mr Noonan did not keep a stock book in the period 1 April 2008 to 31 July 2018. This means that he was not entitled to use the margin scheme for second-hand cars and must account for VAT on the total value of his sales, with credit given for any input tax that he paid.

114. One result of this is that Mr Noonan's expenses (including paintwork, electrical or mechanical repairs, valeting, advertising, fuel, and MOTs) are only taken into account to the extent that he incurred any VAT on these costs. In his oral evidence, Mr Noonan told us that it was his recollection that the businesses he used to carry out these works (such as an MOT garage, mechanic and paint shop) were not themselves VAT registered. This indicates that he incurred little or no VAT on these costs, and if any VAT had been incurred he did not suggest he had any records of this.

115. We have outlined above that HMRC have given Mr Noonan credit for the input tax he actually incurred in relation to his purchases at WOMA, using RPI for the years not covered by the WOMA records. We consider this to have been a reasonable approach.

116. As to the method used by Officer La Roche to arrive at the 83.49% mark-up, we have described above that he calculated this based on the figures given for turnover and for the cost of goods in Mr Noonan's self-assessment tax returns for 2006-07 to 2012-13 inclusive, plus 2017-18 and 2018-19. It was therefore based on figures supplied by Mr Noonan himself, albeit that it was common ground that the tax returns understated the true sales figures. HMRC made an assumption that the turnover and the cost of goods would have been understated in proportion to one another, and/or that the vehicles represented in the declared turnover are the same as the vehicles whose cost is recorded in the declared cost of goods.

117. In the absence of any records or figures from Mr Noonan as to the true amounts of his sales, we consider that this was a reasonable assumption. We also consider that it was reasonable for the officer to calculate the mark-up using figures provided by Mr Noonan himself in his tax returns. Mr Noonan has not provided us with any evidence or calculations that would provide a basis for us to substitute the 83.49% for a different percentage, and we do not do so.

The Edelman papers

118. We note that on 10 November 2023, over two years after the appeal had been lodged with the Tribunal, Mr Grant sent HMRC a number of calculations, spreadsheets and schedules. We understood that these were the calculations prepared by Edelman around 2015 and 2016, and which HMRC had requested through information notices in 2017. We refer to these materials as the Edelman papers. We are mindful that in considering whether to amend the assessment, we may have regard to material not available to HMRC at the time when the assessment was made, and so we may take these papers into account in our considerations, if we think it right to do so.

119. Neither Mr Grant nor Mr Noonan explained how they would propose that the Tribunal should make use of the Edelman papers to reduce the assessment, and by how much. Mr Grant said that he could not comment on figures that had been produced by another agent. Mr Noonan told us that Edelman's figures resulted in a VAT liability that was too high because they had not made allowance for the cars purchased by the two associates.

120. The papers include a page entitled "Tax liability summary" which provides figures for Mr Noonan's VAT and income tax liability for each relevant year. However, the accompanying documentation makes clear that the VAT liability has been calculated using the margin scheme, which we have found that Mr Noonan was not entitled to use.

121. From the Tribunal's perspective, the Edelman papers consist of a lengthy series of figures and calculations that have been provided to us without a detailed explanation as to the basis on which they were produced, without supporting evidence to demonstrate the source of the figures, and that neither Mr Noonan nor his current agent were prepared to endorse as being

correct. Even without these considerations, we would not have accepted a figure for the amount of VAT due that was calculated on a basis that Mr Noonan was not entitled to use. We therefore do not consider that we should reduce the VAT assessment on the basis of anything contained in the Edelman papers.

122. We acknowledge that Mr Noonan will find this decision disappointing, particularly as he had originally been unwilling to sign off on the disclosure report prepared by Edelman because he considered that a VAT liability of £79,887 (the figure calculated by Edelman) was too high. In cross-examination he told Ms Hickey that calculating VAT on his whole turnover was "crazy" and "not fair".

123. Regarding the £79,887 calculated by Edelman, it is relevant to note that this was calculated on the incorrect assumption that Mr Noonan could use the margin scheme. Therefore, even if the disclosure report had been submitted on this basis when it was first prepared, it was highly unlikely that HMRC would have accepted it, particularly as they had repeatedly told Edelman that Mr Noonan was not entitled to use the margin scheme. The Edelman figure also only related to the period from 6 April 2008 to 5 April 2014, whereas the full VAT period ran from 1 April 2008 to 31 July 2018.

124. As to the alleged unfairness, we would draw attention to the many years in which Mr Noonan failed to register for VAT, thereby not only failing to pay tax that was due, but also gaining a competitive advantage over other traders who complied with their VAT obligations. Parliament has stipulated that margin schemes should be made available only subject to conditions imposed by HMRC, and these conditions include strict record-keeping rules that Mr Noonan did not comply with. Failure to comply with these conditions meant that Mr Noonan lost the right to use the margin scheme.

125. We would further point out that the position in which Mr Noonan now finds himself is also a result of his failure to complete the steps which he was required to take under HMRC's disclosure facility, the CDF. HMRC's correspondence was clear that the CDF required him to make a full disclosure of the tax that he should have paid, and that this required the preparation and submission of a disclosure report. When his agents at the time prepared a disclosure report showing a tax liability that he believed to be incorrect, he did not allow the report to be submitted, but then took no further steps to procure a different or amended report.

126. We are satisfied on the evidence that Mr Noonan had ample opportunity, extending over many years, to provide figures which he considered more accurately represented his true liability, and he should have been in no doubt that HMRC required him to do this. In these circumstances HMRC eventually had no choice but to prepare an estimate, with all the potential for inaccuracy that this entails. His dissatisfaction with the end result should, we consider, be placed in this context.

Other points covered in submissions

127. We would also like to refer to some further matters that were covered in submissions and during the hearing.

128. Mr Noonan began his oral evidence by apologising for what he described as the "mess", and providing us with some details about his personal circumstances at the time when he was failing to meet his tax obligations. We would like to put on record that we do not doubt the truthfulness of what he told us about his personal difficulties, much of which concerned the ill health of close family members. We did not understand Mr Noonan to be suggesting that these circumstances should affect the amount of the VAT assessment, rather that he wanted the Tribunal to be aware of the situation in which he found himself at the relevant times.

129. We are grateful to Mr Noonan for providing us with this background. We would note that this does not affect the amount of the assessment, which is an estimate of the amount of VAT that was properly due, and is not affected by, for instance, any concept of whether he may have had a reasonable excuse.

130. We would also like to put on record that Ms Hickey told us that although the penalties that were issued in connection with this assessment are not under appeal, they would be reduced appropriately if the Tribunal chooses to reduce the amount of the assessment. While not forming a part of this appeal, we would agree that this would be an appropriate exercise of HMRC's care and management powers.

131. In emails from Mr Noonan that were forwarded to the Tribunal, he referred to money he had received from his sister, who has since passed away. We understood Mr Noonan to wish to establish that these funds had a legitimate source. HMRC submitted, and we confirm, that the source of Mr Noonan's funds played no part in calculating the VAT assessment. We have therefore not found it necessary to make any findings about the sources of Mr Noonan's funds in reaching our decision.

132. Finally, Mr Noonan made a number of references to amounts he has already paid to HMRC. He was concerned that HMRC did not seem to have taken these payments into account. This appeal is about the correctness of the VAT assessment. Any payments made by Mr Noonan do not affect the amount of the assessment, but they do reduce the amount of tax he owes. We would encourage Mr Noonan to contact HMRC separately if he wishes to verify how they have recorded the payments he has made, including whether these have been recorded as payments of VAT or of income tax.

Conclusion

133. We direct HMRC to recalculate the VAT assessment on the basis that 5%, rather than 25%, of Mr Noonan's sales in the relevant period involved the receipt of a part-exchange vehicle.

134. In all other respects, for the reasons we have given, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

135. 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.

Release date: 24th JANUARY 2025