[2021] UKUT 163 (TCC)

Appeal number: UT/2020/0040

VALUE ADDED TAX – best judgment assessment - whether FTT erred in making factual findings beyond the agreed issues - whether FTT failed to take into account relevant evidence - whether FTT made a finding not available to it on the evidence - appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

KINGSLEY DOUGLAS **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Thomas Scott

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 5 May 2021

Nigel Ginniff, Counsel, for the Appellant

Julian Hickey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") (Judge Jennifer Dean and Ms Susan Stott) released on 4 September 2019. By that decision (the "Decision") the FTT dismissed the appeal of the appellant, Kingsley Douglas, a sole trader, against the decisions of the Respondents ("HMRC") to raise assessments to VAT for the VAT quarterly period 09/09 in the sum of £7,319.17 and VAT periods 06/10 to 12/13 totalling £132,693.00.

2. The assessments were made under section 73 of the Value Added Tax Act 1994 ("VATA") which provides that where it appears to the Commissioners of HMRC that a VAT return is incomplete or incorrect, the Commissioners may assess the amount of VAT due from that person "to the best of their judgment" and notify it to that person. HMRC made those assessments because they considered that Mr Douglas did not have the till rolls relating to sales made in his business, which was the operation of three confectionery, tobacconist newsagent shops. Consequently, HMRC considered that they did not have the underlying records with which to verify the figures declared on Mr Douglas's returns. HMRC then carried out a "business economic exercise" which formed the basis of the "best judgment" assessments. The FTT determined that HMRC had fairly considered all of the material available and arrived at a decision which was reasonable and not arbitrary as to the amount of tax due. They also found that Mr Douglas had not satisfied the burden which was on him to demonstrate that the amounts of the assessments were wrong.

3. By a decision dated 23 September 2019, the Upper Tribunal (Judge Richards) gave Mr Douglas permission to appeal against the Decision. We refer to the grounds of appeal in detail later, but in summary Mr Douglas contends (i) the FTT erred in making factual findings outside the scope of the issues which the parties had agreed fell for determination on the appeal (ii) in determining that there was no evidence upon which they could conclude that Mr Douglas had shown the assessments to be wrong the FTT failed to take into account relevant evidence and (iii) the FTT made a finding on one particular matter which was not available to it on the evidence.

4. HMRC contend that the FTT was fully entitled to reach the conclusions that it did for the reasons it gave.

The Law

5. Section 73 of VATA, so far as relevant, provides:

> "(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 judgement and notify it to him.

> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person –
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> (a) as being a repayment or refund of VAT, or
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> (b) as being due to him as a VAT credit,
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> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount is being VAT due from him for that period and notify it to him accordingly."

6. At [93] and [94] of the Decision, the FTT correctly set out the principles to be derived from the cases on "best judgment" assessments as follows:

> "93. It is a well-established principle following *Van Boeckel*[1] that an assessment is made to best judgement if HMRC "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." *Van Boeckel* also endorsed the concept that the officer making the assessment:
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> > "must not act dishonestly, or vindictively or capriciously, because he must exercise judgement in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of the assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guess work."
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> 94. Once this threshold is passed, the burden falls on the taxpayer to establish on the balance of probabilities that the assessment is excessive. In *Tynewydd Labour Working Men's Club and Institute Limited v Customs and Excise Commissioners* [1979] STC 570 it was stated that:
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> > "… 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.""

7. Thus, it can be seen that the case law establishes that there are two distinct questions for a tribunal in considering an appeal in respect of a best judgment assessment. The first is whether HMRC have assessed the amount of VAT due "to the best of their judgment". The second is whether the tribunal has grounds for changing the quantum of the assessment.

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[1] *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290.

8. Mr Douglas's second and third grounds of appeal challenge a number of the FTT's findings of fact. This Tribunal's jurisdiction in relation to such challenges was recently summarised in *Ingenious Games LLP and others v HMRC* [2019] STC 1851 at [54] to [67]. In essence, so far as relevant to the issues that arise on this appeal:

> (1) There cannot be an appeal on a pure question of fact which is decided by the FTT. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14 in which Viscount Simonds referred to making a finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of law.
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> (2) In relation to an appeal which is said to involve a point of law of the kind identified in *Edwards v Bairstow*, Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 at 476, stated as follows:
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> > "It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

He continued:

> "... for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

He concluded:

> "What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct

> approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

(3) The bar to establishing an error of law based on challenges to findings of fact is deliberately set high. As Lewison LJ said in *Fage UK Limited and another v Chobani UK Limited and another* [2014] EWCA Civ 5 at para 114:

> "Appellate courts have been repeatedly warned … not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluations of those facts and inferences to be drawn from them. … The reasons for this approach are many. They include:
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> > i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> > ii) The trial is not a dress rehearsal. It is the first and last night of the show.
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> > iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> > iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas the appellate court will only be island hopping.
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> > v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
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> > vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

(4) That the weight to be given to particular evidence is a matter for the first instance decision-maker was emphasised by Lord Millett in *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 AC 430 at [99]:

> "The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence … are for the decision-making authority and not the court."

(5) An appellate court should also be slow to interfere with an assessment of the credibility of a witness. In *Alexander Langsam v Beachcroft LLP and others* [2012] EWCA Civ 1230 Arden LJ said at [72]:

> "It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will

> take into account that the judge had the advantage of seeing the witnesses give their oral evidence which is not available to the appellate court. It is therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take account that the judge has reached a multi-factorial judgement, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements of the evaluation unless it is shown that the judge is clearly wrong and reached a conclusion which he was not entitled to reach."

(6) Even if criticisms of certain of the FTT's findings of fact are made out, the Upper Tribunal may still consider whether the remaining findings, taken together with those matters relied upon by the FTT which were not challenged, nonetheless constituted a sufficient basis for the decision under appeal. The Upper Tribunal should not regard any finding of fact as disclosing an error of law where it is not significant in relation to the findings in the decision.

9. These principles were recently confirmed by the Court of Appeal in *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349. The Court also emphasised (at [69]) the following points:

> "This court said in *ACLBDD Holdings Ltd v Staechelin* [2019] EWCA Civ 817, [2019] 3 All ER 429:
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> "[31] The mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it. That point, too, was made in *Henderson* at [48]:
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> "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration …"
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> [32] At [57] Lord Reed added:
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> "I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration *only if the judge's conclusion was rationally insupportable.*" (Emphasis added.)"

The Facts

10. References to numbered paragraphs in parentheses, [xx], unless stated otherwise, are references to paragraphs in the Decision.

11. We have found it difficult to draw together the various findings of fact made by the FTT. That is largely due to the fact that there is no section headed "findings of fact" in the Decision. It is always preferable that the FTT brings together all its findings of fact in one place in a section which is distinct from its recitation of the evidence, the submissions of the parties and its overall conclusions on the issues before it. It is also helpful to set out clearly any agreed facts. In this case, there are some findings, which we take to be undisputed, at [4] to [18], and in the section headed "Evidence" there appear to be passages that go beyond the recitation of evidence and amount to findings. At [85] under the heading "submissions" the FTT appears to resolve a conflict of evidence between Mr Douglas and HMRC which is then elaborated on at [103] under the heading "Discussion and decision", which also contains other findings.

12. It is important to note at this stage that there were two substantive hearings before the FTT. At [2] the FTT recorded that the appeal first came before the Tribunal on 3 May 2017. A further hearing was held on 2 April 2019. During the first hearing it became apparent that there was other evidence available which had not been filed and which was highly relevant to the issues in the appeal. The FTT therefore adjourned the hearing and Mr Douglas was directed to produce the till journals, Simplex books, and records of over-rings for periods agreed between the parties. The three years agreed were 2010, 2011 and 2012. Mr Douglas had stated at the initial hearing that the records were available and could be produced, thus allowing HMRC to provide any additional evidence in response.

13. The FTT recorded its understanding as to what issues remained in dispute following the parties' further consideration of the evidence after the first hearing at [3] as follows:

> "We are grateful to [HMRC's representative] and [Counsel for Mr Douglas] for their efforts in narrowing the issues in this appeal prior to the hearing on 2 April 2019. We were advised that following analysis of the records HMRC no longer contended that the Z readings were inaccurate or non-sequential. HMRC also accepted that the 12 test purchases carried out by HMRC were contained in the business records and were recorded in the Simplex books. The issues remaining related to the accuracy and reliability of the tills and whether the tills were operating or operated correctly in that no sales had been excluded. HMRC contend that in the absence of evidence, namely till rolls, to verify the figures recorded by the Appellant, the only option was to carry out a business economic exercise to establish using best judgement the correct amount of tax due. The Appellant contends that the records were provided and are reliable and the assessment was not made using best judgement."

14. As we shall see, Mr Douglas does not accept that the passage set out above reflects his understanding as to the issues which remained for determination. That contention forms the basis for his first ground of appeal. However, the FTT's findings were based on its own understanding of the issues in dispute, as set out at [3].

15. Against that background, we can summarise the FTT's findings of fact which are relevant to this appeal as follows:

(1) Mr Douglas collected takings from his shops on a daily basis. Takings were reconciled daily. Mr Douglas only ever used daily Z1 readings and recorded the figures from those readings in his Simplex book: [20].

(2) Mr Douglas agreed that HMRC's calculations for period 6/12/12 to 31/1/13 were accurate as they covered a defined period between the Z2 readings being taken. Mr Douglas stated that he had provided HMRC with all journal rolls from the Liverpool Road shop as evidenced by HMRC's document on returning the records which states "KC Douglas Liverpool Road Journal Rolls (Checked).": [22].

(3) Mr Douglas's VAT returns were reviewed by HMRC because he was almost permanently in a repayment position, which HMRC considered as highly unusual for a business in cigarettes, tobacco, and news. At the time of this review, there were still Z readings missing and it was known that Mr Douglas traded with an open drawer in one of his tills, which led HMRC to conclude that the records provided could not be relied upon. HMRC then looked at how the assessment had been calculated and steps were taken to verify information provided by Mr Douglas: [37].

(4) Mr Douglas had explained that he was in a repayment position due to the discount given on cigarettes which were marked up by 2 – 3%. Mr Douglas said that cigarettes were discounted by 40p– 60p per packet. However, test purchases undertaken by HMRC showed that the discounts were in the region of 20p; no discounts had been given on packets of 10 and only a small discount on packets of 20: [41].

(5) These selling prices were applied by HMRC to cigarette sales and the assessment was calculated on the basis of the weighted mark-up i.e. rather than applying an overall mark-up, it was weighted to the volume of goods sold. Of the 80% of standard-rated goods sold, 70% were cigarettes, which had a major effect on the overall mark-up. The prices from test purchases were used together with the information provided by an employee who said that only packets of 20 cigarettes were discounted. The result was a 4.42% mark-up on packets of 20 and 5.77% on packets of 10, giving an overall weighted mark-up for all standard goods of 7.16%. HMRC agreed that the discounts could have varied but stated that if that had been the case, they would have expected to see the VAT returns fluctuate; however they remained in a repayment position. The prices of cigarettes were similar across all of the shops: [41] and [44].

(6) HMRC accepted that the test purchases were made at different times and on different dates and were recorded in the books but explained that the point of the exercise was to test pricing rather than what was in the records. HMRC's Officer clarified that the issue was not whether errors were identified but rather the reliability of the records and in this case there were risks identified which led HMRC to conclude that the records could not be relied upon without verification of the underlying records:[45].

(7) Mr Douglas confirmed that no period Z reports (also referred to as Z2 reports) were taken in the ordinary course, but only the daily takings Z1 reports. HMRC noted that "voids" did not appear on the Z readings which could

potentially be used to reduce the value of sales as they would not be recorded on the material provided to HMRC. HMRC explained that this was the reason why the till rolls were so important as they would show if there had been any misuse of the "void" function: [49].

(8) Comparison of the cumulative sales total, assumed to relate to a period of no more than 5 years based on Mr Douglas's statement as to when the tills used in the business were obtained, to the business' declared VAT outputs for periods 12/07 to 03/13 indicated that registered sales exceeded declared sales by £14,880,690. HMRC concluded this was unsustainable by the business and confirmed that the registers were an unreliable record: [53].

(9) Consequently, HMRC decided that a detailed analysis was needed of journals and Z readings produced by all three registers over an extended but clearly defined period of time to calculate a true value of sales. The relevant records were requested together with how the records should be presented in order to be efficiently and effectively inspected and reconciled. However, when HMRC went to collect the records Mr Douglas presented a "room full to capacity with bags of till rolls", explaining that "they were all there" but "he did not have the time to sort them": [54].

(10) HMRC found that in fact there were not many till rolls in the bin bags which mainly contained loose receipts and Z reads. There were no till rolls relating to the Liverpool Road shop. Although HMRC accepted that the figures on the Z readings were entered into the Simplex books, the accuracy of the figures on the Z readings could not be checked and the risks and inaccuracies highlighted above undermined their reliability: [55].

(11) HMRC's Officer used the journal rolls uplifted and his knowledge of the Z1 Full Report counters sighted on records on previous visits to use best judgement in assessing the source shop of the rolls by matching them within report counter sequence. He then replicated the counts and values on each Z1 Full Report within the journal roll, including those uplifted in January 2013, onto an Excel spreadsheet and sorted them into order according to date and report counter. The Officer stated that it became apparent from this exercise that no journal rolls relating to Liverpool Road had been made available during the visit on 31 January 2013: [57].

(12) HMRC's Officer concluded from his analysis that the records produced by the cash registers were inaccurate and that values were registered incorrectly. He noted that Mr Douglas had failed to produce on request complete records to allow a reconciliation of adjustments he made in the Simplex books to account for over-rings. The officer took the view that any further attempts to inspect the records were unlikely to add any value to the enquiry in support of either HMRC or Mr Douglas: [58].

(13) Following a review of the additional records provided by Mr Douglas in accordance with the Tribunal's directions after the adjournment of the first hearing (which did not include full till rolls for the period directed by the tribunal) a revised analysis of the records was produced by HMRC. Following

this revised analysis, HMRC's Officer was of the view that the Simplex adjustments for various items were inaccurate when compared to the till values. Mr Douglas's evidence that he kept all records was contradicted by correspondence which recorded his assertion that he was advised by HMRC that he did not need to retain till rolls: [61] to [65] and [85].

(14) HMRC concluded that the unsuccessful reconciliation of the Z report values to the Simplex book Paypoint and Payzone postings, together with Mr Douglas's admission that they were inaccurate, proved that the records could not be relied on in isolation. HMRC concluded that Mr Douglas had also failed to comply with his legal responsibility as required under section 4.4 of VAT Notice 727 to provide a record of Daily Gross Takings where the business used a retail scheme concession. HMRC's view was that a Z report in isolation did not constitute a record of Daily Gross Takings and a till journal roll should be produced where a till was used: [68].

(15) The FTT accepted HMRC's evidence as to the incompleteness of the records and found that Mr Douglas's evidence on the issue lacked credibility. The result was that HMRC did not have the underlying records with which to verify the Z readings which formed part of the figures declared on Mr Douglas's returns. Furthermore, features were identified such as the open till drawer and ability to void a sale which increased the potential for inaccuracy. There was ample evidence in support of HMRC's conclusion that Mr Douglas failed to keep all relevant records, that he had not afforded the facilities necessary to verify the returns and that the records were unreliable. This was reinforced by the adjournment of the hearing, the sole purpose of which was to afford Mr Douglas the opportunity to provide the till rolls for specified periods which he maintained he had kept but no till rolls were produced. The FTT also found the evidence that Mr Douglas's records had been destroyed without his knowledge by the tenant at one of the shops lacked credibility and that Mr Douglas had no clear knowledge of what records existed for each shop: [101] to [108].

(16) The FTT considered Mr Douglas's evidence that HMRC were incorrect to contend that no till rolls had been produced for Liverpool Road and that the HMRC bag marked 'Liverpool Road Journal Rolls (checked)' supported this. However, the FTT said there was no evidence before it as to who had marked the bag, what they had checked for or what was found, and it preferred the clear evidence of the HMRC Officer who had sorted through all the records provided and accepted his confirmation that no till rolls were provided for Liverpool Road: [105].

(17) Mr Douglas's assertion as to the discounts applied to cigarettes was vague, unsupported by evidence and inconsistent with that given by his employee who confirmed that discounts varied and that there was no set pattern: [112].

The Decision

16. As we have observed at [7] above, there are two distinct questions for a tribunal in considering an appeal in respect of a best judgment assessment. The first is whether HMRC have assessed the amount of VAT due "to the best of their judgment". The second is whether the tribunal has grounds for changing the quantum of the assessment.

17. Although the FTT correctly directed itself as to the need to consider both of those questions, it did not clearly delineate its findings in the Decision between those two questions, which would have been helpful. However, the FTT clearly dealt with both issues in its reasoning at [109] to [115].

18. At [109] to [114] the FTT considered whether HMRC had made the assessments to best judgment.

19. At [109] the FTT concluded that in the absence of full records, as it had noted at [86], HMRC were correct that the only option available was to carry out a business economic exercise and that reasonableness was a matter that had been taken into account. The FTT also found that HMRC had not misused their power by deciding on a figure which they knew or thought was in excess of the amount which could possibly be payable, leaving it to the taxpayer to seek, on appeal, to reduce that assessment, in the manner cautioned against in *Van Boeckel*.

20. At [110] the FTT accepted the evidence of the HMRC Officer who had reviewed the assessment. That evidence, recorded at [86], was to the effect that the assessment calculations were based on a weighted mark-up exercise. The purchase invoices for the VAT accounting period 12/12 were used to work out the percentage product split. The prices used in the exercise were based on information gleaned by an HMRC Officer during his visits when he noted the prices charged and spoke to the shop assistant at the Liverpool Road shop. The test purchases ascertained the level of discount offered by Mr Douglas's business in relation to the sale of cigarettes. The FTT found that evidence to be clear, cogent, and compelling. The FTT found that the Officer considered whether, in the first instance, the making of an assessment was reasonable. It accepted the Officer's evidence that the records (many of which were still missing at the time the assessments were made and reviewed) could not be relied upon, which led to the economic exercise being carried out.

21. At [111] the FTT said that it was satisfied that the Officer used all of the information available to verify the information provided by Mr Douglas. Purchase invoices were used to calculate goods sold and the percentage product split between standard-rated and zero-rated goods.

22. At [112] and [113] the FTT made the following findings:

> "112. In relation to the prices used in the exercise, we found that the use of information obtained during the relevant period by visits to the shops and information from an employee was wholly reasonable. The Appellant's assertion as to the discounts applied to cigarettes was vague, unsupported by evidence and

> inconsistent with [his employee] Mr Cornwall. Mr Cornwall's evidence confirmed that discounts varied and that there was no set pattern. We noted that Mr Cornwall gave a higher discount figure than that applied by HMRC, however there was no evidence before us to indicate when the discounts referred to by Mr Cornwall were given and we concluded it was reasonable for the figures recorded by HMRC during the test purchases and the information from an employee which gave a lower figure to be used as they were obtained during the relevant period."
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> 113.In those circumstances we were satisfied that it was reasonable for HMRC to use the information obtained by visits and test purchases. We noted that officer Bebbington had considered the reasonableness of the mark-ups and taken into account adjustments for losses and transfer of stock. We rejected the Appellant's submission that the assessment was flawed by the brand of cigarettes purchased or the time of day of the purchases; the onus rests with the Appellant to show that the assessment was flawed and there was no evidence in support of the submission. Moreover, officer Bebbington explained that the brand purchased is a factor considered by HMRC officers in test purchases and that the relevance of different dates for the test purchases was to establish pricing."

23. At [114] the FTT concluded on the best judgment issue as follows:

> "We considered the principles set out in the authorities cited above. We concluded that HMRC fairly considered all of the material available and in doing so, arrived at a decision which is reasonable and not arbitrary as to the amount of tax due. We had no hesitation in concluding that HMRC had not acted dishonestly, vindictively or capriciously."

24. As set out in the third sentence of [113], the FTT found that Mr Douglas had not produced any evidence to show that the assessment was flawed. As the FTT went on to say at [114], the burden of proof in the appeal rested with Mr Douglas and it said that there was no evidence upon which it could conclude that Mr Douglas had shown the assessments to be wrong. The FTT then concluded at [116] that Mr Douglas had failed to discharge the burden of displacing the assessments.

Grounds of Appeal and issues to be determined

25. Mr Douglas has permission to appeal against the Decision on the following grounds:

> (1) The FTT erred in law in not recognising that the parties had agreed between themselves that the correctness or otherwise of HMRC's assessments could be determined by considering (i) whether Mr Douglas's tills were faulty and (ii) whether they had been programmed incorrectly. The FTT accordingly erred by upholding HMRC's assessment on the basis of factual findings going beyond those two issues and/or by not making any, or any sufficient, finding as to whether the tills were faulty.
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> (2) Paragraphs [92] to [114] of the Decision (the section headed "Discussion and decision") deals primarily with the question whether HMRC made the assessments to "best judgment". The FTT's sole reason for confirming the

amount of those assessments was its conclusion that there "was no evidence upon which we could conclude that the Appellant had shown the assessment to be wrong". In reaching this decision, the FTT failed to take into account the following evidence which supported the proposition that HMRC's assessments were too high and suggested that there was no "suppression" of sales:

(i) Evidence that all sales between 6/12/12 and 31/1/13 had accurately been recorded on all tills (see [22]).

(ii) Evidence that all of the 12 anonymous test purchases that HMRC officers made showed up in Mr Douglas's records.

(iii) Evidence that Mr Douglas did not himself operate the tills at any store and, when HMRC officers made their test purchases, they were served by different staff members suggesting that, if significant "suppression" was taking place that had to be because of a conspiracy involving a number of individuals, as to which the FTT made no findings.

(iv) Evidence suggesting that Mr Douglas's shops were not thriving and could not have generated the quantity of suppressed sales that was implicit in HMRC's assessments.

(3) The FTT's finding at [105] that Mr Douglas provided no till rolls for the Liverpool Road store was not available to it on the evidence.

26. Our reading of the grounds of appeal is that none of them relate to the FTT's finding that the assessments were made to best judgment. They relate to the second issue that was before the FTT, namely the quantum of the assessments and, in particular, whether the FTT erred in its conclusion that Mr Douglas had not discharged the burden which was on him to establish that the quantum of the assessments was too high.

27. In our view, aside from the first ground of appeal, which is essentially a contention that there was a procedural irregularity, Mr Douglas is challenging the factual findings of the FTT and accordingly we need to assess those challenges by reference to the principles summarised at [8] above. The burden on Mr Douglas is therefore a very high one if he is to satisfy us that the FTT has erred on a point of law in any respect as regards its factual findings.

Discussion

Ground 1: Scope of the issues properly before the FTT

28. Mr Ginniff submitted that the FTT incorrectly described the two remaining issues which the parties had agreed needed to be determined by the FTT and thereby took into account matters it should not have taken into account. Those issues had been agreed between the parties following a brief hearing on 26 February 2019 that could not proceed in the absence of the lay member of the FTT. They were identified by Mr Ginniff at the commencement of the resumed hearing on 2 April 2019 as being simply whether the tills were faulty or had been programmed incorrectly.

29. Mr Ginniff submitted that because HMRC had accepted by that point that the Z1 readings were reflected in the VAT returns, the question of the reliability of Mr Douglas's records was no longer in issue. Mr Ginniff submitted that the only issue in dispute was whether the tills were faulty in producing incorrect records on the Z readings. He argued that the FTT erred in making no findings as to whether the tills were faulty or had been incorrectly programmed. In his submission, everything recorded on the tills had been entered into the Simplex books. Nothing more was to be learnt from the till rolls, so that the absence of the till rolls was no longer a relevant issue in the appeal. He said that HMRC had conceded that the only way to verify that the Z readings were inaccurate was to check whether the tills were faulty or not. Thus, it was only if the tills were found to be faulty that the assessments could stand.

30. Judge Dean addressed these points in her careful and comprehensive decision of 25 March 2020 refusing permission to appeal ("the PTA Decision"). She stated as follows:

> "6. At [1] of the application for permission to appeal the Appellant avers that the Tribunal incorrectly recorded the two remaining issues to be determined in the case. It is submitted that the issues agreed between the parties were "that the tills were faulty or that they had been programmed incorrectly".
>
> 7. My note of the submissions from both representatives are as follows: on behalf of the Appellant, Mr Ginniff stated:
>
> > "Sequential readings were an issue; HMRC now accept they are and there is no need to look at that as they are accepted as accurate. 12 test purchases went through the books into the Simplex books and into the VAT returns – as accepted by HMRC. The issue is the accuracy of records – reliability of tills and whether they were operating correctly or not and whether there was any programming of the tills to exclude sales."
>
> On behalf of HMRC, Mr Nicholson explained the issue as:
>
> > "Whether the records can be relied upon as an accurate reflection of what happened in the business and, if not, we must look at the credibility of the business. HMRC say that the records are not reliable – there was the possibility for abuse and therefore the credibility of the business should be compared with the mark-up exercise".
>
> 8. The Decision summarised the position as follows at [3]:
>
> > "…We were advised that following analysis of the records HMRC no longer contended that the Z readings were inaccurate or non-sequential. HMRC also accepted that the 12 test purchases carried out by HMRC were contained in the business records and were recorded in the Simplex books. The issues remaining related to the accuracy and reliability of the tills and whether the tills were operating or operated correctly in that no sales had been excluded. HMRC contend that in the absence of evidence, namely till rolls, to verify the figures recorded by the Appellant, the only option was to carry out a business economic exercise to establish using best judgement the correct amount of tax due. The Appellant contends that

> the records were provided and are reliable and the assessment was not made using best judgement."
>
> 9. The application for permission to appeal (at [3]) fails to recognise that the case for HMRC was that the Appellant's records could not be relied without verification from the underlying till rolls and, given the limited till rolls made available (despite the adjournment for them to be produced) taken together with other features of the business which indicated inconsistencies and discrepancies in the records, HMRC's business economic exercise was the only way to establish any tax due using best judgement. As is clear from the Decision HMRC did not abandon issues relating to the reliability of the records; the reliability of the records was relevant to HMRC's inability to verify the figures provided by the Appellant and HMRC's decision to carry out a business economic exercise. The issues were narrowed in that HMRC accepted following the adjournment that Z readings were sequential and the test purchases were recorded. However, HMRC did not accept that the Z readings were reliable without the underlying till rolls showing all recorded purchases (or excluded purchases). I am satisfied that the parties' positions were accurately recorded in the Decision: whether the tills were operating or operated correctly includes any faults, programming, and availability of till rolls generally to establish reliability.
>
> 10. In relation to faults, the Appellant's only arguments in this regard were that there was a faulty drawer on one till and the Z reading button was sensitive. This was considered as part of the evidence and submissions at [20], [33], [34], [37], [47] and [57]. As is clear from the Decision, HMRC did not dispute either point – to the contrary the faulty till drawer was relied upon as further evidence supporting HMRC's case that this opened the possibility for abuse and was relevant to whether the Appellant's figures should be accepted without till rolls in support. In those circumstances the Tribunal did not need to make a finding on whether the tills were faulty in the manner which was agreed by the parties; the relevance of the evidence to the issues to be determined is set out at [106] - [108] of the Decision…"

31. Mr Hickey, for HMRC, confirmed that the Judge's notes, as recorded in the PTA Decision, accurately reflected HMRC's position. HMRC accept that the issues were narrowed in that they accepted following the adjournment that Z readings were sequential and the test purchases were recorded. However, HMRC did not accept that the Z readings were *reliable* in the absence of the underlying till rolls showing all recorded purchases (or excluded purchases).

32. There is therefore a clear conflict between what Mr Ginniff says and what the Judge's notes record. In those circumstances, the Judge's notes must be regarded as conclusive of the matter. That principle was established, as far as the Upper Tribunal is concerned, by Birss J (as he then was) in *HMRC v Royal College of Paediatrics and Child Healthcare and Others* [2015] UKUT 0038 (TCC) where he said at [56] to [58]:

> "56. Mr Conlon submitted as follows. First the Upper Tribunal Rules contain no express provisions as to how conflicts of evidence are to be dealt with after findings of fact by the FTT (see rule 15). Mr Puzey did not disagree. Second the approach of the Employment Appeal Tribunal in *Dexine Rubber Co v Alker*

> [1977] ICR 434 should be applied. That approach was described as "well settled" in *Keskar v Governors of All Saints Church of England School* [1991] ICR 493 (EAT). Essentially the *Dexine* procedure amounts to obtaining the judge's note and putting the criticisms of the note by a party or the parties to the judge for comment. If the judge replies stating that he or she believes the note is correct, then the conclusion must be accepted. Mr Conlon also referred to the judgment of HHJ McMullen QC in *Company X v Mrs A, Mr B*, [2003] WL 21917453 (EAT) that in such circumstances "the record of the Chairman is conclusive".
>
> 57. Mr Puzey submitted that the Upper Tribunal should not follow the *Dexine* approach and that the UT retains the power to accept counsel's submission about what evidence was given below.
>
> 58. The *Dexine* approach is a sensible and workable one. It can and in my judgment it should be applied in the Upper Tribunal."

33. In our view, this principle is equally applicable to a conflict between what counsel says and the Judge's notes record as to the agreed issues before the tribunal.

34. Given that the Judge's notes are accepted as accurately recording the position, we agree with the reasoning and analysis set out above in the PTA Decision. Mr Ginniff's submissions that reliability of the records was no longer an issue in the appeal, and that HMRC had abandoned its arguments as to the failure to keep adequate records, are unsustainable. It is clear from the Decision read in its entirety that the reliability of Mr Douglas's records, and the significance in that context of the missing till rolls, was front and centre in the appeal.

35. Accordingly, we find that the FTT made no error of law in proceeding on the basis of what it recorded at [3] to be the issues to be determined on the appeal.

36. We therefore determine Ground 1 in favour of HMRC.

Ground 2: Whether the FTT erred in its consideration of the evidence

37. We consider each of the four challenges made by Mr Douglas in turn. It is important to note at the outset that before the FTT Mr Douglas's challenge to the quantum of the assessments was not that HMRC's methodology had produced too high a figure and some lesser amount of VAT was due, but that the correct amount of VAT for the relevant periods was zero.

Evidence that all sales between 6 December 2012 and 31 January 2013 had accurately been recorded on all tills as found at [22].

38. At [22] the FTT records that Mr Douglas accepted that (subject to a minor difference) the figures calculated by a comparison of Z2 till readings between the above two dates reconciled with the Z1 takings recorded and entered by Mr Douglas into his Simplex book over that same period. Mr Ginniff submitted that this was a test carried out by HMRC of all three tills independent of the Z1 readings on which Mr Douglas relied and which HMRC accepted were correctly entered into the VAT calculation.

39. At [12] to [14] of the PTA Decision the FTT records that this was accepted by the HMRC officer giving evidence on this point, as also recorded at [77], but the FTT decided that this evidence should not be given any weight because of the limited period in respect of which the comparison was carried out.

40. The FTT explained at [103] its reasons for accepting the Officer's evidence in the round as to Mr Douglas's record keeping, as summarised at [10(15)] above. In particular, the FTT, having reviewed the evidence, was satisfied that the Officer's account that the records were not complete was accurate.

41. Mr Ginniff submitted that the FTT failed to take the evidence referred to at [38] above into account as clear evidence that all sales in that period had been accurately recorded on all tills and there was no evidence supporting the existence of sales that had been "voided" or excluded by programming.

42. We reject that submission. The FTT clearly considered all of the evidence in the round, including the evidence relied on by Mr Ginniff. It was a matter for the FTT as to what weight it should attach to any particular piece of evidence and, as the authorities demonstrate, it is not for this Tribunal to interfere with the FTT's evaluation where the evidence has been properly taken into account.

Evidence that the test purchases showed up in Mr Douglas's records

43. Mr Ginniff submits that the FTT failed to take into account the finding at [45] that the twelve anonymous test purchases had been correctly recorded in the till journals for all three shops as evidence of the accuracy of the recording in the absence of any evidence of "voiding" sales.

44. Alternatively, Mr Ginniff submits that if the FTT decided that the test purchases should only be considered as relevant to the assessment of the mark-up of goods and not to the accuracy of the recording, that decision is one that no reasonable tribunal could reach on that evidence in circumstances where HMRC accepted that the test purchases were fully and correctly recorded in the VAT records.

45. We reject those submissions. As Judge Dean correctly recorded in the PTA Decision, the FTT was fully aware of the agreed fact that the test purchases were recorded and took this into account, particularly at [41], [44] and [45], as summarised at [15] above.

46. The FTT described clearly at [112] and [113], as set out at [22] above, how it took the test purchases into account in considering whether the assessments had been made to best judgment. In our view, those findings are equally relevant to the challenge that Mr Douglas is making as to the quantum of the assessments. Again, it was a matter for the FTT as to the weight that it attached to that evidence in its consideration of the evidence in the round. In that regard, the FTT's assessment of Mr Douglas's credibility and its findings as to the unreliability of the records and, in particular, the absence of the till rolls to verify the Z readings which formed part of the figures declared on Mr Douglas's returns are particularly relevant.

Failure to make a finding as to a conspiracy involving a number of individuals

47. Mr Ginniff referred to the FTT's findings (i) at [20] that Mr Douglas "left the main operational duties to staff members" and (ii) at [36] that there were two shifts and that his duties included cashing up, counting the cash float, and printing the Z reading at the end of trading hours. Mr Douglas had three shops at the time and up to nine staff. The presence of different staff was recorded in the reports of the anonymous visits by officers which were in evidence. Those reports included detail of the cash transactions, what was done with the tills, whether the cash drawer was open and whether a receipt was provided. All of the test purchases were included in recorded sales.

48. Mr Ginniff submitted that in the light of that evidence, the FTT failed to take into account that any suppression of sales could only have been carried out with the collusion of the staff members and made no findings on this matter.

49. In our view, this point is fully answered by the following observation of the FTT at [108]:

> "We accepted the evidence of Mr Ryan that the Appellant had not requested the tills to be programmed so as to supress 'voids'. However, as we have noted HMRC did not allege as part of its case that 'voids' had been supressed by the Appellant or an employee, indeed there was no evidence upon which such an allegation could be based. The relevance of the evidence was simply that it formed part of HMRC's analysis of the reliability of the records and risk factors identified which affected or may have affected the reliability of the figures provided by the Appellant in support of his returns."

50. The FTT was perfectly entitled, on the basis of the evidence before it, to decline to make any finding as to whether any failure to record sales adequately was taking place as a result of deliberate behaviour on the part of Mr Douglas or any of his employees and, in the absence of any such evidence, was bound to do so. Again, the unreliability of Mr Douglas's underlying records was the key issue as a result of which he was unable to satisfy the burden upon him to disturb the quantum of the assessments.

Evidence that the shops were not thriving and could not have generated the sales implicit in the assessments

51. Mr Ginniff referred to the FTT recording at [83] his submission based on the evidence before the FTT that HMRC's case meant that almost £1,000,000 of sales had been diverted over sixteen return periods when Mr Douglas owed £185,000 to his main wholesaler and was overdrawn on his personal accounts. He had told the FTT that he had transferred three of his shops for the cost of fixtures and fittings and stock at value only but in two the business had failed and the third (as at May 2017) was not generating any rental income.

52. Mr Ginniff submitted that there was no indication in the Decision that this had been taken into account. This evidence was, he said, significant and if considered as

an overview of the quantum of the assessments would have led a reasonable Tribunal to comment on it in their decision and indicate why it should be rejected as irrelevant.

53. We accept that there is no finding of the FTT on this point. However, in our view the other matters taken into account and relied on by the FTT, in particular its overall assessment of Mr Douglas's credibility and the absence of the underlying records which led to its conclusion that Mr Douglas had not satisfied the burden on him to disturb the quantum of the assessments, constitute a sufficient basis for its decision on quantum. We therefore conclude that this matter is not material in relation to the findings in the Decision.

54. As we have rejected all of Mr Douglas's factual challenges, we determine Ground 2 in favour of HMRC.

Ground 3: Whether till rolls were provided in relation to the Liverpool Road shop

55. Mr Ginniff referred to the FTT's finding at [105] that HMRC's evidence was accepted that no till rolls were provided for Liverpool Road. Mr Ginniff submits that the FTT failed to take into account evidence before it in the form of an exhibit presented by Officer Walsh in his first witness statement which he described as "the journal rolls uplifted during the visit on 17 May 2013". That Exhibit included details at the foot of one page as relating to Liverpool Road. A further exhibit also included details that could only have been obtained from the journal rolls of each shop thereby indicating that HMRC was in possession of journal rolls for each shop. Mr Ginniff submits that this evidence refutes the finding of the FTT that no journal rolls from the Liverpool Road shop were produced to HMRC.

56. We reject that submission. It is quite clear from what the FTT found at [105], as summarised at [15(16)] above, that the FTT considered this evidence. It gave full reasons why it rejected Mr Douglas's evidence on the point and accepted the HMRC Officer's evidence. There was therefore clearly evidence before the FTT on which it was entitled to make the finding that it did at [105].

57. We therefore determine Ground 3 in favour of HMRC.

Disposition

58. The appeal is dismissed.

Signed on Original

JUDGE TIMOTHY HERRINGTON JUDGE THOMAS SCOTT
UPPER TRIBUNAL JUDGES

RELEASE DATE: 13 July 2021