



**TC03991**

**Appeal number: TC/2012/10083**

*VALUE ADDED TAX – whether operating a trade of buying and selling used cars and car parts - no – whether liable to be registered for VAT – no - whether assessment made to best judgement – no - whether penalty due under VAT Section 67(1) – no - appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MATTHEW JOHN MCALLISTER**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RUTHVEN GEMMELL WS  
MRS CHARLOTTE BARBOUR CA, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on  
22 August 2014**

**Ross Slater, Solicitor, for the Appellant**

**Elizabeth McIntyre, Officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal by Matthew John McAllister (“MM”) against the decision by  
5 The Commissioners for Her Majesty's Revenue and Customs (“HMRC”) on  
23 May 2012 to confirm and amend their decision of 11 July 2011 that MM was liable  
to be registered for VAT with effect from 1 December 2012; that he was operating the  
trade of buying and selling used cars and car parts; that he failed to maintain records  
to allow VAT to be calculated on the second hand scheme basis and, accordingly, was  
10 assessed to an amount of VAT of £238,834.00 and a late registration penalty in the  
amount of £26,868.82.

### Legislation

Article 26a EC Sixth VAT Directive

The Value Added Tax Act 1994 (VATA94)

15 Sections 1,3,4,6,24,25,26,67,70,71,73,76,77,94 and Schedule 1

Value Added Tax (Cars) Order 1992 (S.I. 1992/3122), Articles 2, 4, 8

The Value Added Tax Regulations 1995 (S.I. 1995/2518) Regulations 5, 6, 25, 31, 32,  
39, 40

HMRC Public Notices 718 and 178/1

20 The Finance Act 2008 Schedule 36 Paragraphs 2, 3, 4

### Cases Referred To

*Van Boeckel v Customs and Excise Commissioners* (1981) TSC 290

*Rahman (trading as Khayam Restaurant)(No. 1) v CEC* (1998) TSC 826

*Pegasus Birds v Her Majesty's Revenue & Customs* [2004] EWCA Civ 1015

### 25 Evidence and Finding of Fact

2. The Tribunal had before them two bundles of documents including extracts  
from spreadsheets obtained by HMRC from Inter City Motor Actions Limited  
 (“ICA”) purporting to be sales and purchases of MM (“the printout”).

3. MM and Phil Shepherd (PS), an Officer of HMRC, employed in the Hidden  
30 Economy Team, both gave evidence. MM was a credible witness regarding his  
evidence as to whether or not he carried on a trade. PS was a credible witness.

4. MM, aged 43, was at the time covered by the assessments from the period 1 December 2002 until 14 February 2010, unemployed and received State benefits.
5. As his mother's cousin worked at ICA, MM attended the auctions "helping out" three to four times a week, particularly on auction days which took place on Sunday, Wednesday and Thursday. ICA had two auction sites, one in Perth and one in Glasgow.
6. MM spent most of his time at Glasgow ICA, had many friends there and being there was his "social life". When he was at the auction he would "help out the boys" and play darts with them. He would move motor cars within the auction site car park and assist by having cars available for the employed drivers who would drive them into the auction market itself where there was a rostrum where bids would be made.
7. MM was interested in cars and "bought a couple a year". Most of these MM said were bought at a value of around £300 to £400 with the funding being provided by MM's mother and usually sold for scrap for "a couple of hundred pounds".
8. MM resided at a tenement flatted dwelling house, Flat 2-2, 213 Broadfauld Street, Glasgow, G32 8PS. This was a third floor flat which had no garaging facilities.
9. MM denied any knowledge of the address of 1 Gibson Street, Glasgow, G31 and said he had never lived there. The Tribunal's own enquiries based on the Royal Mail's website and a directory of postcodes showed 3 Gibson Street as the first odd number in numerical order indicating that there is no such address as 1 Gibson Street.
10. MM explained that the process at the auction was that cars were put up for sale, a great number coming from the Arnold Clark motor dealership. A fee was payable for putting cars in an auction and of the 150 to 200 for sale at each auction, approximately 50 cars might not sell.
11. MM said he was not aware of him having an account with ICA or receiving any paperwork but he had bought cars there and he had helped friends and family buy cars, for which he said he received no remuneration.
12. MM recalled that sometime in 2010, the police had approached him in relation to an investigation against a Mr Kennedy. The police questioned MM about cars he was supposed to have bought but he advised that he had not bought the cars although the police did not believe him. MM then asked the police to approach the offices of ICA which the police did and discovered that the cheque for payment for the purchase of the vehicles belonged to a Mr Kennedy. No further action was taken against him.
13. MM was in receipt of benefits and had no savings although he did have a bank account with the Royal Bank of Scotland, being his only account.
14. MM stated that he did not keep any records of the purchases and sales of his cars because the few that were bought were private sales and he could not keep records of cars he was not trading in.

15. MM rarely approached the office of ICA other than to obtain tea and coffee when instructed. MM also visited the office because, on a number of occasions, unusual things had taken place, such as receiving parking tickets and fines for cars which he did not own. MM said that he took these to the ICA office rather than to the police or to the issuer of the tickets. MM explained he did this because he had previously received a bill from ICA for a car which he had not bought.
16. MM stated that embezzlement had taken place at the company with the accountant writing cheques for herself. MM believed that there was “a scam” going on with the Arnold Clark motor dealership which resulted in ICA having to shut down and this was also the reason why he was unable to cite any witnesses because in MM’s view they had been “up to stuff”.
17. PS visited ICA in Glasgow on 30 April 2010 with his colleague, Katherine Reid, and spoke to Mr Dickson Hillcoat, ICA’s company secretary, and Allan Mitchell, ICA in-house accountant.
18. PS made this visit having received “sanitised information” from the National Coordination Unit of HMRC in Ipswich. PS advised that he would be able to give further little information about this “tip off” but acknowledged that it may have been given to HMRC with malice. HMRC wished to restrict questioning on the source of this information so as to protect HMRC’s *modus operandi*.
19. Messrs Hillcoat and Mitchell advised that MM frequented ICA’s premises on an almost daily basis and bought and sold vehicles in his own name using his own account. They also showed PS a copy of the “Digger” magazine which PS understood to be a magazine covering the activities of the Glasgow “underworld” and which contained a photograph of MM.
20. Armed with this photograph, PS and his colleagues identified and met MM in the car park within ICA’s premises. MM denied being in business and said other people were using his ICA account to buy and sell cars and when asked why he was on the premises, he replied “to move this car”.
21. MM agreed to meet with HMRC on 10 May 2010 and, with MM’s permission, on 10 June 2010, HMRC obtained the printout, being details of all vehicles purchased and sold in “Mr McAllister’s name via ICA or via his account with ICA at their Glasgow and Perth premises”, as requested under Schedule 36 of the Finance Act 2008.
22. MM was unwell for the meeting on 10 May 2010 and did not attend.
23. On 14 June 2010, HMRC received the printout and this was subsequently analysed by HMRC.
24. On 22 November 2010, HMRC wrote to MM to request a mutually agreeable time to meet to discuss the potential liability for income tax self assessment in addition to VAT registration.

25. On 1 December 2010, Mr Alex Mullen, a relation of MM, wrote to PS stating “as you are aware given MM’s learning difficulties I am assisting him with this matter” and saying that he would accompany MM at an interview and suggested the week beginning 6 December 2010 as convenient. A telephone call between Mr Mullen and PS on 2 December 2010 was followed on 3 December 2010 by PS writing to thank Mr Mullen for his email and stating that PS would like to speak with colleagues who deal with income tax.
26. On 16 December 2010, PS then stated that he had agreed with his income tax colleagues that the best course of action would be for PS to discuss MM’s activities and report any findings back to them.
27. On 7 February 2011, Mr Mullen wrote to PS saying that MM was in receipt of State benefits, had no other income and whilst he visited the car market from time to time this was just to “visit friends and socialise”. Mr Mullen continued “I believe it is fair to say that Matthew is financially supported by his mother who was fortunately (sic) enough to have had a substantial win on the National Lottery some years back”.
28. These statements were confirmed by MM at an interview on 22 February 2011 but after 20 minutes of questioning, MM gave PS a letter from G Sweeney & Co Limited, Solicitors, advising it would be inappropriate for their client (MM) to be interviewed without legal representation, following a recent well known court ruling, and, on receipt of the letter, the meeting was terminated by PS.
29. On 13 April 2011, Mr Mullen wrote to PS stating that he had not been aware of the letter from MM’s solicitor but, given that MM now had a solicitor, Mr Mullen was withdrawing from the matter as he felt his assistance was no longer required. He stated “let me be clear that my assistance to MM was purely on a family friend/goodwill – bases (sic) given his severe learning condition”. Mr Mullen requested that all correspondence be addressed to MM or to MM’s solicitor.
30. Having failed to receive a response from MM’s solicitor or MM, on 21 April 2011, MM was advised of HMRC’s intention to register him for VAT purposes for the period 1 December 2002 to 14 February 2010. The letter enclosed an explanation of why the registration had taken place together with intimation of the late registration.
31. MM failed to reply within 14 days and, on 12 May 2011, the instruction for registration was given within HMRC.
32. On 15 August 2011, HMRC wrote to MM enclosing the schedule containing the calculation of liability to VAT and the estimated net VAT arrears.
33. Patrick Campbell & Co, Solicitors, (“PC”) had advised HMRC that they were acting for MM on 21 July 2011 but the appropriate mandate was not received until sometime later and, accordingly, the letter of 15 August 2011 was sent to PC on 21 September 2011.

34. On 31 January 2012, PC wrote to HMRC stating that the Tribunal would not accept an application for an appeal until they had received a letter from HMRC rejecting the application for a review.
- 5 35. By letter dated 3 February 2012, HMRC confirmed that the case was being passed to the Appeals and Reviews team with a time limit which was extended to 18 March 2012 and then to 23 May 2012 at the behest of HMRC.
- 10 36. On 23 May 2012 the review letter was issued to MM with a copy to PC and resulted in a reduction of the amount assessed as, on review, HMRC's view was that VAT registration only covered the period from 1 December 2002 to 31 March 2005 (inclusive) and 1 July 2005 to 14 February 2010 (inclusive).
- 15 37. There followed an exchange of correspondence between PC and HMRC in which PC said that they were of the belief that 1 Gibson Street, Glasgow, G31 was an address that did not exist and asked if HMRC had any proof that the Matthew McAllister involved in the allegations was in fact their client and whether ICA had produced anything with MM's signature or anything else to identify him to these transactions.
38. PC also questioned whether HMRC had referred to the purchase transactions and whether they had been taken into account in the calculation of the amounts due.
- 20 39. On 31 May 2012, PC requested a review of the decision within HMRC's letter of 1 May 2013 which repeated the requirement to account for VAT and notified the liability for a penalty for late registration.
40. An appeal to the Tribunal was intimated on 20 June 2012.
- 25 41. Throughout all his dealings with HMRC, MM made no mention of the details of his interaction with the police but did mention he had "been in some trouble" with the police.
42. PS confirmed that he relied solely on the printouts produced by ICA and had no reason to distrust them. Whereas MM had given his bank statements to HMRC, these were returned to him when the letter from G Sweeney & Co Limited was given to PS at the 22 February 2011 meeting and they were not requested again.
- 30 43. PS had carried out no other investigations into the buying and selling activities of any other customer of ICA and assumed that the change of address within the printout to Gibson Street was merely on account of Gibson Street having been a prior residence of MM. Attention was drawn by the Tribunal that the Gibson Street address, appeared at least on some parts of the printout as being chronologically subsequent to the entries showing the address at Braidfauld Street.
- 35 44. PS obtained no information from ICA in relation to how MM had set up his account which would have required some photographic documentation and asked for no details or copies of any of the payments made to the customers who sold cars through the auction.

45. PS on cross examination admitted that MM had denied the allegation that he was trading and he had said that other people were using his account but PS did not believe this. PS took the termination of the trading date to be February 2010, based on evidence in the printout although it was confirmed that MM was still attending on a regular basis at ICA's premises after that date.

46. PS repeatedly stated when cross examined that he could only act on the information given to him.

47. PS, when reviewing the printout, had only looked at the sales and did not consider a number of entries in the printout which showed that the same motor car was purchased and sold on subsequent auction dates. A great many of the motor cars on the printouts were sold at less than their reserve prices.

48. PS had focussed only on the sales data based on his assumption that as MM was a trader, he was only entitled to second hand car relief or the margin scheme if he maintained sufficient records, including a stock book which showed a clear audit trail of cars bought and sold.

49. The meeting with MM at HMRC's premises had been delayed because PS's income tax colleague was not available but PS was unable to give a definitive reason as to why, when the alleged trading involved a turnover of £6.5 million, no income tax had been assessed. PS thought this might be because the VAT assessment was so high but accepted that it might be because of an insufficiency of evidence. On being asked why PS had not carried out any enquiries into MM's lifestyle, PS replied that that was an issue for income tax and not VAT and the income tax investigation was not to proceed.

50. The witness statement of Katherine Reid who accompanied PS at the visit on 30 April 2010 was accepted by both parties and stated that MM was willing to arrange to meet at HMRC's offices and denied being in the business of buying and selling vehicles.

### **Submissions by MM**

51. MM denied that he had ever operated a trade of buying and selling used cars and car parts but accepted that over the period in question he had bought a few cars for his personal use using an account at ICA.

52. MM said that the majority of sales (and purchases) recorded in the printout as having being made in his name were either not made by him or were made by him on behalf of a third party without him receiving any consideration in respect of the transaction.

53. MM says that ICA bought second hand cars from Arnold Clark for resale at auction and that some of these were incorrectly recorded as having been sold to him and, having been resold by him, at a subsequent auction at ICA. MM says that the likely reason for doing this was to boost the turnover of the accounts in ICA and was carried out for their own purposes.

54. In the event that he was trading and seeking to do so illegally, which was denied, MM suggested it would have been unwise to have done so in such volume with one car auction company.

5 55. MM says that the only evidence HMRC has is the printout which HMRC have taken at face value and which they did not investigate further.

10 56. MM says that buying and selling cars in a short compass is not a wise practice as there is a payment to be made to the auction house for doing so and there is no certainty that a car will be sold. MM says that the auction house would have had to pay MM for the vast quantity of vehicles sold and MM says that no enquiry was made from ICA as to how they made all these payments. MM did offer to show his bank accounts to HMRC and he could have been asked for more information.

15 57. MM says that the tip off could be malicious and the information on which the assessment is made is insufficient. MM is aware that the burden of proof is on him to prove that he did not make these supplies which were the subject of the assessment but that he cannot prove a negative. He did not keep any records because he was not trading; he did not keep a stock book to benefit from the second hand car scheme because he was not trading and so had no need to do so.

20 58. MM's agents had approached four to five witnesses but none of them were prepared to come forward and they were surprised that MM was being accused.

59. MM's agents had also attempted through the liquidator to see if there were any backup records from ICA as regards proving where the payments for the sales transactions went but were unable to do so.

25 60. MM says that the assessment is unsound and unsafe and that the fact that no assessment was made for income tax was also relevant. MM says that HMRC are dissatisfied with the evidence of the purchases yet from exactly the same printout they feel the evidence is sufficient to justify the sales.

30 61. MM says that HMRC obtained no bank information from ICA, did not examine MM's bank account, that their evidence regarding the address at 1 Gibson Street is unclear and that his true address had no facility to garage or store the quantity of cars it is alleged he bought and sold. In essence, there is an insufficiency of evidence.

### **Submissions by HMRC**

35 62. HMRC say that MM was engaged in the business of buying and selling motor cars and related parts, based on the information obtained from ICA regarding MM's account.

63. HMRC based their assessment on the balance of probabilities, given the sheer volume of records and, in doing so, removed some vehicles shown as purchases and sales in the printout which were in other peoples' names.

64. HMRC have calculated the liability on the value of sales during the relevant periods and have desisted from using the second hand scheme as there are no records which would allow VAT to be levied on the gross profit margin. Accordingly, the assessment has to be based on the sales value only.

5 65. HMRC say that buying and selling in a short period may be accounted for because each activity resulted in a profit and subsequent sales were made because there might be more and different sellers available at the next auction.

66. HMRC issued the Section 67(1) VAT penalty because of the lack of registration and under Section 70 of the VATA mitigation was given and the penalty was reduced  
10 by 15%.

67. HMRC say that the activities were undertaken by MM and were undertaken for a consideration and that those activities are commonly undertaken by parties seeking to make a profit from them.

### **Decision**

15 68. The Tribunal considered the evidence and the fact that the burden of proof rests on MM and that the standard of proof is the balance of probabilities. This requires MM, on whom the burden lies, to satisfy the Tribunal that the facts that support his case are more likely than not to be true.

69. As MM's Counsel stated, MM cannot prove a negative but, as his claim is that  
20 he was not trading, he is required to do so.

70. The facts that support MM's position lie heavily with the evidence given at the hearing and, in this regard, the Tribunal were wholly satisfied that MM was truthful to the extent that he had not carried on any trading.

71. MM's evidence and the delivery of his evidence led the Tribunal to believe that  
25 MM would not have had the administrative and business skills to carry out an activity of trading which over the period of eight years had an estimated turnover of £6.5 million.

72. The Tribunal noted from the Skelton Argument put forward by MM's agent that the vast majority of the sales (and purchases) recorded in the ICA printout as having  
30 been made using MM's accounts were either not made by the Appellant, or were made by the Appellant on behalf of third parties but without the Appellant receiving any consideration in respect of the transaction.

73. The Tribunal believed that both these statements were correct.

74. The Tribunal did not believe that MM had no knowledge of these matters and  
35 believed this may have led HMRC to carry out their investigations in the way they did.

75. HMRC were told twice in writing by Mr Mullen that MM had learning difficulties and, on one occasion, serious learning difficulties and although HMRC made no representations on this either in writing or at the hearing, MM's evidence before the Tribunal gave credence to this.

5 76. MM admitted taking a letter to ICA that he had received from ICA requesting payment for a car which he had not bought but he did not enquire further about it. He also received parking tickets for cars that he said he had not bought but for which the DVLA would appear to have him registered as the keeper of the motor cars in question. MM's explanation as to why he took the parking tickets to ICA, and not the  
10 issuer of the tickets or the DVLA, was unconvincing.

77. The Tribunal formed the opinion that advantage had been taken of MM and his account had been used to put through purchases and sales, a significant number of which were in the printout registered to him at an address which did not exist. The Tribunal believed that he had not benefitted financially from this process.

15 78. The Tribunal were surprised that, on PS arriving at ICA unannounced the accountant and the company secretary could produce a magazine allegedly about the "Glasgow underworld" which contained MM's photograph. There appeared to be no questioning why this magazine and the photograph were so readily at hand.

20 79. On being interviewed by HMRC, MM denied the accusation that he was trading and was cooperative. It seemed characteristic, based on his other evidence, that when PS asked him what he was doing at ICA he said "moving this car".

80. MM offered his banks statements to HMRC but PS did not examine those and gave them back having been told that MM should avail himself of legal representation. The bank statements were never asked for again.

25 81. MM gave a satisfactory explanation for the cars he did buy at ICA, in particular relating to the modest sums involved and the method by which he paid for them.

30 82. The Tribunal were equally surprised that HMRC, having in their view, uncovered what they considered to be an excessively large amount of trading, even in PS's experience, made no attempt to levy income tax which might possibly have resulted in an assessment of MM's lifestyle.

83. As MM had not kept records, as he maintained he was not trading, he could not benefit from the second hand car scheme because he kept insufficient records. It was suggested that if the purchases had been taken into account then the consequence might be that very little VAT would be due but no evidence was led on this.

35 84. The Tribunal held that MM's statements were more likely than not to be true to the extent that he did not carry on a business as a seller and purchaser of second hand motor vehicles and car parts and, consequently, was not required to be registered as a sole proprietor for the purposes of VAT and was not liable to a late registration penalty. The Tribunal were not persuaded that MM had no knowledge whatsoever  
40 about the use of his ICA account by third parties but that did not constitute trading.

85. HMRC's skeleton argument states that the assessments were made to their best judgment and, in terms of case law, HMRC are not required to carry out exhaustive investigations.

5 86. Mr Justice Wolfe in *van Boeckel v CEC* stated "what the words 'best of their judgement' envisages in my view is that the Commissioners will fairly consider all the material placed before them and on that material come to a decision that is reasonable and not arbitrary as to the amount of tax that is due". Similarly Mr Justice Carnwath in *Rahman trading as Khayam Restaurant v CEC*, said "the Tribunal should not treat an assessment as invalid merely because they disagree as to how the  
10 judgement should have been exercised. A much stronger finding is required: for example, that the assessment has been reached 'dishonestly, vindictively or capriciously'; there is spurious estimate or guess in which all elements of judgement are missing; or is wholly unreasonable". Lord Justice Chadwick in *Rahman trading as Khayam Restaurant (2) v CEC* said "the relevant mistake is whether the mistake is  
15 consistent with an honest and genuine attempt to make a reasoned assessment or if it is of such a nature that it compels the conclusion that no officer seeking to exercise best judgement could have made it". Lord Justice Carnwath in *Pegasus Birds v HMRC* said "the Tribunal should remember that its primary task is to find the correct amount of tax as far as possible on the material properly available to it, the burden  
20 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 on an attack on the Commissioners exercise of judgement at the time of the assessment".

25 87. This assessment was based on one source document being the printout from ICA and it was unfortunate that MM had not mentioned his encounter with the police in relation to their accusing him of selling a car which he did not own and which, subsequently, in MM's evidence the proceeds were payable to a Mr Kennedy. This may have laid some doubt in the minds of HMRC as to the veracity of ICA's records.

30 88. No evidence was obtained by HMRC from ICA as to what must have been large amounts of cash or payments that were transacted. The calculation of the VAT due was based on only the sales information without the same credibility being given to the purchase information on the grounds that the requisite records had not been kept in order for tax to be assessed on a gross profit basis.

89. The detail of the tip off information which may have directed HMRC in their enquiries and which may have been material was not before the Tribunal.

35 90. The printout appeared to cease on 14 February 2010 for no apparent reason. MM could give no reason because he said he was not trading in the first place and HMRC made no enquiry into this. The Tribunal noted that in MM's evidence he had been interviewed by the police who had then raised the matter with ICA in their office in relation to a car that MM was supposed to have sold, the payment for which had  
40 been made to a Mr Kennedy. In MM's evidence, this incident had taken place sometime in 2010.

91. The Tribunal, accordingly, did not believe that HMRC had carried out sufficient investigation nor had made a genuine attempt to make a reasoned assessment given the reliance on only one source of evidence and no other and that HMRC had at least been advised that MM had learning difficulties.

5 92. The appeal is allowed.

93. 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.

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**RUTHVEN GEMMELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 8 September 2014**

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Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 9 September 2014.

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