



**TC04055**

**Appeal number: TC/2011/06073**

*VAT – undeclared sales – determination of amount undeclared – s73 VAT Act 1994*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ROLAND BARTON TRANSPORT  
(a firm)**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE NICHOLAS ALEKSANDER  
DR CAROLINE SMALL**

**Sitting in public at Bedford Square, London on 11 and 12 November 2013 and 20  
January 2014**

**John Shelley, chartered tax advisor, for the Appellant**

**Helena Perrett, a Senior Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against assessments made under s73 Value Added Tax Act 1994  
5 on 9 September 2009 and 18 August 2011. The Assessments were amended following a review, and the final amended assessments are as follows:

Period ended	Amount
30 June 2006	5,436
30 September 2006	5,436
31 December 2006	5,436
31 March 2007	5,436
30 June 2007	5,436
30 September 2007	5,436
31 December 2007	5,436
31 March 2008	5,436
30 June 2008	8,002
30 September 2008	9,285
31 December 2008	9,285
Total	70,060

2. Mr Shelley represented the Appellant, and Mrs Perrett represented HMRC.  
10 Witness statements were presented in evidence from Rowland Barton (the principal partner in the Appellant), from Barry North (RBT's external accountant), from the following officers of HMRC: Surinder Singh, Martin Brick, Rita Pavely, Kim Howard, Sarah Templeman, Martin Priest and Andrew Cousins, and from the following Border Force officers: David Swan and Karen Martin. We heard oral evidence on oath from all  
15 of the witnesses other than Mr North, Officer Priest and Officer Templeman. In addition bundles of documents were submitted in evidence. Following the conclusion of the hearing, we gave directions for the parties to present further documentary evidence and additional written submissions.

## **Introduction**

3. The subject matter of the appeal is VAT arising on undeclared sales by the Appellant, Rowland Barton Transport (“RBT”). It is not disputed that there were such sales, the issues in dispute are (i) the nature of the sales; (ii) the period over which the “off record” sales were made; and (iii) the amount of the sales. RBT contend that they hired tractor units to GIG Transport International (“GIG”) based in County Donegal in the Republic of Ireland during 2007 and 2008. HMRC contend that RBT was itself engaged in undeclared haulage business since at least April 2006.

4. RBT is a family partnership which has a haulage business and HGV workshop based on an industrial estate in Lympne, Kent, located between Ashford and Dover, just off the M20. Rowland Barton (“Mr Barton”) and his son Kenneth Barton are the partners in the firm. RBT has a small workshop and yard.

5. RBT owns three small vans and a number of tractor units for hauling articulated trailers. The business hauls trailers owned by its customers, although it has one trailer itself. This trailer belonged to a customer who did not pay its bill, and therefore RBT kept the trailer. Mr Barton told us when giving evidence that RBT did not buy cross-channel tickets for international loads, rather these were purchased by its customers. In consequence RBT’s only direct costs are fuel and road tolls. RBT’s principal customers were Laser Transport, BT Transport and Norfolk Line/DFPS. These three customers make up about 95% of RBT’s HGV haulage business.

6. The workshop is used to maintain not only RBT’s own vehicles, but also those of third parties.

## **HMRC’s investigation**

7. RBT came to the attention of HMRC as a result of an excise investigation undertaken by Officer Singh. HMRC were concerned that RBT vehicles were involved in the diversion of consignments of alcohol into free circulation in the UK without the payment of excise duties.

8. On 14 October 2008, Officer Singh made an unannounced visit to RBT’s premises. As neither of the partners were available, Officer Singh made arrangements to return to the premises on 23 October 2008 to undertake verification checks on excise goods transported by the firm.

9. At the meeting on 23 October 2008, Mr Barton and his son were asked questions by Officer Singh about the business and its operations. Mr Barton provided details of the employees of the business, including the names of the five full-time drivers and the two self-employed sub-contracting drivers that worked for RBT. He told Officer Singh that the business currently had six tractors and three vans (two tractors having recently been sold). Mr Barton also stated that the business normally hauled trailers belonging to its

customers, although it did have one trailer of its own. Mr Barton explained that as they had not been paid by a customer, they had kept its trailer.

10. When asked about the transport of alcohol, Mr Barton stated to Officer Singh that the transport of alcohol was undertaken under subcontract to GIG, that RBT had worked  
5 for GIG since April 2008 and had made 6 movements for them. When asked how RBT was paid, Mr Barton said cash. Mr Barton handed Officer Singh a bundle of papers including invoices and CMR transport documents for seven loads of alcohol. One of the sets of documents related to tractor (N7DCL) which had not been included in the list of  
10 the six tractors given earlier. Mr Barton explained that this was a “workshop shunter”, but it was registered for road use as an emergency back-up.

11. Officer Singh then asked to review the entries on RBT’s computerized SAGE accounting system. At that point Mr Barton admitted that the invoices had been prepared manually, that he had “got greedy” and had not declared them through the business accounting system. Mr Barton confirmed that RBT had been paid by GIG in cash, and  
15 that the cash had been dropped off at random intervals by drivers working for GIG. The payments were made in advance and details of the jobs to be undertaken were given at the time the cash was dropped off.

12. Officer Singh noted that RBT kept drivers’ timesheets and tachometer discs, and Officer Singh uplifted timesheets, tachometer discs and the bundles of papers for the  
20 alcohol movement transactions.

13. Following the visit, research was undertaken using HMRC’s databases, and the results reported to Officer Singh. These databases include details of drivers and vehicles on cross-channel ferries. These identified that a Mr Osgood and a Mr Currie had been recorded as driving RBT tractors onto cross-channel ferries, and that the ferry tickets had  
25 been purchased through Kadir Demir. Kadir Demir operated a ticket brokerage at Dover, buying ferry tickets in bulk at a discount, and reselling the tickets to hauliers. Kadir Demir has since closed.

14. On 31 October 2008, Officer Singh returned to RBT to interview Mr Barton again. Mr Singh asked Mr Barton about Mr Osgood. Mr Barton explained that RBT had hired  
30 one of its tractors to “Victor”, and that Mr Osgood was Victor’s driver. Mr Barton said that he did not know Victor’s surname, nor the name of his business, nor its address. Mr Barton said that he hired the tractor for £80 per day, and had done so for several months. Mr Barton said that he had also hired two other tractors to Victor. RBT had been paid cash for the vehicle hire, no invoice for the hires had ever been issued, and the income  
35 from the vehicle hire had not been declared. Officer Singh asked Mr Barton whether in fact the vehicles had been used for RBT’s business, and Mr Barton stated that they had not been so used.

15. Officer Singh questioned Mr Barton about the change in his story, and Mr Barton explained that he had been told by Victor to give the explanation that he did at the

original meeting. Further documents were uplifted following this meeting, including accounting records and bank statements

16. Following further investigations by Officer Singh and other officers at HMRC, Officer Singh reached the conclusion that he did not believe Mr Barton's explanation that RBT had hired vehicles to Victor. Instead he considered that the vehicles had been used in the course of RBT's own business, and the income derived from that business had not been declared. Officer Singh arrange for RBT to be assessed for VAT on undeclared sales income for haulage services. We discuss the basis of Officer Singh's calculation of the undeclared sales income below.

10 **RBT's contentions**

17. RBT contend that they hired tractors to Victor (acting on behalf of GIG). RBT admit that they had not declared the rental income, and acknowledge that there was undeclared VAT. However the amount of rental income that they received (and the corresponding VAT payable) was, they submit, considerably smaller than the amounts assessed.

18. In his evidence, Mr Barton told us that he had first met Victor and Mr Osgood in late 2006 or early 2007 at a café located on the same industrial estate as RBT's workshop. This was before services had been constructed on the M20, and truck drivers would stop and use the café on the industrial estate. Mr Osgood was one of GIG's drivers. Victor was not a driver, but came down to the café approximately once every other week to organize the GIG drivers. On occasions Mr Barton had lent tools to Victor. In early 2007 (some two to three months after Mr Barton had first met Victor) one of GIG's tractors broke down, and the driver (probably Mr Osgood) approached RBT to see if they would lend them one of their tractors for a couple of days. Mr Barton agreed to hire one of his tractor units to GIG for £80 per day. The hire was for cash, and was not recorded in RBT's books. Mr Barton based the hire charge on amounts charged by a nearby HGV hire business.

19. Some time after the first hiring, Victor, the GIG representative, asked to hire another tractor, which was also done for cash. RBT continued to hire tractors to GIG for cash. The cash was paid in advance.

20. During 2008, there were a few instances when vehicles were returned by GIG at the end of a hiring when Mr Barton was given the driver's copy of the CMR stamped by the Border Force. Mr Barton was asked by GIG to produce a dummy invoice for that journey.

21. On occasions, tacograph discs were left in the cab.

22. The dummy invoices and the tacograph discs were placed on the RBT's files, and it was these documents that were produced to Officer Singh following the 23 October meeting.

23. Mr Barton in his evidence told us that the GIG personnel, particularly Victor, were unsavoury individuals, and Mr Barton was concerned that they might use violence against him if their details were revealed to HMRC. For this reason he was very reluctant for HMRC to undertake detailed investigations into GIG or into Victor.

## **The evidence**

### *Ferry journeys*

24. The various ferry companies using UK ports provide details to the (then) UK Border Agency of all vehicles transported by them. This information is loaded onto a computerised database to which HMRC have access. By taking vehicle details from RBT's operator's licence, Officer Brick was able to extract from the database details of ferry crossings made by these vehicles, and incorporate them into a spreadsheet. Further searches on the database using names of haulier and drivers enabled Officer Brick to identify further crossings where either the vehicles had been sold or were no longer on RBT's operator's licence.

25. The searches of the database showed that Mr Osgood and Mr Currie made trips between Dover and Calais driving RBT's tractors. Neither Mr Osgood nor Mr Currie appeared on the list of full time or part time drivers engaged by RBT that was given to Officer Singh on 23 October 2008.

26. There were approximately 180 trips made using tickets purchased through Kadir Demir. Three of these trips were by Mr Currie and the remainder by Mr Osgood., In addition Mr Osgood made two trips using tickets purchased by BT Transport and one trip using tickets purchased by Norfolk Line. Mr Currie made two trips using tickets purchased by BT Transport.

27. As regards the trips made on the account of either BT Transport or Norfolk Line, there is no suggestion that GIG at any time hauled consignments for either of these two companies. These trips must therefore have been made for RBT's account. Mr Barton explained that there was one occasion when the RBT workshop serviced Mr Osgood's own van, and he agreed to make a round trip journey for RBT in lieu of payment.

28. One of the trips recorded with Mr Currie as the driver was for a vehicle registration number which did not correspond to any of RBT's tractors, and Mr Barton stated that Mr Currie was not working for RBT on the day in question. However Mr Barton confirmed that the other journeys were recorded against vehicle registration numbers that

corresponded to RBT tractors. However Mr Barton could give no satisfactory explanation for these other journeys.

29. As regards the trips made on Kadir Demir's account, Officer Pavely had worked on HMRC's National Road Haulage Project, and as part of that project, had visited Kadir  
5 Demir and reviewed its business records. At the request of Officer Singh, Officer Pavely  
undertook a further review of Kadir Demir's records, Officer Pavely could find no trace  
of invoices to RBT for the purchase of ferry tickets for the Dover-Calais route. On  
checking RBT's VAT summaries, she could find no claims in respect of input VAT in  
10 respect of ferry tickets from Kadir Demir. However, HMRC's records show that vehicles  
owned by RBT had travelled on ferries under Kadir Demir's account, and that RBT was  
shown as the haulier.

30. RBT submits that the tractors making the trips had been hired by RBT to GIG, and  
that GIG (or its customer) must have purchased the ferry tickets from Kadir Demir.  
15 When the vehicle arrived at Dover, because RBT's name was prominently painted on the  
side and front of the tractors, the person at the check-in gate may have recorded RBT as  
the haulier, even though the haulier was really GIG. RBT submit that there are examples  
in the bundles where shipment papers for a particular consignment show GIG as the  
carrier, yet the name of the carrier appears as RBT on HMRC's database because of  
errors in copying or transposing data.

20 31. HMRC submit that the vehicles making the trips were being driven by Mr Osgood  
or Mr Currie on behalf of RBT, and that either RBT's customer had purchased the tickets  
(as is RBT's normal practice), or RBT bought the tickets itself "off the books" for cash.

32. We were told that the spreadsheet did not include journeys via the Channel tunnel,  
as Eurotunnel did not provide satisfactory data. However we did note at least one entry  
25 on the ferry spreadsheet that referred to Coquelles, being the Channel tunnel terminus in  
France.

33. We were also told by Officer Singh in the course of giving evidence that HMRC  
only kept 18 months of ferry records. However, in written submissions made after the  
hearings, HMRC told us that HMRC did in fact keep older data. In order to keep  
30 database access at a reasonable speed, data more than approximately 18 months old was  
transferred to an offline archive. This archive was only accessible by HMRC officers by  
special request. We were told that Officer Singh and the other HMRC and Border Force  
officers working on this appeal were unaware that older data was archived until after the  
end of the hearings, and had not requested that any searches be made of the archives. We  
35 also noted that some of the entries in the ferry records produced to us related to 2005.  
The implications of the limitations of the database are discussed later in this decision.

*The circumstances of the hires*

34. Mr Barton said in his evidence that when he hired the tractors to Victor, he did not make any checks. In particular, at the time of the first hiring he did not have the address of either Victor or GIG and he did not know Victor's surname (although he learned of Victor's surname later). Nor did Mr Barton check whether GIG's motor insurance covered hired vehicles. Mr Barton in evidence stated that he was taking something of a risk, but

10 "our vehicles were quite old and only worth £5-6,000, moreover since GIG would be subject to the normal VOSA checks at the ports and at the roadside I knew they would have to have their papers in order including their own insurances, so this was my comfort factor. It is the responsibility of the person hiring a vehicle to make provision for insurance and HGV cover is much the same across the industry and normally includes cover for any hired vehicle."

15 35. Mr Barton provided us with a copy of RBT's own motor insurance certificate, but not the underlying policy document. The copy was poorly reproduced, but we were able to read sufficient to be satisfied that the certificate extended not only to vehicles hired by RBT, but also to anyone driving RBT's vehicles with RBT's permission. When giving evidence, Mr Barton stated that the policy covered vehicles hired by RBT, RBT just had to inform the insurer of the hire, and normally did so by e-mail. But we had no evidence  
20 whether the policy continued to give comprehensive cover to Mr Barton's vehicles when hired to third parties.

36. Mr Barton also told us that when hiring vehicles, they used a company that knew RBT, but they had to provide a copy of their goods vehicle operator licence to the hire  
25 company. However, Mr Barton confirmed that did not check or obtain a copy of GIG's operator licence when hiring to GIG.

*CMR Documents*

37. It is necessary to give an outline explanation of the documentation that is required for cross-border transport of excise goods within the EU under duty suspension  
30 arrangements. The form AAD must be completed by the warehouse dispatching the excise goods. One copy of the AAD must be given to the carrier for him to deliver to the receiving bonded warehouse. Another copy is sent directly to the receiving bonded warehouse, so that it can be reconciled with the AAD presented by the driver on arrival with the goods. A further copy goes to the *fisc* for control purposes. The AAD must  
35 show the identity of the carrier. In addition to the AAD, the driver must also carry a CMR form which shows the name of the carrier and details of the journey. The CMR is typically also completed by the dispatching warehouse and given to the driver with the AAD. There are other obligations imposed upon the parties, one of which is that at least one person (typically the carrier) must enter into a bonding arrangement with HMRC (a  
40 transit guarantee) to cover any duty payable should there be defaults in the course of the

transport of the excise goods. RBT does not have a transit guarantee with HMRC, and it was clear from Mr Barton's evidence (and we so find) that he was unfamiliar with the rules relating bonding arrangements for the cross-border transport of excise goods.

5 38. On 23 May 2008, Officer Swan was working at Dover Eastern Docks and stopped tractor R34FNG (hauling trailer MVT29). The vehicle was driven by Mr Osgood and contained 24 pallets of beer. Officer Swan questioned Mr Osgood and searched the vehicle. Mr Osgood told Officer Swan that he had gone out to France earlier that day empty, had left the trailer in Calais and picked up a new trailer with this load. He was returning now to the yard in Lympne and would be taking the load to the consignee the following day. Nothing untoward was found in the search. Officer Swan endorsed the AAD and CMR. He made a note of the operator's licence, which was for RBT. Officer Swan reported the interception to the Border Force's Revenue Fraud Detection Team

15 39. The records of the Border Force's Revenue Fraud Detection Team are consistent with Officer Swan's evidence. In addition, their records show that on 29 May 2008, Mr Osgood was intercepted driving tractor Y542MAH (hauling trailer 1) at Dover Eastern Docks. Mr Osgood was also intercepted on 5 June 2008 driving tractor Y542MAH (the trailer number was not shown). In both of these cases, the load was mixed beer consigned from Francar BVBA in Belgium to Stadwood Storage in London, and the haulier was recorded as being GIG International.

20 40. The practice of the Border Force is that whenever they stop a lorry carrying excise goods at the border, they endorse the CMR and AAD, and send copies to the Fraud Detection Team. Officer Singh said that HMRC do not follow up such interceptions, as they invariably find that such intercepted loads are delivered to their stated destination. It was for this reason that HMRC did not follow-up any of the occasions on which Mr Osgood was stopped when driving one of RBT's tractors.

30 41. It appears that on the occasions when Mr Osgood was stopped (and we find), he provided Mr Barton with the carrier's copy of the AAD and CMR, and asked RBT to prepare a dummy invoice. This would complete the paper trail in the event that HMRC were to follow-up on the interception. It was these papers that Officer Singh uplifted following the 23 October 2008 meeting. There were seven dummy invoices, with the associated CMRs (but not the AADs). All but one of the invoices were made out to GIG. The other invoice was made out to Esco BV in the Netherlands. It transpired during the course of the hearing that the trailer retained by RBT related to the non-payment of the Esco BV dummy invoice.

35 42. Mr Barton produced to the Tribunal a blank copy of RBT's own CMRs. These have RBT's name and other details pre-printed onto them. None of the CMRs before us were on RBT's own pre-printed CMRs. They were all blank forms that were completed in manuscript. The forms all show GIG as the carrier. However HMRC submit that this is consistent with RBT acting as sub-contractor to GIG. HMRC also submit that if GIG had rented the tractors from RBT, there would be no reason for the CMRs to be in RBT's

possession. Mr Barton's evidence was that the CMRs were only given to him to enable RBT to prepare the dummy invoices.

#### *Tachographs*

43. Under the relevant legislation governing road haulage (both EU and domestic), it is the responsibility of the haulier to retain tachograph discs. Tachograph discs for unrecorded journeys were included in the documents given to Officer Singh by Mr Barton following their meeting on 23 October 2008. HMRC contend that the fact that RBT retained these discs as part of their records indicates that RBT were the hauliers. If GIG had rented the tractors then it was GIG who were the hauliers, and it would have been GIG that retained the discs. Mr Barton's evidence was that he found the discs in the tractor when they were returned at the end of the hire period, and he did not throw away the discs and kept them.

#### *Goods Vehicle Operators Licence*

44. During the course of the hearing, Mr Barton was questioned why the tractors hired to GIG remained on RBT's operator's licence, since RBT was not operating those vehicles during the period of hire. Mr Barton informed us that the hire of the various tractor units was secondary to their use by RBT for RBT's own business, and so they needed to continue to be licensed under RBT's name.

#### *Interview*

45. When Officer Singh interviewed Mr Barton at their first meeting on 23 October 2008, Mr Barton told Officer Singh that the transport of alcohol was undertaken by RBT under sub-contract to GIG. Subsequently at the meeting on 31 October, and at the hearing of this appeal, Mr Barton asserted that his initial answers to Officer Singh were wrong, and that RBT had hired tractors to GIG. HMRC assert that Mr Barton's initial statement was correct (or nearer the truth) than his subsequent change of story. Mr Barton says that he spoke to Victor after he had been given the message that HMRC had called on 14 October, and would be visiting again on 23 October. Mr Barton stated that Victor told him to tell HMRC that RBT were acting as sub-contractors to GIG - but this was not correct, and the truth was that RBT were hiring tractors to GIG.

#### *Mr Osgood*

46. There is no documentary evidence that Mr Osgood was paid by RBT (other than in respect of one journey, when RBT waived payment for the repair of Mr Osgood's van). RBT assert that if Mr Osgood was working for RBT, he would have been paid by RBT (either as an employee, or a self-employed contractor). The fact that there is no evidence of any payments being made to Mr Osgood is consistent only with the vehicles having been rented to GIG, and Mr Osgood working for GIG. Officer Singh was cross-

examined on this point, and said that it was not for him to say who paid Mr Osgood – his assessment was based on undeclared sales (we address the basis of the assessment later in this decision).

*Discussion and findings*

5 47. We find that RBT did not hire tractors to GIG. We reach this conclusion for the following reasons.

48. First, and foremost, even though the tractors may be quite old, and worth only £5-6,000 each, they are RBT’s principal business asset. Mr Barton’s evidence is that he hired tractors to Victor (acting on behalf of GIG) without knowing Victor’s surname (although he discovered it later), without knowing his address (or that of GIG), and without checking whether GIG had appropriate insurance in place. Mr Barton gave evidence about how he started the RBT business and built it up himself. We find it wholly out of character that Mr Barton would have risked his principal business assets in this way. We do not believe that Mr Barton would have hired his principal business assets to a stranger based outside the UK without verifying names, addresses, insurance and licence details.

49. Nor did we believe Mr Barton when he said that he believed that GIG’s own insurance policy would have provided cover. GIG is a company based in Ireland, and its insurance would have been with an Irish insurer in accordance with Irish insurance practice. Mr Barton would have no basis for believing that the same practice applied to foreign companies, or even if it did, that the policy would extend to vehicles hired outside the “home” country.

50. We find that the evidence relating to the operator licence, the tachographs and the CMRs of little assistance in helping us reach a conclusion on the hiring question. Even if RBT hired vehicles to GIG, it continued to use those tractors for its own business, and therefore needed those vehicles to continue to be listed on its own operator’s licence. HMRC submitted that the relevant regulations would require the vehicles to be removed from RBT’s operator’s licence and added to GIG’s licence for the duration of the hire, and the fact that this had not happened supported HMRC’s submission that the vehicles had never been rented to GIG. However we can understand that RBT might not have fully complied with these detailed regulations for a series of short hires – particularly if the hiring had been off the books. So we do not place much weight on the fact that the vehicles remained at all times on RBT’s operator’s licence.

51. If the vehicles were hired by GIG, it is likely that GIG were engaged in illicit activities (otherwise, why would they have asked Mr Barton to prepare false invoices and other papers when they had been stopped and inspected by the Border Force at Dover?). In these circumstances, they would have little incentive to keep statutory records, and could well have just left the tachograph discs in the cab after the conclusion of the hiring,

leaving RBT to throw them away later. Equally, if the tractors had been used by RBT, the discs would be kept by RBT. For these reasons we place little weight on the fact that RBT was in possession of the tacograph records.

52. HMRC also submitted that the running cost of an HGV tractor, in terms of wear and tear, makes an £80 per day rental uneconomic, and therefore implausible. We had no evidence of the financial impact of wear and tear or depreciation on HGV tractors, and therefore have taken no account of this submission. Indeed the unchallenged evidence of Mr Barton was that RBT itself rented tractor units for about this price.

53. As regards the CMRs, the entries on their face are consistent both with GIG as carrier on its own account entirely (having hired the tractor from RBT), and also with RBT acting as subcontractor to GIG. We place no weight on the fact that the CMRs were not prepared on RBT's pre-printed stationary. It is not clear who prepared the CMRs, and it is possible that they were prepared by the consignor, or by the driver when collecting the load (at a time when he did not have access to the pre-printed forms). HMRC say that the only reason that the CMRs were kept by RBT is because they were required to do so as sub-contractor to GIG. RBT say that the only reason they had the CMRs was in order to prepare the dummy invoices. We also note that RBT did not have copies of the accompanying AADs. We find this evidence inconclusive either way. We are satisfied that RBT could not have undertaken cross-border carriage of excise goods itself, without working with GIG – as RBT did not have the necessary bonding arrangements in place.

54. The ferry records are not wholly satisfactory, and we recognize that because the tractors were painted in the RBT livery, it is possible that a ferry company may have recorded RBT as the haulier – even though GIG had rented the tractor. We also note that there appears to be a stray Channel tunnel entry, and also an entry for a vehicle which has never been used by RBT.

55. The overwhelming majority of the tickets were purchased through Kadir Demir, and it is not possible to trace who paid for those tickets. When questioned by Officer Singh in October 2008, and in his witness statement, Mr Barton gave a list of the drivers that worked for RBT. The list did not include Mr Osborn or Mr Currie. Yet both of these drivers appear to have driven consignments on behalf of RBT customers (BT Transport and Norfolk Line). Mr Barton explained one of these trips as having been done by Mr Osgood in lieu of payment for maintenance work undertaken on his van. However no satisfactory explanation was given for the other trips undertaken by Mr Osborn or Mr Currie for BT Transport or Norfolk Line.

56. Finally RBT submit that if Mr Osgood was working for RBT, there would be some record of payment to him. HMRC's response was that this was not relevant to their analysis, as their assessment was based on estimating undeclared sales. However the point made on behalf of RBT is not without merit. But if the journey's undertaken by Mr Osborn were illicit, we can envisage that not only would the revenue be suppressed, but

so also would the corresponding direct expenses (such as ferry fares, fuel costs and Mr Osgood's remuneration), and these might be paid out of the cash received by RBT for the work.

57. We note that Mr Barton changed his story between the first interview on 23  
5 October and the second interview on 31 October. Mr Shelley complained on behalf of Mr Barton that Mr Singh was unfairly and unreasonably aggressive when conducting interviews, and that the enquiry (at least initially) was into a possible excise fraud, and only became a VAT enquiry when Officer Singh concluded that it was not possible to find sufficient evidence to support a case that there was an excise fraud.

10 58. Mr Barton admitted that RBT had not declared all of its income, and we consider that it is not unreasonable in these circumstances for HMRC officers to press their enquiries. There is no evidence that Officer Singh acted improperly. The fact that Mr Barton changed his story does undermine his credibility – but we also appreciate that if Victor is as unpleasant as Mr Barton says he is, it is understandable why Mr Barton  
15 answered Officer Singh's questions at the first meeting on the lines suggested by Victor. All that said however, if Victor was so unpleasant, why did Mr Barton rent a trailer to him in the first place - particularly as there was an HGV hire company just up the road (the one that RBT themselves used, and based their hire fee on)?

59. The trailer kept by RBT in lieu of payment is also something of a puzzle. Although  
20 Mr Barton said could not remember for certain, he thought that it was Esco BV that was the bad debtor. Keeping a trailer in lieu of payment for an invoice is extremely unusual and is likely to stick in the mind – such that we do not believe Mr Barton when he says he cannot remember for certain whether Esco BV was the customer. The unpaid debt owed by Esco BV relates to one of the dummy invoices – and Mr Barton's case is that these  
25 were not genuine - he was not contracting with Esco BV, rather he was hiring the tractor to GIG for cash paid in advance. RBT being owed money by Esco BV is inconsistent with RBT hiring tractors to GIG: if RBT had hired the tractor to GIG, RBT would not have been in control of the trailer. We agree with Officer Singh that in any event it odd that a customer would allow a modest transportation debt to go unpaid, when the  
30 consequence is that RBT keep a significantly more valuable trailer. The whole story is so incredible that we doubt the reliability of Mr Barton's evidence on this – and by extension to the rest of Mr Barton's evidence.

60. Our overall assessment is that Mr Barton is not a reliable witness.

61. We find that RBT had not hired tractors to GIG, to Victor (or for that matter to  
35 anyone else). We find that RBT engaged Mr Osgood and Mr Currie to drive their tractors and that RBT was paid for these journeys but did not account for VAT on these supplies.

### **Other issues relating to the conduct of HMRC's investigation**

62. In the course of the hearing, Mr Shelley, for RBT, made a number of criticisms of the way in which HMRC conducted their investigation.

5 63. The manner in which Officer Singh interviewed Mr Barton has been discussed above. There is nothing to suggest that Officer Singh had behaved inappropriately. The answers given by Mr Barton during the course of the interviews forms only one part of the evidence we have considered in reaching our findings, and we would still have reached the conclusion that RBT had not rented tractors, even if we had ignored the interview evidence.

10 64. Mr Shelley also notes that RBT were not made aware of the ferry schedules or the fact that tickets had been purchased through Kadir Demir until HMRC served its evidence in the Tribunal proceedings. Mr Shelley asserts that if this evidence had been disclosed to RBT at an earlier stage in the investigation and appeal process, RBT would have been able to make independent investigations into the ferry trips and possibly  
15 ascertain who had purchased the tickets from Kadir Demir. However Kadir Demir now no longer operated a ticket brokerage in the UK and it was therefore too late to review their records. We agree that it would have been preferable for this evidence to have been disclosed to RBT earlier – however no one could have predicted that Kadir Demir would close their operations in the UK. We note that this evidence was not used in HMRC's  
20 calculation of the VAT assessment.

### **Basis of assessment**

#### *HMRC's calculation*

25 65. Officer Singh determined the VAT to be assessed using a spreadsheet. The conduct of the investigation was taken over by Officer Cousins for a period whilst Officer Singh was seconded to another part of HMRC, and the spreadsheet was refined before the assessments were issued. The calculation was further adjusted to take account of the decision of the reviewing officer following the statutory review.

30 66. The starting point of Officer Singh's calculation was an analysis RBT's invoices, extracted from its computerized accounting system for the period from 8 January 2007 to 20 October 2008. 1910 invoices were recorded. Of these 1118 were for VATable sales and 972 charged no VAT. An additional 29 transactions were added to the total as some of the invoices were for multiple jobs. In the period there were therefore 1939 transactions, with an average transaction value of £848.51.

35 67. Driver timesheets and tachograph records were then analysed to determine the number of journeys taken and the average distance per journey. Because the timesheets and tachograph records were incomplete, the data needed to be extrapolated in places. Officer Singh selected a representative period from 14 October 2007 to 28 December

2008 for which data was available to enable a best estimate to be determined for the number of journeys undertaken. This was two journeys per vehicle per week. This was then applied to any weeks for which neither driver time sheets nor tachograph data was available. This estimate was also applied to the two vehicles that had been sold during the representative period, and for which no other data was available. Officer Singh calculated that there were potentially 200 trips additional to be included in the representative period. Officer Singh did not include RBT vans in his calculation and did not include any of the additional vehicles listed in the ferry data as having made journeys for RBT.

68. Officer Singh calculated an average trip length of 485 km from the data that was available. The unrecorded kilometres was then divided by this average trip figure, which gave 213 of potentially missing trips.

69. Finally, Officer Singh divided the total recorded kilometres by the actual number of recorded trips made, which provided an average journey length of 542 km. The total unaccounted for kilometres was then divided by 542, which gave a result of 191 missing journeys.

70. Officer Singh decided that this last method produced the most reliable estimate, and was the calculation most favourable to RBT – and he used this figure in determining the amount to be assessed.

71. From RBT's computerised accounting system, Officer Singh determined that 58.5% of RBT's supplies were standard rated, and the remaining 41.5% were not subject to VAT.

72. Over the period used for calculating the number of journeys, 1144 invoices had been raised by RBT. Officer Singh determined that there were 1463 recorded vehicle journeys in this period. To this he added the 191 missing journeys, and 200 journeys for the two vehicles that had been sold and for which no records were available. Thus Officer Singh calculated that there had been 1854 journeys in the period, which was 710 more than the number of journeys invoiced.

73. Mr Singh used the fees shown on the dummy invoices as the value of the supplies for the 710 unrecorded journeys. Mr Singh calculated that the VAT shortfall for one year was £44,991. VAT on rental income of £2287 was added to result in a total VAT shortfall of £47,278, or £11,819 per quarter. Mr Singh passed his spreadsheet and calculations to Officer Pavely who raised the formal VAT assessments. Assessments of £11,819 were raised for each of the VAT periods from the quarter ended 30 June 2006 to 31 December 2008 inclusive. This totalled £130,009.

74. In May 2009, Officer Singh was seconded to another HMRC department, and Officer Cousins took over the day-to day conduct of the case. However Officer Singh

was copied on all material correspondence, and supervised Officer Cousins. Officer Singh returned and resumed direct responsibility for the case in May 2010.

5 75. Following the issue of the assessments, correspondence and meetings happened, and a number of adjustments were made to Officer Singh's calculations to take account of transcription and other clerical or arithmetical errors. Additional information was subsequently provided to HMRC by RBT. On the basis of the additional information, Officer Singh increased the average journey length to 300 km, which resulted in a reduction in the assessments to £111,429 for the three year period.

10 76. The assessment was subject to a statutory review which was undertaken by Officer Priest. Officer Priest's decision was communicated to RBT in a letter dated 8 July 2011. Officer Priest agreed with the methodology that had been adopted by Officer Singh. However Officer Priest determined that the calculation effectively assessed RBT in respect of unaccounted VAT for journeys taking place before one vehicle had come into RBT's ownership. Officer Priest instructed Officer Singh to amend his calculation to reduce the assessment. In fact it was Officer Pavely who adjusted the assessments. It is these final assessments (following the review) against which RBT now appeal.

#### *RBT's calculation*

20 77. During the course of HMRC's investigation and correspondence, RBT and its advisors had suggested various alternative approaches to calculation the amount of undeclared VAT. At the hearing, Mr Shelly put forward a methodology that utilised the amount of fuel purchased by RBT over a representative period as shown from RBT's fuel card account. By applying an average mpg of 10.4, Mr Shelley can calculate the total mileage undertaken by the tractors. This can be compared with the invoiced mileage, to reach a figure for distance driven for undeclared journeys. From this Mr Shelley calculates the off record business as £33,000 – and the undeclared VAT at £5775.00.

30 78. We do not consider that RBT's methodology produces a more reliable figure for the undeclared VAT than the methodology adopted by HMRC. First, the methodology assumes that RBT hired its vehicles to GIG, and we have found that it did not do so. Secondly, we agree with HMRC submission that fuel may have been purchased for cash for the off record journeys, and Mr Shelley's methodology assumes that all fuel was purchased using the fuel card account.

#### *RBT's objections to HMRC's calculation*

79. RBT submit that HMRC have given no real analysis, explanation or verification of the underlying figures or the source material from which the assessment was made.

35 80. RBT's contention is that there are only 41,378 missing kilometres, whereas HMRC's contention is that there are 85,045 missing kilometres. RBT say that the

discrepancy arises because HMRC failed properly to correlate timesheets to tachograph readings. Mr Shelley gives the following example for one tractor. On 4 August 2008 the ending tachograph reading is 313,386 km. On the following day the tachograph's opening reading is 314,082 km – a difference of 696 km. HMRC's spreadsheet treats the difference as being a missing journey. RBT assert that this is in fact a reflection of the continuation of the very same journey starting at Gutersloh, stopping in Lympne and then continuing to Birmingham on 5 August (and finally returning to Lympne) – and that HMRC missed out the Birmingham leg and assumed that these are missing miles. The journey was undertaken by two different drivers: one drove from Gutersloh to Lympne, and another drove from Lympne to Birmingham (and back to Lympne). RBT assert that HMRC's calculation assumes that each journey would be reflected only on a single timesheet, whereas the reality is that the journey may be reflected on more than one timesheet if different drivers are responsible for different legs.

81. Moreover, RBT note that the tachograph card is changed after 24 hours or after a change in driver. So if there is more than one job on a day, or if there are two drivers on a longer journey, there will be multiple tachograph cards used. RBT criticise HMRC's calculations as they appear to consider that each separate tachograph card represents a different journey, and that gaps represent an unrecorded journey.

82. HMRC's response to RBT's criticisms is that the attribution of invoices to journeys is not reliable, as the invoices do not record vehicle registration numbers or mileages at the time the invoice is issued. In many cases these details were recorded on the invoices in pencil retrospectively.

83. There are sundry other detailed criticisms made by RBT in respect of HMRC's calculation, and by HMRC in respect of RBT's comments on HMRC's calculation.

84. In a letter dated 11 November 2010, Mr North (RBT's then representative) put forward 300km as the average journey distance, and this was the figure ultimately adopted by Officer Singh in his calculations. On 24 March 2011, Mr North suggested that this be increased to 450 km. In his skeleton argument, Mr Shelley suggested 600 miles – but this was reduced to 600 km (and then 550 km) in the written submissions made following the oral hearing. The methodologies and calculations adopted by RBT during the course of HMRC's investigation and this appeal have not stayed still.

85. However, in the end, the question we have to determine is whether HMRC's assessment was made to the best judgment of the assessing officers. Although not cited to us, we note that in the case of *Johnson v Scott* (1977) 52 TC 383 at 393 in the High Court, Walton J observed:

The true facts are known, presumably, if known at all, to one person only - the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done?

5 Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. When, in para 7(b) of the Case Stated, the Commissioners state that (with certain exceptions) the Inspector's figures were 'fair", that is, in my judgment, precisely and exactly what they ought to be - fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. 10 Where an inference, of whatever nature, falls to be made, one invariably speaks of a "fair" inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a "fair" inference as to what such figures may have been. The figures themselves must be fair. So far from representing an inference that the Commissioners did not appreciate the Inspector's figures fully, this demonstrates that they did. I think the point can be put conversely in another way. At times during Mr. Hall's address to me it almost appeared as if what he was requiring by way of his "lawful proof" was a duly audited certificate as to the Appellant's 15 undisclosed expenditure. Of course, this was not what he was seeking; but once it is clear that this is not, and in the nature of things cannot be, available, then it follows as night follows day that some form of estimate must be made.

25 86. Although that decision related to income tax on trading income, its essence is of broader application. Subject to one point, which we address in more detail below, we are satisfied that the relevant officers reached an honest, reasonable and fair assessment of RBT's VAT liability on the basis of the information available to them at the time.

87. The onus of proof is on RBT to provide this Tribunal with evidence to show that the assessments should be set aside. Although criticisms can be made of HMRC's calculations, that is not enough to cause us to set them aside, bar one caveat.

30 88. The one caveat relates to the periods for which the assessments were made. These extend over three years. When cross-examined on the point, Officer Singh did not give any substantive reason for extending the assessments over three years, other than that this was the statutory maximum period (absent fraud), and that if there had been fraud, the assessments could go back further. Officer Singh merely asserted that the decision to 35 assess for three years was based on his best judgment. Officer Pavely (who actually raised the assessments) gave no substantive reasons for extending the assessments over three years. Mr Barton in his evidence stated that he first met Victor in late 2006, and started the business relationship with GIG in early 2007. His evidence on this point was not challenged by HMRC during cross examination.

40 89. At a very late stage in the proceedings it became known that ferry data that was more than 18 months old was available on special request from HMRC's archives. However HMRC did not retrieve this data, nor sought permission to introduce it in evidence.

90. We note that notwithstanding HMRC's assertion that the online database only includes the last 18 months of records, some of the entries in the ferry databases produced to the Tribunal go back to July 2005. Yet the earliest entry in the database of a ferry journey undertaken by Mr Osgood in one of RBT's vehicles in 5 April 2007. There is no evidence that the undocumented journeys continued after Officer Singh's meeting with RBT on 31 October 2008.

91. We therefore find that the undeclared supplies only occurred in the period from 1 April 2007 and finished on 31 October 2008, a period of 19 months. We therefore uphold RBT's appeal in respect of the assessments for periods ended on or prior to 31 March 2007. We adjust the assessment for the period ended on 31 December 2008 to one third of the amount assessed, as it should cover only one of the three months in the period.

### Conclusions

92. The assessments are therefore determined as follows:

Period ended	Amount (£)
30 June 2006	Nil
30 September 2006	Nil
31 December 2006	Nil
31 March 2007	Nil
30 June 2007	5,436
30 September 2007	5,436
31 December 2007	5,436
31 March 2008	5,436
30 June 2008	8,002
30 September 2008	9,285
31 December 2008	3,095
<b>Total</b>	<b>42,126</b>

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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  
5 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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**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 7 October 2014**