[2016] UKFTT 0282 (TC)

TC05056

Appeal number: TC/2011/04620

VAT – assessment – whether assessment made within one year time limit in s73(6)(b) VATA 1994 – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr Shahzada Rasul **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
CHRISTOPHER JENKINS

Sitting in public at the Royal Courts of Justice on 5 April 2016

Ian Garrard CTA of Youssouf & Co Chartered accountants, for the Appellant

Bernard Haley, HMRC Officer, for the Respondents

DECISION

1. This decision concerns an outstanding issue that remains between the parties as to the applicability of the time limit for VAT assessments set out in s73(6)(b) of the Value Added Tax Act 1994 ("VATA 1994").

2. The appellant had been running two off-licence / grocery shops (O2 Food and Wine, and A1 Food and Wines.) In a decision released on 16 July 2015, the tribunal dealt with the appellant's appeals against various assessments of £102,950.00 for the periods 1 February 2006 to 30 November 2010 and in respect of under-declarations of VAT and a dishonest evasion penalty of £67,565.00 for the period 1 February 2006 to 28 February 2009. The background to the matter and the full reasons for that decision are set out in the decision *Shahzada Rasul v Revenue and Customs Commissioners [2015] UKFTT 0352 (TC)* ("the Decision").

3. As set out in its conclusion at [151] of the Decision the tribunal upheld HMRC's assessments in relation to VAT periods 05/09 to 11/10 in the amount of £27,873. (Under s73 (6) VATA 1994 periods ending within the two years prior to 9 March 2011 (March 2009) were within time). The appellant's appeals failed in relation to the assessments for periods ending after 9 March 2009 and those assessment amounts were upheld. The remaining assessments (periods 05/06 to 02/09 totalling £75,077) were upheld subject to determination of the issue of whether, and if so to what extent, the periods ending before 9 March 2009 were in time.

Evidence

4. We heard oral evidence which was cross-examined by the appellant from Mr Bernard Spranklen, the HMRC officer who made the assessments. We found him to be a credible witness of fact. In addition we had before us a bundle of documents comprising notes of phone calls, meetings and correspondence between HMRC and the appellant, and other persons associated with the appellant's business, and the appellant's agents.

Law

5. The date of the assessments under appeal was 9 March 2011. For periods before those ending after 9 March 2009 it needs to be shown under s73(6)(b) that the assessment was made no longer than:

> "one year after evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment came to their knowledge".

6. We did not understand there to be any disagreement that the decision of the First-tier Tribunal *Carbondesk Group Plc v Commrs for Revenue and Customs* [2015] UKFTT 367 (TC) (Judge Herrington) set out the relevant authorities and from those the relevant legal principles which were to be applied. Chief among the cases referred

to was *Pegasus Birds Ltd v CCE* ([2000] STC 91 and [1999] STC 95). The appellant in that case, a retailer of exotic birds, had evaded VAT on its sales. The appeal considered how the time limit for the VAT assessment that had been made on the appellant was to be approached under the relevant VAT legislation which, although it related to an earlier VAT Act was in identical terms to the s73(6)(b) VATA 1994.

7. In the Court of Appeal, Aldous LJ giving the lead judgment which was agreed by the other judges on the panel, upheld the conclusion and the reasoning of the High Court's decision. Dyson J's judgment in the High Court, having set out the submissions the parties made on the relevant case law put forward (at 101g) the following legal principles which were to be applied:

> "1.The commissioners' opinion referred to in s 73(6) (b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6) (b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6) (b) of the 1994 Act."

8. A number of the appellant's arguments were made by reference to further points set out in the FTT's decision in *Carbondesk*. We deal with those in our discussion section below.

Chronology / background

9. HMRC (Mr Spranklen and various of his colleagues) carried out a number of visits between them to the premises of the O2 and A1 shops between 4 April 2009 and 4 September 2009. Details of these are set out at [35] to [45] of the Decision. On 29 June 2009 one of the HMRC Officers inspecting the premises at O2 found a red and black notebook under the counter which was referred to in the previous Decision as a "diary". The details in relation to this were set out at [24] to [26] and [84] onwards in the Decision. Various till interrogations performed and records taken away for further review. In the current hearing a key component of HMRC's case, and a matter of dispute with the appellant is the significance of facts and evidence relating to whether, as HMRC maintained and as we found in the Decision, certain entries in a column marked "Total Sale" in the diary entries for a period in June 2006 included top up and phone card sales. We have therefore highlighted the further evidence and discussions in relation to this point in setting out the relevant facts.

10. On 3 July 2009, HMRC Officer Lamb carried out a phone interview with the appellant. Under the heading Cash controls her note of the interview noted the following:

> "[The appellant] states that he cashes and takes a Z read from the till up once an evening at both shops after closing time. [The appellant] states he does not write down the sale total and does not use a DGT book for either branch. [The appellant] states that all Z reads are kept and simply passed to the accountant who uses these to prepare the VAT return."

11. On 4 September 2009 Mr Spranklen carried out two visits along with Mr Nowak, one at 11.35am where they spoke to Mr Abbas the details of which were set out in a note produced by Mr Spranklen and where Mr Abbas confirmed that money for the sale of top up and phone cards was kept in a cigar tin, and a further visit at 11.05pm which concluded at 12.25am. Mr Rasul is reported as having arrived at the shop at 11.50pm.

12. Mr Rasul was reported in the note as stating:

> "Phone card money is kept separately but if employee incorrectly rings it through till and puts money in till, the number of cards is then reconciled with cash in tin and any wrongly entered cash is removed from till but the reading not adjusted. A separate sales analysis sheet is kept for phone cards…"

13. Mr Spranklen's note stated that the appellant stated that he "doesn't enter takings into a book. No cash is removed from till during the day."

14. On 13 November 2009 Mr Spranklen wrote to the appellant to ask him to attend a PN160 meeting on 9 December 2009 at HMRC's office. The term "PN160" refers to HMRC's civil evasion penalty procedures the purpose of which is to enable an appellant to make disclosures which would, if a penalty were imposed, enable mitigation to be made. The letter which enclosed the PN160 set out that HMRC were enquiring into O2's VAT returns and that "[HMRC] are now making further enquiries

into these returns as we have reason to believe that under-declarations of Value Added Tax have occurred and this may be as a result of dishonest conduct" It went on to say "The enquiry will be conducted with a view to the recovery of tax arrears and interest, and, if there is sufficient evidence of dishonest conduct, the imposition of a Civil Evasion Penalty." The letter set out that in addition to HMRC explaining the PN160 procedure the appellant "will be invited to make a full disclosure of any irregularities. It is also likely that I [Mr Spranklen] will need to ask you some questions about your business and areas linked to our suspicions."

15. On 4 December 2009 the appellant's accountant at the time, Mr Ahmed, responded stating that "due to the winter holiday" a meeting on 9 December 2009 would not be possible and that he would call Mr Spranklen in the second week of January to set up a meeting. He also asked Mr Spranklen to provide the reasons in writing why it was believed that the appellant was dishonest.

16. After getting this letter Mr Spranklen called Mr Ahmed back on 8 December 2009 to explain that the PN160 process did not allow Mr Spranklen to present evidence of dishonest behaviour as this might prevent his client from achieving up to an 80% reduction in the penalty. His note of the telephone conversation stated that:

> "The meeting would provide his client with the opportunity to make a disclosure but other than that our questions would be limited to confirming the business procedures and processes.
>
> Should his client not attend a meeting then we would proceed with assessment and imposition of a civil penalty of 100%. His client would then have recourse to appeal as appropriate."

17. Mr Spranklen ended by saying he would issue a second meeting invitation which he did in a letter dated 9 December 2009 and which proposed a meeting on 19 January 2010. He asked for confirmation of attendance within two weeks. Not having heard anything, Mr Spranklen then telephoned Mr Ahmed on 18 January 2010 who said he had forgotten about it but would check with the appellant and ring Mr Spranklen back. Mr Spranklen did not get a call back and so rang again and was told by Mr Ahmed that the appellant was happy to attend the meeting but that he had left unexpectedly to go to Pakistan as his mother was very ill. At some point before 5 March 2010, Mr Ahmed told Mr Spranklen that the appellant had returned from Pakistan. In a letter of that date he invited the appellant to a meeting on 14 April 2010. The appellant rang in to cancel this on 13 April 2010 as he was not well due to food poisoning. It was agreed that the meeting be rescheduled to 20 April 2010.

18. The appellant attended this meeting along with his agent which took place at HMRC's office. We accept that the contemporaneous note of the meeting said to be taken by the other officer in attendance (Mohammed Ghazee) was an accurate record of what was said.

19. The introduction to the meeting told the appellant that his attendance was voluntary and he was not obliged to co-operate but that if he did speak to HMRC it might use what he said and any information he provided in assessing the appellant's liability to tax or to a penalty or in any Tribunal proceedings. The appellant confirmed

that he had read the PN160 notice which had been sent and that he understood it. Mr Spranklen then began by setting out what he confirmed in his witness evidence at the current hearing were standard elements of a "PN160" meeting:

> "This meeting is being held because information held by HMRC suggests that the true amount of VAT due from the business has not been declared because of conduct involving dishonesty. The information held might be incorrect or capable of satisfactory explanation but it is my duty to investigate the matter.
>
> We will keep an open mind to the possibility that there may be an innocent explanation for the suspected irregularities. The enquiry will be conducted with a view to the recovery of any Indirect Tax arrears and interest, and if there is sufficient evidence of dishonest conduct, the imposition of the Civil Evasion Penalty as appropriate…Anything you say today, or information you provide, may be used in assessing your liabilities to tax or to penalties…
>
> We are look at the business of O2 Food and Wines for suppression of sales leading to under-declarations of VAT for the full period of registration."

20. The appellant did not make any disclosures in response to Mr Spranklen's question as to whether the appellant wished to tell HMRC about irregularities or matters in his tax affairs. He then answered various questions Mr Spranklen had about the timeline of the setting up and running of the O2 shop and in doing so also mentioned A1. He was asked to describe his end of day cashing up procedure. He explained he usually cashed up at closing time and took a Z reading which was transferred onto a monthly sheet which was provided by Mr Ahmed. Mr Ahmed explained that every quarter the appellant sent him the monthly sheets to complete the return. In response to a question as to whether the daily amounts were ever entered into a daily takings book, the appellant replied that they were only entered onto the sheets Mr Ahmed provided. The appellant and Mr Ahmed also answered various questions relating to staff members at O2 and A1. He was asked about Mr Abbas and explained that he was a friend who helped out when asked. The appellant was asked about his use of various buttons on the till including the "no sale" button. He was asked about the metal tin and cigar box containing money at O2 and what they were used for. The appellant explained the cash in the metal box contained cash from the sale of phone cards and top up cards. He was asked whether he entered these sales into the till and included them in the Z reading. The appellant replied that he did not. In response to the question of whether he kept a separate record for the sale of phonecards and top up cards he answered that he did.

Mr Spranklen's evidence in relation to the assessment he made

21. The diary contained a number of columns which appears to record daily gross takings. There was a record of phone cards and top-ups but it was unclear how the figures came together and how they could be interpreted. He could not check against monthly records because was told they had been destroyed in flood. He did not know at that point who made the diary entries.

22. In relation to the meeting at the shop on 4 September 2009 the meeting with the appellant had happened very late in the evening. At that point in time he regarded there still being uncertainty on the issue of whether phone cards and top ups had been included in the diary entry totals. Mr Rasul had stated that his normal practice was not to include them but sometimes they might and then would be adjusted out. Mr Spranklen feared it would be wholly unreasonable if he had at that point made an assessment without offering opportunity to appellant to answer questions about the matter at a meeting with his agent.

23. Mr Spranklen's evidence in relation to the meeting on 20 April 2010was that the appellant was being asked to confirm some aspects of the business which were felt to be significant in considering whether suppression had occurred and whether this was as a result of dishonest behaviour. The appellant confirmed twice that it was normal practice not to enter the monies taken for phone card/top-ups into the till and therefore the daily z readings. These monies were kept separately from the normal takings and separate records were maintained. Mr Spranklen's evidence was that this "consolidated" his belief that the column in the dairy headed "Till Sales" did not include phone monies and therefore, on the balance of probabilities suppression of the daily gross takings (DGT) had occurred. As at the point in time the meeting took place there was a suspicion there might have been under-declaration but there was uncertainty as to how the diary entries came together. From Mr Spranklen's point of view "It was a key meeting to see how the taxpayer responded."

24. Mr Spranklen's evidence also mentioned that the information was given about the level of staff employed at both branches (only two part-time staff at any given time, one being his wife, and Mr Abbas being someone who helped but did not receive a wage) whereas the diary had appeared to show payments being made to him and others "reinforced" his belief that the appellant was deliberately and dishonestly manipulating the business records to understate the true DGT. He explained that the relevance of the dishonest conduct was that it enabled him to "meet the provisions of s77 (4) VATA 1994 for assessing retrospectively under the twenty year rule." Mr Spranklen also did not feel it was reasonable to issue an assessment before allowing Mr Rasul the opportunity to respond formally to questions about his business procedures.

25. The meeting was "pivotal" according to Mr Spranklen as not only did it establish that suppression had taken place but that it was as a result of dishonest behaviour (the agent confirmed the returns were compiled from records sent to him – the zs – not the diary) and he then felt a further meeting might earn penalty mitigation for the appellant. Mr Spranklen did not think he could have made an assessment sooner as he needed the appellant to clarify how the phonecards were processed and whether they were part of the Z readings. He says the meeting "reinforced" the fact diary could then be used as a basis for a best judgment assessment.

After the meeting

26. On 10 December 2010, having suggested a further PN 160 meeting to offer a further opportunity for possible mitigation which was not taken up Mr Spranklen indicated that he would be proceeding with the issue of assessments and reporting for the evasion penalty. He explained it took a while to collate the information, there were likely to have been holiday periods so it was not until 7 March 2011 that he sent a letter setting out details of the assessment in respect of VAT periods of 05/06 to 11/10 that was to be issued.

27. The letter of 7 March 2011 after setting out a table of the amounts for the various VAT periods stated:

> "The assessment is based on information gleaned as a result of unannounced visits to your premises and inspection of records taken up and it is my opinion that you have suppressed your gross takings and a result of which, underdeclared the correct amount of Value Added Tax.
>
> These records a diary found at your Fulham premises and various journal rolls. It is my opinion that these records reveal irregularities in the level of gross takings declared and these issues may have been discussed at the meeting which was arranged for 02/12/10. In the event you decided not to attend that meeting, however copies of all documents removed were subsequently submitted to your agent Mr Ahmed on 10/12/10. You were clearly aware that my suspicions of dishonest behaviour were based on records taken up, as pointed out in my letter of 10/11/10 and in the three months since the return of records, you have not made any representations in terms of explaining the relevance of those records to address my suspicions…
>
> I have calculated the underdeclaration primarily on the basis of a suspected 40% suppression of true gross takings. I have arrived at this estimation on the basis of a comparison of the takings declared in the VAT return for period 08/06 with what I feel to be the true takings noted for the same period in the diary found at O2."

28. Mr Spranklen then raised the assessment in the sum of £102,950. This was issued on 9 March 2011.

Parties' arguments summarised

29. The appellant's case is that HMRC had sufficient evidence of the facts justifying the assessment no later than 4 September 2009 following the last visit to the appellant's shops whereas HMRC's case is that it was not until the meeting of 20 April 2010 that they had such sufficient evidence.

30. The appellant argues the contemporaneous notes and correspondence (which it suggests is to be preferred to Mr Spranklen's later account in his oral evidence to the tribunal) suggest that Mr Spranklen did, as a matter of fact, have the opinion there was sufficient evidence of the fact that phone cards and top ups were included in the total figures well before 20 April 2010 and certainly by the time of his 8 December 2009 conversation with the appellant's agent in which he indicated he would proceed

to assess if the meeting was not arranged. The fact Mr Spranklen's oral evidence which used terms such as "reinforce" and "consolidate" was supportive of this view.

31. In any case the evidence that Mr Spranklen maintained was relevant was not. The question of whether or not there had been a DGT book was not material. Also as highlighted by the tribunal in its decision, the question of whether the phonecard and top up payments were run outside of the till / z readings in relation to earlier periods covered by the diary (2006) was not explored by asking what the practice was at a time some years later.

32. Furthermore, even if Mr Spranklen was correct, and the evidence as to whether phonecards and top up were included was material, this evidence had been given to HMRC earlier as was apparent from the note of the telephone call with Officer Lamb of 3 July 2009, and the meeting at the shop on 4 September 2009. It could not have been the case that Mr Spranklen was interested in interpreting the diary (which contained matters other than information on takings) because the appellant was not asked any questions about it. Any new information which came to light at the 20 April 2010 meeting was not material and did not re-start the time limit.

33. Accordingly no new evidence relevant to the assessments was acquired at the 20 April 2010 meeting. The evidential data underpinning the calculations in the assessments (a comparison of entries for June and November 2006 in the notebook extrapolated to the quarter ended 08/2006 with the declared takings for the VAT period) was in HMRC's possession no later than 4 September 2009, the date of the last visit to the appellant's premises. Even if new information came to light at the April 2010 meeting it was not material and did not re-start the time limit.

Discussion

34. Before considering the two stage test suggested by Dyson J in *Pegasus Birds* (set out at paragraph 4 of the excerpt in [7] above) it is worth being clear about what issues are not on point.

35. The test is not about whether, at a given point HMRC, could have made an assessment in best judgment. As set out by the FTT at [18] of its decision in *Carbondesk,* although the type of reasonableness (*Wednesbury*) was the same in respect of the question of whether an assessment had been made in best judgement as it was for the question of whether the officer could only make the assessment after receiving further material, the question as far as the issue of time limits was "not to be determined by asking the question as to whether the officer could have made an earlier assessment to best judgment". The fact that the evidence might reasonably be regarded as of sufficient weight so as to found the basis for a valid best judgment assessment does not mean a decision *not* to regard the evidence as sufficient is one which is necessarily wholly unreasonable or perverse. The appellant's submissions to the effect Mr Spranklen could have made a best judgment assessment following the visits to the shops on 4 September 2009 may accordingly be put to one side.

36. Similarly HMRC's arguments that if Mr Spranklen had assessed on 4 September without holding a further meeting then this would have run the risk that an assessment which was vulnerable to challenge as being capricious would have been made are also not strictly on point. Whether it would be capricious or wholly unreasonable or perverse to make an assessment at the earlier point in time is not the test; rather the issue is whether at the earlier point in time the officer was wholly unreasonable or perverse in not regarding the evidence as being of sufficient weight of the fact justifying the assessment that was in fact made. It follows from principles 2 and 4(i) in Dyson J's judgment referred to above, and it is consistent with how the Court of Appeal articulated the operation of the provision at [11] of its decision in that case ("The relevant evidence of facts is that which was considered, in the opinion of the commissioners, to justify the making of the assessment"). We are interested in the facts and evidence underpinning the assessment that was made, not one that could have been made or one that ought not to have been made.

37. The appellant referred the tribunal a passage from *BUPA Purchasing Ltd and others v CCE (No 2)* [2008] STC 101 (and cited in *Carbondesk*) as authority for the proposition that the assessment should be made as soon as reasonably practicable.

38. Arden LJ in *BUPA Purchasing Ltd and others v CEE (No 2)* [2008] STC 101 at [58] stated:

> "VATA thus requires the Commissioners to make an assessment only to the best of their judgment and no doubt it is implicit in this that the Commissioners will make that assessment at as early a stage as reasonably practicable"

39. We do not see this as a separate test as far as the start date of the one year time limit is concerned, and as highlighted by Judge Herrington it is an observation. (See [76] of *Carbondesk* where Judge Herrington made an observation with which we agree to the effect that statement did not function as a gloss to the test on time limits). A situation whereby HMRC wholly unreasonably or perversely waited until the end of the one year period to make the assessment might of course raise questions as to whether the assessment was in best judgment, but it would not affect the question of when time had started to run under the time limit in the first place.

40. The appellant also asks us to note that the final words of s73 VATA enable the Commissioners to make an additional assessment where further evidence comes to the Commissioners' knowledge. However this clearly serves to clarify that the Commissioners are not precluded from making further assessments on the basis of new evidence that comes in after the earlier assessment. It follows there will, as a prior question, have needed to have been consideration of whether that earlier assessment was within the one year time limit. This aspect of s73 was also apparent to the High Court and Court of Appeal in *Pegasus Birds* and the First-tier Tribunal in *Carbondesk* and there is no suggestion that it altered the tests to be applied or that somehow it meant that a stricter approach should be taken to the question of sufficiency than would otherwise be the case.

41. Accordingly the test is the one set out in by Dyson J in the High Court's decision in *Pegasus Birds* and we now proceed to consider that in relation to the facts of this case.

What were the facts, which in the opinion of Mr Spranklen justified the making of the assessment?

42. In Mr Spranklen's opinion the assessment which he made was justified because that the true takings of the shops were greater than the amounts disclosed in the VAT return. We find this view was based on the following facts:

(1) The diary which had been found was a record in relation to particular periods in June 2006 (mainly weekdays) and November/ December 2006 (mainly weekends) of the true takings of 02.

There were two sorts of information:

(a) The June 2006 entries which were comprised a table which set out a total figure (which did not include phone card and mobile phone top ups) and a separate figure for phonecards and top up takings.

(b) The November 2006 entries which referred to two takings figures, from two tills only one of which was declared.

A true turnover figure for the VAT period 08/06 could be estimated by piecing together the figures.

(2) The disclosed amount of the VAT return figure for 08/06.

(3) The figures in (1) and (2) could be compared to derive a suppression rate of 40%.

(4) The appellant was responsible for both 02 and A1.

(5) The suppression rate of 40% was applicable also to the turnover of A1.

(6) The declared turnover figures of the appellant (to which the suppression rate could be applied).

43. In relation to (4) this fact was based in our view on irregularities at A1 in the form of an unusually high number of "no sale" button presses as compared with the estimates which the staff at that shop had given. Mr Garrard, for the appellant, appeared to query whether this was indeed a fact justifying the assessment highlighting that as pointed out by the tribunal in its decision at [122] the use of the no sale button was not something which was factored into HMRC's calculation. However while we agree, and Mr Haley for HMRC accepts that the number of "no sale" button presses was not used as part of the calculation, the fact that there was a high number was relevant as an indicator of suppression at A1. In any case it appears that HMRC do not maintain that evidence of this fact was the last piece of evidence so the issue is not ultimately relevant. While Mr Spranklen also mentioned that the facts as to the number of staff working were also a factor, we think this was an additional factor.

When was the last piece of evidence of these facts of sufficient weight to justify making the assessment communicated to the Commissioners?

44. HMRC's case focuses on the fact at (1) (b) above at [42]. The last piece of evidence of sufficient weight of this fact (that the "total" column did not include the mobile phone and top up takings) was the information given at the meeting between Mr Spranklen and the appellant and his agent on 20 April 2009.

45. Mr Garrard's first point is that what HMRC hold out as evidence of that fact was not actually material to the fact of the interpretation of the diary entries. He highlights that Mr Spranklen did not actually mention the diary at all in the meeting and the meeting and the answers given did not go to the heart of explaining what was in the diary and the interpretation of it.

46. It is correct that Mr Spranklen did not refer to the diary in his questions and nothing in the appellant's answer or that of his agent suggests they had associated his questions with the diary which had been taken away. We do not accept Mr Spranklen's suggestion that because the appellant would have received a receipt for the diary he must have been taken to have known that the questions that were being asked were being directed towards the diary – even if he was aware of this there is nothing to suggest that the contents of the diary which had been prepared by Mr Abbas would have been at the forefront of the appellant's mind). We also cannot see that an answer which did not mention that a diary had been passed to the appellant's accountant to prepare the return would assist on the question of how the diary entries were to be interpreted as distinct to the issue of possible liability for a dishonest evasion penalty. We do not therefore deal with the question of whether, even if this fact (that the diary was given to the accountant) was material, the information provided to Officer Lamb on 3 July 2009 was the last piece of evidence in relation to this matter. However the appellant was asked at the 20 April 2010 meeting whether he entered phonecard and top up sales into the till and stated that he did not. He also replied that he did keep a separate record of these sales.

47. Mr Garrard also drew our attention to [90] of the Decision where the tribunal made the point that it could not necessarily be assumed the appellant's answer that phone cards were kept separate when asked in April 2010 meant they had been in earlier periods. That was indeed the tribunal's view but it is important to note that the issue before us is not whether it was reasonable of the officer to have reached the view the evidence was sufficient evidence of the fact but whether it was in essence wholly unreasonable or perverse not to have reached that view at an earlier point. The point does not assist the appellant in the context of time limits because if the evidence was not pertinent to the fact then there is no earlier point in time on the appellant's case that the evidence was brought before the Commissioners. In any case it is possible for the tribunal on the one hand to find the statement did not satisfy it of a certain matter but also accept that the evidence was within a reasonable range of possibilities that an officer could find (i.e. that it was not necessarily wholly unreasonable or perverse for an officer to be satisfied that it was evidence which pointed towards a particular fact). Looking at the context of the whole meeting as recorded in the note of the meeting and noting that earlier on questions had been asked about the appellant's previous cashing up practice, it was not wholly

unreasonable or perverse of the officer in our view to have reached the conclusion that the appellant's answer made it more likely than not that phone card and mobile phone top ups were not included in previous periods too.

48. In our view the stated practice of the appellant as to whether the phone card and tops were run through the till or not, and the question of whether a separate record was kept were matters which were relevant to the interpretation of the diary entries. An answer suggesting that phone cards and top ups were not run through the till and that a separate record of them was kept would make it more likely than not that in interpreting the "total" figure and a separate amount for phone card and top up sales, in the diary the "total" figure was not inclusive of the phonecard and top up sales.

49. Mr Garrard's next line of attack was that even if this information was material to the fact then it was not new information and therefore not the last piece of evidence. HMRC had visited the shop on 4 September 2009 and had been told by the appellant that the phone card money was kept separately. His answer suggested it was not the normal practice to run it through the till and that a separate analysis sheet was kept for such sales.

50. Mr Spranklen explained he gave this low weight because of the circumstances in which the answer had been given – the appellant had given his answers having entered the shop which was still open to customers at 11.50pm and the visit concluded at 12.25am (as set out in his note of the meeting the appellant had explained the shop had closed at 1am). His evidence also mentioned his fear that by going ahead to assess at this point without giving the appellant an opportunity to be questioned at a more formal meeting with his agent would be unfair and vulnerable to challenge as being reasonable.

51. The issue for the tribunal is not whether we agree with his assessment that the answers given were insufficient evidence of the fact or not but whether his assessment that the evidence of insufficiency was *Wednesbury* reasonable i.e. that it wholly unreasonable or perverse to have concluded the evidence of the fact was of insufficient weight. In our view it was not unreasonable of Mr Spranklen to take account of the circumstances in which the question had been asked and answered. As the appellant points out a desire on the part of the HMRC officer to act fairly and reasonably are not themselves factors in the analysis of sufficiency. Similarly, the wish to offer a mitigation opportunity against a potential penalty, laudable as it may be, does not extend the assessment time limits. However, our view is that on these facts, Mr Spranklen's concern to offer a meeting in more formal circumstances was intertwined with the question of whether the evidence he had received earlier was of sufficient weight – the particular circumstances and the environment in which the answers had been given were precisely the reason why the answers constituted evidence of insufficient weight and also why he felt it was unfair and unreasonable to have assessed at that stage.

52. In our judgment Mr Spranklen's view that he could not regard the appellant's answers given in the early hours of the morning at the premises while the shop was open as not being sufficient evidence of the fact that phone-card and top ups were not

normally run through the till and that a separate record was kept for them fell within the bounds of the discretion accorded to him and was not wholly unreasonable or perverse.

53. Mr Garrard highlights various matters which would appear to throw doubt on the suggestion that the answers given at the 20 April 2010 meeting were indeed the last piece of evidence and which suggest that Mr Spranklen had actually formed the view that there was sufficient evidence to make an assessment before then. In the note of phone conversation the fact Mr Spranklen said he "would" issue an assessment if the meeting did not take place indicates that he was satisfied in his mind that there was sufficient evidence. Mr Haley characterises this as HMRC saying that unless the appellant co-operated then there would be no alternative but to issue an assessment that might not have been in best judgment. Mr Haley also refers to the fact there was an element of frustration and that HMRC were trying to push for a meeting. Mr Garrard further points to the language Mr Spranklen used in what emerged from the meeting of having his belief "reinforced" or "consolidated".

54. We disagree with the appellant that any of these matters indicate that Mr Spranklen had, despite the evidence he gave to the contrary, reached the view that the evidence he had prior to the meeting of 20 April 2010 was sufficient evidence of the relevant fact relating to the interpretation of the "total" column in the diary. His statement on 8 December 2009 that he "would" issue an assessment was obviously conditional on the appellant not attending the meeting. The non-attendance at a meeting he was invited to would itself be a new piece of evidence that might be taken into account in evaluating sufficiency of evidence of a fact. It does not imply that at that point in time Mr Spranklen thought there was sufficient evidence of the relevant fact and that therefore the last piece of evidence of sufficient weight was already before the Commissioners. The fact that Mr Spranklen held a belief or suspicion of under-declaration at an earlier point in time which was later reinforced, or consolidated is not inconsistent with taking the view at the earlier point in time that there was insufficient evidence of the fact.

55. As to the appellant's argument that even if the nuances of the answers given at interview were sufficient to distinguish them from earlier answers then it was *Wednesbury* unreasonable to conclude that they were sufficient evidence to justify assessing, this amounts, in essence, to an attack on the best judgment of the assessment that was in fact made. This does not take the matter further because that matter is not in issue in this hearing which concerns the application of the one year time limit. But, the appellant's argument by reference to [20] and [21] of the decision in *Carbondesk* presents, on the face of it, a more promising angle to approach the issue.

56. There Judge Herrington confirmed, in the context of a submission that the test of whether it was perverse or wholly unreasonable of the officer to treat further material as the last piece of evidence of sufficient weight was not based on the question of the reasonableness of the decision to request the further information but is based on the sufficiency of the evidence that was obtained as a result of the request.

> "[20]…The assessing officer therefore takes the risk, if a request is made for further information, that the information received is not of sufficient weight and therefore, with hindsight, the decision not to make an earlier assessment without it is to be regarded as perverse or wholly unreasonable.
>
> [21] I therefore reject Mr Kinnear's [HMRC's] submission that whether the further material when received changes the preliminary view of the officer is not material. *Pegasus Birds* makes it clear that the tribunal must determine when the assessing officer received the last piece of evidence which in the officer's opinion was of sufficient weight to justify the making of the assessment. Therefore, if the further investigations produce nothing of material significance the result must be that that the last piece of evidence was received before the officer asked for the further information."

57. We agree with this conclusion and in doing so make the following observations. The highlighted risk does not arise because the officer has been wholly unreasonable or perverse in not accepting the sufficiency of the earlier evidence (before the information request) was insufficient; the officer may or may not have been. Rather, it is the fact that if there is no new information thrown up by the request then, by definition, as pointed out by [21] of the decision, the earlier point in time prior to the information request will be the time at which the last piece of evidence emerged which must be taken to have been sufficient (assuming no challenge to best judgment) in the opinion of the Commissioners of the fact justifying the assessment that was made. The failure to make an earlier assessment will be wholly unreasonable or perverse in the sense that any assessment which was made when there was, more than a year earlier, evidence of sufficient weight in the opinion of the Commissioners of the fact justifying the assessment would be.

58. The other point to bear in mind is whether it is correct as a matter of fact that a nil or unsatisfactory response to an information request will not amount to a new piece of evidence itself (which may then be regarded as the "last piece of the puzzle".) See for instance [78] of decision in *Carbondesk* where the fact that none of the additional information envisaged was provided and where it was said the officer was then entitled to assume that if it did not exist then this was a factor that could be taken into account. It must also be acknowledged that on the actual facts of that case the officer did get additional information following the request so the risk point did not arise for decision.

59. The appellant's argument on the basis of the above paragraphs from *Carbondesk* is that if the further information sought was not of sufficient weight then the "last piece of the puzzle" must by definition have been presented to the Commissioners earlier.

60. For the reasons set out above at [48] the answers given were relevant to the fact in question. The sufficiency or weight was different in that following the request the appellant did attend a formal meeting with his agent and did give information in circumstances where his answers could be given more weight.

61. The appellant has not satisfied the burden on it to show the assessment was out of time. The one year time limit started on 20 April 2010 being the date the last piece of evidence of sufficient weight of the relevant fact which justified the assessment came to the Commissioners' knowledge. The assessment made on 9 March 2011 for periods beginning 1 February 2006 was therefore within time and is upheld. The penalty amount determined on the basis of the assessment (we had already determined in the Decision that the dishonest evasion penalty had been validly imposed in principle) was therefore assessed in the correct amount and is also upheld.

Conclusion

62. The appeal on the issue of time limits is dismissed. The assessments stand in the amounts raised. The dishonest evasion penalty (determination of which was held over pending the question of which assessments were in time) is upheld in the amount raised.

63. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2016