[2016] UKFTT 0763 (TC)

TC05490

Appeal number: TC/2015/06973

VAT – Registration – Belated Notification Penalty – Assessment – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SNAR ASSOCIATES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MR JOHN CHERRY

Sitting in public at Fox Court, London on 5 September 2016

Mr Steve Rampat for the Appellant

Rita Pavely, officer of HM Revenue and Customs, for the Respondents

With supplementary material provided by the Respondents on 4 November 2016

DECISION

Introduction

1. This is an appeal brought by SNAR Associates Limited, the appellant, against a decision of HMRC dated 20 November 2013. The decision was that the appellant: a) was required to be registered for VAT for the period 01 July 2003 to 31 July 2008; b) was assessed to pay VAT in the sum of £46,342 in respect of the same period; and c) was liable to pay a penalty in the sum of £3,475.00 for failure to notify this liability at the rate of 15% of the net tax liability but mitigated by 50%.

Permission to appeal out of time

2. The appellant filed its appeal against the decision on 20 January 2016. This was considerably later than the 30-day time limit for appeals provided under section 83G of the Value Added Tax Act 1994 ("VATA") which period expired on 20 December 2013.

3. At the beginning of the hearing Mr Rampat, director of the appellant, applied to the tribunal for permission to bring the appeal out of time pursuant to Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Rules'). Mr Rampat relied upon the agreed bundle of correspondence and documents provided by HMRC.

4. Mr Rampat, on behalf of the appellant, gave two main reasons for the delay of two years and one month in filing the appeal at the tribunal. The first was that he continued in correspondence with HMRC throughout the period 2014 to 2016 but was confused by the alternative routes to challenge the decision of 20 November 2013. The second was that he was awaiting HMRC to provide information he had requested during this two-year period.

5. As early as 16 December 2013 Mr Rampat had written to HMRC regarding the 20 November 2013 decision. A copy of that letter was no longer available. However, in an undated letter received by HMRC on 3 February 2014, he wrote to HMRC's VAT Registration Service and stated, 'We refer to our previous letter dated 16th December 2013 and after discussions with Denise Flindall, we can confirm our appeal against the VAT claim and would appreciate our hearing heard by an Independent Tribunal. Kindly advise the next stage or process to take place.'

6. In a letter dated 12 February 2014 HMRC wrote to Mr Rampat asking him to set out in writing the reasons for his appeal. In a letter dated 23 February 2014 Mr Rampat stated his grounds of appeal as: '1. The period covered in the assessment; 2. The method of calculation'.

7. Thereafter the appellant relied upon a chain of correspondence between himself and HMRC between February 2014 and June 2014. The correspondence concerned the two avenues of challenge available to the appellant as were set out in the original decision letter of 20 November 2013. These avenues were a review by an HMRC officer or appeal to the independent tribunal. He submitted that the subsequent

correspondence with HMRC concerned the preferable route to follow. He also submitted he relied upon the advice and guidance of HMRC to clarify which avenue to pursue.

8. The correspondence culminated in the appellant first filing a notice of appeal to the tribunal on 14 July 2014. The grounds of appeal were those set out in his letter of 23 February 2014. The notice of appeal was returned by the tribunal as it did not enclose a copy of the decision letter or review conclusion letter. On 12 August 2014 the appellant was advised by letter from the tribunal that a copy of such a decision or review letter was required if he had received one and also that further and better particulars of the grounds of appeal were required. Mr Rampat had stated in his covering email to his notice of appeal that he had not received any letter from HMRC and that it had all been done verbally and by telephone. He had stated within his notice of appeal that the date of decision was 26 June 2014 and the date of HMRC's conclusions of review was 30 May 2014. During the course of the hearing he accepted that the decision in question was in fact that of 20 November 2013 and that no review had ever been conducted.

9. Thereafter, from August 2014, he contacted HMRC by phone requesting a copy of the review decision believing that such a review decision either existed or was awaited. He relied upon one letter of HMRC dated 30 May 2014 which stated it had referred his case to the Review and Appeal Unit for consideration. During the latter half of 2014 and 2015 he continued to believe that he was awaiting the conclusions of review from HMRC for his appeal to proceed. He contacted the tribunal orally and by email in 2015 and eventually he was advised to send the decision letter of 20 November 2013. This he did by attaching the decision letter when on 12 January 2016 he re-filed his notice of appeal. The notice of appeal itself was identical to that of 14 July 2014, including retaining the old date.

10. HMRC did not oppose the appellant's application. Ms Pavely accepted there was a degree of confusion on the appropriate avenue for the appellant to pursue and an ongoing discussion between HMRC and Mr Rampat regarding review or appeal. She also accepted there had been some delay on HMRC's part in handling the matter and that there was confusion as to whether the appellant was requesting a statutory review or requesting an appeal.

11. At the hearing the tribunal granted permission to admit the appeal under Rule 20(4)(b) and extended time for the notice of appeal under Rule 5(3)(a) of the Rules.

12. These are our reasons.

13. The tribunal applied the overriding objective under Rule 2(1) of the Rules to deal with cases fairly and justly. It also considered the factors set out in Rule 2(2) namely:

(2) Dealing with a case fairly and justly includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to

participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.

14. The tribunal notes the useful summary provided by the First Tier Tribunal at paragraph 4 of its decision in *Assaf Ali Butt v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 95 (TC):

'In terms of the tests and general approach that we must adopt in dealing with applications to appeal out of time we have considered the recent decisions of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537 and *Denton v T H White Ltd* [2014] EWCA Civ 906, and those of the Upper Tribunal in *McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC), *Data Select Limited* [2012] UKUT 187 (TCC) and *Leeds City Council* [2014] UKUT 350 (TCC). Taking together all those decisions, we concur with the conclusion reached by this Tribunal in the recent case of *Aeron Mathers* [2014] UKFTT 893 (TC) (at [25]):

> "… briefly, we consider the main points to be that:
>
> - even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
> - as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
> - we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and
> - in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select*. Those points are that we should address the questions:
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> (1) What is the purpose of the time limit?
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> (2) How long was the delay?
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> (3) Is there a good explanation for the delay?
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> (4) What will be the consequences for the parties of a refusal to extend time or the grant of such an extension?
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> - We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and

- It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times."'

15. The approach we adopted was therefore to concentrate upon the criteria set down by Mr Justice Morgan in *Data Select* at paragraph 34 of the decision:

> As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

16. However, the tribunal considered all the circumstances of the case and also noted the Court of Appeal's judgment in *BPP Holdings v HMRC* [2016] EWCA Civ 121; [2016] 1 WLR 1915 in which the Senior President of Tribunals stated at paragraph 15-16 and 37-38 of his judgment:

> 15. There are two conflicting decisions of the UT about the principles that are to be applied when non-compliance with rules and directions falls to be considered by a tax tribunal. The first in time is the decision of Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), [2014] STC 973 and the second is the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) where he declined to follow Judge Sinfield's approach. The *Leeds* decision was promulgated after Judge Mosedale's determination in this case and accordingly she could not have known of it. Judge Bishopp followed his earlier reasoning in *Leeds* in coming to the conclusion that the FtT in this case had erred in law.16. The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.
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> ……..
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> 37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
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> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational

basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

17. We consider in turn each of the *Data Select* criteria as applied to the facts of this case. The purpose of the time limit in which to bring an appeal is the pursuit of a clear public interest in the finality of decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion. As time limits, whether imposed by statute, tribunal rule or tribunal directions, serve the public interest, compliance is normally to be expected. This decision is not the forum in which to analyse the potential effect of the stricter approach to compliance with rules and directions mandated by *BPP Holdings* when balancing or giving weight to the competing factors in *Data Select*. Indeed at paragraph 44 of the Court of Appeal's judgment in *BPP Holdings*, His Lordship, the Senior President declined to analyse *Data Select*. However, the fact that the deadline for appeal in this case is set by statute, namely section 83G of VATA, rather than the Rules, only emphasises its importance.

18. The length of the delay in this case before an effective notice of appeal was filed and accepted by the Tribunal on 12 January 2016 was extraordinary. It amounted to two years and one month from the deadline of 20 December 2013. We note that the Upper Tribunal in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at paragraph 96 stated that 'a delay of more than three months cannot be described as anything but serious and significant.' We also note that the Upper Tribunal in *O'Flaherty v Revenue and Customs Commissioners [2013]* UKUT 0161 (TCC) stated that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

19. Nevertheless, we do have regard to the fact that the Notice of Appeal that was filed in 12 January 2016 was identical to that of 14 July 2014 other than that it appended the correct decision to be appealed. We also have regard to the fact that the appellant indicated its desire to appeal to the tribunal in a letter to HMRC on 3 February 2014 following a letter on 16 December 2013. While the parties did not have that letter to hand, it does appear that the decision of 20 November 2013 was at least queried by the appellant within 30 days.

20. In terms of the appellant's explanation for the delay, we accept that Mr Rampat was genuinely confused between the various routes of challenge open to him, review by HMRC or appeal to the tribunal. We also accept that he genuinely relied upon advice from HMRC as to which avenue to pursue and that he relied on advice from HMRC and the tribunal as to how to bring his appeal. We also accept that he believed that he was awaiting information from HMRC before he could bring his appeal, in particular, a conclusions of review letter which he believed to be outstanding.

21. We have some sympathy for Mr Rampat's predicament. Nonetheless, it must be appreciated that the appellant was properly informed of its options and the timescales as early as the decision letter of 20 November 2013. While it is understandable, particularly where one has no legal or other professional representation, to rely on advice and assistance from HMRC and the tribunal it would rarely be reasonable solely to do so. Ultimately, Mr Rampat accepted that the conduct of the appeal was the appellant's responsibility alone. To the extent that he was unclear as to information provided or options available it was his duty to inform himself on behalf of the company.

22. What can be said is that it may have been reasonable for Mr Rampat to continue to believe that he was still awaiting an outstanding review, or at least that the time period for filing an appeal had not expired, during the course of correspondence up to June 2014. The contrary was never expressly indicated to Mr Rampat by HMRC which may have led him into a false sense of reassurance. Correspondence from HMRC after the expiry of a deadline which fails explicitly to point out that a deadline has expired and that immediate action should be taken to rectify deficiencies, always carries the risk that it is misunderstood. It may be taken by taxpayers to be a tacit acceptance by HMRC that the deadline is agreed to be extended, even though HMRC has no such power. It may also be taken by taxpayers to be a tacit acceptance that further action is required on HMRC's part before the appeal can be filed when it is not. However, it must be repeated that the appellant holds the responsibility to properly inform itself of the deadlines and options available and it is likely to be a rare case where this reason alone could found a successful application for permission to appeal out of time.

23. While Mr Rampat only checked with HMRC or the tribunal infrequently as to the position in the 18 months following the return of his original notice of appeal in August 2014, he did at least do so and the substance of his appeal did not change as a result.

24. In terms of the consequences for both parties, HMRC will not be prejudiced beyond the general requirements of defending any appeal. They did not suggest that they would be unable to reply to the substantive points raised nor submit that documents or evidence relevant to the appeal had become unavailable. The consequences for the appellant of refusing permission would be dramatic in the sense that the appeal would fall away and the assessment and penalty would stand without consideration of the merits of the appeal.

25. We place significant weight on HMRC's lack of opposition to the application for permission and fair concession that it had at times been slow to respond to the appellant and provide information requested or at least to clarify that nothing was outstanding. We also note that HMRC fairly conceded it had delayed substantially in replying to the appellant in a previous period of 2009 to 2012 before the decision was promulgated. HMRC's delays in dealing with the appellant are touched upon again below.

26. Weighing all those factors in the balance we considered that it was in accordance with the interests of justice and the overriding objective to extend time for filing the notice of appeal and grant permission for the appeal to be made out of time.

Substantive Appeal

The law

27. Pursuant to paragraphs 1(a) of Schedule 1 to the Value Added Tax Act 1994 ("VATA") a person is required to register for VAT if at the end of any month the value of their taxable supplies exceed a certain threshold amount (from 2003 to 2008 the amounts were £56,000-£67,000) in the period of one year then ending. The person is obliged to notify HMRC of the liability within 30 days of the end of the relevant month, pursuant to paragraph 5(1) of Schedule 1 to VATA.

28. Section 67 of VATA is now repealed but was in force in respect of the relevant time period of 2003 to 2008 (although it was later repealed for any relevant obligation arising on or after 1 April 2010 by virtue of paragraph 25(f) of schedule 41 to the Finance Act 2008 and article 2 of SI 2009/511 and the penalty provisions are now governed by schedule 41).

29. As it is applicable to this case, section 67(1) of VATA provided that in any case where a person fails to comply with paragraph 5 of Schedule 1 (liability to notify or registration for VAT), he shall be liable, subject to subsection (8), to a penalty equal to the specified percentage of the relevant VAT.

30. For the purposes of section 67(3) of VATA, the relevant VAT was the VAT (if any) for which the taxpayer is liable for the period beginning on the date with effect from which he is required to be registered and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of his liability to be registered.

31. Pursuant to 67(4) the specified percentage for the penalty was 15% of the relevant VAT where the relevant period was greater than 18 months.

32. Pursuant to subsection 67(8) VATA, the failure to comply for the purposes of section 67(1) shall not give rise to liability to a penalty if the person satisfies the commissioners or, on appeal, a tribunal that there is a reasonable excuse for his conduct.

33. Pursuant to section 70(1) VATA, in relation to penalties under section 67, the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

34. Section 73(1) of VATA empowers the Commissioners to the best of their judgment to assess the amount of VAT due from a person who has failed to make any returns required under VATA or where such returns are incomplete or incorrect.

35. The penalty to which a person was liable under section 67 is assessed and notified to the person pursuant to section 76(1)(b) of VATA.

36. The time limits for assessments to be made under sections 73 and 76 of VATA are provided under section 77 of VATA.

37. Section 77(2) of VATA provides that an assessment under section 76 may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined. Pursuant to section 77(4) and (4A)(c) an assessment may be made at any time not more than 20 years after the end of the prescribed accounting period in a case involving a loss of VAT attributable to a failure by the person to comply with a notification obligation (such as the obligation to notify the Commissioners of liability to be registered for VAT under paragraph 5 or 6 of Schedule 1).

38. Section 83(1) of VATA provides that, subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to certain matters. These include: pursuant to 83(1)(n), any liability to a penalty or surcharge by virtue of any of sections 59 to 69B; and pursuant to 83(1)(p)(i), an assessment or the amount of an assessment under section 73(1) or (2) in respect of period for which the appellant has made a return under the Act; pursuant to 83(1)(q), the amount of any penalty, interest or surcharge specified in an assessment under section 76; and pursuant to 83(1)(r), the making of an assessment on the basis set out in section 77(4).

The facts

39. The Tribunal received a bundle of documents from Officer Pavely which was agreed by the appellant. Mr Rampat also gave oral evidence in support of his appeal.

40. The tribunal finds the following facts:

41. The appellant company was incorporated in 1999. While not a firm of chartered, certified or otherwise qualified accountants, it provided services to firms who needed accountancy assistance. It provided management and collection of accounts, credit control, finance, accounting services and book keeping. The appellant company was never registered for VAT.

42. On 6 July 2009 HMRC wrote to the appellant company stating that they had been unable to trace a VAT registration for the business and asking it to enclose a completed questionnaire which, among other things, would assist in confirming the status of the business and whether it was trading below the VAT registration threshold. Following further contact, Mr Rampat wrote to HMRC on 21 June 2010 enclosing a fax containing turnover information for the company for the years 2003-2009 with the VAT allowance for each year.

43. Mr Rampat, as a result of further phone contact with Officer Pilditch of HMRC, believed that the company would need to be registered and deregistered for the period 2003-2008 and there would be a liability for tax. Even though Mr Rampat relied upon

the wrong VAT threshold, the schedule he had faxed acknowledged that the appellant was above the threshold. At this time he never spoke to HMRC about the appellant's purchases or expenses but the only discussion was as to sales and turnover.

44. Between June 2010 and 4 October 2012 there was no further contact between HMRC and the appellant, although Mr Rampat believed HMRC would register and de-register the appellant and notify him accordingly of any liability. On 4 October 2012 a VAT registration letter was sent by HMRC to the appellant in almost identical terms as that of 6 July 2009. On 1 December 2012 Mr Rampat received a letter from HMRC stating that the appellant did indeed exceed the VAT threshold for the years 2002-03, 2003-04, 2004-5 and 2005-06.

45. As a result of further correspondence, on 18 February 2013 Mr Rampat provided a schedule of sales and purchases for the company as requested. The document differed from the information provided on 21 June 2010 in that it provided a table with a) purchase figures in addition to sales figures ie. figures in respect of those expenses which would be subject to VAT, and b) 'Variance' figures being the difference between sales and purchases. The information covered the years 2002-03 to 2011-12.

46. On 17 May 2013 HMRC wrote to Mr Rampat to state that they had analysed the figures and could advise that the appellant had exceeded the VAT threshold beginning in May 2003 and should have registered for VAT with an effective date of registration as 01 July 2003. Mr Rampat was also advised that the company remained over the VAT threshold for compulsory registration until 31 July 2008. The letter enclosed a breakdown of monthly sales from September 2001 to August 2011 based on averaging yearly turnover, and whether or not the sales exceeded the relevant threshold figure for VAT registration during each period. A further schedule was enclosed of monthly VAT inputs and outputs for the months July 2003 to July 2008. The total Output Tax was calculated to be £53,081.94 with input tax of £6,739.09 with VAT therefore stated to be due from the appellant in the sum of £46,342.85. The letter also indicated that the appellant would be liable to a penalty of up to 15% of the VAT underpaid.

47. Following correspondence in June 2013, during which Mr Rampat advised that he would be asking an accountant to look at HMRC's figures, a meeting was arranged with HMRC on 7 October 2013. During that meeting HMRC explained to Mr Rampat the rolling turnover figures to show how the company had exceeded the VAT threshold. The belated notification penalties due, at 15% of the unpaid VAT, were also addressed. It was explained that there may be scope to reduce these penalties by up to 50% due to a few delays in the processing.

48. Further to this meeting HMRC issued the decision of 20 November 2013 as addressed above, which is the subject of the appeal.

49. The subsequent chronology between November 2013 and January 2016 is also addressed above.

50. On 11 May 2016 the Appellant provided a list of documents (a 'list') to the Tribunal. This 'list' enclosed a schedule of sales and purchases turnover. The 'list' stated that this same information contained in the schedule had been sent on 28 October 2013 and had not been taken into the overall calculations by HMRC as the purchases had been excluded.

51. The 'list' also stated 'The Case started way back in 2008 by Mike Popperton who worked for the Romford Offices and he requested information relating to the turnover and purchases of SNAR Associates Ltd which was faxed to him and no action was taken until 2013 when D. Flindall contacted me. It appears HMRC failed to include the purchases in its calculations. I was inform (sic.) that I have to register and de register for VAT which has not happened as indicated by Mr Popperton.'

52. The schedule now provided by Mr Rampat of turnover and purchases was for the periods 2002-03 to 2010-11. The Sales / Turnover figures were identical to those provided for the company in the schedule provided by Mr Rampat on 18 February 2013. However the purchases figures were far higher and hence the variance figures far smaller than those provided previously for each year. Indeed the total variance for the period 2002 to 2011 was said to be a loss of £13,712. In addition the table provided a 'VAT analysis'. This was based on 15% of the sales and purchases figures. As a result of this purported loss, the total figure for VAT was said to be a refund of £2,056.80 due from HMRC.

53. Mr Rampat very fairly accepted during the course of the hearing however that this updated schedule and VAT analysis could not be right. While the total figures for sales and purchases were taken from the corporation tax returns for the appellant company and were not disputed, the VAT analysis could not be correct. First the rate of VAT was not 15% during the relevant years. Second, most of the value of the purchases of the company set out in the schedule were not subject to VAT, for example the consultancy fee paid to Mr Rampat (who was not VAT registered) nor rent. Mr Rampat accepted that the far smaller sums for VATable purchases and expenses (such as mobile phones and some travel) as originally recorded by himself and HMRC in their earlier schedules were, for the most part, the accurate figures.

Submissions of the parties

Appellant

54. In light of his concession regarding the figures for VAT that he now largely agreed with HMRC, Mr Rampat no longer pursued his original grounds of appeal regarding the period the assessment covered and the method of calculation.

55. Furthermore, as regards section 77(2) of VATA, Mr Rampat accepted HMRC had two years to make the assessment under section 76 from when they finally determined the VAT due which could only be done by obtaining all the necessary information in order to calculate the VAT. This was at the earliest in February 2013 when he provided figures for his VATable expenses and outgoings. HMRC could not have determined this in 2009 or 2010 purely based on the corporation tax returns

because only when it received the information as to the Vatable expenses could it determine the amount of the assessment.

56. Nonetheless Mr Rampat submitted that HMRC was out of time to assess him for the VAT said to be due as they did in November 2013. He submitted that the law as it was in 2009 should apply and that HMRC was only entitled to go back two years, although the law had subsequently changed to allow HMRC to go back four years or 20 years in the case of deliberate behaviour. Therefore he submitted that the assessment to VAT due and payable of £46,324.69 for the periods 2003 to 2008, as set out in the 20 November 2013 decision letter, should be overturned as it related to periods between five and ten years before.

57. He submitted he had been honest and reasonable with HMRC throughout and had not hidden information and it was unfair to raise such a late assessment.

58. He said that his failure to notify HMRC was through oversight and was not deliberate. He also submitted that HMRC had been very slow between 2009 and 2012 to give him information and respond to the information he had provided.

He submitted that the penalty should be reduced beyond the 50% HMRC had allowed in mitigation. He relied on his good cooperation, that his actions were not deliberate and that HMRC had delayed. He submitted there had to be flexibility on both sides. Although there had been VAT due of around £46,000, a failure to notify of an obligation for five years and he had failed in an obligation to notify and submit returns, this should be outweighed by any subsequent dilatory conduct by HMRC. Therefore the penalty should be reduced to nil.

HMRC

59. HMRC submitted that section 77(4) of the VATA empowered them to make the assessment in 20 November 2013 relating to the relevant periods between 2003 and 2008 because they were empowered to make assessments in relation to periods up to 20 years previously.

60. They submitted the appellant had no reasonable excuse for the failure to notify HMRC of the appellant's requirement to register for VAT so that the 15% penalty under section 67 VATA should stand. They submitted it would be reasonable to expect that a diligent business would be aware of its obligations and be aware of the potential requirement to register for VAT. HMRC submitted that they provide guidance on VAT registration and this would have been publicly available through notices which could be sent out on request such as notice 700. They noted that under section 71 VATA, any reasonable excuse for failure to notify could not be based upon reliance on a third party nor acting in good faith.

61. In relation to the mitigation of the penalty by 50% HMRC submitted that this was the proper sum and it should not be further reduced. It was submitted that HMRC had taken into account both Mr Rampat's cooperation with HMRC throughout by providing figures and attending meetings. The mitigation of the

penalty was said to be broken down as 25% for cooperation and 25% for voluntary disclosure.

62. HMRC further submitted that for the purposes of section 73 VATA, the assessment for the periods 2003 to 2008 had been made to the best of their judgment as it relied on the figures provided by Mr Rampat even if there were a couple of errors between their figures and his. HMRC did accept that they would however revisit two figures which were inconsistent between the figures provided by Mr Rampat in February 2013 and the schedule provided by HMRC in July 2013.

63. Further to this concession, HMRC were invited to provide clarification on these figures following the hearing, and these figures were provided on 4 November 2016.

Discussion and decision

64. The first issue to be determined in the substantive appeal is whether or not the Appellant was liable to be registered for VAT with effect 01 July 2003 to 31 July 2008. The burden would be on the appellant to demonstrate that the decision that he was liable to registration was incorrect.

65. During the course of the hearing Mr Rampat fairly conceded that the Appellant's turnover for a rolling 12 month period beginning in May 2003 reached £56,543 exceeding the threshold for registration at that time of £56,000. The appellant therefore failed to notify HMRC of its liability to VAT registration with effect from 01 July 2003 as required under the provisions of paragraphs 1 and 5 of Schedule 1 to VATA.

66. Mr Rampat, again fairly conceded that the appellant remained liable to be registered until July 2008, as the company's rolling turnover for a 12 month period remained above the threshold for registration for all that time (by July 2008 the threshold was £67,000).

67. The second issue is the extent of the VAT assessment for failure to submit a return. As noted above, Mr Rampat now accepts that the schedules of turnover provided by himself and HMRC in 2013 were largely accurate and the updated figures he provided in May 2016 took into account many expenses which were not subject to VAT. Therefore he conceded that the assessed sum of £46,342, was largely accurate.

68. Following the provision of updated figures from HMRC subsequent to the hearing, HMRC now submit the appropriate sum is to be reduced to £45,614.79. HMRC were of course entitled to rely on the best of their judgment at the time of the assessment. While the tribunal does not therefore allow the appeal in this respect, HMRC will no doubt correct the assessment (and hence the penalty which is calculated at 15% thereof and mitigated by 50% should be reduced to £3,421).

69. The third issue is HMRC's ability to raise an assessment in 2013 in respect of periods from 2003 to 2008. Under section 77(4),(4A)(c) and (4C)(a) of VATA, HMRC was entitled to make such an assessment because a failure to notify HMRC of

the liability to register for VAT was a case involving a loss of VAT attributable to a failure by the appellant to comply with a notification obligation. Under those provisions HMRC did so well within the twenty-year period following the prescribed accounting periods. This twenty-year period has been provided for under section 77(4) since the legislation was enacted and was in force throughout the periods 2003-2008 and at the time of the assessment in 2013.

70. For the purposes of section 77(2) of VATA, the assessment made in November 2013 was within two years beginning with the time when the amount of VAT due for the accounting period had been finally determined. The amount of VAT was finally determined by HMRC on 17 May 2013 following the provision of schedules by the appellant on 12 March 2013 which set out his purchases and expenses which were liable to VAT.

71. We therefore reject the appellant's argument that HMRC was out of time to raise the assessment.

72. The fourth issue is whether or not the tribunal has jurisdiction to entertain an appeal against the assessment to VAT raised. Pursuant to section 83(1)(p)(i) of VATA there is only a right of appeal to the Tribunal where assessments raised under section 73(1) are based on an incorrect or incomplete return. In the appellant's case the assessment to VAT was made based upon a failure to make a return. Therefore, further and in any event, there is no right to appeal to the tribunal regarding the assessment to VAT or its amount.

73. The fifth issue is the appellant's liability under section 67 VATA to the penalty for the failure to notify its requirement to register for VAT for the period 01/07/03 to 31/07/08 or whether the Appellant had a reasonable excuse such failure.

74. The Tribunal is satisfied that the appellant should have notified its liability to register for VAT by July 2003. HMRC first became aware of this in July 2009 and then again in October 2012. The appellant is liable to a belated notification penalty under the provisions of section 67 of VATA.

75. HMRC have satisfied the burden to prove that the penalty is due. The appellant did not attempt to persuade the tribunal that he had a reasonable excuse for his failure to notify HMRC of his liability to register for VAT. Mr Rampat fairly conceded that it was his responsibility to be aware of the potential requirement to register. A reasonable and diligent businessman and director, in the circumstances which pertained for the appellant and Mr Rampat, would have been aware of the requirement to register for VAT and so notified HMRC. Therefore the appellant could not satisfy the Tribunal there was any reasonable excuse for the failure.

76. The sixth and final issue is the amount of the penalty as assessed under section 76(1)(b) VATA.

77. HMRC, have satisfied the Tribunal that the penalty was due at the rate of 15% of the VAT assessed in accordance with 67(4)(c) VATA. This is because the period beginning on the date from which the appellant was required to be registered and

ending on the date on the date on which the commissioners became fully aware of his liability to be registered exceeded 18 months for the purposes of section 67(3)(a) VATA.

78. As recorded above, HMRC had submitted that the 50% mitigation was appropriate. The appellant submitted the penalty should be reduced to nil in accordance with section 70(1) VATA. The burden is on the appellant to satisfy the Tribunal that the amount of the penalty should be reduced to any other sum as it thinks proper.

79. In our view the amount of the penalty was properly reduced by 50% and the mitigation accepted by HMRC was justified. The mitigation and amount of the penalty rightly reflect the extent of the appellant's voluntary disclosure of material and figures to HMRC. It also rightly reflects the appellant's cooperation with HMRC by attending a meeting and responding to requests. However, the fact remains that the appellant remained liable to VAT registration for a period of five years and at no point did he notify HMRC of his liability to register, nor therefore of course the VAT to be paid. This is a substantial period of time.

80. While the appellant is properly to be held responsible for its failures one cannot leave the decision without noting the long and unexplainable gap of three years between 2009 and 2012 during which HMRC failed to pursue their enquiries into the appellant and its VAT status. Mr Rampat was, in our view, right to be disappointed in HMRC's conduct.

81. While the appeal is dismissed, as noted above, as a result of HMRC's provision of updated figures for the assessment, we would expect the amount of the assessment and the consequent penalty to be adjusted accordingly.

82. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 15 NOVEMBER 2016