TC05408

Appeal number: TC/2015/06611

VALUE ADDED TAX - Returns not filed in time - Prime assessments made by HMRC - Returns filed by taxpayer more than 4 years after due dates - Overpayment situation - Claim for repayment - Claim refused as outside 4 year statutory time limit - VAT Act section 80(4) - Application to strike-out the Appeal - Rule 8(3)(c) - Appeal struck-out

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK DOHERTY and GERARD LINDEN (trading as 'D & L CONTRACTS') **Appellants**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at the Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on Wednesday 31st August 2016, with further written submissions from the parties.

Mr Colum McLoughlin of MJM McLoughlin LLP, Chartered Accountants, Belfast, for the Appellants

Mr Dermot Ryder and Mrs Sharon Spence, Officers of HMRC, for the Respondents

DECISION

1. This is my decision in relation to HMRC's application dated 8 January 2016 to strike out the appellants' appeal under Rule 8(3)(c) of *The Tribunal Procedure (First–tier Tribunal) (Tax Chamber) Rules 2009* (SI 2009/273).

2. The appellants registered for VAT with effect from 8 September 2000.

3. They failed to submit VAT returns for the five consecutive periods from 09/07 to 09/08 inclusive.

4. Given the appellants' failure to make those returns, HMRC was entitled to assess the VAT for those periods, and it did so. Those assessments were prime assessments, which were calculated and raised automatically.

5. Some years later, the assessments were withdrawn upon receipt by HMRC of the appellants' VAT returns for these periods.

6. The position was as follows:

Period	Date assessment raised	Sum assessed	Return received	Sum assessed
09/07	16.11.07	4,023	28.8.14	(2,904)
12/07	15.2.08	4,744	28.8.14	(1,949.40)
03/08	16.5.08	5,015	28.8.14	(423.50)
06/08	15.8.08	5,836	28.8.14	(44.66)
09/08	14.11.08	5,912	28.8.14	604.14

7. There had been an overpayment of VAT of £20,971.51.

8. The five assessments were each ostensibly raised pursuant to section 73(1) of the Value Added Tax Act 1994 ('the 1994 Act') although it emerged, following the hearing, that the two latter assessments (06/08 and 09/08) included an amount under section 73(8) of the 1994 Act which entitles the Commissioners to specify in an assessment *'an amount of VAT greater than that which they would otherwise have considered to be appropriate'*.

9. I adopt HMRC's description of section 73(8) as 'the inflated assessment regime'. HMRC issued '100% Inflated Assessment Advice' for each of those two periods which stated: 'Action is required to establish a true liability for the above trader. Assessments inflated by a factor of 100% will continue to be produced until the LVO Process Unit Seat is notified of a base figure for future assessments'.

10. A claim in relation to the overpaid amount was made.

11. On 22 October 2014 HMRC refused to credit the overpaid amount, on the basis that each of the returns had been submitted more than 4 years after the end of the prescribed accounting period, so that section 80(4) of the 1994 Act operated to prevent it from giving any such credit. It was said that whilst the legislation gave the appellants an entitlement to claim a refund, HMRC was not liable to repay since the

claim was rendered more than four years after the end of the prescribed accounting period.

12. Insofar as material, section 80 of the 1994 Act reads as follows:

> **Recovery of overpaid VAT.**
>
> (1) Where a person-
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> (1A) Where the Commissioners-
>
> (a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, have brought into account as output tax an amount that was not output tax due,
>
> they shall be liable to credit the person with that amount.
>
> [...]
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> [...]
>
> (4) The Commissioners shall not be liable, on a claim under this section--
>
> (a) to credit an amount to a person under subsection (1) or (1A) above, or
>
> (b) to repay an amount to a person under subsection (1B) above,
>
> if the claim is made more than 4 years after the relevant date.
>
> [...]

13. On 20 November 2014 the appellants' representatives made further representations, in summary:

(1) It was 'unclear' whether the assessments were made to best judgment;

(2) The partner responsible for the administration of the business was Mr Linden, and he had been suffering from serious ill-health from early 2007 onwards.

14. Following a statutory review, HMRC concluded on 30 January 2015 that the original decision should be upheld.

15. There was further extensive correspondence throughout 2015, including the taxpayers' acceptance that Mr Doherty had consulted an accountant in 2012 (although it was not said exactly when in 2012) with a view to regularising his affairs, 'including almost 4 years of VAT assessments'.

16. The Notice of Appeal is dated 5 November 2015. The Grounds of Appeal, in full, are as follows:

> "1. Penalties in form of confirming assessments;
> 2. Procedure used to arrive at assessments not disclosed by HMRC despite requests;
> 3. Assessment procedures not arithmetically correct;
> 4. HMRC did not make any enquiries into business activity;
> 5. HMRC did not consider effect on housing market in Northern Ireland."

The Application to strike-out

17. *Rule 8(3)(c)* reads:

> " The Tribunal may strike out the whole or a part of the proceedings if - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding".

18. Insofar as relevant to the strike-out application, the Appellants' arguments, in summary, were as follows:

> (1) The assessments were not made to best judgment. HMRC did not consider all of the information available to it when making their assessments as required by case law, and therefore were invalid. In particular, HMRC had failed to consider information from 2 control visits;
>
> (2) Mr Linden had been suffering from ill-health.

19. Insofar as relevant to the strike-out application, HMRC's arguments, in summary, were as follows:

> (1) The appellants submitted their claim outside the statutory time period under section 80(4), in relation to which HMRC has no discretion;
>
> (2) When calculating prime assessments, 'the system will apply best judgment principles'. The prime assessments in this instance were representative either of the previous return figures or the taxable turnover of the business, and hence were made to best judgment.

20. Both parties approached the hearing as if it was a final hearing, and not the hearing of an interlocutory application. Although both parties submitted skeleton arguments, neither engaged squarely with Rule 8(3), and the question which the Tribunal was being asked to decide, at an interlocutory stage. Neither party engaged with the question of whether the taxpayers' assertion that the assessments were not made to best judgment was an assertion which could (even potentially) suffice to justify a full hearing, irrespective of section 80(4) of the 1994 Act.

21. Given this situation, both parties were permitted to make further 'brief written submissions', on 'no more than 2 sides of A4'. The intention of that order was clear: to deal, in as succinct a way as possible, with a point identified at the hearing and for which neither party was apparently prepared. Although both parties purported to comply with that order, neither in fact did. The appellants' representative submitted 4 pages. HMRC submitted two pages, but adopted the strategem of using such a miniscule font that their submissions were barely legible at an ordinary reading distance. Most unfortunately, this gave rise to correspondence including comparative

word counts aiming to demonstrate that HMRC had actually written more words than the appellants had. It need scarcely be said that a dispute (sic) of that kind imposed a wholly unnecessary burden on the Tribunal's resources. Neither party sought to vary my order, nor even had the courtesy to acknowledge that they had each decided, of their own initiative, and in their own different ways, not to comply with it. The situation is unimpressive. I nonetheless wish to assure the parties that I have considered all the submissions and the voluminous attachments to them. It is perhaps an irony, that the resolution of these issues at an interlocutory stage has probably resulted in no less a volume of paperwork and complexity of argument than if the matter had simply proceeded to a final hearing.

Discussion

22. Striking-out under Rule 8(3)(c) is discretionary. In *Revenue & Customs Commissioners v Fairford Group Ltd Plc (in Liquidation)* [2014] UKUT 329 (TCC) the Upper Tribunal (Simon J and Judge Bishopp) gave the following guidance, which binds me and which I must follow:

> "In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing ... A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable ... The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in Three Rivers, the strike out procedure is to deal with cases that are not fit for a full hearing at all." (Para. [41])

Best judgment

23. I turn first to consider whether the appellants' argument as to best judgment is one which carries a 'realistic' prospect of succeeding at a full hearing. Or, put another way, whether there is anything in this appeal, when it comes to the argument about best judgment, which is fit for a full hearing.

24. It is axiomatic that assessments raised under section 73(1) of the 1994 Act should be made to best judgment. The statute says so:

> **Failure to make returns etc.**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

25. The meaning of 'best judgment' is well-trodden ground. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015 the Court of Appeal said that 'best judgment' simply means 'to the best of their judgment on the information

available': see Para [10]. In that case, the Court of Appeal also expressly approved the decision of Woolf J (as he then was) in *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290:

> "What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them" (at p 292)

26. In my view, all the assessments were made to best judgment.

27. These were prime assessments. In its letters, HMRC set out a wholly conventional position in relation to these assessments, reflecting the long-standing practice where such assessments are based on one of two formulas, using centrally stored data concerning the trader's business and tax history, in comparison with the average liability and average taxable turnover of the other traders within the same trade group. The formulas are publicly available: see VAEC2140 to 2142 - 'VAT Assessments and Error Correction'; and also De Voil's *Indirect Tax Service* V5.132A.

28. The assessments (including those under the inflated assessment regime) were all produced by a computer, so there cannot be any question that it acted arbitrarily, dishonestly, vindictively, or capriciously.

29. I do not agree with the appellants' argument that the assessments were not made to best judgment since HMRC had not calibrated or adjusted its formula so as to take account of the taxpayers' figures for output tax in previous quarters.

30. In relation to the first two assessments (09/07 and 12/07) the latest return available to HMRC when assessing was 09/06. The returns for several of the immediately preceding periods - 12/06, 03/07, and 06/07 - were all missing. A similar situation affects the latter three assessments (03/08, 06/08 and 09/08). The latest return available at the time of those three assessments was 06/07.

31. As such, the appellants had not submitted returns for several successive periods. That was the cause of any alleged deficiency in the empirical information available to HMRC. The appellants cannot reasonably complain that HMRC should have considered information which it did not have.

32. Moreover, whilst there were claims for output tax in some previous quarters, some of which (but not all) produced an overall repayment situation, the amounts were of significantly varying amounts. The best that can perhaps be said is that some of the returns showed zero output tax, indicative that the taxpayers' business included some zero-rated work (such as building residential properties).

33. But that does not assist the appellants. It was not inconsistent with its 'main business activity' which was declared on the VAT 1 in 2000 as 'Building Contractors'. Moreover, it is actually consistent with what HMRC was told during the control visits on 7 June 2005, 9 March 2006 and 17 June 2008. HMRC knew that that the

partnership was 'mainly' a builder of new houses (zero-rated) but was also doing some standard-rated work on commercial premises (for instance, at Newtownards).

34. I do not see anything in any of the information available to HMRC which persuades me that HMRC should not have assessed in the way that it did. There was nothing - whether in the figures for previous quarters, or in the information gathered at the control visits - to enable a conclusion that the partnership's business was *wholly* zero-rated and should have been assessed in that way.

35. In terms of the formula, I do not agree that the appellants should have been categorised as a 'repayment trader' and that a 'repayment indicator' should consequently have been set (the effect of which would have been that missing returns would not have generated prime assessments). The appellants themselves accept that they did not at any material time satisfy at least one of HMRC's criteria for setting a repayment indicator (set out in Vat Reg 33400) - namely, that all returns for the past 12 months had been submitted.

36. The fact that the assessments, when compared with the eventual returns, turned out to be substantially incorrect does not mean that they had been made contrary to best judgment. Nor does the fact that a different methodology would or might have led to a different result compel any conclusion that the methodology adopted was so obviously flawed that it could not fairly be said to be made to best judgment.

37. Finally, and for the avoidance of any doubt, I do not consider that my conclusions as to best judgment are altered by the imposition of additional amounts under the inflated penalty regime, even though section 73(8) does not prescribe how the inflated amount ought to be calculated. The inflated assessment notices in this case are clear (i) that the assessments were being made under the inflated assessment regime; and (ii) the percentage was 100%.

The illness of Mr Linden

38. Given, as I have found, the assessments were all made to best judgment, I move on to consider the illness of Mr Linden, and whether anything which is said in that regard carries a 'realistic' prospect of succeeding at a full hearing.

39. Whilst sharing HMRC's sympathy for Mr Linden's situation, I have concluded that nothing said in this regard enjoys a realistic prospect of succeeding at a full hearing.

40. Whilst Mr Linden's illness may, as a matter of fact, have played a part in the late submission of returns (at least, until an accountant was instructed at some point in 2012), he was not a sole trader. During the relevant periods, the taxpayer was a two-member partnership. Whilst the partners, as between themselves, may have apportioned responsibility for various parts of the business, including the responsibility for tax filings, they were nonetheless (when it came to their relationship with HMRC) each responsible for complying with those obligations. In my view, Mr Linden's failure to make the filings on time did not exempt the partnership from doing so. The fact that Mr Linden may have concealed this from his partner is a matter entirely between the partners. It does not affect HMRC, for the simple reason that HMRC cannot be bound by the agreement between the partners.

The meaning and effect of section 80

41. I cannot accept the appellants' argument that section 80 of the 1994 Act has no application where (as here) the assessments have been withdrawn.

42. There is nothing in section 80 which says or suggests that the withdrawal of an assessment should disapply section 80(4). I was not referred to any authority on the point, and my own researches have not been able to identify any. In my view, and reasoning from first principles, the argument is ill-conceived and does not enjoy any realistic prospect of success.

43. Section 80 is a provision, in the nature of a 'mini-code', which deals with and regulates credit for, or repayment of, overstated or overpaid VAT. The fact of 'overpayment' can only be established once a return is made. When that happens, the taxpayers' claim for repayment or credit, as the case may be, is founded upon and advanced under section 80.

44. If the withdrawal of an assessment were to have the effect that section 80 falls away in its entirety (carrying away with it section 80(4)) then the mechanism for making a claim would also have fallen away. That is contrary to common sense, not least since it would apparently deprive section 80 of any meaning. If the appellants' argument, properly understood, is a more nuanced one, namely, that the withdrawal of an assessment means only that section 80(4) falls away, but the remainder of section 80 is left intact, then the structure of section 80 is irrationally distorted and undermined since the footing for a claim exists but without any corresponding time-bar. Put shortly, I simply do not see, and have not been presented with, any good reason why the Commissioners' exemption from liability to a claim under section 80, contained in section 80(4), should be affected once the assessment is withdrawn.

45. As such, I consider that section 80(4) of the 1994 Act does engage in the way that HMRC has argued, and that it lawfully imposes a four-year time limit on the Commissioners' liability in relation to the claim for credit or repayment. In my view, there is no argument to the contrary, enjoying realistic prospects of success, or otherwise meriting a full hearing.

Decision

46. Accordingly, the appeal is struck-out pursuant to Rule 8(3).

47. 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.

Dr CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 11 OCTOBER 2016