[2017] UKFTT 0448 (TC)

TC05910

Appeal number: TC/2015/05596

VAT – date of liability to register – appeal allowed as to the date of liability to register – assessment – made to best judgment – correct save for recalculation to take account the amended date of liability to register – appeal as to the assessment allowed in part - penalty for failure to register – made within time - correct save for recalculation to take into account the amended date of liability to register – appeal as to the penalty allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

AHMED RASOULI **Appellant**
(trading as EURO FOODS)

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MR PETER SHEPPARD

Sitting in public at Bradford on 20 February 2017 with written closing submissions received on 13 March 2017.

Mr Ishmael Musah, Accountant, for the Appellant

Ms Esther Hickey, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By virtue of Mr Rasouli's Notice of Appeal and by the agreement of HMRC to expand the scope of the decisions raised by that notice, the following matters form the subject of this appeal:

(1) HMRC's decision dated 18 June 2015 to register Mr Rasouli (trading as Euro Foods) for VAT with effect from 1 April 2012 until 31 July 2014 ("the Registration Decision").

(2) The 'failure to notify' penalty issued on 11 September 2015 (pursuant to a penalty explanation letter dated 11 August 2015) for £7,142.33, reduced to £4,989.14 on 11 May 2016 ("the Penalty").

(3) The VAT assessment dated 25 November 2016 in the sum of £7,805 in respect of the period from 1 April 2012 to 31 July 2014 ("the Assessment").

The Facts:

2. We read a witness statement, and heard oral evidence, from the relevant officer from HMRC, Mr Gihan Goonesekera. We also heard oral evidence from Mr Rasouli (who adopted a witness statement of his accountant, Mr Ishmael Musah) and also read a witness statement, and heard oral evidence, from Mr Herish Mahmood.

3. Mr Rasouli also adduced a witness statement from Mr Azgher Ahmed. Mr Ahmed was present during the hearing but did not speak English. Mr Rasouli had not previously indicated to the Tribunal that a translator would be required. We asked Mr Musah how he wished to proceed. Mr Musah said that he did not wish to apply to adjourn the hearing and requested that we simply rely upon Mr Ahmed's witness statement. We have our concerns about this witness statement as, although it has been apparently signed by Mr Ahmed, it is said to have been prepared for him by Mr Musah and there is no evidence that it was translated for Mr Ahmed or that he understood it. Nevertheless, we are concerned to ensure that Mr Rasouli presents all the evidence which he wishes to present and so we will admit the witness statement as hearsay evidence but will reflect our concerns by giving it only limited weight. In any event this is somewhat academic as the only controversial point in Mr Ahmed's witness statement is as to the suggestion that he was in charge of the business until 2013. However, both parties and the other witnesses appear to agree that Mr Ahmed only took over the business on 1 August 2014 and so we treat this as an agreed fact.

4. We found Mr Goonesekera to be a credible and helpful witness and so we accept his evidence as a truthful and full account of his involvement in this case. We find that Mr Rasouli's evidence was hampered by his preference for general and unsubstantiated assertions over detail and evidence. As we set out in further detail below, where there is an inconsistency between Mr Rasouli's evidence and the documents, and where there is no satisfactory explanation for that inconsistency, we

prefer the position as set out in the documents. We have no reason to disbelieve Mr Mahmood's factual evidence, which he gave in a clear and helpful manner.

5. We therefore make the following finding of facts. In doing so, we bear in mind that the burden of proof is upon HMRC to show that a liability to a penalty was incurred and that the penalty was calculated fairly but that the burden of proof is upon Mr Rasouli to establish that he should not have been registered for VAT pursuant to the Registration Decision and to establish that the Assessment is wholly or partially incorrect. The standard of proof in these matters is that of the balance of probabilities.

6. Euro Foods traded as a convenience store, selling food, household products, alcohol and tobacco. The sole proprietor of the business was initially Mr Mahmood. Euro Foods was registered for VAT and filed VAT returns for the periods 02/12, 05/12 and 08/12. The return for 08/12 was received by HMRC on 6 October 2012. It appears that a final return was received by HMRC on 20 December 2012, although this was a nil return.

7. On 12 October 2012 ("the October Application"), Mr Mahmood signed an application to cancel Euro Foods' VAT registration, which was duly sent to HMRC. Mr Mahmood stated that he had transferred or sold the business as a going concern. He also said that the transfer or change of legal entity took place on 31 March 2012, that the new owner was Mr Rasouli and that all stocks and assets were transferred.

8. There is a factual dispute as to whether or not Euro Foods was transferred as a going concern. Mr Rasouli asserts that it was not. We find that it was transferred as a going concern from Mr Mahmood to Mr Rasouli. This is because Mr Mahmood clearly states in the October Application that it was transferred as a going concern to Mr Rasouli. Further, Mr Mahmood said in evidence (and, of course, he was Mr Rasouli's witness) that the form was filled in by his accountant but that the accountant explained everything to him. He also said that he sold all stock and assets to Mr Rasouli. Further, neither Mr Rasouli nor Mr Mahmood have given any explanation as to why they say the business was not transferred as a going concern. Mr Musa submits in his written closing submissions that there was no transfer of a going concern because Mr Mahmood's accountant used a VAT 7 document instead of a VAT 68 document and because Mr Mahmood was still in charge of the VAT records until 20 December 2012 when the final return was filed. We reject those arguments. A VAT 68 form is to be used when a VAT registration is to be transferred. There is no such transfer here. Further, the return on 20 December 2012 was a nil return and does not of itself negate there being a transfer of a going concern insofar as Mr Mahmood was trading at some point during that period (although we accept that this may have a bearing on the date of that transfer, as set out below).

9. There is a factual dispute as to when the transfer took place, although both parties' respective approaches to such date has shifted from time to time. We find that the transfer took place no later than 12 October 2012 as this was the date of the form applying to cancel the registration and so, in the absence of any clearer evidence as to the precise date, we treat the date of the transfer as being 12 October 2012. This is for the following reasons.

10. First, Mr Mahmood's oral evidence, which we accept, was that the agreement to transfer the business was reached in October 2012, albeit that the payment of the agreed purchase price of £13,000 was not made in full until March 2013. Mr Mahmood also gave evidence that the lease to the shop and flat above the shop was transferred to Mr Rasouli in October 2012, which is consistent with a transfer date in October 2012.

11. Secondly, Mr Rasouli has not given any credible alternative date. Mr Rasouli said in evidence that the transfer was in late 2012 or 2013 but could not really remember. We asked Mr Musah to explain in his written closing submissions the date when he submits that Mr Rasouli took over the business. His response to this was as follows:

> "Unfortunately, this is not [a] question my client can answer with clarity simple [sic] as a result of the time lapsed considering it is nearly 4 years. I trust the judges will understand that 4 years, very long time for one to remember with specific dates. My client also want[s] to add that he cannot even remember what he eats last week let alone remember events clearly dating back 4 years."

12. Thirdly, the fact that the October Application refers to the transfer taking place on 31 March 2012 must be wrong as Mr Mahmood was still filing VAT returns and making VAT payments for the period 08/12. Indeed, despite the Registration Decision treating the date of liability for registration as 1 April 2012, HMRC in their written closing submissions accept that this cannot be correct and argue that it should be 1 September 2012. Crucially, however, the October Application was signed by Mr Mahmood on 12 October 2012 and so he must still have been in control of the business at that time.

13. Fourthly, there is no obvious reason why the transfer should have taken place on 1 September 2012. We assume that HMRC have taken this date because the last return showing any trading by Mr Mahmood was for 08/12. However, this would not explain why a further return was made on 20 December 2012. We find that the making of the final return is consistent with Euro Foods continuing to trade into the next quarter, which would itself be consistent with a transfer date of 12 October 2012. Whether or not this should have been a nil return is a separate matter, which does not arise for determination in this appeal.

14. Finally, it follows that the totality of the evidence points to the transfer being in October 2012. However, there is no further evidence as to the precise date. As such, we treat 12 October 2012 as the date of the transfer as this is the last date upon which there is any evidence of Mr Mahmood still being in control of the business.

15. Mr Rasouli then continued to trade as Euro Foods until he ceased trading on 31 July 2014. The parties agree as to the date of his cessation of trade. Mr Ahmed then took over the business.

16. During Mr Rasouli's period of trading from 12 October 2012 to 31 July 2014, Mr Rasouli made purchases from various suppliers. We have been provided with an analysis of purchase receipts and invoices by Mr Goonesekera showing that these purchases total £327,471.32 between 1 April 2012 and 31 July 2014. This period is longer than (on our findings as above) Mr Rasouli's period of trading. However, in order to allow calculation of the Assessment and the Penalty (which calculation will have to account for the shorter period of trading than the analysis of the purchases), we find as a fact that Mr Goonesekera's analysis is correct as regards the purchases made by the business (and so Mr Mahmood from 1 April 2012 to 11 October 2012 and Mr Rasouli from 12 October 2012 to 31 July 2014). This is for the following reasons.

17. First, we do not accept Mr Musah's challenge to some of the invoices that they are not made out to Mr Rasouli because they refer to Euro Foods Limited rather than Euro Foods. There has been no suggestion that Euro Foods Limited even exists, let alone that it traded from the same property as Euro Foods. It is clear from Mr Goonesekera's letters requesting information from the suppliers that he was referring to Euro Foods and Mr Rasouli and so we find that even where suppliers referred to Euro Foods Limited they were still purchases by Euro Foods. Indeed, it is of note that Mr Musah makes a similar mistake by referring to Euro Foods Limited at paragraph 13 of his witness statement (adopted by Mr Rasouli in oral evidence) when he clearly meant Euro Foods. Similarly, some of the invoices referred to Mr Ahmed. Again, however, Mr Goonesekera's letters requesting this information made it clear that he was asking for information about Mr Rasouli and Euro Foods and so we treat the references to Mr Ahmed as simply reflecting the fact that Mr Ahmed later became their contact once the business was transferred to him.

18. Secondly, Mr Rasouli has not provided any alternative figures or even any specific or detailed challenges to Mr Goonesekera's calculations of the purchases.

19. We note that Mr Rasouli's self-assessment tax returns show that his purchases were in the sum of £56,379 for 2012-13 and £63,433 for 2013-14. We find as a fact that these are incorrect as they are at odds with Mr Goonesekera's information from suppliers as set out above.

20. We also note that Mr Rasouli's self-assessment tax returns show declared sales of £76,473 for 2012-13 and £92,411 for 2013-14. We find as a fact that these declared sales are incorrect. This is because Mr Rasouli's purchases in accordance with Mr Goonesekera's analysis would be far in excess of the sales, which would make the business wholly unsustainable and would raise the question as to why the purchases were being made at this level. Further, these sales figures are inconsistent with Mr Musah's witness statement (again, adopted by Mr Rasouli in oral evidence) that the records show sales of £208,172 for the period 1 April 2013 to 31 July 2014. Further, Mr Rasouli has not explained how these figures were reached or even whether or not they are correct.

21. We find as a fact that Mr Rasouli has not provided any credible evidence of his actual level of sales. Mr Rasouli maintained that he kept daily records of his sales and

that he gave these figures to Mr Musah. We have not been given (and nor has HMRC) these daily figures and so are not in any position to make any findings as to them.

22. Mr Rasouli produced at the hearing various sales records which had previously been shown to Mr Goonesekera and to which he had referred in correspondence. Mr Musah produced a spreadsheet which provided for sales between 1 April 2013 and 31 July 2014 of £208,172. We have not been presented with a reconciliation of that spreadsheet to the weekly records but are prepared to accept the spreadsheet as an accurate representation of those records. However, we do not accept that Mr Rasouli has discharged his burden of proving that the weekly records are an accurate representation of his sales. Mr Rasouli said in evidence, and we accept, that the weekly records were compiled at the request of Mr Musah. As Mr Musah only began acting for Mr Rasouli after the Registration Decision, the weekly records cannot themselves be contemporaneous. Further, they are in themselves nothing more than a collection of figures and so do not provide any explanation or breakdown as to who the supplies were made to, what the supplies were of, and the individual amounts Crucially, they are said to have been compiled from daily records which are still in existence. We have not been shown these records and neither have HMRC. The accuracy of the weekly sales figures cannot therefore be tested and so we do not accept Mr Rasouli's general and unsubstantiated assertion that they are correct. We therefore find as a fact that Mr Rasouli has not presented sufficient sales records to establish with any accuracy what his sales actually were.

23. HMRC visited Mr Rasouli on 11 March 2014 and 2 May 2014. A further meeting took place on 16 July 2015. There is no material dispute as to what happened during those visits. Importantly, the notes for the meeting on 16 July 2015 state as follows (HP being Mr Rasouli's previous accountant):

> "GG asked when HP advised him he needed to register for VAT. AR said after 2012, maybe after a couple of months, when HP had checked some of the invoices."

24. During cross-examination Mr Rasouli did not accept that his accountant had told him to register for VAT. However, we do not find that Mr Rasouli's denial of this to be credible. He gave no explanation for why he had said in July 2015 that his accountant had said "after a couple of months" that he needed to register for VAT and it was not put to Mr Goonesekera that the note was incorrect. We therefore find as a fact that Mr Rasouli's accountant told him of the need to register for VAT in 2012.

25. As set out above, the Registration Decision was made on 20 April 2015. The VAT liability was agreed with Mr Rasouli's previous accountant on 22 June 2015, resulting in an assessment for £13,604.44. This assessment was a central assessment and so did not have any appeal rights. It formed the basis for the Penalty assessment on 11 September 2015. However, following negotiations between the parties, the central assessment was withdrawn and a new central assessment in the sum of £9,503.13 issued, both on 15 April 2016. The Penalty was reduced to £4,989.14 on 11 May 2016. Following the submission of a return on 24 October 2016 showing net tax

due of £1,698, an Assessment was made on 25 November 2016 pursuant to section 73 of the Value Added Tax Act 1994 ("VATA 1994") (and so an appealable decision) in the sum of £7,805. This sum of £7,805 represents the net tax due and so used as its calculation the same £9,503.13 referred to in the reduced central assessment.

26. The Notice of Appeal is dated 15 September 2015 and was received by the Tribunal thereafter. It is therefore out of time in respect of the Registration Decision and the Penalty decision and was before the Assessment was even made. However, as set out above, HMRC have helpfully agreed to extend the scope of the appeal to include the Assessment. Further, HMRC have consented to the rest of the appeal being made out of time and so we permit the appeal to be made late.

27. For completeness, we note that the Grounds for Appeal state as follows (albeit that, as set out above, the scope of the appeal has now widened):

> "HMRC estimated his sales which resulted in overstating the amount.
>
> We have the sales records so no need to estimate them.
>
> Also HMRC did not take into consideration other vat invoices like rent, repairs and renovation and a one off capital purchase (van) which all had vat. All these resulted in HMRC understating Mr Rasouli['s] input vat.
>
> All above means an overstated vat liability and the resultant penalty.
>
> All we [are] demanding is a chance to consider all relevant invoices to arrive at a true vat liability figure not a vat liability based on estimates.
>
> HMRC have decline[d] all reasonable opportunity to allow us [to] re-calculate the vat based on actuals."

The Legal Framework

28. There was no dispute between the parties as to the correct legal framework.

29. The obligation to register is under Schedule 1, paragraph 1 of VATA 1994, the relevant sub-paragraphs of which are as follows (including the thresholds for the relevant years).

> "(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—
>
> (a) at the end of any month, if the person is UK-established and] the value of his taxable supplies in the period of one year then ending has exceeded [£77,000/£79,000/£81,000]; or
>
> (b) at any time, if the person is UK-established and there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed [£77,000/£79,000/£83,000].

> (2) Where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern, the transferee is UK-established at the time of the transfer and the transferee is not registered under this Act at that time, then, subject to sub-paragraphs (3) to (7) below, the transferee becomes liable to be registered under this Schedule at that time if—
>
> (a) the value of his taxable supplies in the period of one year ending at the time of the transfer has exceeded [£77,000/£79,000/£81,000]; or
>
> (b) there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days beginning at the time of the transfer will exceed [£77,000/£79,000/£81,000].
>
> (2A) In determining the value of a person's supplies for the purposes of sub-paragraph (1)(a) or (2)(a), supplies are to be taken into account (subject to sub-paragraphs (3) to (7)) whether or not the person was UK-established when they were made.
>
> (3) A person does not become liable to be registered by virtue of sub-paragraph (1)(a) or (2)(a) above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this sub-paragraph, he would become liable to be registered will not exceed [£77,000/£79,000/£81,000]."

30. The relevant threshold from 1 April 2012 to 31 March 2013 was £77,000, from 1 April 2013 to 31 March 2014 was £79,000 and from 1 April 2015 to 31 March 2014 was £81,000.

31. The liability to notify is thirty days after the end of the relevant month as set out as follows in Schedule 1 paragraph 5 of VATA 1994.

> "(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.
>
> (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.
>
> (3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered."

32. Section 49(1) of VATA 1994 is also relevant as regards transfers of a going concern, which provides as follows.

> "(1) Where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern, then—

(a) for the purpose of determining whether the transferee is liable to be registered under this Act he shall be treated as having carried on the business or part of the business before as well as after the transfer and supplies by the transferor shall be treated accordingly;"

33. The relevant time limit for the Assessment in the present case is set out in Sections 73 and 77 of VATA 1994, the relevant sub-sections of which are as follows.

"73. 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.

…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following –

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

…

77. Assessments: time limits and supplementary assessments

(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or

(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty.

…"

34. We were referred to case law on best judgment; namely, *Van Boeckel v C&E* [1981] STC 290, *CA McCourtie* LON/92/191 (*McCourtie* being for illustrative purposes only as this was non-binding) and *Queenspice Ltd v HMRC* [2010] UKUT 111 (TCC) (Lord Pentland). The best judgment test is well summarised in *Queenspice Ltd v HMRC*, above, as follows at [9] and [10]:

> "[9] In my opinion, the Appellant's attack on the Tribunal's approach to the evidence of Dr McLaurin is misconceived and must be rejected. As Woolf J (as he then was) explained in *Van Boeckel* the task of the Respondents under what is now section 73(1) of the Value Added Tax Act 1994 ("the 1994 Act") is to make an assessment of tax to the best of their judgment. The very use of the word "judgment" makes it clear that the Respondents are required to exercise their powers in such a way that they make a value judgment on the material before them. Clearly they must make their judgment honestly and in good faith. It must be borne in mind that the primary obligation is on the taxpayer to make a return himself. It follows that the Respondents do not have to carry out exhaustive investigations; they have only to consider the material which is before them in a fair way and to come to a decision which is reasonable and not arbitrary as to the amount of tax which is due.
>
> [10] In *Commissioners of Customs and Excise v Pegasus Birds Ltd* [2004] STC 1509 Carnwarth LJ observed (at para 10) that the word "best" where it is used in the phrase "to the best of their judgment" has to be understood in a context in which the taxpayer's records may be incomplete so that a fully informed assessment is unlikely to be possible. Rather than implying a higher than normal standard, the word "best" accordingly recognises that the result may necessarily involve an element of guesswork. It means simply to the best of the Respondents' judgment on the information available. Generally, the burden lies on the taxpayer to establish the correct amount of tax due (see para 14)."

35. The penalty regime in such circumstances is set out at Schedule 41 of the Finance Act 2008. The obligation to notify a liability to register is specified within paragraph 1 of Schedule 41. Further relevant paragraphs are as follows:

> "6. Amount of penalty: standard amount
>
> (1) This paragraph sets out the penalty payable under paragraph 1.
>
> (2) If the failure is in category 1, the penalty is—
>
> (a) for a deliberate and concealed failure, 100% of the potential lost revenue,
>
> (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue.
>
> …
>
> 7. Potential lost revenue
>
> (1) "The potential lost revenue" in respect of a failure to comply with a relevant obligation is as follows.
>
> …
>
> (6) In the case of any other relevant obligation relating to value added tax, the potential lost revenue is the amount of the value added tax (if any) for which P is, or but for any exemption from registration

would be, liable for the relevant period (see sub-paragraph (7)), but subject to sub-paragraph (8).

(7) "The relevant period" is -

…

(b) in relation to a failure to comply with an obligation under any other provision, the period beginning on the date with effect from which P is required in accordance with that provision to be registered and ending on the date on which HMRC received notification of, or otherwise became fully aware of, P's liability to be registered.

…

12. Reductions for disclosure

(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

13.

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B—

(a) the case A minimum applies if—

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and

(b) otherwise, the case B minimum applies.

…

17.

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18

(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

19

(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph, "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 18(1)).

20 Reasonable excuse

(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or [(on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)—

> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and
>
> (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

36. For completeness, we were also referred to the cases of *Khan v HMRC* [2012] UKUT 224 (TCC), *Michael Haynes v HMRC* [2013] UKFTT 160 (TC), *Karandal v HMRC* [2014] UKFTT 321 (TC) and *Taste of Thai Ltd v HMRC* [2013] UKFTT 318 (TC). In the event, neither party suggested that these were of any particular relevance in the present case and so we simply note that we have considered them and borne them in mind.

Submissions

37. The case was only listed for one day but the evidence was not complete until 5.00pm. Rather than adjourn to another oral hearing, the parties agreed to file written closing submissions. Mr Musah (on behalf of Mr Rasouli) served his submissions first and then Ms Hickey responded. For ease, we will set out HMRC's case first and then Mr Rasouli, although this has no impact upon our view of the burden of proof as set out above.

HMRC

38. Ms Hickey divided her submissions into three matters: the liability to register, the Penalty and the Assessment.

39. As regards the liability to register, Ms Hickey accepts that HMRC was wrong to treat the transfer as being on 1 April 2012 as Mr Mahmood was still declaring and paying VAT until 31 August 2014. Instead, Ms Hickey contends that the operative date is 1 September 2012. This is, she says, because Mr Mahmood must have made a mistake in saying that the transfer was on 31 March 2012, Mr Mahmood said in evidence that the sale was around October 2013 and the VAT returns only covered the period to 31 August 2012.

40. Mr Goonesekera has provided a schedule entitled "VAT Registration Calculation" which provides a running total of the taxable turnover from 1 April 2012 (calculated as set out in Ms Hickey's submissions in respect of the Assessment, as set out below). This shows that the £77,000 threshold was passed in August 2012 as the total from April 2012 to August 2012 was £79,872.19. For completeness, the running total to September 2012 was £95,058.33 and to October 2012 was £108,904.82.

41. Further, Euro Foods' returns for 02/12 to 08/12 revealed cumulative sales of £114,868. The 02/12 return was for a nine month period and so this fifteen month period was recalculated on a pro rata basis to £91,894 for 12 months. Ms Hickey's submission, therefore, is that at the time of the transfer as a going concern (on HMRC's case, on 1 September 2012) Mr Rasouli was already liable to register taking into account the previous twelve months of Euro Foods' trading. Ms Hickey also submitted that it was clear from Mr Goonesekera's calculations that as at the transfer (again, on HMRC's case, on 1 September 2012) Mr Rasouli's turnover would exceed the threshold in the forthcoming twelve months.

42. As regards the Penalty, Ms Hickey's submissions were as follows.

43. The Penalty was calculated at 52.5% of the potential lost net revenue. For the purposes of paragraph 6(1)(a) of Schedule 41 to the Finance Act 2008, this is because the failure was (on HMRC's case) deliberate but not concealed, prompted, not discovered within 12 months and category 1. This included a 50% reduction for the quality of disclosure.

44. The explanation of the Penalty is set out in the schedule attached to HMRC's letter dated 11 August 2015 as follows (and as adopted by Ms Hickey):

> "We consider that the behaviour was 'deliberate'. This is explained below.
>
> …
>
> I explained that your business was a transfer of a going concern and should have been VAT registered when you took over. You explained that you did not know about VAT or VAT registration. You accepted that your accountant advised you regarding VAT sometime after you started trading. I pointed out that you were also aware of the level of sales at the time of our visit on 2 May 2014 (which amounted to annual turnover above the registration threshold). You were also unable to explain why the turnover and purchases declared on the Self Assessment Tax Returns was only half the value of indicated by supplier-held information. The failure to notify is viewed as deliberate.
>
> The disclosure was prompted because you did not tell us about the failure to notify before you had reason to believe we had discovered it, or were about to discover it."

45. The basis for the Penalty is of course the Assessment. Ms Hickey accepted that this had to be recalculated to take into account a transfer date of 1 April 2012 rather than (on HMRC's eventual case) 1 September 2012.

46. As regards the Assessment, Ms Hickey's submissions were as follows.

47. In the absence of satisfactory information about sales figures, Mr Goonesekera used the purchase invoices in order to estimate the accurate standard rated sales. He did so by calculating the gross purchases for the period, multiplying these by a mark up rate to estimate gross sales and calculating the proportion of these which were standard rated.

48. As set out above, Mr Goonesekera calculated the gross purchases at £327,471.32 for the period from 1 April 2012 to 31 July 2014. He did this by analysing documents provided by the suppliers. Mr Goonesekera then reduced these gross purchases by 5% to account for wastage, being a figure agreed with Mr Rasouli's previous accountant.

49. Mr Goonesekera then calculated the mark up rate by converting the gross profit margin of 27.5% contended for by Mr Rasouli's previous accountant to a mark up rate. The difference between a mark up rate and a gross profit margin is that the gross profit margin is calculated by dividing gross profit by revenues whereas a mark up is the ratio between the cost of an item and its selling price, expressed as a percentage over the cost. A gross profit margin is converted into a mark up rate by the following formula: mark up rate = [gross profit margin/(100 – gross profit margin)] %. A 27.5% gross profit margin is therefore the equivalent to a mark up rate of 37.9%. This produced gross sales of £429,003.80.

50. Mr Goonesekera calculated the ratio of standard to zero rated sales by comparing the business' standard rated purchases to the total purchases. In year one, standard rated purchases were 60.29% of the total and in years two and three they were 61.57%.

51. The Assessment for the period 1 April 2012 to 31 July 2014 was £7,805 based upon net tax due of £9,503.13. Ms Hickey has attached to her written closing submissions what she describes as "a preliminary calculation" of £7,868 net tax due to HMRC for the period 1 September 2012 to 31 July 2014 (in keeping with her concession that the liability for registration began on 1 September 2012). As the VAT return already declared net tax due of £1,698, this produces (on Ms Hickey's submissions) a reduction of the Assessment to £6,170.

Mr Rasouli

52. Mr Musah also provided helpful written closing submissions on behalf of Mr Rasouli. His main arguments were as follows.

53. As to the date of transfer of the business, Mr Musah was unable to give a date as set out above.

54. We asked Mr Musah to explain why paragraph 16 of his witness statement stated that Mr Ahmed was in charge until 31 July 2014. Mr Musah simply said that this was a mistake.

55. Mr Musah submitted that the liability to registration, and the resultant Assessment, should commence on 1 April 2013, "as that is when our records start". The 'records' appear to mean the daily sales records. Mr Musah says as follows of these daily records in his closing submissions:

> "The daily records were written in diary like books and then summarised into weekly. I confirm all those records were given to me and I still have them with me in my office. The reason I did not include

> the daily but the weekly was simple [sic] down to simplicity as they are one of the same records. The weekly were summaries of the daily so providing both in my opinion is simply a repetition of the same source of data."

56. Mr Musah did not accept that the transfer was of a going concern. As set out above, he argued that a VAT 7 form was used rather than a VAT 68. Further, Mr Mahmood was still in charge of VAT on 20 December 2012 when he filed the nil return. Mr Musah said that the business was a dying one and so this meant that it was not transferred as a going concern.

57. Mr Musah took issue with the purchase invoices, maintaining that some of them were not Mr Rasouli's as they were made out to Euro Foods Limited or Mr Ahmed.

58. As regards the Assessment, Mr Musah submitted that the weekly sales records should be used as these would give an accurate answer. He produced a spreadsheet and argued that the sales records for the period from 1 April 2013 (when records began) to 31 July 2014 were £208,172. He said that only 50% of these were standard rated, giving rise to output tax of £17,347. He further said that the input tax for the period was £16,127, resulting in a net VAT liability of £1,220.

59. Mr Musah also argued that the assessment was out of time. He simply said that the Assessment was more than two years after the prescribed periods.

60. As regards the Penalty, Mr Musah submitted that the Penalty is not based upon the accurate potential lost revenue. Mr Musah did not give any explanation to suggest that this goes any further than simply meaning that the Penalty calculation does not reflect the VAT due on his calculations. Mr Musah also submitted that the Penalty should be cancelled, reduced or suspended upon the basis of the complexity of the case and Mr Rasouli's help in relation to it.

Discussion

61. In the light of the parties' helpful submissions, the following issues arise for determination:

(1) The period of liability for registration.

(2) Whether or not the Assessment was out of time.

(3) Whether or not the Assessment is to be upheld, cancelled or varied (and, if varied, the amount that the Assessment should be varied to).

(4) Whether or not the Penalty is to be upheld, cancelled, varied or suspended (and, if varied, the amount of such Penalty).

The period of liability for registration

62. As set out above, we find as facts that the transfer was of a going concern, that it took place on 12 October 2012 and that Euro Foods' taxable turnover within the previous twelve months was already over the £77,000 threshold.

63. We accept Mr Goonesekera's calculations in this regard and find that they were made to best judgment and also that, on the evidence before us, is an accurate estimate of the position. As set out above, we reject Mr Rasouli's sales records as an accurate representation of the relevant period. Mr Goonesekera therefore had to work out the taxable turnover from a combination of suppliers' records of purchases and agreements with Mr Rasouli's previous accountant as to the appropriate gross profit margin (from which he could calculate the appropriate mark up rate) and an agreed 5% wastage rate. Mr Rasouli has not provided any credible criticisms of these figures. Further, Mr Goonesekera's analysis of the ratio between standard rated supplies and exempt or zero rated supplies is based upon evidence of the ratio from historic figures. Mr Musah's submission that the appropriate ratio is 50% is not based upon any evidence and its rationale is not even explained.

We therefore find that Mr Rasouli was liable to be registered between 12 October 2012 and 31 July 2014.

Whether or not the Assessment was out of time

64. Given that we have found that Mr Rasouli's liability to register was on 12 October 2012, the first return would not have been due until 31 December 2012 (assuming a period from 1 October 2012 to 31 December 2012) which would have been payable by 31 January 2013 (or 7 February 2013 by electronic payment).

65. The original assessment was issued on 18 June 2015, although this was withdrawn on 15 April 2016. A further assessment was issued on 15 April 2016. This was reduced by the Assessment on 25 November 2016. On the face of it, therefore, various of the prescribed periods were beyond the two year time period for the purposes of section 73(6) of VATA 1994 in respect of the original assessment and the assessment issued on 15 April 2016 and all of them were beyond the two year time period in respect of the Assessment. Further, given our finding that Mr Rasouli first became liable to be registered on 12 October 2012, all the assessments, including the Assessment, were within the four year time period for the purposes of section 77(1) of VAT 1994, as the prescribed accounting period relevant to 12 October 2012 would have not ended until 31 December 2012.

66. Whether or not the Assessment was in time therefore turns upon whether or not the Assessment was made within one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, came to their knowledge.

67. It is not open to a tribunal to substitute its own view for that of HMRC as to what evidence justifies the making of an assessment. It is therefore only open to us to

interfere if the failure to make an earlier assessment was perverse (see *Pegasus Birds Ltd v Customs & Excise Commissioners* [2000] STC 91 *per* Aldous LJ at [18]).

68. The burden of proof in establishing that HMRC was out of time is upon Mr Rasouli. If we find as a matter of fact that Mr Goonesekera made the Assessment within one year after evidence of facts, sufficient in his opinion to justify the making of the Assessment, came to his knowledge, the burden of proof is therefore upon Mr Rasouli to establish that his failure to make an earlier decision was perverse and that the Assessment was made more than one year after such date.

69. It is of note that Mr Goonesekera sent requests to Mr Rasouli's suppliers in December 2014. Even in the event of immediate replies, he could not therefore have had evidence of facts sufficient to justify the making of the original assessment until December 2014. The original assessment was within twelve months of this date. As this has been withdrawn, it is not the assessment under consideration. However, as the other assessments were reductions from it, it is still the starting point in terms of analysing when Mr Goonesekera had facts, sufficient in his opinion to justify the making of the Assessment.

70. Mr Goonesekera explained that the original assessment was withdrawn and another assessment made on 15 April 2016 as a result of discussions which took place at an ADR meeting on 7 March 2016. We were not told, and ought not to know, the contents of those discussions. We note that Mr Musah did not put to Mr Goonesekera in cross-examination, and did not even suggest in submissions, that Mr Goonesekera could or should have made that assessment any earlier. We therefore find as a fact that it was the ADR meeting which gave rise to evidence of facts sufficient in Mr Goonesekera's opinion to justify the making of the assessment on 15 April 2016, which of course was less than twelve months after the ADR meeting.

71. The crucial decision is the Assessment itself. The reason for the Assessment was that Mr Rasouli filed a return on 24 October 2016. The Assessment therefore reflected the contents of that return. Again, the Assessment was of course within twelve months of the return (taking the return as the earliest date at which evidence of the relevant facts came to Mr Goonesekera's knowledge). Again, Mr Musah did not challenge this by way of cross-examination or submissions.

72. Crucially, Mr Rasouli has not established (or even alleged) that Mr Goonesekera acted perversely in making the Assessment when he did. It follows that, even taking the most generous approach to Mr Rasouli on the facts as we have found them, the Assessment was made within time.

The Assessment

73. Ms Hickey rightly accepted that the Assessment will have to be recalculated, as it was based upon a period from 1 April 2012 to 31 July 2014. It is therefore now common ground that the Assessment has to be varied. The schedule prepared by Mr Goonesekera and attached to Ms Hickey's written closing submissions carried out a recalculation but this was from 1 September 2012 rather than (as we have found) 12

October 2012, was put forward on (as Ms Hickey called it) a preliminary basis and Mr Rasouli (through Mr Musah) has not commented on it as Mr Musah made his submissions first.

74. We find that the Assessment is to be varied in accordance with Mr Goonesekera's most recent calculations as set out in the spreadsheet attached to Ms Hickey's written closing submissions, with the rider that it should be recalculated to take into account that the period for the Assessment should begin on 12 October 2016. This is because, as set out above, Mr Goonesekera's calculations have been made to best judgment and, in the context of this appeal, we agree with them. Further, Mr Musah has not provided any credible alternative calculations. In particular, we reject the purported sales records for the reasons set out above.

75. It is clear from this that we accept Mr Goonesekera's methodology and his calculations. The only rider is that they need to be adjusted to remove the period from 1 April 2012 to 11 October 2012. We invite the parties to agree the revised Assessment in the light of this. If they are not able to do so, we will direct that there be written submissions on the point which we will consider on paper and provide a further written decision in this regard.

The Penalty

76. It follows that the Penalty will also have to be recalculated to take the variation to the Assessment into account. Subject to this, we make no other variation to the Penalty. Again, we invite the parties to agree the revised Penalty taking into account the variation to the Assessment.

77. We have reached this decision for the following reasons.

78. First, we are satisfied that the default was deliberate. As set out above, we find that Mr Rasouli's previous accountant had told him in 2012 that he was required to register for VAT and yet he did not do so.

79. Secondly, we find that the default was prompted. The only reason why Mr Rasouli was eventually registered (albeit on a "liable no longer liable" basis) was because HMRC visited him and raised the issue.

80. Thirdly, we find that the 50% reduction for the quality of Mr Rasouli's disclosure should not be increased. Indeed, we find that it was generous, although we will not interfere with it given that HMRC do not invite us to reduce it. This is because Mr Rasouli did not provide HMRC (or even the Tribunal) with the daily sales records and played no part in assisting Mr Goonesekera in obtaining the purchase records.

81. Fourthly, Mr Musah has not suggested that Mr Goonesekera's calculations are incorrect, other than in respect of the underlying Assessment.

82. Finally, Mr Musah has not provided any basis for any other reduction.

83. Although Mr Musah refers to suspension of the Penalty in his closing submissions, he has not explained any basis for us doing so. Further, there has been no request of HMRC to suspend the Penalty and so no decision refusing to do so has been made. As such, we decline to consider the question of suspension any further.

Decision

84. It follows that the appeal is allowed in part in the following respects:

(1) The Registration Decision is varied with the effect that Mr Rasouli was liable to be registered from 12 October 2012 to 31 July 2014.

(2) The Assessment is varied to take into account the registration period from 12 October 2012 to 31 July 2014 but shall otherwise be in accordance with Mr Goonesekera's calculations as set out above (to be agreed between the parties or in default of agreement to be the subject of further written submissions and a decision on paper).

(3) The Penalty is varied to take into account the variation to the Assessment (again, to be agreed between the parties or in default of agreement to be the subject of further written submissions and a decision on paper).

85. We also direct that both parties do have liberty to apply for a determination of the amount of the Assessment and the Penalty in accordance with paragraph 84 above if agreement cannot be reached, reserved to the present Judge and Member.

86. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 24 MAY 2017