[2018] UKFTT 533 (TC)

TC06703

Appeal number: TC/2014/04631

VALUE ADDED TAX – alleged suppression of sales and output tax – best judgement assessment – penalties under Schedule 24 Finance Act 2007

FIRST-TIER TRIBUNAL
TAX CHAMBER

KANDASAMYTHURAI PATHMANATHAN **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
MICHAEL BELL ACA CTA

Sitting in public at Taylor House London on 22 and 23 May 2018

Mr B Athanas, Athanas Associates, for the Appellant

Mr B Haley, HMRC Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against notices of assessment ("the assessments") to Value Added Tax ("VAT") dated 26 February 2014 in the amount of £34,131 in respect of quarterly VAT periods 08/09 to 02/13. Mr Pathmanathan ("the appellant") also appeals against penalties charged under Schedule 24 Finance Act 2007 (FA 2007) issued on the basis that the appellant deliberately concealed supplies and, therefore, understated output tax. The relevant penalty notices were dated 7 and 10 March 2014. The appeals are brought under section 83(1)(p) Value Added Tax Act 1994 ("VATA") and paragraph 15 Schedule 24 FA 2007 respectively.

2. Essentially, the assessments were issued on the basis that the appellant suppressed sales in his Hartlepool grocery shop.

The evidence

3. We were provided with two bundles of documents. In addition, the following witnesses gave evidence for the appellant and were cross-examined:

(1) The appellant produced a witness statement and gave oral evidence (through an interpreter);

(2) Mr Brahba Rupan ("Mr Rupan"), the appellant's previous accountant. Mr Rupan gave oral evidence and was cross-examined; and

(3) Mr Flora, the adviser who conducted the enquiry on behalf of the appellant into VAT affairs and which led to the assessments and penalties under appeal. Mr Flora gave oral evidence and was cross-examined.

4. On behalf of HMRC, Mr Carroll, the HMRC officer who conducted the enquiry into the appellant's affairs, produced a witness statement and gave oral evidence and was cross-examined.

5. In addition, we were provided with a witness statement from Mr Vallipuram Krishnandarajah. He was a member of the Tamil Community and his witness statement concerned a meeting on 20 December 2013 at the offices of Tamsons, the appellant's previous accountants. Mr Krishnandarajah did not give oral evidence.

Relevant statutory provisions

6. The assessment in this case was made under section 73(1) Value Added Tax Act 1994 ("VATA") which provides 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."

7. An assessment under section 73(1) VATA is an appealable decision under section 83(1)(p) VATA.

8. The penalties in this case were imposed under Schedule 24 Finance Act 2007 ("FA 2007") paragraph 1 (1) of which provides as follows:

"*Error in taxpayer's document*

1(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of [a] liability to tax,

(b) a false or inflated statement of a loss . . ., or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was [careless (within the meaning of paragraph 3) or deliberate on P's part].

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy."

9. The appellant's VAT returns are documents specified in the Table referred to above.

10. Paragraph 3 provides for degrees of culpability in calculating the penalty and paragraph 4 deals with the amount, as follows:

"*Degrees of culpability*

3 (1) [For the purposes of a penalty under paragraph 1, inaccuracy in] a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate [on P's part] but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate [on P's part] and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

Standard amount

4(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is-

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

(3) If the inaccuracy is in category 2, the penalty is-

(a) for careless action, 45% of the potential lost revenue,

(b) for deliberate but not concealed action, 105% of the potential lost revenue, and

(c) for deliberate and concealed action, 150% of the potential lost revenue.

4(4) If the inaccuracy is in category 3, the penalty is-

(a) for careless action, 60% of the potential lost revenue,

(b) for deliberate but not concealed action, 140% of the potential lost revenue, and

(c) for deliberate and concealed action, 200% of the potential lost revenue.

(5) Paragraph 4A explains the 3 categories of inaccuracy.

4A(1) An inaccuracy is in category 1 if-

(a) it involves a domestic matter, or

(b) it involves an offshore matter and-

(i) the territory in question is a category 1 territory, or

(ii) the tax at stake is a tax other than income tax or capital gains tax.

The facts

11. The appellant is a sole trader who has been registered for VAT since February 2005. He runs a grocery shop, using the trading name "Premier Store", in Hartlepool. The shop sells a variety of goods e.g. household goods, alcohol, tobacco, confectionery and groceries. The appellant had previously lived in Denmark but had bought the business in Hartlepool in 2005 after moving to the UK with his family.

12. In 2007 his premises were inspected HMRC who found non-duty paid goods. As a result, the appellant paid a £40,000 penalty. He blamed the illegal activities of a local supplier from whom, he claimed, he had purchased the goods in good faith.

13. On 23 October 2012, Mr Carroll and another officer visited the appellant's business premises and interviewed the appellant. The visit was occasioned by information which HMRC had obtained from a "cash-and-carry" wholesale supplier ("Caterers Friend") about supplies which it had made to the appellant. The officers attempted to verify the information obtained from Caterers Friend by checking alcohol on the appellant's premises. They noted that none of the alcohol apparently supplied by Caterers Friend was declared through the appellant's records and returns.

14. During the visit, Mr Carroll rang the appellant's accountants, a firm called Tamsons. He expressed HMRC's concerns about the omitted purchase invoices in the appellant's records. Mr Carroll agreed to write to the appellant expressing concern about the accuracy of his records.

15. Mr Carroll also noted that the alleged zero and standard rated mark-ups were below what he expected for this type of retail shop. Mr Carroll uplifted the appellant's records.

16. After the visit Mr Carroll wrote to the appellant on 26 October 2012 expressing HMRC's concern over the unrecorded purchases. He requested that the appellant quantify the unrecorded purchases and also the sales amounts to which these unrecorded purchases related.

17. The appellant's accountant, Mr Rupan of Tamsons, called Mr Carroll on 13 November 2012 and stated that he understood HMRC's concerns and that he would attempt to quantify the amounts. Mr Carroll mentioned the need for the appellant to cooperate as this would mitigate any potential penalty.

18. Mr Carroll carried out a further review of the records in his possession. He noted that there were three accounts with Caterers Friend used by the appellant.

19. Meanwhile, another branch of HMRC dealing with excise duties visited the appellant's premises on 29 November 2012 and found alcohol upon which excise duty had not been paid. Apparently, the appellant had been reluctant to allow the HMRC officer into the room for the first four hours of the visit, blaming misplaced keys.

20. Mr Carroll rang Mr Rupan on 10 December 2012 to enquire about progress in relation to his letter of 26 October 2012. Mr Rupan said that the matter was being dealt with by a colleague, Mr Flora. Mr Rupan said that the appellant had told him that "the only omitted purchases were an odd invoice for the last couple of months that would be put on the next return." The topic of mitigation of penalties on the basis of full disclosure was discussed. Mr Carroll and Mr Rupan also discussed a possible meeting in February 2013.

21. On 16 January 2013, Mr Rupan faxed to Mr Carroll a letter which contained details of VAT invoices and an unrecorded purchase list from 1 June 2011 to 31 August 2012 ("the Schedule"). The list recorded over 80 previously unrecorded invoices and indicated that the appellant had not recorded £230,000 of purchases in that 15 month period. The information also indicated that in that period there had been approximately £245,000 of undeclared sales on which the under-declared VAT was said to be approximately £3,500. In his letter Mr Rupan stated:

> "We strongly advised the client to keep the records properly. In the absence of information provided by the client we have calculated the sales based on profit margin."

22. Mr Carroll was of the opinion that the mark-ups were too low in his experience of similar types of shops. Mr Carroll also noted that he had information about seven

supplies of alcohol to the appellant which did not appear in the information supplied to him by Mr Rupan.

23. After a telephone discussion between Mr Flora and Mr Carroll a meeting was proposed a 25 February 2013. Mr Carroll said that he was concerned that the appellant has still not made full disclosure of "off record" purchases where he had received purchase invoices.

24. On 13 February 2013, Mr Carroll and a colleague carried out an unannounced visit to the appellant's premises. The officers recorded the selling price of alcohol products. They noted that most products were sold a marked retail price, although some items e.g. Coca-Cola was sold at a price in excess of the marked price. Some products were sold below the marked price because they were "Premier offers" – Premier update offers every four weeks for certain selected lines.

25. On 22 February 2013, Mr Carroll wrote to Mr Flora. He noted that the disclosure of understated purchases covered only the periods 01/06/2010 to 31/08/2011. He stated that a further disclosure was necessary to include all purchases bought (with or without a VAT invoice) which had not been declared on VAT returns submitted to date. Mr Carroll queried the mark-ups and indicated that he needed to review the purchase invoices listed on the initial disclosure. Mr Carroll also suggested a meeting for later in March 2013, but apparently this did not take place.

26. Further exchanges of correspondence and telephone calls took place and Mr Flora indicated that margins in this kind of business tended to be around 16-18%. Mr Carroll agreed to a small reduction in mark-ups. Mr Carroll also indicated that he would be prepared to allow a deduction for input tax if evidence of the purchases was produced.

27. On 30 July 2013, Mr Carroll again rang Mr Flora and explained that the "off record" purchases had still not been disclosed and that the mark-up figures had been calculated from shop prices taken on short visits. Nonetheless, Mr Carroll agreed that a 1% reduction in the suppression of output tax and zero rated sales would be reasonable. This would allow for occasional items sold below the recommended retail price as a result of the Premier four-weekly offers. Mr Flora sent an email later that day agreeing 39% of standard rated sales were undeclared and 34% zero rated sales were undeclared. Mr Carroll explained that the correct percentage for zero rated sales should have been 27% but that this did not affect his assessment figures because they had been based on standard rated goods for resale.

28. On 1 August 2013 assessments and related schedules were issued to the appellant for £113,231 for the quarterly VAT periods 08/09 to 05/10. The assessments were based on the figures agreed with Mr Flora. In accordance with the "presumption of continuity", further assessments were issued for the quarterly periods 08/10 to 02/13.

29. On 7 August 2013, HMRC issued a penalty explanation to the appellant in the amount of £82,098.29 on the basis that the under declaration was "deliberate and

concealed". Mr Carroll, however, made no mention of the issue of this penalty notice in his detailed "blow by blow" account of his dealings with the appellant and his advisers. There was a penalty notice dated 7 August 2013 in the amount of £82,098.29 in the papers with which we were provided. Nonetheless, it is curious Mr Carroll made no mention of this notice and we assume that this penalty notice was the one that was issued under cover of a letter from Mr Carroll on 1 September 2013.

30. At this stage, however, the appellant decided to change his accountants, dispensing with the services of Tamsons and instead instructing Mr Athanas of Athanas Associates. Mr Athanas wrote to Mr Carroll on 22 August informing Mr Carroll that Athanas Associates were now advising the appellant and requested that Mr Carroll provide him with the relevant documents concerning the dispute. These documents were duly sent to Mr Athanas on 2 September 2013.

31. On 17 September 2013, HMRC sent a letter to the appellant enclosing a penalty notice, resulting from the 1 August 2013 VAT assessment, in the sum of £82,098.29. The letter said that the penalty notice would not be pursued until Mr Athanas had had time to review the underlying assessment figures.

32. During October and November Mr Athanas and Mr Carroll exchanged correspondence concerning, inter alia, the circumstances in which the appellant had been interviewed by Mr Carroll and in relation to documents which Mr Athanas wished to see. It is fair to say that the tone of the correspondence from Mr Athanas was combative.

33. In a letter dated 4 December 2013, Mr Carroll explained to Mr Athanas that the methodology which underlay the assessments had been based on the disclosure of "off record" purchases made by Tamsons. Mr Carroll noted that despite earlier requests, the purchase invoices underlying these disclosures had yet to be produced and that, therefore, no input tax allowance had been made. If the invoices were produced, Mr Carroll confirmed that the assessment would be amended to allow for any input tax due.

34. On 23 December 2013, Mr Athanas replied to Mr Carroll as follows:

> "our understanding from your interview records is that you have identified standard rated purchases that were omitted and you prompted the accountant [Tamsons] for the disclosure of off record purchases. We have requested a copy of the reference material which you declined to provide. We have now seen the off record purchases and the initial indications are that the accountant was responsible for the under declared purchases. We are in the process of collating further information regarding this matter and will report you as soon as we have them.
>
> …
>
> We are looking at the invoices now and we need some time to make an opinion on how these invoices were kept without claiming the attached input tax. We are of the opinion that our client is not smart enough to suppress the invoices to avoid VAT. On the contrary, the invoices

> would have reduced the VAT payments if the input taxes were claimed in the normal process. Therefore there was no incentive to withhold the invoices and we can only conclude that the accountant will be responsible for withholding input tax claims. We will submit the invoices to you as soon as we finished with them. We spoke to our predecessor with regard to the input tax claim. He told us that you did not request the invoices and only requested the schedules.
>
> …
>
> We have some concerns with regard to the working of alleged suppressed sales. Our client denies any involvement in suppressing the sales. He explained to us that the tail is mostly manned by staff and our client takes care of the cash control. In order to eliminate any fraudulent activities by the staff he has installed the cash till with scanning facility and this till has to be operated for every sales event. Secondly the till provides many management reports which our client uses the stock control. "

35. On 7 January 2014, Mr Carroll wrote again to Mr Athanas stating that he was still willing "to review any further evidence regarding my assessment issued if it is ever provided to me."

36. On 13 January 2014, Mr Carroll replied to the letter from Mr Athanas of 23 December 2013 and referred to telephone conversations with Mr Athanas earlier that day. Mr Carroll wrote:

> "With regards to your statement that the former accountant Mr Flora of Tamsons Accounting & Tax Consultancy Ltd was responsible for "off record purchases"[1] I refer you to a letter dated 16 January 2013 from Mr Flora. In this letter Mr Flora states that he has 'strongly advised the client to keep his records properly.'
>
> …
>
> You have stated your client is not smart enough to suppress invoices to avoid paying VAT. You are reminded your client has under declared VAT and Income Tax historically. Your client has also been asked to provide the 'off record' purchase invoices on a number of occasions both to yourselves and to the former accountant. You have indicated that you are going to get your client to pick these invoices up from your premises and forward them to my office in the next couple of days. These invoices will then be reviewed and if the evidence of input tax is satisfactory I will reduce my assessment immediately by the appropriate amount. I cannot allow your client the input tax until the evidence has been seen.
>
> You have expressed concerns with regard to the workings of suppressed sales in my assessment. The assessment was raised after lengthy discussions in correspondence with Mr Flora and allowances

[1] Mr Athanas subsequently noted that he had not, in fact, referred to Mr Flora and had never mentioned any named persons in the appellant's previous accountants' firm (letter dated 20 January 2014).

> were agreed on a few items sold below GPR that were on offer from suppliers to your client such as Booker's and you have been sent copies of these agreements."

37. On 16 January 2014, the appellant made an unannounced visit to Mr Carroll's offices. The appellant handed Mr Carroll purchase invoices for five VAT quarters which were said to be the off record invoices. In addition, the appellant handed Mr Carroll two letters from Mr Athanas. One was a Special Subject Access Request dated 14 January 2014 under the Freedom of Information Act, with which we need not concern ourselves. The other letter, dated 13 January 2014, stated:

> "Please find the attached invoices that we recovered from our predecessors on 23 December 2013. We understand that you never requested the invoices from our predecessors and only requested to submit the VAT analysis pertaining to the missing invoices. We are not sure why you waited so long to request invoices to allow the input tax. It appears that you had the necessary information with regard to the output tax and input tax in the VAT analysis sheets when you raise the assessment but you chose to accept output tax leaving the input tax element with no action. We now claim the input tax to be set off from the assessment as per claimed in the VAT analysis sheets."

38. There is no doubt in our mind that Mr Athanas' statement that Mr Carroll had not previously requested VAT invoices was incorrect. For example, Mr Carroll made this point to Mr Flora in an email of 31 July 2013 (which was copied to Mr Athanas among the documents sent to him on 2 September 2013) and made the same point to Mr Athanas in a letter of 4 December 2013. In any event, the need for HMRC to see a purchase invoice in order to verify a taxpayer's entitlement to an input tax deduction is obvious and self-explanatory. We see no basis for Mr Athanas' criticism.

39. Mr Carroll examined the purchase invoices provided by the appellant, cross-referencing them to the schedules provided by Mr Flora. Mr Flora's split between alcohol and tobacco proved to be an accurate, in Mr Carroll's view, and he decided that new figures for the mark-up needed to be calculated and revised output tax figures issued. In addition, now that he had the purchase invoices it was possible for Mr Carroll to calculate the input tax which was allowable. Mr Carroll's evidence was that on the basis of best judgment and the presumption of continuity, he extended the input tax allowances to the VAT periods where input tax evidence had been provided but also to other assessed periods as he had done as regards output tax on sales.

40. The earlier August 2013 assessment was withdrawn on 5 February 2014 and a new assessment was issued on 11 February 2014. The new assessment covered five periods in which it was considered that "off record" sales had been made. The new assessment was delivered by hand to the appellant on 13 February 2014.

41. The schedules to the assessments make clear the basis of calculation. Thus for the VAT periods 08/11 to 08 /12 the total output tax declared was £109,288.82 and the under-declared output tax was £53,205.29, giving a total amount of output tax due on sales in those periods of £162,493.11. From these figures the average output tax under-declared expressed as a percentage was £53,205÷ £109,288 = 48.68%. This

percentage (48.68%) was then applied to other VAT periods on the basis of the presumption of continuity to establish the output tax under-declared in other periods i.e. the periods 08/09 to 02/13. The total amount of output tax declared on the original returns was £181,068.05, the output tax found to be due was £269,211.96 resulting in an under-declaration of output tax of £88,143.91.

42. As regards input tax to the periods 08/11 to 08/12 the input tax verified by HMRC was £36,365.38. The methodology used was that the output tax under-declared figure was used to work back to the original input tax which was now allowed for all other periods (again using the presumption of continuity). This was calculated (before wastage/theft/items sold below RRP), using a 24.43% mark-up (before . Thus, in relation to the periods 08/09 to 02/13, on a total of £88,143.91 of under-declared output tax, HMRC's assessment was based on input tax allowed of £70,838.15 (less a 24.43% mark-up) resulting in a total amount of input tax of £70,838.15. In other words, Mr Carroll made allowances for wastage, goods sold below recommended retail price and theft.

43. Thus the 11 February 2014 assessment issued by Mr Carroll was an assessment for £34,131 of net under-declared VAT for VAT periods 08/09-02/13 calculated as follows:

Output tax undeclared	£141,343
Less	
Input tax under-claimed	£107,212
	£34,131

44. Penalty notices totalling £24,567 were processed on 10 March 2014 on the basis that the inaccuracies in the appellant's returns were "deliberate and concealed" (paragraph 3(c) Schedule 24 FA 2007).

45. On 7 April 2014, HMRC received an email and faxed request for an independent review from Mr Athanas. On 13 May 2014, HMRC accepted the review request, notwithstanding that the review request was late.

46. Next, on 24 July 2014, the statutory review letter upheld the 11 February 2014 assessment and the penalties imposed under Schedule 24 Finance Act 2007 ("FA 2007").

47. The appellant appealed to this Tribunal on 22 August 2014.

The evidence of Mr Rupan

48. Mr Rupan was called to give evidence by the appellant, notwithstanding the fact that his firm was accused of "massaging" the appellant's output and input tax figures for the periods in question i.e. the five periods which formed the basis of Mr Carroll's enquiry.

49. Mr Rupan was the senior partner of his firm which had acted for the appellant for approximately four years before Mr Carroll's enquiry had started in October 2012. Mr Rupan said that he had written the letter which was faxed to Mr Carroll on16 January 2013, stating that he had advised the appellant to keep records properly.

50. When the enquiry started, Mr Rupan said that his firm had handed over all the records and invoices that they possessed.

51. Mr Rupan said that the appellant had suppressed invoices and sales. He denied that he or his firm had manipulated the returns and said that the appellant had not given him the missing purchase invoices at the time.

52. Mr Athanas suggested to Mr Rupan that some of the invoices which had been retained by Tamsons may have related to other clients of that firm in Hartlepool – Mr Rupan said that they had three or four other clients in Hartlepool. It was suggested to Mr Rupan that a number of the invoices related to goods purchased on a "day pass" at a local cash-and-carry and these would not necessarily identify the purchaser. Mr Rupan denied this and said that typically only one or two invoices for a particular period would be missing and would be retained for the following VAT quarter's return. The appellant's invoices were put in a separate box as they were received from the appellant. A separate box was used for each client there was therefore no likelihood of the invoices getting mixed up between different clients.

53. Mr Rupan did not understand why he was being accused of manipulating the returns. He had advised the client not to buy on day passes. He had nothing to gain from submitting false returns.

54. Mr Athanas questioned Mr Rupan about the difficulties that the appellant had had in relation to an earlier issue with HMRC concerning the sale of non-duty-paid alcohol. As a result of this dispute, the appellant had had to pay a £40,000 penalty. Mr Rupan said that he did not know about this problem.

55. Mr Rupan accepted that his firm had omitted to send the missing invoices to the appellant's new accountants. He noted that Mr Flora (a consultant retained by Tamsons) had had certain family difficulties.

56. Mr Rupan denied that his firm played any part in omitting to send invoices to HMRC or suppressing invoices on the returns.

57. Mr Rupan said that in October 2012, the appellant had phoned him and said that there were some missing invoices. Mr Rupan told the appellant to send them to him so that he could rework the VAT returns.

58. Mr Rupan said that he understood that when the missing invoices were sent to him, payment for these invoices had originally been made in cash. He was asked how the figures for cash in the final accounts could, therefore, reconcile. He said that the appellant had introduced money into the business and that ledgers have been created to that effect.

59. Mr Rupan said that he had always advised the appellant correctly but that the appellant had not listened to him. He strenuously denied that he or his firm had any part in "cooking the books".

60. In response to questions from the Tribunal, Mr Rupan said that his firm did not send the VAT returns themselves to the appellant but simply the amounts. His firm was authorised to put in the returns.

61. Mr Rupan confirmed that in the schedule is attached to his letter of 16 January 2013, which contained an analysis of the missing invoices for the 15 month period from 1 June 2011 to 31 August 2012, there were no invoices from Caterers Friend. He did not know why.

The evidence of Mr Flora

62. Mr Flora said that the appellant had been referred to him by Tamsons, for whom he acted as a consultant, but that he had never met the appellant. His consultancy traded under the name of "J & S Associates". After the appellant had received Mr Carroll's letter of 26 October 2012, Mr Rupan had contacted him and asked for his advice, in particular as to the way in which the appellant's returns should be amended. His brief was to negotiate with HMRC with a view to obtaining the best possible settlement and to advise on correspondence.

63. Mr Flora said that he had spoken to Mr Rupan and said that Mr Rupan should advise the appellant that he should maintain full records. He did not consider that Tamsons had advised the appellant poorly – his advice related to the future.

64. Mr Flora told us that the assessment raised against the appellant in July 2013 was not challenged or appealed against because the appellant abruptly changed agents. Mr Rupan had called him saying that the appellant had changed accountants and therefore Mr Flora was asked not to do any further work on the file. An appeal would have been lodged if Tamsons had continued to be instructed. He had no involvement in the penalty calculations, for example.

65. Mr Athanas challenged Mr Flora in relation to the mark-up that Mr Carroll had used in his assessment i.e. 21.5%. Mr Flora said that originally he had used a mark-up of 18-19% (in line with other VAT returns), but Mr Carroll had disputed this and thought that the mark-up should be higher. This would have been challenged on appeal, but the appellant decided to change his representation. Mr Flora said that he had simply looked at previous VAT quarters in reaching the 18-19% mark-up – the nature of the business had not changed it was a matter of missing invoices. Although Mr Flora referred to an 18-19% mark-up in his oral evidence, he actually agreed in an e-mail to Mr Carroll dated 22 July that the average margins in the appellant's type of business were around 16 to 18% , which equates roughly to the 21.5% mark-up used by Mr Carroll in his assessment.

66. When Mr Athanas suggested to Mr Flora that Tamsons had failed the appellant and had not advised him in the way that they should have done, Mr Flora firmly

denied this. In any event, Mr Flora thought that the appellant, who had been running his business for several years, plainly must have understood mark-ups.

67. Mr Flora also noted that the missing invoices had only been sent to HMRC by the appellant and Mr Athanas four months after they had been collected from Tamsons in mid-August.

The evidence of Mr Pathmanathan – the appellant

68. The appellant came to the UK in 2004. He had been introduced to Tamsons, a Tamil-speaking firm of accountants, by a friend who had recommended the firm. Tamsons had advised the appellant to keep invoices and documents which were to be sent to them and that the firm would "look after everything." The appellant said that he had followed the advice to keep documentary records of his purchases and sales correctly.

69. The appellant had been raided by HMRC in relation to excise duty. He said that he had informed Tamsons of the raid but they did nothing – he received no advice. He could not remember when the raid took place nor how much he had been "fined" in relation to a subsequent occasion.

70. The appellant, in relation to the present appeal, denied withholding invoices. He said that he had collected all the invoices and had sent them to Tamsons.

71. In relation to Caterers Friend, the appellant said that he paid cash to the delivery driver on delivery. He confirmed that he had bought liquor from Caterers Friend – he had gone to the cash-and-carry and bought it. He did not recollect buying any items which duty had not been paid.

72. The appellant denied that Mr Rupan had advised him on several occasions to keep records. He also said that he had never met Mr Flora. During the HMRC investigation, there had been no meetings with Mr Rupan but there were telephone calls. Moreover, the appellant said that Mr Rupan had told him that he (the appellant) could buy goods at a cash-and-carry on a day pass. Tamsons had never carried out a means test or capital test in relation to the appellant – there been no questions about his standard of living.

73. The appellant also denied that he had "siphoned" £300,000 from the business to buy a house. He said that he had never suppressed any sales and understood the importance of record-keeping for taxation purposes.

74. In relation to the ADR process, agreement had almost been reached, but discussions collapsed because an invoice from Caterers Friend had been found. The appellant thought that this invoice was "a fake". HMRC had declined to supply a copy of the invoice.

75. The appellant said that he had spent approximately £33,000 on building work in his shop. He said that Mr Rupan had made a mistake. The appellant was about to receive a VAT refund and, instead, Mr Rupan reduced the appellant's invoices and

stopped any VAT refund. In other words, the appellant accused Tamsons of suppressing purchase invoices in order to prevent a VAT refund coming to him, possibly to prevent an enquiry.

76. The appellant said that he had handed all his invoices to Tamsons. The appellant also confirmed that Tamsons had not shown him any of his VAT returns prior to their submission. Mr Rupan would simply advise the appellant how much money had to be paid in respect of VAT.

77. According to the appellant, Mr Rupan has said that invoices procured by the appellant on a day pass issued by a cash-and-carry supplier were acceptable.

78. The appellant was asked why he had continued to instruct Tamsons when he had felt he had received little advice in relation to the previous excise duty investigation in which the appellant ended up paying a penalty of £40,000 (which the appellant had to borrow to pay). The appellant simply said that he was not aware that Mr Rupan was not the right person to do the appellant's accounts and believe that he was "a good person." He believed that Mr Rupan was talking to HMRC and helping him – he believed Mr Rupan.

79. The appellant said that he had signed his self-assessment tax return and agreed the accompanying accounts.

80. The appellant said that he had not heard any other complaints about the competence of Tamsons. To the rest of his recollection, in approximately 2012, he came to believe that he had not been well served by Tamsons and that this impression have been confirmed when he spoke to "other people."

81. When Mr Carroll had come to his premises, he had not been offered the services of an interpreter. The appellant had showed him leaflets relating to promotional items and explained to him that there was no correlation between the promotional price and the regular sales price. Mr Carroll had not spoken to any of the cashier's operating the till in the appellant's shop.

82. In cross-examination, Mr Haley drew attention to various expressions used in the appellant's witness statement and asked him whether he had actually prepared the witness statement himself. In essence, the appellant confirmed that he had told his story orally to Mr Athanas and Mr Athanas had prepared the witness statement which the appellant then signed.

83. The appellant confirmed that after Tamsons had completed the VAT return they returned the underlying records back to the appellant. Mr Haley pressed the appellant as to why he had ceased to engage Tamsons in July 2013. The appellant said that he had learnt from other people ("my friend") that Tamsons not guiding him properly. Mr Haley suggested to the appellant that he had fired Tamsons because they were co-operating with HMRC. The appellant denied this – he said that he felt that Tamsons were not co-operating with him, but accepted this was because they were co-operating with HMRC.

84. Mr Haley suggested to the appellant that there was no benefit to Tamsons in suppressing invoices but there was an advantage to him. The appellant denied this – he said that "this was lies." He said that when the building work to the shop was in progress, he had paid a cheque to the building contractor of £33,000, which included VAT. This should have entitled him to a VAT refund, but he did not receive it. He said that Tamsons had suppressed the invoices and reduced the amount of the purchases by his business with the result that he did not get a VAT refund.

85. Mr Haley put it to the appellant that on 16 January 2014 he had delivered the omitted invoices to Mr Carroll. The appellant said that he had "two or three invoices". He then denied taking the omitted invoices to Mr Carroll. He was asked by Mr Haley whether he had ever visited Mr Carroll's offices. At this stage the appellant professed to be unable to remember the dates and eventually denied visiting Mr Carroll's offices.

86. Mr Haley next referred to the fact that Mr Rupan had said that if he had put all the omitted invoices (which he had not received from the appellant) onto VAT returns it would have indicated that there had been more purchases than sales and this would have been unrealistic – he asked the appellant what his reaction was to the statement. The appellant simply replied that he did not do it. He suggested that Tamsons had mixed up his invoices with invoices from other clients, noting that Mr Rupan had said that he had four other customers in the same geographical area.

87. In re-examination, the appellant accepted that he had collected the missing invoices and delivered them to Mr Carroll on 16 January 2014.

88. In answer to a question from the Tribunal, the appellant said that he had first sent the missing invoices to Tamsons after the HMRC investigation had started.

Witness statement of Mr Vallipuram Krishnandarajah

89. Mr Krishnandarajah produced a witness statement but did not give oral evidence. Usually in these circumstances a witness statement would be given little weight, but nonetheless we have taken account of Mr Krishnandarajah's statement.

90. Essentially, on 20 December 2013, Mr Krishnandarajah accompanied Mr Athanas when he visited Tamsons. They met Mr Rupan (referred to in Mr Krishnandarajah's witness statement as "Mr Ruben"). Mr Athanas asked to see the last VAT returns submitted to HMRC. Mr Rupan produced a bundle of invoices banded together with metal clips. Mr Krishnandarajah stated that he witnessed some loose invoices on the top of the group of invoices. Mr Athanas asked Mr Rupan why the invoices were kept outside the bundle and Mr Rupan replied that the invoices would be claimed in the next quarter. According to Mr Krishnandarajah, Mr Athanas commented that it was "wrong practice to withhold the invoices outside the return quarter."

The evidence of Mr Carroll

91. Mr Carroll explained that he had made two visits to Caterers Friend and uploaded what he described as reference material. He wanted to see if the goods sold by Caterers Friend were recorded in their customers' records and VAT returns. He discovered that the sales from Caterers Friend to the appellant were not recorded in the appellant's records or VAT returns. Mr Carroll had not included the Caterers Friend sales in the assessments which he issued to the appellant, but had confined these to the records received from Tamsons.

92. Mr Carroll noted that he had requested the missing invoices in October 2012 but they had only been delivered in January 2014. The appellant had come to Mr Carroll's offices to deliver the missing invoices.

93. Mr Carroll had analysed all the invoices. He compared the purchase and selling price and gave a wastage allowance. Mr Carroll noted that a number of invoices to the appellant were issued by a firm called "Bookers". He understood that Bookers were owned by Premier (the brand or franchise name under which the appellant traded) and that the Bookers invoices told the retailer what the retail price should be i.e. many of the "own-branded" goods were price marked.

94. Mr Haley questioned Mr Carroll about the percentage margin which he had applied, noting that Mr Flora had said that he expected a margin of 16-18% to be used. Mr Carroll confirmed that his assessments were based on a margin in that range.

95. In his evidence Mr Carroll explained the approach adopted by HMRC in relation to the calculation of potentially omitted sales by reference to trade guidelines. Mr Carroll's evidence was that based on the range of products sold by the appellant's business the guideline mark-up was 21.5%.

96. Mr Carroll explained that the mark-up would be applied to the purchases of the business on the basis that purchases would be fully recorded.

97. Mr Carroll was aware that Mr Athanas had indicated that his calculations would result in a gross margin in the region of 17% and therefore that his percentage of 20% was too high.

98. Mr Carroll went on to explain that a mark-up of 20% (of cost of sales) was equivalent to Mr Athanas' gross margin of 16.66% (based on sales) and provided a simple example to demonstrate the point.

99. Thus, if sales were £120 and the cost of sales were £100 the resulting gross profit would be £20 and a 20% mark-up.

100. This would provide a gross margin of 16.66% (gross profit/sales) (£20/£120 = 16.66%) and broadly in line with Mr Athanas' position. Viewed by reference to purchases, the mark-up percentage was 20% (gross profit/cost of sales) (£20/£100). Therefore, Mr Carroll explained that HMRC's and Mr Athanas' positions were not dissimilar. It was simply a matter of language and approach; but answer was the same.

101. Mr Carroll said that he had no reason to believe that Tamsons had themselves withheld purchase invoices and he could see no reason why they would do so, whereas it was in the appellant's interests to suppress purchases and, therefore, sales. Moreover, there had been no change in circumstances and, therefore, Mr Carroll had used the presumption of continuity to make assessments over a number of periods. Thus, the periods for which Mr Carroll's enquiry related 1 June 2011 to 31 August 2012. In accordance with the presumption of continuity, further assessments were issued for earlier and later quarterly periods.

102. Mr Carroll explained that in calculating the assessments he had reduced the mark-up upon which he had based his assessments from 24% to 21% (in fact, in his assessments Mr Carroll used a mark-up of 21.5%) to take account of various "special offers". Mr Athanas drew attention to two or three individual items (wine and cigarettes) which he queried and to. Mr Carroll responded that the reduction in the mark-up which he had applied was intended to take account of various discrepancies and that Mr Athanas was attempting to extrapolate from one or two lines in one invoice (thereby distorting the result) when in fact there were thousands of lines in dozens of invoices. Moreover, Mr Carroll said that he had given a generous wastage allowance to the appellant. Mr Carroll had carried out many visits to Premier shops in the course of his duty and he was confident that the generous wastage allowance that he had built into his calculations took allowed for Premier special offers etc.

103. Mr Carroll said that he had made the assessment to his best judgment and that although amongst the thousands of entries some individual entries may be incorrect, over a whole VAT quarter the result of any discrepancies would be minimal. For that reason, he had given a generous wastage allowance of 3% to account for any items such as special four-week promotions on a few items.

104. Mr Carroll told us that Mr Rupan had sent him day pass invoices from suppliers. Mr Athanas queried this, noting that a day pass invoice did not fulfil the requirements for a valid VAT invoice. Mr Carroll responded that he simply assumed that the day pass invoices related to the appellant's business and that those invoices had been sent to him by the appellant's accountants (Tamsons).

105. Mr Athanas referred Mr Carroll to the statement of Mr Krishnandarajah to the effect that he had witnessed "some loose invoices" on top of the group invoices in relation to the appellant's VAT return when he and Mr Athanas had visited Mr Rupan. We should note that Mr Athanas, although not formally giving evidence, commented that there were several loose invoices. Mr Carroll commented that there had been dozens of suppressed invoices, not "several". In any event, Mr Carroll considered that the loose invoices most probably represented invoices received at the end of VAT period and which had not yet been processed.

Discussion

106. This appeal concerns assessments for quarterly VAT periods 08/09 to 02/13 and penalties in respect of those periods.

107. The assessments were made under section 73 of the VATA. This provides, so far as relevant, 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."

108. Section 83(1)(p) VATA provides that an appeal shall lie to the tribunal with respect to an assessment under section 73(1) "or the amount of such an assessment."

109. The correct approach to a "best judgment" assessment under section 73(1) VATA, was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) (Judge Scott and Ms Gable), in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v The Commissioners for HM Revenue and Customs* [2018] UKUT 0255 (TCC) (Judge Herrington and Judge Scott) as follows:

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC) (Judge Sir Steven Oliver QC).
>
> 15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):
>
> "In such cases…the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary".
>
> 16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:
>
> "…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment."
>
> 17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the

> tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.
>
> 18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):
>
> "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." "

110. It is clear that a number of the appellant's purchase invoices did not appear in his records or in his VAT returns. Tamsons provided the Schedule of missing invoices from 1 June 2011 to 31 August 2012. Mr Carroll then invited the appellant to provide the underlying invoices in order to substantiate a claim to input tax. The invoices were eventually delivered by the appellant in January 2014 and, consequently, Mr Carroll reduced the assessment to approximately £34,000.

111. Having reviewed all the evidence, we are satisfied that Mr Carroll made the assessments which are under appeal to the best of his judgment for the purposes of section 73 (1) VATA. The correspondence and evidence discloses that Mr Carroll carefully considered all the evidence before him before making the assessments. We consider that Mr Carroll did not overlook any evidence and that his methodology was not flawed.

112. Secondly, we consider that the method by which Mr Carroll calculated the suppressed sales and the manner in which he calculated allowable input tax was sound. We consider that the mark-up that he applied to be reasonable. We further consider that, the use of the presumption of continuity was justified; in other words, if the appellant suppressed invoices in the period from 1 June 2011 to 31 August 2012, he was most likely to have done so in other periods, there being no change of circumstances. Moreover, the use by Mr Carroll of a generous 3% wastage allowance, in our view, took account of the potential discrepancies introduced by items which were sold as "special offers". In short, we see no reason to impugn Mr Carroll's methodology.

113. The appellant blames Tamsons for suppressing the invoices from his VAT returns. We have no hesitation in rejecting this contention. Mr Rupan firmly denied omitting the invoices from the appellant's VAT returns. There was no reason why he should do so and we accept his evidence. Furthermore, we do not accept that Mr Rupan omitted the invoices in order to avoid a VAT refund claim and a possible enquiry. There was no reason for a professional accountant to do this. If there was a

good reason for the refund claim (apparently relating to building works) that could surely have been put to HMRC.

114. Consequently, we reject the evidence on this point of the appellant which we did not find credible. Plainly, the appellant stood to gain from the suppression of purchase invoices.

115. Furthermore, there was, in our view, simply no independent evidence to support the appellant's contention that Tamsons suppressed the appellant's purchase invoices. The statement of Mr Krishnandarajah to the effect that there were some loose invoices evident when he visited Mr Rupan's offices does not account for the dozens of invoices that were suppressed and, as Mr Carroll suggested, could easily be explained as invoices received at the end of the VAT period which then get claimed in the next period – in our experience, a common enough occurrence.

116. Accordingly, we conclude that the appellant was responsible for the suppression of purchase invoices and that the appellant's behaviour was deliberate with concealment for the purposes of paragraph 3 (1)(c) Schedule 24 FA 2007.

117. As regards the calculation of the penalty, the penalty range for a deliberate and concealed understatement was correctly stated to be 50%-100%. The appellant's disclosure of the understatement was prompted because Mr Carroll had already begun his investigation.

118. Further, although the appellant initially denied suppressing invoices his accountant said the appellant had told him only a few invoices had been omitted), this was eventually admitted, albeit that the appellant (falsely in our view) blamed his accountants. The Schedule of the missing invoices took almost 3 months to arrive and was incomplete. Access to records was permitted by the appellant however there was usually a delay in providing documents.

119. In these circumstances, we consider Mr Carroll's assessment of the penalty and the relevant mitigating factors was correct. We see no basis to interfere with it.

120. In conclusion, for the reasons given above, we dismiss these appeals.

Appeal rights

121. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 4 September 2018