TC03823

Appeal number: TC/2013/04852

VAT – time limits for assessment – whether assessment made more than one year after the HMRC officer had received "evidence of the facts sufficient in the opinion of the commissioners to justify the making of the assessments" – held, yes – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TEMPLE RETAIL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS SHAMEEM AKHTAR

Sitting in public at the Tribunal Centre, 45 Bedford Square on 4 July 2014

Mr Michael Firth of Counsel, instructed by Grant Thornton UK LLP, for the Appellant

Mr Bernard Haley, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. In 2011 Temple Retail Limited ("the Appellant") accepted that it had made an error by not recharging certain costs to an associated company, Temple Finance Limited ("TFL"). Correspondence ensued between the Appellant and HMRC as to the amount of VAT underpaid. HMRC raised an assessment on 31 January 2013.

2. The issue before the Tribunal was whether that assessment was made more than one year after "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, came to their knowledge" and thus whether it was out of time by virtue of section 73(6)(b) of the Value Added Tax Act 1994 ("VATA").

The quantum

3. On 31 January 2013 HMRC issued an assessment for £108,000 of VAT which arose in VAT periods 04/08 to 03/11.

4. Before this Tribunal hearing, the parties had agreed that the first four VAT periods included in the assessment were out of time under the normal four year limit in VATA s 77(1)(a) and that the last period was in time under VATA s 73(6)(a). After these adjustments, the amount of VAT at issue in this appeal was £79,235.

The evidence and the facts

5. The Tribunal was provided with two bundles of documents. These included the correspondence between the parties and between the parties and the Tribunal. From that evidence we find the following facts.

6. The Appellant is a retailer of home furnishings. When a customer wishes to purchase goods on credit terms, the Appellant sells the goods to TFL, which supplies them to the customer on credit terms. TFL is partially exempt for VAT purposes.

7. By July 2011 a number of VAT matters were in issue between HMRC and the Appellant. The Appellant made a formal complaint to HMRC about the handling of these issues. The background to the issue under appeal before this Tribunal is that the Appellant owns a number of vehicles which were originally used only for its own business. As the business grew, some of the vehicles began to be used by TFL for debt collection purposes.

8. In a letter dated 18 July 2011, Mr Mintoft, an HMRC officer, pointed out to the Appellant that it "appeared never to have charged TFL for its use of shop vehicles." On 27 September 2011, the Appellant replied, acknowledging that there had been "an oversight" and attaching a spreadsheet showing a proposed allocation of the costs between the two companies.

9. Mr Mintoft replied on 25 October 2011, saying:

> "the schedules provided appear to show the projection of a value for the sample year, 2012, but do not go on to detail the 'discounting' mentioned which adjusts for differences in the previous years, nor do they show the calculation of the VAT quoted in the letter. As I must allocated any such tax to the specific VAT periods, I need the tax to be, as a minimum, broken down into the specific years to be assessed, that is the years ended 31 March 2008, 2009, 2010 and 2010[1]…accordingly can you provide me with the details requested within 30 days of this letter."

10. On 30 November 2011 the Appellant replied, saying:

> "concerning the discounting used, there was no detailed analysis. The discounts proposed were an estimate intended to provide an immediate value to enable the issue to be settled. Reacting to your comment, we have now extracted a detailed timeframe for the inception of debt vehicles. This is based on the timings of shop openings and the fact pattern that debt vehicles are acquired usually one year after the opening of a shop…"

11. This paragraph was followed by further details about the allocation method. Attached to the letter was a schedule setting out the amount of the proposed recharge from the Appellant to TFL for each of four accounting periods, from the year ending 31 March 2008 through to the year ending on 31 March 2011. These figures were arrived at by way of a five-step calculation using the methodology set out in the covering letter.

12. There had been several changes in the rate of VAT during this four year period. Where this had happened, the Appellant pro-rated the recharge for the relevant accounting period on a time basis, and then calculated the VAT at the appropriate rate. For example, for the year to 31 March 2010 the recharge was £226,507. On 1 January 2010 the VAT rate had increased from 15% to 17.5%, so 9/12 of the recharge was subjected to VAT at 15%, being £25,482 and 3/12 was charged at 17.5%, being £9,910. The total VAT due for that accounting period was therefore £35,391.

13. On 31 January 2012, Mr Mintoft replied to the Appellant, saying:

> "the schedules supplied identify the tax concerned at the various different VAT standard rates in force during the period in question. I have allocated the tax to the VAT periods on a time basis as set out in the schedules attached. If you consider this is not a fair allocation, please contact me within the next 14 days to suggest an alternate treatment, If you do not contact me within that period I shall arrange for it to be processed on the suggested basis."

14. Mr Mintoft's allocation was carried out by taking the figures provided by the Appellant and pro-rating them on a time basis over four VAT periods which fell

[1] Both parties accepted that this was a typographical error for 2011.

within in each accounting year. Mr Mintoft then applied the correct VAT rate for each period to the pro-rated figure.

15. The total VAT for each accounting year was identical to that in the Appellant's schedules – so, for example, that for 2009-10 was £35,391, made up of one period at 17.5%, being £9,910 and three periods at 15%, totalling £25,482.

16. On 9 February 2012, Mr Barry, the Appellant's tax manager, corrected what both parties agree was a typographical error in Mr Mintoft's schedules; he went on to confirm that "there is no objection to the period distribution you propose."

17. At some subsequent date, but before January 2013, Mr Mintoft left HMRC. On 31 July 2012 HMRC input the numbers from Mr Mintoft's schedules into their computer system and calculated the total VAT due from the Appellant. However, nothing further was sent to the Appellant until 11 January 2013, when Ms Lakeman of HMRC wrote to Mr Barry saying:

> "you may recall that the company was in discussion with Mr Mintoft regarding the output tax clue on the recharges to Temple Finance. I have found that although these figures were agreed with Mr Mintoft (copy of your letter dated 30.11.11 and Mr Mintoft's schedule enclosed) this assessment was never issued. Please accept my apologies for this oversight."

18. The assessment was issued on 31 January 2013. By letter dated 1 March 2013, which was received by HMRC on 5 March 2013, Mr Barry wrote to Ms Lakeman asking for "a reconsideration of this assessment" on the basis that most of the periods were out of time under VATA s 73(6).

19. Ms Lakeman replied by letter dated 11 April 2013, setting out her reasons why she did not accept that the assessment was out of time. At the end of the letter, she says "if you disagree with my decision, you need to write to me within 30 days of the date of this letter, explaining why you think my decision was wrong and I will look at it again. If you prefer, I will arrange for a review by a person not previously involved in the matter. You will then have the right to appeal to an independent Tribunal. Alternatively they [sic] can appeal direct to the tribunal within 30 days of the date of this letter."

20. On 10 May 2013, Mr Barry asked for an independent review of Miss Lakeman's decision. On 7 June 2013, Mr Alger, an Appeals Support Officer, responded, saying "thank you for your letter of 10 May 2013 accepting HMRC's offer of a review" and informing Mr Barry that this would be completed in the next 45 days by a Mrs Heather Gibbs.

21. On 24 June 2013, Mrs Gibbs wrote to Mr Barry, saying "I refer to your letter dated 10 May 2013 in which you requested a review of the above Notice of Assessment…I have now concluded the review of the assessment." At the end of the letter she advises that the Appellant can appeal to an independent tribunal if it does not agree with her review decision. On 22 July, a Notice of Appeal to the Tribunal

was completed on behalf of the Appellant. Under "grounds for appeal" the Notice says "we are appealing against the Commissioner's review dated 24 June 2013."

Preliminary procedural issue

22. The statutory appeal provisions are at VATA ss 83 to 84. The Tribunal found it difficult to link these provisions with the steps taken by the parties.

23. In particular, Mr Barry's letter was received on 5 March 2013, more than 30 days after the date of the assessment. However, Ms Lakeman did not treat this as being out of time or indeed as an appeal at all. Instead, she issued a new decision which she considered had its own appeal rights. It is possible to analyse what then followed as causing the Appellant's appeal to the Tribunal to be out of time.

24. Both parties confirmed before us that they did not wish to take any time limit points. We decided that it was not necessary to carry out a detailed analysis of the steps taken by the parties to see how they fitted with the VATA appeal provisions. Should the outcome of any such analysis be that permission was required for a late appeal, we give that permission.

The law

25. The case turns on VATA s 73, the relevant parts of which are as follows:

> **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…

26. In *Pegasus Birds v C&E Comrs* [1999] STC 95, Dyson J said that:

> "The person whose opinion is imputed to the commissioners is the person who decided to make the assessment. It does not matter that he or she may not be the person who first acquired knowledge of the evidence of the facts which are considered to be sufficient to justify making the assessment. The knowledge of all officers who are authorised to receive information which is relevant to the decision to make an assessment is imputed to the commissioners."

27. He also set out six principles to be used in deciding whether "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment" has come to their knowledge of HMRC. These are:

> "1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous *to Wednesbury (see Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) [2012] STC 1738 at 1748 (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10-11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act."

28. When *Pegasus Birds* went to the Court of Appeal under reference [2000] STC 91, Dyson J's decision was upheld, albeit without expressly referring to the above principles. Aldous LJ, giving the leading judgment (with which Henry LJ and Scott Baker J agreed) said that the purpose of VATA s 73(6) was "to protect the taxpayer from tardy assessment."

29. In *Lazard Brothers & Co Ltd v C&E Comrs* (1995) VAT Decision 13476, Mr Abel, an officer of HMRC, had decided that Lazards had over-claimed input tax. Following correspondence between the parties, HMRC assessed the company, which appealed on the basis that the assessment was out of time. The VAT Tribunal (Mr Paul Heim), after a careful review of the authorities, concluded as follows:

> "The Tribunal does not consider that the making of calculations upon facts in the possession of the Commissioners comes within the terms of evidence of facts sufficient to justify the making of the assessment. The making of the assessment is the exercise of the Commissioners' judgment upon the facts. It is perhaps unfortunate from the Commissioners' point of view that after one officer had indicated the view that time had started to run, he was moved from his assignment and that another officer took over without a sufficient handover period, marred also by a period of illness."

30. That case also decided that the one year time limit was mandatory and it was not "open to either party to extend it, nor is it extended by the fact of the Commissioners asking for further information, subject always to the conditions as to the sufficiency of the evidence in the opinion of the Commissioners."

31. In *Next Group plc v R&C Commrs* [2011] UKFTT 122, a decision of Judge Bishopp, the main issue before the Tribunal was whether the provision of a brochure to customers was a supply for consideration. Although HMRC succeeded on this substantive point, the Tribunal also found that the assessments relating to VAT periods 05/04 to 08/05 were out of time under VATA s 73(6)(b). The HMRC officer in the case had been provided with the information needed to make the assessments but remained concerned that the arrangements were abusive, and asked Next Group for further information. More than a year later, the officer was informed by letter that no further relevant documentation existed about the motives behind the arrangements. When giving oral evidence, the officer conceded that this later letter "did not add any evidence to that which he already had, rather, it was an absence of evidence" (see [69] of the decision).

32. In *PJ House (t/a P & J Autos) v C & E Commrs* [1996] STC 154, the Court of Appeal decided that HMRC had power to issue "global assessments" – ie a single assessment covering several accounting periods. Further, this power was not limited to cases where it was impossible or impracticable to identify the specific accounting period for which the VAT was due.

Mr Firth's submissions on behalf of the Appellant

33. In reliance on Dyson LJ in *Pegasus Birds*, Mr Firth said that Mr Mintoft was "the person who decided to make the assessment"; it was therefore necessary to establish when he had "the last piece of evidence… of sufficient weight to justify making the assessment."

34. Mr Firth submitted that:

(1) when Mr Mintoft wrote to the Appellant on 25 October 2011, he did not have the requisite evidence, and so asked for further details. In particular, he said "as I must allocate any such tax to the specific VAT periods, I need the tax to be, as a minimum, broken down into the specific years to be assessed";

(2) the further details, and an allocation of the recharges by year, were provided in the Appellant's letter of 30 November 2011;

(3) Mr Mintoft clearly considered that this was sufficient evidence of facts, because he replied on 31 January 2011 that "the schedules supplied identify the tax concerned at the various different VAT standard rates in force during the period in question." He went on to say that he had "allocated the tax to the VAT periods on a time basis as set out in the schedules attached."

(4) All Mr Mintoft had done was to divide the recharge numbers by four, to arrive at the recharge for each VAT period, and then multiply those numbers by the VAT rate which applied in that period.

(5) Mr Mintoft did not consider he needed any more evidence: in his letter of 31 January he is not asking for evidence, but for the Appellant to get in touch "if you consider it not to be a fair allocation". Mr Firth says that Mr Mintoft "obviously therefore thought his allocation was fair."

(6) Mr Mintoft said that if he had not heard from the Appellant within two weeks, he would issue an assessment; had he done so, it would have been identical to that which was eventually sent to the Appellants on 31 January 2013.

35. Mr Firth drew a close parallel with *Lazards:* he says that all that Mr Mintoft had done with the evidence in the letter dated 30 November 2011 was to carry out some very simple calculations. The carrying out of calculations is not "evidence of fact."

36. When Mr Barry emailed Mr Mintoft on 9 February 2012 to say that the Appellant had "no objection" to the allocation, this also was not "evidence of fact." At most it was similar to the letter sent to Mr Abel from Next Group, saying that the Group had no further information about the motivation behind its brochure pricing: Mr Barry's email "did not add any evidence to that which [Mr Mintoft] already had."

37. Mr Firth submitted that this was also HMRC's initial view: Mrs Lakeman's letter of 11 January 2013 says that the figures "were agreed with Mr Mintoft" and to demonstrate this she encloses Mr Barry's letter of 30 November 2011 and Mr Mintoft's schedule: she does not refer to Mr Barry's email of 9 February 2012.

38. Finally, Mr Firth relied on *House* in support of his submission that HMRC does not have to make an assessment on a period by period basis but can make a global assessment.

Mr Haley's submissions on behalf of HMRC

39. Mr Haley agreed with Mr Firth that the phrase "sufficient in the opinion *of the Commissioners* to justify the making of the assessment" should be read as meaning "sufficient in the opinion *of Mr Mintoft* to justify the making of the assessment." Mr Mintoft was the "person who decided to make the assessment," despite the fact that it was in fact issued after he had left HMRC.

40. However, Mr Haley said that Mr Mintoft did not have "evidence of facts" sufficient in his opinion to justify the making of the assessment, until he received the email from Mr Barry on 9 February 2012. Because HMRC must assess on the basis

of a VAT period, not on the basis of an accounting period, it was only when Mr Barry had confirmed that Mr Mintoft had correctly allocated the figures provided by the Appellant to the relevant VAT periods that the "evidence of facts" was in Mr Mintoft's opinion sufficient to make the assessment.

41. As a result, the assessment issued on 31 January 2013 was in time, because it was less than a year after Mr Barry's email of 9 February 2012.

42. Mr Haley drew the Tribunal's attention to the earlier complaint made by the Appellant about the progress of various VAT issues, and said that Mr Mintoft would have been particularly careful to ensure he had the Appellant's agreement before issuing the assessment.

43. The Tribunal asked Mr Haley what, in his submission, Mr Mintoft would have done, had the Appellant not replied to his letter of 31 January 2012. Mr Haley said "he would have made the assessment."

Discussion and decision

44. Dyson J in *Pegasus Birds* said that "the person whose opinion is imputed to the commissioners is the person who decided to make the assessment." The parties were in agreement that this was Mr Mintoft, despite the fact that the assessment had actually been issued after he had left HMRC.

45. That this is correct as a matter of fact can be seen from Ms Lakeman's letter of 11 January 2013: she says "although these figures were agreed with Mr Mintoft this assessment was never issued. Please accept my apologies for this oversight."

46. It is also right as a matter of law: the fourth of of Dyson LJ's principles is that the period of one year runs from the date "when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners." Nothing was communicated to HMRC after Mr Mintoft left HMRC; all that Ms Lakeman did was to issue the assessment.

47. The question therefore is: when was that "last piece of evidence" communicated to Mr Mintoft, so that he had the "evidence of facts" which in his opinion was sufficient to make the assessment?

48. On 25 October 2011, Mr Mintoft set out what he needed "as a minimum" to assess the Appellant. On 30 November 2011 the Appellant provided him with a calculated amount for each of the four accounting periods in question. Despite his reference to "at a minimum", Mr Mintoft asked for no more information.

49. All Mr Mintoft did with the numbers provided in the Appellant's schedules was to time apportion them by (a) dividing the annual figure by four, and (b) multiplying the result by the correct rate for each VAT period. We respectfully concur with the Tribunal in *Lazards* in finding that the mere performing of a calculation by an HMRC officer is not "evidence of facts" and so does not extend the time limit set by VATA s 73(6)(b).

50. In so doing we also reject Mr Haley's submission that Mr Mintoft did not have "evidence of facts…" until such time as the information provided by the Appellant had been allocated to VAT periods. The mere allocation of figures to VAT periods on a time basis is not "evidence of facts" at all. And as Mr Firth says, the Court of Appeal in *House* makes it clear that HMRC do not need to have figures provided to them on a period by period basis before they can issue an assessment.

51. We also agree with Mr Firth that Mr Mintoft's letter of 31 January 2013 did no more than invite the Appellant to object if it disagreed with his time apportionment. As Mr Haley himself accepted, in the absence of a reply from the Appellant, Mr Mintoft intended to make the assessment.

52. Mr Haley made reference to the Appellant's earlier complaint against HMRC's the handling of its VAT affairs, and suggested that this had impacted on Mr Mintoft, making him nervous in his dealing with the Appellants. Even if this was the position, it is irrelevant to the legal test the Tribunal has to apply. The only question before us is the date on which Mr Mintoft had the evidence of facts which was, in his opinion, sufficient to assess the company.

53. That evidence was provided in Mr Barry's letter of 30 November 2011. The one year period set by VATA s 73(6) began to run from the date that letter was received by Mr Mintoft. As a result, the assessments under appeal before this Tribunal were out of time when issued by HMRC on 31 January 2013.

54. This is sufficient for us to allow Appellant's appeal.

55. We observe that our conclusion is entirely consistent with the purpose of VATA s 73(6)(b), which, as Aldous LJ said in *Pegasus Birds,* is "to protect the taxpayer from tardy assessment." If Mr Haley's submissions were correct, HMRC could reset the time clock by the simple expedient of writing to the taxpayer and asking for confirmation (or otherwise) of the assessable VAT. The subsection would be deprived of its protective force.

56. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 21 July 2014