[2019] UKFTT 399 (TC)

VAT – alternative assessments arising from disallowance of input tax – missing VAT invoices – whether HMRC should have accepted the alternative evidence of input tax put forward by Appellant – whether assessment made to best of officer's judgement – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07214

Appeal number: TC/2017/03970

BETWEEN

WASTEAWAY SHROPSHIRE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
TERRY BAYLISS

Sitting in public at Centre City Tower, Birmingham on 19 February 2019

Ashley Clayton, Director, for the Appellant

Gareth McKinley, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

FULL FINDINGS OF FACT AND REASONS FOR THE TRIBUNAL'S DECISION ISSUED ON 1 MARCH 2019

INTRODUCTION

1. This appeal against two alternative VAT assessments (each for £20,593) was heard on 19 February 2019 and a decision dismissing the appeal and containing summary findings of fact and reasons for the decision was issued on 1 March 2019.

2. The Appellant has submitted an application for permission to appeal the Tribunal's decision to the Upper Tribunal. Under the Tribunal's procedure rules, such an application may only be made once full findings of fact and reasons for the Tribunal's decision have been issued. This document contains such findings and reasons. If the Appellant still wishes to apply for permission to appeal the Tribunal's decision following a detailed consideration of this document, it must submit a new application to the Tribunal in accordance with the final paragraph of this document.

THE FACTS

3. We received a bundle of documents which largely consisted of a written witness statement of officer Yvonne Leipacher with extensive documentary attachments. There was also a short (unsigned) witness statement from Mr Clayton which, after giving his name and address, read as follows:

> The amount of money claimed by HMRC and that is in dispute in this appeal is made up mainly of purchase invoices that were lost during a move of the premises, according to the HMRC statement of Case they do not raise this part of the claim and as such I respectfully ask that the appeal should be upheld as they don't mention the lost invoices in their Statement. All information to be used in this appeal relates only to and is in response to the HMRC Statement of Case.

4. We also heard oral testimony from officer Leipacher and Mr Clayton. We found officer Leipacher to be a credible and convincing witness. Mr Clayton did not dispute his previous involvement in another business which had had a similarly slapdash approach to record-keeping and the making of VAT returns, nor did he give any credible explanation for those of the inaccuracies in the Appellant's VAT returns which he accepted. We formed the view that his evidence was to be treated with caution except where it could be externally corroborated.

5. Officer Yvonne Leipacher of HMRC made an unannounced visit on 25 February 2016 to the premises which had been notified to HMRC as being the Appellant's business premises, and found them empty. This was followed up by an unannounced visit by officer Leipacher and a colleague on 14 March 2016 to the Appellant's registered office in Telford, which was Mr Clayton's home. Some business records were taken away, along with a memory stick containing a backup of the Appellant's Sage accounting records.

6. Officer Leipacher examined the records briefly (focusing on a particular period, 04/13) and established a number of areas of concern. On 18 March 2016 Mr Clayton visited her office to deliver further business records (in particular, bank statements) and she outlined some of her concerns to him. He said that he inputted his purchases data into Sage using bank statements and not the actual purchase invoices. A number of purchases were therefore showing as standard rated (therefore supposedly giving rise to input VAT) when they were clearly purchases which did not carry VAT (such as bank charges and rental paid to the landlord of the business premises – a copy invoice showing that no VAT was being charged on the rent); also there were a large number of input tax claims for which there were either proforma invoices or no invoices at all. Officer Leipacher asked Mr Clayton to organise and analyse the

records properly so as to highlight the input VAT entries on his detailed Sage reports for which there were valid invoices, those for which there were no such invoices and those which did not in any event carry the VAT that had been claimed for them. She confirmed her request in a letter dated 18 March 2016.

7. Mr Clayton replied by email on 22 March 2016, saying that he had been "rather shocked" by Officer Leipacher's unannounced visit, not least because he was running late for an important appointment with "the NHS CCG". He referred to the fact that he had struggled to locate all the papers asked for at the visit, and had said they must be in his loft at home. He went on to say:

> "I have remembered that Wasteaway Shropshire were evicted from their business premises by being locked out and as such we lost 2 x 4 drawer filing cabinets worth of paperwork, this included sales invoices, purchase invoices, all correspondence letters and contract documents. We also lost stock, supplies, tools, equipment and officer furniture/equipment."

8. By email dated 24 March 2016, officer Leipacher asked Mr Clayton to provide as many records as possible by 14 April 2016. Upon chasing after that date, she received a response from Mr Clayton by email dated 19 April 2016, in which he said he was "working on the VAT account very hard most days and nights." He wrote that the Appellant had been evicted from its business premises in "December 2015" without prior notice. All the paperwork was lost so he was unable to provide any detailed VAT invoices prior to December 2015. He asked officer Leipacher to "consider the use of your power of discretion under article 182 of the principle VAT directive", and said the Appellant's right to deduct input VAT could be evidenced by the detailed bank statements and Sage accounts already provided, which showed that the payments had been made; and he sent a spreadsheet (broken down by VAT quarters) on which he had provided some "Details" for each entry and VAT numbers in respect of some of the suppliers identified. On examination, it appeared to officer Leipacher that this spreadsheet did not include all the purchase entries included in the Sage data already supplied; it appeared to include only purchases paid for through the bank statements. Mr Clayton had included a column entitled "VAT error", totalling £3,289.27, representing the over-claimed input VAT he had identified in the course of his work.

9. Ultimately, Mr Clayton arranged for the delivery of a further batch of documentation to HMRC on 4 May 2016. This included various purchase and sales invoices. Officer Leipacher examined the material supplied, and was not satisfied with significant parts of it. She corresponded with the Appellant's former landlord, who confirmed that the premises had been taken back on 25 March 2015 and the Appellants had been given the opportunity for a period of two weeks to remove property. Various owners of assets had taken them away, but quite a lot had been left at the premises, including filing cabinets with some paperwork, but nothing of any significance or organised nature.

10. Officer Leipacher completed her initial review of all the material supplied and wrote to the Appellant on 25 May 2016. She had calculated underdeclared output VAT on missing sales invoices (by reference to the average VAT value on the sales invoices she had seen), and had also disallowed input VAT for all stated purchases which she considered to be outside the scope of VAT or VAT exempt, for which no VAT invoices had been provided, which she considered to be for a non-business purpose, which she considered to be for business entertainment, and where she believed the same input VAT had been claimed twice. She then carried out a comparison between the output VAT figures included on the Appellant's VAT returns and the output figures derived from the Sage data. Her calculation showed NET VAT due from the

Appellant of £21,636, which she said she would assess for unless persuaded otherwise by a response from the Appellant. She recorded that many of the shortcomings found in the Appellant's records were similar to those in a previous business of which Mr Clayton had been company secretary in 2008 which had resulted in a 66% disallowance of claimed input VAT and a "best judgment" assessment to recover outstanding tax.

11. Further correspondence ensued, in the course of which it was also noted that the records included a sales invoice to the Appellant's former landlord dated 9 May 2015 for "Stock withheld in Unit B8 Hortonwood 10 Telford". Although the value of the invoice was nil, its date appeared to demonstrate that the eviction was likely to have been before that time, as did the fact that no invoice from the former landlord dated after 1 January 2015 (for rental quarterly in advance) appeared in the Appellant's records.

12. Further correspondence ensued, and whilst officer Leipacher had a number of issues which she felt could best be dealt with at a meeting, Mr Clayton did not respond to her request for him to contact her to arrange one. She therefore issued an assessment on 19 July 2016 for £21,661, slightly adjusted from the earlier figures.

13. Mr Clayton replied by letter dated 25 July 2016. He made various specific comments with regard to identified paragraphs in officer Leipacher's covering letter dated 19 July 2016 for her assessment letter. He requested an independent review of officer Leipacher's decision to assess the Appellant.

14. Following the requested statutory review, HMRC wrote to the Appellant on 16 November 2016, confirming that in principle officer Leipacher's decision was upheld, but that there were a number of technical issues which meant that the existing assessment needed to be re-issued.

15. On 26 January 2017 officer Leipacher wrote to notify the Appellant of amended assessments (a "preferred" assessment and an "alternative" assessment), each for £20,593. The difference between them was solely in the allocation of the various amounts between the VAT accounting periods from 07/12 to 10/15. Neither party addressed us on whether one should be preferred to the other, and accordingly we proceed on the basis that the preferred assessment should be considered first, with the alternative assessment only being considered if we discharge the preferred assessment.

16. In her covering letter dated 26 January 2017, officer Leipacher provided a detailed explanation of the various elements making up her assessment, as follows:

> As previously explained, the bulk of the input VAT has been disallowed because, in the absence of purchase invoices, you have not provided satisfactory evidence of the taxable supply to the business and its direct link to your onward taxable supply for discretion to be considered under Article 182 of the Principal VAT Directive. If no invoice, a pro forma invoice or a document stating 'this is not a VAT invoice' has been provided, it has been listed in my spreadsheet under the heading 'No VAT invoice' and the input VAT has been disallowed. The spreadsheets you provided supports that no invoice was provided for numerous entries with the word 'lost' in red.
>
> If you are now in a position to provide alternative evidence (as explained in my letter of 19 July 2016) then I will review it. I would, however, also refer you to the 'notes' column in my main spreadsheets. Here I have tried to give an indication of whether or not alternative evidence will be sufficient to

support the VAT claimed. I have used the following descriptions (and for ease of reference, I have created individual mini spreadsheets for each description, for each VAT quarter):

(a) Lost. Non-business?

'Lost' indicates that you confirmed in your spreadsheet that no invoice is available. From the description you gave in your Sage accounts, I was not able to ascertain if the supply was used in the course of furtherance of your business in making taxable supplies. If it was not, the input VAT will be disallowed. Some examples of non-business were explained in Officer Champion's letter under headings, supplies of clothes used for uniform, purchases believed not to be for business purposes and business entertainment.

(b) No invoice. Non-business?

This indicates that I could not find an invoice. From the description you gave in your Sage accounts, I was not able to ascertain if the supply was used in the course of furtherance of your business in making taxable supplies. If it was not, the input VAT will be disallowed. Examples of non-business were explained in Officer Champion's letter under headings, supplies of clothes used for uniform, purchases believed not to be for business purposes and business entertainment.

(c) Lost. VAT error on spreadsheet.

'Lost' indicates that you confirmed that no invoice is available. Following our brief meeting on 18 March 2016 I pointed out that input VAT was not recoverable from exempt or outside the scope supplies (as explained in Officer Champion's letter). When you submitted your spreadsheets, you marked several items as 'VAT error'. The input VAT claimed for these entries would be disallowed.

(d) Not VAT invoice.

You provided a pro-forma invoice, statement or document stating 'this is not a VAT invoice'. The input VAT claim the disallowed.

(e) Lost. Exempt?

'Lost' indicates that you confirmed that no invoice is available. From description in your Sage accounts I believe these items may be exempt or outside the scope of UK VAT. The input VAT claimed for these entries would be disallowed if that were found to be the case.

(f) No invoice. Exempt?

This indicates that I could not find an invoice, but from the description given in the Sage accounts, I believe these items may be exempt or outside the scope of UK VAT. The input VAT claimed for these entries would be disallowed if that were found to be the case.

(g) Not VAT invoice. Aged creditor.

You provided a pro forma invoice, statement or document stating 'this is not a VAT invoice'. The input VAT claimed would be disallowed. See also Aged Creditor explanation at (e) below.

(h) No invoice. Aged creditor.

This indicates that I could not find an invoice. See also Aged Creditor explanation at (e) below.

(i) Lost. Aged creditor.

'Lost' indicates that you confirmed no invoice is available. See also Aged Creditor explanation at (e) below.

I have reviewed all invoices provided and only included them in my main spreadsheets (under the headings listed below) if I believe the input VAT was incorrectly claimed because it was for:

(a) An exempt or outside the scope of UK VAT supply.

Most of these you have already identified in your spreadsheet as 'VAT error'.

(b) Non-business purpose.

For reasons previously explained. E.g. work done to Benji in 10/12 return.

(c) Business entertainment.

As previously explained. E.g. 'business meeting' in 10/12 return.

(d) Input VAT claimed twice.

In your 07/14 return you claimed input VAT for 5 invoices from Kenburn Rentals Ltd folios A130 to A134. These invoices were a quarterly rental of baler for £520 plus VAT £104.

I have found 6 invoices for quarterly baler rental (i.e. 6 invoice x 3 months = 18 monthly charges) dated:

Invoice date: 29/4/13. Tax point: 29/4/13.

Invoice date: 28/9/13. Tax point: 13/11/13.

Invoice date: 8/1/14. Tax point: 13/2/14.

Invoice date: 2/4/14. Tax point: 13/5/14.

Invoice date: 4/7/14. Tax point: 13/8/14.

Invoice date: 8/1/15. Tax point: 13/2/15.

You also claimed input VAT for rental of baler from Kenburn Rentals Ltd on a monthly basis using the same invoices listed above for £173.33 and VAT £34.67 as follows:

…

In total, 18 monthly entries.

I have allowed the input VAT claimed in the 18 monthly entries (although technically the tax point on a couple of the entries indicates they were entered in the accounts and claimed to early) and I have disallowed the 5 duplicated entries in the 07/14 return.

(e) Aged creditors

I would refer you to section 4 of Public Notice 700/18 – Relief from VAT on bad debts. This section explains if you have to repay input tax when supplies are not paid for. In brief, you are required to repay input tax if you do not pay for the supplies within 6 months of the relevant date. Your suppliers will not be required to issue a notification so you will need to monitor the time you take to pay your suppliers. The relevant date is:

- the date of the supply, or if later
- the due date for payment

> Using the Sage back-up, I have run a check on unpaid purchase invoices over 6 months old. I have disallowed the input VAT for entries listed under the heading 'Aged Creditors' in the main spreadsheets 7 months after the date of the invoice. I have therefore allowed 6 months and 30 days payment terms.
>
> **(f) Different VAT rate.**
>
> Here, you have claimed input VAT at 20%, but items were actually reduced rate (i.e. 5%) or zero-rate (0%). E.g. 0% items from Charlies Stores in 01/13 return.
>
> …

17. On 1 February 2017 the Appellant wrote to HMRC disputing the revised assessments. In this letter, Mr Clayton accepted certain of the disallowances identified by officer Leipacher on the spreadsheets accompanying her assessment, but maintained that she should have exercised her discretion to allow recovery of input tax for which there was no supporting VAT invoice. He maintained that she had not "fairly or reasonably considered this request. Furthermore I don't think you have given due consideration to ensure that my business pays more tax than should be properly due. I supported my request with records of payments, in some cases weighbridge tickets and detailed Bank statements." He said he had provided "alternative documentary evidence, evidence of payment, the name of the suppliers and where possible the VAT number of the company." He also asserted that "the purchases and VAT claimed were for the benefit of the company".

18. On 9 February 2017 officer Leipacher replied by email, essentially saying that as the previous statutory review had confirmed the inadequacy of the alternative evidence provided in support of the input tax claim for which no VAT invoices could be produced, that decision still stood in the absence of any further evidence. Further correspondence about a review took place, and ultimately officer Leipacher referred the matter for a new statutory review (though this was limited to the quantum of the assessment and the issue of whether it had been correctly notified).

19. The statutory review letter was dated 21 April 2017. On the basis that the Appellant had accepted HMRC's conclusions in respect of everything except the disallowance of input VAT for which no VAT invoices had been produced, the review letter limited itself to that issue (which, according to the letter, accounted for £16,845 of the assessments). It rehearsed the fact that no further evidence had been provided since the earlier statutory review decision that the alternative evidence provided was insufficient. After a brief recapitulation of the previous basis for the decision, it confirmed that it was upheld.

20. On 11 May 2017 the Tribunal received the Appellant's notice of appeal. It stated the amount of tax in issue as £16,845, referred explicitly to HMRC's review conclusion letter dated 26 April 2017 and gave the following as the grounds of appeal:

> "Purchase invoices had been lost due to being evicted, alternative evidence has been provided ie bank statements, spread sheets and Sage accounts information. However all purchase invoices have been disallowed from 2012 until 2016."

21. It seemed to us there was ample evidence that the Appellant's VAT records, such as they were, were unreliable. Quite apart from the absence of large numbers of VAT invoices, the records which were available were extremely sketchy, incomplete and to a significant extent incredible. The Appellant was unable to produce any accounts for its business, and its 14 VAT

returns from 1 May 2012 (its date of registration) up to period 10/15 reported a total of £95,979 of outputs (excluding VAT) and £162,022 of inputs. There was only one VAT quarter (10/15) in which its outputs exceeded its inputs, its net deficit of inputs over outputs over the period of three and a half years was some £66,000 which (when added to the wages which Mr Clayton said were paid to his daughter and her partner) would have meant that the business was losing cash at the rate of approximately £29,000 per year. Alleged purchases for the purposes of the business on derv for period 10/14 were found to be more than the total value of the Appellant's supplies over that period. One sales invoice which Mr Clayton identified as having not been posted or issued (and therefore not included in the Appellant's output VAT figures) was found by officer Leipacher (after contacting the relevant customer) to have been received and paid by that customer. We do not accept that the Appellant was evicted from its premises in December 2015, we find it happened in March 2015 and the surrounding circumstances were as set out at [9] above.

THE LAW

22. HMRC's assessment was raised under section 73 Value Added Tax Act 1994 ("VATA94"), which provides in relevant part 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 judgement and notify it to him.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person –
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount is being VAT due from him for that period and notify it to him accordingly.

23. Regulation 29 of the Value Added Tax Regulations 1995 provides, in relevant part, as follows:

> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of –
>
> (a) a supply from another taxable person, holds the document which is required to be provided under regulation 13;
>
> …
>
> Provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)… above, such other documentary evidence of the charge to VAT as the Commissioners may direct.

24. Section 83 VATA94 provides in relevant part as follows:

> **83 Appeals**

> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters –
>
> …
>
> (c) the amount of any input tax which may be credited to a person;
>
> …
>
> (p) an assessment –
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act…
>
> …
>
> or the amount of such an assessment;

25. it has been well established since the case of *Van Boeckel v Customs & Excise Commissioners* [1981] STC 290 that an assessment will have been made "to the best of their judgement" if HMRC "fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due." An alternative formulation of the same concept, also endorsed in *Van* Boeckel, is that the officer making the assessment:

> "must not act dishonestly, or vindictively or capriciously, because he must exercise judgement in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of the assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guess work.

26. Once this threshold has been passed, it is clear that the burden then passes to the taxpayer to establish, on a balance of probabilities, that the assessment is excessive. This was expressed in the following way in *Tynewydd Labour Working Men's Club and Institute Limited v Customs and Excise Commissioners* [1979] STC 570:

> … any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. There should be no difficulty in the way of the Appellant assuming this burden. The facts and figures are known to him, and if he does not understand the Commissioners' case, the rules provide for the Commissioners to give a proper explanation.

27. In the present case, the bulk of the assessments arises as a result of HMRC refusing to accept the alternative evidence of any relevant charge to VAT put forward by the Appellant pursuant to Regulation 29(3) of the VAT Regulations.

28. The nature of the Tribunal's jurisdiction in relation to this latter point was set out by Schiemann J in *Kohanzad v Customs & Excise Commissioners* [1994] STC 968 as follows:

> "It is established that the tribunal, when it is considering a case where the commissioners have a discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion; it is one where it sees whether the commissioners have exercised their discretion in a defensible manner. That is the accepted law in this branch of the court's jurisdiction, and indeed it has recently been decided that the supervisory jurisdiction is to be

> exercised in relation to materials which were before the commissioners, rather than in relation to later material…
>
> It is, of course, well established that in this type of case, the burden of proof lies on an appellant to satisfy the tribunal that the decision of the commissioners was incorrect."

29. Further, as stated in the First-tier Tribunal case of *McAndrews Utilities Limited v HMRC* [2012] UKFTT 749 (TC):

> "The supervisory jurisdiction in cases such as this involves consideration of whether the Commissioners took into account all relevant matters, whether they took into account any irrelevant matter and whether the decision was within the bounds of reasonableness."

30. It is also clear that an appellant faces a high hurdle in seeking to persuade a tribunal to exercise this jurisdiction. As was stated by the VAT and Duties Tribunal in *Baba Cash and Carry v HMRC* (2007) Decision 20416 (at [12]), after an examination of the ECJ decision in *Reisdorf v Finanamt Koln-West* Case C-85/95 [1997] STC 180:

> "Against the Community law background summarised above, the domestic provision, in the proviso to regulation 29(2)(a) of the VAT Regulations, that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT [i.e. evidence other than the tax invoice] as the Commissioners may direct, gives only slight scope, as it appears to us, in the absence of mala fides, for a taxable person to appeal successfully to this Tribunal in a case where the Commissioners have considered the case and declined to make any such direction."

31. *Reisdorf* was a case in which the German VAT authorities had refused to permit deduction of input VAT on a taxable supply which was evidenced by a copy VAT invoice solely because the relevant original VAT invoice was not held – a strict requirement of German VAT law, unless the original had been lost (which was not alleged in that case). It was held that the power to accept alternative evidence was a matter for the member state. This effectively meant that the German authorities were quite entitled to refuse to permit a copy invoice to be used to support deduction of input VAT in a situation where the original invoice could be obtained. It was inherent in this decision that input deduction could be denied even if there was no dispute that the taxable supply had taken place; the national authorities were quite entitled to require production of the original invoice as a precondition of allowing the deduction, unless it had been lost or destroyed.

THE ARGUMENTS

For the Appellant

32. Mr Clayton argued that he had come to the hearing prepared to argue on the amount of the input VAT disallowed where VAT invoices had been produced; his calculation of that figure was £2,265.23. He said this was based on HMRC's statement of case, which identified in paragraph 2 various heads under which HMRC were seeking to defend their assessment and did not mention disallowance due to lack of supporting VAT invoice or satisfactory alternative evidence. Thus, in his submission, the Tribunal ought to be deciding whether the disallowed input VAT should be limited to the £2,265.23 which he admitted, or some larger amount up to £3,748 (being the difference between HMRC's total assessment of £20,593 and the £16,845 which they had specifically attributed to the missing VAT invoices).

33. The basis for this argument was the drafting of HMRC's statement of case, which started as follows:

MATTER UNDER APPEAL

1. HMRC decision to raise assessment for period 07/12 to 10/15 totalling £20,593, notified to appellant by letter dated 9 February 2017, ***(Attached marked "A")***. With interest of £1441.32 also shown.

2. HMRC disallowed input tax for the following reasons: –

a) Business entertainment is not deductible

b) Input tax cannot be claimed on Pro Forma invoices, they are not VAT invoices

c) Input tax has been claimed on invoices when none has been charged

d) Some input tax has been claimed twice, once on the invoice and once against the payment made

e) Input tax has been claimed against supplies received that either exempt from VAT, such as insurance or outside the scope of VAT, such as road fuel licences.

3. Assessment was raised within legislation 77(4) and 77(4)(a) VAT Act 1994.

4. Assessment has been raised using Best Judgement under Section 73(1) VAT Act 1994.

5. This is appealable under Section 83(1)(c) and (q) of the VAT Act 1994.

34. In response to HMRC's statement of case, I was given an unsigned document dated 27/08/18 headed "Statement of Case for Wasteaway Shropshire Ltd" with Mr Clayton's name at the foot. It read as follows:

> In response to the statement made by D Williams (on behalf of HMRC)
>
> Filed 28 July 2018
>
> Disallowed input tax: –
>
> Wasteaway do not dispute the amount of tax claimed under 2 a 2b 2c 2d and 2e in the statement of case by HMRC in fact in my original statement to HMRC I brought this to HMRC's attention as an error, however this represents only 11% of the amount disallowed which in monetary terms would be £2265.23.
>
> The figure above has been calculated from the detailed assessment made by HMRC so how can they claim Wasteaway owe £20,593 in disallowed input Tax?
>
> There is no other reason listed in the statement of case by HMRC therefore I respectfully ask for the amount disallowed be reduced to £2265.23 and that the interest be removed.
>
> Furthermore the attitude of the investigating officer was a disgrace to the HMRC service I have as reported in my correspondence been treated very poorly and my staff were upset by their treatment when attending the HMRC office.
>
> This case has ruined my company and put 2 people out of work!
>
> The cost of defending the HMRC claim far exceeds the amount I feel is owed by Wasteaway Shropshire Limited and I therefore respectfully ask for an award of costs in the sum of £2500.
>
> Full detailed evidence can be provided if necessary.

For Wasteaway Shropshire Limited

A Clayton

Director 27/08/18

35. In relation to HMRC's refusal to accept the alternative evidence that had been put forward in respect of the £16,845 of input VAT disallowed by them in relation to the missing invoices, he submitted that the evidence provided was more than adequate, and I take him to be arguing that this case was one in which the Tribunal ought to find HMRC's refusal unreasonable.

For HMRC

36. Mr McKinley agreed that, viewed in isolation, the wording of paragraph 2 of HMRC's statement of case was not clear about the extent to which the appeal was in dispute. It was however clear from the rest of the statement of case that HMRC were continuing to defend their refusal to allow the input tax in respect of the missing invoices. For example, under the heading "Appellant's contentions", the following appeared:

> 31. As stated in Notice of Appeal dated 8 May 2017: –
>
> ***"Purchase invoices had been lost due to being evicted, alternative evidence has been provided i.e. bank statements, spreadsheets and Sage accounts information. However all purchase invoices have been disallowed from 2012 until 2016."***
>
> 32. No other grounds of appeal were provided by the Appellant.
>
> 33. The only issue in dispute is the input tax disallowed that relates to missing invoices and insufficient evidence of business use.
>
> 34. Penalty assessment was issued on 16 March 2017 but it has not been appealed and therefore is not subject to this appeal.
>
> 35. Mr Clayton, Director, is of the view that he has provided sufficient alternative information previously to allow discretion to be exercised with regards to the missing VAT invoices.
>
> 36. Therefore this appeal solely concentrates on the invoices related to alternative evidence as shown in the table below.

Period	Amount
Jly-12	£66
Oct-12	£625
Jan-13	£222
Apr-13	£1056
Jul-13	£1602
Oct-13	£2202
Jan-14	£2032
Apr-14	£1012
Jul-14	£737
Oct-14	£2296
Jan-15	£1083
Apr-15	£1388

Jul-15	£1232
Oct-15	£1292
Total	£16,845

37. Under the heading "Respondent's Contentions", the statement of case said this:

> 37. Appellant has been registered for VAT since 1 May 2012 under reference 133 9033 32. The director Mr Clayton has been previously VAT registered and connected to other entities where the issues identified in this case were also identified in relation to those businesses.
>
> 38. Alternative evidence
>
> HMRC enquiries noted the following issues, where VAT has been deducted in respect of: –
>
> - Supplies of clothes used for uniform
> - Exempt and outside the scope supplies
> - Purchases not believed to be for business use
> - Business entertainment
> - Claims that have been made twice
>
> 39. HMRC Officer has only allowed the input tax where she is satisfied there has been a taxable supply to the business, that has a direct link to onwards taxable supplies made by appellant.
>
> 40. The Officer has noted that there are a lot of missing receipts and invoices, and the alternative evidence provided does not prove that these purchases have been used in the course of furtherance of the business.
>
> 41. Appellant has provided bank statements that showed purchases had been made, but it has been unable to satisfy HMRC as to what these purchases were or whether they have been used in the course of furtherance of the business.
>
> 42. HMRC officer has requested the following be supplied where possible to enable her to consider using discretion allowed under Regulation 29(2) of SI 1995/2518: –
>
> - Alternative evidence, i.e. supplier statements
> - Evidence to support receipt of a taxable supply on which VAT has been charged
> - Evidence to support payment
> - Evidence to support how goods/services have been consumed within the business or evidence about their onward supply.
>
> 43. The only evidence that has been provided at least in part, is proof of payment of some of the invoices by virtue of the bank statements provided. All that these show is payment made, but not what they were for, or to whom. Therefore a direct and immediate link to onwards taxable supplies by Appellant cannot be established.
>
> 44. Some of the reference in accounts referred to vehicle tax, insurance, TV licence etc all of which are taxes in their own right and are outside the scope of VAT. Other refer simply to Boots or purchases of DERV. If all the purchases of DRV were for business purposes, then it appears that the DRV

> purchased to collect the items for recycling amounts to more than the business activities themselves.
>
> 45. HMRC say this is not credible.
>
> 46. If the DERV purchases for example can be demonstrated to relate to business use, it is reasonable to question whether all sales have been invoiced or declared.
>
> 47. From the VAT returns submitted, by appellant, it is evident that appellant is operating at a loss. HMRC question how a business can operate for 4 years at a loss?

38. Under the heading "Quantum of the Assessment" in their statement of case, HMRC said this:

> 51. This appeal is limited to the input tax denied due to the failure of appellant to provide alternative evidence that is sufficient to satisfy HMRC, that they are entitled to deduct the disputed input tax.
>
> 52. HMRC say that the assessment raised in this regards are correct and to best judgement.
>
> 53. The figures have been obtained using information obtained from appellant's own records; they are therefore based on fact.
>
> 54. Other elements of the assessment have not been disputed, it is only the input tax to which VAT invoices are not held that is in dispute.
>
> 55. In the absence of sufficient evidence to determine the disputed input tax relates to purchases consumed in the onwards taxable supplies of the business (Regulation 29(2) of SI 1995/2518) HMRC say the decision is correct.

39. To summarise, there were many missing VAT receipts, and the alternative evidence provided does not show that the claimed inputs have been used for the purpose of the business. Whilst bank statements had been provided showing purchases made, this did not show what the purchases were or whether they were used in the business. No link to any taxable supplies had therefore been demonstrated. Officer Leipacher had been correct to refuse to exercise her discretion to allow input tax as claimed.

40. The assessments had therefore been raised to her best judgement, using figures derived from the Appellant's own records. In the absence of any convincing evidence from the Appellant that the assessments were wrong, they should be upheld.

DISCUSSION AND DECISION

41. The wording of paragraph 2 of HMRC's statement of case clearly leaves a lot to be desired. However, when the document is considered as a whole (in particular the extracts set out above) and in context, it is quite clear that:

(1) it explicitly responded to the Appellant's sole stated grounds of appeal, namely that in respect of £16,845 of disallowed input VAT, "purchase invoices had been lost due to being evicted, alternative evidence has been provided ie bank statements, spread sheets and Sage accounts information. However all purchase invoices have been disallowed from 2012 until 2016",

(2) immediately before paragraph 2 of the statement of case which Mr Clayton says led him to believe HMRC were no longer disputing the allowability of VAT claimed on missing invoices, paragraph 1 of that document identified the matter under appeal as "HMRC decision to raise assessment for period 07/12 to 10/15 totalling £20,593, notified to appellant by letter dated 9th February 2017, **(Attached marked "A")**"; the amount

referred to and HMRC's letter dated 9 February 2017 both clearly encompassed the VAT on the "missing" invoices, and

(3) in numerous other places in their statement of case (as extracted above) HMRC made it clear that the missing invoices were at the heart of both the Appellant's Notice of Appeal and HMRC's response to it.

42. It is quite clear, therefore, when reading the documents as a whole that the full amount of the £20,593 assessed by HMRC remained in issue so far as both parties were concerned, subject to its apparent reduction to £16,845 (as stated by the Appellant in its Notice of Appeal to the Tribunal) by reason of the Appellant's seeming acceptance of the first £3,748 of disallowance which was not related to the lack of VAT invoices (or satisfactory alternative evidence).

43. It seemed to us there was ample evidence that the Appellant's VAT records were unreliable. Quite apart from the absence of large numbers of VAT invoices, the records which were available were extremely sketchy, incomplete and to a significant extent incredible. The Appellant was unable to produce any accounts for its business, and its 14 VAT returns from 1 May 2012 (its date of registration) up to period 10/15 reported a total of £95,979 of outputs (excluding VAT) and £162,022 of inputs. There was only one VAT quarter (10/15) in which its outputs exceeded its inputs, its net deficit of inputs over outputs over the period of three and a half years was some £66,000 which (when added to the wages which Mr Clayton said were paid to his daughter and her partner) would have meant that the business was losing cash at the rate of approximately £29,000 per year. Alleged purchases for the purposes of the business on derv for period 10/14 were found to be more than the total value of the Appellant's supplies over that period. One sales invoice which Mr Clayton identified as having not been posted or issued (and therefore not included in the Appellant's output VAT figures) was found by officer Leipacher (after contacting the relevant customer) to have been issued and paid by that customer.

44. The evidence which the Appellant provided by way of "alternative evidence" showed only that payments had been made to various suppliers, by means of bank statements, and those payments had been entered into the Appellant's Sage records as VAT-inclusive amounts. The general lack of credibility of the Appellant's business records (especially bearing in mind Mr Clayton's previous involvement with another business whose VAT accounting and record keeping had followed a similar pattern) meant that HMRC were in our view perfectly justified in requiring more detailed and convincing documentary evidence to replace the missing VAT invoices than the Appellant in fact provided. Officer Leipacher did her best to make sense of the large volume of inappropriately structured material sent to her, and she was to our mind somewhat generous in some of the credit adjustments which she made in calculating the assessments; but she cannot be criticised for refusing to accept the extremely thin evidence which the Appellant supplied as an alternative to the missing VAT invoices.

45. That is enough to dispose of the appeal. We should however mention that in view of some of the errors which were identified by officer Leipacher in the input tax claims made by the Appellant (which were not disputed by the Appellant), the Appellant would have faced an extremely difficult task in attempting to persuade the Tribunal, if it had been relevant, that any of the disputed input tax was properly deductible in calculating the Appellant's overall VAT liability. Proof that a payment has been made to, for example, Tesco does not establish any particular amount of input tax as having been incurred – the relevant goods may well have all be entirely zero rated; and in the light of the overall incredibility of the Appellant's business as summarised above and the nature of the goods or services for which payment was made (judging by the nature of many of the traders to whom the payments were made), the Appellant

has not established to our satisfaction that any of the disputed input tax was incurred for the purposes of its business.

46. It follows that the appeal in relation to the preferred assessment must be dismissed, and that therefore the appeal in relation to the alternative assessment must be allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 19 JUNE 2019