



[2021] UKFTT 0093 (TC)

TC08076

VAT – denial of input tax – best judgment - yes – evidence to show a fairer or better estimate – no - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/01813 (V)

BETWEEN

ENDEAVOUR STRATEGIC DEVELOPMENTS LLP Appellant

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER

The hearing took place on 29 January and 3 February 2021 with the provision of closing submissions in writing after the hearing. With the consent of the parties, the form of the hearing was V (video) and the Tribunal video platform was used. A face to face hearing was not held because of the measures required by the Covid-19 pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Harry Best, Counsel, instructed by Thompson Crooks Solicitors for the Appellant.

Ms Sharon Spence, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents.

DECISION

INTRODUCTION

1. The Appellant appeals decisions made by the Respondents (hereafter referred to as “HMRC”) by which tax claims for input VAT were denied. The Appellant’s business is described as the renovation and redevelopment of properties and construction projects. HMRC issued a decision letter in 18 May 2016 and Notices of Assessment in June 2016 and maintain that in the absence of sufficient evidence the assessments have been made on the basis of best judgment. The Appellant maintains that HMRC did not exercise best judgment, as the decision was not made in good faith and was unreasonable.

BACKGROUND SUMMARY

2. On 26 November 2013 an application was made by Mr Gwynne (a director of the Appellant) to register the Appellant for VAT purposes with effect from 21 August 2013. The first VAT return was duly submitted on 3 April 2014. In response to queries raised by HMRC Mr Gwynne indicated that he expected to make standard rated supplies within the next 12 months.

3. A pre-arranged visit took place on 9 February 2016 between HMRC officials (including Officer Daly), Mr Gwynne and a colleague of Mr Gwynne, Mr Gray. Following that meeting HMRC issued a letter to the Appellant requesting further information and documents.

4. Further correspondence and telephone calls followed and a meeting took place on 7 April 2016 between the officials and the Appellant’s then agent, Grant Thornton. Various documents were provided at that meeting.

5. On 25 April 2016 Officer Daly wrote to the Appellant requiring information to be provided within 21 days, stating that unless the VAT position regarding supplies made by the Appellant was clarified, all input tax claimed from registration would be disallowed under the partial exemption rules.

6. On 18 May 2016 Officer Daly wrote to the Appellant stating that she believed that the Appellant had not declared, or HMRC had not assessed, the correct amount of VAT for the periods 01/14 – 31/10/15 and as a result she had made assessments of £324,065 VAT under section 73 Value Added Taxes Act 1994 (“VATA”).

7. On 2 June 2016 a Notice of Assessment was issued for the amount of £324,065 of VAT previously paid to the Appellant as reclaimed input tax.

8. Further correspondence between HMRC, the Appellant and Grant Thornton followed. In particular, on 16 June 2016 Grant Thornton wrote to Officer Daly requesting a reconsideration of her decision and setting out more detailed information.

9. On 6 August 2016 Mr Gwynne notified HMRC that the firm called Tughans and Mr Best would now be dealing with the Appellant’s tax matters.

10. On 12 December 2016 HMRC Officer Daly issued a Warning of Winding-up Notice which identified the VAT amount and other tax liabilities as outstanding.

11. A letter from Mr Best on 16 December 2016 noted the Appellant’s plan to appeal the VAT assessments, recognising that the appeal would be made out of time, but submitting that it would be in the interests of justice for the late appeal to be permitted. Mr Best noted that partners in the Appellant were very much aware that by the time of the hearing of the appeal the records must be “up-to-date”. He noted that if HMRC pursued the winding-up petition the Appellant would seek to obtain injunctive relief.

12. On 22 December 2016 Officer Daly wrote to confirm that HMRC would hold off winding-up the Appellant until the new year.
13. On 6 January 2017 Officer Daly wrote to Mr Best noting that no appeal had been received and that accordingly she would reinstate the collection of the debts.
14. On 18 January 2016 a further Warning of Winding-up Notice was issued by Officer Daly.
15. On 25 January 2017 Officer Daly wrote three letters to the Appellant in relation to the periods ended 04/16, 07/16 and 10/16. Taken together those letters resulted in input tax credits being denied of:
 - (1) £26,310 for the period 04/16;
 - (2) £29,046 for the period 07/16; and
 - (3) £16,881.88 for the period 10/16.
16. Each letter was also stated to be a notice of assessment under section 73 VATA for VAT. The only amount assessed was £2838.63 for the period ended 10/16.
17. A Notice of Appeal was sent to the Tribunal on 20 February 2017 appealing the decision made on 18 May 2016. That Notice of Appeal made no reference to the 25 January 2017 decision letters.
18. On 24 February 2017 Mr Best requested a statutory review of the decisions made in respect of the periods 04/16, 07/16 and 10/16.
19. On 6 April 2017 another officer from HMRC's appeals and reviews unit issued a review letter pursuant to section 83 VATA confirming the decisions made by Officer Daly in respect of the periods 04/16, 07/16 and 10/16. That letter noted in the normal way that the Appellant had 30 days in which to appeal to the Tribunal.
20. No appeal of the 25 January 2017 decisions has been received by the Tribunal to date.
21. On 5 October 2018 Judge Kempster issued an Unless Order to the Appellant directing that unless there was compliance with previously issued listing directions by 26 October 2018, the appeal may be struck out. On 9 November 2018 Judge Brooks issued an Unless Order to the Appellant directing that unless there was compliance with the directions by 23 November 2018 the proceedings would be struck out. The Appellant confirmed by email that it wished to continue with the appeal, but failed to provide the required documents and was therefore informed that unless those were provided by 10 December 2018 the appeal would be struck out. An application to extend the deadline was granted by the Tribunal until 20 December 2018.
22. On 9 January 2019 the proceedings were struck out on the basis of failure to comply with previous directions. Mr Best applied on 5 February 2019 for reinstatement describing problems arising from the sudden departure of the solicitor handling the appeal from the representatives' firm. HMRC objected to the reinstatement.
23. On 20 July 2019 a panel of the Tribunal reinstated the Appellant's appeal following a hearing. That decision stated that the appeal of the decisions made in the letter 18 May 2016 and related Notice of Assessment issued on 2 June 2016 was reinstated together with the decision to deny VAT credits for the periods of 04/16, 07/16 and 10/16 on the basis of the parties agreeing the terms of an Unless Order by 30 September 2019.

24. On 30 September 2019 Ms Spence informed the Tribunal that the parties were unable to agree the terms of a further Unless Order. Mr Best responded by email saying that an alternative proposal would be put before the Tribunal by 7 October 2019.

25. On 7 October 2019 Mr Best wrote seeking an order containing directions including the appointment by HMRC of an independent officer to carry out a compliance check on the VAT returns for the appealed periods. The Tribunal panel considered such an order to be inappropriate and issued an Unless Order directing that unless the Appellant provided HMRC and the Tribunal with further evidence to show how the disputed VAT claimed as input tax was linked to the taxable supplies of the Appellant, or confirmed that it had no further evidence by 31 December 2019, the appeal would be struck out without further reference to the parties. In addition, a list of specific information in relation to the VAT returns for each of the disputed periods was identified as being required by the Tribunal, including invoices, sales ledgers/breakdowns, contracts, zero rating and reduced rating certificates and building control completion certificates. The Tribunal directed that if, upon receipt of that information, HMRC was unable to agree the VAT liability both parties were to provide their availability for a hearing.

26. On 27 December 2019 Mr Best wrote to the Tribunal stating that the Appellant had no further information or evidence to rely on to show that the disputed input VAT was linked to the taxable supplies of the Appellant and maintained that more than enough evidence had been provided previously to support the deductibility of the input tax.

27. On 23 January 2020 the Tribunal directed that the proceedings should be struck out.

28. On 6 February 2020 Ms Spence wrote to the Tribunal noting that the direction of 15 November 2019 had provided that unless the Appellant provided further evidence or confirmed that not have anything further then the appeal would be struck out. Accordingly, the Appellant appeared to have complied with the terms of the 15 November 2019 Unless Order. On 18 February 2020 Mr Best also wrote to the Tribunal identifying the perceived error in the striking out.

29. On 2 July 2020 Judge Williams reinstated the proceedings, finding that the appeal had previously been struck out in error.

LACK OF APPEAL OF THE DECISIONS/ASSESSMENT MADE ON 25 JANUARY 2017

30. The Notice of Appeal submitted on 20 February 2017 only appealed the decision made on 18 May 2016. It clearly identifies the decision of 18 May 2016 and details set out in the grounds of appeal regarding the chronology and the grounds themselves relate to the matters dealt with in the 18 May 2016 decision and the subsequent June Notices of Assessment. No Notice of Appeal has been received by the Tribunal in respect of the decisions made on 25 January 2017.

31. HMRC clarified in their outline argument that they have treated the appeal as encompassing all the decisions made in May 2016 and January 2017 and would not object if the Appellant wish to make an application to include the decisions made on 25 January 2017.

32. I am satisfied that HMRC have agreed to the admission of the late appeal of the 18 May 2016 decision to the Tribunal. Having regard to HMRC's position I also give permission for that appeal to be notified late.

33. Notwithstanding the terms of the reinstatement of the Appellant's appeal on 20 July 2019, there has in fact been no appeal of the 25 January 2017 decision/assessment. No grounds of appeal in relation to that decision/assessment have been identified. No application has been made to admit a late appeal of the decision/assessment. Despite this, HMRC say

they have treated the case as encompassing all of the decisions including those made in January 2017 and do not object to those matters being considered.

34. I have considered whether I should treat the case as including some form of deemed appeal, given HMRC's position, and despite the lack of any application. The Appellant should have made an appeal within 30 days of the review letter dated 6 April 2017, i.e. before 6 May 2017 (Section 83G VATA). The Tribunal has power under Section 83G VATA to admit a late appeal. However, as at the hearing more than 3½ years has passed without any application being made. The Appellant has not engaged with the January 2017 decisions prior to the hearing and Mr Best did not address them at the hearing or in his written submissions. I therefore see little basis to conclude that the Appellant should be treated as having made an application to admit a late appeal.

35. However, for the avoidance of doubt if I was to consider whether to admit some form of implied appeal of the January decisions, applying the principles set out in *Martland v Commissioners for her Majesty's Customs and Excise* [2018] UKUT 178 (TCC) and *Commissioners for her Majesty's Customs and Excise v Katib* [2019] UKUT 189 (TCC), I would conclude that the lack of any explanation for the lack of an appeal, the lack of engagement with the decisions in the course of the litigation and a consequent weak case given that the Appellant has not challenged the basis of the decisions or provided evidence to show a better estimate of the input tax to which the Appellant should have been entitled, means that any such appeal would not be admitted on an application to do so. For the reasons I set out later I am also satisfied that the Appellant would not succeed in any such appeal.

GROUND OF APPEAL

36. The Appellant's grounds of appeal submitted with the appeal of the 18 May 2016 decisions can be summarised as:

- (1) the decisions made no sense in logic or in law. Officer Daly seemed to refer to a failure to declare output tax and then disallowed input tax;
- (2) a statement that Ms Daly had found errors on the Appellant's VAT returns in a visit on 9 February 2016 could not be true as no records were made available at that time. If there was a suspicion of an offence the Police and Criminal Evidence Act 1984 applied;
- (3) the reasons given for the assessments in the letter of 18 May 2016 were vague. Officer Daly had not identified with particularity the items of input tax which should have been disallowed; and
- (4) the Appellant did not have the funds to pay the assessment of 18 May 2016.

ADMISSION OF LATE EVIDENCE

37. At the test of equipment for the video hearing HMRC asked the Appellant's representatives whether the Appellant wished to include the invoices which the Appellant had sent to HMRC in correspondence previously as there had been no request from the Appellant to include them in the agreed bundles. The Appellant's representative responded in an email expressing concern that a bundle of 4000 pages of invoices may be produced by HMRC at such a late stage and that a postponement may be requested if this occurred.

38. However, I made clear to the Appellant's representatives that HMRC had merely offered to include the invoices on the assumption that the Appellant wished to rely upon them. Those documents were the Appellant's and had been returned to the Appellant by HMRC in 2016. I would not be granting a postponement to enable the Appellant to review its

own documentation which it had held for more than four years. I asked the parties to agree the bundles (as previously directed by the Tribunal).

39. A few days before the hearing an agreed bundle of invoices of 3877 PDF pages was provided.

EVIDENCE

40. The evidence consists of: the evidence bundle consisting of the documents identified in the index, the separate invoice bundle, and the oral evidence of Officer Daly and Mr John Gwynne.

41. Ms Spence confirmed that the evidence contained in the Witness Statements of Ms Kelly, Mr Paul Gwynne and Mr Gray was not challenged and it was not necessary for those witnesses to attend the hearing in order to adopt their evidence.

FINDINGS OF FACT AND REASONS

42. Unless otherwise stated, the findings are made on the basis of evidence which has not been challenged, whether evidence in the Witness Statements of Ms Kelly, Mr Gwynne and Mr Gray or otherwise.

Incorporation and Registration

43. The Appellant was incorporated on 20 August 2013. It has two limited liability partners: Mr John Gwynne and Mrs Gray. Mrs Gray takes no active role in the Appellant's activities.

44. The Appellant was registered for VAT purposes from 21 August 2013 and submitted VAT returns from 3 April 2014. The Appellant's business activities were described in its VAT registration as renovation and redevelopment of rental properties and a variety of construction projects.

The Appellant's VAT returns

45. The VAT returns for the periods 01/14 -10/15 show input tax being reclaimed on purchases and no output tax. The total input tax reclaimed during those periods was £324,065 - the amount which HMRC have denied by virtue of the decision on 18 May 2016 and Notice of Assessment issued on 2 June 2016.

46. The first VAT return to show outputs was that submitted for the 1/16 period showing sales of £100,000 giving rise to output tax of £20,000. That return has been accepted by HMRC.

47. Input tax was claimed in later returns, but no further outputs were declared until the return for 10/16 declaring a value of sales of £373,579. Further sales were declared in the period 07/17, but otherwise no further outputs were declared in the periods up to 01/18.

Other related companies

48. Endeavour Strategic Consulting Ltd ("ESCL") and Endeavour Strategic Ltd were identified as other businesses with which one or more of the partners in the Appellant were involved as director. There were other associated companies at the time of the disputed VAT returns such as Endeavour One Ltd, Endeavour Group Holdings Ltd, Endeavour Let Ltd and Endeavour Security Trustee Ltd. Mr J. Gwynne and Mrs Gray were also directors of several other companies in February 2016.

49. ESCL was incorporated on 3 July 2012 and its business is described as a development company. It is not VAT registered.

50. ESCL acquired properties for redevelopment and the generation of rental income or with the intention to resell. By June 2019 it had been involved in 10 projects most of which

were projects relating to the development of dwellings for use as student accommodation, with income generated from lettings and a subsequent sale of the freehold or immediate sale of the freehold on completion of the development. Almost all of ESCL's resulting supplies have been treated as exempt for VAT purposes.

51. Endeavour Let Ltd ("ELL") carries on business as a letting manager. It has principally acted as the lettings management company for the properties owned by ESCL and its services are also offered to purchasers of those properties following the sale by ESCL. Ms Kelly, who has provided evidence in the form of a witness statement, worked as a letting manager for the company. ELL, and in particular Ms Kelly, were involved with advertising for tenants in the vicarage property described below.

52. Endeavour Strategic Ltd was incorporated on 3 July 2012 and its business is described as a development company. Grant Thornton confirmed that until June 2016 all of ESL's supplies were exempt.

53. None of ESCL, ELL or Endeavour Strategic Ltd is or has been VAT registered.

General VAT compliance

54. The Appellant has not been a member of a VAT group.

55. An accountant provided accounting support to the Appellant and would send summaries to a firm - RPB Accountants - who would in turn submit the VAT returns. The accountant carrying out the support role provided the services to the Appellant and other Endeavour companies, but all of the input VAT on his supply of services was reclaimed by the Appellant. No attempt has been made to identify the relevant proportion of the fee attributable to work for the Appellant and Mr Gwynne confirmed at the hearing that he could not do so.

56. Invoices were frequently issued by suppliers addressed to ESCL regardless of whether the supplies were made to the Appellant or to ESCL or another Endeavour entity. Contact would be made with suppliers by Mr S Gray holding himself out as a representative of ESCL even when the contact related to works which were supposed to be carried out by the Appellant. Mr Gwynne acknowledged at the hearing that not all of the input tax claimed by the Appellant related to supplies made to the Appellant and the amount properly attributable to the Appellant had still not yet been quantified.

57. HMRC have identified that at least 70 invoices relied upon by the Appellant relate to a development called Fitzwarren even though it was accepted by Mr Gwynne at the hearing that that is not one of the projects in relation to which the Appellant has declared taxable supplies/outputs. At least 150 invoices relate to a property known as Encombe even though Mr Gwynne accepted in cross examination that the supplies evidenced by those invoices were made to ESCL. The projects at Fitzwarren and Encombe have been described by Grant Thornton as having resulted in exempt supplies by ESCL.

58. I therefore find that a significant number of the purchase invoices relate to supplies which were not made to the Appellant and for which it is not entitled to reclaim input tax.

Financial management of the Appellant

59. On the basis of Mr John Gwynne's unchallenged evidence at the hearing I find that the Appellant had no loan facilities or overdrafts. However, additional evidence from him about the Appellant's finances is not consistent with other evidence as I now explain.

60. Mr Gwynne said that ESCL paid bills for purchases made by the Appellant directly to the Appellant's suppliers. Mr Gwynne attempted to explain this as being the result of the fact

that ESC had a bank account with Barclays whereas the Appellant only held a bank account with a non-retail bank and was limited in its ability to pay suppliers.

61. I specifically asked Mr Gwynne why funds were not transferred to the Appellant from ESCL by way of loans or advances to enable the Appellant to pay its bills. He provided little response beyond saying that ESCL's bank account was better set up for making payments. However, the bank statements show frequent transfers of money from ESCL to the Appellant in most months from August 2014 onwards, which is not consistent with that evidence. These amounts have not been declared in the VAT returns as relating to supplies made to ESCL and have not been relied upon in Witness Statements or other witness evidence as reflecting supplies made by the Appellant to ESCL (even though that would have been central to the Appellant's case if it was so).

62. Mr Best has stated in correspondence that ESCL would often pay contractors engaged by the Appellant in part satisfaction of the amounts owed by ESCL to the Appellant for work done/services supplied by the Appellant. That is not consistent with the evidence from Mr Gwynne and Mr Best's statements as representative are not evidence. However, even if Mr Best has more accurately described the situation, the point remains that no invoices for those supplies have been provided or indeed any agreement or other evidence providing more detail about those supplies.

63. In addition, the Appellant's banks statements show numerous payments to persons who would appear to be suppliers such as Versasteel Ltd and M Dearly Plumbing. Those are not consistent with Mr Gwynne's claim that ESCL's account was better set up to make payments. There are no payments shown in the bank statements from the Appellant to ESCL to reflect repayment to ESCL of what Mr Gwynne described as payments made on the Appellant's behalf.

64. As a result I do not accept that ESCL paid bills on behalf of the Appellant for supplies made to the Appellant and as part payment for supplies provided by the Appellant to ESCL.

65. Given the evidence about the finances of the two companies and the evidence overall regarding the projects with which the Appellant was involved I find, on the balance of probabilities, that ESCL paid for supplies made to it even where the input tax on those supplies has been claimed by the Appellant in its VAT returns.

The Appellant's activities

The Vicarage

66. The Appellant was formed to acquire a property called St Thomas' vicarage, part of which was an old Grade 2 listed building which required refurbishment and part of which was land on which purpose-built student accommodation was to be constructed. On the basis of Mr John Gwynne's Witness Statement and oral evidence at the hearing I find that the initial plan was for the Appellant to buy the property as an investment, develop it and then dispose of it and/or let it to students. Instead, as the Appellant did not have the funds to purchase the property at the time of the acquisition a back-to-back arrangement was entered into in which the Appellant bought the property for £632,500 and immediately sold it on to an investor operating through a company called Bonefish Capital Ltd ("Bonefish") for the same price. (The reason for the purchase and resale was expressed differently by Grant Thornton in correspondence, but that difference has little implication for this appeal and I therefore do not address it further.)

67. That purchase and sale was completed on 17 September 2013. The purchase and sale were exempt transactions for VAT, but were not reported on the Appellant's VAT returns.

68. At the same time a development agreement was entered into with Bonefish (“the Development Agreement”). This document has not been provided in the evidence before me. I specifically asked for it to be identified at the hearing, but the Appellant and its representatives could not. Given the overall consistency of evidence that a development agreement was entered into between the Appellant and Bonefish and the evidence of the building work certificate provided by Bonefish described below, I find that the Development Agreement existed, even though it was not produced as evidence. There is dispute as to whether Officer Daly has seen it, but given her letter of 19 July 2016 referring to a provision in it, I conclude that she was sent it.

69. However, it is astonishing that such a key document has not been provided by the Appellant for the appeal. There are many matters which have been left unclear by the evidence and it is likely that the Development Agreement would have assisted in clarifying that position. For example, in the initial meeting with Officer Daly in February 2016 the unchallenged note of meeting shows that Officer Daly was told that Bonefish had bought the old building and land and had an option to buy the new build accommodation, whereas later evidence makes no further reference to the option to buy. I return to the implications of the omission of the Development Agreement in the context of the findings overall later in this decision.

70. Mr John Gwynne’s unchallenged evidence is that it was planned that a previously identified contractor would be used to carry out the works, but that contractor went out of business. As a result the works were carried out using individual specific sub-contractors at greater cost. He described how, as a result, the project was delayed and the Appellant was required to pay liquidated damages under the Development Agreement which were set against the amounts due to the Appellant.

71. On 17 September 2013 Bonefish issued a certificate for zero-rated and reduced rate building work, identifying the Appellant as building contractor. It identified the expected date of completion as 1 January 2015 and an estimated value of the supply as £700,000.

72. The unchallenged evidence of Mr P Gwynne shows that:

(1) At the end of October 2014 a Certificate of Completion was issued for part of the works covering the ensuite rooms in the new student accommodation, but not significant other parts of the works including common areas;

(2) During October 2014 to February 2015 Mr Paul Gwynne, who was employed as clerk of works by the Appellant, worked with the letting manager of Endeavour Let Ltd to move students from the old vicarage building to the newly built student accommodation so that refurbishment of the old vicarage could take place;

(3) Some exterior and common area elements of the work on the new and old parts of the vicarage were not completed until the summer of 2015.

73. Mr Gwynne’s evidence in his Witness Statement is that the old vicarage was available for occupation on 1 July 2015. The new accommodation was fully occupied in February 2015.

74. However, the evidence regarding payment to the Appellant and dates of invoices issued in relation to the vicarage when compared to these completion dates is replete with inconsistencies as I now explain.

75. Mr Gwynne said that funds payable to the Appellant under the Development Agreement were released as each stage of completion was achieved by a firm of solicitors called Carson McDowell. However, this was the first time in nearly 5 years of dispute that

such an explanation had been provided by the Appellant and had not been stated in Mr Gwynne's Witness Statement. There was nothing before the hearing to indicate to HMRC that Carson McDowell made payments to the Appellant in relation to the vicarage. Yet the inconsistencies increased as further evidence was provided at the hearing. Mr Gwynne was specifically asked whether the payments from Carson McDowell were shown in the evidence and Mr Gwynne said they were not.

76. The hearing ran into a second day on which, after previously hearing Mr Gwynne describe the release of monies from Carson McDowell, Mr Best sought to rely on a bank statement showing a payment from Carson McDowell on 29 October 2013 as evidence of construction supplies made by the Appellant to Bonefish. 29 October 2013 was only just over a month after the back-to-back purchase and sale of the property. It was therefore exceptionally early for an interim completion payment. There have been no invoices or other documents provided to show to what the payment made by Carson McDowell related. All invoices relied on by the Appellant in relation to the vicarage are dated at least 15 months later.

77. Mr Best maintained that the Development Agreement would have shown that interim payments were to be made to Carson McDowell to be held in escrow and released to the Appellant in stages. However, that document has not been provided and the burden of proof is on the Appellant.

78. Other payments shown by the bank statements as received by the Appellant from Carson McDowell are not reflected in any invoices issued to Bonefish (or indeed any other person) and were not addressed at the hearing as being interim payments. On the contrary, as noted, Mr Gwynne's evidence was that the interim payments were not shown in the evidence. However, the bank statements show the following receipts from Carson McDowell: £86,891.76 on 10 December 2013, £100,000 on 3 February 2014, £60,000 on 3 June 2014, £50,000 on 20 June 2014, £26,000 on 8 July 2014, £50,000 received on 2 October 2014, in addition to the receipt of £100,000 on 29 October 2013.

79. Three invoices have been relied upon by the Appellant as showing taxable supplies made by it in relation to the vicarage:

- (1) An invoice dated 1 September 2015 showing the Appellant billing Bonefish £700,000 for the supply and build of new purpose student accommodation at the vicarage on a zero-rated basis;
- (2) An invoice dated 10 February 2016 showing the Appellant billing Bonefish £49,750 plus VAT at 20%, for furniture and carpets supplied for the vicarage;
- (3) An invoice dated 10 January 2015 showing the Appellant billing Bonefish £100,000 plus VAT at 20% for refurbishment works at the old vicarage building.

80. None of the outputs shown by the invoices were declared on the Appellant's disputed VAT returns. The 10 January 2015 invoice was declared as an output in the 01/16 return it having been stated that the date of January 2015 was an error and the date was in fact January 2016. That return has been accepted by Officer Daly. However, the evidence before me does not show payment of any of the invoices by Bonefish. The total payments shown in the bank statements as being made by Carson McDowell total an amount which is less than half the total of these invoices.

81. The invoice for £700,000 is for exactly the same amount as the estimate on the certificate issued by Bonefish in January 2013 for those works, but that is inconsistent with Mr Gwynne's evidence that the amount paid to the Appellant was reduced by liquidated damages as a result of delays. The total of around £850,000 is consistent with the overall

amount described as payable under the Development Agreement, but is not consistent with Mr Gwynne's evidence of the reduction for liquidated damages. The invoices are also inconsistent with the evidence about interim payments.

82. The dates of the invoices are inconsistent with the evidence about completion dates. For example, given the evidence about the Appellant's funding problems and the fact that costs were higher than expected, it is inconsistent for the £700,000 invoice to have been issued in September 2015 when that part was fully complete and occupied by February 2015.

83. In considering the evidence overall I also apply the principles stated in the case of *Wetton v Ahmed and others* [2011] EWCA Civ 610 where it was said:

In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its nonproduction, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

84. The Development Agreement is certainly conspicuous by its absence and I draw an adverse inference as a result.

85. I find that given extent of the inconsistencies in the evidence and the adverse inference resulting from the lack of the Development Agreement, I reduce the weight given to the invoices provided in relation to the vicarage development for the disputed VAT returns and conclude that they are insufficient to show that taxable supplies indicated by the invoices were in fact made by the Appellant.

Other projects

86. The evidence has described the Appellant as using the knowledge gained from the vicarage project to provide further development/construction services. The projects to which it has been linked were described in meetings between the Appellant, Grant Thornton and HMRC as giving rise to taxable supplies. All of the properties are owned by ESCL. However, there are no agreements showing the nature of any services provided by the Appellant to ESCL on these projects.

87. Bank statements show that monies have been received by the Appellant from ESCL in the relevant period, but the nature of these payments has not been identified and the evidence about their nature has been inconsistent (as described previously). No invoices have been provided for supplies made by the Appellant to ESCL.

88. Mr Paul Gwynne who was clerk of works for the vicarage project has made no reference to any other projects involving the Appellant. Furthermore, Mr John Gwynne made no reference to other works for ESCL in his Witness Statement.

89. Overall, for these reasons and as further explained below, the evidence is inadequate to show that the Appellant provided construction services to ESCL or made any other taxable supplies to ESCL or any other non-Bonefish entity.

90. Overall, I am not satisfied that the generalised and often inconsistent evidence about the Appellant's activities in the periods to which the disputed VAT returns relate is sufficient to show what the Appellant's outputs were and what the VAT treatment of those supplies was.

91. The disputed input tax reflects costs of about £3.1 million. The Appellant claimed in the initial meeting with Officer Daly that the input tax claimed relates mainly to the vicarage project. Indeed, such a claim is consistent with the Appellant's witnesses' statements focussing on that project. In fact, the bundle of invoices supporting the claimed input tax mainly relates to projects other than the vicarage. As noted above, the evidence to show what if any supplies have been made by the Appellant for the other projects is missing.

92. It has been recognised by the Appellant and its representatives that record keeping has been poor. Mr Gwynne recognised at the hearing that input tax was claimed by the Appellant for supplies which were not made to it and on invoices where suppliers grouped together all supplies made to any Endeavour companies in one non-attributed bill.

93. I therefore find that the Appellant has not shown that the input tax claimed by it relates to supplies made to it, or for the bulk of the invoices to supplies made to it.

HMRC's actions leading to the 18 May 2016 decision

94. In January and/or February 2016 Ms Kelly received two or three phone calls from someone claiming to be from HMRC asking to speak to Mr Gwynne. Mr Gwynne called the number provided to Ms Kelly and spoke to Officer Daly who explained that she wished to visit regarding the VAT affairs of the Appellant. It was agreed that she would visit on 9 February 2016.

95. A representative from the Appellant's accountants contacted Officer Daly to suggest that the visit should be moved to Northern Ireland where the accountants were based and all the company administration took place, but Officer Daly maintained she wished to meet at the Appellant's registered address in Salford.

96. It was confirmed at the first meeting that the VAT returns were prepared by the accountants based in Northern Ireland. They were all in paper format and Mr Gwynne asked HMRC to liaise with the accountants regarding the provision of further information as they had all the documents. At the meeting Officer Daly was told about assets being owned by ESCL. The Appellant's transactions with associated companies were described as being limited to a management charge and rent, although it was agreed that this would be confirmed later. Development projects involving the Appellant were broadly described.

97. On 11 February 2016 Officer Daly wrote to Mr Gwynne requesting further information including details of associated companies and transactions with them, lists of properties owned and/or disposed of by the Appellant and associated companies, details of the investor in the vicarage, copies of the contracts for one project described with Salford City Council, the VAT liability of the transactions and the basis for determining that liability, and copies of contracts with sub-contractors.

98. On 8 March 2016 Officer Daly telephoned Mr Gwynne asking about the requested information. She was told that Grant Thornton in Manchester had been appointed to act for the Appellant. She was told that Mr Gwynne and colleagues were gathering the requested information and arranging for documents to be sent to Manchester. On the same day Officer Daly issued a letter stating that she had found errors on the Appellant's VAT returns when she had visited on 9 February 2016 and in the absence of the requested evidence she would disallow the input tax claimed.

99. Officer Daly met with Grant Thornton on 7 April 2016. Grant Thornton had a list of purchase transactions for the 10/15 return and samples of the largest invoices and was trying to arrange for the rest of the information to be provided from Belfast. The information at that meeting, as shown by the notes provided by HMRC, taken together with the information provided to HMRC in the February 2016 meeting, very broadly described property

developments at the vicarage, and other locations. The vicarage back to back purchase and sale had been described, albeit with ESCL said to have been the intermediate company rather than the Appellant, and Officer Daly was told that the other properties involved in the projects were owned by ESCL.

100. Invoices for supplies made to the Appellant in relation to properties owned by ESCL were provided, but no contracts or other documentation showing supplies made by the Appellant to ESCL were provided at that time or later. Other invoices provided could not, on their face, be identified as relating to any particular property. Some invoices simply stated supplies made to “Endeavour” without reference to any particular entity whether the Appellant or another Endeavour company.

101. By 25 April 2016 Officer Daly had been provided with some VAT return summaries and some sample purchase invoices for purchases made by the Appellant. She identified particular transactions of concern:

(1) In 01/14 nearly £6000 of just over £13,000 input tax appeared to be in respect of supplies to Endeavour Strategic Consulting Ltd and paid for by that company;

(2) In 10/15 nearly £14,000 out of nearly £113,000 input tax was reclaimed for invoice to Endeavour Strategic Consulting Ltd who appeared to have paid the bill and £23,500 was reclaimed on Travis Perkins statements with no supporting invoices.

102. Officer Daly stated in that letter that input tax would normally be deductible only in as much as it related to taxable supplies and that without the documents requested by her she was unable to ascertain the liability of the Appellant’s sales. She explained that without that being clarified, all the input tax registration would have to be disallowed under the partial exemption rules. She made clear that bank statements had been requested as an alternative form of evidence to support the claim of the input tax.

103. Grant Thornton sent a letter to Officer Daly on 12 May 2016. HMRC’s stamp shows that it was received on 17 May 2016 by the central processing department. That letter included a schedule showing payments made to suppliers in the period 1 November 2015 to 31 January 2016 and after that quarter in respect of invoices received in that quarter, bank statements from 29 October 2013 to 3 May 2016, bank transaction documents showing payments made by ESCL which were said to be on behalf of the Appellant in respect of invoices issued to the Appellant, a copy of the contract relating to the Salford City Council development and a copy of the transfers dealing with the purchase of the vicarage by the Appellant and back-to-back sale at the same price to Bonefish. There were still no documents provided to show what supplies had been made by the Appellant to ESCL, but the three invoices described above for supplies made to Bonefish were provided. The Salford City Council contract was with ESCL, not the Appellant.

104. Grant Thornton’s letter was not seen by Officer Daly before issuing the decision letter dated 18 May 2016. However, Officer Daly is clear that the contents of that letter would not have altered her conclusion to issue the 18 May 2016 letter.

The subsequent progress of the dispute

105. In a letter dated 16 June 2016 Grant Thornton requested a reconsideration of Officer Daly’s decision and challenged the “best judgement” basis of Officer Daly’s decision letter of 12 May 2016 given their understanding of the extent of documentation which it had been agreed would be produced. In that letter it was maintained that the Appellant’s normal activities consisted of acting as the main contractor for ESCL and that the construction work undertaken by the Appellant was taxable either at the standard rate, the reduced rate or the zero rate. It was noted that the invoices dated 1 September 2015 and 10 February 2016 to

Bonefish had been omitted from the 10/15 and 04/16 returns in error. A copy of the Development Agreement was provided.

106. In the same letter dated 16 June 2016 Grant Thornton also explained that the Appellant entered into an agreement with ESCL to construct social housing units for Salford City Council. It was explained that the works were zero-rated or reduced-rated. However, no copy of any agreement between the Appellant and ESCL was provided. It was acknowledged that in certain instances the Appellant had claimed input VAT on invoices which were made out in the name of ESCL or where payment was to be made by ESCL, but it was maintained that payments by ESCL were as a result of short-term funding issues and did not reflect supplies to ESCL.

107. In response to the 16 June 2016 letter Officer Daly agreed in a letter dated 30 June 2016 to reconsider her decision if the evidence requested by her was provided. She asked for further details regarding particular developments and an explanation of all of the work the Appellant had carried out and for whom, as well as confirmation of what payments had been received in respect of the Bonefish invoices and the bank account into which payment had been made. She also asked for invoices to support the input tax claim made for 04/16.

108. Since then Officer Daly has repeatedly asked for documents and repeatedly extended deadlines for their provision. The evidence she has been provided with has:

- (1) been inconsistent about the VAT treatment of supplies made by the Appellant. Mr Best has said at times that some of the Appellant's supplies were exempt,
- (2) been vague as to the nature of transactions between the Appellant and ESCL and inconsistent about the arrangements between ESCL and the Appellant as I have explained above;
- (3) recognised that book keeping is inadequate;
- (4) recognised that supplies have not properly been accounted for;
- (5) failed to provide documents which should have been readily available.

109. Even now there are numerous documents missing. A list of evidence was identified by the Tribunal in the Directions issued on 7 October 2019, but the Appellant's response was that no further evidence would be provided. The Appellant maintains that it cannot provide further evidence to show a fairer estimate of the VAT payable or repayable.

THE APPELLANTS' CASE

110. Mr Best agrees that the legislation requires that the best judgement standard is applied to Officer Daly's decision. While it is recognised by him that an element of guesswork may have been required given that the VAT returns submitted on behalf of the Appellant did not detail the output tax position in relation to its supplies, Mr Best submits that Officer Daly's decisions were:

- (1) a spurious estimate of guess in which the elements of judgement were missing;
and
- (2) unreasonable and made in bad faith or, at least, not in good faith.

111. In relation to the first of those assertions, Mr Best maintains that, contrary to what Officer Daly said in correspondence, she could not have found errors in the Appellant's VAT returns when she initially visited in February 2016 as there were no records available at that time. She subsequently made clear that she did not believe that the records existed. Given that she was provided with all of the original purchase invoices in July 2016 and some bank statements, it was difficult to understand how she could disallow all of the input tax claimed

by the Appellant. Officer Daly had referred to disallowance under the partial exemption rules, but this basis of her assessments had never been properly explained. Officer Daly had, in reality, ignored the information provided in the correspondence. Consequently, the assessments do not seek to ensure that the Appellant was accounting for the correct amount of tax.

112. In relation to the second reasonableness issue, Mr Best submits that Officer Daly acted in bad faith throughout the investigation and her visit in February 2016 was nothing more than a fishing expedition. Regardless of the information provided, Officer Daly continued to insist that the Appellant's VAT reclaim should be reduced to nil. She had suspected the Appellant and associated entities were "problem" traders and the assessments were a mechanism to bankrupt them and thereby rid her of the perceived problem. Other HMRC officers comprehensively reviewed the VAT returns for the Appellant in 2017 and agreed the repayments contained therein.

113. In his closing submissions, Mr Best amplified these arguments.

114. Mr Best submits that Officer Daly had not taken into account the purchase invoices provided to her. She had not been able to explain in cross-examination the stated reasons for raising the assessment on 18 May 2016 and, despite the contents of her decision letter, she stated at the hearing that she did not use the partial exemption rules to disallow all of the input tax incurred by the Appellant. Officer Daly had made clear that she did not understand the operation of the partial exemption rules. He submits that Officer Daly's recognition that the enquiry resulted from an internal review of traders, whose input tax claimed could not readily be reconciled to their declared outputs, showed that Officer Daly started from the assumption that sales did not exist at all and that the input tax deductions claimed were fraudulent. This conclusion is supported by Officer Daly's comments in correspondence showing that she understood that records were being drafted after the event to support the deductions.

115. Mr Best also refers to the Grant Thornton letter dated 12 May 2016. An HMRC stamp shows that it was received in the Central Processing Unit on 17 May 2016, but she accepted that she had not read it before making the assessment on 18 May 2016. This fact, and Officer Daly's acknowledgement that the Grant Thornton letter would not have affected her decision, showed her to have had no regard, or to have been reckless, as to the evidence provided to her. Her lack of credibility regarding the basis of her assessment was also shown by inconsistent evidence about whether she had seen a copy of the Development Agreement.

116. Mr Best submits that the Grant Thornton letter would have informed her as to the taxable status of the Appellant's supplies in respect of the Bonefish project. The blatant failure to take into account information provided by the Appellant means that the assessments were not made in good faith and were therefore unreasonable.

117. Further information regarding the VAT position of the Appellant was provided by Grant Thornton after the 18 May 2016 decision, including an explanation of the VAT treatment of the Appellant's sales and an extensive report on the VAT position of three associated companies. None of this was taken into account by Officer Daly.

118. As a result it is submitted that Officer Daly exercised no judgement at all in issuing the decision. She acted in bad faith, was motivated for reasons other than an honest and genuine attempt to make a reasoned assessment of the VAT payable or repayable, and no HMRC officer exercising best judgement would have made them.

119. Mr Best's response to my drawing attention in the hearing to the fact that there were three potential options open to me (to dismiss the appeal, fully allow the appeal, or substitute

a better estimate of the VAT position) is that there is insufficient evidence to show a fair substituted figure and therefore the appeal should be allowed in full (and costs awarded).

HMRC'S CASE

120. In HMRC's Statement of Case it is maintained that the burden of proof rests with the Appellant to show that the assessments have not been made on the basis of "best judgement" and that the Appellant is entitled to deduct input tax as claimed. Reliance is placed on the provisions of sections 24(6)(a), 25(2) and 26 VATA and the VAT Regulations 1995 ("the 1995 Regs) setting out the basis on which input tax may be claimed. Reliance is placed on section 73 of the VATA for the power for HMRC to issue best judgement assessments.

121. It is submitted that as a result of the VATA provisions the right to deduct input tax is not an absolute right, but depends on showing that a related taxable supply is made for the purposes of the taxpayer's business. No part of input tax used, or to be used, exclusively in making exempt supplies can be recovered. In correspondence it had been accepted by the Appellant that errors have been made on the returns and that outputs had not been declared. The case centred on a lack of sufficient evidence to support the claimed input tax.

122. HMRC relies upon *Van Boeckel v C&E Commissioners* and *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015 to maintain that the decisions made by Officer Daly complied with the requirements for best judgement assessments.

123. It is submitted that the Appellant made a mixture of taxable and exempt supplies and while it is acknowledged that the Appellant was likely to be entitled to some input tax, there is insufficient evidence to quantify an appropriate recoverable amount.

124. In closing submissions it is submitted that insofar as the decisions were issued under section 73(2) VATA it is widely accepted that HMRC are expected to use best judgement even though that phrase is not used in that subsection.

125. It is submitted that in addition to addressing whether the assessments were best judgement assessments, the Tribunal must also decide whether the Appellant has evidentially demonstrated that the VAT claimed as input tax was incurred in respect of taxable supplies and was therefore input tax as defined under section 24 VATA; and that the VAT claimed as input tax has been charged on a supply to the Appellant as required by Regulation 29(2) of the 1995 Regs.

126. HMRC had written to the Appellant on several occasions, both before and after the assessments were issued, requesting VAT records and alternative evidence, but there was still an absence of proper VAT records for the periods in dispute. What documents have been provided show various problems, such as invoices having been made out to ESCL or simply "Endeavour".

127. The fact that Officer Daly may, or may not, have checked for receipt of a letter from Grant Thornton before issuing the letter of 18 May 2016 does not itself invalidate the assessment. Officer Daly has confirmed that she considered the information from Grant Thornton after the assessment and it did not change her view. She was justified and reasonable in issuing the assessments given that very limited and unsatisfactory information have been supplied to support the high level of claims and no supporting documentary evidence was provided to show taxable supplies until an amount of £100,000+ £20,000 VAT was declared in period 01/16.

128. After consideration of the further evidence from Grant Thornton officer Daly found that the Appellant's bank statements did not correlate with their VAT returns. Invoices provided had not been declared as outputs in the VAT returns and payment did not appear in the bank statements. Bank evidence showed that ESCL had paid for many of the supplies in question.

Contracts provided were between ESCL and third parties. The Appellant was described vaguely as being the main contractor for ESCL on a number, but not all, of its projects although no contracts between ESCL and the Appellant were supplied.

129. A large volume of purchase invoices was provided in July 2016, but without any supporting documentary evidence to link the purchases to taxable supplies. The Appellant's representatives had undertaken on several occasions to provide HMRC with proper records and to identify the true VAT position of the Appellant, but had then explained on several occasions that this was too difficult as a result of the poor state of the records.

130. At the hearing Mr Gwynne had accepted that some of the VAT claimed did not belong to the Appellant and was properly input tax attributable to associated companies. Evidence from the Appellant's representatives had been inconsistent as to whether the Appellant provided construction services or not.

131. The level of purchases (some £3.6 million) far exceeded the level of costs expected in relation to the declared sales. The Appellant said for the first time at the hearing that payments made in relation to the vicarage project were released by a firm of solicitors, Carson McDowell, and accepted that any such drawdowns would have created tax points, but those were not declared on the Appellant's returns.

132. Despite five years of dispute the necessary evidence is still lacking, even taking into account the further information provided by Mr Gwynne at the hearing.

133. As a result it is clear that the assessments and decisions were not spurious. The VAT claimed as input tax by the Appellant in periods 01/14 to 10/15 and 04/16 to 10/16 has been assessed or disallowed due to the lack of supporting records. There was no estimation involved as the burden of proof was on the Appellant to evidence its claims of input tax.

134. With regard to the amount of £2838.63 in the period 10/16 it has not been shown what the output tax or sales declared on the return relate to and therefore whether any of the input tax can be reclaimed.

135. Officer Daly has acted reasonably in not exercising her discretion under Regulation 29(2) to accept invoices which failed to comply with the legislative requirements, such as those issued to other entities or with the generic name "Endeavour".

THE LAW

136. The relevant legislation is set out in the Appendix.

137. The VAT legislation prescribes detailed record-keeping requirements. Those requirements include the obligation to keep business and accounting records, a VAT account and copies of all invoices issued and received by a taxable person (Regulation 6 of the 1995 Regs).

138. However those requirements do not in themselves impose tax charges for non-compliance.

139. The charging provision relied upon by HMRC is contained in section 73 VATA. That provision enables HMRC to assess the amount due from a taxable person "to the best of their judgement" where a person has failed to keep any documents and afford the facilities necessary to verify their VAT returns, or where it appears to HMRC that such returns are incomplete or incorrect.

140. In addition, under section 73(2) there is power to assess an amount as VAT due from a taxable person where a repayment or refund of VAT has been made, or a VAT credit has

been given, and the amount ought not to have been so paid, or credited, or would not have been so paid or credited had the facts been known, or been as they later turned out to be.

141. The application of the “best judgement” requirement has been addressed by the courts, most notably in the cases of *Van Boeckel v C&E Commrs* and *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015 and *Rahman t/a Khayam Restaurant v Customs and Excise Commissioners* [1998] STC 626. The result of those cases can be summarised as follows:

- (1) HMRC should fairly consider all material placed before them and come to a decision which is reasonable and not arbitrary. They must perform that function honestly and bona fide;
- (2) As long as there is some material on which HMRC can reasonably act then they are not required to carry out investigations which may, or may not, result in further material being placed before them;
- (3) The result may necessarily involve an element of guesswork;
- (4) If an assessment is shown to have been wholly unreasonable, or not bona fide, there would be sufficient grounds for setting it aside, but that kind of case is likely to be extremely rare. In the normal case it should be assumed that HMRC have made an honest and genuine attempt to reach a fair assessment. Consequently, the tribunal’s primary task on an appeal against an assessment of VAT is to find the correct amount of tax. The tribunal has power either to set aside the assessment, or to reduce it to the correct figure. Even if the process of assessment is found to be defective in some respect, the question is whether the defect is so fundamental that justice requires the whole assessment be set aside, or whether justice could be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence.

142. The burden rests on the taxpayer to establish the correct amount of tax. That burden of proof is to the usual civil standard of the balance of probabilities.

143. In this case HMRC have denied input tax claimed by the Appellant. “Input tax” is defined in Section 24(1) VATA as VAT on the supply to a taxable person of any goods or services used, or to be used, for the purposes of his business.

144. Section 26 of the VATA sets out that a taxable person is entitled to credit for so much of the input tax as is allowable under regulations as being attributable to identified supplies which in the case of the Appellant are taxable supplies. A “taxable supply” is defined in section 4 VATA as being a supply which is not exempt. During the relevant periods the categories of taxable supplies included not only standard-rated supplies and zero rated supplies, but also reduced-rated supplies.

145. Regulation 101 of the 1995 Regs sets out further details regarding the attribution of input tax to taxable supplies. Put at its simplest, the result of Section 26 VATA and regulation 101 of the 1995 Regs is that if all the supplies made by a taxpayer are subject to output tax (whether standard rated, zero-rated or reduce-rated) the taxpayer is entitled to recover all the tax paid on the inputs of that business. If all the supplies made by a taxpayer are exempt the taxpayer can recover none of the input tax and if the supplies made by the taxpayer are partly taxable supplies and partly exempt supplies an apportionment of the input tax is required and that which is attributable to the exempt supplies is not recoverable (Lord Brightman in *Schemepanel Trading Ltd v C & E Comrs* [1996] STC 871).

146. In this case the Appellant has been described as a developer or contractor. Construction services would be taxable, but it is also the case that the Appellant purchased and sold the

vicarage property. In determining the treatment of supplies made by it the VAT treatment of land sales is therefore also relevant. This decision does not need to address those provisions in detail, but notes that the sale of a building may be zero-rated, standard rated, exempt from VAT or outside the scope of VAT depending upon the circumstances. In fact, it was recognised during the course of the investigation in dispute that the sale of the vicarage was exempt.

147. In addition, in order to claim VAT as input tax Section 24 VATA states that the taxpayer must provide such evidence as may be specified in regulations or HMRC may direct. Regulation 13 of the 1995 Regs requires a taxable person to issue a VAT invoice whenever a taxable supply is made to another taxable person in the UK. At the time of completing a VAT return and claiming input tax a taxable person must hold the VAT invoice(s) relating to the claim (Regulation 29(2)(a)) although HMRC has discretion under Regulation 29 to permit alternative evidence to VAT invoices to be relied upon.

DISCUSSION

148. Despite the fact that case law as described above has shown that there is a relatively high threshold for a taxpayer to show that an officer of HMRC has not exercised best judgement and that the primary matter for the Tribunal is to address the evidence to determine whether a better estimate can be made, the Appellant and its representatives have focused entirely in their presentation of this case on their assertions as to the bona fides or reasonableness of the assessments. Indeed, at the start of the hearing I emphasised that the Appellant should also address the calculations arising under the assessments and what evidence there was to show that alternative calculations should be preferred. However, the Appellant's approach to that is encapsulated by Mr Best's closing submissions in which he states that the appeal should be allowed in full "there being insufficient evidence adduced to inform [me] as to a fair substituted figure."

149. *Rahman* casts doubt on a two-stage approach of considering firstly whether HMRC exercised best judgement and then if the assessment survives that stage whether the assessment should be reduced by reference to the evidence. In this case, however, I consider it is incumbent upon me to address the allegations and assertions made by the Appellant which form the entirety of its case.

Exercise of best judgement

150. Officer Daly made the decision that £324,065 VAT should be assessed in the letters dated 18 May 2016 which was followed by the Notice of Assessment issued on 2 June 2016. I have accepted her evidence that she started the enquiry on the basis of the very high level of purchases being declared by the Appellant as giving rise to input tax when compared to the level of sales/outputs declared. That disparity is shown in the facts above. In itself it would not have justified the decisions later made by Officer Daly, but the evidence shows that this was no more than the basis for the start of the enquiry.

151. Mr Best submitted that Officer Daly could not have found errors in the Appellant's VAT returns during her visit on 9 February 2016 as stated in her letter of 8 March 2016, as she was not shown documents during that visit, and that this is a misrepresentation in her letter which shows that she was not acting bona fide. Mr Best has referred to the fact that in cross-examination Officer Daly stated that the reference to finding errors on her visit to the Appellant's premises was no more than standard wording. Whether or not it is standard wording, Mr Best's assertions ignore the fact that the VAT returns had previously been submitted. I am satisfied that Officer Daly is therefore referring to documents which she already held, i.e. the VAT returns upon which the visit cast doubt. I do not consider her response in cross-examination undermines this conclusion, particular given the context of Mr

Best's style of cross-examination which verged on becoming intimidating and which I was required to limit on several occasions.

152. In addition, Officer Daly clarifies in the letter of 9 February 2016 that in the absence of the requested evidence she would have to disallow the input tax claimed and therefore invites the Appellant to provide information to support the submitted returns.

153. Mr Best submits that Officer Daly's evidence also shows that she considered the Appellant to be producing evidence after the fact to support the submitted tax returns and that this coloured her approach to the enquiry, in effect causing her to approach the taxpayer as if it was dishonest or fraudulent. In her letter dated 25 April 2016 Officer Daly explains that she is concerned that records are being drafted to support the deductions of input tax in the relevant periods. (That concern resurfaces on 8 June 2016 when she wrote to Mr Gwynne explaining that much of the requested information remained outstanding and this was leading her to conclude that the business did not hold records that would meet the statutory requirements.)

154. At the hearing it was made clear that she had reached that conclusion from the telephone call on 12 April 2016 where Grant Thornton had explained that records had been "put together" for the meeting held at the start of that month. Clearly a reference to "putting together" records may refer to organising them or compiling them, rather than constructing them from scratch; but, in any event, a responsible taxpayer completing their VAT returns diligently would pull together their records prior to submitting the returns in order to support their claim and as required by the legislation. The history set out above in the facts shows that on numerous occasions after the exchange with Grant Thornton there was reference to records being prepared and even Mr Best wrote to say that records would be up-to-date by the time of the tribunal hearing. The records have still not been fully provided.

155. No allegation of dishonesty or fraudulent conduct has been made by Officer Daly or any other HMRC officer. Instead, an extraordinarily poor level of bookkeeping and record-keeping has been identified through the course of the enquiry and the subsequent litigation to date.

156. At the time of Officer Daly's decision set out in her letter of 18 May 2016 she had not seen Grant Thornton's letter of 12 May 2016. Officer Daly has maintained that the contents of the letter from Grant Thornton sent to her on 12 May 2016 were insufficient to alter her decision to issue the decision on 18 May 2016. I am satisfied that that is a reasonable and justifiable decision to take, given the information that had been provided, even if the Grant Thornton letter is taken into account. That is because at that stage Officer Daly had been provided with insufficient evidence to show that the Appellant was justified in claiming the input tax claimed in its VAT returns, as I now explain.

157. By 18 May 2016 even taking into account the Grant Thornton 12 May 2016 letter the information provided by, or on behalf of, the Appellant was inconsistent and insufficient in numerous respects. In February 2016 Officer Daly had been told that the only trade between the associated Endeavour businesses was a management charge and payment of rent to ESCL. However, property projects described as involving the Appellant were later said to be concerning properties owned by ESCL, although there were no contracts or other documents provided to show supplies made by the Appellant to ESCL. In addition, Officer Daly had been told in February 2016 that ESCL had bought and sold the vicarage property, whereas the 12 May 2016 letter showed that the Appellant had bought and sold it. Numerous invoices relating to the claimed input tax could not be identified as relating to any particular property, some failed to identify the relevant Endeavour entity and nearly half of the invoices for the 01/14 period related to supplies made to ESCL and paid for by that company. Invoices

provided with the Grant Thornton letter of 12 May 2016 for works carried out for Bonefish were not reflected in payments into the Appellant's bank account and no contract or agreement between Bonefish and the Appellant was provided before 16 June 2016.

158. Given the inconsistent descriptions provided to Officer Daly by that stage of the Appellant's role in the vicarage project and the lack of evidence of payment to the Appellant to support the invoices supplied, I am satisfied that she acted reasonably in making the decision to deny all of the input tax. The latest evidence from the property transfer documents showed that in fact the Appellant had made a large exempt supply when the property was sold to Bonefish, but no account had been taken of that transaction in the VAT returns and there was no evidence to support the claim that the Appellant was otherwise making taxable supplies in relation to the works carried out on the properties owned by ESCL. She had been told that the vicarage project included an option to sell the new buildings to Bonefish and such a sale would also have been exempt.

159. Officer Daly had given the Appellant ample opportunity to provide information to support the submitted VAT returns. In particular, in her letter of 25 April 2016 Officer Daly stated that input tax would normally be deductible only in so much as it related to taxable supplies and that without the documents requested by her she was unable to ascertain the liability of the Appellant's sales. She explained that without that being clarified, all of the input tax claimed would have to be disallowed under the partial exemption rules. She made clear that she would exercise her discretion to permit the provision of bank statements as an alternative form of evidence to support the claim of the input tax.

160. Mr Best repeatedly sought to challenge Officer Daly in cross-examination about the reference to disallowance under the partial exemption rules. He sought to maintain that the Appellant solely made taxable supplies (with one de minimis exception) and as a result Officer Daly's assessment must be found to be fundamentally flawed or spurious. However, that is incorrect. As noted (and as recognised by Grant Thornton in correspondence) the Appellant had made one significant exempt supply on the sale of the vicarage. The evidence does not show that the input tax claimed in relation thereto fell within de minimis rules as the amount of those inputs has not been identified. When Officer Daly referred to the partial exemption rules there was minimal evidence to show what supplies the Appellant had made and to whom in relation to the other property projects and what the VAT status of any such supplies would be. Indeed, at times during correspondence Mr Best has referred to the calculation of the Appellant's partial exemption rate.

161. I am therefore satisfied that the reference to partial exemption was entirely appropriate in this context at the time of Officer Daly's letter in April 2016.

162. Ultimately, her decision letter of 18 May 2016 did not make reference to partial exemption and I am satisfied on the basis of Officer Daly's Witness Statement and repeatedly consistent oral evidence at the hearing that the basis of the decision and subsequent assessment was that the Appellant had simply not produced evidence of taxable supplies to justify the claim of input tax. My findings in this decision show that is clearly correct. The Appellant was only entitled to claim the input tax in accordance with the VAT legislation. The Appellant had not shown that the input tax was attributable to taxable supplies made by it.

163. The fact that the 01/16 return has been accepted by Officer Daly does not alter these conclusions. Notably, that return did declare a taxable supply by the Appellant to which input tax could be attributed, even though the evidence provided to me and the detailed analysis herein raise other issues in relation to that invoice and the return.

164. Similarly, later agreement of VAT returns in 2017 by other HMRC officers has no bearing on my conclusions given that there is no evidence to show the basis of those VAT returns being accepted. It can reasonably be hoped that the Appellant's book keeping and the administration for the Endeavour entities improved to support the submission of those returns.

165. Given the extent of the information provided by the Appellant in relation to the disputed returns, despite the record keeping obligations and the need to have records, including a VAT account, in order to submit VAT returns as well as the issues with that information which I have described in this decision, I am satisfied that Officer Daly's decision and the assessment issued as a result thereof were reasonable actions and bona fide exercises of the power under Section 73 VATA. I find specifically that the decision was reasonable when it was made on 18 May 2016. I note that as a result of the evidence provided subsequently I am satisfied that the inconsistencies have increased for the reasons I explained earlier in this decision.

166. As stated earlier, the Appellant has not appealed the decisions/assessment of 25 January 2017. More particularly, nowhere in the submissions or skeleton argument has the Appellant sought to claim that HMRC failed to exercise best judgment when they were issued. However, for the avoidance of doubt I am in no doubt that those decisions also fall within the scope of the best judgement power in Section 73 VATA.

167. The Appellant has not sought to claim that Officer Daly incorrectly failed to exercise her discretion under Regulation 29(2) of the VAT Regs in relation to evidence of the input tax and I find that there is little basis to do so given the state of the evidence generally.

The impact of subsequent evidence on the best judgement assessment

168. A considerable period of time has elapsed since May and June 2016 when Officer Daly issued her decision and Notice of Assessment. There has been ample time to provide all of the documents requested by HMRC. The Tribunal identified a list of evidence which could have facilitated a decision allowing some of the input tax claimed to be confirmed, but the Appellant did not subsequently provide any of it. There has been ample time to provide calculations and summaries to support the claim of the input tax. That has not occurred.

169. In Mr Best's words there is insufficient evidence to inform me as to a fair substituted figure.

170. I endeavoured in vain during the hearing to obtain some more clarification of Appellant's supplies and their VAT treatment. Mr Best submitted that all supplies made by the Appellant were taxable supplies with one de minimis exception. However, that overlooked the exempt supply in the sale of the vicarage and the other evidence that the Appellant was in fact partially exempt. Significant questions about the nature and extent of the Appellant's supplies remain. No attempt has been made to attribute the large volume of purchase invoices to related supplies by the Appellant, or to identify the extent to which the bulk of those invoices related to supplies made to the Appellant.

171. Without some clarification of the numerous issues raised by the evidence there is little basis on which to decide anything other than that the appeal should be dismissed.

172. For all these reasons the appeal is DISMISSED. The assessment of £324,065 of VAT is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

173. 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.

**TRACEY BOWLER
TRIBUNAL JUDGE**

RELEASE DATE: 07 APRIL 2021

Appendix

This Appendix sets out the legislation applicable to this appeal so far as relevant.

Value Added Taxes Act 1994

Section 4 Scope of VAT on taxable supplies

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

Section 24 Input tax and output tax

(1) Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say—

(a) VAT on the supply to him of any goods or services; ...

...being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Subject to the following provisions of this section, “output tax”, in relation to a taxable person, means VAT on supplies which he makes...

... (6) Regulations may provide—

(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases.

25 Payment by reference to accounting periods and credit for input tax against output tax

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

Section 26 Input tax allowable under section 25

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

- (a) taxable supplies;...

...(3) The Commissioners shall make regulations for securing a fair and reasonable attribution of input tax to supplies within subsection (2) above, and any such regulations may provide for—

- (a) determining a proportion by reference to which input tax for any prescribed accounting period is to be provisionally attributed to those supplies;
- (b) adjusting, in accordance with a proportion determined in like manner for any longer period comprising two or more prescribed accounting periods or parts thereof, the provisional attribution for any of those periods;
- (c) the making of payments in respect of input tax, by the Commissioners to a taxable person (or a person who has been a taxable person) or by a taxable person (or a person who has been a taxable person) to the Commissioners, in cases where events prove inaccurate an estimate on the basis of which an attribution was made; and
- (d) preventing input tax on a supply which, under or by virtue of any provision of this Act, a person makes to himself from being allowable as attributable to that supply.

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.

(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 as being VAT due from him for that period and notify it to him accordingly.

SCHEDULE 11 ADMINISTRATION, COLLECTION AND ENFORCEMENT

6 Duty to keep records

(1) Every taxable person shall keep such records as the Commissioners may by regulations require, ... as the Commissioners may so require.

(2) Regulations under sub-paragraph (1) above may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases).

(4) The duty under this paragraph to preserve records may be discharged—

- (a) by preserving them in any form and by any means, or
- (b) by preserving the information contained in them in any form and by any means, subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

13 Obligation to provide a VAT invoice

- (1) Save as otherwise provided in these Regulations, where a registered person—
 - (a) makes a taxable supply in the United Kingdom to a taxable person,...he shall provide such persons as are mentioned above with a VAT invoice ...

29 Claims for input tax

- (1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice
- (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, hold the document which is required to be provided under regulation 13;...

Value Added Tax Regulations 1995 SI 1995/2518 (as amended)

29 Claims for input tax

- (1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim...
- ...(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, hold 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 or provide such other evidence of the charge to VAT as the Commissioners may direct.

31 Records

- (1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—
 - (a) his business and accounting records,
 - (b) his VAT account,

- (c) copies of all VAT invoices issued by him,
- (d) all VAT invoices received by him,...

32 The VAT account

- (1) Every taxable person shall keep and maintain, in accordance with this regulation, an account to be known as the VAT account.
- (2) The VAT account shall be divided into separate parts relating to the prescribed accounting periods of the taxable person and each such part shall be further divided into 2 portions to be known as “the VAT payable portion” and “the VAT allowable portion”.
- (3) The VAT payable portion for each prescribed accounting period shall comprise—
 - (a) a total of the output tax due from the taxable person for that period,
 - (b) a total of the output tax due on acquisitions from other member States by the taxable person for that period,
 - (ba) a total of the tax which the taxable person is required to account for and pay on behalf of the supplier,
 - (c) every correction or adjustment to the VAT payable portion which is required or allowed by regulation 34, 35, 38, or 38A, and
 - (d) every adjustment to the amount of VAT payable by the taxable person for that period which is required, or allowed, by or under any Regulations made under the Act.

101 Attribution of input tax to taxable supplies

- (1) Subject to regulation regulations 102, 103A, 105A and 106ZA, the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.
- (2) Subject to paragraph (8) below and regulation 107(1)(g)(ii), in respect of each prescribed accounting period—
 - ...
 - (b) there shall be attributed to taxable supplies the whole of the input tax on such of those goods or services as are used or to be used by him exclusively in making taxable supplies,
 - (c) no part of the input tax on such of those goods or services as are used or to be used by him exclusively in making exempt supplies, or in carrying on any activity other than the making of taxable supplies, shall be attributed to taxable supplies, ...