Neutral Citation: [2025] UKFTT 00423 (TC)

Case Number: TC08489

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/08355

VAT – appeal against a decision to register and an assessment made under section 77(4) VAT Act 1994 – timing and best judgment – HMRC fail to come up to proof - appeal allowed

Heard on: 26 March 2025
Judgment date: 10 April 2025

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR CHRISTOPHER JENKINS

Between

TONY JOHN SHEPHERD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Angela Barrett

For the Respondents: Ms Olivia Donovan litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is a VAT case. HMRC assert that the appellant should have registered for VAT for a number of VAT periods between 2004-2005 and 2017-2018. Accordingly, on 22 January 2021 they issued an assessment for VAT (the "**original assessment**") in the sum of £139,456 for those periods. On review HMRC revised the original assessment so that the appellant's requirement to register would only be in respect of the period between 1 August 2016 and 31 March 2019 and reduced the original assessment from £139,456 down to £33,885 (the "**revised assessment**").

2. This decision deals with the appellant's appeal against the revised assessment.

3. The appellant had "run" a taxi company for a number of years including those covered by the revised assessment. He had taken the view that he was not acting as principal in respect of that business but as agent for the drivers who received 50% of the fares, the appellant receiving the other 50%. Accordingly, he accounted for income tax on 50% of the fares, and (he was professionally advised throughout) did not register for VAT as he was below the VAT registration threshold.

4. HMRC's view, reflected in both assessments, was that the appellant was acting as principal and thus his turnover, for VAT purposes, was 100% of the fares received.

5. As the appellant has never registered for VAT, nor indeed completed a VAT return, our jurisdiction on appeal is limited to a consideration of whether HMRC have issued a valid in time best judgment assessment.

6. For the reasons given later in this decision, it is our view that they have not. Accordingly, we have allowed the appeal.

THE RELEVANT LAW

Summary of the legislation

7. A person who makes taxable supplies is liable to register for VAT. He must notify HMRC of that liability within 30 days of the end of the month in which he satisfies the turnover tests for registration. HMRC are then obliged to register him for VAT with effect from that date. If HMRC wish to recover the relevant VAT from a taxpayer, they must assess him to the best of their judgment. A taxpayer has a right of appeal against certain assessments. An assessment for failing to notify liability to register must be made within 20 years of the end of the relevant accounting period. However, it cannot be made more than one year after HMRC have evidence of the facts which in their opinion justifies the making of the assessment (the "**one year rule**").

Jurisdiction

8. As mentioned above, the taxpayer has a right of appeal against certain assessments. But not all. He cannot appeal against an assessment which is visited on him in respect of a period in which he has made no return (see section 83(1)(p) VAT Act 1994 ("**VATA**"). That applies to Mr Shepherd. However, he can appeal against HMRC's decision that he is liable to be registered for VAT. Furthermore, he can appeal against the "making of an assessment on the basis set out in section 77(4)" – see section 83(1)(r) VATA.

9. The assessment in this case is made under section 77(4) VATA. The appeal right against any assessment made under section 77(4) VATA may be restricted to a challenge about the time within which it was issued. However, on the basis of *Burgess & Brimheath v HMRC* [2015] UKUT 578, HMRC must establish that the assessment was a valid assessment given the appellant's right to challenge an assessment made on the basis of section 77(4) VATA. And so HMRC must show not only that it was made within the 20 year period but it was also made in accordance with the one year rule and it was made to best judgment.

Best Judgment

10. In *Van Boeckel v The Customs and Excise Commissioners* [1981] STC 290, Mr Justice Woolf (as he was then) stated:

> "In my view, the use of the words "best of their judgment" does not envisage the burden being placed on the Commissioners of carrying out exhaustive investigations. What the words "best of their judgment" envisage, in my view, is that the Commissioners will 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. As long as there is some material on which the Commissioners 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".

11. In *Pegasus Birds Limited v Commissioners of HM Customs &* Excise [2004] EWCA Civ 1015 ("**Pegasus")**, Lord Justice Carnwath said at [16]:

> "In *Rahman v Customs & Excise Commissioners* [1998] STC 826, I drew attention to phrases used by Woolf J in the leading case under this Act (*Van Boeckel v Customs & Excise Commissioners* [1981] STC 290) and in previous authorities in other tax contexts, to explain the effect of the "best of their judgment" requirement:
>
> > "The passages I have underlined show that the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required: for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles ([1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment". (p 835)

12. And at [21]:

> "Chadwick LJ (para 5) noted that the wording of section 83(p) reflected "the two distinct questions" which may arise where an assessment purports to be made under section 73(1):
>
> > "First, whether the assessment has been made under the power conferred under that section; and, second, whether the amount of the assessment is the correct amount for which the taxpayer is accountable".
>
> Having referred with approval (para 31) to my judgment in *Rahman (1)* and that of Dyson J to like effect in *McNicholas Construction Co v Customs & Excise* [2000] STC 553, he addressed the taxpayer's submission that because the tax due had been found to be less than half the amount of the assessment, the assessment could not have been to "best

judgment" (para 32). He regarded that as a "non-sequitur":

> "The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or 'quantum', stage of the appeal, has made different assumptions - say, as to food/drink ratios, wastage or pilferage - from those made by the commissioners. As Woolf J pointed out in *Van Boeckel* ([1981] STC 290 at 297), that does not lead to the conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgment in these cases. Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake - that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. *In such cases - of which the present is one - the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary*". (emphasis added)…".

The one year rule

13. Section 73(2) VATA 1994 provides for HMRC to make VAT recovery assessments. There are time limits applicable to such assessments. Section 73(6) VATA 1994 provides, in as far as is relevant:

> "73(6) An assessment under sub-section (1), (2) or 3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in Section 77 and shall not be made after the later of the following –
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, …".

14. Although we were not taken to this case, the approach that the tribunal should adopt when construing these provisions is as set out in *DCM (Optical Holdings) Ltd v Revenue and Customs (Scotland)* [2022] UKSC 26 at [20]:

(1) To decide what were the facts which, in the opinion of the officer making the assessment on behalf of HMRC, justified the making of the assessment; and

(2) To determine when the last piece of evidence of these facts of sufficient weight to justify the making of the assessment was communicated to HMRC.

(3) The one-year period runs from the date in [8(2)].

15. The burden of establishing that the assessments were made outside the one-year time limit is on the appellant (see *Nottingham Forest Football Club Ltd v HMRC* [2024] UKUT 145 at [46] and [47]).

THE EVIDENCE AND THE FACTS

16. We were provided with a bundle of documents. Officer David Hoy ("**Officer Hoy**") had originally attended the hearing in the capacity of an observer. However, given that he was the officer responsible for issuing the original assessment, which the parties were agreed had to be made to best judgement, Ms Donovan, at the tribunal's invitation made an application that Officer Hoy be permitted to give oral evidence.

17. The directions in this appeal did not mandate an individual who was to give oral evidence to have previously provided a written witness statement. It simply provided that "Where a party intends to rely on the evidence of the witness, that party may provide a witness statement if they wish to do so". In light of this, and in light too of the overriding objective to deal with cases fairly and justly, and the fact that Ms Barrett did not object to Officer Hoy providing oral evidence, we allowed him to do so. He was cross examined on his evidence by Ms Barrett, who also gave a blend of submissions and oral evidence. From the documentary and oral evidence, we find as follows:

(1) Throughout the years covered by the original assessment and the revised assessment, the appellant was in business as a sole trader. We are not certain of the trading name of the appellant (it appears to be either Abel Cars or Angie's Cabs), but the business was that of a taxi firm, and the cars had the logo "Angie's Cabs" on them.

(2) The appellant employed an accountant who he relied on to compile his accounts.

(3) In 2019 HMRC started an enquiry into the appellant's 2016-2017 and 2017-2018 self-assessment tax returns. Those returns declared a turnover of £78,615 in the first of those years and an estimated turnover of £80,000 in the second of those years. That self-assessment enquiry was led by Officer Romano-Critchley ("**ORC**").

(4) On 13 December 2019 there was a meeting between the appellant, Ms Barrett, ORC and Officer Hoy. The meeting notes from that meeting ("**the meeting notes**") record, amongst other things, that; taxis are metered; fares are set by the local authority; jobs are booked through phone calls with Ms Barrett who allocates them to drivers; drivers can be hailed on the street or pick up jobs on taxi ranks; Ms Barrett records phone bookings in a diary which shows fares paid and which driver took which job; drivers record their work on job sheets which are sent to Ms Barrett; the sheets show the total fares taken, the drivers "commission" i.e. 50% of the fares, which jobs are on account and the fuel costs incurred by the drivers; drivers keep all the tips; most of the appellant's time is spent maintaining the cars; the appellant is responsible and pays for the vehicles' MOT, insurance, tax, fuel, taxi licence, vehicle tests and all maintenance and repairs; drivers usually drive the same car which is rarely used for personal use; when used for such use drivers pay their own fuel; drivers who work several shifts per week take cars home; drivers working less frequently collect the cars from an address in Brentwood; the appellant and Ms Barrett live off the profits of the business.

(5) Prior to the visit on 13 December 2019, ORC had requested and had received certain business records from the appellant.

(6) Following that visit, she asked for further business records.

(7) In a letter dated 9 October 2022 the appellant, ORC indicated that it was HMRC's view that in running Abel Cars, the appellant was acting as principal and not an agent and thus the turnover he should have recorded in his accounts (and that he should have used to calculate his

tax liabilities) should have been 100% of all the jobs by all the drivers from which allowable commission could be deducted as an income expense. It also went on to record that her colleagues in VAT had determined that the appellant should have been registered for VAT and would be in touch with him in due course.

(8) In a letter dated 20 November 2020 to the appellant, ORC issued assessments to the appellant for his tax years ended 5 April 2016, 2015, 2014, 2013, 2012, and 2011. These were based on an uplifted turnover to that declared by the appellant of 193%.

(9) In a letter dated 4 December 2020 to the appellant, Officer Hoy referred to ORC's letter of 20 November 2020. He recited ORC's explanation that, in acting as principal, the appellant should have included all of the drivers' commission in his turnover figure. Based on the figures for 2016-2017 and 2017-2018, which ORC had used in her enquiry, Officer Hoy estimated that in 2016-2017 the appellant's turnover was £187,648, and in 2017-2018, it was £118,988. These figures appear to have been the original turnover figures declared by the appellant uplifted by 193% by ORC. Since these were over the VAT registration threshold, the appellant was legally required to register for VAT.

(10) He then went on to provide a schedule of what, in his view, was the total output tax due for the periods starting 09/04 and ending 03/19. This was based on the appellant's declared self-assessment income uplifted by 193%, for those periods, to which he applied a flat rate percentage (to give credit for input tax) of initially 9% and subsequently 10%. That gave rise to the figure of £139,456 set out in the original assessment which was comprised in a letter to the appellant from HMRC dated 22 January 2021.

(11) In a letter dated 27 February 2021, which was not part of the evidence (notwithstanding that Ms Barrett told us that she had asked for it to be included in the hearing bundle, but that HMRC had declined to do so on the basis that it was not relevant) the appellant requested a statutory review.

(12) This letter was not acted upon until January 2023 following the involvement of HMRC's Debt Management Unit.

(13) A letter dated 1 February 2023 to the appellant written by Officer Nigel King, Officer King apologises for the delay in responding to the letter of 27 February 2021; explained that he had reviewed the periods of VAT registration; recorded that in his view the appellant's requirement to register for VAT should only have been for the period 1 August 2016 to 31 March 2019; enclosed a schedule of his workings; reduced the original assessment to £33,885.

(14) That schedule deals with the periods 09/16 to 03/19. Officer King used the same gross output figures as those used by Officer Hoy in his original schedule, other than those for the period 09/16, and applied the same flat rate percentage.

(15) Ms Barrett put to Officer Hoy that he had told her that this was the first time that he had been involved in dealing with the taxi business and that he was not confident about how the taxi business was run. He responded by saying that he did vaguely remember a conversation to that effect, but it related to the years preceding those covered in the meeting. But he accepted that this was the first time that he had dealt with a taxi business and the issues thrown up when deciding whether an individual was acting as principal or agent were difficult ones, and a number of factors had to be taken into consideration.

(16) It was Officer Hoy's evidence that having come to the conclusion that the appellant was acting as principal, he was unable to assess the appellant until ORC had concluded her enquiry into the appellant's direct tax affairs. Once she had done that and concluded that the appellant's turnover should be uplifted by 193%, which only became apparent in November 2020, he was only then able to reflect that principle, numerically. He did this in the original assessment as recorded in the schedule attached to his letter dated 4 December 2020.

(17) It was also Officer Hoy's evidence that the basis on which he and ORC had concluded that the appellant was acting as principal was the information provided to them at the meeting on 13 December 2020. However, save as set out below, Officer Hoy was not able to provide a nuanced explanation of which particular items of information he took into account and why they pointed him towards his conclusion that the appellant was acting as principal.

(18) This is notwithstanding that in HMRC statement of case, it is declared that "HMRC considered…the following nine factors set out below and came to the conclusion that the Appellant was the principal and not the agent". Those nine factors are then set out in the statement of case and include: The fact that the vehicles were owned by the firm; they were kept on firm premises; not much private work was done; the firm taxes insures and maintains the vehicles; drivers pay was fixed at 50% of the takings; if the customer doesn't pay the driver still gets a commission; the cars have "Angie's Cabs" logo on them; the firm deals with complaints; drivers submit weekly job sheets so the firm can calculate their earnings; prices are set based on the local authority rates but those rates may be amended for a particular journey, in which case that amendment is undertaken by the appellant.

(19) Ms Barrett put to Officer Hoy that VAT guidance notice 700/25, dated September 2016, set out a number of criteria which should be considered when deciding whether an individual is acting as principal or agent, and there were indications when the facts are tested against these criteria, that the appellant was acting as agent. In response to these questions, Officer Hoy said that: the fact that customers paid cash rather than on account was not an important factor in favour of the appellant acting as agent; many people paid cash; what was more important was the fact that the drivers got a commission of 50% rather than a fixed sum; the notice suggests that where drivers are entitled to have full fare, that is an indication of agency; but here the drivers were simply paid 50% commission, the full fare being something to which the appellant was entitled; although bookings were relayed to the drivers, this was equally consistent with Mr Shepherd acting as principal; although the drivers were not employees, they were still working almost exclusively for the appellant and in his view, therefore, that pointed towards the appellant acting as principal.

DISCUSSION

Submissions

18. In summary Ms Donovan submitted as follows:

(1) Our jurisdiction is limited to considering whether HMRC has made a best judgment assessment and whether that assessment has been made in time.

(2) Officer Hoy's evidence was that he based his decision on whether the appellant was acting as principal rather than agent on the information he was given at the meeting on 13 December 2019.

(3) Given that this was a direct tax led enquiry, he was not then able to compute the appellant's liability until ORC had determined that, for direct tax purposes, the appellant's income should be uplifted by 193%. That only became apparent to him in November 2020. The original assessment was issued in January 2021, within both the twenty year and one year limitation periods.

(4) Officer Hoy had given the appellant credit for input tax by using a flat rate of initially 9% and subsequently 10%.

(5) Although the reviewing officer reduced the original assessment down from £139,456 to £33,885 that does not mean that Officer Hoy's original assessment was not made to best judgment. The reviewing officer used the same methodology as that used by Officer Hoy. He simply reduced the number of VAT periods to which that methodology should be applied, limiting it to the periods covered by the income tax enquiry.

19. In summary Ms Barrett submitted as follows:

(1) The appellant had received professional advice throughout.

(2) HMRC took two years to respond to their letter of 27 February 2021.

(3) The appellant could not have submitted a VAT return because he didn't know that he was liable to register.

(4) Tested against the criteria set out in VAT notice 700 /25, there are pointers which tend to suggest that the appellant was acting as agent and not as principal.

Our view

20. We agree with HMRC that the scope of this appeal is limited to consideration of whether they have made an in time best judgment assessment.

21. Unfortunately for them, based on the evidence that we have been provided with, we cannot say that they have.

22. It is clear to us that in order to come to a conclusion on whether the assessment was made to best judgment, evidence needs to be put before us of two things. Firstly, the material on which the assessing officer based his/her decision to assess. Secondly, the way in which that officer processed that information and came to that decision.

23. In this appeal, we have evidence of the first but not of the second.

24. We accept that the information on which the HMRC officers base their decision that Mr Shepherd was acting as principal and not as agent came from the business records which had been obtained by ORC, and the information provided by the appellant and Ms Barrett at the meeting on 13 December 2019.

25. But we have no, or certainly insufficient, evidence of whether either officer fairly considered all material placed before them and on that material came to a decision which was one which was reasonable and not arbitrary.

26. Officer Hoy's Letter of 4 December 2020 notifying the appellant that he intended to issue VAT assessments, contains little information regarding the basis on which he was intending to

assess other than "as [ORC] explained in her letter you failed to include the drivers commission in your turnover figure as you should when you are acting as Principal…".

27. The letter to which he refers was ORC's letter of 20 November 2020. In that letter ORC simply records the business records which she had examined in regard to the self-assessment enquiry and other information came to the conclusion that there were inaccuracies in the tax returns and that on average over the two years of her enquiry, the appellant's turnover was actually 93% higher than he had declared. We cannot see any reference in that letter to this conclusion being based on her view that Mr Shepherd was acting as principal rather than agent, let alone the reason why she might have come to that conclusion.

28. ORC had, of course, sent an earlier letter to the appellant on 9 October 2020. That simply stated that "It is HMRC's view that, in running Abel Cars, you are acting as principal and not an agent". No explanation or reasons were given as to why HMRC (presumably ORC) had reached that conclusion.

29. So, while both letters explain the tax consequences of the appellant acting as principal, neither explain the reasons why the officer had come to the conclusion that the appellant was so acting.

30. The original assessment tells us nothing about the information on which the assessments were based, nor the process that either officer went through when analysing that information and concluding, as they are now claiming, that the appellant was acting as principal of the taxi firm.

31. As we have mentioned at [17(18)] above, HMRC's statement of case sets out nine factors which, that statement of case submits, were considered by HMRC. That submission also says that the conclusion was reached using the responses given at the meeting along with the guidance at VTAXPER77100 (together with a hyperlink to HMRC's internal manuals), but although Officer Hoy was called to give evidence, he was not taken through these nine factors. His oral evidence was that he had considered the guidance and considered the information provided in the December 2019 meeting. But there was nothing more. We have no idea what weight he gave to the various factors (his oral evidence was that this was a difficult multifactorial test) and why he concluded that, on balance, the factors tended towards Mr Shepherd acting as principal. We simply have the information on which he based his decision on the one hand, and his conclusion on the other. We do not know how that information was processed to enable him to come to that conclusion.

32. Officer Hoy mentioned when giving oral evidence, that he had notes of the process through which he went but given that he had originally attended the hearing as observer, he could not immediately access those notes, and they were certainly not put before us as evidence to support HMRC's case and best judgement.

33. It is certainly true that when being cross-examined by Ms Barrett, Officer Hoy did say that a variable commission (i.e. 50% of the takings) which was paid to the drivers, militated towards Mr Shepherd acting as principal whereas a fixed commission might have suggested that he was acting as agent .He also said that cash wasn't important and the drivers were self-employed.

34. But there is nothing in any contemporaneous literature suggesting that he employed this reasoning at the time of coming to his conclusion and assessing. We are not clear whether this

was something that he was simply saying at the time of the hearing, or whether it was an analysis that he had undertaken prior to issuing the assessment.

35. There was no evidence of the process undertaken by ORC in analysing the business records and the information provided at the December 2019 meeting, to enable her to come to the conclusion that Mr Shepherd was acting as principal and not as agent. And it is clear from the letter of 4 December 2020 that Officer Hoy was relying on ORC's explanations regarding the direct tax position to justify his assessment to VAT. This was clear too from his evidence that he was not able to assess until ORC had come up with the 193% uplift. He did not go so far as to say that he was also relying on ORC's analysis that Mr Shepherd was acting as principal, and it would been very difficult for him to have done so given that we had no evidence of what that analysis comprised.

36. It may very well have been the case that, as submitted by Ms Donovan, the factors which were taken into account by HMRC (it is not clear whether this was Officer Hoy and/or ORC) were indeed those which were set out in her statement of case, and that they were tested against the guidance in the internal guidance. But HMRC have provided no evidence that these were indeed the factors (even if there was information in relation to them provided at the December 2019 meeting) nor what intellectual process was undertaken by either officer which generated their conclusion that on balance the information pointed towards the appellant acting as principal rather than as agent.

37. In the absence of any such evidence, it is frankly impossible for us to say whether either officer fairly considered that material, or, in the case of Officer Hoy, made a genuine attempt to make a reasoned assessment of the VAT payable.

38. In these circumstances we cannot say that HMRC, through the agency of Officer Hoy, have made a valid best judgment assessment. It is our view that both the original assessment and the revised assessment (which is based on the analysis on which the original assessment was based i.e. that the appellant was acting as principal) were not made to best judgment.

DECISION

39. For the foregoing reasons, we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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.

Release date: 10th APRIL 2025