[2020] UKFTT 260 (TC)

TC07744

Appeal number: TC/2016/02527

VAT – bad debt relief claims – whether made out of time – yes – whether assessment issued out of time – no – whether assessment made to best judgement – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LESLEY COOK **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
SUSAN STOTT

Sitting in public at Leeds on 5 August 2019

The Appellant appeared in person

Ms Sinclair, presenting officer, for the Respondents

DECISION

1. The grounds of appeal included a number of complaints against HMRC (the Conduct Allegations) which Mrs Cook accepted at the start of the hearing were matters which we have no authority to deal with and should, instead, be taken up with the HMRC Adjudicator's Office. The Conduct Allegations are not, therefore, set out in this decision and we make no findings in connection with the Conduct Allegations.

2. Mrs Cook asked at the start of the hearing to introduce additional evidence. HMRC noted that the documents were already in the bundle prepared for the hearing and so had no objections to the material being introduced by Mrs Cook.

3. We also dealt with HMRC's application to include their Statement of Case in the bundle, together with a number of other documents. Mrs Cook objected to the inclusion of these as she stated that she had not seen them before.

4. HMRC explained that the Statement of Case had been provided to her lawyer on 1 December 2017 and had been omitted from the bundle due to an oversight. It had also been included in the bundle produced for a preliminary hearing which had taken place, and that that bundle had been supplied to Mrs Cook at that hearing.

5. The additional documents were:

   (1) a letter from HMRC responding to a letter from Mrs Cook;

   (2) emails from Mrs Cook to HMRC

6. HMRC submitted that these documents were relevant to the question of provision of documents and had clearly been seen by Mrs Cook previously.

7. On the basis that all of this was potentially relevant information which had been provided previously, and in the interests of justice, we concluded that the material produced by both Mrs Cook and HMRC should be admitted.

8. Mrs Cook also noted that HMRC had not supplied certain documents which had been directed to be disclosed in directions following a case management hearing. These were documents which were to be disclosed "insofar as within [HMRC's] possession or control".

9. HMRC confirmed that they had undertaken a search for the relevant documents following the issue of the directions, having searched two relevant offices as well as searching a database of records held in offsite storage facilities. HMRC further confirmed that they had advised Mrs Cook in May 2019 of the results of the searches and that those documents were therefore not within their possession or control.

Appeal

10. This is an appeal against an assessment under s73 VATA 1994 in the sum of £25,173, disallowing input VAT claimed for the periods 10/10 to 07/11 as follows:

(1) 10/10 - £4,891.54

(2) 01/11 - £8,126.16

(3) 04/11 - £5,050.08

(4) 07/11 - £7,106.05

11. In correspondence and in the course of the hearing, it was clear that there has also been a dispute about a return for the 01/12 return. Some of the background giving rise to the assessment under appeal relates to that 01/12 return but no appeal has been made in respect of that return and so we make no findings in respect of that return.

Background

12. Mrs Cook was a director of a company, ACP Recruitment Ltd (ACP), which traded as a recruitment agency.

13. On 18 July 2005, Mrs Cook applied to have ACP struck off the register at Companies House on the basis that it had not traded or carried out any business in the preceding three months.

14. The company factored out its sales invoices on a recourse basis and was in dispute with its factoring company. As a result, the striking off was delayed.

15. The invoices were eventually assigned to Mrs Cook by the factoring company. Mrs Cook later issued letters for the amounts outstanding and, six months after those letters, issued further letters advising that the VAT would be reclaimed.

16. On 18 July 2008, Mrs Cook completed a VAT68 form to request the transfer of the business as a going concern to her, as a sole proprietor trading as ACP Recruitment (UK), and applying to use ACP's VAT registration number. The information on the VAT 68 included the statement that ACP had transferred its business to Mrs Cook on 20 July 2008 and that she had taken over the business on the same date.

17. On 13 August 2008, ACP was stated to have been dissolved.

18. On 13 October 2008 Mrs Cook completed a VAT 1 form, describing her main business activities as "recruitment (reclaiming bad debts)" and stating that this was neither a voluntary nor compulsory registration. On 27 October 2008, HMRC notified Mrs Cook that the reallocation of the VAT number had been approved.

19. Mrs Cook submitted the four repayment returns under appeal, as follows:

(1) Long period to 10/10 – outputs of £32,251, output tax: £0; inputs of £29,349, input tax: £4,891.54

(2) Period 01/11 – outputs of £0, output tax: £0; inputs of £46,435, input tax: £8,126.16

(3) Period 4/11 – outputs of £28,857, output tax: £0; inputs of £30,300, input tax: £5,050.08

(4) Period 7/11 – outputs of £47,712, output tax: £0; inputs of £42,636, input tax: £7.106.05

20. The input tax claimed on these returns was repaid by HMRC.

21. On 19 January 2012 HMRC requested a VAT visit. This was refused by Mrs Cook due to an ongoing dispute with HMRC in relation to the Conduct Allegations.

22. On 8 March 2012, HMRC wrote to Mrs Cook to advise that they had not received a return for the 01/12 period and to remind her that nil returns were required if appropriate or, if she had ceased trading, to notify HMRC so that de-registration forms could be issued.

23. On 12 March 2012, Mrs Cook advised HMRC that "the company" was no longer trading. In the context of the correspondence, it appears that Mrs Cook was referring to her registration as sole trader rather than to ACP.

24. On 20 March 2012, Mrs Cook wrote to HMRC and stated that she had completed the final return for the bad debts, as previously agreed with an HMRC officer, Mrs Stewart. She also stated that HMRC had details of all of the invoices she had claimed relief for, all returns had been completed, and the company was no longer trading. She asked for the business to be de-registered. Again, the reference to the company appears in context to mean Mrs Cook's VAT registration as a sole trader.

25. On 10 April 2012, HMRC issued de-registration forms to Mrs Cook.

26. On 16 April 2012, HMRC wrote to Mrs Cook regarding an overdue VAT payment for the 01/12 VAT period. Following further correspondence, Mrs Cook again wrote to HMRC to state that the amount of VAT claimed by HMRC in respect of the 01/12 return was not due as the company had not traded and was recovering bad debts.

27. On 15 May 2012, HMRC requested the following information from the bad debt account in respect of the 01/12 return:

(1) the amount of VAT claimed as bad debt relief;

(2) the VAT period in which Mrs Cook originally accounted for output tax;

(3) the names of the relevant customers;

(4) the dates and numbers of the invoices to which the bad debt related.

28. On 22 June 2012, the de-registration forms were received by HMRC, with the following information:

(1) date of cessation of trade: 1 January 2012

(2) date on which taxable supplies ceased to be made: 1 January 2006

(3) date from which Mrs Cook wished to be de-registered: 30 June 2012

29. On 11 September 2013, following further correspondence, Mrs Cook's representative wrote to HMRC to explain that the 01/12 return had been incorrectly completed and that the figure shown as a VAT payment due to HMRC should have been shown as a VAT repayment claimed by Mrs Cook, Four documents were provided as support for the claims. These were described as tax invoices, and were on ACP letterhead, showing the following details:

(1) Date 20/7/2009: Net amount £8,550.00; VAT rate 17.5%; VAT £1,496.25; total £10,046.25

(2) Date 31/8/2009: Net amount £13,750.00; VAT rate 17.5%; VAT £2,406.25; total £16,156.25

(3) Date 27/10/2009: Net amount £9,450.00; VAT rate 17.5%; VAT £1,653.75; total £11,103.75

(4) Date 5/7/2010: Net amount £6,550.00; VAT rate 17.5%; VAT £1,146.25; total £7,696.25

30. On 18 September 2013, Officer Kiely of HMRC replied to explain that bad debt relief claims had to be made within four years and six months of the end of the VAT period of the adjustment. As no output tax had been declared in respect of the business since the VAT period 04/05, the claim for bad debt relief was either made out of time or related to transactions for which no output tax had been declared to HMRC.

31. In the same letter, HMRC referred to the VAT repayments claimed in the 10/10, 01/11. 04/11 and 07/11 VAT periods and requested a full breakdown of the input tax for each period, together with the supporting invoices. HMRC also referred to the outputs shown on the 10/10, 04/11 and 07/11 returns and requested a breakdown of these, together with the supporting invoices.

32. On 26 August 2014, HMRC notified Mrs Cook that an assessment had been raised on the basis that HMRC had not received the information requested. On 15 September 2014, a VAT Notice of Assessment for £25,173.00 was issued.

33. Following further correspondence, Mrs Cook appealed to this Tribunal on 5 May 2016.

Appellant's evidence

34. Mrs Cook provided a witness statement and gave oral evidence at the hearing.

35. Mrs Cook's evidence was as follows:

36. She stated that she had claimed bad debt relief on the advice of an employee of HMRC, Ms Stewart, and explained that she had been advised by Ms Stewart that the invoices which had been factored would need to be re-assigned and the invoices re-

issued. Mrs Cook stated that she had throughout simply done what she was told to do by HMRC.

37. Mrs Cook had had difficulty getting information from the factoring company and could not access the company accounts information as she did not have a licence for the relevant software. She still had reports of amounts assigned and re-assigned on which to base the re-issued invoices, which were issued as paper copies. Despite re-issuing the invoices, she had no success in getting the funds from the clients, even with the involvement of solicitors. It took a substantial amount of time to sift through paperwork to get the information needed to make the bad debt relief claims.

38. The amounts shown as outputs in the returns in the relevant periods were the amount of the invoices previously issued by the company, as set out in the factoring report as "disapproved debt". Those invoices had been re-issued in each VAT period. The VAT shown as input tax on the returns was explained to be the VAT bad debt relief claimed and was taken from the factoring report.

39. Mrs Cook explained that she had produced the material requested in relation to the bad debts claims to HMRC in 2012. It had been requested by an officer with whom there had been a history of difficulties, and Mrs Cook had delivered the material to an HMRC office as she did not want that officer to visit her. Mrs Cook stated that she had been asked to take the material to Castle House, Lisbon Street, in Leeds.

40. Mrs Cook stated that the material was in two boxes and consisted of the lever arch files of copy invoices and also disks with accounts records. As Mrs Cook did not have the necessary licence for the relevant accounting software, she was unable to extract the data herself. She provided a photograph of the boxes which she said had been taken by her husband with his phone when he accompanied her to deliver the boxes.

41. Mrs Cook stated that she had only received the front page of HMRC's letter of 18 September 2013; if the rest of the letter had been provided, she would have been able to deal with it sooner. As she only had the front page, she had believed that HMRC were only querying the 01/12 return. She therefore re-sent the 01/12 return supporting material to HMRC. It was not until she received the complete letter in 2015 that she realised that they were requesting information on other periods.

42. We note that we are somewhat surprised that Mrs Cook had not asked to see the rest of the letter of 18 September 2019 when she received the front page, as that first page ends with the line "Additionally, your client has also claimed refunds of VAT in the following periods within the last four years:".

43. Mrs Cook also noted that the assessment raised was sent to her previous address. As a result, she was not aware of the assessment until 2015 when she received a bundle of information from HMRC. She had moved house in 2012, and stated that she might have advised HMRC by phone of the change of address. Her solicitors had also included the new address in their letters to HMRC.

HMRC evidence

44. In addition to the information in the bundle, Officer Kiely provided a witness statement and gave evidence to the tribunal.

45. Officer Kiely's evidence was as follows:

46. She had become involved in the case in September 2013, when she was asked by another HMRC officer to respond to Mrs Cook's representatives with regard to the technical issue of bad debt relief claimed in relation to Mrs Cook's 01/12 VAT return.

47. Officer Kiely had reviewed the legislation, guidance and undertook an overview of the case and the information held by HMRC. She had noted that the last VAT return declaring output tax under Mrs Cook's VAT registration number had been in the 04/05 VAT period. Accordingly, it appeared that the claim for bad debt relief may be out of time although the supporting invoices supplied by Mrs Cook's representative had been dated in 2009 and 2010.

48. She had also noted that four repayment VAT returns had been submitted, being the four returns under appeal. These had been repaid by HMRC and Officer Kiely noted that they had not yet been verified and so decided to ask for evidence to substantiate the claims.

49. A review of these returns showed that outputs had been declared in three of the returns but no corresponding output tax had been declared on the return. As there was no explanation to explain why VAT had not been charged on these outputs, she also decided to ask for information with regard to the output figures.

50. Accordingly on 18 September 2013 Officer Kiely wrote to Mrs Cook's representatives, noting that any bad debt relief claim would need to relate to transactions that took place within four years and six months of the end of the VAT period and that, as no output tax had been declared to HMRC since the 04/05 period, it appeared that no reclaim could be made in respect of the 01/12 return. The letter also requested a breakdown of the input tax claimed in the 10/10, 1/11, 04/11 and 07/11 VAT returns together with an explanation of the outputs declared on the 10/10. 04/11 and 07/11 VAT returns. The letter requested a response by 31 October 2013 and noted that the input tax claimed may be disallowed if the evidence requested was not received.

51. Officer Kiely explained that the claims for repayment could not be verified without the evidence requested and that she did not feel that, at the time of writing in September 2013, she had sufficient evidence or details to be able to make a decision as to the validity of the repayment claims.

52. No substantive response to her letter of 18 September 2013 was received before April 2014 when Officer Kiely moved to another role within HMRC. Officer Kiely did not specifically ask that an assessment be raised later but she accepted that she may have noted that there was a time limit within which an assessment could be raised.

Relevant law

53. VATA 1994 provides as relevant:

> 36 Bad debts
>
> (1) Subsection (2) below applies where—
>
> (a) a person has supplied goods or services . . . and has accounted for and paid VAT on the supply,
>
> (b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
>
> (c) a period of 6 months (beginning with the date of the supply) has elapsed.
>
> (2) Subject to the following provisions of this section and to regulations under it the person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of VAT chargeable by reference to the outstanding amount.
>
> (3) In subsection (2) above "the outstanding amount" means—
>
> (a) if at the time of the claim no part of the consideration written off in the claimant's accounts as a bad debt has been received, an amount equal to the amount of the consideration so written off;
>
> (b) if at that time any part of the consideration so written off has been received, an amount by which that part is exceeded by the amount of the consideration written off;
>
> and in this subsection "received" means received either by the claimant or by a person to whom has been assigned a right to receive the whole or any part of the consideration written off.
>
> (3A) For the purposes of this section, where the whole or any part of the consideration for the supply does not consist of money, the amount in money that shall be taken to represent any non-monetary part of the consideration shall be so much of the amount made up of—
>
> (a) the value of the supply, and
>
> (b) the VAT charged on the supply,
>
> as is attributable to the non-monetary consideration in question.]
>
> …
>
> (5) Regulations under this section may—
>
> (a) require a claim to be made at such time and in such form and manner as may be specified by or under the regulations;
>
> (b) require a claim to be evidenced and quantified by reference to such records and other documents as may be so specified;
>
> (c) require the claimant to keep, for such period and in such form and manner as may be so specified, those records and documents and a record of such information relating to the claim and to [anything subsequently received] by way of consideration as may be so specified;

(d) require the repayment of a refund allowed under this section where any requirement of the regulations is not complied with;

(e) require the repayment of the whole or, as the case may be, an appropriate part of a refund allowed under this section [where any part (or further part) of the consideration written off in the claimant's accounts as a bad debt is subsequently received either by the claimant or, except in such circumstances as may be prescribed, by a person to whom has been assigned a right to receive the whole or any part of that consideration;]

…

(f) include such supplementary, incidental, consequential or transitional provisions as appear to the Commissioners to be necessary or expedient for the purposes of this section;

(g) make different provision for different circumstances.

(6) The provisions which may be included in regulations by virtue of subsection (5)(f) above may include rules for ascertaining—

(a) whether, when and to what extent consideration is to be taken to have been written off in accounts as a bad debt;

(b) whether [anything received] is to be taken as received by way of consideration for a particular supply;

(c) whether, and to what extent, [anything received] is to be taken as received by way of consideration written off in accounts as a bad debt.

(7) The provisions which may be included in regulations by virtue of subsection (5)(f) above may include rules dealing with particular cases, such as those involving [receipt of part of the consideration] or mutual debts; and in particular such rules may vary the way in which the following amounts are to be calculated—

(a) the outstanding amount mentioned in subsection (2) above, and

(b) the amount of any repayment where a refund has been allowed under this section.

(8) Section 6 shall apply for determining the time when a supply is to be treated as taking place for the purposes of construing this section.

…

73 Failure to make returns etc

…

(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…

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.

…

(6) An assessment under subsection … (2) … 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,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

54. VAT Regulations 1995 (SI 1995/2518) provides as relevant:

165A

(1) Subject to paragraph (3) and (4) below, a claim shall be made within the period of 4 years and 6 months following the later of—

(a) the date on which the consideration (or part) which has been written off as a bad debt becomes due and payable to or to the order of the person who made the relevant supply; and

(b) the date of the supply.

(2) A person who is entitled to a refund by virtue of section 36 of the Act, but has not made a claim within the period specified in paragraph (1) shall be regarded for the purposes of this Part as having ceased to be entitled to a refund accordingly.

(3) This regulation does not apply insofar as the date mentioned at sub-paragraph (a) or (b) of paragraph (1) above, whichever is the later, falls before 1st May 1997.

(4) A person shall be regarded for the purposes of this Part as having ceased to be entitled to a refund where the date mentioned at sub-paragraph (a) or (b) of paragraph (1) above, whichever is the later, is on or before 30th September 2005.

166 The making of a claim to the Commissioners

(1) Save as the Commissioners may otherwise allow or direct, the claimant shall make a claim to the Commissioners by including the correct amount of the refund in the box opposite the legend "VAT reclaimed in this period on purchases and other inputs" on his return for the prescribed accounting period in which he becomes entitled to make the claim or, subject to regulation 165A, any later return.

Submissions and discussion

Whether the bad debt relief claims were made in time

55. Regulation 165A of the VAT Regulations 1995 requires that in this context bad debt relief claims must be made within four years and six months of the later of the date payment was due and payable or the date of supply (the "relevant date") and, further, under Regulation 165A(4) where the later of the date payment was due and payable or the date of supply falls before 30 September 2005, the taxpayer has been unable to claim bad debt relief since 1 April 2009.

56. Although Mrs Cook has stated on de-registration forms that the company ceased to make taxable supplies from 1 January 2006, it was not disputed that the business had last reported output tax in the 04/05 period. We find that the business therefore did not make taxable supplies after the 04/05 period, although it may have continued to have some intention to do so until 1 January 2006. No submissions or evidence were provided to suggest that any later payment date would apply.

57. Mrs Cook has referred to re-issuing invoices to customers in 2007 after the factoring company reassigned the debts, and her representatives provided re-issued invoices dated 2009 and 2010 in relation to her 01/12 return, but we do not consider that a re-issuing of invoices would operate to change either the payment due date or the date of supply for any of the relevant original supplies for which bad debt relief was claimed.

58. The first repayment claim was made in the 10/10 period, some five and a half years after the last output tax reported. In her grounds of appeal, Mrs Cook refers to the 10/10 period return being for a long period covering 27 months from August 2008 to October 2010. Although this was not referred to in the hearing, it appears that this was intended to suggest that some part of this VAT period fell within the time limits for claiming bad debt relief. However, the date on which any claim could be regarded as having been made was the date on which the 10/10 return was filed and not the date on which the period covered by the return started.

59. As such, we find that that the relevant dates of the supplies to which any bad debt relief claims could be related arose more than four years and six months before the first repayment claim was made. Accordingly, we find that Mrs Cook was out of time to claim bad debt relief in the return filed for the 10/10 period and similarly out of time to claim bad debt relief in the subsequent returns.

60. We note that Mrs Cook's evidence is that she was following advice from HMRC provided at various times from 2006 onwards as to claiming bad debt relief but we consider that it is clear from case law such as *Birkett* [2017] UKUT 89 (TCC) that, as there is no mechanism in the relevant legislation which provides discretion to HMRC to accept a late claim, we have no jurisdiction to consider an argument that HMRC should be bound by such advice.

61. We turn, therefore, to consider whether the assessment made by HMRC was made in time.

Whether HMRC were out of time to raise the assessment

62. HMRC's evidence and submissions were that the assessment had been made in time as they had not been provided with information sufficient to justify making an assessment before Officer Kiely's letter to Mrs Cook's representatives on 18 September 2013 and, therefore, had been within the one year limit provided by s73(6) VATA 1994 when the assessment was made on 26 August 2014.

63. Mrs Cook argues in her grounds of appeal and also in further particulars filed that HMRC had been provided with all of the information required to raise the assessment long before the assessment was made, as follows:

(1) the VAT 68 files in July 2008 states that the business activity was "reclaiming bad debts";

(2) in September 2010, HMRC had noted that "the trader is looking to claim bad debt relief on invoices she hasn't even declared yet";

(3) on 12 March 2012, Mrs Cook advised HMRC in correspondence that she had filled in the final return for bad debts as agreed previously with Ms Stewart and that HMRC had had details of the invoices on which relief had been claimed;

(4) on 18 July 2012, the de-registration application stated that "the company" had only been collecting VAT from bad debts, not trading and that this was confirmed again in correspondence on 21 August 2012.

64. In the Further Particulars, Mrs Cook submits that HMRC were clearly aware that the returns in question included only claims for bad debts and, as such, the assessment was made out of time.

65. Mrs Cook also explained that she had taken a box of documents in paper and electronic form to HMRC's offices around July 2012.

66. In summary, in her Grounds of Appeal, Mrs Cook states that HMRC had all of the relevant information at the latest by 21 August 2012. In an email from Mrs Cook to her MP on 21 August 2012 with a copy of correspondence to HMRC, Mrs Cook states that "Ms Stewart of HMRC" has all the paperwork. From a note produced by Mrs Cook, her correspondence with Ms Stewart took place in 2006/7 when ACP ceased trading.

67. Mrs Cook submitted that any assessment needed, therefore, to be raised within twelve months of 21 August 2012 and, as the assessment had been raised on 26 August 2014, it was out of time.

68. We agree with the decision in *Post Office* [1995] STC 749 that the relevant time in this context is when evidence of facts sufficient to justify making the assessment came to the knowledge of HMRC, rather than the time at which it might have been possible to work out through constructive knowledge that there was an error in the returns. The question therefore is at what point did HMRC have enough information to make the assessment.

69. We note that three of the four VAT returns under appeal include figures for outputs (that is, supplies made) totalling £108,820 (£32,251 in 10/10; £28,857 in 4/11; £47,712 in 7/11) in those periods albeit that no VAT had been charged in respect of those supplies. All four VAT returns include figures for inputs (that is, purchases made) totalling £148,720 (£29,349 in 10/10; £46,435 in 01/11; £30,300 in 04/11; £42,636 in 07/11). In addition, each of the returns included a claim for repayment of input tax.

70. Regulation 166 of the VAT Regulations 1995 requires that a claim is made by including the correct amount of the refund in the "VAT reclaimed" box on a VAT return within the time limit allowed for making the claim. We note that Notice 700/13 (included in Mrs Cook's documents for the tribunal) states that bad debt relief is claimed by including the "the amount of the VAT you're claiming in box 4 of your VAT Return". Box 4 is the box for "VAT reclaimed" referred to in Regulation 166.

71. There is no requirement nor option either in the legislation nor in the Notice to include any amounts relating to the bad debt claim in the boxes for supplies made and purchases made. It was not specifically explained why figures were included in these boxes on the returns when the business had not made any supplies or purchases in the relevant periods although Mrs Cook acknowledged in the hearing that she had not completed the returns correctly.

72. Mrs Cook's evidence as to the documents submitted by her to HMRC by 21 August 2012 was that these consisted of copies of invoices raised by the business and disks with accounts records stored using accounting software to which she did not have a licence and so could not extract the information in those records to print it out.

73. There was some dispute as to the extent to which HMRC had knowledge of the information provided by Mrs Cook. Although her evidence was that she had had telephone confirmation from an HMRC officer at the time that the information had been received, HMRC were later unable to locate the information and have no record of it having been received. However, as set out below, we consider that we need make no findings as to whether the documents to which Mrs Cook refers were actually received by an HMRC officer as we consider that those documents as described by Mrs Cook would not in any case contain sufficient information to start the one year limitation period.

74. In particular, we find that Mrs Cook's evidence as to the contents of the information provided to HMRC does not include any information that would explain the inputs (purchases) amounts included on the VAT returns.

75. We consider that the fact that Mrs Cook's VAT 68 and correspondence in earlier years had stated that she intended only to claim bad debt relief does not preclude the possibility that she had actually made supplies and purchases in the relevant periods; a business is not necessarily restricted to the activities declared on VAT registration forms.

76. We therefore consider that an inspector looking at the returns under appeal at 21 August 2012 on the basis of the information that Mrs Cook stated had been supplied to

HMRC at that date would not be able to determine that those returns related solely to bad debt relief claims, even if that inspector had relevant knowledge that the taxable person in question was intending to make a bad debt relief claim in that return. We accordingly consider that an inspector would not be able to make a decision as to the validity of the repayment claims on the basis of the information provided even if that information was within their knowledge in the *Post Office* context.

77. As no submissions were made to indicate that any further information was provided to HMRC between 21 August 2012 and 18 September 2013, we conclude that sufficient evidence of the relevant facts relating to these returns enabling a decision to be made as to their validity therefore did not come to HMRC's knowledge within the context of the decision in *Post Office* before Officer Kiely's request for that information on 18 September 2013.

78. Accordingly, as the assessment was made less than a year later on 26 August 2014, we consider that the assessment was therefore made in time.

79. We have considered the question of whether the assessment was correctly addressed. HMRC's evidence was that the assessment was issued to the address which they had on file at the relevant time, as required by law. They also submitted that the inclusion of a different address in a letter by Mrs Cook's solicitor would not be regarded as formal notification of a change of address. No evidence was provided by Mrs Cook that HMRC had been formally notified of a change of address other than her response in the hearing that HMRC may have been advised of a change of address by telephone, which HMRC state would not have been accepted as appropriate notification.

80. We note that the correspondence from Mrs Cook's solicitors to HMRC in 2013 does not state that she has moved nor specifically advise HMRC that Mrs Cook's address for correspondence has changed; the address is included in a line identifying their client. From the evidence put to us, we consider that the assessment was therefore addressed to the address held by HMRC for Mrs Cook at the relevant time and that HMRC had not been advised that this address had changed in a manner which would have changed the address held by them on file. We consider that the assessment was therefore addressed as required by law.

81. ***Whether the assessment was made to best judgement***

82. Mrs Cook argues that even if the assessment was made in time, it was not made to best judgement because it was made vindictively by the relevant HMRC officer for reasons relating to the Conduct Allegations.

83. HMRC submitted that there was no statutory requirement in s73(2) that an assessment be made to best judgement but that, regardless of the statutory provision, the assessment had been made to best judgement. Mrs Cook had not provided a detailed breakdown of the input tax repayment claimed, and so the input tax repayment had been disallowed. The assessment was based entirely on the amounts claimed in the relevant VAT returns; Mrs Cook had been given an opportunity to provide an explanation of the input tax claimed as well as the outputs and had not done so. It was submitted that the

assessment was reasonably made, in accordance with the decision in *Van Boeckel* [1981] STC 90. As HMRC made submissions as to best judgement regardless of whether best judgement is required by law, we have considered the point.

84. The assessment was made under s73(2) VATA 1994, as the repayments claimed by the returns had all been paid to Mrs Cook. The test in s73(2) is whether a repayment amount would not have been paid had the facts been known or been as they later turned out to be. If an amount would not have been paid, the amount assessed under s73(2) is that amount.

85. The assessment in respect of these returns denies the repayment of input tax claimed on the relevant returns in full. The reason given as the basis for the assessment was that no information had been provided to support the claim for input tax repayments and that, to the extent that the repayments related to bad debt claims, they were out of time.

86. We note that in the case of *Rahman* [1998] STC 826, the court held that:

> "the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment had been reached 'dishonestly or vindictively or capriciously'; or is '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 (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223). Short of such finding, there is no justification for setting aside the assessment."

87. We also note that in *Van Boeckel* the court considered that HMRC must make a value judgment on the material before them "honestly and bona fide", and that:

> "It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment."

88. We have found that the claims for bad debt relief were out of time and that there was and has been no information provided which could show any other entitlement to repayment of the amounts repaid. Accordingly, we consider that the only assessment which could be made under s73(2) was to disallow the repayments in full. That was the assessment made by HMRC. We therefore consider that the amount of the assessment cannot accordingly be regarded as having been "reached 'dishonestly or vindictively or capriciously'" nor that it is 'wholly unreasonable', or a 'spurious estimate or guess in which all elements of judgment are missing'. Accordingly, we consider that the amount of the assessment was made to best judgement.

89. To the extent that Mrs Cook's submissions were that HMRC should not have issued an assessment at all, rather than to dispute the amount of the assessment, we consider that the legislation is clear that HMRC are entitled to make an assessment where an amount has been wrongly repaid to a taxpayer. It has been established in case

law such as *Abdul Noor* [2013] UKUT 71 (TCC) and other decisions which are binding on us that this Tribunal has no general supervisory jurisdiction over HMRC's decision making and so we have no jurisdiction to consider whether HMRC's decision to issue an assessment was incorrectly made.

Decision

90. For the reasons set out above, the appeal is dismissed.

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

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 16 JUNE 2020