Neutral Citation: [2022] UKFTT 00442 (TC)

Case Number: TC08652

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2018/04678

*Assessment under section 73 (1) Value Added Tax Act 1994 – whether made to the best of HMRC's judgment – yes – appeal dismissed*

**Heard on:** 22 September 2022
**Judgment date:** 30 November 2022

**Before**

**TRIBUNAL JUDGE MARK BALDWIN**
**MR DUNCAN MCBRIDE**

**Between**

**NEOTERICK UK LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Jahangir Chowdhury of JC Associates

For Respondents: Mr Mohammed Uddin, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. The Appellant, Neoterick UK Limited ("Neoterick"), appeals against an assessment made on it by HMRC on 23 November 2017 under section 73 (1) of the Value Added Tax Act 1994 ("VATA") for £45,024.90 in respect of VAT periods 01/14 – 07/17.

2. Section 73 (1) VATA provides that, where a person has not made any returns required to be made under that Act or it appears to HMRC that such returns are incomplete or incorrect, they may assess the amount of tax due from that person "to the best of their judgment". Neoterick challenges the assessment on the ground that it was not made "to the best of [HMRC's] judgment".

### BACKGROUND

3. Neoterick operates a Subway in Stowmarket, Suffolk. The company was incorporated on 21 November 2012 and started trading on 15 January 2014.

4. HMRC conducted two test purchases at Neoterick's business premises on 2 August 2017. The till receipts showed that the items purchased were reported as zero-rated, when at least some of the items purchased should have been standard rated.

5. Following invigilations on 5 and 13 October 2017, HMRC wrote to Neoterick on 17 October 2017 confirming the findings of the invigilations and indicating that a VAT assessment would be issued to address what appeared to be serious under-reporting of standard rated supplies. However, the letter went on to invite Neoterick to provide evidence if it thought that the assessment was incorrect.

6. Not having received a reply, HMRC issued a VAT assessment under section 73 VATA on 23 November 2017 for £45,024.90 covering VAT periods 01/14 – 07/17.

7. Following further correspondence with Neoterick's agent, HMRC set out an explanation of the rationale of the VAT assessment in a letter of 3 April 2018.

8. HMRC upheld the VAT assessment following a review.

### THE LAW

9. There was no dispute before us as to the relevant law, which is settled and well-known and which we summarise briefly below.

10. As noted above, the starting point is section 73 (1) VATA, which provides that, where a person has not made any returns required to be made under that Act or it appears to HMRC that such returns are incomplete or incorrect, they may assess the amount of tax due from that person "to the best of their judgment" and notify the assessment to that person. Neoterick asserts that this assessment was not raised by HMRC "to the best of their judgment", and so it is to the meaning of that phrase we must now turn.

11. Mr Chowdhury did not refer us to any authorities and Mr Uddin only referred us to one. This was *Van Boeckel v CCE*, [1981] STC 290, where Woolf J addressed the principles inherent in the requirement that HMRC should exercise their best judgment, which he considered to be:

> (1) "[T]he Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide";
>
> (2) "[T]here must be some material before the Commissioners on which they can base their judgment".

(3) "[T]he Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the Commissioners to obtain that information without carrying out exhaustive investigations. 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."; and

(4) "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."

12. This discussion has been developed in a number of cases, and (although neither party referred us to them) we now briefly refer to a number of important subsequent cases. In *Rahman t/a Khayam Restaurant v CCE*, [1998] STC 826, Carnwath J considered Woolf J's comments in *Van Boeckel*. He observed that:

> "I have referred to the judgment [of Woolf J] in some detail, because there are dangers in taking Woolf J's analysis of the concept of "best judgment" out of context. 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 […] Short of such a finding, there is no justification for setting aside the assessment."

13. In *Commissioners of Customs & Excise v Pegasus Birds Ltd*, [2004] STC 1509, Carnwarth LJ observed that:

> "The statutory words 'to the best of their judgment' are used in a context where the taxpayers' records may be incomplete, so that a fully informed assessment is unlikely to be possible. Thus the word 'best', rather than implying a higher than normal standard, is a recognition that the result may necessarily involve an element of guesswork. It means simply 'to the best of (their) judgment on the information available'."

14. In *Georgiou (t/a Marios Chippery) v CCE*, [1996] STC 463, the Court of Appeal held that the Tribunal had used the right test in deciding that HMRC had assessed to the best of their judgement by using the evidence before them at the time of making the assessment.

**HMRC'S EVIDENCE**

15. Mr Uddin called three witnesses, all of whom submitted a witness statement, which they adopted and elaborated on as they gave evidence and in cross-examination.

***Mr Sean Clayton***

16. Mr Clayton is a higher officer of HMRC. He has been employed by HMRC and its predecessor since 1990 during which time he has worked in a number of areas including VAT assurance. In July 2017 Mr Clayton was asked to review the VAT returns of Neoterick. This was because Neoterick's VAT returns showed a percentage of standard-rated sales falling in the range 55% to 78% with an average of 72% in the periods 01/14 to 04/17.

17. Mr Clayton went into the premises of Neoterick on 2 August 2017 and purchased a six inch turkey "Sub" that was toasted along with a cup drink and three cookies. He was not asked if he was eating in or taking away and he was given a till receipt which showed the "Sub" and cookies as zero rated sales. One of his colleagues, Mr Mills, conducted a similar test visit on the same day and his till receipt showed a toasted "Sub" as zero-rated.

18. On 23 August 2017 Mr Clayton met with Mr Pradeep Thirunavukkarasu a director of Neoterick, at the company's premises. At this meeting he obtained background information around when the company started trading, its opening hours, seating arrangements etc. He also raised the subject of the test purchases on 2 August.

19. Subsequently a number of records were reviewed. In particular, it was noted that over a seven day trading period in the weeks beginning 2 November 2016, 25 January, 8 February and 12 April 2017, the end of day journal reports showed a number of days with no "eat in" sales at all. Mr Clayton found it strange that a Subway branch with 15 covers would record days when there were no eat in sales at all. This was an extremely low figure.

20. On 5 and 13 October 2017 Mr Clayton conducted an invigilation of sales at the company's premises. This was by prior arrangement with the company. The exercise involved observing sales and annotating a copy of each till receipt. Mr Clayton explained that at the invigilation HMRC officers would stand close to the till and be given a copy of the till receipt for all sales, which they would annotate with their observation as to whether the food was toasted, taken away or eaten in. The first invigilation covered a lunch time and an evening and the second a full day. Both invigilations took place in the same way.

21. The invigilation on 5 October was between 11:25 and 14:03 and subsequently between 18:00 and 21:03. Mr Clayton was personally involved in both sessions of the 5 October invigilation and in the invigilation on 13 October he was personally involved from 11:00 to 13:58 and then from 17:00 to 20:04. Mr Clayton carried out his invigilations with another HMRC officer, Mr Ken Clark.

22. Following the invigilations Mr Clayton compared the percentage standard rated sales on the invigilation days with Neoterick's historic declarations, and found that the percentages on the invigilation days (88.97% on 5 October and 93.3% on 13 October) were materially higher than the standard rated percentages historically declared (in the range 55% to 78%).

23. On 17 October 2017 Mr Clayton wrote to Neoterick setting out his proposal to issue a VAT assessment for £43,033 covering the periods of 01/2014 to 07/2017 assuming a standard rate in percentage of 92%.

24. Mr Clayton did not receive a reply to his letter and so issued a decision letter on 27 November.

25. Subsequently, HMRC were informed that JC Associates had been appointed as Neoterick's agent and on 27 February 2018 HMRC received a letter from JC Associates challenging the basis of the assessment and the evidence it was based on. Mr Clayton replied to that letter (and a subsequent one received from JC Associates), setting out the basis of the evidence and the facts relating to the assessment, all of which had previously been disclosed in the pre-assessment letter to Neoterick.

26. On 15 May 2018 JC Associates requested a review of Mr Clayton's decision. This was carried out and on 13 June 2018 the result of the review (which was to uphold Mr Clayton's decision) was sent to Neoterick.

27. In answer to a question from the Tribunal, Mr Clayton explained that the error rate (that is to say the percentage of till receipts during the invigilations which showed what Mr Clayton

and his colleagues considered to be the wrong VAT liability) was between 4 and 5%. We asked Mr Clayton why it was not appropriate to adjust Neoterick's taxable turnover by applying a 4/5% uplift. Mr Clayton explained that, when they have HMRC officers standing next to them, till operators tend to make far fewer errors than would normally be the case.

28. Mr Clayton made his best judgment assessment assuming that 92% of all sales were standard rated. This was the average percentage of standard rated sales by value over the invigilation days. He applied that percentage to the company's gross turnover. The assessment is for the difference between that figure and VAT declared on the sales returned as taxable in the period.

29. We also raised with Mr Clayton a point raised by Neoterick, which is whether he had taken seasonal fluctuations into account. Mr Clayton said that he would try to do this whenever he could, but in this case there was no discernible pattern in sales to be taken into account. For example, in some summer periods the percentage of standard rated (heated or eat in) turnover was higher than in some winter periods, whereas one would naturally expect the result to be the other way round. This had been pointed out to JC Associates.

***Mr Glen Mills***

30. Glen Mills is an HMRC officer. He gave evidence that he has carried out a test purchase at Neoterick's premises on 2 August 2017. He ordered a six inch BMT "Sub" and was asked whether he wanted this "cheese and toasted" to which he replied "yes". He subsequently ordered a cup drink as well. He was not asked whether he was eating in or taking away. He asked for a receipt for his transaction and observed that there was no VAT number on the receipt and there was no breakdown of VAT. He was able to clarify from the receipt that the "Sub" had been entered as a "cold" take away.

31. On Friday 13 October 2017 Mr Mills had taken part in the invigilation exercise from 08:10am until 11:00 and from 13:58 to 17:00. Mr Mills worked with Mr Paul Berry on the invigilation.

***Mr Kenneth Clark***

32. Kenneth Clark is a higher officer in HMRC and has worked as a VAT compliance officer since 1994. He gave evidence of participating in the invigilation on 5 October and again on 13 October. He was present with Mr Clayton from 11:25 until 14:00 and then from 18:00 to 21:00 on 5 October. He accompanied Mr Clayton on 13 October from 11:00 to 13:55 and then from 17:00 to 20:00.

33. Mr Clayton's evidence simply corroborated that of Mr Clayton as to when and how the invigilations had been carried out.

34. Mr Clark also explained that for 12 years he had been part of a team examining hundreds of Subways and was for a period the "national coordinator" of the "campaign" dealing with these traders. He explained that, based on his (very extensive) experience, he would expect the percentage of sales in a Subway branch which are standard rated to be in the region of 75-95% with an 87% average. He said that Subways are a very generic brand, with all outlets operating in broadly the same way. Generally, he would expect "Subs" to be eaten in or heated, and that explains the high percentage of standard rated supplies.

***Mr Paul Berry***

35. Paul Berry is an administrative officer of HMRC, for whom he has worked since 2010. He gave evidence in a witness statement of participating in the invigilation on 13 October from 08:10 to 11:00 and then again from 13:58 to 17:00. His evidence corroborated that of Mr Mills as to when and how the invigilations they had been involved in were carried out.

**NEOTERICK'S EVIDENCE**

36. Mr Chowdhury and Mr Thirunavukkarasu both provided brief witness statements, although neither gave evidence in person in the Tribunal. Neither of their witness statements contributed to our understanding of the events giving rise to these assessments.

**HMRC'S ARGUMENTS**

37. For HMRC Mr Uddin asserted that this estimate had been raised to HMRC's best judgment. As *Van Boeckel* indicated, it is not for HMRC to do the taxpayer's job. The assessment was based on reasonable data.

38. At the outset, two HMRC officers had separately made test purchases, both of which had been incorrectly categorised for VAT purposes. Subsequently, they had carried out invigilations over the main trading periods on one day and throughout another day. Those invigilations showed a much higher percentage (92%) of standard rated sales than had been historically declared by Neoterick. That percentage was within, although it was towards the top of, the range that Mr Clark would expect based on his substantial experience.

39. Mr Uddin observed that Neoterick had not called any staff members or directors to give evidence in the Tribunal, nor had they provided any further information when given the chance to do so by Mr Clayton.

**NEOTERICK'S ARGUMENTS**

40. Mr Chowdhury said that the percentage of standard rated turnover was too high, when applied to a Subway which (he said) mainly sold cold food.

41. He criticised HMRC for undertaking a relatively small sampling exercise. Apart from the two "one off" purchases on 2 August, they had attended for part of one day and a whole of another and then extrapolated those results over a four year period. He contrasted this with HMRC's investigations in *Van Boeckel*, where they had looked at a five week period and extrapolated that over three years.

**DISCUSSION**

42. We can deal with Mr Chowdhury's comments in relation to the sample period in *Van Boeckel* quite briefly. In that case, the two HMRC officers took the input tax figures for the five week period (which were reliable) and performed various calculations in order to calculate what they considered the gross takings of the pub should have been over the three year period the assessment related to. They never (and this was one of the criticisms made of them) carried out an invigilation in the pub at all; theirs was an entirely "desktop" exercise. Woolf J held that neither not carrying out any "in person" investigations nor using a sample period meant that the assessment was not made to the best of the officers' judgment. Following Mr Chowdhury's logic, to match the sample period (as a proportion of the period to which the ultimate assessment related) in *Van Boeckel*, the officers here would have needed to carry out an invigilation every day for something like a six week period. That seems to us to be excessive. As Woolf J observed, there is no need for HMRC to carry out any investigations of their own (although they clearly did so here). They simply need to do whatever is required to assemble sufficient material on which to make a bona fide value judgment.

43. Mr Chowdhury also criticised some of the language used in HMRC's letters, for example where words such as "believe" and "possible" were used. He intimated that this might suggest that Mr Clayton and his colleagues were unsure of their ground. We have read Mr Clayton's letters in the hearing bundle and consider that his language is no more than a polite, non-assertive way of explaining his conclusions and inviting comment. His letters do not strike us as those of a man who was unsure of his position and "hazarding a guess" as to what the correct analysis might be.

44. Mr Chowdhury asserted that the percentage of standard rated sales found by HMRC was simply too high. Subways, in his view, generally sell cold, takeaway (and therefore zero rated) food. Regrettably, neither of us have any personal experience of Subways we can bring to bear on this point, but we note that this observation is completely at variance with Mr Clark's extensive experience of Subways and their VAT affairs. We prefer Mr Clark's evidence on this point to Mr Chowdhury's unevidenced assertion.

45. Mr Chowdhury complained that the period covers by the assessment runs from 1 November 2013 whereas the business did not start trading until January 2014. Mr Clayton explained that the assessment covers the periods for which Neoterick has been VAT registered, which may include some time before it began to trade. However, as the assumed percentage of standard-rated supplies is applied to turnover, this has no impact on the assessment; if the business was not trading, there would have been no turnover. We agree. There is nothing in this complaint.

46. If we apply the *Van Boeckel* tests to this case, we observe:

(1) There is no suggestion that Mr Clayton and his colleagues did not carry out their review honestly and bona fide.

(2) There must be some material on which HMRC can base their judgment. HMRC had their initial two sample purchases, which indicated (albeit on a very small evidence base) that Neoterick did not correctly categorise sales from a VAT point of view. They then had their two invigilations, which gave a percentage standard rated turnover at the top of, but well within, the expected range based on Mr Clark's extensive experience of investigating Subways.

(3) HMRC are not required to do the taxpayer's job for them. Neoterick (and subsequently JC Associates) were given opportunities to provide other evidence which would displace Mr Clayton's initial conclusion. For example, in his letter of 17 October 2017 to Neoterick he explained in great detail how he had investigated the company's affairs and then said:

> "before we make assessments of tax due, I would like to give you the opportunity to make any further comment to my findings and calculations. If you feel there are other factors for me to consider, please forward details and supporting evidence."

Mr Clayton gave Neoterick a month to reply to him. Neither Neoterick, nor JC Associates after their appointment as agent, have ever provided any additional information to Mr Clayton or any of his colleagues that would support a different conclusion.

47. As far as Mr Chowdhury's comments around seasonal fluctuations are concerned, Mr Clayton is clearly very well aware of the need to take these into account but he was not able to do that here because there was no discernible pattern and, as he observed in his letter to JC Associates on 3 April 2018, "if you review your client's VAT returns, you will see that standard rated sales were lower in the winter months than the summer months. I would expect this to be reversed." HMRC cannot be expected to take seasonal fluctuations into account when such a material as they have been able to gather does not provide any logical basis for them to do that.

48. Mr Chowdhury's assertions about the nature of a Subway (that it predominantly serves cold take away food) are not borne out by Mr Clark's extensive experience.

49. Putting all of this together, it seems to us that this assessment clearly meets the tests set out in *Van Boeckel* as discussed in the subsequent cases.

**DISPOSITION**

50. This appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

51. 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.

**MARK BALDWIN**
**TRIBUNAL JUDGE**

**Release date: 30th NOVEMBER 2022**