Neutral Citation: [2023] UKFTT 00030 (TC)

Case Number: TC08689

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

Initially by video link and then at the Tribunal Centre, Taylor House, London

Appeal reference: TC/2019/04627

*VAT – failure to comply with directions – failure to attend – hearing in the absence of Appellant's representative – assessments upheld – penalties on the basis that behaviour "deliberate" – penalties confirmed*

**Heard on 27 June 2022; 6 October 2022 and 27 October 2022**
**Judgment date: 11 January 2023**

**Before**

**TRIBUNAL JUDGE ANNE REDSTON**
**MS JANE SHILLAKER**

**Between**

**ATN MARKETING LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Wendy P Bartram, of Ian R Collins & Co

For the Respondents: Milan Chudasama, Litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. On 8 July 2019, ATN Marketing Limited ("ATN") appealed to the Tribunal against VAT assessments and penalties which totalled £270,350. That figure is taken from a Statement of Account which included other non-appealable sums. However, on 1 December 2020, Ms Bartram confirmed in an email to the Tribunal that the appeal was in fact against the following HMRC decisions, which together total £283,030:

(1) a VAT assessment made on 28 April 2014, and issued the following day, of £112,537 for period 04/12 ("the First Assessment") and a related penalty for deliberate behaviour issued on 8 July 2015 for £63,020 ("the First Penalty"); and

(2) a VAT assessment dated 8 July 2015 for £52,227.79 for period 04/15 ("the Second Assessment"), and a related penalty of £55,246 for deliberate behaviour issued on 19 November 2015 ("the Second Penalty").

2. In this decision, the term "the Assessments" means the First and Second Assessments taken together, and "the Penalties" means the First and Second Penalties.

3. For the reasons explained in the main body of this decision, we upheld the Assessments and the Penalties and refused the appeal.

### THE HEARINGS, THE DIRECTIONS AND FAILURE TO ATTEND

4. This case was listed for three hearings, the first two of which were adjourned with directions.

#### The first hearing

5. The case was listed for a one day hearing by video to begin at 10am on 27 June 2022. Ms Bartram had previously confirmed in writing that she had "a reliable broadband connection and the ability to access the electronic bundle while simultaneously attending the hearing by video". By directions issued on 1 June 2021 ("the First Directions") ATN had been directed to serve the following:

(1) by 29 June 2021, a list of the documents on which ATN intended to rely at the hearing of its appeal;

(2) by 21 July 2021, statements from all witnesses on whose evidence they intended to rely at the hearing, setting out what that evidence will be ("witness statements"); and

(3) by 21 days before the hearing, a skeleton argument.

6. The First Directions also required ATN to confirm to the Tribunal that it had complied with the first two of the above requirements, and to copy the Tribunal on its skeleton argument.

7. Ms Bartram did not serve any witness statements, and on 23 August 2021 emailed the Tribunal saying she would be attending the hearing alone, and that she was "not a witness". She also provided a documents list which consisted of 24 items set out on a single page; these included "detailed VAT return workings"; "summary of correct allocation of payments"; "plans showing usage of exhibition space" and "sample of invoices for recharge of exhibition space". On 20 June 2022, Mr Chudasama emailed the Tribunal (copying Ms Bartram) as follows:

> "In regard to the documents list submitted by the Appellant's representative (attached to this email) the Respondent does not know which documents are specifically being referred to. The Respondent is not sure if these documents are housed in the Respondent's document bundle, of if these are new. Furthermore, if there are any additional documents on which the Appellant

> and their representative intend to rely on, the Respondent has not received them."

8. Ms Bartram emailed her skeleton argument to Mr Chudasama and the Tribunal at 9.36am on the day of the hearing. It was three pages long, and largely consisted of assertions that evidence had previously been provided to show that the Assessments were incorrect, without any cross-references to particular supporting documents, other than a general instruction to "See Documents". The skeleton also included factual statements as to how ATN's business was run, which plainly constituted witness evidence. An extract from that skeleton argument can be seen at §44 below.

9. When the hearing commenced, the Tribunal asked Ms Bartram why she had not complied with the First Directions, but she had no explanation. The Tribunal explained the nature of witness evidence and said that it appeared to us from the skeleton that ATN was seeking to rely on such evidence, but that no statements from witnesses had been provided. We also explained that skeletons need to be cross-referenced to the supporting evidence, and that the skeleton as filed fell significantly short of what was necessary.

10. Soon after those exchanges, Ms Bartram lost her internet connection to the hearing. There were several reconnection attempts, and she finally re-joined by phone. She told the Tribunal she lived in a remote part of the country with unreliable broadband and would prefer the hearing to be on a face-to-face basis. Taking into account in particular her connection difficulties, we decided to adjourn the hearing with directions.

**The Second Directions**

11. The Second Directions were given orally at the first hearing and subsequently issued in written form on 28 June 2022. They included the following:

(1) The relisting of the hearing on a face-to-face basis in London for 6 October 2022, with the parties to hold 27 October as an alternative; both these dates were agreed with the parties.

(2) By 22 July 2022 ATN was to file and serve a redrafted skeleton argument which:

(a) focused on the Assessments and Penalties which were in dispute;

(b) was cross-referenced to the documents in the Bundle;

(c) explained why those documents supported its case; and

(d) if reliance was placed on any documents that were not already in the Bundle**,** by the same date ATN was to provide copies of those documents to HMRC.

(3) In relation to witness evidence, the Directions said (emphasis in original):

> "If Ms Bartram wants to explain what the Appellant did, either generally or in relation to the disputed assessments, she is giving **witness evidence**. She must set out in advance of the hearing the facts which she wants to put before the Tribunal, in the form of a witness statement, and send a copy of that witness statement to HMRC and the Tribunal.
>
> If the Appellant wants Mr Allan [the director of ATN] to give witness evidence, a witness statement must be provided for him by the same date, and he must attend the hearing. If he does not attend, it is unlikely that the Tribunal will place weight on his witness statement.
>
> Ms Bartram is to ensure that she receives a receipt from both Mr Chudasama and from the Tribunal when she has sent the emails referred to above."

(4) An "unless order" stating that unless ATN complied with the directions about the skeleton argument, documents and witness evidence "in full and by the time specified, the Tribunal is unlikely to allow that evidence or arguments to be considered at the hearing".

(5) Directions to HMRC to file and serve:

(a) a supplementary Bundle if Ms Bartram served further documents; and

(b) an amended skeleton argument to take into account (i) any points made in Ms Bartram's new skeleton argument, and (ii) any points in any witness statements provided in response to the directions.

(6) If either party did not attend the relisted hearing, or there were any failure to comply in full with the directions about documents, witness statements and/or skeleton arguments, the Tribunal was very unlikely to adjourn the relisted hearing, but instead would decide the case on the basis of the evidence provided.

12. The hearing was relisted by the Tribunal clerk for the earlier of the two available dates, and confirmations issued to the parties.

**Failure to comply with the Second Directions**

13. On 27 September 2022, the Tribunal clerk sent us a further copy of the original Bundle and Mr Chudasama's skeleton, but no amended skeleton arguments or witness statements.

14. I directed that she check whether any further documents had been received from Ms Bartram, and if not, to ask whether the appeal was being maintained given the failure to comply with the Second Directions. On 29 September, Ms Bartram confirmed that ATN was continuing with its appeal, and made no comment about her failure to comply.

**The hearing on 6 October 2022**

15. The hearing was listed to begin at 10.30 am. Mr Chudasama was present, but Ms Bartram was not. At 10.37 the Tribunal clerk forwarded three emails from Ms Bartram saying she was on the train, but that it had been delayed due to damage to the line, and she was unlikely to reach the hearing centre before midday.

16. The Tribunal clerk contacted Ms Bartram by phone at around 11am; she was still on the train with no indication as to when it would reach London. We decided that it was in the interests of justice to adjourn the hearing to 27 October 2022, the second of the parties' two available dates.

**The Third Directions**

17. Following the second hearing, the Tribunal issued an adjournment decision together with further directions ("the Third Directions") which:

(1) noted that ATN had failed to comply with the Second Directions, but extended the deadline for compliance to seven days from the date of issue of the Third Directions;

(2) repeated the "unless order" from the Second Directions; and

(3) repeated the warning from the Second Directions, set out at §11(6); and

18. ATN did not comply within that extended time limit.

19. The Third Directions also delayed the start time of the next hearing by 30 minutes to 11am to allow the parties (and in particular Ms Bartram) more time to travel to the venue.

**The third hearing**

20. Mr Chudasama was again present at the start time for the relisted hearing, but Ms Bartram was not. Shortly after the start time, I received a forwarded email from the Tribunal clerk. This had been sent by Ms Bartram at 7.09 that morning; it said she "had a virus" and "difficulty speaking". She requested that the hearing be adjourned so she could attend to represent ATN.

21. Mr Chudasama objected, saying it was in the interests of justice to proceed, taking into account in particular that this was the third hearing he had attended to represent HMRC, and that ATN had failed to comply with the Tribunal's directions.

22. The Tribunal considered the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), and in particular Rule 2 of those Rules, as set out below.

*The Tribunal Rules*

23. Rules 33 is headed "Hearings in a party's absence", and it reads:

> "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

24. It was clear that Ms Bartram had been notified of the hearing. We considered whether it was in the interests of justice to proceed. Rule 2(2) says:

> "Dealing with a case fairly and justly includes--
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

*Application of Rule 2 of the Tribunal Rules*

25. The relevant factors here are (a), (c) and (e) of Rule 2.

(1) In relation to (a), ATN's appeal concerned VAT assessments and related penalties. Although the penalties were for deliberate behaviour, ATN had failed to file any witness evidence, despite the original directions and two sets of further directions. It was also relevant that Mr Chudasama had attend all three hearings on behalf of HMRC, so had therefore prepared for this case on two previous occasions. If the appeal was not heard on this occasion, even more time and the related costs would be wasted.

(2) In relation to (c), Ms Bartram's absence meant that she would not be able to explain orally why she believed ATN should succeed. However, the Tribunal had adjourned he first hearing to allow her to participate at a face-to-face hearing, and had delayed the start time of the third hearing to take into account her travel time. In addition, she had been repeatedly directed to provide a properly referenced skeleton argument which set out ATN's case, together with witness evidence, and had failed to comply.

(3) In relation to (e), a fourth adjournment of the hearing would inevitably cause delay. The appeal concerned VAT periods 04/12 and 04/15, over 10 and 7 years previously. Relisting the hearing would further lengthen the gap between the dates on which the events occurred, and the eventual hearing of the appeal. In assessing whether we were able properly to consider the issues, we took into account the following:

(a) we had a Document Bundle of over 750 pages containing the correspondence between the parties; ATN's Notice of Appeal to the Tribunal; details of the penalties and other documents;

(b) we had also been provided with a Bundle of Authorities containing extracts from the legislation and various relevant court and tribunal judgments; and

(c) although we only had Ms Bartram's original skeleton argument, she had twice been directed to refile that document, cross-referencing as appropriate to any documents she was relying on in support. In our judgment ,"proper" consideration of the issues does not extend to directing a further adjournment because a party failed to provide details of its case in breach of two sets of directions.

26. We also considered the following other factors:

(1) both parties are entitled to have the case dealt with fairly and justly, so we are required to consider the effect of a postponement decision on HMRC as well as on ATN, see *Transport for London v O'Cathall* [2013] EWCA Civ 21 at [42]. HMRC wanted the case resolved, as was clear from Mr Chudasama's submissions, and he had already attended and prepared for two previous hearings;

(2) a further postponement would not only cause delay to HMRC and ATN, but also other Tribunal users. As Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

(3) Ms Bartram had been warned in both the First and Second Directions that if she did not attend the relisted hearing, the Tribunal was "very unlikely to adjourn…but instead to decide the case on the basis of the evidence provided".

(4) Although Ms Bartram had emailed the Tribunal to say she "had a virus" and "difficulty speaking", she had not provided any more details, such as how long she had been ill; when she had realised she had "difficulty speaking"; whether she had made an appointment with her GP and if so when that was and with what result; and whether she had booked a train and if so when she had cancelled her booking.

27. We also took into account Ms Bartram's failures to comply with Tribunal letters and directions:

(1) she failed to comply with the First Directions to file and serve a skeleton argument by 21 days before the hearing, instead doing so less than half an hour before the first hearing was due to start;

(2) despite being twice directed to refile her skeleton argument appropriately cross-referenced to supporting documents, she had failed to do so;

(3) although the Tribunal had explained the nature of witness evidence orally during the first hearing and in the Second Directions, and despite the fact that Ms Bartram's

skeleton argument referred to factual matters which required support by way of witness evidence, she did not file any witness statements; and

(4) the first hearing was adjourned because Ms Bartram had connected to the hearing from a location with inadequate broadband, although she had previously confirmed in writing that she that she had "a reliable broadband connection", and the appeal had originally been listed to be heard by video in reliance on that confirmation.

28. Had Ms Bartram attended the hearing, the Tribunal would also have been likely to enforce the earlier "unless order" and prevent her from relying on any expansion to her skeleton argument or on any oral witness evidence. That was because:

(1) she had had a long time to comply with the Tribunal's directions, but had not done so;

(2) she had emailed the Tribunal several times since the first hearing, but had never provided an explanation for her failures to comply; and

(3) it would be unfair to HMRC, and not in the interests of justice, for detailed submissions and witness evidence to be put forward by Ms Bartram for the first time at the hearing.

29. As a result, even had Ms Bartram attended, she would have been allowed to make only limited submissions, and could not have given any witness evidence. Her non-attendance therefore made less difference to ATN than would have been the case had she been able to put forward fully reasoned submissions, supported by documentary and witness evidence.

30. Taking into account all the foregoing, we decided to proceed with the hearing despite Ms Bartram's failure to attend. However, we also decided that as Ms Bartram was not present at the hearing, and despite the "unless order", it was nevertheless in the interests of justice to take her skeleton argument into account, although because she had failed to cross-reference it to the Bundle, we were unable to identify the documents which she said supported ATN's case.

**The evidence**

31. The findings of fact in this decision are made on the basis of the evidence in the Bundle provided for the hearing (see §25(3)). For the reasons explained above, there was no witness evidence.

**THE FIRST ASSESSMENT**

32. The First Assessment was made on 28 April 2014 and issued the following day; it related to period 04/12 and was for £112,537.

**Findings of fact about the First Assessment**

33. On 16 September 2013, HMRC Officer Ms Kathryn Stephenson wrote to ATN to confirm that on 9 October 2013 she would be visiting its premises to check its VAT records. She attached a list of queries; these included requests for purchase invoices and other evidence to support ATN's claimed input tax deductions relating to the supply of exhibition space. At all relevant times Ms Bartram was acting on ATN's behalf in filing its VAT returns and carrying out other related book-keeping tasks.

34. The visit took place as arranged. During the visit Ms Stephenson was told that £112,537 of the input tax included in period 04/12 was "an early claim". Ms Stephenson also identified that a claim for the same amount and relating to the same supplier had been made in period 10/12.

35. ATN did not provide all the information Ms Stephenson had requested, and she followed up with Ms Bartram by phone, and on 24 March 2014 she sent Ms Bartram an email. She sent

a further email on 15 April 2014, but still did not receive evidence to support the £112,537 claimed as input tax for period 04/12. Instead, Ms Bartram relied on the same bank payments to support the input tax claimed in 04/12 as she had used to support the 10/12 claim. We find as a fact that this one payment had been put forward to support two separate input tax claims.

36. On 29 April 2014, Ms Stephenson issued ATN with an assessment under Value Added Tax Act 1994 ("VATA"), s 73. It included £112,537 for period 04/12 and £42,794 for period 04/13, a total of £155,331. Ms Bartram subsequently provided evidence relating to period 04/13, and HMRC accepted that the assessment for that period should be vacated. Since period 04/13 is not in dispute, we have not made related findings of fact. The remaining assessment was for period 04/12 of £112,537; this was the First Assessment.

37. Following phone conversations between Ms Bartram and Ms Stephenson, on 27 August 2014 Ms Stephenson emailed Ms Bartram saying "the input tax claim of £112,537 is not supported by onward sales or by payment of the purchase invoice", and attaching an excel spreadsheet setting out the sales and the corresponding invoices. She asked Ms Bartram to provide any further information by 10 September 2014, but Ms Bartram did not respond.

38. Ms Stephenson followed up by email on 15 September 2014, and having again received no reply, on 24 December 2014 issued a Notice to ATN under Finance Act 2008, Sch 36, para 1 ("a Sch 36 Notice"). This required ATN to supply purchase invoices, credit notes, bank statements, paid cheques, nominal accounts and supplier statements relating to the supply of exhibition space for the period 1/1/12 to 31/7/13. A copy of the Sch 36 Notice was sent to Ms Bartram's firm, Ian R Collins & Co. No response was received.

39. HMRC later identified that the Sch 36 Notice contained an error, and it was reissued on 6 February 2015 in the same terms. Again, no response was received. On 17 March 2015, HMRC issued a penalty notice charging ATN £300 for failure to comply with the Sch 36 Notice. That penalty has not been appealed, but the Notice was still not complied with.

40. On 28 May 2015, Ms Bartram wrote to HMRC saying she disagreed with the First Assessment on the basis that:

(1) it was "not in accordance with the information provided";

(2) the exhibition space is "only partially invoiced as an onward supply as ATN also uses a proportion of the exhibition space rented"; and

(3) ATN "pays for the exhibition space in instalments by prior arrangement with the provider and details of payments were provided".

41. Ms Bartram ended by saying she was attaching a copy of a reconciliation. On 9 June 2015, Ms Stephenson called Ms Bartram to say that the "Exhibition Reconciliation' attached to her letter "was actually a blank page". Ms Bartram promised to forward a further copy, but did not do so.

42. On 9 June 2015, Ms Stephenson called Ms Bartram again, and said that ATN had not complied with the Sch 36 Notice. Ms Bartram responded by stating that this information had been sent to Ms Stephenson "some time ago", but that she would send it again. She did not do so. Ms Stephenson chased again on 12 June 2015, leaving three telephone messages, but Ms Bartram did not respond.

**Submissions about the First Assessment**

43. Ms Bartram's skeleton said that Ms Stephenson had been provided with evidence showing that only part of the exhibition space was rented out, and that ATN had itself used the other part; that "summaries of the usage of the exhibition space" together with "maps of the

utilised space" and "evidence of sales invoices raised" had been supplied to HMRC. Those statements are followed by the words "see documents" in capital letters.

44. Ms Bartram continued by saying (text as in original)

> "evidence of payments were supplied;
>
> The provider of the Exhibition Space Regularly submitted invoices well in advance of the Exhibition Date which were later amended and then either reissued or credited
>
> The appellant had an agreement with the suppler that the invoices were able to be paid in instalments this was therefore the reason it was considered that payment of the purchase invoices were not paid as it was not apparent how the payments and credit notes had been matched
>
> SEE DOCUMENTS
>
> In addition to support that that the exhibition space was supported as an onward supply that part of the company's trade was subsequently sold on."

45. Mr Chudasama submitted that:

(1) Ms Stephenson had repeatedly tried to obtain supporting documents from Ms Bartram;

(2) as could be seen from the correspondence, Ms Bartram had frequently said she had sent HMRC various documents, but those documents had not in fact been provided

(3) ATN had refused to comply with the Sch 36 Notice, despite the penalty; and

(4) Ms Stephenson had carried out a detailed analysis of the evidence with which she had been provided.

46. In his submission the First Assessment had therefore been made to Ms Stephenson's best judgement, and there was no evidence on which the Tribunal should change the quantum of that Assessment.

**The law on best judgment assessments**

47. The First Assessment was made under VATA s 73, which is headed "Failure to make returns etc". Subsection (1) provides as follows (emphasis added):

> "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."

48. The correct approach to a "best judgement" assessment was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) ("*Fio*") (Judge Scott and Ms Gable), in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC) (Judges Herrington and Scott):

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC) (Judge Sir Steven Oliver QC).

15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):

> 'In such cases…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.'

16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:

> '…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment.'

17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.

18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):

> 'The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment.'"

49. The case of *Van Boeckel v HMRC* [1981] STC 390 also provides guidance on the approach to best judgement assessments. Woolf J (as he then was), said:

> "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."

50. In *Rahman*, Chadwick LJ considered the judgment in *Van Boeckel*, and said:

> "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'."

## Application of the law to the facts

51. The Tribunal agrees with Mr Chudasama that the First Assessment was plainly made to Ms Stephenson's best judgment. As he said, Ms Stephenson repeatedly tried to obtain copies of the evidence which Ms Bartram said was available; Ms Bartram several times stated that she had sent documents when she had not done so; and Ms Stephenson also carried out her own detailed reconciliations and checks, which were not displaced by the limited evidence which Ms Bartram did supply.

52. In relation to the second stage of a deciding an appeal against a best judgement assessment, we have found as a fact that ATN made only one payment but made two related input tax claims.

53. We went on to agree with Mr Chudasama that there was no basis to change the quantum of the First Assessment. Although we had explained orally at the first hearing why Ms Bartram needed to support her skeleton argument by reference to documentary and/or witness evidence, and despite having repeated those points in both the Second and Third Directions, Ms Bartram did not comply. As a result, her skeleton contain assertions that the First Assessment is incorrect, but those assertions are not supported with evidence.

54. As a result of the foregoing, the Tribunal upholds the First Assessment and refuses ATN's appeal against it.

### THE FIRST PENALTY

55. The First Penalty was charged under FA 2007, Sch 24 on the basis that ATN's behaviour had been deliberate and the disclosure prompted.

## The legislation

56. FA 2007, s 97 is headed "penalties for errors", and begins:

> "(1) Schedule 24 contains provisions imposing penalties on taxpayers who
>
> (a) make errors in certain documents sent to HMRC…"

57. Sch 24, para 1 reads:

> "(1) A penalty is payable by a person (P) where
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to
>
> (a) an understatement of a liability to tax…
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part."

58. A VAT return is one of the documents listed in the Table below that paragraph. Para 3 is headed "degrees of culpability" and provides:

> "(1) For the purposes of a penalty under paragraph 1, an inaccuracy in a document given by P to HMRC is
>
> (a) 'careless' if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) 'deliberate but not concealed' if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

> (c) 'deliberate and concealed' if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

59. Para 4 provides that where there is no offshore element, the penalties are 30% of the "potential lost revenue" or "PLR" for careless action; 70% of the PLR for deliberate action, and 100% of the PLR where the action is both deliberate and concealed.

60. Para 5 defines the PLR as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

61. Para 9(1) provides that a person discloses an inaccuracy by:

> "(a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy…and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy…is fully corrected."

62. Para 9(2) provides that a penalty is "unprompted" if "made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy", and otherwise it is "prompted".

63. Para 10(2) provides that where the behaviour is deliberate, the "standard" penalty for a prompted disclosure is 70% and the minimum penalty 35%; where the behaviour is careless, the standard penalty is 30% and the minimum penalty is 15%. The quantum of the penalty within those bands is decided by "the quality of disclosure" see para 10(1). Para 9(3) provides that "in relation to disclosure 'quality' includes timing, nature and extent".

**Case law**

64. In *Tooth v HMRC* [2021] UKSC 17 at [43], in the context of the Taxes Management Act 1970 ("TMA"), the Supreme Court said:

> "Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely 'inaccuracy'."

65. The Court added at [47], with reference to the relevant section of the TMA:

> "for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement."

66. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) at [63] the Tribunal (Judge Greenbank and Mr Bell) similarly held that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document".

**The basis for the First Penalty**

67. The First Penalty was issued by HMRC on the basis that ATN had acted deliberately. Ms Stephenson explained that penalty by saying:

> "2 sets of invoices for the purchase of exhibition space for the Spring Fair 2013 have been received and processed through the purchase day book. The initial input tax claim of £112,537 is not supported by onward sales or by payment of the purchase invoice. You must have known that 2 sets of invoices had been received and processed for the same supply. Bank payments used to evidence the payment of the initial invoice during a premises visit on 19/11/2013 were later used to support the payment of the later claim. The behaviour leading to the inaccuracy is deemed to be deliberate."

68. She also decided that the disclosure was prompted. As noted above, the maximum penalty for a prompted deliberate disclosure without concealment is 70% and the minimum is 35% of the PLR.

69. In this case, the PLR was £112,537. HMRC gave the following reductions:

(1) For "telling", 10% out of a possible 30%; no greater amount was given because ATN did not accept that it had wrongly double claimed the input tax.

(2) For "helping", 10% out of a possible 40%, on the basis that Ms Stephenson's requests for information "have not been fully met".

(3) For "giving", 20% out of a possible 30%, because "access to most of the requested records was given during the initial visit but later requests for information have not been met promptly or at all".

70. The overall reduction of 40% was then used to reduce the part of the penalty which falls within the 35% band between the maximum of 70% and the minimum of 35%, so by 14 % (35 x 40) leaving 21% in charge; the resulting percentage was therefore 56 (35 + 21). As a result, the penalty was £63,020.72 (£112,537 x 56%).

71. Mr Chudasama submitted that the First Penalty had been correctly charged for the reasons given by Ms Stephenson. Ms Bartram's skeleton argument said only that "evidence of input tax claimed was submitted together with onward supply and use of space by the company". This is essentially a reiteration of her submissions about the First Assessment.

72. It is for HMRC to prove that a penalty assessment is justified. The Tribunal agrees with Ms Stephenson and Mr Chudasama that ATN acted "deliberately", because Ms Bartram relied on the same evidence (the bank statements) to support two different claims for input tax and knew that a duplicate claim had been made. There was also no doubt that disclosure was "prompted".

73. We therefore went on to consider the level of mitigation. The purpose of the "telling" category is that a penalty should be reduced where a person accepts that the document (here the VAT return) was inaccurate. The Notes on Clauses, published when Sch 24 was introduced, describe "telling" as an "admission", in other words "telling HMRC that there is or may be an inaccuracy". On behalf of ATN, Ms Bartram did not make any such admission, and the 10% reduction for "telling" is therefore generous. However, as mitigation was not raised as an issue by either party, we decided not to increase the penalty by reducing the mitigation.

74. For the reasons set out above, we confirm the First Penalty and refuse ATN's appeal against it.

#### THE SECOND ASSESSMENT

75. The Second Assessment was dated 8 July 2015; it related to period 04/15 and was for £52,227.79.

### The law

76. There was no dispute that the Second Assessment had been raised not only under VATA s 73, but also in reliance on VATA s 26A, which provides as follows:

> "(1) Where
>
> (a) a person has become entitled to credit for any input tax, and
>
> (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date, he shall be taken, as from the end of that period, not

to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

(2) For the purposes of subsection (1) above 'the relevant date', in relation to any sum representing consideration for a supply, is –

(a) the date of the supply; or

(b) if later, the date on which the sum became payable."

77. Section 73(4) provides the *vires* for the making of regulations to restore entitlement to a deduction where supplies are paid for after the six months provided for by Reg 74(1). Under those *vires*, Reg 172I provides tor the making of a later claim.

**Findings of fact about the Second Assessment**

78. As with the First Assessment, at all relevant times Ms Bartram was acting on ATN's behalf. She included input tax of £255,865.97 in ATN's 04/15 VAT return; this included £105,231.40 for the purchase of exhibition space relating to a "Spring Fair" due to take place in 2016. After taking that input tax into account, ATN's VAT return for that period showed a repayment of £53,004.61.

79. HMRC selected the 04/15 return for further checks. The Spring Fair invoice was dated 9 March 2015, and stated it was due for payment immediately. Ms Bartram told Ms Stephenson that as at 9 June 2015 no payment had been made. Ms Stephenson requested details of correspondence with the supplier, including a payment plan, but this was not provided. Ms Stephenson also noted that the input tax total on ATN's purchase day book did not agree with the figure on the VAT return, and asked for "a copy of the VAT summary and related working papers" together with "a schedule of proposed payments for Exhibition space", but these were not provided. Ms Stephenson made her requests on 2 June 2015; 9 June 2015; 12 June 2015, 19 June 2015 and 22 June 2015.

80. On 8 July 2015, Ms Stephenson decided that ATN had not shown that the VAT of £105,231.40 was deductible, so that ATN was required to pay HMRC £52,227 instead of being due a repayment. On the same day, Ms Stephenson issued the Second Assessment; this too was raised under VATA s 73.

81. Correspondence continued between the parties about ATN's VAT filing. On 9 March 2018, Ms Bartram provided evidence that a payment of £83,334 had been made in period 01/16 and a second payment of £20,938 in period 04/16; the two together totalled £104,272. Ms Bartram said these two payments taken together related to the invoice dated 9 March 2015 (which was for £105,232.40). No explanation was provided for the difference of £101.3 between the two figures.

82. Ms Stephenson did not accept that these two later payments validated the input tax claimed in 04/15 because:

(1) when Ms Bartram provided HMRC with copies of the purchase day books for periods 04/12 to 04/18 in October 2018, Ms Stephenson identified that in period 01/16 the input VAT shown in the day book was £100,087.32, whereas that claimed on the VAT return was £202,372. Thus, in that period, ATN had claimed input tax of £102,285.07 more than could be supported by its invoices for that period. In Ms Stephenson's view, the "missing" invoice was that for which input tax had already been claimed in period 04/15.

(2) VATA 26A provides that input tax can only be claimed if the payment is made within six months, but:

(a) the date on the Spring Fair invoice fell within period 04/15; and

(b) the two payments were made in period 01/16, more than six months later.

(3) If Ms Bartram was correct that the two payments related to the 04/15 invoice, the related input tax had been correctly claimed in period 01/16 in accordance with Reg 172I.

(4) If the input tax were also to be allowed in period 04/15, there would be a duplicate claim, and the earlier claim would be barred by VATA 26A.

83. Ms Stephenson invited Ms Bartram to provide further evidence relating to period 04/15, but Ms Bartram did not do so. Having fully considered the material provided, Ms Stephenson concluded that there was no reason to change the Second Assessment.

**Submissions**

84. In relation to the Second Assessment, Ms Bartram's skeleton argument said only that "evidence of input tax claimed was submitted together with onward supply and use of space by the company". There is no further detail under that heading. However, when she moved on to make submissions about the Second Penalty, she said that "under normal trade dealings with the supplier time to pay arrangements were always agreed with the supplier" and that she had "established" that these terms had been agreed. We have taken those statements to relating to the Second Assessment rather than to the Second Penalty.

85. Ms Bartram also sought to rely on *Premspec v HMRC* [2020] UKFTT 167 (TC) (Judge Citron and Mrs Gable) ("*Premspec*"), in which the Tribunal found that claims for input tax were allowable because the "relevant date" for payment of the invoices was later than the dates on the face of the invoices. Ms Bartram said that was also the case here.

86. Mr Chudasama said that there was no evidence that the position was similar to that in *Premspec*. Instead, the correspondence between the parties explained the reasons for Ms Stephenson's decision to issue the Second Assessment, and also demonstrated that it was made to her best judgment.

**The Tribunal's view**

87. In relation to the first stage of a best judgement, is clear from the case law set out at §47ff that the appellant has the burden of showing that there was no "honest and genuine attempt to make a reasoned assessment of the VAT payable". It is plain that Ms Stephenson made a reasonable and reasoned decision on the basis of the evidence available to her, and we find it was made to her best judgment.

88. In relation to the second stage, we agreed with Mr Chudasama that Ms Bartram had not provided any evidence that ATN had agreed deferred payment terms with the particular supplier such that the "relevant date" was after the payment date shown on the face of the invoice. The position in *Premspec* was entirely different, because in that case:

(1) the Tribunal had heard credible oral evidence from the supplier and from the director of the appellant company as to the terms on which the supplies were made; and

(2) the arrangements made commercial sense because:

(a) the supplier and the appellant were under common control; and

(b) the supplier provided "an interest free line of credit" to the appellant so as to help its credit status as part of a process for it "moving away from being subsidised by the sister companies and standing on its own two feet".

89. In ATN's case, there was no witness evidence from the supplier, from the directors of ATN, or from Ms Bartram herself. There was also no documentary evidence as to the existence of the extended payment terms which Ms Bartram said were in place. Finally, there was also

no evidence (such as that provided in *Premspec*) to provide an explanation as to why the supplier would have agreed to delayed payment.

90. We also found that Ms Stephenson was correct to decide that, if the invoice had in fact been paid in two instalments in VAT periods 01/16 and 04/16, those later payments did not retrospectively validate the earlier input tax claim, see VATA s 47A(1). That would only have been the case if ATN's position had been factually similar to *Premspec,* but as explained above, there was no evidence to that effect. In addition, ATN made a second claim for the same input tax in period 01/16, which Ms Stephenson allowed. It is plainly not possible to make two valid claims for the same input tax.

91. We thus find that ATN has not shown that there is any reason for the Tribunal to change the Second Assessment. As a result we uphold it and refuse ATN's appeal.

**THE SECOND PENALTY**

92. The Second Penalty was issued on 19 November 2015 on the basis that ATN acted deliberately. The maximum penalty was therefore 70% of the PLR and the minimum penalty was 35%. The PLR was £105,232. Ms Stephenson awarded reductions as follows:

(1) for "telling", 10% out of a possible 30%; no greater amount was given because ATN did not accept that it had acted wrongly;

(2) for "helping", 20% out of a possible 40%, on the basis that some of the requested information was provided; and

(3) for "giving", 20% out of a possible 30%, again because some of the requested information was provided.

93. That 50% total reduced the part of the penalty which lay in the 35% band between the maximum of 70% and the minimum of 35%, so by 17.5 % (35 x 50); the mitigated penalty was therefore 52.5%. As a result, the penalty charged was £55,246 (£105,232 x 52.5%).

94. Mr Chudasama submitted that the Second Penalty had been correctly charged because Ms Bartram must have known the 04/15 input tax claim was not supported by evidence: this was clear from her failure to supply supporting documents and from the making of a second duplicate claim relating to the same invoice in 01/16.

95. Ms Bartram's skeleton argument said that ATN did not act deliberately because "it was aware of extended payment terms and expected refunds and therefore the claim that the appellant's actions were deliberate is contended". She did not explain or support that statement.

96. We agree with HMRC that ATN acted with the required "intentionality", see *Tooth* cited above, because:

(1) Ms Bartram knew at the time she made the 04/15 input tax claim that no payment had been made;

(2) she was fully aware of the legal requirement in VATA s 26A that a claim cannot be made if the six month rule is not met; this is clear from her reliance on *Premspec*;

(3) she has not provided any evidence to support her assertion that a later payment date was agreed; and

(4) she made a second duplicate claim in period 01/16.

97. We therefore find that Ms Bartram knew when she made the 04/15 input tax claim that it was not correct. We confirm the Second Penalty and refuse the appeal.

**OVERALL DECISION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL**

98. For the reasons set out above, ATN's appeal is refused and the Assessments and the Penalties upheld.

99. 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 REDSTON**
**TRIBUNAL JUDGE**

**RELEASE DATE: 11th JANUARY 2023**