[2017] UKUT 0357 (TCC)

Appeal number: UT/2016/0142

VAT– assessment-whether FTT erred in finding that assessment was made within one year time limit in s 73 (6) (b) VATA 1994 – no – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SHAHZADA RASUL **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Kevin Poole

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 22 June 2017

Jeremy Woolf, Counsel, instructed by Youssouf & Co, Chartered accountants, for the Appellant

Joseph Millington, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the appellant ("Mr Rasul") against the decision of the First-tier Tribunal (Judge Swami Raghavan and Mr Christopher Jenkins) (the "FTT") released on 25 April 2016 (the "Decision").

2. The only issue in the appeal was whether assessments issued by the respondents ("HMRC") on 9 March 2011 for VAT due for periods ending before 9 March 2009 were made within the time limit set out in s 73 (6) (b) of the Value Added Tax Act 1994 ("VATA"). That section relevantly provides that an assessment must be made no later than:

> "… one year after evidence of facts sufficient in the opinion of the Commissioners to justify the making the assessment came to their knowledge."

3. The FTT found that the last piece of evidence of sufficient weight to justify the making of the assessments was the fact that mobile phone cards and top up sales were not disclosed in Mr Rasul's VAT returns for the relevant periods. As the FTT found, an HMRC officer, Mr Spranklen, had visited Mr Rasul's shop around midnight on 4 September 2009 and had been told by Mr Rasul that the phone card money was kept separately which suggested it was not the normal practice to run those takings through the till, the readings from which were the basis of Mr Rasul's VAT returns.

4. However, the FTT accepted HMRC's contentions that Mr Spranklen did not have sufficient evidence of the fact that phone card and top ups were not included in the VAT returns until a later meeting on 20 April 2010 at which in essence Mr Rasul confirmed the information he had given at the meeting on 4 September 2009 regarding the treatment of phonecards and top up sales. The FTT accepted Mr Spranklen's evidence that he had given low weight to the information given to him on 4 September 2009 because of the circumstances in which the information had been given and that Mr Spranklen had feared that by going ahead to assess at this point without giving Mr Rasul the opportunity to be questioned more formally at a meeting with his agent would be unfair and vulnerable to challenge as being unreasonable.

5. The FTT found that Mr Spranklen's view that he could not regard Mr Rasul's answers given in the early hours of the morning at the premises when the shop was open as not being sufficient evidence of the fact that phone cards and top ups were not normally run through the till fell within the bounds of discretion accorded to him and was not wholly unreasonable or perverse. Accordingly, the FTT found that the one year time limit started on 20 April 2010 and not, as contended by Mr Rasul, 4 September 2009 with the result that the assessments made on 9 March 2011 were within time.

6. Mr Rasul appeals to this Tribunal against the Decision on the grounds that the FTT's conclusion that HMRC did not have evidence of facts sufficient in their

opinion to justify the making of the assessments in question prior to the meeting of 20 April 2010 was perverse in the light of the fact that HMRC were told by Mr Rasul on 4 September 2009 that, as a general rule, mobile phone cards and top up sales were accounted for separately. Mr Rasul contends that evidence of the relevant facts that were sufficient to justify making the assessment clearly came to HMRC's knowledge on 4 September 2009.

7. Permission to appeal against the Decision on the grounds set out at [6] above was given by Judge Sinfield on 9 November 2016.

Relevant Law relating to time limits for VAT assessments

8. We have set out at [2] above the statutory provisions relating to time limits for the making of a VAT assessment which are relevant to this case, namely s 73 (6) (b) VATA.

9. The parties were in broad agreement as to the legal principles to be applied in interpreting s 73(6) (b), as derived from the authorities. These were comprehensively set out by Dyson J in *Pegasus Birds Ltd v CCE* [1999] STC 95 at pages 101g to 102c as follows:

> "1. The commissioners' opinion referred to in s 73(6) (b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
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> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
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> 3. The knowledge referred to in s 73(6) (b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
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> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
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> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).

> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6) (b) of the 1994 Act."

10. In relation to principles 4 and 5 Dyson J held that the test is a subjective rather than an objective one. The person whose opinion is to be imputed to HMRC is the person who decided to make the assessment, regardless of which person within HMRC acquired the knowledge of the facts in question: see page 102f of the judgment.

11. Dyson J observed at page 102h in forming their opinion HMRC "must have regard to their obligations to act to the best of their judgment" in making an assessment.

12. In the light of the principles set out at [9] above Dyson J in *Pegasus Birds* formulated the test to be applied at page 104d to e as follows:

> "The question for the tribunal on an appeal, therefore, is whether the commissioners' failure to make an earlier assessment was perverse or wholly unreasonable. In some cases, the position will be clear. Suppose that evidence of all the facts which in the opinion of the commissioners justified the making of the assessment was known to the commissioners at the beginning of year one, and the assessment was not made until the beginning of year three. Suppose further that the reason for the two-year delay is that the file was lost, or there was a change of staff with the result that the officer who had acquired the evidence did not pass it on to his successor. In those circumstances, the delay in making the assessment would be wholly unreasonable, and an appeal would succeed on the time-limits point."

13. The Court of Appeal approved the test formulated by Dyson J. The case is reported at [2000] STC 91. The Court of Appeal made it clear that it is the task of the tribunal to assess whether as a matter of fact the officer held the opinion in question. Aldous LJ said at page 97j to 98a:

> "An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information."

14. The Court of Appeal in a later appeal involving the same taxpayer clarified the test to be applied in determining whether an assessment was to best judgment. In *CCE v Pegasus Birds Ltd* [2004] EWCA Civ 1015 it held it was not to be established by reference to *Wednesbury* principles. The correct test is whether there has been an honest and genuine attempt to make a reasoned assessment: see Carnwath LJ at [22].

15. That is not to say that whether an assessment could be said to be "wholly unreasonable" is wholly irrelevant to determining that question. This follows from the following passage from [77] of the judgment, per Chadwick LJ:

> "It is important to keep in mind that it does not follow, necessarily, that an assessment which is "wholly unreasonable, being outside the parameters of the

> reasonable" is not, nevertheless, the result of an honest and genuine attempt to assess the amount of VAT properly due from the taxpayer. All that can be said is that an assessment may be so far outside the bounds of what would have been reasonable that it calls into question whether there was, indeed, an honest and genuine attempt to assess the amount properly due. It is open to a tribunal to find that it is so unlikely that an experienced officer of Customs and Excise, seeking to make a proper assessment of the VAT properly due, would have made an assessment in the amount that he did that the proper inference to draw is that, in making that assessment, he could not have been doing his honest best. But that is an evidential inference from the facts; it is not a finding that because (although doing his honest best) his assessment fell below an objective standard of reasonableness, he failed to exercise the power to assess to the best of his judgment as a matter of law."

16. The threshold for making a "best judgment" assessment is therefore comparatively low. But that is not the same as saying that the twelve month time limit in s 73(6)(b) starts to run as soon as there is sufficient evidence before HMRC to enable an officer to reach the view that he is entitled to issue a "best judgment" assessment. If the officer decides that further enquiries need to be made and/or further information obtained before making an assessment, the time limit will not start to run against him unless that decision is perverse or wholly unreasonable.

17. This issue was considered by the FTT in *Carbondesk Group PLC v HMRC* [2015] UK FTT 367 (TC) where in an MTIC case the FTT had to consider whether the decision by the officer to seek further information about the taxpayer's due diligence on its counterparties as a result of which a small amount of further material emerged meant that the officer's decision to regard that further information as the last piece of evidence sufficient to justify the making of the assessment was perverse or wholly unreasonable.

18. The FTT referred to the risk that HMRC run in this situation at [20] and [21] of its decision on the following terms:

> "20…. Mr Mantle's submission, which I accept, is that the question can be determined by identifying of the additional pieces of evidence received by HMRC within one year of the date of the assessment which the officer considers to have justified the assessment. It is then necessary to consider whether the additional material is of sufficient weight to justify the making of the assessment that was actually made. In judging whether the additional material is of sufficient weight Mr Mantle accepts that the tribunal is not to apply its own view as to that question. Rather it must consider whether it was perverse or wholly unreasonable of the officer to treat the further material as the last piece of evidence of sufficient weight justifying the making of the assessment. As Mr Mantle also submitted, the test is not based on the question of the reasonableness of the decision to request the further information but is one based on the sufficiency of the evidence that was obtained as a result of the request. The assessing officer therefore takes the risk, if a request is made for further information, that the information received is not of sufficient weight and therefore, with hindsight, the decision not to make an earlier assessment without it is to be regarded as perverse or wholly unreasonable.

> 21. I therefore reject Mr Kinnear's submission that whether the further material when received changes the preliminary view of the officer is not material. *Pegasus Birds* makes it clear that the tribunal must determine when the assessing officer received the last piece of evidence which in the officer's opinion was of sufficient weight to justify the making of the assessment. Therefore, if the further investigations produce nothing of material significance the result must be that the last such piece of evidence was received before the officer asked for the further information."

19. The fact that there may have been a delay (not exceeding the statutory time limit) between HMRC receiving the last piece of evidence that was in its opinion sufficient to make the assessment and the actual making of the assessment is not relevant. The FTT said this at [76] of *Carbondesk*:

> "… the legal test as to what is tardy is different. It is measured by reference to when HMRC received the last piece of evidence sufficient in its opinion to make the assessment it did. Parliament has given HMRC significant leeway in this respect, placing great weight on their judgment as to when that point has been reached; the only risk for HMRC in taking an extended period of time before they ask for further information is that what they ask for by way of further information turns out not to have the degree of importance that they thought it might have with the result that it would be perverse or wholly unreasonable to rely on it as justifying an assessment. I can therefore place no weight on the fact that HMRC should have concluded matters much quicker than they did."

The Decision

Findings of fact

20. The FTT made various background findings at [9] to [20] of the Decision followed by specific findings at [21] to [25] regarding Mr Spranklen's evidence in relation to the assessment that he made. These findings can be summarised as follows.

21. On 29 June 2009, an HMRC officer inspecting one of Mr Rasul's shops found a notebook referred to as "the Diary". The FTT found that the Diary was a record in relation to particular periods in June 2006 and November/December 2006 of the true takings of the shop in which it was found. A question that emerged during HMRC's investigation was whether certain entries in a column marked "Total Sale" in the diary entries for a period in June 2006 included mobile phone card and top up card sales.

22. On 4 September 2009 at 11.35 am Mr Spranklen and a colleague visited the shop where they spoke to a Mr Abbas, an unpaid helper of the Appellant, who confirmed that money for the sale of top up and phonecards was kept in a cigar tin. Later in the same day, they made a further visit, which started at 11.05 pm, whilst the shop was still open, and concluded at 12.25 am the next day, Mr Rasul arriving at the shop at 11:50 pm.

23. In response to questions from Mr Spranklen, Mr Rasul was reported as stating that phonecard money was kept separately and not generally rung through the till and that a separate sales analysis sheet was kept for phonecards. Earlier enquiries had

established that the accountant who prepared Mr Rasul's VAT returns did so purely on the basis of the Z readings from the shop's till.

24. Consequently, Mr Spranklen suspected that the "total" figure in the June 2006 periods found in the Diary was not inclusive of phonecard and top up sales and accordingly suspected that suppression had occurred. He initiated a civil evasion enquiry under the PN 160 procedure, the purpose of which is to enable a taxpayer to make disclosures which would, if a penalty were imposed, enable mitigation to be made. On 13 November 2009 Mr Spranklen wrote to Mr Rasul to ask him to attend a formal meeting on 9 December 2009 at HMRC's office. The invitation letter stated that HMRC had reason to believe that under declarations of VAT had occurred and this may be as a result of dishonest conduct. It went on to say that an enquiry would be conducted with a view to the recovery of tax arrears and interest, and if there was sufficient evidence of dishonest conduct, the imposition of a civil evasion penalty. In addition, the letter stated that Mr Rasul would be invited to make a full disclosure of any irregularities and that it was likely that Mr Spranklen would need to ask him questions about his business and "areas linked to our suspicions".

25. A note of a telephone conversation which Mr Spranklen had with Mr Rasul's representative on 8 December 2009 records that the representative was told that should his client not attend a meeting, HMRC would proceed with assessment and the imposition of a civil penalty.

26. Mr Rasul's representative rejected the meeting date. A further meeting was scheduled for 19 January 2010 but Mr Rasul was not able to attend on that date either. The meeting was ultimately held on 20 April 2010.

27. At that meeting, Mr Rasul was asked about the sale of phonecards and top ups. His responses reflected what he had said on 4 September 2009.

28. Although the FTT did not specifically say so, it would appear from its later findings that it accepted Mr Spranklen's evidence in relation to the assessment he made, as recorded at [21] to [25] of the Decision.

29. At the time of the visit late on 4 September 2009 Mr Spranklen regarded there still to be uncertainty on the issue of whether phonecards and top ups had been included in the diary entry totals, Mr Rasul having stated that his normal practice was not to include them but sometimes they might and then would be adjusted out. Mr Spranklen feared it would be wholly unreasonable if he had at that point made an assessment without offering Mr Rasul the opportunity to answer questions about the matter at a meeting with his agent.

30. At the meeting on 20 April 2010 Mr Rasul confirmed twice that it was normal practice not enter the monies taken for phonecards and top ups into the till and therefore the daily Z readings. These monies were kept separately from the normal takings and separate records were maintained. This "consolidated" Mr Spranklen's belief that the column in that Diary headed "Till Sales" did not include phone monies and therefore, on the balance of probabilities suppression of takings had occurred.

From Mr Spranklen's point of view "it was a key meeting to see how the taxpayer responded." Mr Spranklen did not feel it was reasonable to issue an assessment before allowing Mr Rasul the opportunity to respond in a formal setting to questions about his business procedures. The meeting was "pivotal" as not only did it establish that suppression had taken place but that it was as a result of dishonest behaviour. Mr Spranklen did not think he could have made an assessment sooner as he needed Mr Rasul to clarify how the phonecards were processed and whether they were part of the Z readings. The meeting "reinforced" the fact that the Diary could be used as a basis for a best judgement assessment.

31. On 9 March 2011, an assessment in the sum of £102,950 was raised on the basis of a suspected 40% suppression of true gross takings.

Issues to be determined

32. The FTT records at [29] that Mr Rasul's case was that HMRC had sufficient evidence of the facts justifying the assessment no later than 4 September 2009 following the last visit to Mr Rasul's shop whereas HMRC's case was that it was not until the meeting on 20 April 2010 that they had such sufficient evidence.

33. At [34] the FTT correctly identified that the issue was to be determined by reference to the two stage test suggested by Dyson J in *Pegasus Birds* as set out at paragraph 4 of the excerpt from his judgment quoted at [9] above.

34. At [35] the FTT correctly observed that this test was not about whether, at a given point, HMRC could have made an assessment in best judgment. It did, however, go on to say:

> "As set out by the FTT at [18] of its decision in *Carbondesk*, although the type of reasonableness (*Wednesbury*) was the same in respect of the question of whether an assessment had been made in best judgement as it was for the question of whether the officer could only make the assessment after receiving further material, the question as far as the issue of time limits was "not to be determined by asking the question as to whether the officer could have made an earlier assessment to best judgment". The fact that the evidence might reasonably be regarded as of sufficient weight so as to found the basis for a valid best judgment assessment does not mean a decision *not* to regard the evidence as sufficient is one which is necessarily wholly unreasonable or perverse. The appellant's submissions to the effect Mr Spranklen could have made a best judgment assessment following the visits to the shops on 4 September 2009 may accordingly be put to one side."

35. In the light of the Court of Appeal's judgment in *Pegasus Birds* referred to at [13] above, the observation that whether an assessment had been made to best judgment is to be tested by reference to the *Wednesbury* principles is clearly incorrect. We consider the implications of this later.

36. The FTT correctly observed at [36] that the issue was to be determined by reference to the facts and evidence underpinning the assessment that was made, not one that could have been made or one that ought not to have been made.

Reasoning and findings

37. At [42] and [43] the FTT made findings as to the facts which in the opinion of Mr Spranklen justified the making of the assessment, namely the entries in the Diary and the further information given by Mr Rasul as to the mobile phone and top up takings. The FTT records at [44] HMRC's case that the last piece of evidence of sufficient weight of the fact that the "total" column in the Diaries did not include the mobile phone and top up takings was the information given at the meeting between Mr Spranklen and Mr Rasul and his agent on 20 April 2010.

38. At [49] the FTT records the submission on behalf of Mr Rasul that information given at the meeting on 20 April 2010 was not new information and therefore not the last piece of evidence because HMRC had visited the shop on 4 September 2009 and had been told by Mr Rasul that the phonecards money was kept separately, that answer suggesting it was not the normal practice to run it through the till and that a separate analysis sheet was kept such sales. The FTT dealt with this submission, and this is the core of its reasoning for the Decision, at [50] to [54] as follows:

> "50. Mr Spranklen explained he gave this low weight because of the circumstances in which the answer had been given – the appellant had given his answers having entered the shop which was still open to customers at 11.50pm and the visit concluded at 12.25am (as set out in his note of the meeting the appellant had explained the shop had closed at 1am). His evidence also mentioned his fear that by going ahead to assess at this point without giving the appellant an opportunity to be questioned at a more formal meeting with his agent would be unfair and vulnerable to challenge as being reasonable.
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> 51. The issue for the tribunal is not whether we agree with his assessment that the answers given were insufficient evidence of the fact or not but whether his assessment that the evidence of insufficiency was *Wednesbury* reasonable i.e. that it wholly unreasonable or perverse to have concluded the evidence of the fact was of insufficient weight. In our view it was not unreasonable of Mr Spranklen to take account of the circumstances in which the question had been asked and answered. As the appellant points out a desire on the part of the HMRC officer to act fairly and reasonably are not themselves factors in the analysis of sufficiency. Similarly, the wish to offer a mitigation opportunity against a potential penalty, laudable as it may be, does not extend the assessment time limits. However, our view is that on these facts, Mr Spranklen's concern to offer a meeting in more formal circumstances was intertwined with the question of whether the evidence he had received earlier was of sufficient weight – the particular circumstances and the environment in which the answers had been given were precisely the reason why the answers constituted evidence of insufficient weight and also why he felt it was unfair and unreasonable to have assessed at that stage.
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> 52. In our judgment Mr Spranklen's view that he could not regard the appellant's answers given in the early hours of the morning at the premises while the shop was open as not being sufficient evidence of the fact that phone-card and top ups were not normally run through the till and that a separate record was kept for them fell within the bounds of the discretion accorded to him and was not wholly unreasonable or perverse.

> 53. Mr Garrard highlights various matters which would appear to throw doubt on the suggestion that the answers given at the 20 April 2010 meeting were indeed the last piece of evidence and which suggest that Mr Spranklen had actually formed the view that there was sufficient evidence to make an assessment before then. In the note of phone conversation the fact Mr Spranklen said he "would" issue an assessment if the meeting did not take place indicates that he was satisfied in his mind that there was sufficient evidence. Mr Haley characterises this as HMRC saying that unless the appellant co-operated then there would be no alternative but to issue an assessment that might not have been in best judgment. Mr Haley also refers to the fact there was an element of frustration and that HMRC were trying to push for a meeting. Mr Garrard further points to the language Mr Spranklen used in what emerged from the meeting of having his belief "reinforced" or "consolidated".
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> 54. We disagree with the appellant that any of these matters indicate that Mr Spranklen had, despite the evidence he gave to the contrary, reached the view that the evidence he had prior to the meeting of 20 April 2010 was sufficient evidence of the relevant fact relating to the interpretation of the "total" column in the diary. His statement on 8 December 2009 that he "would" issue an assessment was obviously conditional on the appellant not attending the meeting. The non-attendance at a meeting he was invited to would itself be a new piece of evidence that might be taken into account in evaluating sufficiency of evidence of a fact. It does not imply that at that point in time Mr Spranklen thought there was sufficient evidence of the relevant fact and that therefore the last piece of evidence of sufficient weight was already before the Commissioners. The fact that Mr Spranklen held a belief or suspicion of under-declaration at an earlier point in time which was later reinforced, or consolidated is not inconsistent with taking the view at the earlier point in time that there was insufficient evidence of the fact."

39. At [58] to [60] the FTT deals with the submission on behalf of Mr Rasul, relying on the passages from *Carbondesk* quoted at [17] above, that if the further information sought was not of sufficient weight then the "last piece of the puzzle" must by definition have been presented to HMRC earlier. The FTT observed at [58] that it is a matter of fact whether a nil or unsatisfactory response to an information request will amount to a new piece of evidence itself and therefore be regarded as the "last piece of the puzzle" and then concluded at [60] that the sufficiency or weight given to the information given at the meeting on 9 September 2009 was different in that subsequently Mr Rasul did attend a formal meeting with his agent and did give information in circumstances where his answers could be given more weight.

40. Accordingly, the FTT concluded at [61] that Mr Rasul had not satisfied the burden on him to show the assessment was out of time on the basis that the one-year time limit started on 20 April 2010, being the date the last piece of evidence of sufficient weight of the relevant fact which justified the assessment came to HMRC's knowledge.

Grounds of Appeal and issues to be determined

41. As mentioned at [6] above, Mr Rasul's sole ground of appeal is that the FTT's conclusion that HMRC did not have evidence of facts sufficient in their opinion to justify the making of the assessments in question prior to the meeting of 20 April 2010 was perverse in the light of the fact that HMRC were told by Mr Rasul on 4 September 2009 that, as a general rule, mobile phone cards and top up sales were accounted for separately.

42. It was clear from the submissions that Mr Woolf made in support of this ground, both in his skeleton argument and orally before us, that Mr Rasul contends that the FTT's conclusion was perverse on two alternative bases as follows:

> (1) From the evidence, and in particular Mr Spranklen's own evidence, the FTT should have inferred that Mr Spranklen had by December 2009 (when he indicated that he would have made an assessment if no further meeting occurred) formed the opinion that he did have evidence of facts sufficient to justify the making of the assessment; and
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> (2) If contrary to (1) above, Mr Spranklen did not form the opinion that he had sufficient evidence because of his concerns that reliance on the admission made on 4 September 2009 and other evidence could result in an assessment being "open to challenge as being unreasonable" then his concerns were infected by an error of law, namely a misunderstanding of the best judgment test. Since the best judgment test is a good faith test so that even a wholly unreasonable assessment is valid, no one could sensibly suggest that an officer was acting in bad faith in acting on an admission made by the taxpayer on a fairly basic point of business procedure. An officer who correctly directed his mind to the best judgment test, could therefore not have reasonably concluded that an assessment could be open to legal challenge or considered unreasonable on account of that fact, given the admissions made in the meeting on 4 September 2009 and the other evidence provided to HMRC. By not appreciating this point the FTT also made an error of law in its assessment of the position and therefore could not make a proper assessment of whether Mr Spranklen's opinion was wholly unreasonable or perverse.

43. It is clear from the passage from the Court of Appeal's judgment in *Pegasus Birds* quoted at [15] above that whether or not Mr Spranklen held the opinion that he had evidence of facts sufficient to make the assessment is a question of fact. It is clear from the first sentence of [54] of the Decision that the FTT had found, as a matter of fact, that Mr Spranklen was not of the opinion that the evidence he had prior to the meeting on 20 April 2010 was sufficient evidence of the relevant facts to justify the assessment.

44. The only appeal which can be brought in this case is an appeal on a point of law arising from the decision of the FTT: see Tribunals, Courts and Enforcement Act 2007, section 11(1). There cannot be an appeal on a pure question of fact which is decided by the FTT. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. So much is clear from *Edwards v Bairstow* [1956]

AC 14 in which Lord Simonds referred to making a finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see at page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of law. In relation to an appeal which is said to involve a point of law of the kind identified in *Edwards v Bairstow*, we were reminded of what was said by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 at 476, as follows:

> "It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

He continued:

> "… For a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

He concluded:

> "what is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

45. Mr Woolf submitted that the cases referred to at [43] and [44] above were looking at the position prior to the creation of the Upper Tribunal and the current position was set out by Lord Carnwath in *HMRC v Pendragon plc* [2015] UK SC 37. Mr Woolf referred to [48] to [51] of Lord Carnwath's judgment where he referred to the role of the Upper Tribunal as a specialist tribunal, with the function of ensuring that the FTT adopts a consistent approach to the determination of questions of principle which arise under the particular statutory scheme in question. Lord Carnwath went on to say that in the light of that role, where the task for the FTT was to make an evaluation of primary facts it had found then it was not productive for time

to be spent by the higher courts enquiring as to whether the task involved the question of law or fact, or a mixture of the two and therefore that a more flexible approach to the issue should be taken.

46. Lord Carnwath's judgment was considered by the Court of Appeal in *Davis & Dann v HMRC* [2016] EWCA Civ 142. This was an MTIC case where the Upper Tribunal had to decide whether facts found by the FTT would have led a reasonable person to conclude that there was a fraud. The Court of Appeal held (per Arden LJ) at [99] of its judgment that this task involved a categorisation of the facts and that this involved potentially a question of law.

47. Mr Woolf submits that similarly in this case the question for the Upper Tribunal is whether the FTT made an error of law in the manner in which it evaluated the primary facts which it found from the evidence and the inference it drew from those facts.

48. We reject that submission. In our view, the question as to whether Mr Spranklen held the opinion that the FTT found that he did was a primary fact to be established by it on the basis of the inferences it drew from the evidence before it. Determining that question did not involve the evaluation of any other primary fact found by the FTT in contrast to the position in *Davis v Dann* where the task was to evaluate whether particular facts found would support a finding that there had been a fraud.

49. We can find nothing in Lord Carnwath's judgment suggesting that the Upper Tribunal should be free to interfere with the FTT's findings of primary facts except on the basis described in the cases referred to at [43] and [44] above. Indeed, it is clear that Lord Carnwath's remarks regarding the role of the Upper Tribunal in ensuring a consistent approach to issues of principle so as to give guidance for future cases were confined to the evaluation of facts in accordance with legal principle: see [50] of the judgment.

50. Accordingly, we shall consider whether the FTT made an error of law in its findings as to the opinion held by Mr Spranklen according to the principles laid down in the cases referred to at [43] and [44] above. The burden is therefore on Mr Rasul to satisfy us that it was not open to the FTT on the evidence before it to make the findings it did as to that opinion and the case law cited above demonstrates that the hurdle that Mr Rasul has to surmount is a high one. It is a test which is only rarely satisfied.

51. The common law test as to the adequacy of reasons for a judicial decision, as expounded in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 and *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, applies to the requirement of the FTT to give reasons for its decisions. Reasons which do not satisfy this standard of adequacy involve an error of law which can be the subject of an appeal under section 11 of the Tribunals, Courts & Enforcement Act 2007. We consider later a submission by Mr Woolf that in making its findings at [54] of the Decision the FTT failed to give adequate reasons.

52. There was no dispute that the alternative basis on which Mr Rasul puts his case does involve a question of law. In relation to that issue, we need to decide whether the matters identified by Mr Woolf constitute errors of law and if so, whether those errors undermined the FTT's conclusion that it was not wholly unreasonable or perverse of Mr Spranklen to have held the opinion that the last piece of evidence of sufficient weight to justify the assessment was the information given at the meeting held on 20 April 2010.

53. We shall now turn to consider the alternative bases on which Mr Woolf submits the FTT made errors of law in the Decision.

Discussion

The FTT's finding of fact on Mr Spranklen's opinion

54. We start by summarising the evidence that was before the FTT as to Mr Spranklen's opinion. We were taken to the relevant transcripts of Mr Spranklen's oral evidence to the FTT as well as to his witness statement.

55. When giving his evidence in chief Mr Spranklen was asked a number of questions relating to the importance he placed on the meeting held on 20 April 2010. When asked by HMRC's representative about the purpose of that meeting, he replied that whilst there was a suspicion of under-declaration by that point, they only had "bits of information." Mr Spranklen then said:

> "I think at that point we felt that it was reasonable, and as part of the ongoing enquiry to invite Mr Rasul in with his agent to a formal meeting so that we could clarify some of the key issues concerning the entries in the diary in terms of the phonecards, in terms of the top-up cards, and to what extent they would have been processed within those z readings. That was one of the key parts of that interview: how did the phonecards, how did the top-up cards relate to the z takings and everything else."
>
> I felt to have gone ahead with any assessment before that date might have been unreasonable, so I felt it was only fair to give Mr Rasul the opportunity to attend a meeting with an agent in a formal setting to go over the stuff, because we had information from various sources and from various documents that he would need to see to concentrate the key issues and to ask questions around, obviously how the takings are processed and everything else, and stuff."

56. Mr Spranklen went on to answer questions in relation to the 4 September 2009 late night meeting as follows:

> "…. I asked him questions about the phonecards and everything else and he said that it was normal practice to leave out, not to include phonecards or top-ups because of the z's but sometimes it might happen but then the takings were adjusted out but the z was left.
>
> So, there was still uncertainty at that point. That was in September, and so by November I sort of decided in my own mind that we've got the diary, we've got

> Mr Rasul just saying that potentially the z, the phonecards and top-ups weren't in the z, so I felt it was reasonable to start an enquiry and get him in for a meeting as soon as we could with his agent because we'd called around in the early hours, sort of late at night and for me to have jumped ahead with an assessment at that point, I think I would have been accused of being wholly unreasonable, I think, to have gone ahead with an assessment without at least giving Mr Rasul an opportunity to come in and for us to go over some of the very key issues that were at stake here."

57. Later, in his cross-examination Mr Spranklen gave further information about the context of the September 4 meeting as follows:

> "… Can I just add at that stage that he came in and he was a bit, obviously, sort of in a panic and we were there again in the evening in the house and we were only there for half an hour, and yes, he did answer that question and that's why, because of the late hour and the fact that we were only there for half an hour, I felt that the question should be asked again in the formal setting."
>
> I didn't want to take advantage of his position at that time."

58. He elaborated on this point in answer to questions from Judge Raghavan as follows:

> "I didn't want to appear to be acting hastily and unreasonably in jumping straight to an assessment following that meeting because Mr Rasul could have said, "Well, I turned up and was surprised to see you there. I was thrown and I sort of answered things without really thinking about it because it was a late-night visit."

59. Mr Spranklen was asked whether he gained anything from the meeting on 20 April 2010 which helped him to make an assessment. He responded as follows:

> "… I felt that meeting was absolutely pivotal in establishing in my mind that not only had suppression taken place but also that it was as a result of dishonest behaviour. At the meeting, Mr Rasul was asked again to go over how the phonecards and the top-ups were processed through the business and he repeated at that meeting that the phonecards and top ups were not part of the z readings, which I felt was absolutely crucial and also I think the agent had said that he worked out the VAT returns from summary sheets, I think, of the z prints that were sent by Mr Rasul to him. He didn't work off any diary.
>
> ….so a number of key issues were coming at that meeting and at the end of which I felt that I was now in a position, potentially in a position, to proceed with an assessment."

60. Mr Spranklen was asked whether he could have raised the assessment before 20 April 2010. His response was that he did not think he could have made a best judgment assessment because he needed Mr Rasul to clarify the issue in the phonecards in terms of how they were processed through the business. He went on to say:

> ".... It was precisely to avoid the accusation of acting unreasonably and acting hastily that I didn't immediately go to an assessment, but I felt that Mr Rasul should have been given the opportunity to actually clarify some of the issues at that meeting. I didn't want to act hastily but I felt that I didn't have enough – I felt that that meeting, the meeting in April, made up my mind and it reinforced the fact that that diary could then be used as a basis for a best judgment assessment. So, that was my reasoning. I felt that I had acted consistently throughout. I felt that I had acted timely and I had acted reasonably in my approach to this and my argument remained consistent throughout."

61. He added to this in his cross examination as follows:

> "He confirmed how the phonecards were processed and I just felt at that point that, you know, in terms of best judgment we could now rely on -use the diary as the basis for a best judgement assessment because you know we had till totals, we had everything else, the different columns in there."

62. As referred to at [24] above, a note of a telephone conversation that Mr Spranklen had with Mr Rasul's agent on 8 December 2009 records that if Mr Rasul did not attend a further meeting then HMRC would proceed with an assessment and imposition of a penalty.

63. Mr Spranklen was recalled to answer questions from Judge Raghavan on that note. He said that note should perhaps have said "may proceed with an assessment" but that the gist of it was that he was trying to get a meeting underway and he felt that he needed the meeting to confirm the position on the phonecards before he was happy that he could raise an assessment. He went on to say:

> "…if he hadn't proceeded [with a meeting] then I would have had to have made an assessment on the information that I had but to my mind the assessment would have been – they could be a number of question marks against that assessment and I felt that I needed to clarify the point about the phonecards before I was confident that, you know, the assessment could be made with the best information available, I think at that point, and I always felt it was reasonable to have that meeting to expressly ask…"

64. The essence of Mr Woolf's submissions on the evidence set out above is that the only reasonable conclusion that can be drawn is that although Mr Spranklen would have liked to have more evidence he had accepted that he had sufficient evidence to justify the making of the assessment before the meeting on 20 April 2010, and certainly by 8 December 2009 when he confirmed in his conversation with Mr Rasul's agent that if the further meeting he was requesting did not proceed he would proceed to make an assessment.

65. Mr Woolf submits that looking at the evidence as a whole, and in particular the fact that Mr Spranklen stated that he would have made an assessment if no further meeting was possible, the only reasonable inference is that he accepted that he had sufficient evidence but ideally wanted it confirmed. This also accords with the FTT's findings at [49] and [50] where the FTT does not suggest anything new was said but instead suggests that the circumstances of its repetition enabled more weight to be put

on it. The gist of Mr Spranklen's evidence is clearly that he is accepting that the April meeting was a repetition of what was said previously, but in a more formalised setting where it could not be suggested that Mr Rasul was being taken advantage of. Nothing new was clarified; it was just repeated in a more formalised setting. It does not follow from that that he previously had an insufficiency and the fact that the note of the telephone conversation held on 8 December 2009 shows that he would have made an assessment if no meeting had occurred shows that Mr Spranklen accepted he had sufficient evidence but considered it prudent to seek more.

66. Therefore, Mr Woolf submits, once Mr Spranklen had reached the stage that he would have taken the view that he would make an assessment if he received no further information he already had sufficient evidence to justify an assessment and his opinion must have been that that was the case. The FTT therefore misunderstood the evidence because Mr Spranklen's evidence shows that he was of the opinion that he had sufficient evidence to make the assessment before the meeting on 20 April 2010.

67. Mr Woolf also criticises the reasoning of the FTT at [54] of the Decision. With regard to the last sentence of that paragraph, although the FTT was correct in stating that a suspicion may not mean that time has started to run, the evidence shows that Mr Spranklen would have made an assessment if the meeting proved impossible and therefore if no further evidence was available and therefore Mr Spranklen must be taken to have had sufficient evidence of the facts to justify the making of the assessment. Reading the evidence as a whole, Mr Spranklen cannot reasonably be regarded as having given evidence to the contrary; on a proper reading of the evidence he gave evidence that he ideally wanted further evidence and for a variety of reasons, including reasons clearly linked to mitigation of penalties, considered it unreasonable to make an assessment without offering a meeting, but also gave evidence that he had sufficient evidence because he had resolved to make an assessment if there was no further evidence available because a meeting was not possible.

68. Mr Woolf submits that underlying [54] of the Decision is an assumption that Mr Rasul's non-attendance at a meeting would be evidence of the fact that takings for the sale of phonecards and top-ups were not run through the till, but it was perverse to suggest that Mr Rasul's non-attendance would, as the FTT said, be itself a new piece of evidence on that issue. The non-attendance at the meeting could not therefore be considered to be of any probative significance. In any event, the FTT did not give adequate reasons as to why that would be the case.

69. We have concluded that the FTT was entitled on the evidence before it to conclude that Mr Spranklen was not of the opinion that he had sufficient evidence of facts to justify the assessment before the meeting of 20 April 2010 was held. Our reasons for that conclusion are as follows.

70. Mr Woolf's submissions fail to appreciate that the test in s 73 (6) (b) focuses on the sufficiency of evidence of the facts that would justify an assessment. In our view, in considering the sufficiency of evidence the Officer is entitled to consider what weight he can attach to the evidence that he has been given. The principles laid down by Dyson J in *Pegasus Birds* set out at [9] above make it clear that the statutory

provision focuses on the evidence of the facts that need to be proved and that the task of the tribunal is to determine when the last piece of evidence of these facts "of sufficient weight" to justify making the assessment was communicated to HMRC: see the first and fourth principles.

71. It is clear from the FTT's reasoning at [50] to [54] that it correctly focused on the question of Mr Spranklen's opinion of the weight that he could attach to the evidence that he obtained following the meeting on 4 September 2009. In our view, the FTT was entitled to conclude that Mr Spranklen's evidence, as recorded at [54] to [57] and [59] above, indicated that he was of the opinion that he could not attach sufficient weight to the evidence he obtained at the meeting on 4 September 2009, at least without attempting to verify it, because of the circumstances in which the information was obtained. Applying the *Edwards v Bairstow* principle, we could only accept Mr Woolf's submission that the evidence demonstrates that Mr Spranklen was focusing on the issue of making the assessment and not the sufficiency of evidence when the Officer said that it might be considered unreasonable to have made the assessment without offering the opportunity for a meeting were we to be of the view that such an inference was the only conclusion that could reasonably be drawn from the evidence. Mr Woolf comes nowhere near to satisfying us on that point.

72. In our view, it was open to the FTT to conclude, as it clearly did, that the various statements that Mr Spranklen made in his evidence to the effect that it would be unreasonable to make an earlier assessment and that he did not wish to act hastily were all directed to the question as to whether the evidence he had was of sufficient weight to justify the assessment. We accept Mr Millington's submission that Mr Spranklen's concerns regarding unfairness or unreasonableness were inextricably linked to his concerns that the evidence was of insufficient weight, as the FTT clearly found by the manner in which it expressed its findings at [51] of the Decision.

73. We turn now to the question as to whether the only reasonable inference to be drawn from the note of the telephone conversation which took place on 8 December 2009 is that by that time Mr Spranklen had formed the opinion that he had sufficient evidence to justify an assessment.

74. It is clear that the FTT did have concerns on that point because Mr Spranklen was recalled to give evidence on it and Judge Raghavan asked him to explain why the note says that he would proceed with an assessment if there was no further meeting.

75. As we have recorded at [62] above, Mr Spranklen's evidence was that he made that comment because he was "trying to get the meeting underway". He also said that it would have been better if he had said "may proceed with an assessment" and went on to say that he felt that he needed the meeting to confirm the position on the phonecards "before I was happy that I could raise an assessment".

76. It was clear from his further evidence on the point, that he would have had no alternative but to make the assessment had the meeting not taken place but there would have been a "number of question marks against that assessment".

77. Although the FTT does not make specific reference to this evidence at [54] of the Decision, in our view when it made reference in the first sentence of that paragraph to "the evidence he gave to the contrary" in response to the suggestion that he had reached the view that the evidence he had prior to the meeting of 20 April 2010 was sufficient, the FTT had in mind the evidence referred to at [75] and [76] above. In our view the use of this phrase indicates that the FTT was satisfied, having considered the wording of the note in the context of the rest of the evidence available, that the note did not indicate that Mr Spranklen had formed his opinion on the sufficiency of the evidence before the meeting took place. In particular, the evidence from the note had to be weighed up against Mr Spranklen's evidence that he felt that the meeting was "absolutely pivotal" in establishing that suppression had taken place and that the meeting in April "made up my mind" that he could make an assessment.

78. For this reason, we reject Mr Woolf's submission that Mr Spranklen's evidence should be characterised as his having resolved to make an assessment if there was no further evidence available because a meeting was not possible. We accept Mr Millington submission that when properly considered, Mr Spranklen's evidence was not saying that he would issue an assessment with no further evidence. In response to hypothetical questions based on facts that never arose, he was indicating, as he said in his oral evidence, that he may issue an assessment only after some future event. This is entirely consistent with the FTT's finding that, at the time he wrote the note, he did not consider the evidence he held to be sufficient. In our view, this was a conclusion that the FTT was fully entitled to make on the evidence before it.

79. Furthermore, as the FTT indicated at [54], whether Mr Spranklen would have issued an assessment was conditional on Mr Rasul not attending the meeting. The meeting did of course take place and therefore what may or may not have happened following the meeting was entirely hypothetical.

80. Neither do we accept Mr Woolf's submission that non-attendance at a meeting he was invited to would not be of any probative value in evaluating the sufficiency of evidence in relation to whether the phonecards and top ups were included in the relevant VAT returns.

81. The point is of course hypothetical in any event because the meeting did take place. Mr Woolf criticises the FTT for not giving any reason for that finding. However, in his decision refusing permission to appeal Judge Raghavan said:

> "I am not persuaded that the FTT erred in law in finding this fact. It heard and considered evidence from the officer and at [4] found him to be a credible witness of fact. If it were the case that Mr Rasul had not attended a meeting which would have given him the opportunity to explain a statement adverse to his position this fact would be capable of being relevant to the weight what he had said before and potentially relevant therefore to the sufficiency of the evidence on the relevant fact."

82. The *English v Emery* case referred to at [51] above contemplates that any defect in providing reasons can be cured after the event and in our view the clarification given by Judge Raghavan mentioned above is sufficient for that purpose.

83. Furthermore, we agree with Judge Raghavan's assessment to the effect that were it the case that Mr Rasul did not attend the meeting at which he would have been given the opportunity of providing further evidence in relation to the phonecards and top-up takings could give rise to the inference that Mr Rasul had nothing more to say on the subject. It is therefore a new piece of evidence which is clearly relevant to the sufficiency of the evidence which had previously been obtained.

84. Therefore, we can see no grounds on which we should interfere with the FTT's finding that Mr Spranklen had not reached the view that the evidence he had prior to the meeting on 20 April 2010 was evidence of sufficient weight to justify an assessment.

Whether Mr Spranklen's opinion was wholly unreasonable or perverse

85. Mr Woolf submits that Mr Spranklen's reasons for not being satisfied before the meeting held on 20 April 2010 had occurred were infected by an error of law. His answers show that he did not understand the best judgment test and that he could have made an assessment as long as he was acting in good faith. *Pegasus Birds* shows that a wholly unreasonable assessment can be held to be to best judgment as long as it is an honest and genuine attempt to make a reasoned assessment. Mr Woolf submits that when Mr Spranklen gave the evidence referred to at [54] above to the effect that he felt it might be considered unreasonable to have made the assessment without offering the opportunity for a meeting he was focusing on the issue of making an assessment to best judgment not the sufficiency of evidence. When stating, as recorded at [55] above, that there was a degree of uncertainty about the position following the 4 September 2009 meeting, that cannot have been intended to be a reference to a lack of factual certainty which is secured by the April meeting, because nothing about the mobile phone cards and top up takings was clarified at the April meeting. The reference must instead be to his concerns that he would be acting unreasonably with undue haste otherwise.

86. Mr Woolf submitted that nobody could sensibly suggest that an officer was acting in bad faith in acting on an admission made by the taxpayer on a fairly basic point of business procedure. An officer who correctly directed his mind to the best judgment test, could therefore not have reasonably concluded that an assessment could be open to legal challenge or considered unreasonable on account of that fact, given the admissions made in the meeting on 4 September 2009 and the other evidence provided to HMRC.

87. Therefore, in his submission, the FTT's analysis was flawed since it failed to appreciate that Mr Spranklen was acting on a basis that was tainted by an error of law and it meant that the FTT could not make a proper assessment of whether the decision was perverse, because a proper understanding of the best judgment test is a precondition to such an exercise.

88. We accept that the FTT may have wrongly assumed that whether an assessment was made to best judgment was to be tested by application of the *Wednesbury* principles, as is apparent from [35] of the Decision. However, it is also apparent from that paragraph that the time limit issue was not to be determined by asking the question as to whether the officer could have made an earlier assessment to best judgement. As the FTT correctly said, the fact that the evidence might reasonably be regarded as of sufficient weight so as to found the basis for a valid best judgment assessment does not mean a decision not to regard the evidence as being of sufficient weight is one which is necessarily wholly unreasonable or perverse. If that were the case, it would effectively impose a requirement on HMRC to issue assessments on a "hair trigger" basis. It is therefore clear that insofar as the FTT fell into error that error did not in any way influence its assessment that Mr Spranklen's opinion that he did not have evidence of sufficient weight to justify an assessment until after the meeting on 20 April 2010 was wholly unreasonable or perverse.

89. Similarly, although in certain passages from Mr Spranklen's evidence that we have quoted above, the Officer refers to it being "wholly unreasonable" to have made an assessment without Mr Rasul being given the opportunity to attend a further meeting and that following the meeting he could proceed to a best judgment assessment we cannot see how that in itself makes his opinion that he did not have sufficient evidence to justify an assessment before that time wholly unreasonable or perverse. The fact that he might, as a matter of law, have been able to proceed to an assessment on the basis of the material he already had is a separate matter to the question as to whether he was of the opinion that the evidence he had was of sufficient weight and whether such opinion was wholly unreasonable or perverse.

90. In any event, as Mr Millington submitted, had Mr Spranklen proceeded to make an assessment in circumstances where his belief was that the evidence that he had was not of sufficient weight to justify the assessment and that he would be acting wholly unreasonably and taking advantage of the taxpayer in so doing, that would call into question whether the assessment was made honestly and in good faith.

91. Therefore, we can see no basis on which we should interfere with the FTT's finding that it was not wholly unreasonable or perverse of Mr Spranklen to have formed the opinion that he did not have evidence of sufficient weight to make the assessment until after the meeting on 20 April 2010. Since s 76 (6) (b) VATA 1994 focuses on whether the evidence obtained is of sufficient weight, the fact that no new material emerged from the meeting of 20 April 2010 is of no concern. It was the context of the meeting of 4 September 2009 that in the opinion of Mr Spranklen did not give the evidence he obtained sufficient weight to make an assessment, but the fact that it was repeated in a more formal setting in his opinion gave that same information sufficient weight on which he could base his assessment.

92. We can see nothing wholly unreasonable or perverse in that opinion. Indeed, Mr Spranklen is to be commended for following an approach which was designed to be scrupulously fair to Mr Rasul. It is obviously highly desirable that HMRC's Officers should be seen to be scrupulously fair in the way that they approach the question of best judgment assessments and it would be highly undesirable if the law was to be

interpreted in such a way that it operated as an encouragement to make an assessment in circumstances where there is any doubt as to whether the taxpayer has been treated fairly.

Disposition

93. The appeal is dismissed.

JUDGE TIMOTHY HERRINGTON **JUDGE KEVIN POOLE**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 12 SEPTEMBER 2017