Neutral Citation: **[2024] UKUT 00145 (TCC)**

Case Number: UT/2022/000129

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London EC4A 1NL

Procedure - Value Added Tax - section 73(6)(b) VAT Act 1994 - correct test for whether assessment made one year after evidence of facts sufficient in the opinion of HMRC to justify the making of the assessment came to their knowledge - burden of proof - Edwards v Bairstow challenge - appeal dismissed

Heard on: 13 December 2023
Judgment date: 22 May 2024

Before

JUDGE GREG SINFIELD

JUDGE NICHOLAS PAINES KC

Between

NOTTINGHAM FOREST FOOTBALL CLUB LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Howard Watkinson, counsel, instructed by The Independent Tax and Forensic Services LLP

For the Respondents: Ross Birkbeck, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. On 29 April 2019, the Respondents ('HMRC') assessed the Appellant, Nottingham Forest Football Club Limited ('NFFC'), for VAT of £345,561 for the period 08/15. NFFC appealed to the First-tier Tribunal (Tax Chamber) ('FTT').

2. The only issue at the hearing of the appeal was whether the assessment had been made within the time limit in section 73(6)(b) of the VAT Act 1994 ('VATA'). Section 73(6)(b) VATA states that an assessment shall not be made later than one year after evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, came to their knowledge. HMRC contended that their knowledge of the facts was only complete on or after 9 May 2018 whereas NFFC argued that HMRC had the necessary knowledge of the facts on 20 April 2018 which was more than one year before the assessment was made and thus it was out of time.

3. In a decision released on 25 August 2022 with neutral citation [2022] UKFTT 305 (TC) ('the Decision'), the FTT dismissed NFFC's appeal. The FTT's findings are set out below at [10].

4. With the permission of the Upper Tribunal ('UT'), NFFC now appeals on three grounds, namely that:

(1) the FTT failed to apply the correct tests as set out in the relevant case law;

(2) the FTT erred in its treatment of the burden of proof; and

(3) the FTT's conclusion that 9 May 2018 was, on balance, the best date on which HMRC had evidence of the facts sufficient in their opinion to justify the making of the assessment was perverse because there was no evidence to support that finding.

5. NFFC was represented by Mr Howard Watkinson and Mr Ross Birkbeck appeared for HMRC. We are grateful to both counsel for their submissions both written and oral.

THE DECISION

Evidence in the FTT

6. The only evidence before the FTT was an electronic bundle of approximately 250 pages and the witness statements of two HMRC officers. The first and lengthier witness statement was that of Geoffrey Bell, the assessing HMRC officer, who did not give oral evidence as he had retired from HMRC by the time of the hearing. The second and shorter witness statement was given by Andrew Pickerill, an HMRC officer who had reviewed the assessment issued by Officer Bell. Officer Pickerill gave oral evidence and was cross-examined. NFFC did not adduce any witness evidence.

7. Officer Bell described the events that led up to the assessment in his witness statement at paragraphs 7 to 42. Officer Bell describes when he obtained evidence of the facts sufficient to justify the making of the assessment in paragraphs 7 to 13:

> "7. I arranged a visit with John Taylor, the Finance Officer at the Club, … for 16 April 2018. During this visit I discussed with John how the business operated, the VAT treatment of the supplies made, and the accounting systems used. The accounting systems used during the period of my audit were SAGE and then NAVISION.
>
> 8. I made subsequent visits to the Club on 20 April 2018 to examine invoices and to download the General Ledger data, and on 9 May 2018 to collect a SAGE back up of the accounting records.

9. The accounting data provided was analysed back in the office and basic checks carried out including checking the quarterly VAT Return calculations from the supporting computerised records to the declared figures. Various figures were shown on the documents provided to support the 08/15 VAT Return declaration which led me to believe the declaration for the 08/15 period was inaccurate. This VAT Return covered the periods 01 June 2015 to 31 August 2015.

10. The actual VAT declaration for the VAT period 08/15 was as below:

… [Officer Bell set out amounts declared on the VAT return and in various accounting documents that supported them.]

11. There appeared to be problems when the Club changed accounting systems from SAGE to NAVISION. I believed that the true figures for the period to be the figures on the 'Adjusted VAT statement' document dated 29/10/15 of £452,237.27 Output tax and £327,866.96 giving an overall tax liability due to HMRC of £124,370.31. This figure also matched the figure on the 'Calc and Post VAT settlement' document dated 07/10/15 showing a liability due to HMRC of £124,370.31 for the period. These figures, added to the incorrect repayment claim made for £348,177 meant that the liability due to HMRC for this period was £475,547.

12. The Club had identified a problem when changing over accounting systems and that their 08/15 declaration was incorrect. The Club submitted an Error Correction Notice on 2 November 2015 for £126,984 but I believed that this didn't correct the full liability due.

13. The varying figures on the accounting documents provided for the VAT period 08/15 were put to the Club by email of 24 May 2018."

8. The only part of Officer Bell's witness statement which explicitly addressed the time limits issue was paragraph 53:

> "[53] I believe during the change-over of accounting systems the new system was not set up correctly resulting in an incorrect repayment claim being submitted for the period. Poor historic records kept by the Club also made it difficult for the current finance team to reconcile previous tax declarations and so the Club were reluctant to accept my findings. The varying figures on the accounting documents provided by the Club to support the VAT period 08/15 declaration were put to the Club to comment on by my email of 24 May 2018 after I had analysed the data. This is the date when I believe the 1-year evidence of fact rule commenced."

9. In [7], the FTT recorded that, although NFFC had submitted that no weight should be given to Officer Bell's evidence as he was not available to be cross-examined, his witness statement largely recited or was mainly corroborated by the documentary evidence and was not disputed by NFFC to any material extent. The FTT commented that both parties focused on the documentary evidence at the hearing.

FTT's findings of fact

10. The FTT set out its findings of fact at [13] – [33] as follows:

> "13. As is well known, the Appellant is a football club based in West Bridgford, Nottingham, currently playing in the Premier League, although during the times material to this appeal the Appellant was playing in the Championship.
>
> 14. On 16 April 2018 Officer Bell visited the Appellant to discuss how the business operated and what accounting systems were used.

15. Officer Bell again visited the Appellant on 20 April 2018 to examine invoices and to download general ledger data. A back up memory stick containing data from the Appellant's previous accounting system, Sage, was then collected by Officer Bell on 9 May 2018.

16. These dates are important because HMRC argues that the knowledge of the facts test was only satisfied at the earliest on 9 May 2018 when Officer Bell received the memory stick containing the Sage data. The Appellant, however, argues that the knowledge of the facts test was satisfied earlier, on 20 April 2018, when Officer Bell downloaded the general ledger data.

17. On 11 May 2018 Officer Bell emailed Mr John Taylor, Head of Finance at the Appellant, indicating the matters into which he wished to look:

> "Thanks for confirming your agreeing to the email protocol and for providing the SAGE back up. I attach a spreadsheet showing the accounting entries posted to the NAVISION accounting system that I would like to take a look at – Tab1 for Sales and Tab 2 for Purchases."

18. Navision was the Appellant's accounting software which replaced Sage. It was not clear from the evidence when Navision started to be used and when Sage ceased to be used by the Appellant.

19. Officer Bell emailed the Appellant on 24 May 2018 to query the 08/15 quarter VAT return. Officer Bell indicated that the Appellant may have under-declared output tax (£88,125) and over-declared input tax (£258,409). The total sum of the under and over declarations was £346,534, owed to HMRC.

[The FTT set out the email and some subsequent email exchanges which are not material to our decision.]

25. …. On 26 April 2019 Officer Bell e-mailed the Appellant stating that VAT due to HMRC was, therefore, £348,177.

26. Officer Bell stated that an assessment would be raised for the under-declared VAT if the Appellant agreed the figures.

27. On 26 April 2019 the Appellant e-mailed Officer Bell and indicated that it agreed to the under-declaration figures.

28. A notice of VAT assessment was issued to the Appellant on 29 April 2019, in the sum of £345,561.

29. Notwithstanding the apparent agreement on the quantum of the assessment, on 19 June 2019 the Appellant's agent notified the intention to appeal the assessment.

30. This was followed on 11 July 2019 by confirmation that a formal statutory review was required. The conclusion of the review was carried out and notified to the Appellant on 28 August 2019. The conclusion of the review was to uphold Officer Bell's assessment.

31. Mr Pickerill confirmed that HMRC had come into possession of the Sage data on 9 May 2018. Mr Pickerill also accepted that the reference in paragraph 8 of Officer Bell's witness statement to HMRC receiving possession of the General Ledger on 20 April 2018 was probably a reference to the Navision data handed over on 20 April 2018 – he believed that this was confirmed by HMRC's Caseflow data system.

32. Mr Pickerill also confirmed that the third paragraph of the email of 11 May 2018 was referring to data from Navision (handed over to HMRC on 20 April 2018).

> 33. Mr Pickerill was asked whether it was likely that Officer Bell had prepared the spreadsheet attached to the email of 11 May 2018 from the Sage data picked up on 9 May 2018 or whether it was more likely to have been compiled from then Navision data collected on 20 April 2018. Mr Pickerill accepted that to compile the spreadsheet from the data collected on 9 May would have been a "short turnaround." However, he considered that he would only be speculating as to whether the data came from that collected on 20 April rather than that collected on 9 May. Mr Pickerill also said that it would be speculation on his part to claim that the Sage data had no relevance to the assessment."

FTT's discussion

11. In its discussion of the parties' submissions and the evidence at [34] – [40] of the Decision, the FTT said:

> "34. It was common ground that, in accordance with the decision of Dyson J in *Pegasus Birds*, the burden of proof lay upon the Appellant to show that the assessment was made outside the time limit specified in section 73(6)(b) VATA.
>
> 35. We should make it clear that there was no suggestion of any kind of wrongdoing by the Appellant. It was apparent that the Appellant's error arose innocently from the change in its accounting systems. No penalty was charged by HMRC.
>
> 36. Mr Smith [on behalf of NFFC] submitted that the emails of 11 May and 22 May indicated that Officer Bell had all the information he needed to make an assessment and that that information was derived from the Navision accounting system handed over to HMRC on 20 April 2018. Therefore, the one-year period prescribed by section 73(6)(b) VATA expired on 20 April 2019. Consequently, the assessment issued on 29 April 2019 was time-barred.
>
> 37. Ms Hickey [for HMRC] submitted that the one-year period only started to run from 9 May 2018. She noted that Officer Bell considered that the time period started on 24 May 2018 when he sent the email to the Appellant having analysed the data which he had obtained.
>
> 38. Mr Smith suggested that the Sage data did not relate to the 08/15 period. But there was no evidence to this effect. Similarly, Ms Hickey suggested that the reference in Officer Bell's email of 24 May 2018 to VAT Nominal Accounts 3302 and 3301 were references to Sage. She said that Sage used four-digit reference codes. Again, there was no evidence to support this suggestion. Accordingly, we have disregarded the suggestions made by Mr Smith and Ms Hickey in relation to the Sage data.
>
> 39. It was conspicuous that the Appellant did not provide witness evidence to clarify the data that was in the possession of Officer Bell. Such a witness could easily have confirmed, for example, whether the Sage data was irrelevant to the 08/15 period and whether the reference codes related to Sage data. But no such evidence was forthcoming.
>
> 40. Instead, we are left with the documentary evidence which, in our view, does not demonstrate that the Sage data was irrelevant to Officer Bell's knowledge of the facts before 9 May 2018. On the evidence, therefore, it is impossible for us to conclude that the evidence of the facts, sufficient in the opinion of Officer Bell to justify the making of the assessment, came to his (and therefore HMRC's) knowledge on 20 April rather than 9 May 2018. In other words, the Appellant has failed to discharge the burden of proof on the

balance of probabilities. It follows, therefore, that the assessment was not time-barred by section 73(6) (b) VATA."

LEGISLATION

12. Section 73(2) VATA provides as follows:

> "(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly".

13. Section 73(6) VATA provides as follows:

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

14. Section 77 VATA provides, in as far as is relevant:

> "(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made–
>
> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, …"

CASE LAW

15. The relevant guidance on how to construe and apply section 73(6)(b) VATA was set out by Dyson J (as he then was) in six propositions in *Pegasus Birds Ltd v C & E Commissioners* [1999] STC 95 ('*Pegasus Birds*'). at page101:

> "1. The Commissioners' opinion referred to in Section 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.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question: *C & E Commissioners v Post Office* [1995] STC 749, 754G.
>
> 3. The knowledge referred to in Section 73(6)(b) is actual, and not constructive knowledge: *C & E Commissioners v Post Office* at p.755D. 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.

> 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): *Heyfordian Travel Ltd. v C & E Commissioners* [1979] VATTR 139, 151; and *Classicmoor Ltd. v C & E Commissioners* [1995] V & DR 1, 10.1.27.
>
> 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*: *Classicmoor* paras. 27 to 29; and more generally *John Dee Ltd. v C & E Commissioners* [1995] STC 941, 952D-H.
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in Section 73(6)(b) of VATA."

16. Dyson J stated that proposition 6 was common ground and he did not need to say anything further about it in the judgment.

17. Dyson J's approach was approved by Aldous LJ in *Pegasus Birds* in the Court of Appeal, [2000] STC 91, at paragraphs 11 and 15:

> "The relevant evidence of facts is that which was considered, in the opinion of the Commissioners, to justify the making of the assessment. The one-year time limit runs from the date when the facts constituting the evidence came to the knowledge of the Commissioners.
>
> …
>
> 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."

18. In *Lithuanian Beer Ltd v HMRC* [2018] EWCA Civ 1406 ('*Lithuanian Beer CA*'), the Court of Appeal considered section 12(4)(b) of the Finance Act 1994 which is materially identical to section 73(6)(b) VATA save that it applies to assessments to excise duty rather than VAT. The FTT in that case ([2015] UKFTT 441 (TC)) cited the passage from Dyson J's judgment in *Pegasus Birds* including proposition 6 and noted, at [71], that the parties were agreed that the burden of proving the assessment was made out of time lies with the appellant. That was significant because one of the questions which the FTT had to determine was when the facts that, in the assessing officer's opinion, justified the making of the assessment came to the knowledge of HMRC. The relevant facts were contained in documentation that was provided to another officer of HMRC after a visit to the appellant's premises. The issue was whether that documentation had been provided to the other officer more than 12 months before the assessment was made. On that point, the FTT concluded at [65] that:

> "… in the absence of specific evidence as to when this copy documentation was sent or received, I am not satisfied on a balance of probabilities that any particular copy document was received 12 months or more before the Assessment was made."

19. This led the FTT to its conclusion at [78]:

> "Overall, I have concluded that the last piece of evidence to justify the making of the Assessment was communicated to the Commissioners when [the] contents of the copy documentation sent to Officer Ansah following his visit on 2 November 2010 came to his knowledge. For reasons set out at [76], I am not satisfied this was on or before 14 November 2010. It follows that, on a balance of probabilities I have concluded that the Assessment was made within 12 months of the last piece of evidence being communicated to the Commissioners."

20. The FTT dismissed the appeal and the appellant appealed to the UT on the ground that the FTT had failed to apply the correct legal test in that the FTT failed to apply the plain words of section 12(4)(b). There is nothing in the UT's decision ([2017] UKUT 245 (TCC)) to suggest that the appellant made any submission that the FTT had erred in basing its conclusion on a failure by the appellant to discharge the burden of proof. The UT set out the six propositions formulated by Dyson J in *Pegasus Birds*. At [11] of its judgment, the UT quoted the passage above from [65] of the FTT's decision and, at [34], the UT set out [78] of the FTT's decision. The UT stated at [42] that the FTT came to the correct answer and they could detect no error of law in its reasoning and dismissed the appeal. There is, however, no discussion by the UT in *Lithuanian Beer* of the issue of burden of proof or proposition 6 in *Pegasus Birds*. The appellant appealed to the Court of Appeal.

21. In the Court of Appeal, Sales LJ, as he then was, noted at [11] that the FTT had found that the appellant had been unable to show on the balance of probabilities that the documents had been provided to the HMRC officer more than 12 months before the assessment was made. There is no discussion in the judgment of whether the FTT was right to base its decision on the failure of the appellant to satisfy proposition 6 of *Pegasus Birds*. However, at [24], Sales LJ noted that the parties agreed that relevant guidance was to be found in *Pegasus Birds* and that Dyson J's decision and his reasoning were approved by the Court of Appeal. He then set out the six propositions from *Pegasus Birds,* including proposition 6.

22. In *Lithuanian Beer CA*, Sales LJ, as he then was, held that:

> "[25] In my view, this guidance [in the judgment of Dyson J in *Pegasus Birds*] supports the approach contended for by HMRC and adopted by the FTT and the UT below. Proposition 3 emphasises the importance of the word 'knowledge' in the sub-paragraph. Constructive knowledge is not sufficient. Yet Mr Jones's submission amounts in effect to a plea for constructive knowledge to be treated as sufficient. He says that it is enough for the relevant HMRC officer to know that relevant evidence exists, even though he does not know what its contents are. This is constructive knowledge of the facts said to be evidenced by the material in question. Proposition 1 makes the point that in this context there is no distinction to be spelled out of the phrase, 'evidence of facts', between knowing that evidence exists and knowing what that evidence reveals about the facts of the case.
>
> [26] Section 12(4)(a) sets out the ordinary limitation period which is applicable. Sub-paragraph (b) is clearly intended to operate on a narrow basis. But the interpretation proposed by Mr Jones would make its application very wide, creating the risk that it would subsume the ordinary limitation period in many cases, to an extent which Parliament did not intend. The object of sub-para (b) is to give effect to a principle of fair treatment of taxpayers which is much narrower. If HMRC make a later assessment to claim underpaid tax, relying on a number of factual building blocks based on evidence they have seen, a shorter limitation period is appropriate if they knew about that evidence and what it revealed earlier on but sat on their hands and failed to take prompt action on the basis of it.

> [27] The structure of section 12(4)(b) itself and the guidance given by Dyson J supports this interpretation. The phrase, 'sufficient in the opinion of the Commissioners to justify the making of the assessment', is a reference to the opinion actually formed by the Commissioners at the time when they issue the assessment which is in dispute in the proceedings: see Dyson J's proposition 4(i). Proposition 4(i) is modified by his proposition 5 if it appears that the officer acting for the Commissioners has behaved irrationally or in a *Wednesbury* unreasonable way (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) in taking the view that an assessment could not be issued on the basis of some less complete set of evidence than he in fact required to be available before he thought that he could justify making the assessment in question.
>
> [28] Paragraph (b) in s12(4) requires that one identifies the evidence taken into account by the officer who issues the assessment as the justification for issuing it (or, under proposition 5, the evidence of which he was aware which ought rationally to have compelled him to reach the opinion that an assessment would be justified at some earlier stage), and compares that with the 'evidence of facts' which it is said the Commissioners knew a year or more before the assessment came to be issued. Both elements in the comparison turn on the subjective state of mind of HMRC officers regarding what they understand the evidence available to them actually shows. If the 'evidence of facts' known to the Commissioners previously was the same as the evidence of facts which led them to form the opinion later on that an assessment was justified (or, on a *Wednesbury* approach, should have led them to form that opinion), then it will be clear that the Commissioners have sat on their hands and the special, truncated limitation period in paragraph (b) will apply.
>
> [29] It is this comparative exercise to which Dyson J refers in proposition 4(ii). In my view, it is clear that where he speaks of the last piece of evidence being 'communicated' to the Commissioners, he means that it is communicated in such a way that the contents of the evidence are in fact known to them. He does not mean that it is sufficient that the evidence is made available to them, although it is not read and digested by them.
>
> [30] Despite Mr Jones's efforts to distinguish the present case from a situation in which documents are made available to an HMRC officer in a general sense, such as where he is simply presented with a room full of documents and told that he can look at anything he likes, there is no viable dividing line to be drawn. In that situation, the officer will not have knowledge of the 'evidence of facts' contained in each and every document in the room. It is unrealistic to suppose that Parliament intended that the special limitation period in s12(4)(b) is applicable in such a case. The officer will only have such knowledge where he reads and digests the contents of particular documents. Similarly, in our case, Mr Ansah did not have knowledge of the 'evidence of facts' contained in the certificates of conformity until he read and digested their contents, if he ever did. On the findings of fact which were made, this did not happen before the critical cut-off date for limitation purposes of 14 November 2010."

23. Sales LJ concluded, at [32], that:

> "For the reasons I have given, I consider that the FTT and the UT applied s12(4)(b) correctly to the facts in this case."

24. The leading authority on the application of s.73(6)(b) VATA provision is now *DCM (Optical Holdings) Ltd v HMRC* [2022] UKSC 26 ('*DCM*') in which the Pegasus Birds principles were approved (save for point 6, which was not mentioned as the burden of proof

was not an issue in the *DCM* appeal). The Supreme Court in *DCM* also approved what Aldous LJ had said in *Pegasus Birds* in the Court of Appeal.

DISCUSSION

Ground 1 – FTT failed to apply the correct test

25. The first ground of appeal is that the FTT failed to apply the correct test as set out in the relevant case law at [15] – [18] above. Mr Watkinson accepted that the FTT had correctly set out the test to be applied in determining whether HMRC were within the time limit for issuing an assessment in section 73(6)(b) VATA at [10] and [11]. In those paragraphs, the FTT quoted the relevant passages from *Pegasus Birds* in the High Court and Court of Appeal (see [15] and [17] above). Mr Watkinson did not seek to argue that the FTT had misstated or misunderstood the test in *Pegasus Birds* that was approved in *DCM*. He submitted that the FTT had simply failed to apply the appropriate test.

26. Mr Watkinson contended that the FTT was required by *Pegasus Birds* to determine two things:

(1) what facts justified the making of the assessment in the opinion of Officer Bell and whether that opinion was reasonable; and

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

27. Mr Watkinson said that, in the Decision, the FTT did not decide what evidence was sufficient to make the assessment, whether Officer Bell's opinion that the evidence did not justify making the assessment earlier was *Wednesbury* unreasonable, and when the last piece of evidence was actually communicated to HMRC. He submitted that the failure to apply *Pegasus Birds* and determine those matters was an error of law.

28. Mr Birkbeck submitted that the FTT applied the correct test at [39] and [40] of the Decision. The FTT concluded that it was not able, on the evidence put before it, to determine whether or not the Sage data was part of the evidence on which the officer making the assessment relied. It followed that, as the burden was on NFFC, as stated in proposition 6 of *Pegasus Birds*, the appeal must fail.

29. There is no dispute that the FTT were clearly aware of the legal principles to be applied as set out in the passage from *Pegasus Birds* in the High Court, quoted in [10], and in the Court of Appeal, quoted in [11]. Having set out the relevant propositions, it seems to us to be highly unlikely that an experienced FTT would then disregard them and we do not consider they did so. The FTT turned to the submissions of the parties and in the first paragraph of that section of the Decision, [34], referred to *Pegasus Birds*. The submissions made by NFFC and recorded at [36] and [38] addressed what information Officer Bell needed to make the assessment and when he had it. NFFC contended that the emails of 11 and 22 May showed that he had everything he needed to make the assessment from the Navision data provided to HMRC on 20 April 2018. HMRC's submissions in [37] and [38] put the contrary view that Officer Bell only had all the necessary information on 9 May when the Sage data was handed over. Crucially, the FTT found that the submissions made by both parties about the Sage data in [38] were unsupported by evidence and so the FTT disregarded them. That was why the FTT did not address the *Pegasus Birds* propositions explicitly: they did not have the evidence to do so. In the absence of any evidence from NFFC to show what evidence was provided to Officer Bell and when, the FTT could not determine the necessary facts set out in proposition 4 of *Pegasus Birds*. In conclusion, we consider that this ground must fail not because the FTT did apply the *Pegasus Birds* propositions but because the FTT were unable to determine the necessary facts in the absence of any evidence in relation to them. Accordingly, the FTT were

compelled to decide the appeal on the burden of proof, which they decided lay with NFFC, and to which we turn next.

30. Before we consider the next ground of appeal, we mention that Mr Watkinson also made a brief submission that the use of the word "irrelevant" by the FTT in [39] and [40] showed that the FTT had applied a lower standard, ie the wrong test. It seems to us that this submission is unfounded. We agree with Mr Birkbeck that, when they held in [40] that the documentary evidence did not demonstrate that the Sage data was irrelevant to Officer Bell's knowledge of the facts before 9 May 2018, the FTT were saying that the documentary evidence did not show whether or not the Sage data added anything to the Navision data which HMRC already had. The FTT was not applying a lower standard when considering principle 4 in Pegasus Birds because they were not able to consider it at all due to the lack of evidence. In our view, the use of the word "irrelevant" does not show any error of law.

Ground 2 – FTT erred in its treatment of burden of proof

31. At [40] of the Decision, the FTT concluded that NFFC had failed to discharge the burden of proof in that it had not shown, on the balance of probabilities, that the assessment was made outside the time limit prescribed by section 73(6)(b) VATA. NFFC contends that the FTT was wrong to conclude that NFFC bore the burden of proof. Mr Watkinson put this ground in three ways. His primary submission was straightforwardly that the burden of proof in relation to section 73(6)(b) VATA should be on HMRC. Secondly, if that was not correct as a general proposition, Mr Watkinson contended that, once a prima facie case had been made by NFFC, the evidential burden shifted to HMRC and they had not discharged it. Mr Watkinson's third point was that, even if NFFC bore the burden of proof, that did not justify the failure by HMRC to make full and frank disclosure of all material relevant to the time limits point.

32. As the FTT recorded at [34], it was common ground between NFFC and HMRC that the burden of proof lay on NFFC to show that the assessment was made outside the time limit specified in section 73(6)(b) VATA. The FTT and the parties had taken that view on the basis of Dyson J's clear statement in proposition 6 in *Pegasus Birds*. In *Pegasus Birds*, the proposition that the burden is on the taxpayer to show that the assessment was made outside the time limit was, as before the FTT in this case, common ground and Dyson J did not say anything further about it in the judgment.

33. Mr Watkinson submitted that *Pegasus Birds* is not authority for the proposition that the taxpayer bears the burden of proof in section 73(6)(b) cases because the point was common ground and was not argued in that case. He further submitted that, as no authority was cited for proposition 6 and it was not part of the ratio in *Pegasus Birds*, it is not binding. In support of his submission, Mr Watkinson referred us to the decision of the Supreme Court in *Egon Zehnder Ltd v Tillman* [2019] UKSC 32 in which Lord Wilson said at [21]:

> "When a court makes an assumption about the law, instead of reaching a focused determination in relation to it, the decision based upon it does not carry binding authority under the doctrine of precedent: *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397, 406-408."

34. In *National Enterprises Ltd v Racal Communications Ltd*, the Court of Appeal had held that where an appeal was dismissed only on the grounds put forward, that decision was not authority that the court had jurisdiction in such cases since that issue had not been addressed. That case was considered by the Court of Appeal in *R (Kadhim) v Brent LBC Housing Benefit Review Board* [2000] EWCA Civ 344 ('*Kadhim*'). In *Kadhim*, the Court of Appeal held at [33] that:

> "… there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court."

35. However, the Court of Appeal urged caution in *Kadhim* at [38]:

> "Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court and there has been no argument upon it: as Russell LJ went to some lengths in *National Enterprises Ltd v Racal Communications Ltd* to demonstrate had occurred in the previous case *Davies Middleton & Davies Ltd v Cardiff Corpn* 62 LGR 134. And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."

36. Mr Watkinson submitted that Dyson J's comment on the burden of proof in proposition 6 of *Pegasus Birds* falls squarely within the 'assumed without argument or consideration rule' referred to in *Kadhim*. He pointed out that the Court of Appeal's decision in *Pegasus Birds* ([2000] STC 91) did not address who bore the burden of proof on the time limit issue and did not specifically approve what Dyson J had said about it in the High Court. Mr Watkinson also drew our attention to the fact that the Supreme Court in *DCM* did not address the burden of proof point either or even include proposition 6 when quoting the well-known passage from *Pegasus Birds*. Mr Watkinson submitted that cases that simply cited *Pegasus Birds* as authority for the proposition that the taxpayer bore the burden of proof in section 73(6)(b) appeals add nothing to its value as precedent on the point.

37. Mr Watkinson's final point on this part of his submissions on the second ground was that, in any event, the Upper Tribunal is free to depart from *Pegasus Birds* on this point about burden. He submitted that even if proposition 6 was part of the ratio of *Pegasus Birds* in the High Court, that would not bind the Upper Tribunal and the ordinary comity principle would apply (see *Impact Contracting Solutions Ltd v HMRC* [2023] UKUT 215 (TCC), at [96]). Mr Watkinson submitted that the *Pegasus Birds* tests largely turned on matters peculiarly within the knowledge of HMRC and therefore, as a matter of general principle (see Halsbury's Laws Vol.12 [700]), the burden of proving that the assessment was made within the time limit should lie on HMRC.

38. Mr Birkbeck submitted that proposition 6 in *Pegasus Birds* was clear and should be accepted as binding authority for the proposition that the taxpayer bears the burden of proof in respect of section 73(6)(b), as NFFC had accepted at the hearing before the FTT. He further contended that even if NFFC was right that *Pegasus Birds* is not binding on burden of proof, proposition 6 was part of the ratio of the Court of Appeal's decision in *Lithuanian Beer* and that was a binding authority on the point. Mr Watkinson submitted that *Lithuanian Beer* was not a decision on who bore the burden of proof but on what knowledge means. In that case, the Court of Appeal made clear that constructive knowledge of the facts was not sufficient when determining when the officer had knowledge of the facts sufficient to justify the assessment. In particular, simply knowing that evidence exists, without knowing its contents and relevance, is not 'knowledge of the facts sufficient to justify the making of the assessment'.

39. Mr Birkbeck submitted that *Lithuanian Beer CA* is binding authority on where the burden lies in appeals on the ground that an assessment was made out of time. He contended that the proposition that the appellant bore the burden of showing that the assessment was made outside the time limit was central to the FTT's reasoning and decision in *Lithuanian Beer*. That proposition was never questioned in the appeals to the UT and Court of Appeal.

40. Mr Watkinson submitted that the parties' submissions in FTT in *Lithuanian Beer* were not concerned with who had the burden of proof but whether "evidence of facts" had come to the knowledge of HMRC. The same question arose in the appeals to the UT and CA and the burden of proof was not specifically raised or discussed. It followed that *Lithuanian Beer CA* is not binding authority on the point.

41. It appears that, until this appeal, there has never been any challenge to the proposition that the taxpayer bears the burden of proof in an appeal where it is alleged that a VAT assessment was not made within the time limit in section 73(6)(b) VATA. We are not aware of any decision in which a court or tribunal has explicitly considered the issue of who bears the burden of proving that an assessment was made late. Of course, the fact that a proposition has never been challenged before does not mean that it is correct but, if it is wrong, it seems surprising to us that it has not been challenged before now.

42. We accept that a proposition assumed without argument is not authority (see *Kadhim* at [20]) and we do not simply rely on proposition 6 of *Pegasus Birds* as establishing that the taxpayer bears the burden of proof in relation to section 73(6)(b). However, we agree with proposition 6. The proposition that an assessment is in time under s 73(6)(b) necessarily involves a negative proposition of fact: that HMRC did not have knowledge of all the relevant evidence in the period prior to a date one year before the date of the assessment. HMRC could only bear the legal burden of proof/burden of persuasion in relation to that if the law contained a presumption that assessments under section 73 are based on evidence acquired more than a year earlier unless the contrary is shown. There is no reason to infer the existence of any such presumption.

43. As to an evidential burden, it is conceivable that in a particular case the state of the evidence before the FTT might be such as to raise an inference that HMRC had the knowledge more than a year before the assessment. But that was not the position here. It was impossible to draw any inference from the documentary evidence reviewed by the FTT as to whether or not the assessing officer had relied on material supplied to HMRC on 9 May 2018.

44. On the basis of the authorities discussed above, we accept that *Pegasus Birds* is not binding on us as authority for the proposition that the taxpayer bears the burden of proving that an assessment was made late. That does not mean, however, that the proposition is wrong or that we should not apply it. Moreover, the proposition that the taxpayer bears the burden of proof was accepted without comment by the Court of Appeal in *Lithuanian Beer CA* and we consider that case is authority on the point and binding on us for the reasons below.

45. The FTT's decision in *Lithuanian Beer* was based on the appellant having the burden of showing that the assessment was made after the time limit had expired and failing to do so. In the UT, the appellant made an application to adduce new evidence to show that HMRC had acquired evidence to justify the making of the assessment more than 12 months before it was actually made. That application was refused but it showed that the appellant was aware that the FTT's decision was based on the appellant having the burden of proof. We consider that the UT must also have been aware that placing the burden of proof on the appellant was a crucial part of the FTT's reasoning. Even though the appellant did not make any submission on burden of proof, we consider that the UT would not have left the point unaddressed if they had considered that the FTT had erred in relying on proposition 6 of *Pegasus Birds*. The UT

did not hold back from pointing out where, in their opinion, the FTT had gone wrong even where the point had not been taken by the parties (see [41] of the UT's decision in *Lithuanian Beer*).

46. We bear in mind the Court of Appeal's guidance at [38] in *Kadhim*, set out at [35] above. It is clear that holding that a decision of a superior court is not a binding authority for a point because it was assumed without argument should only be done in the most obvious of cases and limited with great care. We consider that the decision in *Lithuanian Beer CA* is an example of the situation mentioned by Buxton LJ in [38] of *Kadhim* where a point has not been the subject of argument but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Although there is no discussion about who bore the burden of proof on *Lithuanian Beer CA*, Sales LJ clearly understood that the FTT's decision depended on the appellant having the burden of proof (see [11] of the judgment). We consider that, in the circumstances, it is inconceivable that Sales LJ would not have commented if he had considered that the FTT was wrong to have relied on proposition 6 of *Pegasus Birds* in reaching its decision. Accordingly, we consider that Sales LJ's acceptance of the proposition went beyond mere assumption and *Lithuanian Beer CA* is binding authority for the proposition that the burden is on the taxpayer to show that an assessment was made outside the time limit specified in section 73(6)(b) VATA.

47. Further, in our view, it makes sense for the appellant in an appeal based on section 73(6)(b) VATA to have the burden of showing that the assessment was made outside the time limit. In such cases, the evidence of facts which justified the making of the assessment would generally be in the hands of or known to the taxpayer and its advisers (and was in this case). It follows that the taxpayer will usually be able to demonstrate when it provided specific evidence to HMRC and/or why the information known to HMRC should have been sufficient in the opinion of the assessing officer to justify the making of the assessment. When the taxpayer has done so, it is for HMRC to show why such evidence was not sufficient to justify the making of the assessment.

48. Mr Birkbeck made an alternative submission on this point which was that even if NFFC were right and the burden had lain on HMRC they would have discharged it. We agree. It is important to look at what the evidence was in relation to the information, ie evidence of facts, that Officer Bell obtained from NFFC. That evidence is contained in paragraphs 7 to 13 of his witness statement (set out at [7] above). Officer Bell's evidence was that he obtained two sets of accounting data on two separate dates, namely the Navision General Ledger data on 20 April and the Sage back-up of the accounting records on 9 May 2018. There was no suggestion that there was any other information or evidence of facts that led to the making of the assessment. Although not mentioned in his witness statement, the FTT also saw an email which Officer Bell sent to NFFC on 11 May 2018 with a spreadsheet showing accounting entries posted to the Navision accounting system that he wished to look at. Officer Bell analysed the data and identified some discrepancies between the accounting data and the figures on the VAT return for the period ending 08/15. Officer Bell's evidence was that he believed that the discrepancies were due to problems experienced by NFFC when it changed accounting systems from Sage to Navision. Officer Bell put the figures on the accounting documents and his view of the correct position to NFFC in an email of 24 May 2018.

49. HMRC's case was that Officer Bell only formed his conclusion that the assessment was justified on or after 9 May 2018. The combined effect of the emails of 11 May 2018 and 24 May 2018 with Officer Bell's statement of his belief that the errors in the VAT return had been caused by the changeover from the Sage accounting system to the Navision system was sufficient to establish a prima facie case that the evidence justifying the assessment was contained in part in the Sage data received on 9 May 2018 and the assessment was therefore

made in time. At that point, even if HMRC had the burden of showing that the assessment was made in time (quod non), the evidential burden would have shifted to NFFC.

50. If, as we have concluded, the burden of proof rested with NFFC, Mr Watkinson's secondary argument was that, once a prima facie case had been made by NFFC, the evidential burden shifted to HMRC to justify the assessment as being within time. Mr Watkinson submitted that, in this case, HMRC did not provide evidence that addressed the *Pegasus Birds* tests and so did not discharge the evidential burden that had shifted to them. Mr Watkinson said that Officer Bell did not say in his witness statement what the facts were which, in his opinion, justified the making of the assessment. Mr Watkinson pointed out that the only reference to the time limit in section 73(6)(b) VATA in Officer Bell's witness statement was what was said in paragraph 53 (set out at [8] above). Officer Bell said in his witness statement that he believed that the one year evidence of facts rule commenced on 24 May 2018 which was the date of his email to NFFC setting out his view, after he had analysed the data, that there were inconsistencies between the accounting data and the entries on NFFC's VAT return for period ending 08/15. Mr Watkinson criticised this as (a) not supporting HMRC's case which was that the date was 9 May 2018 when HMRC obtained the Sage back-up, and (b) showing a lack of understanding of the law on time limits as Officer Bell appeared to consider that the time limit started to run only after he had analysed material and not when that material came into his possession. HMRC's case in the FTT was that the evidence of facts, sufficient in the opinion of Officer Bell to justify the making of an assessment, was obtained at the earliest on 9 May 2018 when he obtained the Sage back-up. Mr Watkinson submitted that, in the absence of any evidence to support that case, the FTT should have allowed NFFC's appeal.

51. Mr Birkbeck accepted that where an appellant bears the burden of proof and establishes a prima facie case then the evidential burden shifts to HMRC to rebut it with evidence of their own. If they can do that then the burden will switch back to the appellant. Mr Birkbeck submitted that, in the context of this case, the burden was on NFFC to prove that the assessment was made out of time by showing that Navision data which was provided to HMRC on 20 April 2018, ie more than one year before the date of the assessment, was evidence of facts sufficient to justify the making of the assessment without the need for the Sage back-up provided on 9 May 2018. That would establish a prima facie case that Officer Bell did not rely on the later evidence. It would then fall to HMRC to rebut that conclusion by showing that Officer Bell did in fact rely on the Sage back-up or otherwise acquire the relevant knowledge later. Mr Birkbeck submitted that NFFC failed to establish what evidence was contained in the Navision data as opposed to the Sage back-up or put forward an argument based on it that the Sage back-up was not of sufficient weight to justify making the assessment. There was therefore no evidential case for HMRC to rebut and the appeal rightly failed on the burden of proof.

52. We do not accept Mr Watkinson's submission that NFFC had established a prima facie case that caused the evidential burden to shift to HMRC. Notwithstanding the fact that Officer Bell thought that the one year time limit only started to run when he had completed his analysis and sent the email of 24 May 2018 to NFFC, HMRC's case that the time limit did not begin to run before 9 May 2018 was clear at the hearing. The FTT recorded in [3] that HMRC argued that their knowledge of the facts was only complete on 9 May 2018 whereas NFFC argued that HMRC had the necessary knowledge of the facts on 20 April 2018. As we have found, NFFC had the burden of showing that HMRC had the necessary knowledge of the facts on the earlier of the two dates on which Officer Bell had obtained evidence of the facts. The FTT noted in [39] of the Decision that NFFC had not provided any witness evidence to clarify the data that was in the possession of Officer Bell. The only evidence before the FTT, apart from the HMRC witness evidence, was the documentation. This did not establish a prima facie case that Officer Bell had only relied on the Navision information. In the absence of any evidence in support of

its arguments, it cannot be said that NFFC had established a prima facie case or that the evidential burden had shifted to HMRC.

53. Mr Watkinson's third argument in support of this ground was that, even if NFFC had the burden of proof, it did not justify the failure by HMRC to make full and frank disclosure of all material relevant to a time limits point. Mr Birkbeck submitted that if NFFC considered that it needed further information then it could have made an application for specific disclosure prior to the hearing under the FTT Rules but they did not do so. In those circumstances, it was not an error of law for the FTT to decide the case on the evidence before it. We agree with HMRC on this point. Given our conclusions so far, we do not think that this submission takes matters any further where the burden of proof was on NFFC. It is correct that HMRC has a duty of candour to the appellant and the FTT (see *Karoulla (t/a Brockley's Rock) v HMRC* [2018] UKUT 255 (TCC), at [32]), however, that was a very different case where HMRC refused to return Mr Karoulla's till rolls which meant he was unable to access them. In our view, there was no such obstacle preventing NFFC from putting forward its case as it had provided the relevant material to HMRC and would have known what was in it even if they had not retained copies of the data. NFFC did not have to establish what documents Officer Bell had reviewed in order to show that HMRC had sufficient evidence of facts on or before 29 April 2018 to justify the making of an assessment.

54. We conclude our discussion of this ground of appeal by commenting that the FTT would not have needed to resort to deciding the appeal by reference to the burden of proof (and thus this appeal would probably not have happened) if either party had produced evidence of what was contained in the Navision and Sage records.

Ground 3 – Edwards v Bairstow challenge

55. We can deal with NFFC's third ground of appeal very briefly. It is founded on *Edwards v Bairstow* [1956] AC 14, HL ('*Edwards v Bairstow*'). In that case, Viscount Simonds said in his speech, at page29, that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". NFFC submits that the FTT made a finding at [40] that 9 May 2018 was, on balance, the best date on which HMRC had evidence of the facts sufficient in their opinion to justify the making of the assessment. NFFC contends that the finding was perverse because there was no evidence on which such a finding could properly be made. As Mr Birkbeck submitted and Mr Watkinson acknowledged at the hearing, this ground of appeal turns on whether the FTT made the finding that NFFC says it made. If the FTT did not find that 9 May 2018 was the date on which HMRC Officer Bell had evidence of the facts sufficient to justify making an assessment then there is nothing for *Edwards v Bairstow* to bite on and this ground must fail.

56. We consider that, reading [39] and [40] together, it is clear that the FTT were unable to make any finding about the two sets of data and what evidence of facts they contained. In [40], which is set out at [11] above, the FTT did not make any positive finding of fact that HMRC had evidence of the facts sufficient to justify making an assessment on 9 May 2018 and nor, in our view, is one implied. The FTT clearly states that they found it impossible to conclude on the evidence that Officer Bell had knowledge of evidence of the facts sufficient, in his opinion, to justify the making of the assessment on 20 April which was NFFC's case. The FTT then concluded that NFFC had failed to discharge the burden of proof on the balance of probabilities so its appeal must fail. Accordingly, this ground of appeal must be rejected.

DISPOSITION

57. For the reasons given above, NFFC's appeal is dismissed.

COSTS

58. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Upper Tribunal Judge Greg Sinfield

Upper Tribunal Judge Nicholas Paines KC

Release date: 22 May 2024