Appeal number: TC/2012/03651

VALUE ADDED TAX – assessments – non-attendance by Appellant – whether evidence to show that assessments excessive or incorrect – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROMASAVE (PROPERTY SERVICES) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at the Royal Courts of Justice on 2 November 2016

The Appellant was not present and was not represented

Laura Poots of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("Romasave") appeals against four assessments disallowing input tax and against two misdeclaration penalty assessments issued by the Respondents ("HMRC").

2. Romasave was not present at the hearing. At the beginning of the hearing, we dealt with procedural matters arising from this.

Non-attendance at the hearing

3. The circumstances leading up to Romasave's non-appearance were as described in the following paragraphs.

4. Romasave had been due to serve a skeleton argument on 12 October 2016. It failed to do so. It made an application to the Tribunal for postponement of the hearing. On 24 October 2016, the Tribunal refused the postponement application and ordered Romasave to deliver a skeleton argument by 5:30 on Wednesday 26 October. Romasave failed to comply with this order and informed HMRC and the Tribunal that it anticipated serving its skeleton argument on Friday 28 October.

5. Despite this, no skeleton argument was served on the latter date.

6. On 1 November 2016, the day before the hearing, Rainer Hughes (the solicitors acting for Romasave, who were not the representatives named in Romasave's Notice of Appeal) sent a letter by email to the Tribunal. Their letter included the following paragraphs:

> "We have been instructed by the Appellant to request the hearing in this matter be adjourned on the basis that they have been unable to raise funds for their legal expenses, including Counsel's fee for the hearing. The Appellant is making every effort to obtain funding for this matter, however, this is taking longer than anticipated. The Appellant anticipates being in a position to raise the funds for Counsel and our firm within the next month. In the circumstances we request that the hearing be adjourned and re-listed on the first open date after 3 January 2017.
>
> Please note in view of the Appellant's lack of funds, there will be no one present to represent them at the hearing this week.
>
> The Respondent will not be prejudiced by a short adjournment in this matter; as it is in the interest of justice and pursuant to the Appellant's Article 6 ECHR [*sic*]. Any preparation already done for the hearing this week will still be used at any adjourned hearing. It should be noted that the Appellant will be severely prejudiced in the event this matter is not adjourned for them to have a fair trial with legal representation."

7. The Tribunal did not agree to Romasave's request. (We refer later to points made by the Judge in the letter dated 24 October 2016 refusing the earlier postponement application.)

8. Also on 1 November 2016, HMRC emailed the Tribunal to object to Romasave's request. HMRC requested that the hearing should proceed as planned and that should Romasave not appear, it should continue in Romasave's absence. HMRC referred to the history of the matter, and submitted that it would be unreasonable for the hearing to be adjourned in the current circumstances. HMRC indicated that, irrespective of whether or not the hearing was adjourned, they would be submitting an application for costs for Romasave's unreasonable behaviour in relation to the hearing.

9. The Tribunal determined that the hearing would not be adjourned; any relevant applications would be considered at the hearing.

Submissions by Ms Poots at the hearing relating to the adjournment application

10. Ms Poots indicated that as Romasave was not attending the hearing, HMRC would not be pursuing a further strike-out application on the same basis as that which they had previously made by reference to the non-compliance with the order to Romasave to serve its skeleton argument by the later revised date.

11. She asked the Tribunal to exercise its power under Rule 33 to proceed with the hearing. Both parties had been notified of the date and time of the hearing. She submitted that it was in the interests of justice to proceed with the hearing. She referred to Romasave's behaviour.

12. The Tribunal had directed that Romasave's skeleton argument should be served not later than 21 days before the hearing. HMRC had "chased" Romasave's solicitors on 13 and 14 October 2016. The first response from Rainer Hughes on 14 October had been that the fee earner with conduct of the matter had been out of the office unwell. On the same day, HMRC had asked Rainer Hughes to provide them with and exact date by which the skeleton argument would be received. HMRC had also emailed the Tribunal to ask that the date for service of HMRC's skeleton argument should be amended to seven days after receipt of Romasave's skeleton argument.

13. On 17 October 2016 HMRC had emailed Rainer Hughes again to say that no skeleton argument had been received, nor any information as to when it was likely to be received. HMRC asked for an update on the matter.

14. On 18 October 2016, HMRC had emailed the Rainer Hughes partner responsible for the matter, referring to the absence of any information from the relevant fee-earner. HMRC indicated that in order for them to have sufficient time to serve their own skeleton argument, they required Romasave's skeleton argument by 5 pm that afternoon. If this was not received by that time, HMRC would have no option but to return to the Tribunal and seek compliance with the Directions.

15. As HMRC did not receive Romasave's skeleton argument on that date, they applied for an unless order providing that if that skeleton argument was not received by HMRC and the Tribunal by 21 October 2016, Romasave's appeal would automatically be struck out.

16. On 19 October 2016, Rainer Hughes had responded as follows to the Tribunal with reference to HMRC's application:

> ". . . We sincerely apologise for not having filed and served our client's Skeleton Argument in line with the Tribunal's Directions. However, this is as a result of having to instruct new Counsel at short notice. Our client's new Counsel is now in possession of the papers in this matter, including joint appeal bundle.
>
> In view of the above there is not sufficient time for our client's new Counsel to consider the papers properly, prepare and file the Skeleton Argument and for the Respondent to file their Skeleton Argument. In these circumstances we respectfully request that the hearing listed on 2 and 3 November 2016 be adjourned for a short period and re-listed on a date of the parties' convenience. In addition the directions for Skeleton Arguments should also be extended. It will be noted that all other directions in this appeal have been complied with.
>
> . . ."

17. On the same day, HMRC had sent a letter by email to the Tribunal setting out their objections to Romasave's request for an adjournment.

18. Ms Poots drew attention to the comments of the Judge in the Tribunal's letter dated 24 October 2016 refusing Romasave's application for postponement.

19. On 26 October 2016, Rainer Hughes had emailed HMRC and the Tribunal, stating:

> "We note the Tribunal's letter dated 24 October 2016 requires our client to file and serve its Skeleton Argument by 5.30 pm today. Please note Counsel is in the process of preparing the same, however we will not be able to meet the current deadline. Counsel will have the Skeleton Argument finalised by Friday 28 October 2016 when we will be able to file and serve the same.
>
> . . ."

20. Ms Poots explained that in view of that email, HMRC had prepared their own skeleton argument without the benefit of the arguments from Romasave.

21. Romasave had not served a skeleton argument at all. Nothing had been heard either on Friday 28 October or Monday 31 October. Then Rainer Hughes had sent their letter dated 1 November 2016.

22. She submitted that that letter did not deal with any of the points which had been raised by the Tribunal in its letter dated 24 October 2016. There was no explanation at all as to the changing of the story as the date for the hearing approached:

(1) There was reference to illness;

(2) Then there was a reference to Counsel preparing the skeleton argument;

(3) Then there was a contradictory reference to the need to raise funds for Counsel's fees.

23. Moreover, the letter failed to give any detail relating to Romasave's financial position. Ms Poots submitted that there was no evidence to support the statements made on Romasave's behalf. There was no evidence concerning the attempts to raise new funds. There was no detail as to why Romasave expected to be able to raise funds in the next month; what would change? There was no explanation of why Counsel had prepared a skeleton argument and had been unable to file it. There was no mention at any point of any name of Counsel in question.

24. Crucially, there was no mention of any reason why Romasave could not attend in person, by a director or employee, even to explain the funding questions or what had been happening in the last few weeks.

25. Ms Poots' instructing solicitor had tried to contact Rainer Hughes, Romasave and Romasave's accountants King & King, who still had authority to represent Romasave as the representatives named on Romasave's Notice of Appeal.

26. On the point concerning lack of funding, Ms Poots repeated that it was not possible to ask Romasave about this. However, there appeared to be some evidence relating to Romasave's financial position. She referred to a document handed to us. This was a Land registry form TR1 relating to the transfer of a property in Barking, Essex. This referred to the sale of that property to the local authority for a consideration of £3.45 million. The solicitors who had been involved in the transaction for Romasave were Rainer Hughes.

27. Ms Poots referred to another document handed to us. This was a copy of the latest abbreviated accounts of Romasave to 31 July 2015 as obtained from Companies House. The balance sheet showed that the total net assets of Romasave reduced from £759,620 as at 31 July 2014 to £46,261 as at 31 July 2015.

28. Ms Poots expressed concern as to HMRC's position in relation to recovery of the VAT. We intervened to comment that there had been a reduction under the heading "Creditors; amounts falling due after more than one year" from £2,865,111 to £1,869,236, and that some form of explanation would be necessary in order to determine the position.

29. Ms Poots emphasised the risk of prejudice to HMRC, who had been trying to resolve the position since December 2015, as shown by the witness statement of Finola Tuohy. Ms Poots referred to the sequence of events since that date; Romasave had repeatedly been failing to engage with HMRC even where legal assistance was not required, and where HMRC had been trying to assist Romasave in relation to input tax claimed.

30. Ms Poots referred to the overriding objective in the Tribunal Rules. Rule 2 required parties to help the Tribunal to further the overriding objective, and to co-operate with the Tribunal generally. She referred to the recent case of *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016] EWCA Civ 121, [2016] STC 841, CA. At [37] the key points referred to by Ryder LJ had been proportionality, cost and timeliness; a tribunal's orders, rules and practice directions were to be complied with in like manner to a court's.

31. At [38] Ryder LJ had stated that the correct starting point was compliance unless there was good reason to the contrary which should, where possible, be put in advance to the tribunal. Ms Poots referred to [32] and the factors mentioned at [42]. She submitted that weight should be given in this case to those factors, namely compliance and the efficient conduct of litigation at a proportionate cost.

32. Ms Poots also referred to *Teinaz v Wandsworth London Borough Council* [2002] EWCA Civ 1040, [2002] ICR at [20] (beginning at "Although an adjournment . . .") and [21]. The Court of Appeal acknowledged the right to a fair trial, but in her submission, the Tribunal was entitled to be satisfied as to the reasons for the absence of the litigant.

33. Looking at the parties' respective positions, there were relevant factors for each. It was relevant that Romasave's appeal might, and in her submission must, be dismissed if it proceeded. This factor had weight for Romasave and for HMRC.

34. HMRC did not accept the explanations which had been given for Romasave; they were changing and inconsistent, lacking in detail and evidence. The Land Registry evidence undermined what had been said on Romasave's behalf. Whatever it had spent the proceeds on, it had clearly not prioritised these proceedings. There was no evidence whether Counsel had been properly instructed. There was none relating to the lack of funding. Romasave had repeatedly not given an explanation, and had only reacted when pressed by HMRC or by the Tribunal.

35. As nobody was present on behalf of Romasave, it was not possible for Ms Poots to put the following to Romasave; she submitted that there was a strong suggestion that Romasave was simply seeking to delay matters in this case.

36. Even if the reason was genuine, it was not a good reason, and in particular it did not explain Romasave's absence of attendance in person to answer.

37. Romasave had already requested an adjournment, and had had it refused. Ms Poots submitted that what had happened in the last few days amounted to an attempt to obtain an adjournment by default.

38. Romasave had sought to argue that HMRC would not be prejudiced; Ms Poots submitted that HMRC would be prejudiced by any adjournment. HMRC did not have its money.

39. Ms Poots stated that winding up proceedings were stayed behind this appeal. (These had been commenced by HMRC.) In her submission, this gave Romasave a good reason to seek to delay this hearing

40. She submitted that there would be a very significant prejudice to HMRC if the hearing was adjourned. HMRC had incurred costs preparing for the hearing, chasing Romasave and taking other steps in relation to the proceedings. Mrs Tuohy, one of HMRC's witnesses, had retired from HMRC on Monday 31 October, and so was no longer attending on a work day.

41. Ms Poots referred to the length of time that the proceedings had already taken. The appeals had been made four years ago and covered periods which went back ten years.

42. The final factor was that Romasave had failed to engage in attempting to resolve matters outside the Tribunal. The documentation in the hearing bundle showed the attempts that had been made to achieve that resolution.

43. Ms Poots submitted that in the present case the need to enforce compliance and conduct litigation efficiently should take precedence. There was a need to resolve these long-standing appeals.

Our decision on the application for adjournment and related matters

44. We briefly adjourned the hearing to consider the submissions made in correspondence on behalf of Romasave and those made by Ms Poots on behalf of HMRC.

45. On my return, we announced our decision that there should be no adjournment and that the substantive hearing should proceed in the absence of Romasave or any representation on its behalf. We indicated that we would set out our reasons in this decision.

46. We have set out extracts from letters written on Romasave's behalf. In the Tribunal's letter dated 24 October 2014 refusing Romasave's earlier application for postponement, the decision of the Judge who had considered that application was set out:

> "The application for postponement is refused. The hearing which is scheduled to take place on 2 and 3 November was arranged in May 2016. The application for postponement was not made until 20 October 2016. The reason given is that the appellant has had to appoint more junior counsel due to lack of funds, who will not have time to prepare. The appellant states that counsel was in possession of the papers as at 19 October 2016, 2 weeks prior to the hearing. The appellant was due to serve its skeleton argument on 12 October 2016 but has not done so due it appears to the change in counsel. The appellant did not make any prior application for extension of time or offer any reason for the delay until the postponement application was made on 19 October 2016. No

> reason has been put forward as to why the appellant has not taken action sooner to arrange representation by appropriate counsel given that this hearing has been arranged since May 2016 or why the appellant's funding issue was not acted upon at any earlier stage. Moreover the appellant is not wholly without representation. No reason has been given as to why the appellant's representative could not produce a skeleton argument. In the circumstances the Judge does not consider it is in the interests of justice of [*sic*] fairness to postpone the hearing at this stage."
>
> [The remainder of the letter dealt with Romasave's skeleton argument and HMRC's strike-out application.]

47. We took into account the following factors:

(1) The effect of proceeding in Romasave's absence would be that it could not present its arguments, other than any points already raised in the correspondence and witness statement contained in the hearing bundle;

(2) It was for Romasave to satisfy us that the VAT assessments were incorrect, and if it could not do so, those assessments would have to stand as made;

(3) It appeared to us that Romasave had failed to engage properly with the Tribunal process;

(4) The absence of clear explanations for Romasave's difficulties, and the inconsistencies between the various reasons given for not serving its skeleton argument;

(5) The absence of any person to represent Romasave at the hearing, if only to give further explanation of its reasons for requiring a postponement of the substantive hearing;

(6) Purely as a background indicative factor, Romasave's lack of co-operation with HMRC in their attempts to resolve the matters in dispute without resort to the Tribunal;

(7) The apparent risk of financial prejudice in relation to any tax potentially found to be due, if the hearing were to be postponed;

(8) The complete absence of any reason for us to take a view any different from that expressed by the Judge in the Tribunal's letter dated 24 October 2016 as set out above.

48. In the light of *BPP* and related cases which require us to take into account the need for compliance with the Tribunal's orders, Rules and practice directions and the efficient conduct of litigation at a proportionate cost, we considered that the balance of these factors weighed in favour of refusing Romasave's application for postponement and allowing the substantive appeal hearing to proceed as listed and as arranged as long ago as May 2016. We concluded that it was in the interests of fairness and justice to do so. We did not consider that Romasave's Article 6 rights would be infringed in any way by allowing the hearing to proceed.

49. We therefore proceeded with the substantive hearing. We set out below our decision on Romasave's appeal.

The background facts

50. The evidence before us consisted of a bundle of documents. This included witness statements given by Jasdip Singh Hare for Romasave, and Finola Tuohy and Deborah Rosalee Murfitt for HMRC. Both HMRC's witnesses were available at the hearing for any questions to be put to them.

51. From the evidence, we find the following background facts.

52. The disputed decisions made by HMRC are as set out in the following table; the numbering of these decisions does not correspond to that in the proceedings brought by Romasave in the Upper Tribunal (*Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 0254 (TCC)):

Decision	**VAT period**	**Amount**	**Date of decision**
VAT assessment (Decision 1)	09/08	£2,890.70	3 December 2008
VAT assessment (Decision 2)	12/08	£5,666.66	13 March 2009
VAT assessment (Decision 3)	03/06, 06/06/, 09/06, 12/06, 03/07, 06/07, 09/07, 12/07, 03/08, 06/08	£109,325.34	15 April 2009
Misdeclaration penalty (Decision 4)	06/08	£3,338	18 May 2009
Misdeclaration penalty (Decision 5)	03/06, 06/06, 09/06, 12/06, 03/07, 06/07, 09/07, 12/07, 03/08	£12,941	18 May 2009
VAT assessment (Decision 6)	09/09	£1,099.57	16 March 2010

53. HMRC's understanding is that Romasave carries on business as a property developer and that the input tax claimed by it in the relevant periods mainly related to one development, the Duke's Head Public House on Barking Road. This property was subject to an option to tax. HMRC further understand that property was a public house, with some existing residential accommodation, and it had been damaged by a fire. Romasave developed the property into flats and a function venue.

54. The issues in the present appeal had begun with a visit by HMRC to the Appellant's offices on 11 September 2008. Ms Wood, an Officer of HMRC, had raised a number of queries about different developments carried out by the Appellant.

In subsequent correspondence, HMRC had raised and explained the need for a partial exemption calculation.

55. Since then, there had been extensive correspondence and a number of further visits. The most recent visit had been carried out on 18 February 2016 (while preparation for this appeal was ongoing). At that visit, Officer Tuohy was able to establish that some of the input tax claimed was supported by VAT invoices and would be allowable. However, Officer Tuohy noted that she did not have all the necessary records available to her and that a partial exemption calculation was needed.

56. Following that visit, Mrs Tuohy wrote to Romasave on 26 February 2016, explaining the further information that was still required, including copies of certain VAT invoices, and requested a response by 18 March 2016.

57. Mrs Tuohy received no response to that letter. On 18 April 2016, she wrote again to Romasave. In that letter, she repeated her request for the information listed in the letter of 26 February 2016. She also set out a list of questions which would assist in identifying the types of supplies made by Romasave, for the purposes of applying any partial exemption method. Again, she received no response to that letter.

58. Mrs Tuohy sent a chaser letter on 10 May 2016, again seeking the information requested in the letters of 26 February and 18 April. As at 28 October 2016, no reply had been received.

Arguments for HMRC

59. Ms Poots referred to the long procedural history of Romasave's appeal. Each of the assessments had been raised in order to disallow input tax which had been claimed by Romasave, as a result of a lack of information and evidence to support the input tax claims. The misdeclaration penalties related to that disallowed input tax.

60. We intervened to say that Romasave's Notice of Appeal form had referred only to a decision dated 9 November 2009, and to a single figure of "tax or penalty or surcharge" of £109,325.34. Ms Poots confirmed that the understanding of the parties and the Tribunal was that all the decisions referred to in the above table were subject to appeal. Certain of the other decisions related to refusal of repayment. The First-tier Tribunal and the Upper Tribunal had acted in relation to all these decisions. The Upper Tribunal had expressly decided that all these appeals ought to be admitted.

61. Ms Poots referred to the VAT principles relevant to Romasave's appeal. The supplies made by a property developer on a property which was opted to tax could fall into different categories, ie standard-rated, exempt or zero-rated. In accordance with s 26 Value Added Tax Act 1994 ("VATA 1994"), a taxable person ("trader") was entitled to credit for input tax which was attributable to taxable supplies. Taxable supplies included standard-rated and zero-rated supplies.

62. In order to claim input tax, a trader must hold a VAT invoice from the supplier, as required by regs 13 and 29 of the Value Added Tax Regulations 1995 (SI 1995/2518) ("the VAT Regulations"). A trader was not entitled to credit for input tax if or insofar as consideration was not paid to the supplier (s 26A VATA 1994).

63. Where a business made both taxable and exempt supplies, it was possible that the business would incur costs which related to both. In those circumstances, it was necessary to attribute a proportion of the input tax to the taxable supplies and a proportion to the exempt supplies using a partial exemption method.

64. Unless a business had agreed a method with HMRC, it had to use the standard method set out in reg 101 of the VAT Regulations.

65. The trader should first identify any input tax which was wholly attributable to the taxable supplies (recoverable) or wholly attributable to the exempt supplies (not recoverable). The remaining input tax was residual input tax. The recoverable proportion of the residual input tax would be determined by reference to turnover, being the proportion of the total supplies made by the taxpayer that were taxable supplies.

66. Where the standard-method did not give a fair and reasonable result, it was possible for the trader and HMRC to agree a special method on another basis. In Romasave's case, HMRC had considered floor space; this raised the question whether the relevant property was one building.

67. Ms Poots referred to the principles governing assessments and burden of proof. A trader was required to make quarterly returns (reg 25 of the VAT Regulations). Where it appeared to HMRC that a return was incomplete or incorrect, HMRC could assess the amount of VAT due "to the best of their judgment": s 73 VATA 1994.

68. Under s 83 VATA 1994, the trader had a right of appeal to the Tribunal. On such appeal, the burden was on the trader to prove that the assessment was wrong.

69. HMRC understood the issues in this appeal to be:

(1) Whether Romasave was able to provide VAT invoices for certain amounts claimed as input tax. These items were identified in the schedule to HMRC's letter dated 26 February 2016.

(2) In relation to the same items, whether Romasave was able to prove that it did pay the consideration to the suppliers (for example by supplying bank statements or receipts).

(3) In relation to invoices from Alderton Estates and Capital Mastercraft, whether Romasave was able to prove that these invoices were not duplicates for the same supplies.

(4) The application of a partial exemption method. In order to claim credit for input tax, Romasave had to identify the input tax that was directly attributable to any taxable supplies or to any exempt supplies. It was then necessary to

calculate the recoverable percentage to be applied to any residual input tax. This calculation required the identification of (i) the value of the taxable supplies made and (ii) the value of all supplies made.

70. In order to ascertain the figures for a partial exemption, it was necessary to identify the different supplies made by Romasave (particularly in relation to the Duke's Head development). The questions relevant to that process had been set out in a letter to Romasave from HMRC dated 18 April 2016.

71. Ms Poots referred to HMRC's letter to Romasave dated 11 September 2008, in which a number of amounts had been disallowed. HMRC had subsequently written again on 21 August 2009, after Mrs Murfitt had made two visits. Since then, there had been extensive correspondence between Romasave and HMRC.

72. Mrs Tuohy had made a visit to Romasave's premises on 18 February 2016. On 26 February 2016 she had written to Romasave requesting a number of items of information, as well as explanations on matters concerning management fee charges from Alderton Estates and invoices in similar terms from Capital Mastercraft.

73. Ms Poots referred to the note of Mrs Tuohy's meeting with Romasave, and submitted that the information which Romasave had provided was not a clear explanation of the relevant work as would be needed for a partial exemption calculation. Mrs Tuohy had written again to Romasave on 18 April 2016 setting out a list of the missing items of information required. Ms Poots referred in detail to this list, and to the questions which arose in the absence of such information.

74. She emphasised that HMRC's witnesses were present at the hearing. Nobody was here on behalf of Romasave to cross-examine them. She mentioned a minor correction which needed to be made to Mrs Murfitt's witness statement.

75. Ms Poots referred to paragraph 20 of the document attached to Romasave's Notice of Appeal. She wished to draw the Tribunal's attention to it. It stated:

> "The original decisions to impose the Assessments were unreasonable and not proportionate. The Appellant is concerned that later decisions (arrived at during the High Court proceedings) have been motivated by bad faith, costs orders having been made against HMRC in the High Court proceedings."

76. She submitted that this allegation had never been properly pleaded. It related to later decisions arrived at during the High Court proceedings. The allegation of bad faith would have been vigorously denied, and HMRC's witnesses were ready to deal with it, but it did not relate at all to the present hearing.

77. Ms Poots sought to put the points raised by Romasave, so far as these could be understood from what had been provided. She referred to the witness statement of Jasdip Singh Hare.

78. In relation to Decision 1, he had stated that this had been sent to "Gandrids Wood House"; this was not and never had been an address or the Registered office of Romasave. Romasave had not received this assessment letter.

79. Ms Poots emphasised that this was a point which had been specifically dealt with by the Upper Tribunal in *Romasave* at [69]. It had decided that Romasave had been notified of the assessment on 21 February 2012. She referred to its decision at [29] (as introduced by [28]). The assessment had not been invalid. There had been a muddle concerning addresses. The Upper Tribunal had held that this did not render the assessments invalid; they had been treated as notified at a later date.

80. Mr Hare had also stated that HMRC's decision letter dated 3 December 2008 referred to earlier letters from HMRC dated 24 October 2008 and 11 September 2008. The former had related to disallowed input tax for the period 6/08 and a remainder of repayment of £13,152.88. In addition, it had gone on to state that HMRC would raise an assessment in the sum of £66,868.83 for periods 03/07 and 03/08. The 11 September 2008 letter had requested various items of information; Mr Hare stated that this had been provided to HMRC during Mrs Murfitt's visit on 19 June 2009.

81. Ms Poots referred to the assessment. The result to which HMRC had been drawn was that the whole of the input tax claimed had been disallowed as a result of the lack of information. Mr Hare had contended in his witness statement that HMRC had failed to provide full details and/or reasons for this assessment; he argued that HMRC were put to strict proof.

82. Ms Poots stated that the latter contention by Romasave muddled the burden of proof; this fell on Romasave. HMRC had explained the assessments in their witness statements. She referred to Mrs Murfitt's witness statement. In correspondence since that point, HMRC had requested specific documentation, but emphasised that without a partial exemption calculation, input tax could not be recovered.

83. She referred to the section in Mr Hare's witness statement relating to Decision 2. She had already dealt with the point concerning the address and notification of the assessment. Mr Hare had contended that HMRC had failed to provide full details and/or reasons for this assessment. Ms Poots commented that HMRC had explained the basis, as stated in Mrs Murfitt's witness statement:

> "10. Decision 2 was a decision to disallow input tax for the VAT period 12/08 on the basis that no supporting evidence had been produced.
>
> 11. Officer Wood had written to the Appellant on 6 March 2009 . . . and asked for the information requested in the letter dated 11 September 2008 to be provided by 13 March 2009. Officer Wood gave the warning that, if Romasave did not respond, she would disallow all of the input tax reclaimed by the company as there had been no supporting evidence produced."

84. Ms Poots dealt with Decisions 3, 4 and 5 together. She submitted that the penalty notices followed on from the assessment, so that if the assessment was upheld, the penalty decisions should also be upheld.

85. In his witness statement, Mr Hare had referred to these decisions together. He stated that HMRC had not provided a detailed breakdown of how this assessment had been calculated, or provided documentary evidence detailing the assessment. He was unable to comment on the assessment or penalties until HMRC had furnished Romasave with this information.

86. Ms Poots referred again to Mrs Murfitt's witness statement, which confirmed that the assessment had been made because there had been no evidence produced by Romasave to support its input tax repayment claims, and that the misdeclaration penalty assessments had been made under s 63 VATA 1994 as Romasave had made returns which had overstated its entitlement to a VAT credit for input tax. Ms Poots emphasised the requirement for sufficient information on which to base a partial exemption calculation.

87. Turning to Mr Hare's comments in his witness statement relating to Decision 6, he had referred to HMRC's decision letter dated 16 March 2010. This had stated that the input tax had been reduced to nil as HMRC had been unable to obtain access to the records for VAT period 09/09. He contended that a letter from Romasave's accountant King & King had provided responses to the information required; the documentary evidence to which HMRC referred had been provided to Mrs Murfitt at the meeting on 19 June 2009.

88. Ms Poots explained that this had been a decision by Mrs Touhy, and referred to Mrs Tuohy's witness statement:

> "15. . . . Decision 6 was a decision to disallow the input tax claimed on Romasave's September 2009 return. The basis for this Decision was that Romasave had failed to produce documents in support of its claim. This was a decision taken by me and was done as a last resort because we had not received the information we needed from Romasave, as explained in a letter to Romasave of the same date . . . Romasave had continually failed to make contact with me in order to discuss this matter. The letter clearly explained what they needed to do if they disagreed with my decision, and made reference to some online factsheets for further guidance."

89. With reference to all the decisions, Ms Poots explained that for each VAT period, it was necessary to identify the input tax and the payment records which went with it.

90. That concluded the list of issues which Romasave had raised.

91. Ms Poots referred to the issues which HMRC understood to be those raised in this appeal (see [69] above), and in particular issue (4), what was required in order to apply a partial exemption method. This was an overarching problem for all the

periods involved. It was necessary to calculate a recoverable percentage. If Romasave had appeared at the hearing, it could have explained the position. It had not done so.

92. Ms Poots submitted that Romasave had failed to meet the burden of proof to show that the assessments were wrong.

93. In relation to the penalties, these went with the assessments; if the assessments stood, then the penalties stood.

94. This concluded her submissions on why HMRC submitted that the appeal should be dismissed.

95. She made submissions as to costs; we deal with those at the end of this decision.

Consideration and conclusions on the substantive appeal

96. We accept and agree with Ms Poots' analysis of the principles relevant to Romasave's appeal. Where a trader is partially exempt, it is necessary for the purposes of the standard partial exemption method under reg 101 of the VAT Regulations to establish for each VAT period the amount of input tax, the amount of the taxable supplies, the amount of the exempt supplies, and the total amount of the supplies (both taxable and exempt) made by the trader. If any of this information is not available, it is impossible to arrive at a proper computation of the recoverable input tax.

97. In addition, for input tax purposes it is necessary to have evidence verifying payment for the supplies made to the trader, whether these relate to the trader's taxable supplies, exempt supplies, or fall to be treated as part of the residual category in order to be subjected to the attribution process as indicated by Ms Poots in her description of the standard partial exemption method.

98. Ms Poots explained to us that the issues which HMRC had identified for the purposes of the hearing were all issues which could and should have been narrowed or entirely resolved by discussions between Romasave and HMRC. HMRC had at all times remained willing to consider any further documents and information provided by Romasave. Romasave's failure to provide information and documents and to respond to correspondence since the meeting in February 2016 had resulted in these matters having to be brought before the Tribunal.

99. We must emphasise that, contrary to the comments of Mr Hare in his witness statement, it is not for HMRC to prove the details of and basis for the VAT assessments. (The position for the misdeclaration penalties is somewhat different, as we will explain.) The burden of proof falls on Romasave as the party seeking to resist the VAT assessments. If Romasave does not succeed in satisfying the Tribunal that the assessments should be reduced or cancelled, they stand as made. This applies even if there may have been discussions between Romasave and HMRC which might have resulted in adjustments being agreed by HMRC once they had eventually been

provided with all the information that would have been necessary to resolve the issues in dispute.

100. With the above principles in mind, we look at each of the decisions in turn:

(1) Decision 1. The assessment disallowed the whole of the input tax for the period as a result of the lack of information concerning the input tax claimed. We do not consider that the points raised by Mr Hare in the relevant section of his witness statement constitute evidence sufficient to enable a proper calculation of recoverable input tax pursuant to the standard method. Accordingly, the assessment for 09/08 must stand as made.

(2) Decision 2. The position is the same as that for Decision 1. We have set out Mrs Murfitt's evidence concerning the assessment for 12/08. Again, this assessment must stand as made.

(3) Decision 3. This is the most substantial assessment, covering the VAT periods 03/06 to 06/08. It had been made following HMRC Officer Wood's letter dated 6 March 2009 in which she repeated her request for information made in her letter dated 11 September 2008. The amount of tax due to HMRC was £99,464, and the interest calculated as at 15 April 2009 was £9,861.34, giving a total of £109,325.34 as referred to in the Notice of Appeal form. In her letter dated 6 March 2009, Officer Wood indicated that if she did not receive the requested information by 13 March 2009, she would be raising an assessment against Romasave disallowing all input tax claimed by it, on the basis that no supporting evidence had been produced. We find that nothing in Mr Hare's statement shows any reason for the assessment to be varied or cancelled, as no sufficient evidence was provided to HMRC to enable them to carry out the calculation of recoverable input tax.

(4) Decision 6. We have set out above the reasons given by Mrs Tuohy for deciding to disallow the input tax for period 09/09. We find that the position is the same as for the other VAT assessments, and that Romasave has not satisfied us that there is any reason for this assessment to be varied or cancelled.

101. We turn to Decisions 4 and 5, the misdeclaration penalty assessments for VAT periods 06/08 and 03/06 to 03/08. In terms of burden of proof, HMRC have to show that the penalty has been incurred. Once they have done so, the only basis on which Romasave can resist the misdeclaration penalty assessments is if it can show the Tribunal either that it had a reasonable excuse for the conduct in question or that, at a time when it had no reason to believe that enquiries were being made by HMRC into its affairs, it furnished to HMRC full information with respect to the inaccuracies in its returns, ie the claims to deduction of input tax not supported by the requisite information.

102. Ms Poots referred to the automatic nature of the test under s 63 VATA 1994. She stated that for each relevant period, the penalty arose because the returns understated Romasave's liability (or overstated its entitlement to credit) and the amount of VAT which would have been lost as a result of that understatement

exceeded 30 per cent of the gross amount of tax for each relevant period (the output tax plus the input tax).

103. We are satisfied that that test was met for the periods in question. As a result, the burden of proof shifts to Romasave to show the Tribunal that its circumstances meet either of the conditions described at [101] above.

104. We can see no reasonable excuse for the conduct in question, namely the making of VAT returns containing input tax claims based on insufficient information. Romasave has provided no explanation for that conduct.

105. As to the second condition, we do not consider that Romasave fulfils it. The whole basis for the VAT assessment covering the periods in question is the lack of sufficient information to enable the recoverable input tax to be properly calculated. Nothing in Mr Hare's witness statement gives a sufficient explanation for the failure to provide the necessary information.

106. As a result, there is no basis on which we could interfere with HMRC's decision to assess these misdeclaration penalties. They must stand, alongside the underlying VAT assessment to which they are related.

107. As Romasave has not satisfied us that any of the assessments covered by Decisions 1 to 6 should be amended or cancelled, we must dismiss its appeal.

HMRC's application for costs

108. Ms Poots applied for costs pursuant to Rule 10(1)(b) of the Tribunal Rules. She submitted that there had been unreasonable behaviour on Romasave's part. In addition, she submitted that Romasave's behaviour had increased the costs incurred by HMRC in dealing with the appeal. HMRC had had to chase Romasave, apply for an order for the appeal to be struck out automatically if Romasave did not comply with the Tribunal's direction and serve a skeleton argument by 21 October 2016, and appear and argue in relation to Romasave's application for an adjournment. The majority of the hearing had been devoted to this. Further, HMRC had had to prepare the bundles, despite this being the responsibility of Romasave as provided for in the Directions. Ms Poots stated that Romasave had not complied with Direction 9, nor with Direction 8.

109. We had not been provided with a copy of the Directions agreed by Judge Cannan on 25 August 2016. As a result, we cannot comment specifically on the two Directions mentioned by Ms Poots.

110. However, we are persuaded, as a result of the correspondence to which we have already referred, that Romasave through its legal advisers has behaved unreasonably in conducting these proceedings. We have referred to the inconsistencies in the reasons given on Romasave's behalf for not producing its skeleton argument. HMRC were put into the position of having to produce a skeleton argument on 28 October 2016, the Friday before the hearing on Wednesday 2 November, without any

indication of the arguments which Romasave would be putting before the Tribunal. Romasave had applied on 19 October 2016 for an adjournment, which had been refused by the Judge considering the matter as indicated by the Tribunal in its letter dated 24 October 2016. Romasave had subsequently applied again on 1 November 2016 for an adjournment, despite the decision given in the Tribunal's 24 October letter. That further application was made on the day before the hearing. The parties had been warned when given notice of the hearing that adjournments would be unlikely to be granted at a late stage. Romasave's further application was made at such a late stage that it was not possible for it to be properly considered before the hearing. As a result, the representatives and witnesses for HMRC had to attend without knowing whether or not the substantive hearing would proceed.

111. We consider that this is a clear case of unreasonable conduct by and on behalf of Romasave. We therefore order that Romasave shall pay to HMRC the costs occasioned to them by such unreasonable conduct, to be agreed between the parties or, in default of such agreement, to be determined by a Judge.

Result of Romasave's substantive appeal

112. Romasave's appeal against all the assessments and penalties is dismissed.

Right to apply for permission to appeal

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

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 02 DECEMBER 2016