TC01991

Appeal number: TC/2010/02814

VAT – s 60 VATA 1994 – dishonesty penalty – no dispute on facts – Appellant appealed amount of penalty – whether full disclosure and co-operation by Appellant for purposes of mitigation – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX

PETER VAUGHAN ORWIN t/a P C JOINERY **Appellant**

- and -

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

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)
ROBERT BARRACLOUGH (MEMBER)

Sitting in public at Leeds on 3 October 2011

For the Appellant: the Appellant in person

For the Respondents Mr D Griffiths of Counsel for H M Revenue & Customs

DECISION

The Appeal

1. Having already given our decision at the conclusion of the hearing to dismiss this appeal, the following are the Tribunal's full findings of fact and reasons for the decision, a summary of which was issued on 17 February 2012.

2. This is an appeal by Peter Vaughan Orwin t/a P C Joinery ("the Appellant") against a Decision of the Commissioners of Her Majesty's Revenue & Customs ("the Respondents") to assess the Appellant to a dishonesty penalty in the sum of £63,105 in accordance with s 60(1) of the Value Added Tax Act 1994 (VATA).

3. On 22 February 2010 HMRC gave the Appellant notification of a civil penalty as a result of his having failed to account for VAT between 10 July 2002 and 31 October 2008 ("the decision period"). The penalty was issued for evasion through dishonesty of Value Added Tax in the sum of £210,353. The Appellant does not dispute the evasion of VAT or the amount assessed as having been evaded. Neither does the Appellant dispute that a penalty is payable. The appeal relates to the amount of the penalty.

4. The evidence before the Tribunal consisted of a copy of the exchange of correspondence between the Appellant and the Respondents between 2001 and 2010; witness statements by Mr Mark Denton, Mr David Derbyshire, Mr Chris Harrop and Mr Andrew Wilkins, Officers of HMRC; the Appellant's VAT registration document; the notice of appeal and Mr Orwin's oral evidence to the Tribunal.

Relevant legislation

5. Section 60(1) VATA 1994 states : -

> '(1) In any case where –
>
> > (a) for the purpose of evading VAT a person does any act or omits to take any action, and
> >
> > (b) his conduct involves dishonesty (whether or not it is such to give rise to criminal liability) he shall be liable .. to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct …'

Section 60 has been repealed for most purposes (Finance Act 2007 Schedule 24 para 29(d)) but remains in force for the purposes of this appeal (Regulation 4 Finance Act 2007 Commencement Order SI2008/568).

6. By s 70 VATA the Commissioners (or on appeal) the Tribunal may "reduce the penalties to such amount (including nil) as they think proper".

7. Mr Griffiths on behalf of HMRC said that the maximum penalty of 100% of the VAT evaded had been mitigated by 70%. The level of mitigation had been determined by reference to the criteria in HMRC's Public Notice 160 "Enquiries into Indirect

VAT Matters". HMRC's criteria in respect of their enquiry into VAT matters is contained at s 2.3 of Public Notice 160 dated September 2007 and states : -

> *'.. the maximum penalty of 100% tax evaded will normally be reduced as follows:-*
>
> - *Up to 40% for early and truthful explanation as to why the arrears arose and the true extent of them*
> - *Up to 40% for fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.'*

Factual background

8. The Appellant was first registered for VAT with effect from 23 July 2001. He was previously involved in a limited company (as a director trading under the name of Regional Master Limited) registered for VAT with effect from 16 April 1997 under registration number 686 6696 58, and which deregistered on 7 November 2001 after entering insolvency. The main business activity was described as "building contract work". Regional Master Limited's principle final place of business was at the same address at which the Appellant voluntarily registered for VAT with effect from 23 July 2001 under registration number 772 8607 96. The main activity for that business was described as 'joinery and general building'. On 14 June 2002 an Officer of HMRC called at the Appellant's given trading address to inspect his books and records. The Appellant could not be found. The Officer subsequently wrote to the Appellant warning that unless contact was made within five days the Appellant's VAT registration would be cancelled. There was no contact and subsequently the registration was cancelled with effect from 9 July 2002.

9. Following cancellation of the Appellant's registration, and despite continuing to make sufficient level of supplies to be required to remain on the VAT register, the Appellant did not re-register for VAT and no longer made VAT returns. However, he continued to receive "self billed" invoices from customers showing the Appellant's VAT registration number, the payments including VAT which were in addition to the "net" amounts showing on the Appellant's quotations for work.

10. On 19 June 2008 the Respondents evasion officers met with the Appellant to carry out an interview in relation to his business affairs. It was established that the Appellant had continued to carry out all record keeping requirements in maintaining business records with regard to sales invoices, bank receipts and self-assessment returns. The Appellant explained that having become a sole proprietor he had to suffer his own tax deductions under the Construction Industry Scheme and also the deductions of his sub-contractors. He said that after making these scheme deductions he was finding sub-contractor wages exceeded his income. The Appellant said that he therefore allowed his VAT registration to be cancelled and gave quotes for work without VAT. However, he continued to use invoices which showed his earlier VAT registration number, and contractors continued to pay him the VAT due. For the next six years he continued to receive VAT without making payments of the VAT or enquiring how to pay this VAT to HMRC. To correct the VAT position on 10 August

2008, HMRC retrospectively re-registered the Appellant as a sole proprietor with effect from 10 July 2002. The Appellant therefore remained liable to account for VAT for the decision period, and following further investigation HMRC determined his total liability for that period at £210,353. HMRC assessed the Appellant in accordance with s 60(1) VATA 1994 and mitigated the amount by 70% in accordance with s 70(1) VATA 1994 resulting in a penalty of £63,105.

11. The calculation of the Appellant's VAT liability for the decision period was made with the support of his accountants and for simplification purposes the VAT liability was determined with reference to the "flat rate scheme" as provided in the VAT Regulations 1995, Regulation 55. The amount of VAT due was calculated at 13.5% of the total value of sales, being the rate for a taxable person within the trade sector for "labour only building or construction services". Strictly speaking the Appellant was not eligible to use the "flat rate scheme" during the decision period because his annual turnover was in excess, in each year, of the £150,000 limit for using the scheme. Nonetheless this method of calculation was used with the agreement of the Appellant through his accountant and HMRC to arrive at a reasonable calculation of VAT due.

12. HMRC say that 100% VAT mitigation was not possible because there had not been a full and unprompted disclosure by the Appellant. The maximum amount of mitigation which HMRC would have been able to consider was 80%. HMRC allowed the full amount, 40% (of 40%), for the Appellant's early and truthful explanations as to the reason for the arrears and quantifying the amount of the arrears. HMRC then allowed a further 30% mitigation (of 40%) for the embracing and meeting of responsibilities under Public Notice 160 Enquiry Procedure. Full mitigation was not justified, HMRC say, because there had been delays in the Appellant completing and returning VAT documentation. The VAT 1 "Value Added Tax - Application for Registration" form was sent to the Appellant on 26 June 2008 but not returned until 15 August 2008. Furthermore, a long period VAT Return ending 31 October 2008 was due to be made by 30 November 2008, but was only received by HMRC on 13 February 2009. Duplicate copies of the Return had been sent to the Appellant on 26 November 2008 and 3 December 2008 (the Return that HMRC received was a 3 December 2008 copy) and HMRC had to write to the Appellant on 5 February 2009 advising that an assessment would have to be made for the VAT they believed to be due unless the Return was submitted within two weeks. In the event, the Return was submitted a week later. The total mitigation allowed was therefore 70% and the penalty liability was £210,353.00 VAT x 30%, that is, £63,105.00.

The Appellant's grounds of appeal

13. The Appellant's grounds of appeal, as disclosed by his notice of appeal, are that he and his accountant gave 100% co-operation to HMRC in their investigation. The Appellant contended that the penalty decision (originally issued 3 August 2009 and withdrawn due to a technical error), made on 22 February 2010 had been a "snap decision" made marginally inside the time limit within which HMRC had to make its review decision.

14. The Appellant also said that the VAT figure had been calculated on his gross earnings, with no allowance having been made for any invoices/contracts with no VAT attached, and that accordingly the civil penalty had been based on an erroneous figure.

The Commissioners' response

15. HMRC assert that the Appellant's conduct had been dishonest and that he had gained a financial benefit from his conduct. They said that the Appellant, following the lapse of his VAT registration, went "missing" from the tax authorities despite the fact that he was knowingly trading above the VAT threshold and continually received self-billing invoices, deliberately not notifying the persons raising the invoices that he was not VAT-registered. HMRC assert that he did this with the intention of avoiding paying VAT. In addition, HMRC say the Appellant received payment of VAT on the self-billed invoices whilst knowing he was no longer registered for VAT.

16. HMRC further assert that the Appellant retained the VAT paid to him without making any declaration of the amounts to HMRC and continued to trade throughout the relevant period as a joinery contractor, gaining a tax advantage over VAT-registered traders in the building/joinery trade working on large project work and employing sub-contractors.

17. HMRC also say that, following the lapse of the Appellant's VAT registration status, it would have been reasonable for him to expect formalities to have been completed – that is outstanding final returns, a declaration of VAT due on stock and assets, and otherwise monitoring and accounting for payments due or receivable from HMRC.

18. With regard to the Appellant's ground of appeal that the Respondents had made a "snap" decision, the Respondents say that they were required to complete the review by Monday 12 October 2009. They say that the majority of the review work had been completed by Friday 9 October 2009. However, there was an outstanding query with regard to why the flat rate scheme had been used to calculate the Appellant's outstanding VAT liability. After speaking to the Appellant the Respondents agreed an extension for the period within which the review had to be carried out, but in the event the Respondents were able to complete the review by 12 October 2009. In other words 'in time', and issue the review decision letter. The Respondents therefore say that there is no evidence or grounds to suggest that a 'snap' decision was made. HMRC therefore submit that the VAT liability on which the penalty has been calculated was determined by reference to information supplied by the Appellant and had in any event been agreed with the Appellant through his accountant.

Tribunal's Decision

19. From the facts available to the Tribunal it is clear that the Appellant's grounds have no legal basis. It is clear that the Respondents assessment of the penalty is proper and indeed, as they suggest, possibly generous, and has been reached by a sensible application of the Regulations and appropriate policies. It cannot be said that the

Appellant fully co-operated with the Respondents in supplying information promptly as required. The Respondents had selected his 2005 Self Assessment Return for enquiry following one of a sequence of late submitted Returns, and that enquiry ultimately resulted in the VAT penalty being imposed. The VAT penalty arose following a direct tax investigation and not on the basis of any voluntary disclosure by the Appellant. It was during the course of the enquiry that, following an examination of Bank receipts, additional income was found in excess of that declared in the Appellant's Self Assessment Return, the value of which was more or less equivalent to the VAT on declared sales, for which the Appellant had not accounted to HMRC. The Appellant did not co-operate fully. He did not promptly return the long period VAT return when requested. Indeed, a second and third return was sent to the Appellant by the Respondents before he finally completed and returned it.

20. The Tribunal is therefore satisfied that HMRC have correctly decided that the Appellant is liable to a civil penalty under s 60 VATA 1994 and that an appropriate level of mitigation of 70% to reflect his overall cooperation is appropriate, thereby allowing an adjustment for the mitigating factors of the case as set out under VATA s 70(1). The Tribunal therefore concludes that HMRC have correctly assessed the Appellant in accordance with s 76 and s 77 VATA 1994.

21. The Appellant's appeal is accordingly dismissed.

22. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 4 May 2012