# TC02953

**Appeal number: TC/2012/05240**

***VAT – penalty – careless or deliberate – voluntary disclosure prepared but in meantime question raised by HMRC – omission found to be deliberate rather than careless and also prompted – further mitigation allowed and penalty reduced to 36.75% - appeal allowed in part***

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

**MARGARET FINDLAY** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JUDITH POWELL**
**GILL HUNTER**

**Sitting in public at Bedford Square on 17 January 2013**

**Mrs Louise Norman, VAT Agent, for the Appellant**

**Bruce Robinson, Officer with HMRC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against a penalty imposed in respect of VAT paid late. The penalty was calculated by the Respondents on the basis that the omission from the relevant return was deliberate and that disclosure was prompted whereas the Appellant says that the omission was careless, being based on a naïve misunderstanding of VAT and would have been unprompted but for HMRC discovering the omission before a voluntary disclosure could be completed so the penalty should be reduced as a result.

2. **Facts**

3. The Appellant is aged 82 and did not attend the hearing of the appeal. We were told that she would have found it difficult to do so but this meant we did not have an opportunity to hear directly from her about the events leading to this appeal. We heard evidence from Mr Tony Nickson, Higher Officer and caseworker with HMRC responsible for conducting assurance visits to VAT registered traders and pre-credibility checks on repayment VAT returns.

4. The Appellant is a racehorse owner and has owned racehorses for a number of years. She sold a racehorse named "Big Fella Thanks" and received payment of £200,000 on 25 March 2011. It is not disputed that the sale of the racehorse attracted VAT.

5. The Appellant used the services of Weatherby's VAT Services to deal with her VAT returns. The payment of £200,000 was credited to the Appellant's bank account with Weatherby's on 25 March 2011 but the sale was not brought to the attention of the VAT agents at Weatherby's and the return for the period 04/11 did not show output tax for the sale of Big Fella Thanks. On 26 July 2011 Mrs Findlay received a further £40,000 in respect of the sale of the same horse. Weatherby's VAT Services did not hear of the sale until August when the Appellant advised them of the sale for inclusion in the 07/11 return. It was said she did not receive the invoice from the unspecified third party who prepared it until August 2011 but we did not hear from the Appellant and cannot conclude anything about this. The Appellant sent the invoice to Weatherby's in August 2011. When Weatherby's received the invoice they realised the VAT related to the 04/11 period, could not be included in the 07/11 return and the omission would have to be disclosed by way of voluntary disclosure.

6. During the course of a pre-credibility check, Mr Nickson identified an input claim in August 2011 by an unidentified third party for £40,000 for the supply to him of Big Fella Thanks. The VAT invoice supporting this claim was in the name of Mrs Margaret Findlay, was dated 31 March 2011 and numbered 04-100. The invoice states the sale price of £200,000, identifies the horse sold as "Big Fella Thanks" and shows VAT payable of £40,000 and a total due of £240,000. It was never discovered who prepared the invoice but it was not prepared by the Appellant and it was unclear when she first saw it. Confusingly, a second invoice, dated 14 April 2011 and thus falling into the same VAT period, was issued as well and, again, it is unclear

who issued it. Both invoices bear the same number and are identical in all material respects apart from the date.

7. Mrs Norman told us, and we accepted what she said, that when Weatherby's realised that the sale related to an earlier period they realised the sale could not be included in the 07/11 return and started to prepare a voluntary disclosure of the omission from the return for the earlier period. This would have been declared in a voluntary disclosure lodged in September 2011 covering other matters; by then HMRC had alerted the Appellant to their knowledge of the omission and raised an assessment on 26 August 2011 so it could not be the subject of a voluntary disclosure.

8. Mr Nickson had checked the 04/11 return of the Appellant in the context of his enquiry into the related input claim and had discovered that the output tax relating to the sale was not included on it nor accounted for in payments made in that period. . He raised an assessment for the unpaid VAT on 26 August 2011 and requested an explanation of the circumstances leading to the omission from the 04/11 return at the same time. Following further correspondence he notified his conclusion in letters of 2o October 2011 and 31 October 2011 and a penalty notification of 17 November 2011. He explained, in the context of the penalty calculation that he regarded the omission as deliberate and the disclosure was prompted and that the penalty was calculated on this basis.

9. In the context of his decision about mitigating the penalty Mr Nickson confirmed he knew that the Appellant was elderly. However he also stated that she had been a racehorse owner for many years and had failed on this occasion to check what her obligations were in relation to VAT on the sale and specifically the timing for payment of VAT after she received £200,000 in March 2011.

10. In evidence and in his witness statement (the contents of which he confirmed to us) he explained the law relating to penalties. (This is found in Finance Act 2007 Schedule 24). Where an omission is deliberate and where disclosure is prompted, as he considered both to be the case here,, the penalty ranges between a minimum of 35% and a maximum of 70% of the potential lost revenue – in this case £40,000. The conduct of the Appellant determines whether the penalty is the maximum, the minimum or somewhere between the two. Mitigation is applied to the 35% range between the minimum and the maximum. He mitigated this in the following way. The maximum reduction is 30% for "telling", 40% for "helping" and 30% for "giving" and so the maximum of 100% applied to the 35% difference between 70% and 35% would reduce the penalty to 35%.

11. The mitigation applied by Mr Nickson in this case was 15% for telling, 30% for helping and 15% for giving and this results in a 21% reduction of the penalty to a total of 49% of the potential lost revenue. The potential lost revenue was in fact (because of other undisputed factors) £38,274 and the penalty, following mitigation, 49% of that figure. We were not clear how Mr Nickson reached his decision about mitigation since he stated that Mrs Findlay had not, in his opinion been truthful, had given no assistance and had not given bank statements as requested.

12. The Appellant requested a review of his decision. Upon review the penalty was further mitigated by 75% of the 35% range resulting in a total penalty of 43.75%. the further reduction was made because it was accepted that the Appellant and its agent had understandable difficulties in obtaining bank statements from an independent bank so that the mitigation for "helping" was increased from 30% to 35% and "giving" from 15% to 25%. The person conducting the review, whilst accepting these difficulties, did not apply full reduction to either category because, in the case of "helping" there was a lack of co-operation in providing a full explanation of the circumstances and in the category of "giving" there was no holding letter explaining there was likely to be a delay. There was no further mitigation allowed by the reviewer in the category of "telling" from the 15% (out of a maximum of 30%) mitigation given by Mr Nickson since in the opinion of the reviewer the mitigation given by Mr Nickson was appropriate since there was no explanation of the underlying circumstances or the background to the arrangements and the third party acting on behalf of the Appellant in making the sale was not identified.

13. **Submissions**

14. The Respondents say the Appellant was an experienced racehorse owner first registered for VAT as long ago as 2003 and should have been aware of her VAT obligations or should have checked the position when she received the sum of £200,000 in March 2011. It was implausible to say she was not aware of that the sale had taken place, it was not clear when she received the invoice and she failed to give them details of the person who prepared it on her behalf. They say the omission is deliberate rather than careless; they accept it was not, at any stage, concealed, which is the most serious level of inaccuracy. The internal guidance states that "careless" means a "failure to take reasonable care" whereas "a deliberate inaccuracy" occurs when a person gives HMRC a document they know contains an inaccuracy. They say that the inaccuracy came to the attention of Weatherby's in August 2011 but was not drawn to the attention of HMRC before Mr Nickson raised the matter in his assessment on 26 August 2011. They were not persuaded that a voluntary disclosure had been prepared since no evidence of it was given to them.

15. The Appellant says the omission was careless and not deliberate. Mrs Norman says on behalf of the Appellant it was a simple and naïve mistake and resulted from a misunderstanding of VAT. In any case, she says, the Appellant would have disclosed the mistake on the Voluntary Disclosure prepared for September but when Mr Nickson discovered the omission and raised the assessment in August it would not have been appropriate to include the omission in the statement and it was equally inappropriate to return the VAT in the 07/11 return since it related to the 04/11 return.

16. **Our decision**

17. We have first to decide upon the quality of the original omission and whether it was careless or deliberate. We did not have the opportunity to hear from the Appellant who might have been able to provide relevant factual evidence of what happened. In the absence of hearing from her we have to decide the matter on the facts that exist. There is an inference that the omission was only careless because she

did not receive the VAT invoice until August and immediately forwarded it to the agents. We agree with the Respondents that nothing helpful has been explained about the circumstances surrounding the original omission from the 04/11 return. We know nothing about where the horse was kept, how the decision was reached to sell it nor how the paperwork was handled. We accept fully what they say about her receipt of funds. The receipt of the £200,000 is one clear fact that we can find. £200,000 is not a trivial amount and she should have, at the least, made enquiries about what to put on her VAT returns when she received it. This might be regarded as a failure to take reasonable care and we might have concluded differently if, for example, the horse was sold and no funds at all were received until August. But she did receive substantial funds and must have known there was a related substantial VAT liability. If she decided to wait until the further £40,000 was received then she should have checked with her VAT agents that this was the correct thing to do. We take into account that she is elderly but we also take into account that she had owned racehorses for many years and had access to professional advice. If we had heard evidence from her it is possible we would have concluded differently but we did not and so we conclude that the omission was deliberate rather than careless.

18. Having concluded that the omission was deliberate we then considered the decision about mitigation. The maximum penalty is 70% of the potential lost revenue. (Finance Act 2007, Schedule 24 ("Schedule 24") paragraph 4(2)(b)). Schedule 24 then provides for potential reduction to this maximum. Paragraph 9 of Schedule 24 contains provisions for reduction where the omission is disclosed and distinguishes between prompted and unprompted disclosure.

19. The Respondents say the disclosure was prompted and the Appellant says it would have been unprompted but for Mr Nickson contacting them prior to the September Disclosure statement being issued. Disclosure is unprompted if "made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy and otherwise is prompted". Schedule 24 paragraph 9(2). The difference between the type of disclosure is that where the disclosure is unprompted the penalty can be reduced to 20% rather than to the minimum of 35% where the disclosure is prompted. In view of the definition of unprompted and that anything else is prompted we agree that the disclosure was prompted. The result of this is that the penalty cannot be reduced below 35%.

20. At this stage we wish to record there is no reason to doubt that Weatherby's acted in what they believed were the best interests of their client. They say they have put systems in place to try and capture information sooner. We find it harsh when the reviewer criticised their failure to let Mr Nickson know there might be a delay in obtaining bank statements whist accepting this is the counsel of perfection. We can see that there might well have been a short delay whilst they decided how to deal with the omission from the 04/11 return.

21. These matters are relevant to possible mitigation of the penalty to some amount between the maximum of 70% and the minimum of 35%. In this appeal we have power to substitute for HMRC's decision another decision that HMRC had power to

make. This allows us to increase or reduce the penalty decided upon by HMRC or to affirm their decision.

22. We considered their decision concerning mitigation for "helping" and "giving" and conclude that the mitigation should be of the full amount in both cases. The reason for allowing further mitigation for "helping" is that the reviewer restricted mitigation in this category for much the same reason as he did in the first category of "telling" and we conclude there must be a difference between the two categories and that the Appellant did what she could, through her agent, to help. We are not persuaded that background circumstances were relevant at this stage. What was relevant was dealing with the omission which, through Weatherby's, was conducted helpfully. We have already commented that we regard the criticism of Weatherby's about the delay in the production of bank accounts to be harsh and again we have decided the mitigation should also be made to the maximum extent possible for the category of "giving".

23. The possible mitigation for "telling" is the most difficult category. We have agreed with the Respondents that the omission went beyond carelessness and that, because Mr Nickson discovered the error at much the same time as the agents did, but acted more speedily to deal with it, the disclosure was prompted but we were persuaded that once the mistake was discovered by Weatherby's it would certainly have been disclosed in the voluntary disclosure statement. The Appellant might have acted more quickly so that it could have been brought to the attention of her agents and thus to the attention of HMRC sooner than happened but we have decided that this error on her part determines the quality of the disclosure and whether it was careless or deliberate and the provisions about mitigation contemplate that a deliberate omission can be mitigated under the "telling" category and we can see that the Appellant, through her agents would have made a disclosure very soon after the error was discovered by them and conveyed to her. We have decided that further recognition needs to be given to the way in which the Appellant would have acted (through Weatherby's) in the weeks immediately following the discovery of the error and have mitigated the penalty by 33.25% (being 95% of the 35% range between the irreducible 35% and the maximum of 70%). On this basis we have reduced the penalty to a total of 36.75% (35% + (35-33.25 = 1.75%) and to that extent have allowed the appeal in part.

24. 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.

**JUDITH POWELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 10 October 2013**