[2015] UKFTT 0543 (TC)

TC04699

Appeal number: TC/2014/04388

VAT - input tax wrongly claimed on vehicles used for private purposes - penalty for prompted disclosure arising from deliberate behaviour without concealment - whether any evidence of claimed intention to use the vehicles for business purposes - no - appeal not allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAM NARROYA **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LES HOWARD

Sitting in public at Nottingham Justice Centre, Carrington Street, Nottingham on 6 May 2015

Mr Ram Narroya, the Appellant in person

Mr David Ridley, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Ram Narroya ("the Appellant") against the decision of The Commissioners for Her Majesty's Revenue and Customs ("HMRC") to impose a civil penalty in the sum of £5,545.73, under Schedule 24 of the Finance Act 2007, relating to a prompted disclosure arising from deliberate behaviour (without concealment), assessed at a rate of 47.25% on an assessment of £11,785.55, following inaccuracies in his VAT return for the period ending 09/11.

2. The assessment and penalty resulted from a decision to deny recovery of input VAT incurred on three cars which the Appellant claimed were intended to be used in a chauffeuring business. HMRC say that they have not been provided with any evidence of such an intention, the cars were never used for a chauffeur business and in fact had been used for private purposes.

3. The Appellant does not dispute the inaccuracies in his VAT return, the value of the potential lost revenue, the assessment or that the discovery was prompted. The only issue in dispute is whether the Appellant's behaviour in connection with the discovery was deliberate.

Background

4. The Appellant registered for VAT as a sole proprietor effective from 14 February 2005 under VAT number 859 8858 35. His declared main business activity was given as the building and renovation of residential property. His VAT registration remains extant.

5. The disputed penalty arose from a visit initially undertaken on 26 January 2012 to verify a repayment claim for period 09/11 of £11,785.55.

6. At the visit on 26 January 2012, the Officer found that the Appellant had sought to recover VAT incurred on three cars:

An Audi A4, on which he claimed input VAT of £2,483.83

A VW Jetta, on which he claimed input VAT of £1,116.67

A BMW X5, on which he claimed input VAT of £7,040.67

7. The Appellant explained that he had decided in June 2011 to diversify into a chauffeur service, taking clients to airports and business meetings. He had purchased the cars between July and September 2011.

8. The Appellant confirmed that the three vehicles were parked on his drive at home and that he had driven them for private purposes. He had not advertised or set up a website but was said to have "got some letterheads" though those were not available. The Officer asked about the insurance required and the Appellant stated

that he needed public liability insurance but advised that he "did not have the insurance documents available today but would provide these".

9. During the visit the Officer identified other input tax discrepancies, which are not subject to the appeal, and also identified that the Appellant was partly exempt, due to income from residential property rental.

10. The Officer explained that the business should provide objective evidence of its intention to make future supplies and requested the following to be available for a future meeting:

> DVLA documentation and insurance documents for the three cars;
>
> A tax invoice for the BMW;
>
> Confirmation and documentary evidence to show payment for the cars;
>
> Documentary evidence to show what steps were taken to set up a chauffeur service;
>
> Other documentary evidence required in respect of the visit.

11. At a return visit on 17 May 2012, the Appellant said that he could not provide any documentary evidence to substantiate the setting up of a chauffeur business and that he would be happy for this input tax on the three cars to be disallowed. He stated that "he had been very busy and therefore had not had the time to progress his original intention to set up the chauffeur business". The cars were again being used for personal purposes by his family.

12. The Appellant had been made fully aware of the rules regarding the recovery of input tax during a previous assurance visit in 2008, where input tax was disallowed for a vehicle. HMRC's letter dated 1 December 2008 informed the Appellant quite clearly that non-business items should not be claimed. The Appellant was advised that under normal input tax recovery rules VAT incurred can be recovered only if the input has a clear link to sales or the outputs of a business which carry a right to deduct input tax.

13. In view of the fact that this area of VAT had previously been brought to the Appellant's attention, HMRC considered that the Appellant had deliberately continued to claim VAT that he knew he was not entitled to. HMRC therefore concluded that the Appellant's behaviour was deliberate. At the time when the VAT return for period 09/11 was submitted in early November 2011, the Appellant was aware that the cars were not being used for business purposes and had produced no evidence to show that there was an intention for such use in the future. The claim for input tax recovery was, therefore, inaccurate and his behaviour was considered to fall within the description of "deliberate behaviour without concealment", under Paragraph 3(1)(b), Schedule 24 of the Finance Act 2007.

14. On 25 July 2013 the return for the period 09/11 was amended and an assessment of tax due was made (within the two years allowed by s 73(6)(a) of the VAT Act 1994).

15. On 28 October 2013 a penalty explanation letter was issued stating that the incorrect claiming of VAT on the purchase of the three cars not used or shown to be intended to be used in the business was a prompted inaccuracy, resulting from deliberate behaviour, making the Appellant liable to a penalty in the range 35 - 70%.

16. The following reductions were allowed:

> Telling: 15% (of maximum 30%) - some mitigation given for the explanation of how the errors arose
>
> Helping: 20% (of maximum 40%) - mitigation given for assistance given by the Appellant in the attribution of input tax for the partial exemption calculations
>
> Giving: 30% (maximum) - full mitigation was given for allowing access to the records

Total: 65%

The penalty rate was therefore calculated as: 70% - (65% of 35%) = 47.25%.

17. The Notice of Penalty assessment was issued on 6 December 2013 showing a penalty amount of £5,545.73 in respect of inaccuracies in input tax declarations in period 09/11 of £11,737, of which £10,641.17 related to the three cars.

18. By telephone on 23 December 2013, the Appellant said that he wished to appeal the penalty amount. He denied that his behaviour was deliberate stating:

> "Your reasoning for a deliberate act appears to be that on the previous VAT visit, you informed me that you found non-business items had been claimed. This was correct at that point but at that time I did not understand that the items in question were non-business items. This was therefore NOT deliberate. It is difficult to provide documentary evidence of an intention. I did however discuss this intention with my barrister and my accountant at the time and I am sure they will provide a written statement to confirm this. It is my strong opinion that these penalties should be cancelled because there was no deliberate act and I have more than fully cooperated with you on this."

19. In a subsequent email dated 27 February 2014, the Appellant stated:

> "With regard to the penalty of £5,545.73, I am not in agreement with this because my intention was to set up a chauffeur business for weddings etc. Further to this end I spoke to my barrister about the legal requirements involved and I can provide confirmation of this from him if required. This clearly demonstrates my intent. After carrying out some market research I discovered that there were many companies of this type in Derby. The result

> of this is that prices are relatively low and it was therefore felt not to be economical to prove. I changed my mind therefore about the business around March 2012. I had been under a lot of stress at that point due mainly to my father's illness and simply lost heart and did not proceed."

20. On 14 March 2014, by email, the Appellant requested a review of the penalty decision and submitted a letter from a barrister dated 13 March 2014 which states:

> "I can confirm that during 2011 Ram entered into discussions with me on the subject of his intention to purchase vehicles with a view to starting up a chauffeur car hire business. I particularly recall that these vehicles were high end cars to include a Bentley. Mr Narroya was most keen on this idea which had arisen from his own wedding experiences."

21. HMRC replied that the statement did not support the Appellant's purchase of a BMW, an Audi and a Jetta which are the cars on which he reclaimed input tax in his 09/11 VAT Return. HMRC reminded the Appellant that they had requested insurance documentation to verify that the Appellant had taken out public liability insurance as a requirement and evidence of a chauffeur business, together with other documentation by way of evidence of any steps taken to set up the chauffeur business. Nothing had been produced.

22. On conclusion of the review on 26 February 2014, HMRC upheld its decision.

23. On 9 May 2014, HMRC issued their review conclusion letter upholding the original penalty decision.

24. On 14 July 2014, the Appellant lodged a Notice of Appeal with the Tribunal Service.

25. On 21 October 2014 the Appellant emailed the insurance documentation relating to the BMW car. However the terms of the Policy specifically excluded "use for hire and reward".

26. HMRC obtained a copy of the invoice for the BMW which showed that VAT had not in fact been charged on the vehicle. On 29 October 2014, HMRC wrote to the Appellant stating that they were concerned that the Appellant had deliberately withheld the invoice, and that this was further evidence of deliberate behaviour on his part.

27. On 11 November 2014 the Appellant wrote to say that he "thought there was VAT on the car purchase" and that in his view it was not deliberate behaviour.

The legislation

28. The relevant legislation is contained under:

VAT Act 1994

- Section 83 - sets out matters that carry a right of appeal.

Schedule 24 of the Finance Act 2007

·Paragraph 1A(1) details when a penalty is payable
·Paragraph 1A(2) defines a relevant inaccuracy
·1A(2)(a) an understatement of a liability to tax
·Paragraph 3(1) details the degree of culpability
·Paragraph 4 sets out the amount of the penalty.
·Paragraphs 9 and 10 set out the reductions for disclosure.
·Paragraph 11 consideration of special reduction
·Paragraph 13 deals with the time limits for issuing a Sch 24 penalty
·Paragraph 14 deals with the suspension of a penalty

The Appellant's contentions

29. The Appellant's stated grounds of appeal as contained in his Notice of Appeal dated are:

"My appeal is based on the fact that it was my intention to set up a car chauffeur business.
I submitted a VAT return for the period ending September 2011 on which I claimed input tax for 3 cars. At that point my intention was to set up the chauffeuring business. I then changed my mind around January to March 2012. My father was taken seriously ill and after several failed operations he passed away. It was very hard to deal with anything else during this period and I subsequently felt I could not cope with setting up a new business.
The return was not paid. I had a visit from the VAT officer to discuss my claim.
The VAT officer issued a penalty and asked for proof of my original intention to start the business. I provided a letter of explanation dated 27th February 2014 , the officer then wanted evidence to support this letter, which I provided to the officer, a letter from my barrister confirmed that I had the intention to set up the business. I had discussed this at length with him so he was fully aware of my intention.
The officer did not accept this, as an exact make and model of car had not been specified to purchase. We had searched for suitable cars at the right price and had kept an open mind depending on which models were available. However the letter did mention high end vehicles which it was obviously always our intention to purchase.
The letter from my barrister does not confirm the three cars in question but does confirm "high end vehicles" the X6, Audi and VW subsequently purchased are the high end vehicles.
I spoke to the officer to ask her to reconsider the matter, she asked for the barrister to confirm the vehicles and insurance.
I have sent HMRC a revised letter from my barrister confirming the mentioned vehicles.
The officer has now taken the stance that this was just a business idea and nothing more and we had no intention of setting it up.
This is definitely not the case. It was my intention to set this business up.
The officer says I used these privately and again this is not the case. Once we decided not to continue with the car business, the vehicles were used on other business. Prior to purchasing the high end chauffeur cars I did already own several cars for private use and certainly had no need for any more
I think the officer concerned is not giving this matter due consideration. It appears that no matter what evidence is produced, this is disregarded. This applies even to the word of a barrister."

30. At the hearing the Appellant reiterated his above grounds of appeal.

HMRC's submissions

31. Schedule 24 of FA 2007 provides a penalty regime across both direct and indirect taxes. Paragraphs 1-3 of Schedule 24 state as follows:

> (1) A penalty is payable by a person (P) where -
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy, which amounts to, or leads to -
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless, within the meaning of paragraph 3, or deliberate on P's part.

32. HMRC contends that conditions 1 and 2 are established in that the Appellant, for the reasons given above, rendered to HMRC documents containing inaccuracies, namely VAT returns including incorrect claims for input tax. HMRC contend that the inaccuracies were deliberate but not concealed.

33. The definition of 'deliberate but not concealed' is provided for in paragraph 3 (1)(b) of Schedule 24 to FA 2007 and occurs 'if the inaccuracy is deliberate but P does not make arrangements to conceal it'.

34. The amount of any penalty is provided for in paragraph 4 of Schedule 24 to FA 2007 and, so far as material, paragraph 4 (1) provides, where actions of a taxpayer are 'deliberate but not concealed', for a penalty of 70% of the 'potential lost revenue'.

35. The 'Potential Lost Revenue' in respect of a document, is defined within paragraph 5 of Schedule 24 of FA 2007, and includes an amount which would have been repayable by HMRC had the 'Inaccuracy not been corrected.'

36. HMRC found and corrected a number of inaccuracies in the Appellant's VAT return for period ending 09/11. Specifically the Appellant had claimed input tax in relation to the purchase of the three cars.

37. The Appellant states in his appeal that he intended to start a chauffeuring business, using these cars, and that he had discussed this business idea with a barrister. He states that his intentions only changed after his father became seriously ill. However, when challenged about the personal use of the vehicles, and asked for

further details of the intended business, the Appellant could not provide any documentary evidence and subsequently withdrew the claim.

38. HMRC's view is that in light of a previous disallowed claim for input tax on a car in 2008, full reasons for the disallowance having been given at that time, the Appellant would have been fully aware of the limited circumstances in which input tax was allowed to be claimed on cars. Furthermore it became apparent at a later date in the current claim that one of the cars, the BMW had not had VAT charged on it in the first place.

39. The information initially provided by the barrister gave incorrect car details as it included a car (a Bentley) which was not part of the claim. HMRC also submits that one of the cars, the VW Jetta, is not what would generally be regarded as a "high end car" for the purposes of the Appellant's purported business model. This is borne out by the relatively low amount of VAT attributed to this car (£1,116.67). Overall HMRC submit that the argument put forward by the Appellant, that he intended to start a chauffeuring business, lacks credible evidence. Given the previous disallowance in 2008, and the fact that there was no VAT charged on the BMW, this was clearly deliberate behaviour on the part of the Appellant.

40. As such the Appellant is liable to a maximum penalty of 70% of the potential lost revenue, but after an allowance for mitigation, the penalty was reduced to 47.25% of the potential lost revenue.

41. Because the inaccuracy was discovered during checks made into the Appellant's VAT return, HMRC consider this to be a 'prompted' disclosure within the meaning of paragraph 9(2)(b) of Schedule 24 to FA 2007. The scheme of the legislation is such that all disclosure is 'prompted' unless it falls within the definition of an 'unprompted' disclosure as within paragraph 9(2)(a) of Schedule 24, that is if it is made at a time when the person making it has no reason to believe that HMRC had discovered it or are about to discover it. The errors were found during the course of the compliance checks, and therefore the disclosures were prompted.

42. HMRC has the discretion to make a special reduction for certain penalties where there are special circumstances, but submit that no special circumstances apply in this case, and that no further deductions can be given.

Conclusion

43. A deliberate but not concealed inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy.

44. When the Appellant purchased the three vehicles he did not take out the insurance appropriate for a chauffeur business. His initial intentions could be regarded as a business idea that he may have discussed with advisors. However no evidence has been provided to demonstrate a firm intention to start a chauffeur business. HMRC established at their initial visit that the cars had been parked at his home address and had been used for private purposes.

45. Accordingly, at the time when the Appellant submitted his VAT return for period 09/11 in early November 2011, he was aware that the cars were not being used for business purposes and he has supplied no evidence to show that there was an intention for such use in the future.

46. The claim for input tax recovery was, therefore, inaccurate and the Appellant's behaviour in so doing falls within the description of prompted deliberate behaviour without concealment, as envisaged by Paragraph 3(1)(b), Schedule 24 of the Finance Act 2007.

47. The reductions for telling HMRC of the inaccuracy, for helping and giving HMRC access to records to enable the inaccuracy to be quantified are, in our view, reasonable and appropriate. We therefore consider that the reduced penalty rate of 47.25% reflects the deliberate behaviour shown in making the return with the inaccuracy and the assistance given to HMRC in establishing the tax due.

48. For the above reasons the Tribunal dismisses the appeal.

49. 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 CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 27 OCTOBER 2015