[2017] UKFTT 788 (TC)

TC06194

Appeal number: TC/2015/04906

VAT – Penalty for inaccuracy in VAT return (Sch 24 FA 2007) – Whether inaccuracy was "deliberate"

FIRST-TIER TRIBUNAL
TAX CHAMBER

MEHAFFEY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR TONY HENNESSEY FCA

Sitting in public at Belfast on 25 May 2017

Mr Adrian Huston JP, of Huston & Co Tax Consultants & Accountants, for the Appellant

Ms Sharon Spence for the Respondents

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DECISION

Introduction

1. Mehaffey Ltd (the "Appellant" or "Appellant company") appeals against a penalty notice dated 4 September 2014 imposing on the Appellant a penalty under Schedule 24 of the Finance Act 2007 ("Schedule 24") in the sum of £156,162.72, for inaccuracies in the Appellant's VAT returns for the periods 12/09 to 09/13.

2. The penalty was consequential to an earlier 23 January 2014 notice of assessment, in which HMRC assessed the Appellant to an additional amount of VAT in the sum of £258,495. That assessment was issued on the basis of HMRC's finding that the Appellant was liable to VAT on sales declared in the Appellant's EU Sales Lists as having been made to customers who were VAT registered in the Republic of Ireland. HMRC concluded that the Appellant had not followed correct procedures, and had not kept the required evidence, to show that the goods had been sold to a customer VAT registered in another EU Member State, and thus had not been entitled to sell the goods free of UK VAT.

3. The Appellant has not appealed against the assessment to VAT. The Tribunal accordingly proceeds on the basis that the HMRC findings in the previous paragraph are correct.

4. The Appellant appeals only against the penalty. The parties were in agreement at the hearing that in fact the only issue in the case is whether or not the inaccuracies in the Appellant's VAT returns were "deliberate" within the meaning of Schedule 24. Schedule 24 provides for a higher penalty to be imposed in cases where the inaccuracy was "deliberate" than in cases in which it was merely "careless". The penalty was calculated on the basis that the inaccuracy in this case was deliberate. A finding that it was not would thus lead to a reduction of the penalty.

5. Such a finding would have a further consequence for Mr and Mrs Mehaffey, the directors of the Appellant company. Under paragraph 19(1) of Schedule 24, in cases where a penalty is payable by a company for a *deliberate* inaccuracy, HMRC can by written notice make the directors personally liable for the penalty imposed on the company. In this case, such personal liability notices were issued by HMRC on 17 September 2014 to Mr and Mrs Mehaffey, making each of them personally liable for half of the penalty imposed on the Appellant company. Although the present appeal is not brought by Mr and Mrs Mehaffey against the personal liability notices, but rather by the Appellant company against the penalty, a finding by the Tribunal that the Appellant company's conduct was not deliberate would mean that Mr and Mrs Mehaffey could no longer be made personally liable in respect of the penalty.

Background facts

6. The Appellant's main business activity was sale of furniture. The business was initially a partnership between Mrs and Mr Mehaffey, trading as "Biggie Best". From 1 August 2003, the business traded as a limited company, Mehaffey Ltd, of which the former partners became directors, and the VAT registration of the partnership was

transferred to the company. The Appellant company was deregistered from VAT on 1 July 2013, at its own request. During the VAT periods to which this appeal relates, Mr Mehaffey was also in full time employment.

7. In January 2009, HMRC Officer Peter Maguire conducted a VAT visit. A note of the visit prepared by the officer noted that Mrs Mehaffey ran the business while Mr Mehaffey who was in full time employment helped out. The note states that:

> Mr Mehaffey … came across as very eager to get things right. … The accountants prepare all the VAT records and do this very comprehensively. I found the records/business to be credible and trader to be compliant. …
>
> Repayments are due to volume of work carried out in RoI [Republic of Ireland]. Examined invoices and payments received to support volume of Z/R [zero rated] work. Customer's RoI VAT numbers were not entered on sales invoices but recorded in Sage Customer EC Sales Activity Report. Discussed in detail checking validity of vat numbers and holding proof that the supplies were made into RoI. Mr Mehaffey is now full aware about Proof of Movement when supplying goods to RoI.

8. In April 2013, HMRC received a request for assistance from the Revenue Commissioners in the Republic of Ireland under Exchange of Information arrangements, to verify supplies declared by the Appellant on EC sales lists to T & C Ryan (VAT registered in the Republic of Ireland) in the years 2010-2012. The request stated that T & C Ryan had stated that they did not quote their VAT number for the purchase of goods from Northern Ireland and did not purchase goods from there. The reply to this request from HMRC Officer McGrann, dated 25 June 2013, stated as follows:

> Mr Phillip Mehaffey said that he never had any personal contact with T & C Ryan. Contact was made through his former employee Dawn Duke. She left his employment two weeks ago, he did not have a home address available. He said Supplies to IE [Republic of Ireland] were made on his behalf by Fultons who also collected the bankers draft. Fultons are no longer trading. He had no details of the drafts. He said that he had not checked any IE registrations since he started. Three other deregistered IE traders were referred to him to obtain current registrations. Then he said his records had been destroyed in a flood (due to a burst pipe). He was told that he must obtain valid registration numbers. The company has been referred for a full VAT visit.

9. In a letter to the Appellant dated 6 August 2013, HMRC notified the Appellant of a VAT visit to take place on 6 September 2013.

10. The Appellant subsequently applied to cancel its VAT registration, stating that the company had ceased to trade from 30 June 2013, and its VAT registration was cancelled with effect from close of business on that date. The HMRC notice of deregistration stated that the Appellant's application to deregister had been received by HMRC on 13 August 2013.

11. The VAT proceeded on 6 September 2013, conducted by HMRC Officer Francis McCarville. A note of the visit prepared by him states:

> Mr Mehaffey was given an opportunity of making a disclosure, none was made. Mr Mehaffey explained that he used his garage as an office and as a result of a burst water pipe all the records were lost with the exception of 03/13 & 06/13, bank statements and copies of the annual accounts. Mr Mehaffey said he could provide evidence that he had a burst water pipe if required. …
>
> The SCAC raised by the Revenue Commissioners related to a declaration made on the ESL by Mehaffey to Thomas & Catriona Ryan … for the sale of goods valued at ú498,953. No evidence was made available … to support the charges which were zero rated as is required per Notice 725 Section 4 and 5. When asked about the other sales which were made to VAT registered customers in the Republic of Ireland Mr Mehaffey said that he used a van (which was owned by the Company he worked for) to deliver the goods to a Patrick O'Riordian at a warehouse on Cows Road Dundalk, the Irish VAT numbers were supplied by O'Riordian.

12. The note went on to state the Appellant had been informed that an assessment would be raised to recover the VAT on the value of sales listed in its EC Sales Lists (which included sales to a number of other Republic of Ireland VAT-registered traders in addition to T & C Ryan), allowing the Appellant 3 months to provide evidence that a sale to the customers had taken place.

13. The papers before the Tribunal include a number of requests by HMRC to the Republic of Ireland Revenue Commissioners for administrative assistance, seeking information whether other Republic of Ireland VAT numbers listed in the Appellant's EC Sales Lists belonged to traders who had purchased goods from the Appellant. Various replies from the Revenue Commissioners between December 2013 and February 2014 indicated as follows. One trader stated that she had had no dealings with and had purchased no goods from the Appellant. One trader's VAT returns indicated no trading, and no goods or services purchased from any EU countries, from 1 January 2011 to 31 August 2013. One trader had gone into liquidation in February 2010 and no tax returns had been filed since then. One trader's up to date VAT returns to October 2013 included no goods purchased from other EU countries. Another trader denied any dealings with the Appellant. One trader said that he had bought goods from the Appellant years ago but had had no dealings with the Appellant since. Another trader had no intra-Community acquisitions declared in the previous 12 months.

14. In a letter to the Appellant dated 3 January 2014, HMRC Officer McCarville advised the Appellant that HMRC were about to issue the Appellant with a VAT assessment in the sum of £278,862. The letter set out how that amount was calculated. It is not in dispute that this was the amount of VAT on the sales to the various customers listed in the Appellant's EC Sales Lists in VAT periods from 09/09 to 06/13.

15. On 23 January 2014, HMRC issued a notice of assessment in the sum of £258,495 (plus interest of £12,075.33).

16. In another letter dated 23 January 2013, HMRC issued a further assessment in respect of VAT period 06/13.

5 17. In a letter to the Appellant dated 28 April 2014, HMRC stated that in the absence of evidence that goods were sold to the customers whose Republic of Ireland VAT numbers were quoted, HMRC would have "no alternative but to raise a deliberate penalty".

18. Following further correspondence, a letter from HMRC to the Appellant dated 5
10 August 2014 stated that HMRC intended to charge the company an inaccuracy penalty under Schedule 24 in the sum of £156,162.72, and explained how the proposed penalty was calculated. The Appellant's conduct was considered to be deliberate, and the disclosure was considered to be prompted. This meant that the penalty range prescribed by the applicable legislation was between 35% and 70% of
15 the potential lost revenue. HMRC considered that the Appellant should be given a total reduction of 40% for the quality of disclosure, which is to say, the penalty would be the minimum of 35% of the potential lost revenue, plus 60% of the difference between 35% and 70%. This meant that the total penalty would be 56% of the potential lost revenue. The letter then set out the potential lost revenue for each of the
20 VAT periods to which the penalty was to be applied, and indicated what the 56% penalty for each period would be, leading to the total penalty indicated in the letter.

19. On 4 September 2014, HMRC then issued a notice of penalty assessment to the Appellant company in the sum of £156,162.72, as earlier foreshadowed. This is the penalty against which the Appellant now appeals.

25 20. On 17 September 2014, HMRC issued to both Mr Mehaffey and Mrs Mehaffey personal liability notices under paragraph 19 of Schedule 24.

21. A letter from the Appellant dated 23 September 2014 was treated by HMRC both as a complaint that was referred to its complaints department, as well as a request for review that was referred to its review team.

30 22. In a review decision dated 21 July 2015, the HMRC review officer upheld the assessment and penalty. For purposes of the present appeal, it found that the behaviour of the Appellant was deliberate, on the following basis. Mr Mehaffey had been advised in the 9 January 2009 visit of the need to check the validity of Republic of Ireland VAT numbers and to hold proof that supplies were made into the Republic
35 of Ireland. He had subsequently not done so, but instead had on his own admission delivered goods to Patrick O'Riordin in Dundalk and used VAT numbers supplied by Mr O'Riordin. Furthermore, the Appellant had applied to deregister from VAT when HMRC had highlighted that there were issues.

Applicable legislation

23. Paragraph 1 of Schedule 24 provides that a penalty is payable where a person gives HMRC a VAT return which contains an inaccuracy that amounts to or leads to an understatement of a liability to tax, and where that inaccuracy was either "careless" or "deliberate".

24. Paragraph 3(1) of Schedule 24 provided that an inaccuracy is:

> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

25. Paragraph 4 of Schedule 24 relevantly provides that the penalty for a deliberate but not concealed action is 70% of the potential lost revenue.

26. Paragraph 5 of Schedule 24 deals with the definition of "potential lost revenue", which is not in issue in this appeal.

27. Paragraph 10(1) of Schedule 24 provides that if a person liable to a penalty has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure. Paragraph 10(2) provides that where a person would otherwise be liable to a penalty of 70%, the penalty may not be reduced to a percentage that is below 35% of the potential lost revenue where the disclosure is prompted.

28. Paragraph 11 of Schedule 24 provides for the reduction of penalties where HMRC think it right because of special circumstances. "Special circumstances" does not include ability to pay.

29. Paragraph 15 of Schedule 24 provides for appeals to the Tribunal against decisions of HMRC in relation to penalties under that Schedule.

30. Paragraph 17 of Schedule 24 provides that in an appeal against the amount of a penalty, HMRC may rely on paragraph 11 to a different extent to HMRC, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed. "Flawed" means "flawed when considered in the light of the principles applicable in proceedings for judicial review".

31. Paragraph 19 of Schedule 24 has already been described above.

The hearing

32. Prior to the hearing, both parties submitted written outlines of argument, and the Appellant submitted medical evidence and a handwritten note of the VAT number of one of the Appellant's Republic of Ireland customers. HMRC also made an application for the late admission of witness statements of HMRC Officer Malachy Laverty, and Republic of Ireland Revenue Commissioners' Officer Enda Malone, both which the Tribunal decided at the hearing would be admitted, although Officer Malone was not available to give oral evidence.

33. At the hearing, witness evidence was given by the witnesses referred to below, and the Tribunal heard submissions on behalf of both parties.

34. At the conclusion of the hearing, the Tribunal issued a direction inviting the parties to file further written submissions identifying any case law relevant to the present case, and in particular, case law dealing with the question of whether incorrectly zero rating goods on the basis that they are said to be exported to another EU Member State amounts to a deliberate or a careless inaccuracy. Both parties filed written submissions in response to that direction.

The Appellant's witness evidence

Luke Mehaffey

35. In his witness statement, Mr Mehaffy's son, Luke Mehaffey, states that he helped his father deliver wooden flooring, furniture and soft furnishings to a warehouse in Dundalk.

36. In his oral evidence, he stated as follows. He assisted his father to deliver furniture and soft furnishings from the age of 15, from 2009-2013. Deliveries were mainly around Dundalk, to an industrial estate. He remembers only one long journey beyond Dundalk. He does not know with whom his father was dealing; he just unloaded the van.

37. There was no cross-examination.

Mr Mehaffey

38. In his witness statement, Mr Mehaffey states amongst other matters as follows.

39. He and his wife established a business in 2000. They began to develop business in the Republic of Ireland in relation to showhouses for a company called Euro Construction. Through Euro Construction, they were introduced by a Mr Curron to Pat Reardon (not O'Riordan as recorded by HMRC), and other customers came through this contact. Euro Construction collected most of their goods, but the Appellant began delivering goods himself to make sure they went to the Republic of Ireland.

40. Having no experience in business they employed accountants to advise them. The only advice they received from their accountant was to ensure that their customers in the Republic of Ireland had a valid Republic of Ireland VAT number. The information on the VAT returns was prepared by the Appellant's accountants. The 2009 HMRC visit took place in the accountants' offices. The accountants had not told the Appellant to put VAT numbers on the invoices.

41. At the time of the meeting with Officer McGrann, Mr Mehaffey's health was not good. Officer McGrann made a comment about Dawn Duke which upset Mr Mehaffey. At that meeting, Mr Mehaffey correctly stated that Fultons delivered goods for the Appellant. Mr Mehaffey also correctly stated that he did not check the Republic of Ireland VAT numbers on the EC Sales Lists as he thought that HMRC would check them. He also correctly stated that records had been destroyed by a burst pipe. Due to health issues, he may not have been thinking correctly at the time, and his wife was at the time also suffering health issues. Subsequently Officer McCarville took his remaining documents away, and Officer McCarville then proved to be very difficult to contact, and it was very difficult to get his documents back from Officer McCarville. Mr Mehaffey tried unsuccessfully to contact Mr Reardon, the person who introduced him to Pat Reardon, and one of his customers in the Republic of Ireland. Mr Mehaffey did not receive the 17 December 2013 letter from HMRC.

42. The Appellant company was unprofitable most of the time that it traded. Mr Mehaffey completed all records to the best of his ability but did not get good enough advice. Further details are given of the illnesses of Mr and Mrs Mehaffey.

43. In his examination in chief, Mr Mehaffey said amongst other matters as follows.

44. He had a serious flood at his home. It cause £30,000 of damage and he had to replace the full kitchen. At the time of the HMRC inspections he was suffering badly from depression and could not attend to VAT matters. He checked that everyone was a genuine customer. He went to Dundalk to find Mr Reardon and was told never to come back again or he might not be alive. The house where he fitted carpet was right on the border in a very bad area. A statement from the carpet fitter has been included in the hearing bundle. Mr Mehaffey was told by HMRC to put VAT numbers on invoices and to make sure that goods went to the Republic of Ireland, and he did this. He got the Republic of Ireland VAT numbers from Mr Reardon. Mr Mehaffey gave further details of his health and how it affected his ability to work at material times. The Appellant company last traded in 2013, and lost a lot of money. The Appellant company was deregistered for VAT as Mr Mehaffey's doctor advised him not to stress himself out any more.

45. In cross-examination, Mr Mehaffey said amongst other matters as follows.

46. He did not accept that he chose not to comply with the requirements for sales to the Republic of Ireland. He did not mention Mr Reardon the day that he said to Officer McGrann that records had been destroyed in a flood because he was not well that day. He did not mention to HMRC officers that he was suffering from mental illness because he was too embarrassed. When asked if he wanted to make a

disclosure, he did not know what a disclosure was. He got Republic of Ireland VAT numbers from Mr Reardon, but did not verify them, and had no VAT number for Mr Reardon.

47. When it was put to him that he could have been delivering to anyone, he said that he took people at their word. When it was put to him that his mental illnesses did not prevent him from working, he said that his doctor advised that being idle would make things worse. When it was put to him that it was implausible given the amounts at stake that he would not have incurred the necessary costs to get copies of cheques to prove that sales were made to the Republic of Ireland, he said that he simply did not have the money to do so. When it was put to him that he was making VAT repayment claims for many years without evidence of the sales, he said that he had evidence for some of them. It was put to him that he only claimed that his contact's name was Reardon rather than O'Riordan at a very late stage, after enquiries had been made with the Revenue Commissioners in relation to the name O'Riordan. This was despite the fact that HMRC had previously referred to the name O'Riordan in several documents. The Appellant responded that he did not receive all mail from HMRC, and that HMRC should have sent letters by recorded delivery.

48. In re-examination, Mr Mehaffey said amongst other matters as follows. Mr Reardon was like an agent. He gave Mr Mehaffey the VAT numbers of the people to whom the Appellant sold. Mr Reardon then added 10% as his commission. Mr Mehaffey thought that he was doing everything right. He was satisfied that goods were being exported. He ceased trading as the company was making a loss and he could not take it any more.

The HMRC witness evidence

HMRC Officer Maguire

49. In his witness statement, HMRC Officer Maguire stated amongst other matters as follows. He carried out the 9 January 2009 assurance visit at the Appellant's accountant's premises, which Mr Mehaffey attended. Officer Maguire noted that the Appellant was not entering Republic of Ireland VAT numbers on sales invoices, but only on Sage customer EC sales activity reports. Officer Maguire discussed in detail with Mr Mehaffey the proper procedures for EC movements, the need to validate Republic of Ireland VAT numbers, the type of evidence required for proof of movement and the need to retain evidence that supplies were made into the Republic of Ireland. His notes of that meeting indicate that he would have fully educated Mr Mehaffey on the evidential requirements. The action points in the notes of the meeting provided for the company to put a system in place that would be checked at the next VAT visit.

50. In examination in chief, Officer Maguire said amongst other matters as follows. He is 100% sure that he would have informed Mr Mehaffey during the visit of all the requirements of the Public Notice to support zero rating. He remembers that Mr Mehaffey was pleasant and made the right responses, and Office Maguire was

satisfied that he understood. Officer Maguire dealt with Mr Mehaffey and understood that he was the principal responsible person in the business.

51. In cross-examination, he denied that he had left out of his witness statement facts favourable to the Appellant. He said that he considered that the issue was whether Mr Mehaffey had understood what the requirements were for zero rating, and Officer Maguire was satisfied that in 2009 he was.

52. In re-examination Officer Maguire said that he had not undertaken the visit for purposes of a full audit, but was concerned with zero rating.

HMRC Officer McGrann

53. In his witness statement, HMRC Officer Bernard McGrann stated amongst other matters as follows. On 18 June 2013 he visited the Appellant company and spoke to Mr Mehaffey. Officer McGrann informed Mr Mehaffey that T&C Ryan had denied doing any trade in Northern Ireland. Mr Mehaffey said that all deals had been made through his employee Dawn Duke, who had finished work 2 weeks previously and for whom Mr Mehaffey did not have an address. Mr Mehaffey gave the name of the company he believed was presently employing Dawn Duke. Mr Mehaffey said that he had not undertaken any VAT registration number checks of any of his EU customers since he had started. He said that goods were delivered by "Fultons" who collected the banker's drafts, but that he did not have copies or details of the banker's drafts. He said that multiple banker's drafts were lodged at the bank as a single lodgement. He said that records had been destroyed by a burst water pipe at his house and that the company no longer used Sage. Officer McGrann told Mr Mehaffey that the company would be referred for a full VAT inspection and that Mr Mehaffey should take urgent steps to reconstruct the records.

54. In examination in chief, Officer McGrann said amongst other matters as follows. During his visit he spoke to Mr Mehaffey and not Mrs Mehaffey. When he asked Mr Mehaffey for documents relating to T&C Ryan, he said that they had been destroyed. At the visit Mr Mehaffey never mentioned a Mr O'Riordan or Reardon or that he delivered goods himself. Whenever he was asked how he moved goods he said he used Fultons.

55. In cross-examination, it was put to Officer McGrann that Mr Mehaffey had only ever said that he used Fultons to deliver to customers in Northern Ireland. Officer McGrann said that he had written his notes up after the visit. He said that he had thought that Mr Mehaffey was joking when he said that all his records had been destroyed and his employee had left without contact. He was satisfied that he had conducted himself properly at the interview, and has never had a complaint. He could tell at the meeting that Mr Mehaffey was not going to be cooperative. Mr Mehaffey could not produce one thing having been told the week before about the meeting. He did not know at the time that Mr Mehaffey suffered from mental illness.

HMRC Officer McCarville

56. In his witness statement, HMRC Officer Francis McCarville stated amongst other matters as follows. On 6 September 2013 he undertook a VAT assurance visit at the Appellant company's VAT registered address, and he met Mr Mehaffey. Mr Mehaffey, when asked if he wanted to make any disclosure, made none. Mr Mehaffey explained that records had been destroyed by a burst water pipe, with the exception of 03/13 and 06/16, bank statements and copies of the annual accounts. Mr Mehaffey said that he delivered goods to the Republic of Ireland on a Saturday in a van owned by his employer to Mr Patrick O'Riordian in Dundalk. Officer McCarville did not ask for any details of Mr O'Riordian as he is not listed as a customer on the Appellant's EC Sales Lists. Officer McCarville said that an assessment would be raised and that a penalty would be charged. Officer McCarville cannot recall if Mr Mehaffey stated that he had any illnesses. Officer McCarville considered that the behaviour was deliberate because the Appellant had been told in January 2009 to check Republic of Ireland VAT numbers and retain proof of removal but had not done so, and had been offered an opportunity to reconstruct evidence which should have been easy but had not done so. Officer McCarville considered that when the Appellant submitted its VAT returns, it knew that it did not have the evidence to support the Republic of Ireland sales and knew that it would not be able to get that evidence. At the time that the penalty was calculated, Officer McCarville considered that there we no special circumstances.

57. Officer McCarville did not attend the hearing to give oral evidence.

Officer Malone of the Republic of Ireland Revenue Commissioners

58. In his witness statement, Officer Malone stated amongst other matters as follows.

59. In 2015, in response to a request from HMRC for information about a Patrick O'Riordan in Dundalk, Officer Malone made enquiries of the Louth Revenue District. They confirmed that they had no information to provide but could not make further enquiries based on the limited information available. HMRC were unable to provide further details. Officer Malone then checked the Revenue central registration system. He found 138 taxpayers with the name Patrick O'Riordan or variations thereof, but there were none of that name in Louth who had been VAT registered at any time, and no employee of a furniture sales and/or delivery company by that name could be found in Louth.

60. In 2016, in response to a request from HMRC for information about a Pat Reardon, Officer Malone identified 13 individuals of that name or variations thereof, none of whom were resident in Dundalk or border counties at the time, and none of whom were listed as engaged in furniture sales or ancillary businesses, and no employee of a furniture sales and/or delivery company in Louth by that name could be identified.

61. Officer Malone did not attend the hearing to give oral evidence.

HMRC Officer Laverty

62. In his witness statement, HMRC Officer Laverty stated amongst other matters as follows. He is the manager of Officer McCarville, whose statement accurately reflects HMRC records. Officer Laverty supports the penalty issued. Officer Laverty made the enquiries of the Republic of Ireland Revenue Commissioners referred to in the statement of Officer Malone. The responses of the Revenue Commissioners to those enquiries are exhibited to Officer Laverty's witness statement. The first response stated: "Irish Revenue can confirm that although there are a number of individuals named as Patrick O'Riordan on record in RoI, there are no individuals or businesses on record of that name in Louth who are VAT-registered, and there are no individuals or businesses of that name on record in any area of ROI who are involved in the same or supply of furniture or associated activities". The second response stated: "while it is not possible for me to confirm or deny the existence of the individual described to your Officers based on the available records, I can confirm that Revenue does not have a record of an individual named as Patrick Reardon and trading in furniture or related goods at an address at … Dundalk".

63. In examination in chief, Officer Laverty said amongst other matters as follows. In these kinds of transactions, it is unusual for a trader to rely on a third party as it leaves the trader open to liability for whatever the third party does or does not do. HMRC were not required to undertake the investigations that it did with the Republic of Ireland Revenue Commissioners, but HMRC were in fact trying to get information to help the Appellant.

64. In cross-examination, when it was put to Officer Laverty that the Appellant had had difficulty contacting Officer McCarville, Officer Laverty said that Officer McCarville was a very professional officer. When it was put to Officer Laverty that a person VAT registered in one part of the Republic of Ireland may in fact be trading in another, he responded that it could happen but he was happy that Officer Malone had carried out exhaustive checks. He considered that with so much at stake, the Appellant might have been expected to find alternative evidence of the transactions in question. Officer Laverty would not be drawn on whether the supplies actually took place or not.

The Appellant's submissions

65. The Appellant submitted as follows.

66. Mr Mehaffey's involvement in the business was constrained by his full-time employment. Both he and his wife had considerable health issues. Mental health issues affected Mr Mehaffey's ability to attend to company tax affairs. Financial difficulties prevented the company from obtaining VAT advice. The VAT returns were prepared in good faith without professional guidance. The January 2009 HMRC visit found Mr Mehaffey "very eager to get things right", and Mr Mehaffey believed he was doing what was required. He obtained Republic of Ireland VAT numbers for his customers, and was not made aware of the need to validate these VAT numbers. The fact that he obtained the VAT numbers third-hand from Mr Reardon would not have been an obviously bad thing to Mr Mehaffey: he believed that he had complied

by obtaining the numbers, regardless of how he had obtained them. Mr Mehaffey felt that by delivering the goods himself to the Republic of Ireland he was ensuring they were indeed exported. He may have been careless, but he did not deliberately submit inaccurate VAT returns.

5 67. In the June 2013 visit, Officer McGrann's comments about Dawn Duke caused his considerable distress. After the September 2013 visit Mr Mehaffey had considerable difficulty contacting the Officer McCarville and with collection and retrieval of the company records.

68. Mr Mehaffey was trying to cooperate. Explanations can be provided for 10 claimed instances of non-cooperation by the Appellant. Mental health issues and his employment elsewhere limited what he could do. He tried to make enquiries himself in Dundalk but was warned not to return. Mr Mehaffey will not in future be involved in any business ventures, so there is no future risk of non-compliance.

69. The Appellant's post-hearing submissions submit as follows. HMRC have said 15 in their post-hearing submission that they cannot find any case law relevant to the Tribunal's direction. That being the only thing asked by the Tribunal, the rest of the HMRC post-hearing submission should be ignored. The facts of the present case are distinguishable from *Group One (Mehmood) v Revenue and Customs* [2016] UKFTT 198 (TC) ("*Group One*").

20 **The HMRC case**

70. HMRC submitted as follows.

71. The onus of proof is on HMRC to establish that the penalty under section Schedule 24 has been applied correctly. The ordinary civil standard of the balance of probabilities applies.

25 72. The inaccuracies are the result of "deliberate" behaviour because the Appellant knew, at the time he put the figures on the returns, that the declarations were wrong.

73. The inaccuracies in the Appellant's VAT returns stem from the fact that the Appellant failed to comply with the secondary legislation contained in Public Notice 725 'The Single Market" ("Notice 725") which permits HMRC to impose conditions 30 which are and which take effect as tertiary legislation and have the force of law. In accordance with the legislation contained in Notice 725, para 4.3, the Appellant is legally required obtain and show on his sales invoices his customer's EC VAT registration number and keep valid commercial evidence that goods have been removed from the UK to a destination in another EC Member State. The Appellant 35 did not meet those legal requirements and therefore was not entitled to zero rate his supplies. Failing to hold proper evidence results in the supplies being standard-rated.

74. A deliberate inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy. HMRC guidance at CH81150 states "it is not

necessary to demonstrate that the person knew what the accurate figure was, only that they knew that the figure was not accurate”.

75. While HMEC have some sympathy for Mr and Mrs Mehaffey given the illnesses suffered by them, illness did not impair the ability of either to recognise that their VAT declarations were inaccurate.

76. “Deliberate” behaviour is indicated in this case by the following facts. (1) The Appellant was instructed at the January 2009 visit to check the Republic of Ireland VAT numbers to ensure they were valid and to retain evidence of dispatch, but subsequently failed to do so. (2) The Appellant at the June 2013 visit distanced himself from the suspect supplies by claiming that they were made by a former employee for whom he had no address, that deliveries were made by Fultons who were no longer trading, and that he had no details of the banker’s drafts. (3) The Appellant later claimed for the first time that records were destroyed in a flood. (4) The Appellant then at the September 2013 meeting did not mention Fultons but claimed for the first time that he made deliveries himself to a Patrick O’Riordian in Dundalk who supplied him with the Republic of Ireland VAT numbers. (5) The Appellant has not subsequently provided any alternative proof of payment for the disputed items despite having been given ample opportunity to do so, and despite the fact that duplicate payment and bank records should be relatively easy to reconstruct. (6) The responses from the Republic of Ireland Revenue Commissioners establish that the supplies were not in fact made to the customers as claimed. (7) The Appellant applied for deregistration of VAT immediately after being advised in August 2013 of an impending visit. (8) Net sales continued to be in the region of £100,000 up to and including VAT period 06/13 when the company ceased trading. (9) It is implausible that Mr Mehaffey could manage to deliver the quantities of furniture claimed while holding down a full time job and suffering from illness, in circumstances where the Appellant has no evidence at all to support the zero-rated sales.

77. At the time the Appellant completed its VAT returns, Mr Mehaffey knew that he did not have valid evidence to support zero-rating and he knew that he would never be able to get valid evidence to support zero-rating. The Appellant has never been in possession of valid evidence to allow him to lawfully zero-rate these goods. He knew he did not hold valid evidence within 3 months of supply as required by law (Public Notice 725, para 4.4), yet he deliberately failed to adjust the Appellant’s VAT returns. VAT at the standard rate on these supplies has accordingly been knowingly omitted from the VAT returns by the Appellant.

78. In their post-hearing submissions, HMRC submit as follows.

79. HMRC have not identified any case law specifically dealing with the question of whether incorrectly zero-rating goods on the basis that they are said to be exported to another EU Member State amounts to a “deliberate” or a “careless” inaccuracy. However, *Group One (Mehmood) v Revenue and Customs* [2016] UKFTT 198 (TC) (“*Group One*”) is remarkably similar. Reliance is placed particularly on paragraphs [31], [36], [38]-[40] and [42]. The Appellant’s absence of evidence is unexplained. Mr Mehaffey has given inconsistent statements and changed his story at different

times. Given that records were not kept it is questionable how the returns could have been put together except by using figures known to be questionable. Bank statements have not been provided to support the level of activity claimed. Given the amount at stake, the Appellant might have been expected to put more resources into evidencing its claim. Between 03/13 and 06/13, when HMRC enquiries started, the Appellant's business went from being almost wholly zero rated to wholly standard rated.

80. The Tribunal should accept Mr Maguire's evidence that he provided the Appellant with a "full education" in respect of the legislative requirements in Public Notice 725 in particular, the need to obtain valid evidence of export and to check Republic of Ireland VAT numbers. The Tribunal should be sceptical of the Appellant's claim that most records were destroyed by a flood due to a burst pipe. Mr Mehaffey confirmed in his evidence that he never checked any Republic of Ireland VAT numbers or of Mr Reardon.

81. There are no special circumstances justifying a special reduction. The penalty imposed was fair in the circumstances.

The Tribunal's findings

82. Curiously, neither party identified any case law dealing with the legal test for distinguishing between a "deliberate" and a "careless" inaccuracy for purposes of Schedule 24.

83. An inaccuracy will obviously be "careless" rather than "deliberate" in circumstances where the trader knows the correct figure and intends to include that correct figure in the VAT return, but through inadvertence or oversight puts a different figure in the return.

84. An inaccuracy will obviously be "deliberate" in cases where the trader includes in a VAT return the figure that the trader intends to put, and knows that the figure is wrong.

85. A more difficult question is how to classify an inaccuracy in circumstances where the trader includes the figure that the trader intends to put, but the trader does not know whether the figure is correct or not. An example would be where the trader has some information suggesting that the figure is correct, but where the trader does not have the time or inclination to check whether this is so, and simply uses that figure hoping that it is correct. Another example might be where a trader has no information as to the correct figure, but just uses a good faith estimate, which turns out to be inaccurate.

86. Another question is how to deal with cases involving lack of knowledge of the law. Suppose, for instance, that a trader in a VAT return treats certain goods as zero rated in the genuine but incorrect belief that they are zero rated by law. Ignorance of the law is of course no excuse in principle for not applying the correct VAT treatment, and the trader may in such cases be liable to a penalty. However, the question is whether in such cases the penalty is to be calculated on the basis that the inaccuracy

was “deliberate” or “careless”. On one view, in this situation the trader has deliberately included a figure in the return that is wrong, whether or not the trader knew it is wrong, so that ignorance of the law does not prevent the inaccuracy from being deliberate. On another view, an inaccuracy is not “deliberate” unless the trader knows that the figure is wrong. On the latter view, even though ignorance of the law is not a reasonable excuse for making the inaccurate statement, and will not absolve the trader of liability to a penalty, ignorance of the law may still mean that the inaccuracy was “careless” rather than “deliberate”.

87. The same issues as those identified in the previous paragraph would arise in cases where a trader has acted on the basis of an erroneous view of the facts, in circumstances where the trader does not know that that view is erroneous, but would have known if the trader had conducted appropriate checks.

88. Because these questions were not addressed in the submissions of the parties, the Tribunal makes no detailed findings of law in respect of them. HMRC have accepted that they have the burden of proving on a balance of probability that the penalty has been imposed correctly. In the circumstances, in the absence of submissions by HMRC dealing with the issues above, the Tribunal proceeds on the basis that HMRC must prove, in order to establish that an inaccuracy was “deliberate”, that Mr Mehaffey positively *knew* at the time that the VAT returns were submitted that the Appellant was not entitled to treat as zero rated the sales included in the Appellant’s EC Sales Lists as having been made to the Republic of Ireland.

89. The Tribunal also proceeds on the basis that the Appellant did in fact make sales in the amounts indicated in its VAT returns and EC Sales Lists. HMRC did not put its case on the basis that those sales never took place. Indeed, HMRC could not have put it case on that basis, given that they have assessed the Appellant to VAT on the amounts of those sales. Nor has the Appellant in any way suggested that sales in these amounts did not in fact take place.

90. The fact that HMRC has the burden of proof does not mean that the appeal must necessarily succeed unless HMRC can produce positive evidence to show that Mr Mehaffey knew that he was not entitled to treat these sales as zero rated. HMRC are entitled to invite the Tribunal to draw inferences from the circumstances as a whole, including from the conduct of Mr Mehaffey during and after the period to which this appeal relates.

91. One matter to which the Tribunal attaches considerable weight is that as a general principle, it is the responsibility of every trader to keep appropriate records to evidence its tax position. This principle applies to all areas of taxation, not just to VAT. The Appellant did not suggest that he was ignorant of this principle. On the contrary, he contends that he did keep records but that they were destroyed in a flood in his home. His case is also that he thought he was complying with legal requirements by obtaining Republic of Ireland VAT numbers for those to whom he supplied goods.

92. The evidence shows that in the periods 09/10 to 09/13 to which this appeal relates, the Appellant was making EC supplies in the amount of approximately £100,000 per quarter. Given the sums involved, and given the Appellant's claim that the business made a loss for most of its existence and that the Appellant's own financial resources were limited, the Tribunal considers it to be inherently implausible that Mr Mehaffey would have been prepared to have this level of dealings with customers he had not met, and about whom he knew nothing other than names and VAT numbers he had been given by Mr Reardon, or that he would be content to have such dealings operating through the intermediary of Mr Reardon about whom he also appears to know little or nothing.

93. Mr Mehaffey gave evidence that he has attempted to undertake enquiries in Dundalk with a view to finding Mr Reardon, and has been met with threats. He also said that one of the places where he undertook work in the Republic of Ireland was a very bad area. Again, the Tribunal considers it inherently implausible that the Appellant would in the circumstances have done the level of business that it claims to have done in this kind of environment, over such a long period of time, especially given that Mr Mehaffey said that the business was losing money in the process during most of its existence.

94. The Tribunal also finds it implausible that the Appellant would have had this level of dealings without having significant business records, not only for purposes of establishing the Appellant's entitlement to zero rate the relevant part of its supplies, but for purposes of its VAT records more generally, for purposes of company and other tax requirements, and for other business purposes. The Tribunal finds it implausible that all such records would be irretrievably destroyed by a flood in Mr Mehaffey's home caused by a burst pipe. For instance, duplicates of bank records could have been obtained from the bank in 2013 going back to the beginning of the period to which this appeal relates. The Tribunal accepts the evidence of Officer McGrann that he told Mr Mehaffey in June 2013 that he should take urgent steps to reconstruct his records. Despite this, even by the time of the Tribunal hearing, the Appellant had not yet produced any significant documentary evidence in relation to the supplies in question.

95. In view of this, the Tribunal also accepts the HMRC submission that inferences can be drawn from the timing of Mr Mehaffey's claim about the burst water pipe, and the timing of the Appellant's request for VAT deregistration. The Tribunal takes into account Mr Mehaffey's evidence that the business was ended due to his and his wife's health, and the fact that it was not making significant money. The Tribunal weighs this evidence against the evidence that shows that the VAT returns showed the business as continuing to trade at the same level of approximately £100,000 per quarter until the last quarter of its VAT deregistration. The evidence suggests that the end of the business came abruptly, at a time when it was still trading a full volume, just after the Appellant was informed that a VAT visit was to take place.

96. The Tribunal accepts that both Mr Mehaffey and Mrs Mehaffey were suffering significant health issues during material periods during and after the VAT periods to which this appeal relates. The Tribunal makes allowance for this, and the fact that Mr

Mehaffey was also in full time employment at material times. Nevertheless, the Tribunal must also take into account that until the time of its VAT deregistration, the Appellant's business was able to continue at full volume despite these problems.

97. The Tribunal takes into account that, for whatever reason, there may have been certain tensions between Mr Mehaffey and HMRC, and that because of this and Mr Mehaffey's mental health problems, it is potentially possible that he may have been perceived as being uncooperative when he himself was not intending to be.

98. The Tribunal also takes into account the evidence that has been presented on behalf of the Appellant. However, evidence submitted from persons other than Mr Mehaffey has been unhelpfully vague. A very brief letter from Alan Beattie Furniture dated 16 August 2015 states that that company has been trading with the Appellant "for many years", and that its prices "included deliveries to both North and South of Ireland". The letter does not give details of exactly what supplies were made on what dates, and exactly where they were delivered and to whom. A letter from Wesley Abraham states that he fitted carpet for the Appellant in a house/office in the Republic of Ireland. The letter does not state when, and in any event this evidence of one specific job in the Republic of Ireland is hardly supporting evidence for all of the sales to the Republic of Ireland listed in the Appellant's EC Sales Lists over all the VAT periods in question. Nor is the evidence of a single purchase in the sum of £10,500 made in March 2013. Mr Mehaffey's son gave evidence that he assisted his father to make deliveries to the Republic of Ireland from 2009-2013, but again this evidence does not indicate specific supplies made or the amounts for which such supplies were made over the course of the VAT periods to which this appeal relates. The Tribunal finds that no significant evidence has been provided in support of the overall supplies made by the Appellant over the course of the VAT periods to which this appeal relates.

99. The Tribunal cannot know for certain exactly what happened. It can only make findings based on a balance of probability, in the light of the evidence and circumstances as a whole. On that basis, the Tribunal considers it more likely than not that Mr Mehaffey did not make the supplies in the manner he describes. Consequentially, the Tribunal considers it more likely than not that he is not disclosing the true details of the persons to whom the supplies were made, and the circumstances in which the supplies were delivered to customers. The Tribunal is satisfied that it is more likely than not that the reason for this must be that Mr Mehaffey considers that disclosure of the true details would make it apparent that he was aware that the Appellant was not entitled to zero rate those supplies.

100. For those reasons, the Tribunal is satisfied on a balance of probability that the inaccuracy in the Appellant's VAT returns was deliberate.

101. The Appellant did not at the hearing challenge the calculation of the penalty on any basis other than on the basis of whether the inaccuracy was "deliberate" or "careless". Nor did the Appellant challenge the decision on special circumstances. The Tribunal is not persuaded that there is any other error, or that the HMRC decision on special circumstances is flawed.

Conclusion

102. For the reasons above, this appeal is dismissed.

103. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 01 NOVEMBER 2017