[2017] UKFTT 879 (TC)

TC06274

Appeal number: TC/2016/00938

Value added tax - Personal Liability Notice - Finance Act 2007 Schedule 24 paragraph 19 - burden of proof - whether inaccuracies properly identified in penalty assessment - no - time limits for service of personal liability notice - whether out of time - yes - whether liability for assessed penalty transferred to director - no - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARREN CRESSWELL **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DAVID MOORE

Sitting in public at Alexandra House, The Parsonage, Manchester on 4 and 5 July 2017

Mr Michael Firth of Counsel for the Appellant

Ms Ann Sinclair, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Darren Cresswell ("the Appellant") against a decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to issue a Personal Liability Notice ('PLN') to the Appellant for a deliberate inaccuracy under Schedule 24 Finance Act 2007 ("the Act") in the sum of £208,207.02 on 19 August 2014 and reissued in the amended sum of £203,709.26, on the grounds that the inaccuracy was attributable to the action of the Appellant as an officer of the Company and as the Company is or is likely to become insolvent he is liable to pay part of the penalty.

2. The Company penalties and the amounts which make up the PLN (based on the original total amount of £208,207.02) are set out below

Company penalty	Amount of Company penalty	Appellant's Personal Liability (50%)
NPPS-293379	£216,678.55	£108,339.27
NPPS-293397	£6,269.20	£3,134.60
NPPS-293402	£192,526.25	£96,263.12
	£940.05	£470.03
Total	£416,414.05	£208,207.02

3. The penalties are identified by HMRC in six separate schedules - as below. Schedules 1 and 2 give rise to NPPS-293379, Schedule 3 gives rise to NPPS-293397 and Schedules 4 - 5 give rise to NPPS-293402.

Schedule	Subject	Total
Schedule 1	Alleged purchases from Pix Mania	£205,729.55
Schedule 2	Alleged discrepancies between the company accounts and VAT returns	£10,949
Schedule 3	Alleged over claimed input VAT	£6,269.20
Schedule 4	Alleged purchases from Pix Mania	£190,958.95
Schedule 5	Alleged discrepancies between the Company accounts and VAT returns	£1,567.30
Schedule 6	Careless inaccuracies	£940.05
Total		£416,414.05

Background

We are Electricals limited and WAE+ Limited

4. The Appellant is a former director of We Are Electricals Ltd ("the Company") Company number 07298465. The following facts are material:

i. The Company was formed on 29 June 2010.

ii. The Company registered for VAT with effect from 30 June 2010 under VAT registration number 993 5150 94. The Company submitted VAT returns for periods 09/10 to 12/12.

iii. There were two directors, the other director being Ben Stephen Slater who was also the Company secretary. The Appellant and Mr Slater were the sole equal shareholders.

iv. The Company operated from premises at 180 Newhall Street, Birmingham, B31 1SJ. The nature of its business as described on registration with Companies House was 'Retail sale via mail order houses or via Internet'.

v. There were no registered charges over the Company's assets.

vi. The registered office on incorporation was 2 Redhouse Square, Duncan Close, Moulton Park Industrial Estate, Northampton, NN3 6WL. On 8 January 2011, the Company's registered office was changed to 'c/o Turn90 2nd Floor Quayside Tower, Broad Street, Birmingham'. [Turn90 Ltd was another company of which the Appellant and Mr Slater were directors and shareholders trading in information technology consultancy activities]. The registered office of the Company was changed again on 4 August 2011 to 180 Newhall Street, Birmingham and then back to 2 Redhouse Square, Duncan Close, Moulton Park, Northampton, on 5 June 2012.

vii. On 29 November 2011, the Company's accounting reference period which ended 28 June 2011 was extended to 29 November 2011. Its last accounts made up to 29 November 2011 showed that fixed assets amounted to £9,355, cash £1,455 and stock of £1,500. Its total assets were stated to be £12,300 made up of £10,000 called up share capital and £2,300 held in the profit and loss account. The accounts showed a total turnover of £618,482 and were approved and signed off by the Appellant on 29 March 2012. They replaced previously filed accounts to 28 June 2011 which were reported as being erroneous due to clerical errors.

viii. The Appellant says that the Company effectively ceased trading around December 2012.

ix. The Appellant's correspondence address at the date of incorporation of the Company was also 2 Redhouse Square, Duncan Close. In November 2013 his address was stated as 37 Bradley Lane, Bilston, West Midlands, WV14.

5. The Appellant is also a former director of WAE+ Limited ("WAE+"), VAT Registration No 120 9819 19. The following facts are material:

i. The company was formed on 27 September 2011. The registered office on incorporation was 180 Newhall Street, Birmingham, being the company's trading premises.

ii. WAE+ Ltd registered for VAT under VAT registration number 120 9819 19. It filed VAT returns for periods 11/11 to 05/13. No VAT returns were delivered for period 08/13 [although it should be noted that WAE+ did not cease trading until August 2013].

iii. Its sole directors and shareholders were the Appellant and Ben Slater who was also the company secretary.

iv. The company operated from 180 Newall Street. It activities are described at Companies House as 'Non-specialised wholesale of food, beverages and tobacco; Retail sale via mail order houses or via Internet; Operation of warehousing and storage facilities for land transport activities'.

v. WAE+ charged its assets and securities to Bibby Financial Services, an invoice discounting and invoice factoring company on 2 November 2011. The charge was satisfied and discharged on 7 August 2012. There was also a charge dated 17 July 2013 of the company's assets to ART Share (Social Help Association for Reinvesting in Enterprise) Ltd., which provided loans and working capital for businesses. Companies House records show the charge as unsatisfied on dissolution.

vi. WAE+'s accounts drawn to 30 September 2012 show turnover of £1,650,293, cost of sales £1,397,159 and gross profit of £253,234. Net operating profit after administration costs before tax is shown as £122,177. The accounts were approved and signed on 11 October 2012. No accounts were filed for the y.e. 30 September 2013, although the company continued to trade until July/August 2013.

vii. Administrators were appointed on 2 September 2013.

6. The Company operated as a mid-sized e-commerce business selling mostly electrical items on line. The Appellant says he was responsible for the technological side of the business (website development, programming and systems administration), whereas Ben Slater, was responsible for the day to day management of the business, preparation of accounts and delivery of VAT returns.

7. The Appellant says that business first picked up in December 2010 when the company was "drop-shipping" from Pix Mania Pro (drop-shipping is direct delivery from the Company's supplier to the customer, under the Company's branding). VAT returns showed that the company's trading accelerated significantly sometime later, in mid-2011. This ties in with the switch over to WAE+ in late 2011 (see paragraph 11 below).

8. In August 2011, the Company experienced significant negative publicity after being unable to honour customer orders of HP Touchpads when let down by the supplier.

9. Over the following months, the Company also experienced considerable problems with payment providers, in particular, the "reserves" placed on the Company's accounts. The Appellant says that customers placed their orders and made payment on line. Payments were processed through Paypal or 1st Mercantile Bank. A 5% reserve was charged by the bank and the trader received 95% of the payment within 4 or 5 days. 1st Mercantile Bank suspended the account in September 2011 which resulted in the Company not being able to fulfil orders. After the problems with Paypal and 1st Mercantile Bank the Company used Pay Point in January 2012 and after further problems with Pay Point moved to another provider.

10. Further problems were encountered when Google Shopping implemented a new requirement in their 'feed', which was the main source of traffic to the website and de-listed the company for 28 days. This caused a serious cash flow issue.

11. The Appellant says that the combination of problems with payment providers and hostile online sentiment led to the establishment of WAE+ in September 2011. From the beginning of 2012 onwards, WAE+ Ltd largely began operating in place of the Company and the "We Are Electricals" brand was replaced with the "WAE+" brand.

12. WAE+ then operated until July/August 2013 when it, too, succumbed to problems processing payments and the negative online publicity this was giving rise to.

HMRC's enquiry

13. On 31 October 2012, HMRC visited the Company to discuss outstanding VAT returns (for periods 03/11 to 06/12). It should be mentioned at this stage that correspondence which followed with the Appellant and the Company interchanged between 2 Redhouse Square, Duncan Close, Northampton, England NN3 6WL and 2 Duncan Close, Moulton Park Industrial Estate, Northampton, NN3 6WL, (although the addresses are one and the same place) and then 180 Newall Street, Birmingham. HMRC appear to have stopped using the Company's address at 180 Newall Street, after the Appellant's letter in November 2013 (see later). This takes on some significance in terms of the Notices raising Penalties which were served on the Company and the Appellant.

14. The Appellant says it was around this time that accountants PWC were instructed to act on behalf of the Company and to arrange for the correction of the Company accounts, the outstanding VAT returns and to deal with 'tax issues of significant

complexity relating to refunds and chargebacks'. The Appellant says in his witness statement "Due to the intensive issues over the previous months, we did not have a very clear picture of the records which HMRC required".

15. The Appellant says that PWC were aware that WAE+ was essentially taking over from the Company. He says that complexities involved with the accounts, due to the deferral payments that then became suspended, refunds, chargebacks, court actions and so forth that had occurred over the preceding months were the reasons they chose to go with PWC instead of a far cheaper local accountancy firm. They needed the experts, and believed that PWC would provide them with the clarity needed to get on top of the accounts. However even after the insolvency of WAE+, they were still not certain as to the (accuracy) of the Company's accounts, as they had given complete control to PWC, but had not received back from them the figures that they felt they should have received [no accounts were delivered for the year end 30 September 2013 and no VAT return delivered for period 08/13]. He said in giving evidence that the Company had not paid all of PWC's fees and that may have been the reason.

16. On 20 March 2013, following submission of the outstanding VAT returns for periods 03/11 to 12/12, HMRC undertook an intervention in order to verify the credibility of the three repayment returns - periods 06/11 (£452.77 CR), 03/12 (£54,508.04 CR) and 12/12 (£33,764.15 CR).

17. HMRC say that a comparison was made between the sales in the annual accounts for the year ending 28 June 2011 and the VAT outputs declared which revealed that there was a difference of £138,773.00. [It should be noted that the accounts for the year ending 28 June 2011 had been replaced by the amended accounts for the extended year to 29 November 2011 and so it is unclear why HMRC were comparing the Company's VAT returns with the old replaced accounts]. An appointment with PWC and the Appellant was arranged for 23 April 2013.

18. HMRC say that at no time during the course of their intervention, did either the directors or PWC advise that another company - WAE+ had taken over the bulk of the trading activities. To compound problems, it appears that WAE+ had continued to use the Company's VAT registration number instead of its own. All this caused considerable confusion for HMRC in terms of reconciling VAT returns with the Company's accounts, particularly following information received by HMRC from EC authorities relating to acquisitions from Europe. The Appellant says that PWC were aware that WAE+ had taken over trading from the Company and would have been expected to inform HMRC of such a fundamental point.

19. At the meeting with the Appellant and PWC, HMRC was advised that the difficulties in reconciliation could partly be explained by:

- refunds/ sales credits relating to orders which the company could not fulfil;
- suppliers refusing to take goods back.

20. HMRC asked for copies and evidence of sales credits. HMRC also noted acquisitions declared on the VAT returns for 06/11 to 12/11 and therefore a VAT

Information Exchange System (VIES) check was completed in order to verify these. The information received quoted the Company's VAT Registration No 993 5150 94, and showed acquisitions from SAS Pix Mania for periods 12/11 to 03/13. As a result of this a VIES Mutual Assistance request was sent to France for verification by the French authorities. The spreadsheets that were sent to HMRC did show acquisitions but these were for 06/11 only. Of concern to HMRC was the fact that the Company records did not shown any acquisitions.

21. Spreadsheets were provided by PWC to HMRC with some of the information requested for the visit. HMRC say that they were only provided with the returns that related to refunds/sales credits. HMRC needed to inspect all the purchase and sales information in order to establish that all sales had been declared. Unfortunately the Company could not locate all the relevant invoices and little progress was made.

22. On 1 August 2013 HMRC visited PWC, to inspect the Company's primary records. Several issues were identified as raising concerns. The sales in the accounts were in excess of the declared outputs, [but HMRC appear to have been still looking at the wrong accounts]. PWC agreed to investigate the discrepancies and advised that in addition to the errors pointed out by the Appellant, there had been input tax errors based on:

- using gross (i.e. VAT inclusive) instead of net figures and therefore input tax had been over claimed;
- using duplicate purchase invoices and therefore again over claiming input tax;
- the output tax declared was incorrect due to the fact that at one point the Company had offered a 5% discount, but when the output tax was worked out it was done on the full value of the goods.

23. On 7 October 2013, on checking Companies House to see if Annual Accounts had been submitted for the year ending June 2012, HMRC established that Ben Slater and Darren Cresswell had resigned their directorships on 1 August 2013.

24. On 10 October 2013 HMRC wrote to PWC regarding the purported shortfall of £138,773.00 that had earlier been identified. PWC passed on the enquiry to the Appellant.

25. In a letter received by HMRC on 19 November 2013 the Appellant advised:

> "The discrepancy regarding the 2011 annual accounts can be attributed to the fact that we used a member of staff that we have only now after analysis found to be inaccurate. The accounts, as processed by Price Waterhouse Coopers for the period have been shown to be accurate and correct regarding this period, and should be used for the basis of any calculations.
>
> The main reason for the far higher sales values on the 2011 annual accounts, was that at the time the accounts were filed, the sales figures were higher than the actual sales figures for the period, as we had not accounted for the refunds and returns for that period that we became fully aware of when Price Waterhouse Coopers became

involved and analysed our accounts for us, due to situations such as Chargebacks, Money Claims and standard consumer returns."

Although the Appellant was no longer a director of the Company his letter headed notepaper gave his address as 2 Redhouse Square, Duncan Close, Northampton.

26. Five months passed without further event until 1 April 2014 when HMRC wrote to the Appellant at 2 Duncan Close, Moulton Park Industrial Estate, Northampton and advised that enquiries confirmed that between 1 January 2012 and 30 September 2013 the Company had made purchases totalling £2,906,163.00 from Pix Mania in France, but there was no evidence that output tax had been declared on the sale of those goods. By using the 5% mark up as quoted in the 2011 annual accounts, the output tax due was £610,291.00, [£2,906,163 plus 5% = £3051, 471 x 20%].

27. On 12 and 14 June 2014, HMRC, again using 2 Duncan Close Northampton, as the Appellant's address:

- Raised an assessment totalling £356,317 for periods 09/10 to 09/13.
- Reduced the credit claim for period 03/12 from £54,508.04 to £39,504.04. Reduced the credit claim for period 12/12 to zero and raised an assessment for £255,761.
- Issued a penalty explanation to the Company in contemplation of penalties under Schedule 24 of the Act.

28. On 29 July 2014, HMRC having allowed a reduction for "telling" "helping" and "giving" issued four Notices of penalty assessments to the Company under Schedule 24 of the Act in the total sum of £416,414.05 (see paragraph 3 above). HMRC's letter was addressed to 2 Redhouse Square, Duncan Close, Northampton.

29. On 19 August 2014, HMRC issued to the Company, an "Officer's liability to pay a company penalty - notification to company" under Schedule 41 Finance Act 2008. The letter was addressed to 2 Redhouse Square, Duncan Close, Moulton Industrial Estate. The Company was advised that:

- a notice of penalty assessment had been sent to the Company in the sum of £416,414.05; and
- a notice had been sent to the Appellant informing the Company officer that the amount he was personally liable to pay was £208,207.02.

30. On 19 August 2014, HMRC issued a Personal Liability Notice ("PLN") in the sum of £208,207.02 to the Appellant, advising that they had charged the Company penalties for a deliberate inaccuracy and, even though they were charged to the Company, the Appellant was personally liable to pay 50% because he was jointly involved in the running of the company. HMRC's letter was addressed to the Appellant at 2 Duncan Close, Moulton Park Industrial Estate, Northampton. The Appellant was advised that under paragraph 19 (1) Schedule 24 Finance Act 2007, he was:

- personally liable to pay because HMRC believed that the Company was likely to become insolvent;
- liable to pay 50% because he was jointly involved in the running of the Company.

31. On 28 December 2014 the Appellant responded that he had not received HMRC's letter until the end of November 2014;

> "In the interest of justice could the following special circumstances be taken into consideration:
>
> 1) The address to which all HMRC correspondence for We Are Electricals was sent, was inaccessible by both Directors, did not forward to our address, nor were we made aware of the correspondence. We had written a letter in 2013, to which as far as we had understood, we had not as yet received a reply.
>
> 2) Only in October 2014, was any correspondence first sent to Mr Darren Creswell's address - however at this time, Mr Darren Cresswell was out of the country (air flight plans and travel itinerary can confirm this) from 13 September until the end of November 2014.
>
> 3) On his return in December 2014, Mr Darren Cresswell contacted HMRC regarding the demand for payment, and a colleague on the phone agreed to send out all copies of undelivered letters to his address.
>
> 4) Mr Ben Slater has as yet not received any HMRC correspondence.
>
> 5) At the earliest possible date of availability for both Directors (being 28th December 2014) - both directors went through the letters for the first time, and found there to be serious misunderstandings in the evidence used, and therefore incorrect values and penalties raised.
>
> 6) As the 30 day appeal time had passed, but neither Director was aware of the situation until now, we felt it reasonable grounds to request an Out of time appeal regarding the VAT Penalties for We Are Electricals REF: 993515094.
>
> If we can be granted an out of time appeal on the above points, we will be happy to respond in detail with all required additional information within 30 days of response.
>
> Correspondence address:
>
> 37 Bradley Lane, Wolverhampton, West Midlands, W1/14 8EW."

32. The letter from HMRC which the Appellant was referring to was his of November 2013.

33. On 20 January 2015, HMRC acknowledged the Appellant's letter and asked if he wanted a review.

34. On 19 February 2015 the Appellant outlined the reasons why he contested the penalty, saying:

"The decision against We Are Electricals was based on the assumption that approximately £2.9 million of customer orders were made and processed, but not declared in We Are Electricals VAT returns over the period in which the penalties applied. This is owing to the documented sales received from Pix Mania in France.

The transactions with Pix Mania in France were conducted under WAE+ Limited, and not We Are Electricals, however it appears that the VAT registration was not updated with regards to the Pix Mania account. Customers had orders placed with WAE+ Limited, who made the purchases and items were delivered to WAE+ Limited. Therefore the assumption that approximately £2.9million of customer orders were undeclared on We Are Electricals is incorrect. The £2.9 million of customer orders were declared as part of WAE+ Limited's trading, and accounted for.

PWC who were initially handling these matters for us were made fully aware of this situation very early on, and should have clarified these points to yourselves when they were initially raised. They were fully aware that WAE+ Limited was trading, and that We Are Electricals had effectively ceased trading as shown in the VAT returns.

Therefore, with this in mind, we would ask for an appeal against the penalties incurred against We are Electricals and the Directors therein, and ask for a re-evaluation based on this new information.

The other penalties mentioned relate to the difference between the submitted Company Account figures and the VAT figures. It appears that the Companies House figures have been used as a basis to state that the VAT figures are incorrect. However, the opposite of this is true - namely that the Companies House figures were submitted incorrectly and had not been corrected - a point that we made PWC very clear on. The VAT figures are completely accurate, and to ensure this, this is why we hired the expertise of PWC in sorting out these details.

In closing, we will be more than happy to provide (where possible) any more clarification or information regarding these points, and hope that we can work together to reach an amicable solution."

35. HMRC responded by asking the Appellant whether he wanted a local review or wished to appeal the Notice of Penalty assessment.

36. On 7 April 2015, the Appellant served an appeal on the basis that the information on which the assessment has been raised needed 'to be re-evaluated as previously stated'.

37. Nothing further happened until 11 September 2015, when HMRC advised that, as the Appellant had resigned as a director with effect from 1 August 2013, he had ceased to have the authority to act on behalf of the Company. HMRC also advised that although the raising of the PLN was valid, it appeared that it may have not been properly served. The PLN was then re-issued to the Appellant's stated address in Wolverhampton on 18 November 2015, some 16 months after service on the Company of the Penalty notice.

38. The Appellant lodged an appeal which was received by the Tribunal on 27 January 2016.

39. HMRC then examined the VAT returns that had been submitted by WAE+ Ltd, VAT Registration No 120 9819 19. The returns for 11/12 to 05/13 showed acquisitions from other EC Member States totalling £235,181.00, being far less than the purchases that had been established as being made from Pix Mania during the period 12/11/ to 03/13. HMRC inspected the VAT Information Exchange System (VIES) which showed that acquisitions had been received from Denmark, France, Germany, Ireland, Netherlands and Sweden. Furthermore the purchases from France were not from Pix Mania.

40. On 21 July 2016 HMRC issued a penalty explanation letter which explained that the behaviour that caused the inaccuracy in relation to the Pix Mania purchases was deliberate and concealed. The disclosure was considered to be prompted. HMRC explained that penalties had been reduced because:

- the behaviour that caused the inaccuracy in relation to the annual accounts discrepancy was amended from deliberate and concealed to deliberate. The disclosure was considered to be prompted.

- the behaviour that caused the inaccuracy in the over claimed input tax had been amended from deliberate to careless and the twice reclaimed input tax was unchanged to careless.

41. On 21 July 2016 a revised notification letter of an officer's liability to pay a company penalty was issued to the Company in the sum of £407,418.52 (reduced from £416,419.05) and a revised Personal liability notice was issued to the Appellant for 50% of the penalty, in the sum of £203,709.26.

Legislation

42. The legislation so far as relevant is set out below.

Paragraph 1 Schedule 24 Finance Act 2007 provides:

Error in taxpayer's document

(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 I 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.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

The Table includes VAT returns.

Paragraphs 3 to 5 schedule 24 provide (so far as relevant):

3. Degrees of culpability

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC 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).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P-

(a) discovered the inaccuracy at some later time, and
(b) did not take reasonable steps to inform HMRC.

4. Standard amount

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) ... the penalty is-

(a) for careless action, 30% of the potential lost revenue,
(b) for deliberate but not concealed action, 70% of the potential lost revenue, and
(c) for deliberate and concealed action, 100% of the potential lost revenue.

5. Potential lost revenue: normal rule

(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to-

(a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and
(b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

Paragraph 13

13(1) Where P becomes liable for a penalty under paragraph 1 or 2 HMRC shall-

(a) assess the penalty,
(b) notify P, and
(c) state in the notice a tax period in respect of which the penalty is assessed.

(2) An assessment-

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),
(b) may be enforced as if it were an assessment to tax, and
(c) may be combined with an assessment to tax.

(3) An assessment of a penalty under paragraph 1 must be made within the period of 12 months beginning with-

(a) the end of the appeal period for the decision correcting the inaccuracy, or
(b) if there is no assessment within paragraph (a), the date on which the inaccuracy is corrected.

(4) An assessment of a penalty under paragraph 2 must be made within the period of 12 months beginning with the end of the appeal period for the assessment of tax which corrected the understatement.

(5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which-

(a) an appeal could be brought, or
(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraphs (3) and (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

Paragraphs 15 to 17 Schedule 24 provide (so far as relevant):

15. Appeal

(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

16 (1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply-

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may-

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11-

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

Paragraph 19 Schedule 24 provides (so far as relevant):

19. *Companies: officers' liability*

(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership "officer" means-

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c 46)),

(a) a manager, and

(b) a secretary.

(4) In the application of sub-paragraph (1) in any other case "officer" means-

(a) a director,

(b) a manager,
(c) a secretary, and
(d) any other person managing or purporting to manage any of the company's affairs.

(5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)-

(a) paragraph 11 applies to the specified portion as to a penalty,
(b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,
(c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,
(d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),
(e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and
(f) paragraph 21 applies as if the officer were liable to a penalty.

(6) In this paragraph "company" means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association.

Evidence

43. The bundle consisted of five lever arch files containing a copy of the exchange of correspondence, copy VAT returns, copy Companies House registered documentation including copy annual accounts for the two companies, assessments, penalties, calculations, the Notice of appeal, and witness statements by the Appellant and Mrs Hurst for HMRC, each of whom gave evidence under oath to the Tribunal. We were also provided with relevant legislation and case law precedent. We were not provided with copies of the two Companies bank/debit card statements.

44. The table below shows the VAT return information delivered by the Company and WAE+.

We are Electricals Limited

DATE	PURCHASES	FROM EC	SALES	VAT ON SALES	%
9/10	4,271	2481	2,662	466	17.5%
12/10	12,687	12,340	13,244	2,141	17.5 & 20%
3/11	84,679	76,905	18,383	3,676	20%
06/11	124,955	52019	70,671	14134	20%
09/11	366,230	35,852	335,014	67002	20%
12/11	239,656	26,588	358,115	71,628	20%
03/12	135,868	-	-136,671	-27,334	20%
06/12	129,440	-	131,796	26,359	20%
09/12	89,096	-	142,403	28,480	20%
12/12	170,362	-	1,542	308	20%
TOTALS	1,240,748	206,155	937,159		

WAE+ Limited

DATE	PURCHASES	FROM EC	SALES	VAT ON SALES	%
11/11	16,582	-	16,529	2,754.18	20%
2/12	74,917	-	81,413	16,282.80	20%
5/12	458,185	-	479,627	95,925.50	20%
8/12	622,272	-	637,247	127,449.65	20%
11/12	1,851,434	83,817	1,780,028	356,606.01	20%
02/13	1,144,383	40,929	1,099,183	219,837.05	20%
05/13	826,011	110,435	700,755	140,116.64	20%
08/13					
11/13					
TOTALS	4,994,239	235,181	4,794,782	958,969	

45. At the hearing Mrs Hurst when cross examined on her evidence said that:

i. It may have been 1 August 2013, when HMRC visited PWC that she first learned the Appellant had resigned as a director of the Company, rather than October 2013, as she had indicated in her witness statement. The issue is relevant in terms of the address she used when corresponding with the Appellant.

ii. She had taken notes at the 1 August 2013 meeting, but had not produced the notes in her evidence. It was therefore not entirely clear what documentation had been requested or produced by PWC and the Appellant.

iii. She accepted that she had originally been comparing the VAT returns with the the accounts drawn to 28 June 2011, whereas corrected accounts were drawn to 30 November 2011, In that regard her witness statement saying that there were inaccuracies was not correct. She said that she had not seen the 30 November 2011 accounts until sometime after the PLN had been issued. She conceded that the Appellant in November 2013 had asked HMRC to rely upon the accounts prepared by PWC.

iv. She had formed the view that the inaccuracies arose from deliberate conduct because HMRC had been trying to contact the Appellant and his co-director but had received no response. She agreed that the directors' conduct may not have amounted to deliberate conduct.

v. She agreed that HMRC had not sent or followed up its letter of 1 April 2014 when it was returned by the Post Office marked 'refused.' She agreed that the letter had been addressed to the Company's address, although it later came to light that the Company's address was not the Appellant's address and in any event the Appellant had resigned from the Company on 1 August 2013.

vi. The information provided by the French authorities had not been disclosed in any detail and was not included in evidence. As a result of this the Appellant was not able to cross check the allegations that had been made.

vii. She accepted that if the Company ceased trading in May 2013, it could not be trading at the end of 2013 (HMRC's assessment was to September 2013). Consequently purchases for the period between May and September could not have been by the Company, and must have been by WAE+.

viii. She accepted that in identifying the Company as having made the purchases from Pix Mania she was relying on the VAT number given by the French authorities and that a mistake could have been made either by Pix Mania or the authorities. There had been no cross check with the French authorities or Pix Mania to eliminate this possibility.

46. The Appellant in evidence said:

i. WAE+ took over trading from the Company in late 2011/early 2012. It was WAE+ which made the purchases and sales from that point on. Trading was via the WAE+ website, and branding. Money went into and out of the bank/card accounts of WAE+.

ii. He did not dispute the fact that goods to the total value of £2.9 million had been purchased from Pix Mania.

iii. He agreed that he had to take some responsibility for the mistake that had been made when WAE+ used the Company's VAT number when dealing with Pix Mania, but said that issuing invoices was not part of his responsibility. He had not prepared the VAT returns which were dealt with by his co-director Mr Slater. He was the technical director and never became involved in the accounts or VAT returns. He had not signed the returns. He could not be absolutely certain that the VAT returns correctly reflected the £2.9m purchases from Pix Mania. He no longer held the company accounts and papers which were taken by the administrators. He had to assume however that the returns were correct.

iv. They had instructed PWC to prepare the Company accounts and the overdue VAT returns to ensure that these were properly prepared and accurate.

v. The list of sales to customers included as an exhibit with his witness statement, ran to hundreds of pages but did not include the dates of the sales. He agreed it was therefore difficult to relate them directly either to sales by the Company or WAE+.

vi. He agreed that he had not mentioned Pixmania or purchases from the EEC at the 1 August 2013 meeting with HMRC, but said that was because PWC were already aware of the purchases from Europe and assumed this information had already been passed on to HMRC.

vii. He also agreed that he had not mentioned the existence of WAE+ at his meeting with HMRC or subsequently, but again explained that he assumed this information been provided by PWC.

viii. He acknowledged that although the PLN had been sent to the Company's correspondence address he received notification of the original Personal Liability Notice in early December 2014.

HMRC's Case

47. The penalty had been raised in accordance with Schedule 24 of the Finance Act 2007. Under paragraph 1 of Schedule 24 of the Act, a penalty is due when a person gives HMRC a document and two conditions are satisfied, namely that:

i. the document contains an inaccuracy which amounts to, or leads to an understatement of a liability to tax, a false or inflated statement of a loss or a false or inflated claim to repayment of tax;
ii. the inaccuracy was deliberate.

48. HMRC identified inaccuracies during verification checks made into the Company's EC purchases and ascertained that Pix Mania had recorded sales to the Company of £2,906,163.86 between VAT periods 03/12 and 09/13. HMRC submit that these purchases were not recorded in the Company's VAT returns as purchases or sales. There was no evidence that:

- Output tax was declared in respect of purchases from Pix Mania.
- There was no acceptable explanation with regards to the difference between the sales in the annual accounts to the outputs declared.
- There was no acceptable explanation for the over claimed input tax.

49. Therefore the Appellant is liable to a penalty under paragraph 19 (1) of the Act.

50. The Appellant was one of the officers of the Company and it was the actions of the Appellant that caused the deliberate inaccuracy. In his reply to HMRC's Statement of Case, he has confirmed that the inaccuracy was attributable to him as an officer of the Company:

> "The error here is one of us carelessly providing Pix Mania with an old VAT number. This point, I acknowledge as a careless mistake on my part, and did not think to check the VAT number we were using to place Pix Mania orders."

51. In a situation where a corporate body is, or is likely, to become insolvent, an officer will be liable to a penalty under paragraph 19(1) of Schedule 24 of the Finance Act 2007.

52. The Appellant failed to explain these transactions at the visit to the Appellant at the Company's accountant's offices on 1 August 2013.

53. In his reply to the HMRC's Statement of Case, the Appellant has confirmed that:

> "WAE+ Ltd for all intents and purposes, was the company that purchased the goods from Pix Mania, and sold to customers. WAE+ Ltd accounted for these purchases."

54. The Appellant, as a director of the Company, would be aware that acquisitions and acquisition tax were being declared on the Company VAT returns for the periods 03/11 to 12/11 and that a conscious decision was made to stop making these entries in the VAT returns from 03/12 onwards.

55. He was also a director of WAE+ and must have been aware that these acquisitions, including those from Pix Mania, were not being recorded on the VAT returns for WAE+ Ltd and that there were no declarations of acquisition tax on any of the WAE+ Ltd VAT returns [Acquisition Tax, i.e. VAT on goods purchased from a

VAT registered business in another EC member state dispatched to the UK recoverable as input VAT, subject to normal rules]. He has not provided sufficient evidence, such as the VAT account and VAT summaries for WAE+ Ltd, to substantiate his contention that WAE+ Ltd accounted for these transactions.

56. The maximum penalty for a deliberate and concealed inaccuracy is 100%. In this instance to reflect the quality of disclosure by the Appellant, HMRC submit that a penalty of 65% in relation to the potential lost revenue is appropriate.

57. The behaviour of the Appellant was deliberate in relation to the annual accounts discrepancy. The accounts to 28 June 2011 were dated 26 June 2012 and the outstanding returns for periods 03/11 to 12/12 were submitted on 1 March 2013. The Appellant stated in an undated letter received on 19 November 2013 that the annual accounts were "accurate and correct regarding this period". The Appellant was a director of the Company and as an officer of the Company was required to ensure that accurate VAT returns were submitted.

58. The disclosure was a prompted disclosure because the Company did not tell HMRC about the inaccuracy before the Company had reason to believe HMRC had discovered it or were about to discover it.

59. The maximum penalty for a deliberate inaccuracy is 70%. In this instance to reflect the quality of disclosure by the Appellant, HMRC submit that a penalty of 49% in relation to the annual accounts discrepancy is appropriate.

60. There were no special circumstances which would allow a special reduction under paragraph 11 of Schedule 24 of the Finance Act 2007.

Appellant's case

61. Mr Firth summarises the Appellant's grounds of appeal as below:

(a) There were no inaccuracies. HMRC assert that two types of deliberate inaccuracy have been identified:

- The first is an assertion that the Company had purchased £2.9m of goods from Pix Mania between 1 January 2012 and 31 September 2013, sold those goods to customers and failed to account for output tax. The Appellant's case is that this is incorrect: the amount purchased from Pix Mania is also disputed and any purchases in the period in question from Pix Mania were made by WAE+.

- The second is an assertion that there was a discrepancy between a set of accounts for the year ending 28 June 2011 and the Company's VAT returns. The Appellant's case is that the accounts as amended by PWC (to reflect refunds and cancelled orders) to the extended date of 29 November 2011 are correct.

.

(b) HMRC's case has not been clearly and properly pleaded and does not satisfy the burden of proof, in terms of allegations of inaccuracy, and deliberateness by the Appellant.

(c) HMRC's Personal Liability Notice was served on the Appellant out of time.

(d) If there were any inaccuracies, they have not been identified and were not deliberate.

(e) If there were deliberate inaccuracies, they were not deliberate by the Appellant.

No inaccuracies

(i) The Pix Mania Issue

62. From March 2012 onwards, WAE decreased its activities and was no longer operative in a significant way (there were some legacy matters). Instead, WAE+ was by some margin the main operative company, buying from suppliers (including Pix Mania) and selling to customers.

63. A full list of WAE+ sales of goods purchased from Pix Mania is included in the Appellant's witness statement. The spreadsheet unfortunately omits the dates of the orders. The first sale/order is 15 February 2012 and the orders then go through to 1 September 2013 (a point that confirms these relate to WAE+). Officer Hurst alleges that she was not told anything about there being another company. In fact, however, she acknowledges (in her witness statement) that she was told at least as early as May 2013 that the Company was no longer trading.

64. HMRC have no evidence with which to challenge this. Even if Pix Mania did declare the dispatches as being for the Company's VAT number that cannot change the fact that WAE+ was the operative company which purchased the goods and from which customers bought the goods. Thus it was WAE+ which was liable to account for output VAT on those sales.

65. Furthermore, the first letter in which this issue was raised was one dated 1 April 2014, but was sent to the wrong address and, indeed, delivery was refused. It is not apparent what, if anything, Officer Hurst did as a result of that letter being returned as undelivered.

(ii) The Accounts Issue

66. It is not apparent which accounts HMRC are referring to when they say that there was a discrepancy between the accounts and the VAT returns. There were no statutory accounts for a period to 28 June 2011. The original accounting date was 28 June 2011, but this was extended to 29 November 2011 after PWC were instructed.

67. The Appellant's understanding is that draft accounts were produced for the year to June 2011, but they did not reflect the correct level of refunds/charge backs and thus overstated turnover. Subsequently, PWC were instructed to establish the correct position.

68. HMRC's case is based upon there being a discrepancy between the 2011 accounts and the VAT returns. Putting to one side the absence of evidence of that discrepancy:

- The existence of a discrepancy does not tell one which document is correct and which is incorrect. It is for HMRC to prove that the VAT returns were wrong.

- HMRC have not said or suggested why the returns were wrong. If their case is that the Company was suppressing its turnover, it would not make sense for the turnover not to also be suppressed in the accounts prepared by the Company.

69. No explanation is given of penalty schedule 5 which apparently relates to the Accounts Issue and periods 03/12 and 12/12.

Inadequate pleading and particulars

70. Mr Firth for the Appellant asserts that HMRC's case is too vague; their statement of case sets out their contentions.

> "The Respondents contend that there was no evidence that output tax was declared in respect of purchases from Pix Mania, a supplier in France, and therefore the Appellant is liable to a penalty under paragrap19(1) of the Act.
>
> The Respondents contend that there was no acceptable explanation with regards to the difference between the sales in the annual accounts to the outputs declared and therefore the Appellant is liable to a penalty under paragraph 19(1) of the Act.
>
> The Respondents contend that there was no acceptable explanation for the over claimed input tax and therefore the Appellant is liable to a penalty under paragraph 19 (1) of the Act."

HMRC also say:

> "The Appellant was personally liable to pay 50% because he was jointly involved in the running of the company."

71. This is wholly inadequate:

> "An allegation of fraud or dishonesty must be sufficiently particularised...particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowingly not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference." (*Three Rivers DC v. Bank of England* [2001] UKHL 16, §186, Lord Millett).

> "The tribunal should insist at the outset that any allegations of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done." (*CEC v. Pegasus Birds Ltd* [2004] STC 1509 at §38(iii)).
>
> "Second, an allegation of fraud or dishonesty must not only be distinctly alleged but sufficiently particularised. This is a separate principle. The requirement to plead fraud or dishonesty unequivocally is designed to give the party opposite sufficient notice that this is indeed what is being alleged. The requirement to give sufficient particulars goes further than this..." (*E Buyer UK Ltd v. HMRC* [2016] UKUT 123 (TCC), §46).
>
> "All allegations of impropriety and lack of bona fides should be exhaustively and unequivocally particularised in writing prior to cross-examination: *Pegasus Birds v. HMRC* [2004] STC 1509, [38] per Carnwath LJ." (*GSM Export (UK) Ltd v. HMRC* [2014] UKUT 0529 (TCC), §182, Proudman J).

72. The lack of an "acceptable explanation" is not even an allegation of deliberateness/dishonesty, let alone a particularisation of the basis upon which that serious allegation is made.

73. Further, the assertion that the Appellant was "jointly involved in running of the company" does not even suggest in what way the Appellant acted deliberately/dishonestly. It is tantamount to attempting to shift the burden of proof to the Appellant to show that he did not act deliberately.

74. HMRC's witness statement does not make matters clearer: HMRC asserts that it has been proved that the Company made purchases from Pix Mania and that those goods must have been sold. This addresses the alleged inaccuracy, but not deliberateness by the Company or the Appellant. HMRC simply asserts that:

- The behaviour was deliberate and concealed.
- The behaviour in respect of Pix Mania was deliberate and concealed because the books and records did not contain the acquisitions. This does not address whether the omission was deliberate (even if it is assumed to have been inaccurate).
- The behaviour in respect of the accounts was deliberate and concealed because no acceptable explanation was provided. That does not address deliberateness.

75. For this reason alone, HMRC's case must fail: they have failed to particularise any facts which they propose to prove that are inconsistent with the Company, let alone the Appellant, having behaved honestly.

Inadequate evidence

76. In respect of the existence of an inaccuracy, HMRC's evidence is hopeless.

77. First, on the matter of the alleged difference between the Company's accounts in the period to 28 June 2011 and the turnover declared on tax returns, HMRC cannot even prove whether there was a difference, or if there was a difference what it was, let alone which of the two was accurate.

78. Officer Hurst refers to "Annual Accounts for year ending 28 June 2011" in her witness statement but produces neither the accounts nor the VAT returns to which they were compared. A search of Companies House reveals that no accounts were submitted for a year to 28 June 2011 because the accounting year was extended to 29 November 2011. Those accounts were submitted as small company accounts on 30 March 2012 and amended on 20 April 2012. What accounts are HMRC referring to and where are they in the evidence?

79. There is then a complete absence of any evidence that the Appellant was involved in either the preparation of those accounts and/or the preparation of the VAT returns said to be inaccurate.

80. Second, on the matter of the Pix Mania purchases, Officer Hurst asserts that information from the French authorities showed purchases by the Company in the period 1 January 2012 to 31 December 2013 of £2.9m. That information has not been produced, nor is there anything else to corroborate the claim.

81. Officer Hurst states that she has examined the returns submitted by WAE+ and that they do not support the Appellant's assertion that purchases from Pix Mania in the period identified were made by WAE+. Those returns have been produced, together with "VIES" print outs for period 03/13, 12/12 and 06/13:

- There is no explanation of what the VIES reports show, relate to or how they prove the alleged inaccuracy.
- In any event, they are incomplete.
- The assessments relate to under-declared tax on supplies by the Appellant, not acquisitions (which would be immediately recoverable).

82. There is then a complete absence of any evidence that the Appellant was involved in the preparation of the Company VAT returns and that he knew they were inaccurate.

Validity of the PLN and Time limits

83. A PLN is made when notice is given to the officer of the company by HMRC:

> "19 (1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer."

84. For notice to be provided, it must be received (or deemed to be received):

> "As I have said, it was not enough for HMRC to send the NOE letter: it had to be received. It was for HMRC to prove that they sent the NOE letter and I find that they have proved this. It was for the appellant to prove its case that the NOE letter was not received at the White House." (Spring Capital Ltd v. HMRC [2016] UKFTT 246 (TC), §31).

85. HMRC's letter of 19 August 2014, issuing the PLN, although addressed to "Darren Cresswell", was intended to be sent to the Company. Officer Hurst was aware that the Appellant had resigned as a director of the Company on 1 August 2013 (in her witness statement she says she was aware of this on 7 October 2013).

86. In any event, the address for We Are Electricals is wrong. The correct address was 2 Redhouse Square, Duncan Close, Northampton, England NN3 6WL (correctly used to notify the Company of its penalties). The personal liability notice is addressed to "2 Duncan Close, Moulton Park Industrial Estate, Northampton, NN3 6WL".

87. It follows that the PLN on 19 August 2014 did not comply with the requirements of paragraph 19. HMRC appear to have accepted this by re-issuing the notice in November 2015.

88. The purported reissue of the notice on 18 November 2015 was out of time. Schedule 24 Paragraph 13 states:

> "13 (3) An assessment of a penalty under paragraph for 1 A must be made before the end of the period of 12 months beginning with
>
> (a) the end of the appeal period for the decision correcting the inaccuracy, or
>
> (b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected."

89. The personal liability notice has no existence separate of its notification to the officer by HMRC - see paragraph 19(1). The assessments against the Company were made on 2 May 2014. On any view, the time limit had expired by 18 November 2015.

90. A further notice was sent on 21 July 2016, for a reduced amount. This is the notice HMRC now rely upon. It is also out of time.

(c) No deliberate behaviour

91. Even if either or both of the inaccuracies is established, there is no basis for concluding that the inaccuracy was deliberate in the sense that someone, acting on the Company's behalf, intentionally and knowingly understated its turnover.

92. Further it is impossible to understand why WAE would instruct PWC to analyse and deal with its accounts and tax if it was perpetrating two massive frauds. WAE+ was a real company that was genuinely carrying on business at the relevant time. Even if it is established that £2.9m of supplies to customers should have been declared in the Company rather than WAE+ there is nothing to suggest that anyone at WAE was aware of this error. An email from Ben Slater to the Appellant on 27

February 2012 confirms the problems that WAE had had regarding payments and customers.

93. HMRC's case on deliberateness is inherently improbable. Cogent evidence would be required to establish it. In fact there is no evidence.

(d) No deliberate behaviour by the Appellant

94. Even if there was deliberate behaviour by someone at WAE, there is nothing to indicate that the Appellant had any involvement in that conduct, let alone knowing involvement:

- He was not involved in the preparation of the VAT returns.
- Emails in the Appellant's witness statement confirm that PWC dealt with Ben Slater (and note also, that these emails are signed "Ben Slater, Director, WAE+" in November 2012).
- An email of 29 November 2013 at 2.41pm from Ben Slater to the Appellant confirms that Mr Slater was responsible for the accounts.

Discussion and conclusion

95. HMRC accept that the onus of proof rests with them to demonstrate that the Appellant is liable to pay the penalty under the Personal Liability Notice. The standard of proof is the ordinary civil standard, that is, the balance of probabilities.

96. HMRC have the burden of proving in respect of each penalty:

(a) The Appellant's VAT return(s) contained an inaccuracy.

(b) That inaccuracy was deliberate in the sense that the Company actually knew that it was inaccurate, but nevertheless proceeded.

(c) The Appellant did (or failed to do) something intending or knowing it would bring about the inaccuracy.

(d) That the personal liability notice was validly issued.

Inaccuracies

97. It is difficult to understand why HMRC were unaware that the Company's accounts, particularly given that they had been filed with Companies House, had been amended to 29 November 2011 until sometime after their intervention had concluded, the Penalty Notice served on the Company and the Personal Liability Notice served on the Appellant.

98. The Company's turnover as shown in the accounts to the year end, 29 November 2011, is stated to have been £618,482. The total sales as shown in the Company's

VAT returns to the end of period 12/11 is stated to have been £798,089. Deducting the turnover in December 2011 from the 12/11 return would approximately reconcile the two figures, particularly if refunds and sales credits are taken into account.

99. The turnover of WAE+ to the year end 30 September 2012 is stated to be £1,650,293. The total sales as shown in that company's VAT returns to the end of period 08/12 was £1,214,816 and to the end of period 11/12 was £2,994,844. Taking into account the fact that the 11/12 VAT period was its largest at £1,780,028 the month of September could have approximated to £435,417 being the difference between the accounts figures and the VAT returns, therefore reconciling fairly approximately the accounts and VAT returns. On this basis there is no readily apparent or significant disparity between the VAT returns and the accounts.

100. However the Appellant Company's VAT returns and those of WAE+ do not reflect the £2.9m purchases from the EEC. The total of goods purchased from the EC as shown in the Appellant Company's returns was £206,155. The total of goods purchased from the EC as shown in the returns of WAE+ is £235,181. Clearly therefore there is something wrong as the sum total of these two figures falls a long way short of £2.9 million.

101. Furthermore HMRC inspected the VIES which showed that acquisitions had been received from Denmark, France, Germany, Ireland, Netherlands and Sweden and the purchases from France were not from Pix Mania.

102. As HMRC say, EC acquisitions and acquisition tax were being declared on the Company VAT returns for the periods 09/10 to 12/11, but from 03/12 onwards no EC acquisitions or acquisitions tax were declared. Similarly with WAE+ no EC acquisitions and acquisition tax were being declared on its VAT returns for periods 11/11 to 08/12. Declarations of acquisitions and tax on acquisitions were resumed for WAE+'s final three returns, 11/12 to 05/13. This would indicate that a conscious decision was made to stop making these entries in the VAT returns throughout 2012 and up to April 2013.

103. It seems clear therefore that the two companies acquisitions from other EC member states [box 9] has been grossly understated, but also possible that such acquisitions were included in the 'purchases' [box 7]. However the tribunal was not provided with any further details or information that had been received from VIES/ France so whilst there were clearly inaccuracies, HMRC has not identified whether there was any lost revenue in terms of the total VAT paid.

104. HMRC's assertion with regard to purchases from Pix Mania continuing until the end of 2013 cannot be correct given that the Company ceased trading in May 2013 and WAE+ also ceased trading at the latest by August 2013 having decreased its activities from the spring of 2013.

105. HMRC's penalty calculations assume that none of the £2.9 million purchases from Pix Mania were included in sales by the Company and WAE+, which cannot be a reasonable assumption.

106. The inaccuracies as identified by HMRC are based on a reconciliation of the Company's accounts to 28 June 2011 and its VAT returns for the period from 09/11 to 12/12. However the Company's accounts were amended and prepared to the extended date of 29 November 2011 and as HMRC have conceded, any inaccuracies there may have been in the VAT returns have not been correctly identified against the amended accounts.

107. HMRC did not compare, as they should have done, the VAT returns of the Company and WAE+ with the respective annual returns for each company and the information received relating to Pix Mania and other EC imports. Although there were undoubtedly inaccuracies in the tax payer's VAT returns, HMRC have not satisfied condition 1 of paragraph 1 of Schedule 24 and shown that those inaccuracies amounted to or led to an understatement of a liability to pay tax.

108. Further, the penalty under paragraph 4 of Schedule 24 must be calculated by reference to the "Potential Lost Revenue". Because HMRC have calculated the Potential Lost Revenue by reference to the Company's accounts and VAT returns without considering those of WAE+, which possibly included the revenue derived from the Pix Mania and other EC imports, the computations used by HMRC in arriving at the penalty cannot be correct.

109. So as Mr Firth for the Appellant says, HMRC's case is too vague and is based upon there being a discrepancy between the June 2011 accounts and the VAT returns, but putting to one side the absence of evidence of that discrepancy with the November 2011 accounts, the existence of any such discrepancy does not tell one which document is correct and which is incorrect. It is for HMRC to prove that the VAT returns were wrong. There is also no explanation given relating to the penalty in schedule 5 [see paragraph 3 above] which apparently relates to the Accounts Issue and periods 03/12 and 12/12.

110. On that basis, and as conceded in evidence by Mrs Hurst, HMRC have not identified any inaccuracies.

111. Whether or not the PLN notice was served in time is therefore academic, but we nonetheless find that it was served out of time. The PLN on 19 August 2014 did not comply with the requirements of Schedule 24, paragraph 19. HMRC appear to have accepted this by re-issuing the notice on 18 November 2015, which did not comply with paragraph 13 having been served out of time. A further notice was sent on 21 July 2016, for a reduced penalty and it is this notice which HMRC now rely upon. However that notice is also out of time.

112. For the above reasons the appeal is allowed.

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

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 18 December 2017