



TC06388

Appeal number: TC/2013/6107

VAT – adjustments to return - omitted sales – disallowed input tax

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Mr PAUL SHORE
(t/a DP CONTRACTORS)**

Appellant

-and-

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

Respondents

**TRIBUNAL: Judge Peter Kempster
Mr Simon Bird**

Sitting in public at Centre City Tower, Birmingham on 3 July 2017

The Appellant did not appear and was not represented

Mr Bernard Hayley (HMRC Solicitors Office) for the Respondents

DECISION

1. As confirmed in the Tribunal Directions dated 19 July 2016, the only period under appeal is the VAT period 04/11. HMRC's disputed decision dated 3 July 2013 amended the 04/11 return:

(1) To reduce the input VAT claimed from £5,071.60 to £3,999.88. The adjustment disallowed three items:

(a) £1,040.00 relating to purchase of an Iveco Tipper truck.

(b) £23.17 relating to purchase of a power shower.

(c) £8.55 relating to purchase of paint and brushes.

(2) To increase the output VAT declared from £2,046.00 to £18,605.40 to cover omitted sales (itemised on a schedule provided to the Tribunal).

(3) The net result of the above amendments was an assessment in the amount of £14,605.52 (compared to a declared repayment claim of £3,025.60).

15 **The Hearings**

2. The situation concerning the hearings on 18 July 2016 and 3 July 2017 was described in the Tribunal Directions issued on 10 July 2017:

"The Hearing

1. The substantive appeal was previously listed for 18 July 2016 in Birmingham before Judge Kempster and Mr Mohammed Farooq, with Mr John Nicholson (HMRC Appeals Unit) appearing for HMRC and Mr John Routledge (Shackleton Limited) appearing for the Appellant. On the day of the hearing Mr Routledge informed the Tribunal that Mr Shore had been admitted to hospital. The Tribunal adjourned the hearing and made case management directions, including that "Mr Routledge will update the Tribunal concerning Mr Shore's medical condition."

2. The continuation hearing was listed for three days commencing 3 July 2017 before the current panel. On the day of the hearing Mr Routledge informed the Tribunal by telephone that Mr Shore had been admitted to hospital, and that neither Mr Shore nor Mr Routledge would be attending the hearing. Prior to the commencement of the hearing the Tribunal's clerk telephoned Mr Routledge to ascertain which days of the hearing he would be appearing; Mr Routledge stated that he would not be attending any of the days.

3. The Tribunal noted that (a) HMRC had appeared as listed and had produced their three witnesses in attendance; (b) Mr Routledge was on the record as Mr Shore's Tribunal Procedure Rule 11 representative; (c) there was no application to postpone the hearing; (d) in order not to further inconvenience witnesses it would be appropriate to take the

evidence of those witnesses; (e) Mr Routledge had the opportunity to cross-examine those witnesses but had chosen not to attend to ask questions; and (f) the Tribunal had no information concerning Mr Shore's medical condition or prognosis.

5 4. Taking all the above into account, the Tribunal considered that it was
in the interests of justice to proceed with the hearing, pursuant to
Tribunal Procedure Rule 33, so as to hear HMRC's opening and take
the evidence of HMRC's witnesses (all of whom had filed formal
10 witness statements). Having done that, the Tribunal determined that the
hearing be adjourned, and case management directions be issued (as
below).

Directions

IT IS DIRECTED that

- 15 5. The hearing is ADJOURNED.
6. No later than **18 August 2017** the Appellant shall:
- (1) Provide to the Tribunal in writing medical evidence supporting his non-appearance at the hearings on 18 July 2016 and 3 July 2017 (for example, hospital admissions certificates).
- 20 (2) State to the Tribunal in writing (with a copy to HMRC) whether Mr Shore wishes to give oral evidence to the Tribunal (with an opportunity for cross-examination by HMRC and questions from the Tribunal) or instead, given his medical condition, would prefer to make a written submission.
- 25 (3) If Mr Shore would prefer to make a written submission then he must state whether he has anything to add to his formal witness statement dated 30 July 2015. If Mr Shore would prefer to give oral evidence to the Tribunal then he and his representative must state to the Tribunal their proposals to ensure that this can be done without any further delay, and confirm that Mr Shore's medical advice is not contrary to that
30 course of action.

7. The Tribunal will consider the Appellant's response to the Direction in paragraph 6 above, and then inform the parties whether a continuation hearing will be required."

35 3. Mr Shore did not comply with Direction 6(1) (medical evidence). He confirmed on 15 August 2017 that he preferred to make written submissions, which were included in that letter. HMRC's comments on certain aspects of that letter were sought and provided to the Tribunal.

40 4. Having considered the additional information, we are able to determine the proceedings without reconvening the hearing.

Background

5. In February 2011 Mr Shore applied for VAT registration, stating that he was a partner in DP Contractors. He subsequently updated HMRC:

5 “Today I telephoned your offices and updated them that whilst the business is still going ahead and the registration is required, the business entity is changing from a partnership as per the original application to that of a sole trader as Paul Shore t/as D P Contractors

10 The main business activity of the business is road surfacing and ground working services ... I have already established a contract with a large contractor who supply me with job sheets for road workings. I shall complete the works then invoice them for the works

Please find enclosed a copy of my Employers Liability Certificate. D P Contractors has not invoiced any sales yet therefore cannot provide you with sales invoices at present.”

15 6. The first VAT return submitted was for the period 04/11 and is the return under appeal. It showed a refund due of £3,025.60. HMRC commenced an enquiry, received copies of documents requested (including a purchase day book and bank statements), and interviewed Mr Shore with his representative Mr Routledge. Mr Shore confirmed that he was a sole proprietor trading as DP Contractors, and that the
20 sole customer of the business was Southern Electrical Contracting Limited (“SEC”). The business prime accounting records were examined and several discrepancies from the documents previously provided to HMRC were noted. Mr Shore suggested that there may some confusion with a business conducted under the name “D&P Contractors”; he referred to a partnership between himself and Mr David MacMillan.
25 HMRC were not satisfied with the explanations provided by Mr Shore and Mr Routledge.

7. In November 2011 Mr Routledge stated to HMRC: “... in this instance D&P Contractors often gets referred to as DP Contractors but the two identities refer to the same business as established with the contract with Southern Electric.”

30 8. In December 2011 HMRC interviewed Mr MacMillan. Mr MacMillan stated:

(1) His address was used on the sales issued to SEC for the period 9th December 2010 and 21 July 2011 and his VAT registration number was the number used on the invoices issued to SEC for the period 09 December 2010 to 01 April 2011.

35 (2) He decided to tender directly to SEC for a contract with his friend Mr Shore and that as Mr Shore was not VAT registered the tender was made using Mr MacMillan’s VAT registration number. The tender process took several months and before the contract was agreed and supplies made he sustained a back injury and did not therefore get involved with the supplies made to SEC.
40 He had been receiving state benefits during the period of the contract with SEC.

(3) All of the paperwork and all of the payments were sent to Mr Shore and not to Mr MacMillan and as such Mr MacMillan's address and VAT number should not have been included on the contract.

5 (4) He had received a telephone call from Mr Shore's accountant who stated that Mr Shore had his own VAT registration number and that the VAT was Mr Shore's.

(5) He denied that the signature on the Framework Agreement between D & P Contractors and SEC was his.

9. Also in December 2011 HMRC wrote to Mr Shore informing him of the
10 explanation given by Mr MacMillan and stating:

15 "I have interviewed Mr MacMillan who states that although he set up the contract with [SEC] under his VAT number, the original intention was that you and he would be partners in this contract. However, Mr MacMillan states that, due to an injury, he never commenced the contract and it was you who continued the contract alone. Between 9/12/10 and 12/12/11 D & P Contractors have issued 190 invoices to [SEC]. The majority of these invoices have not been declared on your VAT returns. Please provide me with a full explanation in relation to this discrepancy."

20 10. Mr Shore replied:

25 "I was formerly in a partnership starting back in December 2010. My business partner supplied his personal VAT registration number and details on his sales invoices. The payment of the invoices was paid into an account with my name on it. In February this year, the partnership ceased and I applied and obtained my own VAT registration number. My effective date of registration is 1st March 2011 and am on cash accounting. Last week, my former partner went to the local VAT office as it appears that his VAT return for the period had not been submitted. The advice given to him by the local officer was that he should submit a
30 "nil" return. Does this mean that the VAT liability can be transferred to my account? If so, this doesn't seem fair and what appeal procedures do I have."

11. On 19 January 2012 HMRC wrote:

35 "... you state that between December 2010 and 1st March 2011 [Mr Shore] was in partnership. Can you please confirm who [Mr Shore] was in partnership with and what work was he doing? You also state that payment of the invoices raised by the partner, were paid into an account with Appellant's name on it. Can you please confirm if money was transferred to the said partner and if so, please provide copies of the bank statements to evidence this? Can you please confirm why the
40 partnership ceased and what process for invoicing and payment were once this happened."

12. Mr Routledge wrote on 15 March 2012:

5 “Paul Shore and David MacMillan have been long term friends. The
intention of D P Contractors was to be that of a partnership but due to
Mr Macmillan's illness, the intention broke down. The Original SSE
contract was awarded under Mr MacMillan's established business, for
10 which we are not instructed. In February 2011, as a result of the
breakdown, The Appellant re-established D P Contractors and started
works for SSE Contracting. We are not in a position to confirm who
was raising the sales invoices on work undertaken by for Southern
Electric Contracting between December 2010 and 1st March 2011.
Please supply a copy of all invoices you refer and how they relate to our
client VAT registration.”

13. In January 2013 HMRC interviewed the creditors manager of SEC, who confirmed:

15 (1) SEC used a subcontractor Dave MacMillan t/a D&P Contractors since 6
December 2010. On 19 December 2011 the subcontractor details changed to
Paul Shore t/a DP Contractors.

20 (2) The same NatWest bank account was notified for both accounts. Invoices
were submitted on a regular basis and paid, totalling around £605,000
(excluding VAT). Copy invoices were provided to HMRC.

14. In June and July 2013 HMRC raised adjustments to the 04/11 return. The adjustments were upheld on formal internal review. Mr Shore appeals to this Tribunal against the adjustments.

Witness evidence

25 15. We took oral evidence from two witnesses for HMRC, both HMRC officers
involved into the investigation into Mr Shore's 04/11 VAT return.

16. Mrs Shelley Croft adopted and confirmed a witness statement dated 4 October 2016, and answered questions from the Tribunal. Mrs Croft's evidence was:

30 (1) In an interview under PACE caution on 5 July 2013 Ms Andrea Hancock
(Mr Shore's domestic partner) confirmed that she had written the signature of
Mr Macmillan on the agreement with SSE Contracting Limited dated 19
September 2011.

35 (2) The bank statements for Mr Shore's account (provided via Mr Routledge)
did not accord with statements she obtained separately from NatWest. She
concluded that the statements provided by Mr Shore were altered and false.
The statements provided by Mr Shore showed receipts from customer SSE
Contracting Limited which corresponded to the sales declared on Mr Shore's
VAT return; however, the statements provided by the bank showed more
40 receipts from that customer, and accorded with the customer's own schedule
of payments to Mr Shore. Further, the NatWest statements did not reveal any

payments by Mr Shore to Mr Macmillan. She concluded that all the payments made by the customer were received by Mr Shore. The sales adjustment made by HMRC reflected the additional sales revealed by the true bank records and the customer's records.

5 17. Mrs Beverly Plant adopted and confirmed a witness statement dated 9 June 2015, and answered questions from the Tribunal. Mrs Plant's evidence was that she challenged the three items for which input VAT was disallowed:

10 (1) She showed the presented invoice for the truck purchase to the purported supplier (Driveover Limited) who confirmed there was no vehicle with that registration number in their stock records, and that the document did not correspond to any of their sales invoices for the relevant period. She concluded the invoice was a forgery. Mr Shore had not provided any cogent explanation.

15 (2) Mr Shore was a groundwork contractor. She saw no clear business purpose requirement for the purchase of a power shower or for paint and brushes. Mr Shore had not provided any cogent explanation.

18. We also had witness statements from Mr Shore and Mr Routledge; and, for HMRC, Mr Griffiths (another officer involved in the investigation) and Mr MacMillan. We include the evidence of Mr Shore and Mr Routledge in the
20 Appellant's case statement below. Mr Griffith's evidence corroborated that of his colleagues and, although he attended, we had no questions for him. Mr MacMillan's evidence supported the statements he made to HMRC in interview (see [8] above) and he did not attend.

Appellant's case

25 19. From the Notice of Appeal, witness statements, and submissions, Mr Shore's case may be summarised as follows.

20. HMRC had incorrectly attributed sales in the period 9 December 2010 to 30 April 2011 to Mr Shore. Those sales were by a like-sounding business entity, namely Dave MacMillan trading as D&P Contractors. The disputed sales were by a different
30 trader and pre-dated Mr Shore's date of VAT registration. Mr Shore was never in partnership with Mr MacMillan. In the absence of any transfer of a business as a going concern, there was no reason why Mr Shore should be liable for supplies made by a different trader.

21. Mr Shore had been a friend of Mr MacMillan, was previously an employee,
35 and there had been an intention to form a partnership but that had never materialised. Mr Shore commenced business on his own account in February 2011 as a groundwork contractor, working mainly for SEC. The lorry purchase happened around this time. He registered for VAT from 1 March 2011; he left all the paperwork to his accountant, Mr Routledge. He had now ceased trading.

22. The business had only ever traded as DP Contractors. The disputed invoices were issued under the name of D&P Contractors and all related to Mr MacMillan's business, and correctly recorded the details of that business. They were nothing to do with Mr Shore.

5 23. SEC had not paid all the invoices – around £23,500 was unpaid – and Mr Shore was on a cash accounting basis. Account had not been taken of £36,298.08 input tax.

24. Mr Shore had been arrested by HMRC on allegations of VAT fraud but had never been prosecuted. His health had severely deteriorated as a result of the stress.

10 **Respondents' case**

25. Mr Haley submitted as follows for the Respondents.

26. Although there had been an intention to set up a partnership between Mr MacMillan and Mr Shore, this in practice never happened due to Mr MacMillan's ill health.

15 27. Mr MacMillan has confirmed that he did not sign the contract with SEC and an associate of Mr Shore has confirmed that it was she who signed Mr MacMillan's name on the contract.

28. In order to secure the contract with SEC, Mr Shore continued to act as though the work with SEC was through D&P Contractors, issuing invoices to SEC using that
20 business's name and Mr MacMillan's VAT number.

29. The invoices were all paid into Mr Shore's bank account, with no distribution of funds to Mr MacMillan in respect of the alleged partnership or otherwise.

30. Should a partnership have been in place, this would represent a separate legal entity for VAT with a separate VAT number with both partners being jointly liable.
25 There had been no attempt by Mr Shore to account for VAT on any alleged partnership income. HMRC contended that the reason for this was that in fact the partnership never traded, instead Mr Shore traded on his own account using Mr MacMillan's details in order to secure work.

31. Mr Shore had failed to account for VAT on his supplies to SEC and the
30 assessments should therefore stand.

Consideration and Conclusions

Disputed sales

32. In relation to the disputed additional outputs (see [1(2)] above), we must
35 determine whether the amounts paid by SEC and attributed by HMRC as sales by Mr Shore were correctly so attributed, or whether instead the sales were made by another trader as Mr Shore maintains.

33. We regard it as settled law that the onus of proof is on Mr Shore, to the normal civil standard of balance of probabilities.

34. Mr Shore's contention is that the additional sales were in fact made by a business operated by Mr MacMillan, and that Mr Shore is being unfairly assessed with the VAT properly recoverable from Mr MacMillan. Having carefully considered all the evidence, we do not accept Mr Shore's explanation. Mr MacMillan states that he never entered into the SEC contract, he having become unwell by the time of the contract and thus unwilling to take it up. Mr Shore's domestic partner, Ms Hancock, has admitted to forging Mr MacMillan's signature on the SEC contract. We conclude that the SEC contract was not entered into or undertaken by Mr MacMillan or any business operated by Mr MacMillan. The contract payments for work undertaken on the SEC contract were paid into Mr Shore's bank account; that fact only became apparent to HMRC when they obtained bank statements direct from NatWest and compared them with the documents provided by Mr Shore. If Mr Shore's explanation had any plausibility then he would have arranged for the payments allegedly due not to him but to Mr MacMillan's alleged business to have been transferred to Mr MacMillan. We accept Mrs Plant's evidence, supported by the bank statements themselves, that all the monies were received, retained and utilised by Mr Shore, with no payments over to Mr MacMillan. We conclude that Mr Shore knew all along that the monies belonged to him because his business was undertaking the work and receiving the payments. He then indulged in a deliberate deception by not including the sales on his VAT returns, and he later attempted to conceal that deception by providing to HMRC documents that he knew were inaccurate but appeared to back up his false explanation.

35. Accordingly, we conclude that the additional sales to SEC identified by HMRC were correctly assessed on Mr Shore.

Disputed purchases

36. In relation to the three items of disallowed input tax (see [1(1)] above), from the correspondence in the bundle it appears that some or all of these may have been conceded in full or part; for the avoidance of doubt we shall regard them all as disputed in full. Mr Shore has provided no cogent explanation for how either of the two minor items (power shower, and paints and brushes) were purchases related to his business as a groundwork contractor; we agree with HMRC's conclusion that there was insufficient evidence that these represented deductible input tax of the business. On the other item (the truck), HMRC have fairly put to Mr Shore that the purchase invoice presented by him appears to be a forgery, based on their interview with the purported seller. That is a serious allegation but Mr Shore has, again, provided no cogent explanation for how the paperwork could have been produced legitimately. In the absence of a convincing explanation, and seen in the context of the other paperwork irregularities referred to above, we agree with HMRC's conclusion that there was insufficient evidence that this represented deductible input tax of the business. Accordingly, we uphold the adjustments of input tax in full.

Conclusion

37. For the reasons stated above we confirm the adjustment to the 04/11 VAT return described at [1(3)] above, and dismiss the appeal.

Decision

5 38. The appeal is DISMISSED.

39. 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
10 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.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 20th MARCH 2018