[2018] UKFTT 658 (TC)

TC06806

Appeal number: TC/2017/06876

VAT – inaccuracies in returns – Schedule 24 to Finance Act 2007 – omissions in invoicing associate business for services supplied – whether inaccuracies 'careless' – under-statement of the value of deemed supply on de-registration – whether behaviour 'deliberate' – whether special reductions – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

PINK ECO CLEAN **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
NOEL BARRETT

Sitting in public at George House, Edinburgh on 9 August 2018

Ms Agnieszka Sawka, in person for the Appellant

Mrs Elizabeth McIntyre, HMRC officer, for the Respondents

DECISION

Introduction

1. Ms Agnieszka Sawka, trading as Pink Eco Clean ('the appellant'), appealed against the penalties imposed by the respondents ('HMRC') under Schedule 24 of the Finance Act 2007 ('Sch 24') for inaccuracies in the VAT returns.

2. The penalties have been imposed consequent to VAT assessments raised under section 73 of the Value Added Tax Act 1994 ('VATA') for the period from 1 October 2014 to 31 December 2016, and in relation to the final VAT return on de-registration for the month from 1 January 2017 to 2 February 2017. The overall quantum of the VAT assessments is £10,110.

3. The appeal relates only to the penalties imposed for the inaccuracies in the submitted returns. There is no dispute as to the quantum of assessments for the VAT under-declared in the relevant returns.

4. The under-declared VAT of £10,110 represents the Potential Lost Revenue ('PLR') for Sch 24 purposes, £3,244 of which is assessed as 'careless' inaccuracies, and the balance of £6,866 as 'deliberate' inaccuracies.

5. The issues for the Tribunal to determine in this appeal are:

(1) Whether the 'careless' penalty of £486.60, being 15% of the PLR of £3,244, is to be upheld;

(2) Whether the 'deliberate' penalty of £2,403.10, being 35% of the PLR of £6,866, is to be varied;

(3) Whether special reductions apply to any of the penalties.

Evidence

6. HMRC called the evidence of VAT Assurance Officer, Mhairi Black, who had carried out the inspection of the VAT records of the appellant. Ms Sawka was given the opportunity to cross-examine Officer Black. Ms Sawka also gave evidence on behalf of the appellant.

7. There is no issue of credibility as to matters of fact from either witness.

The legislative framework

8. The penalties under appeal are imposed under Sch 24 to FA 2007, of which the material paragraphs for the purposes of this appeal are as follows.

9. Paragraph 1 of Sch 24 concerns 'Error in taxpayer's document' and is the relevant provision under which the penalty assessment is raised.

Error in taxpayer's document

1(1) A penalty is payable by a person (P) where –

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

1(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.

1(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

1(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

10. Paragraph 2 concerns the failure to notify HMRC of an under-assessment and does not apply to this appeal.

11. Paragraph 3 defines the degrees of culpability, and the relevant descriptions for this appeal are as follows:

Degrees of culpability

3(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, […].

12. Paragraph 4 provides for the standard amount of penalty imposable as a percentage of the potential lost revenue ('PLR'): (a) 30% of PLR for careless action; (b) 70% of PLR for deliberate and not concealed action; and (c) 100% for deliberate and concealed action.

13. Paragraph 5 defines PLR as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

14. Paragraph 7 provides for the determination of PLR where losses are concerned. Sub-paragraph 7(1) states:

> Where an inaccuracy has the result that a loss is wrongly recorded for purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the potential lost revenue is calculated in accordance with paragraph 5.

15. The nature of disclosure is defined under para 9(2), whereby disclosure

> 'is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information or the under-assessment, …'

16. Paragraph 11 provides for special reduction whereby HMRC may reduce a penalty under para 1,1A or 2 if they think it right because of special circumstances.

17. Paragraph 17 provides for the Tribunal's jurisdiction, on an appeal against a decision of HMRC that a Sch 24 penalty is payable, whereby the tribunal 'may affirm or cancel HMRC's decision' or 'substitute for HMRC's decision another decision that HMRC had power to make'.

18. If the tribunal substitutes its decision for HMRC's, it may rely on para 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.

19. Paragraph 18 (under Part 4 for Miscellaneous) provides for the extent P is to be assessed for culpability where agency is involved. The relevant sub-paras are:

> **AGENCY**
> **18(1)** P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.
>
> **18(2)** In paragraph 2(1)(b) and 2(a) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
>
> **18(3)** Despite sub-paragraphs (1) and (2), P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2) […].

20. Schedule 1 to the VATA provides at para 8(1) as follows:

> Where a person ceases to be a taxable person, any goods then forming part of the assets of a business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless –
>
> (a) the business is transferred as a going concern to another taxable person; or
>
> (b) the business is carried on by another person who, under regulations made under section 46(4), is treated as a taxable person; or
>
> (c) the VAT on the deemed supply would not be more than £1,000.

21. VAT Notice 700/11 on 'Cancelling your registration', which was provided to Ms Sawka, states at paragraph 7 as follows:

> 7.1 **What you have to do about your stocks and assets**

When you deregister, you usually make what is known as a deemed supply of the goods you have on hand. This means you may have to account for VAT on some of your business assets and stock on hand, depending on:

- what they are
- how you obtained them
- why you're cancelling your registration

You will not have to account for VAT if the total VAT due on the assets would be £1,000 or less.

7.2 **What you must include**

You must include assets such as:

- interests in land (but only if they would be taxable if you sold them, for example, where an option to tax has been made)
- tangible goods (for example, unsold stock, plant, furniture, commercial vehicles, computers) on which you claimed VAT when you bought them …'

The Facts

VAT de-registration

22. Ms Sawka is in partnership with Mr Kolodziej in a laundrette business known as Pink Eco Clean. Ms Sawka has a good command of English and deals with the administration and management aspects of the business, while Mr Kolodziej works to the instructions of Ms Sawka and is also the driver of the van used in the business.

23. The business was registered for VAT from inception in around September 2013. However, as the rolling turnover for a 12-month period was around £60,000, a decision was taken at the start of 2017 to de-register from VAT.

Associate business

24. Ms Sawka also runs a business called Pink Cleaning, providing cleaning services for holiday let apartments. With some of the holiday-let clients, Pink Cleaning also provides laundry service of bedding, linen and towels via the appellant.

25. From the schedule that itemised the laundry services supplied by the appellant to Pink Cleaning, Ms Sawka would seem to have started her associate business of Pink Cleaning in July 2014.

Matters highlighted in VAT assurance visit

26. On 17 February 2017, Officer Black of HMRC carried out a VAT assurance visit of the appellant's records at its business premises.

27. On 22 February 2017, Officer Black informed the appellant in writing of the few outstanding VAT matters she had identified during the visit, to be followed up by 10 March 2017. Of relevance to the appeal were the following matters:

(1) **Invoice for Van**: purchased in 2015 from William Mitchell & Sons Ltd was invalid for VAT purposes, and that unless a valid invoice from the seller is provided, the input VAT of £2,558.60 would be disallowed.

(2) **Value of stocks and assets at de-registration**: as per VAT Notice 700/11, which was brought to Ms Sawka's attention, output VAT is chargeable on items on which input VAT had previously been claimed.

(3) Specifically, based on the purchase records examined, the assets purchased in 2013 alone and for which input VAT had been claimed, were over a gross value of £6,000. Consequently, VAT must be charged on all goods on hand as deemed supply on de-registration in the final return.

(4) **Use of business assets**: several invoices for bedding, linen and towels from Out of Eden Ltd, were items rented to holiday lets via Pink Cleaning, and when returned, were laundered through equipment at Pink Eco Clean. Input VAT can only be claimed for goods or services used for business purposes. Since these goods were used by Pink Cleaning and not Pink Eco Clean, a charge must be raised for the use of these assets.

(5) Ms Sawka was asked to provide the calculation for the use of the assets, with the accompanying overhead costs and previous pattern of use.

28. There were two further matters that required follow up:

(1) Till reconciliation: till reports with an analysis of daily gross takings, with figures to be compared against those already declared, and any differences explained.

(2) Bank reconciliation: entries on the appellant's bank statements described as 'Cashflow' to Ms Sawka and Mr Kolodziej to be verified against the other side of these transactions by providing the corresponding bank statements for the six months from 1 July to 31 December 2016.

29. Numerous exchanges of emails followed on 6 to 9 March 2018 between Ms Sawka to Officer Black whereby documentation was attached in 7 emails by Ms Sawka to clear matters that had been identified in the assurance visit. Among the documents sent during this period are:

(1) An invoice from William Mitchell & Sons Ltd dated 31 December 2015 in relation to a Ford Transit Connect, showing net price of £12,793.03; RF licence for £225 and DVLA fee of £55; output VAT thereon of £2,558.61.

(2) Bank statements for Ms Sawka's account for the six months from 1 July to 31 December 2016.

(3) Bank statements for Mr Kolodziej's account for the six months from 1 July to 31 December 2016.

Submission of the final VAT return

30. On 7 March 2017, the appellant's final VAT return was submitted.

31. For present purposes, it is significant that the submission of the final VAT return was after the VAT assurance visit, but before documentation was furnished to Officer Black to clear up the matters she raised after the VAT visit.

32. For the deemed supply of machinery at de-registration, output VAT was included in the final return based on a book value of the machinery at £6,240.

Matters leading to the VAT assessments

33. On 27 March 2017, Officer Black wrote to the appellant with the following conclusions after she had checked the figures on the final return against documentation provided:

> (1) On the value of stock and assets at de-registration: that she did not believe the appellant had accounted for the business assets and stock on hand, as had been highlighted previously.
>
> (2) From the purchase invoices in 2013 for machinery such as the lagoon washer, electric dryer, ironing table, body former, spotting table and counter and till, the costs were approximately £35,800. Even taking into account depreciation, the deemed value of supply should still be higher than the £6,000 as per the final return.
>
> (3) Use of business assets by Pink Cleaning: the calculation provided by Ms Sawka for 2016 showed the net value of supply being £10,500, resulting in VAT of £2,010 being under declared. The same figure was used to assess the under-declaration for 2015.

34. More information was provided to Officer Black, who replied by letter dated 21 April 2017 (sent by email), advising that:

> (1) From the inventory stock spreadsheet, the net value of stock on hand was £5,857.78, giving rise to an assessment of VAT at £1,171.35.
>
> (2) The VAT due for the use of business assets was quantified at £3,245.83 based on invoices that should have been rendered by the appellant to Pink Cleaning.

35. In relation to the schedule of deprecation which formed the basis for the net value of machinery of £6,240 used to calculate the output VAT on the deemed supply at de-registration, Officer Black raised questions and made observations as follows:

> (1) In applying the straight-line depreciation method, how was the lifespan for each asset arrived at? Was any scrap value being attributed to any of the items?
>
> (2) Items 9 to 13 on the schedule had a depreciation charge for 2013-14, which was before the dates they were purchased.

(3) Certain items noted at the assurance visit were not included, such as the computer, supply soap pumps at £850, and a Brother printer.

(4) The Ford Transit Connect cost should be at £12,793 and should not be inclusive of the licence and DVLA fees.

(5) An explanation as to why items 7 to 11 on the schedule of depreciation were excluded in the total in calculating the value of the deemed supply.

36. On 22 April 2017, Ms Sawka emailed Officer Black to advise that she was out of the country and would deal with the matters raised by 12 May 2017.

37. On 12 May 2017, Ms Sawka's accountant, Anna Kulawik, drafted an email reply which was forwarded to Officer Black by Ms Swaka with attachments. The schedule of depreciation was substantially revised from the previous version which delivered a net book value of £6,240 to a revised net book value of the assets for deemed supply purposes of £28,476. The material changes include:

(1) The overall depreciation charge of £12,312 for the year 2013 was removed.

(2) Depreciation was charged after the purchase date of the relevant assets, which meant the overall depreciation charge was reduced from £12,312 to £6,340 for 2014, and from £12,312 to £7,068 for 2015, and from £11,566 to £9,079 for 2016.

(3) The depreciation charge was increased from £6,150 to £9,079 for 2017, since some assets which were fully depreciated in the previous schedule continued to be depreciated.

(4) The asset of 'Supply soap pumps' was added, while the computer and printer were noted as no longer in use.

(5) Five invoices originating from Poland to supply direct to Pink Eco Clean in the UK were attached; no VAT was charged on these 'exports' by one member state within the EU to another member state; no input VAT was claimed on purchase; the net book value of these items were therefore not included in the value of deemed supply on de-registration.

The VAT assessments

38. On 1 June 2017, section 73 VATA assessments were raised in relation to the use of the appellant's business assets by the associate business of Pink Cleaning. The assessments were raised as for the last VAT return periods for the years, although the amounts related to under-declaration through the relevant years:

(1) £141 for period 12/14;
(2) £758 for period 12/15;
(3) £2,133 for period 12/16
(4) £212 for the one month from 1 January 2017 to 2 February 2017;
(5) Total of the above is £3,244.

39. The following section 73 assessments were also raised for the deemed supply of stock and assets at the point of de-registration:

(1) £1,171 on the value of stock on hand;
(2) £5,695 on the value of business assets;
(3) Total of the above is £6,866.

The penalty assessments

40. On 30 June 2017, Officer Black wrote to indicate HMRC's intention to impose Sch 24 penalties in relation to the PLR of £3,244 and £6,866.

41. For the use of the appellant's business assets by Pink Cleaning, the behaviour leading to the inaccuracies was assessed as 'careless':

> 'You were careless in accounting properly for the use of the business assets between the two entities. It was calculated for some of the period but not consistently to reflect the actual pattern of asset use.'

42. The penalty range of 15% to 30% was set for 'prompted' disclosure. Reduction of 100% was given for the quality of the disclosure, for telling, helping and giving access to records, which was applied to the difference in the penalty range (30% less 15%), giving an overall reduction of 15%.

43. The overall penalty percentage of 15% was applied to the PLR of £3,244 to arrive at the penalty of £486.60.

44. For the inaccuracies in relation to the final VAT return, which failed to include the deemed supply value of stock on hand of £1,171 and assets of £5,695, the behaviour leading to the inaccuracies was assessed to be 'deliberate':

> 'The requirement to account for the output tax on stock & assets on hand was explained at the premises visit on 17/02/2017. Written advice regarding the issue was then included in letter dated 22/02/2017. However, neither were acted upon and the final return was submitted on 07/03/2017 without accounting for the relevant output tax.'

45. The penalty range of 35% to 70% was set for 'prompted' disclosure. Reduction of 100% was given for the quality of the disclosure, for telling, helping and giving access to records, which was applied to the difference in the penalty range (70% less 35%), giving an overall reduction of 35%.

46. The overall penalty percentage of 35% was applied to the PLR of £6,866 to arrive at the penalty of £2,403.10.

The appellant's case

47. On 15 September 2017, Ms Sawka lodged a Notice of Appeal against the penalties, stating the grounds of appeal as follows:

(1) 'I did not intentionally neglect to charge the VAT';

(2) ‘I am polish and whilst I speak pretty good English, it is not my first language and I am not an expert in the taxation system’;

(3) ‘I fully accept the findings of the examination and am prepare to repay the £10,000 of tax that is being asked for’;

(4) ‘I have found myself in this position completely by mistake and due to my lack of knowledge I find the penalty fine of nearly £3000 very hard’;

(5) ‘I can offer no reason other than a genuine admission that I was negligent and lacked the correct information.’

48. In evidence and in response to questions put to her by the Tribunal, Ms Sawka stated that she graduated in the study of Logistics in Poland, and was working for a pharmacy in an administrative capacity until she was taken ill. Her illness was of a duration that permitted her employer to dismiss her lawfully, and she was unable to find employment in Poland.

49. In February 2011, Ms Sawka came to the UK for a visit and ended up staying in search of work. She worked for hotels before starting self-employment in providing private cleaning for householders. This line of her business evolved into the associated business of Pink Cleaning, which provides cleaning and laundry services for customers running holiday lets.

50. In the summer of 2013, Ms Sawka decided to go into partnership with Mr Kolodziej, her then boyfriend, to set up the business of Pink Eco Clean, given Mr Kolodziej’s experience in the laundrette business.

51. Ms Anna Kulawik, also from Poland, has been advising Ms Sawka ‘from the beginning’, which we understand to be from the start of the business of Pink Eco Clean. We also infer that it was on Ms Kulawik’s advice that the appellant became registered for VAT ‘from the beginning’.

52. For dealing with her accounting and tax affairs, Ms Sawka explained that she would visit Ms Kulawik at her home office with all business documents: sale invoices, till receipts, cash books, bank statements, ‘what we sell and what we bought from suppliers’. Ms Kulawik’s is about 45 minutes by car from appellant’s premises.

53. With the first depreciation schedule resulting in a deemed supply value of £6,240, Ms Sawka said: ‘my accountant helped me to do’.

54. When asked whether she understood what was being related by Officer Black at the premises visit, regarding the inclusion of the deemed supply value of assets on hand at de-registration, Ms Sawka said: ‘I knew what we were talking about all the time’; that ‘everything I heard from her 100%’.

55. We asked why the Lagoon Electric Dryer, which had no deemed supply value in the first schedule, was changed to having a supply value of £1,677 in the revised schedule. Ms Sawka said: ‘Only I know, this washer dryer, you can’t sell this.’

56. We asked why the Woodmark Dryer T5350 was not included in the first depreciation schedule, Ms Sawka said: 'I can't explain'. (The Woodmark Dryer was one of the assets bought from Poland on which no VAT had been charged, and no VAT was claimed as input.)

57. When asked who prepared the figures for the final VAT return, Ms Sawka said: 'she did, with information I provided.' By that, the Tribunal infers it was Ms Kulawik who prepared the figures for the final VAT return, but with information provided by Ms Sawka.

58. When asked whether Ms Kulawik understood what was required for the final VAT return, Ms Sawka said: 'she saw all of the letter [of 22 February 2017]'; 'I think she understood but not 100%'. (The Tribunal is unclear whether Ms Sawka meant: (a) that Ms Sawka was not 100% sure that Ms Kulawik understood, or (b) that Ms Kulawik did not understand 100%.)

59. We asked how the second depreciation schedule was prepared, Ms Sawka related that on her return from Poland, she went to Ms Kulawik's and they 'did together' the revised schedule, 'over the weekend Friday and Saturday'; 'altogether 2 or 3 days to prepare figures for Miss Black', and that Ms Kulawik wrote the email (of 12 May 2017) for Ms Sawka to forward to Miss Black.

60. We asked why Ms Sawka included the depreciation charge of £2,615 against the Ford Transit van (in the first schedule) when the van had a purchase date of 31 December 2015 according to the invoice. We noted that the registration number of the van means that the vehicle was first registered in 2014.

61. Ms Sawka told us that the van was bought by her friend, a Mr Kennedy who is the owner of the farming business of William Mitchell & Sons Ltd. Ms Sawka cleaned Mr Kennedy's flat, and over time he became a very good and supportive friend of hers, including helping her with the English in 'lots of emails', and was the named representative on the Notice of Appeal, even though it is not evident that Mr Kennedy was closely involved with the appeal in the end.

62. Ms Sawka said Mr Kennedy bought the van upfront in 2014 to help with the finances of the appellant; that the appellant paid Mr Kennedy monthly for the use of the van; that the appellant was 'paying for the van a year before [owning] it'. When the van was fully paid by the appellant, an invoice was made up in January 2016.

63. We asked when the VAT on the van was claimed, Ms Sawka said: 'for December 2015 when I was doing the VAT', adding 'for selling the van from him to me'; that is, as we understand: 'when Mr Kennedy sold the van to Ms Sawka'.

64. Ms Sawka also informed the Tribunal that the van was involved in two accidents and was hit from the back and has a dent in the body work; that one accident took place before the de-registration. (The value of the van on the revised depreciation charge schedule was stated at £10,490.)

65. We asked why the original invoice against which the VAT was claimed was invalid. Ms Sawka said: 'This thing I could fix, and very fast, and I did. I knew it, what I did was wrong'. Ms Sawka went to see Mr Kennedy who then went to see his accountant and the invoice was then 're-made' for VAT purposes.

66. Ms Sawka finished her evidence by returning to the depreciation schedule, which she 'tried to fix that' with her accountant; that it took them 'lots of time' to work out 'what we need to do and how to calculate properly'; that it took 'two days' to do, and 'two or three days' to get all figures to Miss Black.

HMRC's case

67. Since there is no dispute about the amounts due on the assessments, there is no dispute about the PLR used to calculate the penalties.

68. As set out in the penalty explanations, HMRC have met the burden of proof in imposing the penalties for 'careless' inaccuracies at 15% and for 'deliberate' inaccuracies at 35%.

69. HMRC consider that there are no special reductions which can be applied in the appellant's case.

Discussion

Whether the 'careless' penalties to be upheld

70. On the first issue, the quantification of the omissions in charging VAT by the appellant to the associate business of Pink Cleaning, is not in dispute. The PLR for the penalty assessment at £3,244 is correct for Sch 24 purposes.

71. An inaccuracy is 'careless' if it is due to failure by the taxable person to take reasonable care, as defined by para 3(1)(a) of Sch 24.

72. The test whether a taxpayer has taken reasonable care is the one as formulated in *Anderson (deceased) v HMRC* [2009] UK FTT 206 by Judge Berner at [22]:

> 'The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.'

73. Similarly, in *Hanson v HMRC* [2012] UKFTT (TC) ('*Hanson*'), Judge Cannan considered 'carelessness' for Sch 24 penalty purposes at [19] with reference to case law on 'negligent conduct' for the predecessor provisions in s 29 of TMA:

> 'In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under section 29 Taxes Management Act 1970. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer.'

74. Nevertheless, in the context of Sch 24 penalty regime, Judge Cannan concluded that there is a subjective element in the test of reasonable care at [21]:

> 'What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent.'

75. The purchase of bedding, linen and towels from Out of Eden Ltd by the appellant to be used in Pink Cleaning was a supply made by the appellant to Pink Cleaning. If input VAT had been claimed by the appellant, then output VAT should be charged to Pink Cleaning. These were transactions not difficult to understand, and the omission of rendering invoices to Pink Cleaning was a failure to take reasonable care to ensure that the symmetry of the transactions was maintained.

76. As to the supply of laundry services by the appellant to Pink Cleaning, over the course of those years in which the appellant was VAT registered, there were instances when invoices were rendered by the appellant to Pink Cleaning to charge for the laundry services. This was indicative of Ms Sawka's awareness that the use of the laundry services by Pink Cleaning constituted a supply by the appellant for which output VAT should be charged and included in the relevant return periods.

77. The omissions represented a failure to take reasonable care to render such invoices consistently. The rendering of invoices was a matter for Ms Sawka alone, and a matter that Ms Sawka had demonstrated her understanding by doing, albeit only for some of the time, what was required to be done.

78. The random or haphazard manner in which the invoicing of supplies and services rendered to Pink Cleaning was carried out was a failure to take reasonable care. Had the invoices been consistently rendered, then the accountant would have included these supplies in preparing the VAT returns. The ultimate cause of the inaccuracies lies with Ms Sawka, and invoicing was not a matter that involved the input or assistance of her accountant.

79. In the Notice of Appeal, Ms Sawka admitted that she has been negligent. Even if she was not using 'negligent' with the legal connotation from case law, it was an admission that she was aware of having failed to do what was required to be done.

80. The penalty range of 15% to 30% is therefore correctly set. We note also that 100% reduction has been given for the quality of disclosure. We agree that Ms Sawka has demonstrated an openness and willingness to co-operate at every stage of Officer Black's enquiry.

81. The penalties at 15% for this category of inaccuracies are therefore set at the minimum, and there is no scope for the Tribunal to vary the assessment further.

82. For these reasons, the overall penalty amount for this category of inaccuracies at £486.20 is confirmed.

Whether 'deliberate' penalties to be varied

83. There are two elements to this category of inaccuracies. First, the omission to include the value of stock on hand at de-registration resulted in £1,171 being under-declared in the final return. Secondly, the value of assets was under-stated by the difference of the two versions of the schedule on depreciation charges, which resulted in £5,695 of output VAT being omitted.

84. Both elements of inaccuracies were occasioned by the need to account for VAT on the deemed supply of stocks and assets on hand at de-registration from VAT.

85. HMRC assessed the omissions to be deliberate as it was a point highlighted by Officer Black orally at the assurance VAT visit to Ms Sawka, and was a point reiterated in writing by the letter dated 22 February 2017.

86. To determine the degree of culpability of the behaviour resulting in the inaccuracies, the Tribunal needs to assess the extent Ms Sawka fully understood what was being related to her by Officer Black.

87. The term 'deliberate' (as regards action) is to be given its ordinary meaning as stated in the Oxford English dictionary: 'well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done of set purpose; studied; not hasty or rash.'

88. In *Anthony Clynes v HMRC* [2016] UKFTT 369 (TC) ('*Clynes*'), which also concerns inaccuracy in VAT returns, it is found 'for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way' (at [82]).

89. Within Sch 24, the term 'deliberate' is used in the context of an 'inaccuracy' which was 'deliberate' on the relevant person's part. On a purposive interpretation of 'the natural wording and the scheme and context of the overall provisions', Judge Morgan continues at [83] of *Clynes* by observing:

> 'The fact that the deliberate conduct is tied to the inaccuracy, indicates that for this penalty to apply the person must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy.'

90. In *Auxilium Project Management Limited v HMRC* [2016] UKFTT 249 (TC), Judge Greenbank stated at [63]:

> 'In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.'

91. For the following reasons, the Tribunal is of the view that the inaccuracies were not 'deliberate' in the sense that Ms Sawka had acted consciously, with full intention and set purpose to under-declare the value of the deemed supply.

(1) The letter of 22 February 2017 raised a number of matters for Ms Sawka to follow up, which she did do with alacrity and diligence and furnished Officer Black with sizeable email attachments on 7, 8, and 9 of March 2017.

(2) The matters raised following the VAT visit did not just concern the value of deemed supply, but included other issues such as: (i) the invoice for the transit van being invalid for VAT purposes; (ii) the omitted invoices for services rendered to Pink Cleaning; (iii) Till reconciliation; (iv) Bank reconciliation between the appellant and its proprietors.

(3) It is material that the timing of the VAT visit, whilst after the notification to de-register from VAT, was only shortly before the due date of 7 March 2017 for the final return.

(4) The timing of Ms Sawka's efforts to clear the VAT issues with Officer Black coincided with the timing of her efforts in preparing the figures for the final return. In terms of timing, Ms Sawka was therefore dealing with numerous issues all at once.

(5) We accept Ms Sawka's evidence that *she* did the depreciation schedule 'with the help of the accountant' which resulted in the value of deemed supply being £6,240.

(6) We do not doubt as to Ms Sawka's sincerity when she claimed she understood Officer Black fully: 'I knew what we were talking about all the time'; that 'everything I heard from her 100%'.

(7) Notwithstanding the claim that she fully understood Officer Black, we are of the view that Ms Sawka understood Officer Black semantically and that she was unable to assess the correctness of the schedule that arrived at the value of the deemed supply being £6,240.

92. We consider that Ms Sawka was conscientious in her efforts to comply with the requirements highlighted to her. She responded to Officer Black's questions with a diligence that is evident from the correspondence and acknowledged by HMRC in giving the 100% reduction to the penalty ranges.

93. In relation to the first element of inaccuracies, we conclude that the omission of including stocks in the value of deemed supply was due to a lack of understanding that 'stocks' and 'assets' mean different things in the present context. The schedule entitled 'Inventory – Stock 2 Feb 2017' as 'Attachment 2' to Officer Black in response to her letter of 27 March 2017 did not seem to have been prepared at the time when the final return was due, but was produced when the omission of the deemed supply of stocks was raised by Officer Black in her letter of 27 March 2017.

94. In preparing the depreciation charge schedule, we infer that Ms Sawka considered herself to be dealing with the matter of deemed supply in full. The errors

in the depreciation schedule that resulted in the value of deemed supply being £6,240 were largely due to applying depreciation charge to all listed assets for all years concerned in a straight-line manner, regardless of when the assets were bought.

95. Consequently, an annual depreciation charge of £12,312 was applied to the years 2013, 2014 and 2015, whilst most of the assets were purchased on or after 1 November 2013 (apart from two bought on 30 September 2013 and 11 October 2013).

96. The errors in the depreciation charge schedule were significant errors by reference to the extent of under-statement in the value of deemed supply. However, we find that the errors in the schedule that gave rise to the under-declaration of VAT were not deliberate, in the sense that Ms Sawka had made those errors with the full intention and set purpose of reducing her VAT liability in the final return.

97. We are of the view that Ms Sawka is a straightforward person, who wrongly thought that she had understood fully what Officer Black related to her. Her belief that she fully understood what was required was consistent with the outcome that she set about completing the schedule with the help of the accountant. Further, as Ms Sawka said in evidence, she alone knew the residual value a piece of equipment had.

98. We find the inaccuracies in the value of the deemed supply were not 'deliberate', whether by omission of stocks, or errors in the depreciation charge schedule. The inaccuracies in relation to the deemed supply are therefore to be re-categorised as 'careless'.

99. If the inaccuracies are 'careless', we need to ask whether they are attributable to the agent to render the defence under para 18 of Sch 24 relevant, whereby:

> 'P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy … or unreasonable failure …'

100. We were told that the final return was prepared by Ms Sawka's accountant based on the information provided by Ms Sawka. It would appear that the omission of value of stocks and the under-statement of the value of assets were both attributable to the information as provided by Ms Sawka. For this reason, the inaccuracies were not attributable to an agent to render the defence under para 18 of Sch 24 relevant.

101. We conclude therefore that the inaccuracies in relation to the value of deemed supply were 'careless', and the penalty range applicable is therefore 15% to 30%. With 100% reduction for the quality of disclosure, the overall penalty percentage is 15%, applied to PLR of £6,866, the penalties of £2,403.10 are reduced to £1,029.90.

The issue of PLR being potentially over-stated

102. For completeness, we note here our findings as regards the PLR in relation to the value of the deemed supply for the van. From the purchase history of the transit van, it had a cost of £12,793 in 2014. In the end, one year of depreciation charge (for 2016) at £2,297 was deducted in the revised schedule to arrive at a deemed supply value of £10,496, for the purpose of calculating VAT due thereon.

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103. In our view, it would have been in order for another year of depreciation at £2,297 to be charged against the van (for the year 2015), since the van was used by the appellant throughout 2015 while being 'acquired' via monthly payments. Another year of depreciation charge would have equated to a reduction of VAT in the sum of £459.40 in the section 73 assessment.

104. From Ms Sawka's evidence, some value of the van would have been written off following the accident that happened before de-registration. Based on an estimate of write-off at £2,500, which would seem reasonable, it would have equated to a further reduction of £500 in the VAT assessment.

105. Consequently, we are of the view that the PLR was overstated in relation to the transit van in assessing the Sch 24 penalty related thereto.

106. Notwithstanding our findings in relation to the over-statement of the value of deemed supply for the van, the appellant did not appeal against the s 73 assessments. Even though the PLR in relation to the van was probably over-stated, in the absence of an appeal against the s 73 assessments, there is no scope for any adjustments to be made on the PLR on which the penalties are based.

Whether special reductions

107. In relation to the inaccuracies in the VAT returns due to a failure to invoice Pink Cleaning for purchases made on its behalf, and for supplies of laundry services, we do not consider that there were any special circumstances to merit special reductions. The transactions involved were standard in nature, and it was well within the understanding and awareness of Ms Sawka that the invoices should have been rendered, which would have in turn avoided the repeated inaccuracies in returns.

108. As regards the inaccuracies in the value of the deemed supply in the final return, we find that the occasion of de-registration did give rise to circumstances which were not 'ordinary' in the sense of being run of the mill. The fact that the value of deemed supply has to be established for stocks and assets on hand is not the 'normal' or 'usual' event and could have merited special reductions.

109. However, in the present case, the special circumstances were to a large extent mitigated by the fact that Officer Black alerted Ms Sawka to this special aspect in the appellant's final return by highlighting and explaining the requirement of charging VAT on deemed supply. To that end, we do not consider that special reductions are merited to reduce the penalties further.

110. In order to find special circumstances, we must be satisfied that the decision of HMRC not to allow a special reduction was 'flawed'. In other words, that HMRC's decision failed to take into account all relevant factors, took into account irrelevant factors, was wrong in law or was outside the bounds of reasonableness. We are not satisfied on the evidence before us that HMRC's decision was flawed in that sense.

111. HMRC clearly took into account these circumstances but did not attribute to them sufficient weight to enable them to categorise Ms Sawka's behaviour as 'careless' rather than 'deliberate'.

112. Whilst we have re-categorised the inaccuracies from being 'deliberate' to 'careless', this is in no way a criticism of Officer Black's approach in her enquiry, which we find to be technically sound and thorough. In reaching our conclusions, we have the benefit of Ms Sawka's evidence which was not available to Officer Black when she made her penalty assessments.

Deposition

113. The penalties of £486.20 in respect of 'careless' inaccuracies in omitting to invoice supplies made to the associate business are confirmed in full.

114. The penalties of £2,403.10 in respect of 'deliberate' inaccuracies in relation to the value of deemed supply on de-registration are varied by re-categorising the inaccuracies as 'careless', and reduced to the sum of £1,029.90.

115. The appeal is accordingly allowed in part.

116. 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 HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 8 NOVEMBER 2018