[2019] UKFTT 75 (TC)

TC06959

Appeal number: TC/2017/01015

VAT – output VAT deliberately under-declared for thirteen VAT periods - assessments – s73 VATA 1994 – prompted disclosure – penalties – Schedule 24 FA 2007 -taxpayer was awaiting a CIS repayment and suffering cash flow difficulties – whether reasonable excuse – no – whether assessments and penalties correctly determined – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TONY DEMOLITION WORKERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER HELEN MYERSCOUGH

Sitting in public at Taylor House, Rosebery Avenue, London on 3 September 2018

Mr Joseph Aworinde for the Appellant

Ms Ann Sinclair, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Tony Demolition Workers Limited ('the appellant') against the decision of the Respondents ('HMRC') to assess the appellant for VAT under s 73 VATA 1994 ('VATA') in the sum of £491,644, amended to £553,799 (plus interest) on the basis that the appellant had under-declared and over-declared the output tax on its VAT returns in thirteen VAT periods between 04/11 and 10/14.

2. The appellant also appeals a Notice of penalty assessment issued under Schedule 24 to the Finance Act 2007 applied at 35% of the potential lost revenue, in the sum of £193,829.65.

3. The points at issue are whether the assessments are correct and whether the penalties have been properly raised and charged on the appellant.

Preliminary matter

4. On the day of the hearing the appellant's agent Mr Aworinde of A Joseph Business Innovations Limited, Chartered Certified Accountants, who act as external accountants and taxation agents to the appellant, applied for a postponement. Mr Aworinde said that the appellant's books and records had been seized on 26 June 2018 by HMRC on presentation of warrant issued by the Crown Court, Croydon.

5. He said that he had hoped to put together a bundle including copy correspondence with HMRC, together with a witness statement. This became impossible in the absence of the appellant's books and records.

6. HMRC objected to the application on the basis that all relevant correspondence and other documentation, including Mr Aworinde's own witness statement, had already been included in the papers lodged with the Tribunal.

7. The application to postpone was refused.

Factual background

8. The appellant company has been registered for VAT since 10 October 2004, under VAT registration number 843 6687 89. The company was incorporated on 3 August 2005. Its main business activity is described as the provision of construction services, namely ground works and demolition, by way of engaging sub-contractors. The company's directors on formation were Mr Blendar Kurani and Mr Arben Hysa. Mr Hysa is currently the sole director and shareholder, Mr Kurani having resigned on 14 April 2008.

9. The appellant was selected for a VAT visit in June 2013 after a comparison had been carried out between what was being declared as VAT outputs and payments that were being made to the appellant by its main contractors, under the Construction Industry Scheme ('CIS'). Under CIS, contractors deduct money from sub-contractor's

payments and pass it to HMRC. The deductions count as advance payments towards the sub-contractor's tax and National Insurance. VAT should be the same as, or greater than, the CIS deductions. The CIS/NAT comparison for the appellant showed that there was a difference in 2012 and 2013, where VAT declared was significantly less than the payments made to it by the contractors for which it worked. Total CIS payments received in year ending 5 May 2012 were £1,035,670. VAT outputs declared for year ending 30 April 2012 were £409,517. Total CIS Payments received in year ending 5 May 2013 were £1,236,741. VAT outputs declared for year ending 30 April 2013 were £486,549. The appellant appeared to be providing its services exclusively to one customer, Keltbray Limited.

10. HMRC made contact with the appellant on 12 December 2013 and a meeting was arranged for 11 February 2014 to inspect it's books and records. The meeting was subsequently cancelled at the request of the appellant.

11. On 21 July 2014, HMRC arranged another appointment for 2 October 2014, at the premises of the appellant's agent Mr Aworinde, but on arrival were informed that there had been a mix-up with the dates and so the meeting did not go ahead.

12. By letter dated 1 December 2014, the appellant's agent Mr Aworinde advised that they were the company's external accountants responsible for compiling and filing the appellant's VAT returns. A Voluntary Disclosure of underpaid VAT was made. The appellant's agent said that:

> "…the Company appears to have underpaid VAT for the past six years. This was discovered when year-end accounts were prepared and bank lodgements for work done were compared to output VAT returns for the year. The Company's director had on notification committed to repaying the amounts involved but did not have the money.
>
> The Company is a demolition contractor and subject to sub-contractors repayments. Repayments for three years were made by HM Revenue & Customs only recently. The Company now appears to be in the financial position to make good the underpayments."

13. Enclosed with the letter was:

- a spreadsheet listing the VAT underpaid for six years to 31 August 2013 in the total sum of £335,089.31;
- a cheque for £335,089.31; and
- a completed VAT652 'Notification of Errors in VAT Returns' ('the Error Correction').

14. HMRC wrote to the appellant acknowledging the Error Correction and advised that the matter would be sent to another team to carry out further checks.

15. On 28 January 2015, HMRC arranged an inspection visit for 25 February 2015 which went ahead as planned. The appellant and its representative were both present at the meeting. Officer Moir interviewed the director, Mr Arben Hysa, and the agent to

establish basic facts regarding the business. During the interview it was established that all payments made to the business were from the one contractor that the business worked for. Officer Moir asked the agent and the director how the under-declaration of VAT had come about. He was told by the agent that it was because HMRC owed the business CIS repayments and that it had already cash-flow problems. The director had decided to under-declare VAT output tax. The agent and the director were advised by Officer Moir that VAT and CIS were two separate issues and that VAT should be accounted for in the correct amount at the correct time, and that if there were any cash-flow issues the agent or director should have contacted HMRC's Debt Management Unit.

16. Officer Moir advised the agent and the director that as the Voluntary Disclosure was submitted after HMRC had made contact to carry out a VAT inspection, it would be seen as a Prompted Disclosure. Officer Moir also told them that he would have to consider penalties.

17. Officer Moir also said that the inaccurate returns appeared to be deliberate behaviour as the appellant had purposely under-declared VAT.

18. On the front of each VAT return, since 2011, there was a hand-written summary of the true amount of tax due and the amount declared, namely a lesser amount. The figures corresponded to those in the Voluntary Disclosure. Officer Moir advised the agent that this confirmed his view that it was a Prompted Disclosure and that the behaviour appeared to be deliberate.

19. Mr Moir then checked the appellant's bank statements (although some were missing) and ascertained that there were further under-declarations of VAT which had not been recorded on the Error Correction. He calculated the VAT due as follows:

VAT Period	**Money in bank**	**VAT due @ 1/6th**	**Paid**	**Difference**
04/11	352,510	58,751	11,260	47,491
07/11	133,499	22,249	22,142	107
10/11	280,551	46,758	22,008	24750
01/12	295,495	49,249	15,242	34,007
04/12	478,878	79,813	17,841	61,972
07/12	290,082	48,347	24,386	23,961
10/12	96,568	16,094	17,808	-1,714
04/13	41,180	6,863	42,411	-35,548
07/13	399,762	66,627	41,076	25,551
10/13	337,939	56,323	20,278	36,045
01/14	253,503	42,250	31,940 ,	10,310
10/14	1,819,051	303,174	93,607	209,567
Total	4,779,018	796,498	359,999	436,499

20. On 3 March 2015, HMRC advised that a further VAT visit would be scheduled for 21 April 2015, when HMRC would require sight of the records and bank statements

which had not been available on 25 February 2015. The Error Correction would not be processed as such, and instead an assessment would be issued.

21. On 16 April 2015 a VAT Notice of Assessment was issued for periods 04/11, 07/11, 10/11, 01/12, 04/12, 07/12, 07/13, 10/13, 01/14, and 10/14. An Over declaration notification was issued for periods 10/12 and 04/13. The net amount due was £436,499 (as detailed above).

22. On 26 May 2015 a further visit was carried out to inspect the records and bank statements which had not been made available on the previous visit. Once again, not all the statements were available. Officer Moir noted the amounts received from the available statements and asked for the missing statements to be forwarded to him.

23. The missing statements were finally received by Officer Moir on 23 July 2015. He carried out another comparison between what was being declared on the VAT returns and what was being received as payments in the bank statements. Further under-declarations of output tax were found as follows:

VAT Period	**Money in bank**	**VAT due @ 1/6th**	**Paid**	**Difference**
10/12	188,986	31,497	18,714 ,	12,783
01/13	428,750	71,458	9,767	61,691
04/13	255,413	42,568	43,437	-869
Total	873,149	145,523	71,918	73,605

24. On 7 September 2015 HMRC advised that, as further discrepancies had emerged between the amount banked and the VAT declared, a revised assessment would be issued.

25. On 18 September 2015, a VAT Notice of Assessment was issued for periods 10/12 and 01/13 with an over-declaration for period 04/13. The net amount due totalled £73,605 (as above).

26. On 25 February 2016, HMRC issued a Penalty explanation and schedule in contemplation of penalties under Schedule 24 Finance Act 2007 for VAT periods 04/11 to 01/13, 07/13 to 01/14 and 10/14. This explained that the behaviour that caused the inaccuracies was deliberate but not concealed and that the disclosure was prompted. It was issued as a Prompted Disclosure as the Voluntary Disclosure was submitted after HMRC had contacted the appellant to arrange for a VAT inspection to take place at the agent's premises. HMRC first contacted the appellant on 12 December 2013. The Voluntary Disclosure was submitted on 1 December 2014.

27. The proprietor of the appellant company, Mr Hysa, was aware of the under-declarations, as he and the agent had carried out a bank reconciliation when preparing end of year accounts for each year. An inspection of the bank statements showed that the amounts going through the business bank account was more than what was declared on the Voluntary Disclosure, and in addition, returns that had been submitted after the

Voluntary Disclosure had been submitted, also showed differences. Officer Moir issued the penalty at 70% as it was a Prompted Disclosure and deliberate behaviour but not concealed. However, reductions totalling 35% were given - for giving (30%) as a Voluntary Disclosure was submitted, telling (40%) as Officer Moir was given access to the records and was told the under-declarations had been happening since 2011, and helping (30%) as the appellant had agreed to a VAT inspection and forwarded missing bank statements to him. With reductions for giving, telling and helping the penalty percentage was 35%.

28. On 31 March 2016, a Notice of penalty assessment was issued under Schedule 24 Finance Act 2007 in the sum of £191,882.25.

29. On 22 April 2016 the Agent appealed the assessments and penalties, on the basis that:

- HMRC had failed to provide clarification of the assessments as requested. Assessments had eventually been advised via HMRC's Debt Management Unit and not by Officer Moir;

- the appellant had overpaid VAT by way of payment on account of the amount due prior to HMRC's visit;

- formal computations were being compiled from their files which would be submitted by 18 May 2016.

30. On 20 June 2016, the agent said that in his view, the assessment calculations were incorrect. He requested that the penalties be either reviewed, vacated or listed for appeal, advising that:

i. "You were made aware from our working papers of VAT under-declarations for relevant years. We also advised the Company Director delayed the £335,089 paid prior to your visit only on account of cash flow. The payment was made within days of receipt CIS repayments from HM Revenue & Customs. Repayment had been delayed for more than two years. The under-payments were self-declared and paid prior to your visit, prompted, it appears, by Notification of Errors Section of HM Revenue & Customs.

ii. The over-declarations for periods 10/12 and 04/13 were in fact part payments on account of under-declared VAT for previous periods.

iii. The penalties are contrary to HMRC practice in cases of self-declaration of errors and under-payments and therefore unacceptable. We demand cancellation thereof or list our objections for appeal.

iv. Where penalties are payable, HMRC officers have, in practice, discretions on imposition of penalties; especially where tax payers and agents have cooperated with investigating officers. Why you chose to impose any penalty at all let alone the maximum is beyond us."

31. On 1 July 2016, HMRC advised that their earlier correspondence explained why HMRC considered the disclosure to have been prompted.

32. On 18 July 2016 the Agent requested an analysis of the banking on which HMRC had based their computations. Officer Moir says that he did not respond to this letter or provide the analysis requested as the assessments were self-explanatory and based on the amounts going through the business bank account, details of which the agent already had.

33. On 19 September 2016 the agent requested a review of the penalties, on the following basis:

i. "The tax payer was aware of the VAT under-payment. Payment to HMRC was delayed as a result of cash flow issues. Payment was made voluntarily when the company had funds available and not on account of HMRC's pending visit.

ii. Payment was made on receipt from HMRC of three years outstanding CIS repayments.

iii. We discovered in the course of our work that VAT had been under-paid for a number of years. These were brought to Mr Moir's attention and the working papers were made available to him on his visit."

34. HMRC agreed to review their decision.

35. On 4 November 2016 the agent wrote to HMRC, enclosing notes from his working papers and a spreadsheet of the VAT underpaid. In addition, he re-iterated the grounds of the appeal and pointed out that HMRC had failed to provide the analysis which he had earlier requested, showing how the VAT under-payments had been computed.

36. On 14 November 2016 HMRC's Reviewing Officer advised that in his view the decision to issue the two assessments should be upheld, but that the quantum of the first assessment should be varied on the basis that banking had been compared to the net tax paid rather than, correctly, to the output tax declared. The decision to notify a penalty on the basis that the behaviour was deliberate but not concealed, with a Prompted Disclosure was upheld, the quantum to be adjusted following the amendment to the assessment.

37. On 21 November 2016 HMRC advised that in order to correct the error identified by the Reviewing Officer, the quantum of the assessment notified on 16 April 2015 of £436,499 would be reduced by £18,460, to £418,039, and the resultant penalty would be adjusted accordingly.

38. On 28 November 2016 the agent wrote in response to HMRC's review and again requested the bank statement analysis in order to verify HMRC's assessment figures. In respect of the penalty, the agent advised that:

> "Your assertion that a penalty should be imposed on the basis that [the company] deliberately under declared output tax, is not wholly correct. We agree the company director was aware of the VAT underpayment over the years, but payment was withheld

only on account of cash flow problems aggravated by the withholding of CIS repayments due to the company for three years. We submit again, that this payment was not prompted by Mr Moir's visit; but was paid, rather, when cash was available."

39. The appellant submitted a Notice of Appeal dated 16 January 2017.

40. On 31 March 2017 HMRC enclosed an analysis of the amounts paid into the appellant's business bank account, the tax that was due on the amounts, the amounts of VAT that had been paid and what the difference was. This was done by VAT period, using the revised first assessment figures and the figures from the second assessment.

41. On 19 April 2017 the agent requested a more detailed analysis of the bank deposits extracted from the appellant's bank statements and on 6 July 2017 requested a breakdown of the amount of VAT, penalties and interest now payable in view of the £18,460 error.

42. On 9 January 2018, the VAT Notice of Assessment originally notified on 16 April 2015 in the sum of £436,499 was amended to £420,775 by the issue of a VAT Notice of Amendment of Assessment, to supplement the Notice of Assessment notified on 18 September 2015.

43. Prior to the hearing, a final summarising assessment was prepared by Officer Moir to incorporate the two previous assessments; to correct two periods where the 'tax paid/declared' allowance had been given twice, and also to adjust other periods following a review of the calculations. The final assessment to include all periods, to replace the assessments referred to in paragraphs 19 and 23 above and on which penalties would be applied (subject to HMRC formally issuing amended Notices of Assessment and Penalties) is as below:

Period	**Money in Bank**	**VAT due**	**Output tax Declared**	**Under-declaration**
04/11	352,510/6	58,751	11,547	47,204
07/11	133,499/6	22,249	24,985	2,736 CR
10/11	280,551/6	46,758	22,652	24,106
01/12	295,495/6	49,249	15,884	33,365
04/12	478,878/6	79,813	18,383	61,430
07/12	290,082/6	48,347	25,392	22,955
10/12	285,554/6	47,592	18,714	28,878
01/13	428,750/6	71,458	9,767	61,691
04/13	296,593/6	49,432	43,437	5,995
07/13	399,762/6	66,627	41,958	24,669
10/13	337,939/6	56,323	21,158	35,165

01/14	253,503/6	42,250	32,785	94,65
10/14	1,819,051/6	303,174	101,562	201,612
Total				553,799

Appellant's case

44. The appellant's grounds of appeal as stated in its Notice of Appeal to the Tribunal are:

> "1. HMRC has failed to supply an analysis of the bank statements from which the assessments were raised. The assessments are unacceptable in the absence of verification of the figures from which the assessments are raised.
>
> 2. Penalties have been imposed on the basis that payment of underpaid VAT for the relevant years was prompted by HMRC's visit. This was not the case. Payments were not made only because of cash flow difficulties, aggravated by non-payment of CIS monies due from HMRC to the company for three years. Payment was made on receipt of the CIS repayment. We therefore seek a reduction in the penalties.
>
> 3. Payment of full assessments and penalties would impact on the company's ability to carry on business in the foreseeable future."

HMRC'S Case

45. At the visit to inspect the appellant's books and records on 25 February 2015 the agent confirmed that Mr Hysa was fully aware of the VAT under-declaration between 04/11 and 10/14. The fact that the appellant omitted output tax from its VAT returns is therefore not in dispute.

46. As the omitted output tax led to an incorrect VAT return, s 73 VATA is relevant to determine the appeal in that, where it appears that VAT returns are incorrect, HMRC may assess and notify the amount of VAT due to the best of their judgment.

47. Under paragraph 1 of Schedule 24 Finance Act 2007, a penalty is due when a person gives HMRC an inaccurate return, and two conditions are satisfied. These are:

- 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 a repayment of tax.

- The inaccuracy was deliberate.

48. HMRC identified inaccuracies during checks made into the appellant's VAT returns for the periods 04/11 to 01/13 and 10/14.

49. A penalty has therefore been correctly notified in accordance with Schedule 24 Finance Act 2007.

50. The behaviour of the appellant in relation to the inaccuracies was deliberate but not concealed because the appellant:

- had made a deliberate decision to under-declare its liability to VAT in order to ease its cash flow situation; and

- knew that output tax was being omitted from its VAT returns as it was made aware of this by its representative over the years.

51. The maximum penalty for a deliberate inaccuracy is 70% and the minimum is 35%. In this instance, to reflect the level of disclosure of the appellant, HMRC consider that a penalty of 35% in relation to undeclared output tax is appropriate.

52. HMRC also considered "special reduction" in accordance with paragraph 11 of Schedule 24 Finance Act 2007, but concluded that there were no special circumstances on which they could make such a reduction.

53. The appellant contends that the penalty is not a Prompted Disclosure as an Error Correction was submitted once the appellant had received its CIS repayments. However, this was a Prompted Disclosure because the appellant did not tell HMRC about the inaccuracies before the appellant had reason to believe HMRC had discovered them or were about to discover them. HMRC had tried to visit the Company to inspect it's books and records on several occasions prior to the submission of the Error Correction, return of 1 December 2014:

- the visit 11 February 2014 was cancelled;
- the visit on 2 October 2014 was cancelled when HMRC attended the premises of the agent.

54. The appellant contends that HMRC have not provided an analysis of the bank statements from which the assessments were notified. HMRC have provided an analysis on 31 March 2017. The analysis showed the monies paid into the appellant's bank account on a quarterly basis, upon which the assessments were calculated and notified.

55. The appellant contends that the correct output tax was not paid due to cash flow difficulties exacerbated by the late repayment of a CIS repayment by HMRC. However, there are no circumstances in which VAT can be under-declared in VAT returns.

56. The appellant contends that payment of full assessments and penalties would impact on its ability to carry on business. There is no requirement under s 73 VATA 1994 or under the provisions in Schedule 24 Finance Act 2007 to take account of the appellant's ability to pay the assessments and associated penalties.

Evidence

57. We were provided with two bundles of documents:

i. Bundle 1 - which included the assessment decision, and the review decision. Copy correspondence between the parties; a summary of HMRC's calculations supporting the assessment and penalties and the witness statement of Mr Alasdair Moir, the HMRC officer who determined the assessment and penalties. Mr Moir also gave oral evidence under oath to the Tribunal.

ii. Bundle 2 - which included relevant authorities and legislation

Relevant legislation

58. The relevant VAT legislation is contained in VAT Act 1994:

Section 73 Failure to make returns

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following -

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

Section 77 of the Act states -

(1) Subject to the following provisions of this section, an assessment under section 73 shall not be made -

(a) more than [4 years] after the end of the prescribed accounting period or importation or acquisition concerned.

Section 77(4) of the Act (prior to 1 April 2009 and relevant to VAT periods prior to 04/09) previously read as follows –

(4) Subject to subsection (5) below, if VAT has been lost -

(a) as a result of conduct falling within section 60(1) or for which a person has been convicted of fraud, or

(b) an assessment may be made as if, in subsection (1) above, each reference to [3 years] were a reference to 20 years.

Section 77(4) of the Act provides (w.e.f 1 April 2009) –

(4) In any case falling within subsection (4A), an assessment of a person('P'), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).
(4A) Those cases are-
(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf).

59. Legislation relating to the imposition of penalties is set out below:

Schedule 24 Finance Act 2007 – Penalties for errors (effective from 1 April 2009).
Paragraph 1 Schedule 24 Finance Act 2007 provides:

"Error in taxpayer's document

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.

Paragraphs 9 and 10 Schedule 24 provide (so far as relevant):

9. Reductions for disclosure

Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under assessment by -

(a) telling HMRC about it,
(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure -

(a) 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, and
(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

10 (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it -

(a) in the case of a prompted disclosure, in column 2 of the Table, and
(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	Minimum % for prompted disclosure	Minimum % for an unprompted disclosure
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%

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.

Conclusion

60. In respect of the Discovery Assessments, the onus of proof rests at law with the appellant to demonstrate that the assessments raised are incorrect.

61. In respect of the Penalty Assessments, the onus of proof rests with HMRC to establish that their decision to issue the penalties, as determined, is not flawed.

62. The standard of proof is the ordinary Civil Standard on the balance of probabilities.

63. As HMRC say, the omitted output tax led to incorrect VAT returns. Section 73 VATA provides that HMRC may assess and notify the amount of VAT due to the best of their judgment.

64. The appellant asserts that HMRC failed to supply an analysis of the bank statements from which the assessments were raised and that the assessments are therefore unsubstantiated in the absence of verification of the figures from which the assessments are raised. HMRC provided their analysis of the bank deposits under cover of their letter of 31 March 2017. On the information provided and in the absence of any detailed submissions by the appellant, that the figures contained in the table at paragraph 43 above are flawed, we have to conclude that the assessments are correct.

65. Under paragraph 1 of Schedule 24 Finance Act 2007, a penalty is due when a person gives HMRC an inaccurate return or other document and two conditions are satisfied. These are:

- 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 a repayment of tax.

- That the inaccuracy was deliberate.

66. The appellant does not dispute that its returns for the relevant periods were inaccurate or that its behaviour in relation to the inaccuracies was deliberate but not concealed.

67. The appellant asserts that the assessments were not prompted. We do not accept this. The appellant did not tell HMRC about the inaccuracy before the appellant had

reason to believe HMRC had discovered it or were about to discover it. HMRC had tried to visit to inspect the books and records on several occasions prior to the submission of the Error Correction. The Voluntary Disclosure was submitted after HMRC had contacted the business to arrange for a VAT inspection to take place at the agent's premises. HMRC first contacted the appellant on 12 December 2013. The Voluntary Disclosure was submitted almost a year later, on 1 December 2014.

68. Although the appellant may have been suffering cash flow difficulties, it is specifically stated in s 71(1) VATA 1994 that any insufficiency of funds to pay any VAT due is not reasonable excuse. The appellant has produced no evidence to substantiate its assertion that it was suffering an insufficiency of funds due to unforeseen circumstances beyond its control.

69. The appellant asserts that its cash flow problems had been exacerbated by a delay in receiving an expected CIS repayment from HMRC. There is a statutory obligation on a person required to make a return to pay the VAT due to HMRC. The Value Added Tax Regulations 1995, at Regulation 40, state that any person required to make a return "shall pay" to HMRC "such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return".

70. The Income Tax (Construction Industry Scheme) Regulations 2005 Regulation 56(5) stipulates that HMRC shall not repay any sum deducted under FA 2004 s 61 to a company sub-contractor until:

> "The tax year in which the deduction was made has ended and the qualifying sub-contractor has delivered the return required by regulation 73 of the PAYE Regulations (annual return of relevant payments liable to deductions of tax)."

71. There is no provision that allows a taxpayer to defer making payment of VAT due to HMRC until an expected CIS repayment had been received.

72. Repayment claims for limited company sub-contractors can only be dealt with when the company has filed its final Employer Payment Summary and all associated Full Payment Submissions for the tax year.

73. There was nothing unforeseeable about the CIS deductions. For sub-contractors within the CIS who do not qualify for 'gross payment' status, the deductions are required by law. They are an ordinary incident of trade in the construction industry and a foreseeable event. It is a reasonable expectation that a prudent business would put necessary precautions in place to ensure they meet their legal obligations to make payment of VAT to HMRC by the due date.

74. The appeal is therefore dismissed. The discovery assessments and penalty assessments as referred to in paragraph 1 above are confirmed.

75. 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: 05 FEBRUARY 2019