



[2019] UKFTT 0370 (TC)

TC07198

VALUE ADDED TAX – penalty for deliberate and concealed failure to notify requirement to register for VAT – personal liability of an officer of the taxpayer – paragraph 22 of schedule 41 to Finance Act 2008 – was the appellant a shadow director or manager of the taxpayer – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03784

BETWEEN

MOHAMMED ABDUL MALIK

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ROBIN VOS
RICHARD LAW**

Sitting in public at Taylor House, London on 16 May 2019

Martin Kaney of X-Vat Limited for the Appellant

Esther Hickey, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Selling pizzas is a competitive business. The Appellant, Mr Malik, has been involved in that business since at least 2009.
2. Between 2013-2017, Mr Malik worked for a company called Newham Pizza Limited (“Newham”) which operated a pizza franchise in Barking Road, East London.
3. Following an investigation, HMRC concluded that the takings had been suppressed and that Newham should have been registered for VAT from early 2014. They imposed a penalty on Newham of £138,692.40 under schedule 41 of Finance Act 2008 (“Schedule 41”) in respect of its failure to notify HMRC of its obligation to register for VAT.
4. As they had been informed that an application had been made to strike the company off the Companies House register, HMRC also sent personal liability notices to Newham’s director, Mr Abdul Munaim and to Mr Malik making each of them liable to pay 50% of the penalty which had been imposed on Newham (i.e. £69,346.20 each). This was done under the power conferred on HMRC by paragraph 22 of Schedule 41 which allows HMRC to make an officer of the company, specifically a director, shadow director, manager or secretary, liable for a penalty which is payable by the company for a deliberate failure if that failure is attributable to the relevant individual.
5. Mr Malik does not take issue with the assessment of the penalty on Newham including the basis on which it has been charged or the way in which it has been calculated. His single ground for appeal is that he was not an “officer” of Newham as defined in paragraph 22 of Schedule 41 and so HMRC do not have power to make him liable for any part of the penalty.

NEWHAM’S LIABILITY TO A PENALTY

6. Although this appeal is against Mr Malik’s liability to pay a portion of the penalty which has been charged on Newham and is not an appeal by Newham against the original penalty, HMRC still have the burden of showing that the penalty has been properly charged.
7. This was covered in detail in HMRC’s statement of case and skeleton argument and is not challenged by Mr Malik, except in respect of the penalty on himself.
8. On the basis of the evidence before us, we are satisfied that Newham was liable to be registered for VAT, that it failed to notify HMRC of its liability to register for VAT and that the failure was deliberate and concealed. We are also satisfied that HMRC used their best judgement in calculating the VAT which would have been due had Newham registered at the correct time and which forms the basis for the calculation of the penalty. No issue was raised by Mr Malik with HMRC’s calculation of the reduction which they have allowed for Newham’s disclosure.
9. The evidence also confirms that the relevant procedures and time limits for assessing the penalty have been complied with.
10. The only issue which we therefore need to consider in detail is whether the conditions of paragraph 22 of Schedule 41 are satisfied so as to enable HMRC to make Mr Malik liable for part of the penalty which is payable by Newham.

LIABILITY OF AN OFFICER FOR A PENALTY PAYABLE BY A COMPANY

11. Paragraph 22 of Schedule 41 provides as follows:

“Companies: officers’ liability

- 22(1) Where a penalty under any of paragraphs 1, 2, 3(1) and 4 is payable by a company for a deliberate act or failure which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.
- (2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.
- (3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership ‘officer’ means-
- (a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c 46)),
 - (aa) a manager, and
 - (b) a secretary.
- (3A) In the application of sub-paragraph (1) to a limited liability partnership, ‘officer’ means a member.
- (4) In the application of sub-paragraph (1) in any other case ‘officer’ means-
- (a) a director,
 - (b) a manager,
 - (c) a secretary, and
 - (d) any other person managing or purporting to manage any of the company’s affairs.
- (5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)-
- (a) paragraph 14 applies to the specified portion as to a penalty,
 - (b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,
 - (c) paragraph 16(3) to (5) and (7) apply as if the notice were an assessment of a penalty,
 - (d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 16(6),
 - (e) paragraphs 17 to 19 apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and
 - (f) paragraph 23 applies as if the officer were liable to a penalty.
- (6) In this paragraph ‘company’ means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association.”

12. Paragraph 1 of schedule 22 contains three conditions before liability for a penalty payable by the company can be imposed on an individual:

- (1) A penalty must be payable by the company for a deliberate failure.
- (2) The individual on whom HMRC seek to impose liability must be an “officer” of the company (as defined in sub-paragraph 3 of paragraph 22).
- (3) The deliberate failure must be attributable to that officer.

13. There is no dispute that a penalty is payable by Newham and that penalty is for a deliberate failure.

14. The points we therefore have to decide are whether Mr Malik was an officer of Newham and, if so, whether the company’s failure was attributable to him.

15. In accordance with paragraph 22(3) of Schedule 41, an officer includes a shadow director within the meaning of s 251 of the Companies Act 2006 and also a manager.

16. Section 251(1) of the Companies Act 2006 provides as follows:

“(1) In the Companies Acts, ‘shadow director’ in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.”

17. There is no definition of ‘a manager’ in schedule 41. It was submitted by both parties (and we agree) that this word must therefore take its normal meaning.

18. The Oxford English Dictionary defines a manager as:

“A person who manages (a department of) a business, organisation, institution, etc.; a person with an executive or supervisory function within an organisation, etc.”

19. Where the preconditions for imposing a liability on an officer are satisfied, HMRC has power to decide what proportion of the penalty payable by the company any particular officer should be liable for. In this case, HMRC have decided that Mr Malik should be liable for 50% of the penalty payable by Newham. Mr Kaney made it clear on behalf of Mr Malik that, should the Tribunal find that HMRC has power to make Mr Malik liable for a portion of the penalty payable by Newham, he does not challenge the basis of apportionment between himself and Mr Munaim.

THE EVIDENCE

20. We had two bundles of documents and correspondence prepared by HMRC. Mr Kaney provided a further letter as part of the evidence shortly before the hearing. We also had witness statements from the investigating officer, Brendan Spranklen and from Mr Malik. Both Mr Spranklen and Mr Malik gave oral evidence.

21. Both the documentary evidence and the oral evidence revealed clear contradictions as to the key question of Mr Malik’s role within the business. We have to decide whether, based on this contradictory evidence, HMRC have shown, on the balance of probabilities, that Mr Malik was an officer (as defined) of Newham and that the company’s failure was (at least in part) attributable to him.

THE PIZZA BUSINESS AT BARKING ROAD

22. A pizza takeaway/delivery business has been operated from Barking Road since at least 2009 under the name “TGF Pizza”.

23. Mr Malik explained that the business is a franchise operation and that owners/managers come and go. As a result of this, there have been regular changes to the entities/individuals operating the business since 2009. Based on the records maintained by HMRC and the Companies House records provided as part of the evidence, we find as a fact that the following entities/individuals were involved. We do not say exactly what dates each of them were involved as there are significant discrepancies and overlaps between, for example, the dates when the relevant companies were incorporated/dissolved and the dates when the relevant companies/individuals were registered as operating PAYE.

24. The first operator was a company called Delicious Pizza Limited. The records here are confused as there are two companies with that name which are mentioned in the documents we have been provided with. The first company has Company Registration Number 06888463 and HMRC's records show that the directors of that company were Fahim Habibolah and Mr Malik.

25. There is an extract from Companies House records showing a company with the same name but with Company Registration Number 07528274. The director of that company is shown as Mr Abdul Muniam. It appears that this is a typographical error and that in fact the director was the same individual as the director of Newham, Mr Abdul Munaim as the address and date of birth in both cases are the same.

26. This second company called Delicious Pizza Limited however was only incorporated after the second franchisee, Wonderful Pizza Limited, referred to below, had taken over the franchise. On the balance of probabilities, we therefore find that it is the first Delicious Pizza Limited (Company Number: 06888463) and which is shown in HMRC's records which operated the business. As mentioned above, HMRC's records clearly show that Mr Malik and Mr Habibolah were the two directors of that company and we find as a fact that they were.

27. The next franchisee was Wonderful Pizza Limited. Mr Malik was the sole director of that company.

28. After Wonderful Pizza, the business appears to have been taken over by Mr Shopon Miah operating as a sole trader. HMRC's PAYE records show that Mr Malik and Mr Habibolah were both listed as employees of Mr Miah.

29. The business was then taken on by another company, Pan Pizza Limited. The sole director of Pan Pizza Limited was Mr Habibolah. Mr Malik is shown as an employee of the business in HMRC's PAYE records.

30. Newham took over from Pan Pizza towards the end of 2013. Mr Munaim was the sole director of Newham. Mr Malik and Mr Habibolah were both employees of the company.

31. Other than Newham, none of these businesses have ever been registered for VAT.

MR MALIK'S OTHER BUSINESSES

32. Mr Malik was a director of five other companies between 2011-2017. There are only two that we need to mention.

33. The first is Aladdin's Cave Limited. This was a company set up in partnership with another individual importing wine from Italy. The company was registered for VAT. Mr Malik gave evidence that the VAT compliance was dealt with by his partner's wife. This is supported by the fact that the application for VAT registration was made by the partner and not by Mr Malik and we accept that Mr Malik was not involved in the VAT compliance of this company.

34. The second company we should mention is Square Pan Pizza Limited. This is a separate pizza delivery/takeaway business which Mr Malik told us operated from a different location. Mr Malik was a director of this company from 8 August 2012 to 18 March 2014. He confirmed

in his evidence that, during this period, he worked both at Barking Road and in this second location.

HMRC'S INVESTIGATION

35. HMRC had identified Newham as a potential tax defaulter. As a result of this, three HMRC officers, Brendan Spranklen (dealing with VAT issues), Martin Charman (dealing with direct tax issues) and Mr J Bone paid an unannounced visit to Barking Road on 19 November 2015.

36. The officers were able to speak to Newham's director, Mr Munaim. Mr Malik was not present.

37. Mr Spranklen's notes record Mr Munaim as having said that the financial responsibilities of the business were handled by his uncle, Mr Malik and that Mr Malik had also dealt with the transfer of the business from the previous owner. Mr Munaim also told Mr Spranklen that the total of the takings for each day would be passed to Mr Malik.

38. Mr Charman asked Mr Munaim questions about the staff employed by the business. Mr Munaim is recorded in Mr Charman's notes as saying that he leaves the payment of staff and other matters to Mr Malik.

39. Mr Spranklen notes that he saw a copy of a letter from a company called Tristar Packaging dated 8 October 2015 which started "Dear Fahim/Malik ... welcome to Tristar packaging".

40. Mr Spranklen took away with him a bag of receipts covering a 31 day period in October/November 2015. Based on these receipts, Mr Spranklen concluded that Newham's turnover was above the VAT registration threshold.

41. In July 2016, Mr Charman wrote to Newham's accountants, BBK Accountants Limited. The letter made it clear that as HMRC had been told that Mr Malik records the sales and other business details on behalf of Newham, HMRC wanted to speak to Mr Malik. The letter suggested a meeting with BBK, Mr Munaim and Mr Malik.

42. Mr Asad responded by email in August 2016 to confirm that he was obtaining certain documentation which HMRC had requested and asking if the meeting which Mr Charman had suggested could be deferred until the end of September as "one of the director is getting married end of this month".

43. There followed a series of email communications between Mr Asad of BBK and Mr Charman trying to fix a date for the meeting. One particular email from Mr Charman on 1 November 2016 reiterated the fact that, as their understanding was that Mr Malik dealt with the company's sales and business records, both Mr Munaim and Mr Malik would need to be at the meeting. Mr Asad confirmed in his reply that he would make sure that both of these individuals would be present at the meeting.

44. The second meeting eventually took place on 6 December 2016 and was attended by Mr Spranklen and Mr Charman from HMRC, by Mr Munaim and Mr Malik on behalf of Newham and by Newham's accountant, Mr Asad.

45. Mr Spranklen's evidence was that Mr Malik took the lead in answering HMRC's questions relating to the business despite the presence of Newham's director, Mr Munaim and its accountant, Mr Asad. This is consistent with Mr Spranklen's and Mr Charman's notes of the meeting.

46. Mr Spranklen told us that, at the meeting on 6 December 2016, he formed the clear impression that Mr Malik took a key role in running the business. Mr Munaim said very little and the accountant, Mr Asad, only answered a few of HMRC's questions.

47. As far as Mr Malik's role within the business is concerned, HMRC's notes reflect the following:

- (1) He was usually responsible for cashing up at the end of the day.
- (2) He was responsible for administering PAYE.
- (3) He reconciled the takings between card payments, cash payments and expenditure as well as reconciling the order receipts with the takings.
- (4) He had a detailed knowledge of the ordering system.
- (5) He was able to give fairly precise figures for the business' weekly turnover and also to compare this with the business' weekly turnover in the "early days".

48. In his oral evidence, Mr Spranklen confirmed that he prepared the notes of the two meetings within a week of the meetings taking place.

49. Since the previous meeting in 2015, the company had kept a diary of weekly takings/expenses and this was provided to HMRC at the meeting.

50. At around the time of the meeting, Newham applied to be registered for VAT and HMRC registered the business with effect from 30 September 2016.

51. However, as a result of reviewing the diary provided at the second meeting and comparing this with the receipts obtained at the first meeting, Mr Spranklen concluded that the company should have been registered for VAT with effect from February 2014.

52. During 2017, Mr Charman corresponded with Mr Asad in order to try to arrange a further meeting. However, towards the end of July 2017, Mr Asad informed Mr Charman that Newham had applied for the company to be struck off the Companies House Register and that Mr Asad/BBK were no longer dealing with the matter.

53. As a result of this, HMRC registered Newham for VAT with effect from February 2014, issued various VAT assessments and, on 6 November 2017, issued the failure to notify penalty to Newham.

54. On 8 November 2017, HMRC issued the personal liability notices to Mr Munaim and to Mr Malik.

55. The November 2017 correspondence sent to Newham at Barking Road and to Mr Munaim at his home address were returned to HMRC marked "RTS" (return to sender).

56. Mr Spranklen noted in his oral evidence that third party enquiries with Just Eat and Hungry House (the organisations through which a large proportion of the business' orders were received) showed that Mr Malik was listed as the contact for Hungry House and that Mr Habibolah was the contact for Just Eat.

57. Mr Spranklen mentioned that, during his investigation, he had noticed that HMRC's PAYE records listed Mr Malik's national insurance number against Mr Munaim's name. There was no explanation as to how HMRC's systems could allow this to happen but Mr Spranklen suggested that this must reflect the information which had been provided to HMRC by Newham and that this emphasised the close connection between Mr Malik and Mr Munaim.

MR MALIK'S APPEAL

58. BBK wrote to HMRC in November 2017 on behalf of Mr Malik to appeal against the penalty for which HMRC said he should be liable under paragraph 22 of Schedule 41. By this time, Mr Asad had left BBK and the appeal was dealt with by Mr Kassam. The appeal was on the basis that Mr Malik was not an officer of Newham.

59. In the light of this letter, HMRC suggested a meeting with Mr Malik in order to discuss his involvement with Newham and a meeting was arranged for 7 February 2018.

60. At this meeting, Mr Malik was adamant that he held no significant role within the business and that he was simply an employee. In particular, he denied having responsibility for administering PAYE for Newham or dealing with the financial responsibilities of the business. He insisted that Mr Munaim was incorrect in saying at the first meeting that Mr Malik did have these responsibilities. He also denied having seen HMRC's notes of the meeting which took place on 6 December 2016 and denied having said the things recorded in that note relating to his responsibility for the financial aspects of the business. As he had not seen the note of the meeting, he said he was unable to correct the inaccuracies.

61. It was said at the February 2018 meeting that Mr Munaim's whereabouts were unknown.

62. Following the meeting, HMRC wrote to Mr Malik confirming their view that he had a sufficiently significant involvement with the business to allow them to issue the personal liability notice.

63. BBK wrote to HMRC on 15 March 2018 and 19 March 2018 reiterating the fact that Mr Malik was only an employee of the business. In the letter of 19 March, BBK specifically stated that they dealt solely with Mr Munaim in relation to accounting and payroll matters.

64. In order to back this up, Mr Malik had tracked down Mr Munaim and had been able to meet with him, as a result of which, Mr Munaim wrote a letter confirming that Mr Malik was simply an employee and did not have any significant control or influence on the business. This letter from Mr Munaim was attached to BBK's letter of 19 March 2018.

65. Mr Malik was clear in his oral evidence under oath that he did not have responsibility for the financial affairs of the business and in particular was not responsible for PAYE or for recording sales/expenses.

66. Mr Malik explained that Mr Munaim would usually leave the shop at about 9:00pm. Mr Malik would often be there until the shop closed and so would cash up at the end of the day. However, this would also be done by other employees if Mr Malik was not there. A note of the takings would be left in the till for Mr Munaim to see the next morning.

67. According to Mr Malik, his main responsibilities for Newham were to make pizzas, answer telephone calls and make deliveries.

68. Mr Malik did not challenge what HMRC say Mr Munaim told them at their first meeting with Mr Munaim. Mr Malik's explanation was that, as a young man, Mr Munaim may have panicked at that meeting and, as a result, said things which were not correct.

69. As far as the second meeting with HMRC is concerned which took place on 6 December 2016, Mr Malik says that he attended the meeting at Mr Munaim's request and that Mr Munaim told him that HMRC wanted to ask him questions about his role within the business. This is the reason he says why he took the lead in answering HMRC's questions – i.e. that Mr Munaim had effectively instructed him to do so.

70. Mr Malik explained that he had detailed knowledge of the cash reconciliation process and the ordering system given his position as a long-standing employee. However, he specifically denies telling HMRC at the meeting that he was responsible for PAYE.

71. As far as Mr Malik's comments about the weekly takings are concerned, he explained that he was able to give an accurate estimate based not on any responsibility for recording the takings but, as a result of his long experience in the industry, from seeing how busy the shop was and how many pizzas were being made on a day to day basis.

72. Mr Malik accepted that he had some knowledge of VAT. He knew for example that there was a limit above which a business needed to be registered for VAT although he could not say exactly what the limit was at any particular time. Whilst he knew the business was doing well, he did not know whether the takings were in excess of the registration limit. In any event, Mr Malik did not consider it to be his responsibility to think about this as he was not the person running the company. Similarly, Mr Malik says he did not know whether the company's takings were fully declared or not.

73. As far as the letter from Tristar is concerned, Mr Malik did not know why his name was on this. He also did not have an explanation as to how Hungry House had got hold of his name. He speculated in both cases that it might be because he had been working in the business at Barking Road for such a long time.

74. Mr Malik also denies having any role in preparing the diary of payments/expenses which were given to HMRC at the 6 December 2016 meeting. His recollection was that this was given to HMRC by Mr Asad. He assumes that it was prepared by Mr Munaim.

75. In summary, Mr Malik was adamant that he was not a directing mind or controlling person in relation to the business and in particular that he did not instruct Mr Munaim what to do and that Mr Munaim did not act in accordance with instructions or directions from Mr Malik.

MR MALIK'S ROLE

76. Ms Hickey, on behalf of HMRC, submits that Mr Malik is a shadow director or a manager of Newham within paragraph 22 of Schedule 41.

77. In support of this, she relies in particular on the statements made by Mr Munaim at the first meeting with HMRC and on the statements which HMRC say Mr Malik made at the second meeting with HMRC on 6 December 2016.

78. Ms Hickey also refers to the letter from Tristar addressed to Mr Habibolah and Mr Malik and also the fact that Mr Malik is listed as the contact for Hungry House. Both of these, she says, indicate that Mr Malik has a leading role in the business.

79. Ms Hickey also referred to the fact that Mr Malik is clearly knowledgeable about VAT and, despite having a good grasp of the business' turnover, did not take any steps to ensure that the business registered for VAT.

80. On the basis of this, Ms Hickey submits that Mr Malik was responsible for the company's financial records and in particular the recording of sales. He and Mr Munaim, she says, maintained a false list of sales in order to avoid detection and arranged for this to be provided to HMRC.

81. Ms Hickey also drew attention to the previous history of the business at Barking Road. There is a consistent pattern of frequent changes to the person responsible for the business but there is a clear close connection shown between Mr Malik, Mr Munaim and Mr Habibolah, with none of the persons operating the business having registered for VAT. She submits that this was part of a deliberate plan designed to enable at least some of the individuals to deny being in control of the business. She speculated, for example, that had HMRC investigated

Wonderful Pizza (the company of which Mr Malik was a director) it would be Mr Munaim or Mr Habibolah saying that they had no involvement in the running of the business.

82. In Mr Kaney's view, HMRC have not discharged the burden of showing that, on the balance of probabilities, Mr Malik was an officer of Newham and that the company's failure was attributable to him. He says that there is no single compelling point which tips the balance in favour of HMRC.

83. He criticises HMRC for confusing the actions of the company and the actions of Mr Malik. For example, he refers to a number of occasions on which HMRC refer to Mr Malik as the "taxpayer", whereas it is the company which is the taxpayer.

84. Mr Kaney argues that HMRC's conclusions are based on suspicion and opinion stemming from the second meeting and not on any evidence. He makes the point that what Mr Spranklen heard at that meeting has been unequivocally denied by Mr Malik and is supported by letters both from BBK and from Mr Munaim. He also notes that HMRC have not provided any internal evidence from their own records that Mr Malik was, for example, involved in Newham's PAYE compliance.

85. Whilst Mr Malik may have some experience of VAT, this is only relevant if HMRC can show that Mr Malik is a shadow director or a manager of the business. An individual who is only an employee (and not an officer) cannot be responsible for the company's failures, even if he knows about them.

86. Mr Kaney submits that the activities relied on by HMRC could have been carried out by any trusted employee of the business. This would include, for example, cashing up and reconciling the takings/receipts.

87. Turning to the diary of takings/expenses, Mr Kaney argues that there is no evidence that Mr Malik produced this. Mr Malik says that Mr Munaim must have produced it. Mr Kaney refers to the fact that Ms Hickey, in her submissions, said only that the company (and not Mr Malik personally) had produced it.

88. Turning to the predecessor companies, Mr Kaney argues that any allegation of phoenix trading is pure speculation. There is, he says, no evidence of any tax loss in respect of any of these companies. In particular, they were all registered for PAYE.

89. We have considered carefully the evidence on both sides and, on the balance of probabilities, we are satisfied that Mr Malik was a manager of Newham's business. We explain below the reasons for this.

90. It is clear that, at the first meeting with HMRC, Mr Munaim indicated that Mr Malik was responsible for the company's financial matters.

91. This point was emphasised to Mr Asad on at least two occasions after the meeting in November 2015 when HMRC were trying to arrange a second meeting and made it clear that it was essential that Mr Malik attended the meeting. Mr Asad did not suggest in any way in response to HMRC that Mr Malik did not in fact play a significant role in relation to Newham's business and, in particular, in respect of financial matters.

92. Instead, the meeting was arranged at which Mr Malik was present and it is clear from the notes of the meeting and from Mr Spranklen's evidence that, out of the three people at the meeting who were representing the company (Mr Malik, the director Mr Munaim and the accountant, Mr Asad), Mr Malik was the one who was able to provide all the detailed information about the company's finances and the way in which the business operated.

93. Whilst Mr Kaney made the point that the HMRC notes of this meeting and Mr Spranklen's evidence are hearsay and are not direct evidence of the facts, they are nonetheless evidence. They are also, in our view, strong evidence of the underlying facts which are recorded given that the notes were made shortly after the meeting and are therefore the most reliable record of the meeting.

94. There is no evidence prior to the issue of the personal liability notices in November 2017 which contradicts anything that was said at either of the first two meetings with HMRC. It is only after the personal liability notices had been issued and Mr Malik became aware that HMRC may be able to make him liable for penalties imposed on the company that it was suggested that Mr Malik had no responsibility for the operation of the company's finances and other business activities. This inevitably affects the weight which can be given to that evidence.

95. The statement from BBK in their letter of 19 March 2018 that they only dealt with Mr Munaim in relation to accounting and payroll matters does not provide much assistance. Whilst it is possible that it was Mr Munaim who passed information to BBK, the evidence is that financial information was only passed to BBK once a year and it does not answer the question as to who was responsible for compiling and keeping track of that financial information.

96. The letter provided by Mr Munaim which was attached to BBK's letter of 19 March 2018 states only that Mr Malik did not have significant control or influence on the business. It does not say what role he did have and, in particular, whether he was responsible for financial matters.

97. In any event, we can place little reliance on the statements made in these letters given that the individuals who made those statements were not called as witnesses and were not available for cross-examination, unlike Mr Spranklen who did appear as a witness, was cross-examined as to his recollection of the meeting on 6 December 2016 and robustly confirmed his recollection of events.

98. This then leaves Mr Malik's own evidence and the statements which he made at the third meeting with HMRC in February 2018. Again, the statements were made and the evidence given after the personal liability notices had been served. It was of course therefore very much in Mr Malik's interests to distance himself from the business, to refute the statements which he is recorded as having made at the previous meeting with HMRC and to portray himself as a mere employee.

99. Despite Mr Malik's protestations, we think it is more likely than not that he did make the statements recorded in HMRC's notes of the meeting on 6 December 2016 and that those statements were accurate. Mr Spranklen was clear in his evidence that there was no misunderstanding about what Mr Malik was telling them about his role in relation to the company's finances including his responsibility for PAYE compliance and recording and reconciling the business' takings and its expenditure.

100. We are fortified in this when we look at the surrounding circumstances. We have found as a fact that Mr Malik was a director of the first two companies which operated the franchise at Barking Road (Delicious Pizza Limited and Wonderful Pizza Limited). He was also a director of a separate company operating another pizza business during the period when other companies (including Newham) were operating the business at Barking Road. Given his experience and seniority, it seems to us much more likely that Mr Malik would have held a managerial position with Newham rather than being an employee responsible only for taking orders, cooking pizzas and delivering pizzas. This supports the version of events recorded in the note of the second meeting with HMRC rather than that put forward by Mr Malik in the third meeting and in his evidence at the hearing.

101. Whilst they are relatively small points, the fact that the packaging company welcomed Mr Habibolah and Mr Malik as customers in October 2015 and the fact that Mr Malik is recorded by Hungry House as their contact for the business at Barking Road also supports the conclusion that Mr Malik had a managerial role and was not simply an employee with no managerial responsibilities.

102. Our conclusion therefore is that Mr Malik had primary responsibility for the financial aspects of Newham's business. In particular, he was responsible for calculating and keeping track of the company's income and expenditure. Whether or not this is sufficient to make him a shadow director is debatable but we have no doubt that it makes him a "manager" within the dictionary definition referred to above.

WAS NEWHAM'S FAILURE ATTRIBUTABLE TO MR MALIK

103. In order to impose liability on Mr Malik, it is not enough that he is an officer of the company. The failure has to be attributable to him (see paragraph 22(1) of Schedule 41).

104. Mr Kaney argued that, as Mr Malik is not a director, he has no responsibility for ensuring that Newham was registered for VAT.

105. Whilst it may technically be right that it is the directors of a company who are responsible for ensuring that the company complies with its tax obligations, it seems clear that paragraph 22 of Schedule 41 envisages the possibility that it is not only the directors who may have personal liability for a penalty given that managers and secretaries are included in the list of people who may be made liable.

106. In our view, a company's failure may be attributable to a particular individual even though that individual may not be the one who has the legal obligation to make the relevant notification.

107. On the basis that Mr Malik was the person who had responsibility for the company's finances, we consider that Newham's failure to notify HMRC of its liability to register for VAT is attributable, at least in part, to Mr Malik on the basis that he took no steps to ensure that the company and, in particular, Mr Munaim complied with this obligation.

108. The amount of the penalty depends not only on whether the failure was deliberate but also on whether it was concealed. Mr Malik has said that he does not contest the amount of the penalty as his only ground of appeal is that he was not an officer of the company. We think we should nonetheless briefly address this point as it might be appropriate to reduce the penalty payable by Mr Malik if he was not responsible for the concealment.

109. The concealment relied upon by HMRC is the production of the diary purporting to show a breakdown of income and expenditure and which was provided to HMRC at the meeting on 6 December 2016.

110. Mr Malik's evidence at the hearing was that he played no part in putting the diary together or providing it to HMRC.

111. However, having found, on the balance of probabilities, that Mr Malik was the person who was responsible for the company's finances and, in particular, keeping track of the company's income and expenditure, we think it more likely than not that he either produced the diary or was closely involved in producing the diary with a view to it being provided to HMRC. It does not matter whether it was Mr Malik or Mr Munaim who provided it to Mr Asad who in turn provided it to HMRC. Mr Malik was still involved in the attempted concealment and so the company's failure is at least in part attributable to him.

CONCLUSION

112. Mr Malik was primarily responsible for the financial aspects of Newham's business and was therefore a "manager" within the meaning of paragraph 22 of Schedule 41.

113. Newham's deliberate and concealed failure to notify HMRC of its liability to register for VAT was attributable at least in part to Mr Malik.

114. The penalty has been properly calculated and the reduction allowed by HMRC for disclosure is appropriate.

115. An allocation of 50% of the penalty to Mr Malik is also appropriate.

116. HMRC's decision that there are no special circumstances which would justify a reduction in the amount of the penalty is not "flawed" in a judicial review sense and so cannot be revisited by the Tribunal.

117. HMRC's decision as to the penalty for which Mr Malik should be liable is therefore upheld and this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

118. 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.

**ROBIN VOS
TRIBUNAL JUDGE**

RELEASE DATE: 12 JUNE 2019