[2021] UKFTT 164 (TC)

TC08133

VAT: assessment: (1) whether accountant negligent / acting on a "frolic of his own" and (2) whether Appellant making relevant supplies. Best judgment - in *Van Boeckel v Customs and Excise Commissioners. (1980) 1 BVC 378 applied. Penalties: whether Sch.24 penalties criminal in nature? Yes Han & Yau Martins & Martins Morris v Commissioners of Custom and Excise [2001] EWCA Civ 1048 & King v Walden (Inspector of Taxes) [2001] STC 822 applied. Meaning of 'deliberate' considered. HMRC v Tooth [2019] EWCA Civ 826, Cliffe v HMRC [2019] UKFTT 564 (TC), and Anthony Leach v HMRC [2019] UKFTT 0352 (TC) considered. Auxilium Project Management v HMRC [2016] UKFTT 249 (TC* ("*Auxilium*") *applied.*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03059

BETWEEN

SHANEIKA CLARKE **Appellant**

-and-

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

TRIBUNAL: JUDGE ASIF MALEK
JULIAN STAFFORD

The hearing took place on 15-17 March 2021. The form of the hearing was V (video) via the Tribunal video platform and all parties, witnesses and representatives attended remotely. A face-to-face hearing was not held because it was just, proportionate and in the interest of justice for the hearing to be conducted by video. The documents to which we were referred are the hearing bundle, various legal authorities and the skeleton arguments of the parties.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr. Andrew Young, of counsel, for the Appellant

Ms. Olivia Donovan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against the Respondents decisions to:

(1) issue to the Appellant a VAT assessment, pursuant to section 73 of the VAT Act 1994 for the period ending 10/12 in the sum of £37,228, and

(2) Charge the Appellant penalties under section schedule 24 of the Finance Act 2007 for 'deliberate and concealed' inaccuracies in the total sum of £75,962.14.

THE LAW

Legislative framework

2. Section 73(1) of the VAT Act 1994 provides that:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are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."

3. The relevant parts of Schedule 24 Finance Act 2007 provide:

"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.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of 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.

…….

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

(2) If the inaccuracy is in category 1, 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.

4A (1) An inaccuracy is in category 1 if—

(a) it involves a domestic matter…"

4. Article 6 of the European Convention on Human Rights sets out the right to a fair trial providing:

"1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

5. Article 3 of the Human Rights Act 1998 stipulates that:

> "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

6. Article 6 of the Human Rights Act 1998 makes it

> "unlawful for a public authority to act in a way which is incompatible with a Convention right" .

Burden and standard of proof

7. It is for the Appellant to show that the assessments made against her are wrong.

8. It is for the Respondents to show that the determination of the penalties is correct.

9. The standard of proof in each case is that of the balance of probabilities.

EVIDENCE: DOCUMENTS, WITNESSES AND FINDINGS OF FACT

Documents

10. The documents that we were invited to consider consisted of a bundle produced by the Respondents. References to numbers in square brackets in this decision are references to the page numbers within that bundle.

11. In addition, both parties submitted skeleton arguments and authorities for us to consider.

Witnesses

12. Only the Appellant gave evidence before us. She provided the relevant affirmation. She was carefully (and properly) taken to two witness statements produced by her [73 & 126]. She confirmed her signature on these documents and confirmed that they were true. In addition, she was taken to and had the opportunity to comment on the other documents contained in the bundle during the course of her examination-in-chief. The Respondents had an opportunity to cross-examine the Appellant and we had an opportunity to ask questions.

Findings of fact

13. Whilst we considered all the documents, witness statements and oral testimony before us we only deal here with the findings of fact that are necessary for us to reach our decision. It has been necessary to make some of our findings under the heading "Discussion" in this decision in order to preserve the coherence of what is being said. This decision ought to be read accordingly.

14. After considering all the evidence we make the following findings of fact on the balance of probabilities:

(1) The Appellant commenced trading in or around February 2011 as a sole trader supplying vehicles for hire to the general public [99].

(2) On 19 March 2012 Burton Car Rentals Ltd, a company in relation to which the Appellant is the sole director and shareholder was incorporated.

(3) On 17 September 2012 the Appellant's accountant, Mr. Appiah-Danquah, registered the Appellant for VAT with effect from 1 February 2011 using her correct date of birth and national insurance number via the Respondents online registration portal [130].

(4) A certificate of VAT registration was issued by the respondents on 21 September 2012 [132].

(5) A VAT return for the period 1 February 2011- 31 September 2012 was submitted by the Appellant's accountant on 6 December 2012 showing a total value of sales of £229,544.53 and a total value of purchases of £333,697.86 giving rise to a VAT reclaim of £56,123.20 [133].

(6) On 7 December 2012 the Appellant's accountant wrote to the Respondents enclosing a notification of an error in the Appellant's VAT return [134-135].

(7) On 16 January 2013 Mr. Akinnuoye, a work allocation officer for the Respondents, wrote to the Appellants accountant to inform him that the Respondents wished to conduct a "check of VAT records" visit to take place on 21 February 2013 at the accountant's office at 10.30 am [136].

(8) On 21 February 2013 Mr. Ogunlade, an officer of the Respondents, duly met with Mr. Appiah-Danquah at his office. There is a dispute as to whether or not the Appellant was also present at this meeting. For the reasons we give below we have concluded that the Appellant both knew about the investigation and that she was present at this meeting. During the course of this meeting Mr. Ogunlade discussed the trading activities of the business with both the Appellant and Mr. Appiah-Danquah. He further carried out a detailed sales check, a detailed purchase check and "uplifted" some invoices. [151].

(9) On 4 March 2013, Mr. Ogunlade wrote to the Appellant to confirm the outcome of the visit of 21 February 2013. In that letter he says that he has found errors on the Appellant's VAT returns and provides a schedule of the tax due [141-145].

(10) On 17 April 2013, Mr. Ogunlade wrote to the Appellant to confirm a further visit on 9 May 2013 in order to finalise his checks [148].

(11) On May 2013, Mr. Ogunlade wrote to Mr. Appia-Danquah, to confirm that the visit of 9 May 2013 had been rearranged to 22 May 2013 further to their telephone conversation [149].

(12) On 3 June 2013, Mr. Ogunlade wrote to Mr. Appia-Danquah, to confirm that the visit of 22 May 2013 had been rearranged to 16 July 2013 further to their telephone conversation [150].

(13) On 18 July 2013 Mr. Ogunlade visited Mr. Appia-Danquah at his offices as arranged. On arrival Mr. Appia-Danquah told Mr. Ogunlade that he had not been able to get hold of the Appellant.

(14) On 19 July 2013, Mr. Ogunlade wrote to the Appellant, first referring to his meeting with the Appellant's accountant on 18 July 2013 and then confirming that he had now issued assessments based upon the information available to him [160].

(15) A notice of assessment was sent to the Appellant, on or around 19 July 2013, assessing her to VAT in the sum of £37,228 together with interest in the sum of £700.43 giving a total of £37,928.43 [162].

(16) On 15 April 2014 Burton Car Rentals Ltd was dissolved.

(17) On 1 May 2014 Mr. Ogunlade wrote to the Appellant explaining that the Respondents intended to charge penalties in the sum of £75,962.14. In this letter he also set out the basis upon which the penalties had been calculated and in particular said that false invoices had been created to support figures and that he considered this behaviour to be both deliberate and concealed. [165].

(18) On 2 May 2014 Mr. Ogunlade wrote to the Appellant to confirm that a decision had been made by the Respondents to charge a penalty based upon the percentage of loss of revenue. [175]

(19) On or around 5 June 2014 the Respondents issued a notice of penalty assessment to the Appellant.[177].

(20) On 25 August 2014 the Appellant submitted a VAT registration application to transfer her VAT registration (number 141 8605 23) to Burton Car Rentals Ltd. [187].

(21) On 17 March 2016 the Appellant commenced a claim in the County Court for the recovery of unpaid taxes and penalties.

(22) On 20 April 2018 the current appeal was notified to this Tribunal. On or around 17 July 2018 the Respondents applied to have the appeal struck out [62-63]. That application was heard, together with an application by the Appellant to amend her grounds of appeal, on 10 January 2019. In a decision dated 16 January 2019 Judge Gillett dismissed the application to strike out and gave permission for the Appellant's grounds of appeal to be amended [98-105]. The Respondents filed a statement of case on 10 June 2019.

PRELIMINARY ISSUE- SUBMISSION OF NO CASE TO ANSWER

15. At the start of the hearing it was submitted on behalf of the Appellant that there was no case for her to answer and that the Respondent's case relating to the penalties should be struck out. In effect, the Appellant sought a ruling that this Tribuanl bar the Respondents from taking further part in the appeal so far as it related to the penalties imposed, pursuant to Rules 8(3)(c), 8(7)(a) and 8(8) of the First-tier Tribunal (Tax Chamber) Rules Consolidated version – as in effect from 21 July 2020 ("The Rules").

16. The Appellant argued that there was no reasonable prospect of the Respondents case on penalties succeeding. This was because the Respondent had failed to give full particulars of every fact or matter relied upon and had failed to provide sufficient evidence to prove the pleaded case.

17. We carefully examined the statement of case prepared by the Respondents. In our judgment the matters that the Respondents relied upon where sufficiently set out. It is clear to us that the Respondents are asserting that the Appellant's returns contained inaccuracies and that the Appellant's behaviour was deliberate and concealed. In particular the statement of case contains an allegation that the input tax reclaim was grossly inflated and fake invoices were provided to the Respondents in support of the repayment claim.

18. In so far as the evidence is concerned we reject the Appellant' argument that there was no evidence before us because the Respondents had failed to call any witnesses, if indeed that is what was being argued. Under Rule 15(2)(a) we have a wide discretion to admit evidence. Our discretion is to be exercised in line with the overriding objective set out in Rule 2. Our discretion is not circumscribed by the rules relating to hearsay. Documents not introduced by means of a witness statement do not cease to be evidence before us simply because of this fact.

19. Further, we do not accept that, at this summary disposal stage, we need to be satisfied that the Respondents have provided sufficient evidence to prove their pleaded case. This is so notwithstanding the fact that the Respondents carry the burden of proof in relation to the penalties. This is to put the test too high and to put the cart before the horse. We are not concerned, at this stage, with considering whether or not the Respondents can prove their case on the evidence that they have adduced. That would be to conduct a summary trial. At this stage, we may only strike out the Respondents case if we are satisfied that the Respondents

have no reasonable prospect of success. The criterion that we should apply here is not one of the balance of probabilities, but the absence of any reasonable prospect of success (See the speech of Lord Hobhouse of Woodborough in *Three Rivers DC v Bank of England (No.3) [2001] 2 All E.R. 513* which whilst dealing with summary judgment applications under CPR 24 gives us the fundamental basis for the distinction). In our judgment it cannot be said, at this summary stage, that the Respondents have no reasonable prospect of success.

DISCUSSION

Assessment to tax

20. The Respondents have assessed the Appellant to tax in the sum of £37,228. If it is being argued that the assessment is invalid or otherwise flawed by reason of the fact that it has not notified to the Appellant then we reject such argument. We are satisfied by reason of the documentary evidence before us that the assessment was sent to the Appellant on or around 19 July 2013. In particular, we note that the Appellant is not saying that she did not receive the assessment, but only that she passed all correspondence from the Respondents onto her accountant without reading it first.

21. As set out earlier in this decision the burden of displacing that assessment rests on the Appellant. It is for her to show, on the balance of probabilities, that the assessment is wrong.

22. The Appellant says that the assessment is wrong because it is, effectively, made against the wrong person. She did not make the supplies. It was Burton Car Rentals Ltd that did and the assessment should have been made against it. Burton Car Rentals Ltd is a company in relation to which she was sole director and shareholder at all relevant times.

23. The starting point is that the Appellant commenced trading in February 2011 with three vehicles. Burton Car Rentals Ltd was incorporated on 19 March 2012 and could only ever have carried on business after that time [par 7/ 99]. The Appellant was registered as a taxable person on 17 September 2012 with effect from 1 February 2011. She says that her accountant, Mr. Appiah-Danquah, completed the registration form without reference to her [par 6 127]. It is alleged on behalf of the Appellant that her accountant was either acting negligently or 'on a frolic of his own' when he applied for the Appellant to be registered for the purposed of VAT [par 25 69] and that he should have registered Burton Car Rentals Ltd instead. It is noteworthy, of course, that only the Appellant (and not Burton Car Rentals Ltd) could be registered with effect from 1 February 2011; the latter only having been incorporated on 19 March 2012.

24. The question for this Tribunal is then twofold. Firstly, has the Appellant demonstrated, on the balance of probabilities, that her accountant was acting negligently and/or 'on a frolic of his own' in registering her personally for VAT? Secondly, what effect does that have on her VAT registration? On the first point the Appellant offers no evidence other than to say that she was unaware and surprised to hear that she had personally been registered for VAT. This, to our mind, is insufficient. More would be needed in this context from someone who, on her own evidence ,does not open post addressed to her from the Respondents, but puts it all in bags to hand to her accountant and then relies upon him to further act entirely unsupervised and without recourse to her. In our judgment the Appellant has failed to demonstrate that her accountant acted negligently or "on a frolic of his own" in registering her personally for VAT. Given that we have found that the Appellant's accountant was not acting negligently or on his own accord in registering the Appellant personally for VAT we find that she was properly registered for VAT personally. We do not, of course, make any findings as to whether or not the Appellant was compelled to be registered at this time – only that she was registered and that this was properly done on her behalf.

25. However, simply concluding that the Appellant was registered for VAT is not, by itself, sufficient to dispose of the question as to whether the Appellant can show that she did not make the supplies alleged and that, rather, it was Burton Car Rentals Ltd that did.

26. At page 28 of the bundle there is to be a found a rental agreement between "BCH Burton cars" and Mr. James Ryan. The agreement relates to a hire period between 28 August 2013 – 2 September 2013. It includes the VAT number 141860523 and VAT in the sum of £48.33 is charged. This is the Appellant's VAT registration number, Burton Car Rentals Ltd not having applied to be registered for VAT until around 25 August 2014 [19]. At page [87] there is another agreement- this time between Burton Car Rentals Ltd and Mr Hunt for the period 23 April 2013 – 30 April 2013. This agreement is anomalous because, whilst it does not contain a VAT number, it nonetheless purports to charge VAT in the sum of £126.65. The same is true for the agreement to be found at page [92]. This evidence is difficult to reconcile with the Appellant's position that (a) the person making the supplies was Burton Car Rentals Ltd and (b) she knew nothing about the fact that she was VAT registered given that in at least one case an invoice is generated with her VAT number on it.

27. Further, there is nothing in the evidence before us to suggest that the Appellant or her accountant raised this point with Mr.Ogunlade during the course of his investigation. It seems to us that it would have been a relatively easy matter for this issue to have been put to bed at that stage. To the extent that the Appellant denies being present at the meeting of 21 February 2021 and denies any knowledge of the investigation we reject such a contention. The contemporaneous evidence consisting of the notes and correspondence of Mr. Ogunlade is to be weighed against the self-serving bare assertion made by the Appellant. It would have, of course, been open to the Respondents to call Mr. Ogunlade to give evidence. That is likely to have put, at the very least, the question of who was in attendance at the meeting of 21 February 2021, beyond doubt. Likewise, it was open for the Appellant to call Mr. Appiah-Danquah. It is a great pity that Mr. Ogunlade, in particular, was not called.

28. Doing the best we can with the evidence that we have, in our view, it is more likely than not that the Appellant was both aware of the VAT investigation and was present at the meeting of 21 February 2021. The only other conceivable alternatives (deception by either Mr. Appiah-Danquah or Mr.Ogunlade) are both farfetched and absent even the scintilla of evidence.

29. Lastly, the Appellant, on the 25 August 2014, made an application to cancel her VAT registration and to transfer her VAT number to Burton Car Rentals Ltd with effect from 19 March 2012 [19]. This is inconsistent with the Appellant's position that she did not make any supplies on which she had to account for VAT.

30. Given what we say above, it seems clear to us that the Appellant is unable to show that she did not make the alleged supplies or that Burton Car Rentals Ltd did.

31. Under section 73(1) of the VATA 1994 where, in cases such as this, the Respondents conclude that the returns submitted are incomplete or incorrect they are entitled to make an assessment which is based upon their "best judgment". In that regard Both Mr. Young and Ms. Donovan referred us to the decisions in *Van Boeckel v Customs and Excise Commissioners. (1980) 1 BVC 378.* The relevant principles for us to consider are set out in the speech of Woolf J (as he was then):

> "Therefore it is important to come to a conclusion as to what are the obligations placed upon the Commissioners in order to properly come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that

> function honestly and bona fide. It would be a misuse of that power if the Commissioners were to decide upon a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer, on appeal, to reduce that assessment.
>
> Secondly, clearly there must be some material before the Commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the Commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed upon the Commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

32. Mr. Young argued before us that the assessment could not have been made to "best judgment" because (a) there was no evidence before the Respondents to make such a judgment and (b) the magnitude is clearly disproportionate to the value of any supplies that could have been made. In respect of the former we respectfully disagree. We accept the Respondents position, and it is clear from the documents that we have been referred to, that Mr. Ogunlade was furnished with documents by Mr. Mr. Appiah-Danquah upon which the Respondents made the assessment. In respect of the latter argument Mr. Young led evidence before us from the Appellant to the effect that any deposit was either returned to the driver, paid out to in respect of congestion / parking charges or applied in relation to fuel or damage and ought, therefore, not to form part of her turnover. Whilst this might be the case, the difficulty is that there is no evidence that this information was put before the Respondents when they made the assessment. On the Appellant's case she had no interaction with the Respondents and does not know what was said or done on her behalf by her accountant. Of course, if she were able to show that there was evidence before the Appellant which showed, for example, that the deposit was returned partly or mainly in some or most of the cases then it would have been unreasonable for the Respondents to have made a "best judgment" assessment which ignored this information. Not only is that not the case here, but there is nothing to suggest that the deposits were treated as sales by the Respondents in their calculations. It is for the Appellant, who not only carries the burden of displacing the assessment, but also makes the assertion that deposits were wrongly treated as sales by the Respondent, to show that this was the case. She singularly fails to do so. In these circumstances we cannot see how it can be argued that the assessment made by the Respondents was arbitrary or capricious. On the contrary, it was one that was reasonably open to the Respondents to make.

33. Accordingly, the Appellant's appeal against the assessments must be dismissed.

Penalties

34. By notice dated 5 June 2014 the Respondents assessed the Appellant to penalties under Schedule 24.

35. Mr Young argued before us that penalties imposed under Sch 24 are criminal in nature for the purposes of the ECHR. He relied upon the decision in *Han & Yau Martins & Martins Morris v Commissioners of Custom and Excise [2001] EWCA Civ 1048*. He might also have referred to the decision in *King v Walden (Inspector of Taxes) [2001] STC 822*, at paras 62–79 where Jacob J in the High Court held that tax-geared penalties, calculated as a percentage of a tax liability, for fraudulent or negligent delivery of documents were generally criminal in nature. Although these cases do not deal with penalties under Sch 24 (which, for VAT purposes, largely came into force for periods after July 2008) we are, nonetheless, persuaded that a penalty under Sch 24 ought to be treated as criminal in nature. This is particularly so where the penalty is imposed for 'deliberate' and 'concealed' behaviour.

36. The consequences of this are that the rights granted under Article 6 of the ECHR apply in relation to the penalties assessed. Article 6 (1) gives the Appellant the right to a fair trial, Article 6(2) provides that there is a presumption of innocence until the Appellant is proven guilty, and Article 6 (3)(d) gives her the right to cross examine witnesses. To the extent that the Respondents argue that Article 6 does not apply to penalties assessment or is limited in its application we respectfully disagree and reject any such argument.

37. The applicability of Article 6 (2) appears to be, tacitly at least, accepted by the Respondents who agree that they have the burden of proof in relation to the penalties imposed.

38. The Appellant argues that the Respondents have failed to adduce any evidence to show that the pre-requisite conditions for the imposition of a penalty under Sch 24 are met, namely:

> (1) That the Appellant gave HMRC a document…
>
> (2) That contains an inaccuracy which amounts to, or leads to …a false or inflated claim to repayment of tax…

39. We do not come to the same conclusion. The document at page [133] seeking a repayment of VAT was given to the Respondents. It could, in our view, only have originated from the Appellant or her agent. We have, for the reasons set out earlier, rejected the Appellant's assertion (which in our judgment was for her to prove on the balance of probabilities) that her accountant and agent was on 'a frolic of his own'. The subsequent correspondence and meeting notes that we have seen tend to show that the document at page [133] contained an inaccuracy which led to a false or inflated claim for the repayment of tax.

40. Mr. Young also asserts that the penalty allegation is one of bad faith and that if it is to be advanced before this Tribunal it must be distinctly advanced and with the requisite particularity. He criticises paragraph 8, 10, 16 and 21 of the statement of case. He then criticises the evidence that the Respondents have adduced. He says that the Respondents have failed to put forward any evidence as to the knowledge and intention of the Appellant. He also says that 'deeming knowledge and intention' does not amount to evidence. He further criticises the documentary evidence on the basis that it is hearsay evidence which should properly be produced by a witness who should be tendered for cross-examination.

41. None of these arguments are, in our view, persuasive. Article 6 (3) does not apply. The Respondents did not tender any witnesses therefore it cannot be argued that the Appellant was not afforded an opportunity to cross examine or challenge such a witness. We do not accept Mr. Young's contention that we should only consider hearsay evidence if supported by the

attendance of the witness before us for the reasons given earlier in this judgment. Article 6 (2) was not engaged in the traditional sense in that there was no interview (and on the Appellant's case no contact) with the Respondents prior to the start of proceedings. In the proceedings before us the Respondents opened their case first and accept that the burden is on them in relation to the penalties.

42. That leaves us to consider only the fairness of the proceedings under article 6(1) in light of the criticisms made by Mr. Young. Fairness must not only be viewed in light of the jurisprudence regarding Article 6(1), but also by reference to the Rules and in particular Rules 2 (the overriding objective) 5 (case management powers) and 15 (evidence). These rules give this Tribunal a wide discretion to regulate the form, format and conduct of hearings before it subject only to the overriding requirement to deal with cases fairly and justly. Article 6(1) merely reinforces the fairness requirement. In effect we must consider whether the criticisms that Mr. Young lays at the door of the Respondent are such that the hearing before us was rendered unfair or unjust.

43. With regards to the Respondents statement of case, those engaged in the drafting of civil pleadings can rarely, it seems, win. Judges and parties can often be heard to criticise, in equal measure, the prolixity of pleadings and the lack of detail. Lord Hope encapsulated the problem in *Three Rivers Dc v Bank of England (No 3) HL [2003] 2 AC* when he said at paragraph 49 that "*a balance must be struck between the need for fair notice to be given on the one hand and excessive demand for detail on the other*". The basic purpose of pleadings, per Lord Saville in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 72 BLR 26* *"… is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it*". This is the case even where fraud is pleaded.

44. The usual course, in civil proceedings at any rate, is for any party dissatisfied with the pleadings of another is to seek for those pleadings to be struck out and / or seek further information under parts 3.4 and 18 of the Civil Procedure Rules respectively. In civil proceedings parties are required to make any application to strike out promptly for the obvious reason that parties prepare their cases on the basis of pleadings and much time and money might otherwise be wasted on answering unclear or poorly particularised allegations. The usual result of a strike out application made to tackle a poorly pleaded case is that the offending party will be required to amend and bear all consequential costs. This is because it is fairly settled law that where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (see *Soo Kim v Youg [2011] EWHC 1781 (QB)*).

45. In this Tribunal Rule 25 (2) sets out the requirements of the Respondent's statement of case. It is clear that those have been met. Further, the Appellant could have been in no doubt from the Respondents' statement of case that it was alleged that she had attempted to recover a sum that she was not entitled to by submitting a grossly inflated claim for repayment of input VAT through her agent and by providing to the Appellant fake invoices in support of that claim. That, in our view, gave her fair notice of the case against her. Thus, the perceived lack of particularity could not have caused any unfairness to the Appellant.

46. We turn next to the question of whether the Appellant can be shown to have acted deliberately. There have been a number of recent decisions in this area, and we were not referred to all of them. We set out our understanding of the law first before turning to the details of this case.

47. The term "deliberate" has recently been examined in the context of discovery assessments under section 29 of the TMA 1970 by the Court of Appeal in the matter *HMRC v*

Tooth [2019] EWCA Civ 826. Giving the lead judgment Floyd LJ reasoned that, essentially, the combined effect of sections 118(7), 29 & 36 of the TMA 1970 was that in Mr. Tooth's case the requisite degree of intent could be established, without more, if HMRC could establish a deliberate inaccuracy. This is because the intent was "deemed" by virtue of section 118(7) on the HMRC establishing that the inaccuracy was deliberate. So, when, in Mr. Tooth's case, he made a claim for loss relief in the wrong box on his tax return (knowing that it was the wrong box, but explaining elsewhere in his return that he had done this and why) it mattered not that he had no intention to bring about a loss of tax or mislead. He had intended to use the wrong box for his loss relief claim. That was deliberate and his further intention was not relevant. The decision is being appealed to the Supreme Court, the outcome of which is awaited. The reasoning expounded by Floyd LJ was *obiter dicta* and is, accordingly, not binding upon us.

48. We agree with this Tribunal's decision in *Cliffe v HMRC [2019] UKFTT 564 (TC)*, if and to the extent the learned Judge in that case meant to hold, at paragraph 68 that the term "deliberate" should be consistently interpreted as between section 29 of the TMA 1970 and Schedule 24. It seems to us that support for this proposition can be derived from the explanatory notes to the Finance Act 2008 which explicitly states in respect of section 29 of the TMA 1970 "*This corresponds with the terms used in paragraph 3 of Schedule 24 to the FA 2007*". However, we respectfully disagree with the conclusions reached by the learned Judge as a result.

49. We prefer to follow the decision of this Tribunal in *Auxilium Project Management v HMRC [2016] UKFTT 249 (TC* ("*Auxilium*"). This is not only because the reasoning of Floyd LJ with regards to the meaning of the term "deliberate" is *obiter*, but also because the explanatory notes to the Finance Bill 2007 shed considerable light on the intention of parliament in enacting Schedule 24. We agree with Judge Redston when she recently observed in a decision of this Tribunal in the matter of *Anthony Leach v HMRC [2019] UKFTT 0352 (TC)*:

> "The Notes for Sch 24 refer repeatedly to the level of penalty being based on "behaviours", with the most serious penalties being reserved for "deliberate and concealed behaviours". The Notes say that the concepts set out in the Schedule provide "a uniform language for behaviours", and that "where a person has taken reasonable care in completing their return…no penalty will arise". In our judgment, this behaviour-based approach shows that the meaning of "deliberate" cannot extend to purely mechanical errors, where there is no intention to mislead."

50. In *Auxilium* this Tribunal held, at paragraph 63 of that decision, that:

> "… 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"

51. In our view, and in summary, the term "deliberate" should be interpreted consistently between section 29 of the TMA and Schedule 24 and in the manner this Tribunal interpreted the term in *Auxilium*.

52. Applying this to the facts it seems to us that the documents in question must be the VAT return for the period 10/12 [133] and the further invoices provided in support. On the evidence before us we find that the return was based upon false invoices (see [151-159]) and,

accordingly, contained errors. The evidence suggests that the invoices from D & J Woodcock, The Value Car Centre, JD Haynes & JA Haynes and Amanah Prestige have been fabricated. We accept that this evidence is not the best evidence that the Respondents could have produced. As we have already said, it would have been extremely helpful to have had Mr Ogunlade and the other investigating officers give evidence. It would have allowed us to form a fuller picture and allowed the Respondents evidence to be properly tested by cross examination. However, this does not mean that we are obliged to simply ignore the documents that we have before us. The fact that these documents are uncorroborated by oral testimony goes, in our view, to the weight that we place on them and not to their admissibility. We do not, accordingly, place as much weight on these documents as we would have done had the relevant officer(s) been present as (a) witness(es).

53. The Appellant says that she knows nothing about those invoices and it is said on her behalf that if there has been a fraud then it was also committed on her. We do not accept that. The fabricated invoices were provided to the Respondents by the Appellant's accountant, Mr Appia-Danquah. There is nothing before us which would suggest that Mr. Appia-Danquah has acted improperly and we have already rejected the proposition that he was "on a frolic of his own". Whilst Mr. Young, during closing, told us "we have asked HMRC to look into the accountant, but do not know what they are doing about it" this is not evidence. In so far as the evidence is concerned we are satisfied, on that evidence, that no reports have been made to the Police or any professional body about Mr. Appia-Danquah. It seems to us that the most likely explanation for the fabricated invoices being in Mr. Appia-Danquah's possession is that the Appellant gave them to him for the purposes of completing her VAT return(s). The alternative is that Mr. Appia-Danquah fabricated the invoices and then presented them to the Respondents in order to benefit the Appellant – all without her knowledge. This is not only far-fetched, but there is no evidence to support such a conclusion. During the course of this hearing Mr. Young encouraged us not to speculate on the accountant or what he did on the premise that this was dangerous. We accept his point and tread carefully. However, we are not required to leave our critical faculties at home when looking at evidence. Where there are gaps in the evidence before us we are entitled to draw inferences from the evidence (or indeed the absence of evidence) to plug those gaps. Doing so, we are satisfied that it is more likely than not that the fabricated invoices were provided by the Appellant to her accountant. We are further satisfied that the Appellant, in providing those invoices to her accountant, also intended that the Respondents rely upon them as accurate.

54. It was not argued before us that the Appellant had not "concealed" the inaccuracy. However, we deal with the point for the sake of completeness. The meaning of "concealed" is not defined in Sch 24. The Oxford English Dictionary states that "conceal" means:

> "To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from…others; to refrain from disclosing or divulging."

55. In the circumstances where we have already concluded that it was more likely than not that the Appellant provided fabricated invoices to her accountant it seems to us that we are led to the inevitable conclusion that her behaviour was both deliberate and concealed.

56. In these circumstances the Appellant's appeal against the penalties assessed against her must be dismissed.

CONCLUSION AND UPDATE

57. For the reasons already given we dismiss the Appellant's appeals.

58. Since the writing of this decision, but before its promulgation, the Supreme Court has reversed that part of the Court of Appeal's decision in ***Tooth*** that we sought to distinguish in this decision at paragraph 47 above. The Supreme Court's reasoning supports the conclusions that we have come to in this decision about the meaning of the term 'deliberate'.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. 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.

ASIF MALEK
TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2021