



[2021] UKFTT 0196 (TC)

TC08146

VAT – penalty – deregistration – incorrect completion of application to deregister and final VAT return – whether deliberate behaviour – "blind-eye" knowledge - schedule 24 Finance Act 2007

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/05195

BETWEEN

CHOHAN MANAGEMENT LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ALEKSANDER

The hearing took place on 18 March 2020. With the consent of the parties, the form of the hearing was V (video) using the Tribunal's video platform. A face to face hearing was not held because of the impact of the COVID-19 pandemic. The documents to which I was referred are the skeleton arguments of the parties, an electronic documents bundle of 291 pages (which included copies of the witness statements and the expert report of Mr Cosslett), and an authorities bundle.

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.

Rebecca Sheldon, counsel, instructed by Croner Taxwise, for the Appellant

Alex Barrett, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Chohan Management Limited ("Chohan") in respect of a decision by HMRC to assess a penalty pursuant to schedule 24 Finance Act 2007 ("Schedule 24") in the sum of £83,151.02. The penalty notice was issued on 5 June 2019 and was upheld following a review by a letter dated 2 August 2019.
2. There was an unsuccessful attempt to resolve the appeal using ADR.
3. At the hearing, HMRC confirmed that they were no longer alleging that Chohan's conduct was both deliberate and concealed, and were now seeking a penalty of £58,205.71 on the basis that Chohan's conduct was deliberate but not concealed.
4. HMRC's assessment for the VAT underlying the penalties is not disputed and is not subject to any appeal. Chohan also concedes that its conduct was careless. The sole issue before the Tribunal is whether Chohan's conduct was deliberate.
5. Chohan was represented at the hearing by Ms Sheldon, and HMRC were represented by Mr Barrett. In addition to the electronic bundle of documentary evidence, witness statements from Kirsty Drummond (the HMRC officer responsible for raising the penalty assessment) and Haroon Bashir ("Mr Bashir", a director of Chohan) were submitted, and both attended the hearing and gave oral evidence on oath. In addition, an expert report from Stephen Cosslett, a handwriting expert, was included in the bundle. In his report, Mr Cosslett acknowledged his duty to the court and that he was aware of the requirements of the Civil Procedure Rules relating to expert evidence, and the report concludes with a statement of truth. Mr Cosslett gave oral evidence under oath.
6. References in this decision to "paragraphs" are, unless the context otherwise requires, to paragraphs of Schedule 24.

APPLICATION TO STRIKE OUT PART OF HMRC'S STATEMENT OF CASE

7. At the commencement of the hearing, Ms Sheldon made an application to strike out part of paragraph 23 of HMRC's Statement of Case, or (alternatively) for HMRC to provide further and better particulars of the allegations made. Paragraph 23 of the Statement of Case is as follows:

23. A few days before the rearranged visit, the Appellant stated that following a break in, there had been a fire at the property, in the centrally located storeroom where business records were stored. Mr Bashir, at the subsequent meeting below, confirmed that no damage had been caused to stock or assets, which included highly combustible ink cartridges and paper but that the computer backup had also been destroyed. He further confirmed that the fire was investigated by the police, who had lifted paperwork.

8. Ms Sheldon's application was that the penultimate sentence in this paragraph carries the implication that Mr Bashir had deliberately set fire to records – and that its inclusion in the Statement of Case would allow HMRC to effectively plead fraud without actually saying so in terms contrary to the rule in *Three Rivers District Council v Bank of England* [2001] UKHL at [184]. Mr Barrett submitted that this paragraph was included in the Statement of Case to explain why Chohan had been unable to produce documents requested by HMRC. It was a statement of fact, and HMRC was not making any insinuation that the fire was in any way deliberate.

9. I decided that the penultimate sentence in paragraph 23 should not be struck out, and that HMRC were not required to provide further and better particulars of the allegation. I find that

the language used is not prejudicial, and that I do not read the sentence as insinuating that the fire was caused deliberately. I found the paragraph helpful insofar as it gave context and an explanation as to why Chohan says it was unable to provide documents to HMRC. In the circumstances I also declined to direct that HMRC be required to provide further and better particulars of the allegation.

10. For completeness, I would mention that Ms Drummond in her witness statement says that Mr Bashir, together with one of his brothers, appeared in the Dundee Sheriff Court in connection with a suspicious fire at Chohan's property and an alleged insurance fraud in October 2020, and that a further first diet is to be held in January 2021. Although no application was made by Ms Sheldon in relation to this evidence, I have, nonetheless, disregarded it, given the absence of any detail about the fire and alleged fraud, and the fact that Mr Bashir has not been convicted of any offence.

BACKGROUND FACTS

11. On the basis of the evidence before me, I find the background facts to be as follows.

12. Chohan was incorporated on 20 May 2014 and applied to be registered for VAT with effect from 1 June 2014. At all material times, the directors of Chohan were Mr Bashir and his brothers Omar Bashir and Qamar Bashir.

13. Chohan's only business was, and has ever been, the acquisition of commercial premises at Block 4, Nobel Road, Dundee, DD2 4UH ("Block 4") which it leased to its associated company Fazteck Limited ("Fazteck").

14. As well as being a director of Chohan, Mr Bashir was also a director of Fazteck until March 2015. The other directors of Fazteck were, at the material times, his brother Omar Bashir and his father Mohammad Bashir Chohan. Fazteck dealt in ink cartridges and toners for printers, and to a limited extent in paper and CD labels.

15. The registration details for Mr Bashir at Companies House state that his occupation is "accountant", both in relation to his appointment as a director of Chohan (from incorporation until April 2018, when he resigns – he is subsequently reappointed as a director in October 2019), and as a director of Fazteck.

16. Chohan's application for registration (form VAT 1) was filed on 22 May 2014, and listed Fazteck under the heading "Other Business Involvement". On the same date, Chohan also filed forms VAT 5L and VAT 1614A. Form 5L gives details of land and property, and Chohan completed the form stating that it was the beneficial owner of Block 4, which it intended to lease. Form 1614A was filed by Chohan notifying HMRC of its option to tax Block 4 with an effective date of 1 June 2014. All the forms, VAT 1, VAT 5L and VAT 1614A, were signed electronically by Mr Bashir in his capacity as director.

17. On 6 June 2014, HMRC wrote to Chohan to confirm that its application had been accepted, and Chohan was registered for VAT with effect from 1 June 2014. On 17 June 2014, HMRC wrote to Mr Bashir to confirm receipt of the notification of the option to tax Block 4. The letter included the following paragraph:

If you subsequently de-register your business from VAT, your option to tax will not be automatically revoked. Should you wish to revoke your option to tax, a separate notification will have to be sent to our office within the relevant timescales. Please see section 8 of the aforementioned VAT Notice 742A for full guidance on revoking an option to tax.

If you have any general queries relating to option to tax please refer to VAT Notice 742A a copy of which can be viewed on our web site:

www.hmrc.gov.uk or alternatively you can call the VAT Advice Line on Tel 0300 200 3700.

18. Chohan's first VAT return was for the period 08/14, which was received electronically by HMRC on 9 February 2015. It made a repayment claim for £84,569.26, being the input incurred on the purchase of Block 4.

19. On 11 March 2015, HMRC wrote to Chohan asking for details about the VAT repayment claim. Mr Bashir replied by email on 18 March 2015 as follows:

I am emailing in regard to your letter dated 11th March 2015.

The repayment has come about with the company acquiring a commercial property.

I am attaching the main invoice that relates to the repayment in the VAT Quarter.

Please kindly let me know if there is anything further that you require to finalise the claim.

Thank you

Regards

Haroon A Bashir

The invoice attached to the email was the invoice from the seller in respect of the purchase of Block 4 by Chohan.

20. Chohan's only asset was Block 4, and its only activity was renting Block 4 to Fazteck. The rent charged was £3500 per month (inclusive of VAT), and Chohan accounted for the VAT charged on the rent on its quarterly VAT returns.

21. On 22 March 2016, Chohan filed form VAT 7, applying to deregister for VAT. The reason for deregistration given on the form was that taxable supplies over the following 12 months were expected to be below the registration threshold and were estimated to be £35,000. The form also included a handwritten note referring to the reason for cancelling registration as "REDUCTION IN PRICES".

22. Question 15 on form VAT 7 asked: "Do you have, or have you had, an option to tax on any property?", and the response was a cross in the "No" box. Question 17 asked: "Please estimate the total VAT inclusive value of stocks and assets you have on hand on which VAT is due. This includes the value of property on which an option to tax has been made and VAT has been reclaimed", and the response was "£0.00". Form VAT 7 was signed by Mr Bashir.

23. Mr Cosslett's evidence (which was not challenged) was that, although Mr Bashir signed the form VAT 7, the body of the form was completed by somebody else.

24. On 12 April 2016, HMRC wrote to Chohan confirming that its VAT registration had been cancelled with effect from 23 March 2016. The letter went on to say:

You must declare on your final VAT return the value and VAT on any stocks and assets on hand when you cancel your registration unless the VAT (including VAT chargeable on land and property) is £1000 or less.

[...]

If you have opted to tax any land and property you will need to include the values and VAT on your final VAT return.

25. Chohan's final VAT return for the period 99/99 (being the period 1 March 2016 to 23 March 2016) was filed electronically. It did not include the value of Chohan's stock and other assets as at deregistration (such as Block 4) as an output and did not include VAT on the value of its stock and other assets (including Block 4) in the calculation of output tax incurred on deregistration.

26. Ms Drummond and a colleague visited Chohan and Fazteck at their premises at Block 4 on 12 April 2018 and interviewed Mr Bashir. No one else attended the meeting. Copies of Ms Drummond's visit notes (both the original manuscript notes and the typed-up version) were included in the bundle. The accuracy of the visit notes was not challenged during Ms Drummond's cross-examination, and I find them to be accurate.

27. When asked about the books and records of Fazteck, Mr Bashir confirmed that he was solely responsible for the upkeep of the business books and records, operating the payroll and completing the VAT returns. When asked about VAT default surcharges incurred by Fazteck, Mr Bashir explained that Fazteck used to employ a bookkeeper, but the person had suffered a stroke a year ago, and the company had got behind in filing returns because he was dealing with everything else in the business.

28. As regards Chohan, Mr Bashir confirmed that the company owned Block 4 and did not own any other properties, and its sole income was from renting Block 4 to Fazteck – and that this had not changed from its original registration to its deregistration. Mr Bashir could not remember who had registered Chohan for VAT, but it was either himself or Mr Tooth (the company's external accountant).

29. Mr Bashir told Ms Drummond that there had been a fire in the plant/records room where records and computer back-ups were housed, and that the police had removed surviving records as they were investigating the fire.

30. Ms Drummond's notes in relation to the deregistration state as follows:

KD [Ms Drummond] asked who had applied for the VAT de-registration. HB [Mr Bashir] asked if it was him. KD showed HB the VAT 1 form and HB confirmed that he had signed the form. He had applied for deregistration in view of the turnover. KD asked HB why he had ticked the box at Question 15 no. HB said that he did not know. KD asked why nil had been entered for the value of the property at Question 17. HB said that he couldn't remember. KD ascertained that HB recalled claiming back VAT on the property when it was purchased and getting a visit to verify the claim. KD asked why the other side of the equation was not declared. HB remembered being above the VAT threshold but went below the threshold. He couldn't remember that far back as to why he didn't declare OTT [option to tax], stocks or assets at deregistration. HB confirmed that the property had not been revalued. HB thought that property in the area had devalued.

31. Following the visit, Ms Drummond wrote to Chohan on 18 June 2018 noting the error in the final VAT return and her intention to assess output tax on Block 4 on the basis of its value as at its original purchase date. She noted that as an error had been identified, a penalty might arise. She enclosed with the letter HMRC factsheets relating to penalties, invited comments on the proposed assessment and on penalty behaviours, and stated that cooperation would reduce possible penalties. A further copy of this letter was sent by recorded delivery on 26 June 2018 following email correspondence with Mr Bashir about difficulties with Royal Mail. On 2 July 2018 Mr Bashir confirmed receipt, and Ms Drummond sent Mr Bashir the various HMRC factsheets mentioned in her 18 June letter, as these had not been enclosed when she re-issued that letter on 26 June.

32. Ms Drummond emailed Mr Bashir asking for a response on 9 August 2018, and Mr Bashir responded that he was on medical leave until Monday – but that a colleague would respond. On 23 August 2018 Ms Drummond emailed Mr Bashir again, and on 31 August Mr Bashir replies saying that he had been on medical leave, but was now back and catching up with work.

33. On 13 November 2018, Ms Drummond and a colleague visited Block 4, having notified Fazteck of their intention to do so on 11 October 2018. When they arrived, they found that the premises were locked-up, with staff waiting outside. Omar Bashir arrived later, and telephoned Mr Bashir. Mr Bashir advised that he was at a hospital appointment and asked if the meeting could be rearranged. Ms Drummond told Mr Bashir to contact her to arrange an appointment, and left her business card with Omar Bashir, with all her contact details. On 14 November 2018 Mr Bashir emailed Ms Drummond asking for available dates for a meeting, and Ms Drummond replied with available dates in November and December on 15 November 2018. Mr Bashir did not respond to Ms Drummond.

34. Ms Drummond visited Block 4 with a colleague on 12 December 2018, having previously notified Fazteck of the proposed visit on 28 November. The discussion at the meeting primarily concerned Fazteck, but Mr Bashir stated that he would revert to Ms Drummond about the Chohan VAT error prior to Christmas.

35. On 1 March 2019 Ms Drummond wrote to Chohan proposing an assessment of underdeclared VAT due on the value of property and the stocks and other assets held at the time of deregistration. The VAT proposed on Block 4 was £81,490 being the same as the input tax originally claimed on its purchase. The VAT proposed on the other assets was £8,403.50 taking their book value in the accounts as at 31 May 2016 (being after deregistration on 24 March 2016) but which took into consideration depreciation for the full year. The letter went on to consider possible penalties:

As errors have been identified, there may be a penalty charged. I have already provided copies of the following factsheets to you:

- CC/FS7a - Penalties for inaccuracies
- CC/FS9 - The Human Rights Act
- CC/FS10 – Suspending penalties
- HMRC1 – What to do if you disagree

Please confirm that you have read and understood factsheet CC/FS9, because it contains important information about your rights and I need to be certain that you understand them.

If you have any questions about these factsheets, please phone me on the number shown at the top of this letter. If you need additional copies of the factsheets they can be downloaded from our website.

Your co-operation will help reduce the amount of any penalty should one be charged. We would like to take full account of the circumstances surrounding why the inaccuracy occurred and it would help if you could answer the following questions and provide any further information you think is relevant.

- Why did this error occur?
- Why did you complete the VAT7: Application to cancel your VAT registration stating that you did not have a property on which an option to tax was made?

- Why did you complete the VAT7 stating that your value of stocks and assets, including property, was nil?
- What checks, if any, were carried out to ensure the correct amount of VAT was being accounted for?

Where a penalty is applied you will have the right to have it reviewed or to appeal.

I have already invited you to provide comments regarding the errors and potential penalties in my previous letter to you however you have not as yet responded. I would point out that at this stage I am considering charging a deliberate penalty. This is because Mr Haroon Bashir registered the company for VAT, he completed the VAT returns and he applied to deregister the company by completing the VAT7 form. Mr Haroon Bashir was an official of the company at this time. It is not credible that Mr H Bashir could have forgotten that VAT was charged on the purchase of the principle place of business and in any case the questions on the form with regards to the value of stocks and assets and opted land and property would have triggered a reminder. Unless you can show otherwise it is my intention to issue a deliberate penalty. I have therefore enclosed a copy of factsheet CC/FS14 Managing Serious Defaulters for your information.

If you wish to comment or provide any further documentation that you wish me to consider please send them to me now. If I have not heard from you by 22/03/19 I will proceed to issue my assessment and penalties as advised.

36. The letter was delivered by hand.

37. As she had received no reply to this letter, on 27 March 2019 Ms Drummond issued a notice of assessment for £89,893.00 VAT and £7607.44 default interest, which was hand delivered to Chohan's address. On 4 April 2019 she sent a penalty explanation letter to Chohan proposing a deliberate and concealed penalty of £83,151.02 be levied. The reason given in the schedule to the letter for Chohan's behaviour being treated as deliberate and concealed was:

You purchased a property which had an option to tax made by the seller. You subsequently registered the company for VAT and made an option to tax meaning you would charge VAT on the property rentals. You later applied to deregister company on the grounds of reduced turnover. When completing the VAT 7 application to deregister you ticked No to the question Do you have, or have you had, an option to tax on any property? And you stated 0 (nil) to the question Please estimate the total VAT inclusive value of stocks and assets you have on hand on which VAT is due. This includes the value of the property on which an option to tax has been made and VAT has been reclaimed. You failed to account for the VAT on stocks and assets, including the opted property, at deregistration.

The disclosure was Prompted because you didn't tell us about the Inaccuracy before you had reason to believe that we'd found out about it, or were about to find out about it.

For this deliberate and concealed Inaccuracy with a prompted disclosure, the minimum penalty percentage is 50% and the maximum penalty percentage is 100%.

This means that the penalty range is from 50% to 100%.

38. The penalty calculation took into account the quality of Chohan's disclosure on the following basis:

- (1) Telling - 0% as the business had not actively engaged with HMRC to provide the records or discuss the reasons for the errors. Answers given were generally vague.
- (2) Helping – 15% as the business had provided some information verbally to allow HMRC to conclude the quantum of the assessment. No records were provided.
- (3) Giving – 0% as access to records were never provided.

39. Applying the reduction percentage to the penalty range gives a penalty of 92.5% of the potential lost revenue. The letter stated that no other reduction or adjustments were considered to be appropriate. The potential lost revenue was stated to be £89,893, and the penalty was therefore £83,151.02

40. On 11 April 2019 Croner Taxwise wrote to Mr Drummond, stating that they represented Chohan and asking for time to review the case. On 3 May 2019, Croner Taxwise wrote to HMRC asking for reconsideration of the penalty:

At this time, the business employed an internal bookkeeper called Mr Martin Gorrie. Mr Gorrie is a former Chartered Accountant. Mr Gorrie also looked after the tax and VAT affairs of the business and Mr Gorrie prepared the VAT 7 form.

Given Mr Gorrie's background and qualifications, the Directors of the business incorrectly assumed that Mr Gorrie would highlight any pitfalls of de-registering from VAT and complete the VAT 7 form accurately.

My clients have expressed their regret that no checks of the completed form were carried out before Mr Bashir signed it. Had my clients done so, they would have been able to correct the answers to questions 15 and 17. In addition, they would have been alerted to the notes that accompany question 17 which state that VAT on assets may need to be brought to account on the final VAT return and this could have ultimately reversed the decision to de-register from VAT.

It has subsequently come to light that during this period Mr Gorrie was not well and more recently he has suffered a brain haemorrhage. It is evident from the form that he was distracted from his duties because of his illness or did not understand the form because in the 'Notes' section of the form he advises that the business is deregistering due to 'a reduction in prices' which, given the reason for de-registering, doesn't make sense and is also obviously incorrect.

In hindsight, my clients consider that the decision to de-register the business from VAT was an error. If my clients had been aware of the rules on assets on hand on deregistration they would not have proceeded to de-register the business.

[...]

My clients would like to put their apologies for the errors on record. My clients are also demonstrating full cooperation in commissioning this letter to ensure that their VAT affairs are fully transparent.

My clients may have been at fault for putting their VAT affairs entirely in the hands of Mr Gorrie but they assumed him to be a competent and appropriately qualified person. Mr Gorrie may possibly have been distracted by illness when he completed the form, or may not have fully understood it, and sadly it is not possible to ask him now.

In summary, we do not consider that the errors arose as a result of deliberate behaviour and we should be very grateful if you would take this into account

along with the additional information we have provided and reconsider the penalty that you have applied.

41. Ms Drummond replied to Croner Taxwise on 4 June 2019 stating:

Thank you for some background information regarding Mr Gorrie. I have considered your client's business experience and I am aware that they were in business prior to the setting up of Chohan Management Ltd and its associated company Fazteck Ltd. I therefore consider the directors to be experienced business people.

I also considered what a 'reasonably prudent business person' would do in the same circumstances and I would expect that, when signing any form, such a business person would read it prior to signing it so that they were fully aware of what they are signing. I do not consider that Mr Bashir, in all his years of business experience, would be naive enough to sign a form without being fully aware of the contents. I would also point out that the answers to questions 15 and 17 are so blatantly wrong that they should have stood out. It is therefore more likely than not that your clients knew that the answers were wrong. In addition, by providing the answers which they did to these questions would ensure it was unlikely to be flagged at deregistration for further attention by HMRC – this is an attempt at concealment.

I note that you state your clients have expressed their regret that no checks of the completed form were carried out however Mr Bashir stated, when asked, that he could not remember anything regarding the signing and submission of the VAT 7 Deregistration form. In fact Mr Bashir could not remember much about his various business affairs when asked. I also do not consider that your client has demonstrated full cooperation as the business records were not provided and there was significant delay in providing requested information.

The letter continued by saying that Ms Drummond, having considered the representations with her manager, had decided to uphold the penalty.

42. The notice of penalty assessment was issued on 5 June 2019, and the penalty was confirmed following a statutory review by the review decision letter dated 2 August 2019.

MR BASHIR'S EVIDENCE

43. Mr Bashir's evidence was that although he studied accountancy for his degree at Dundee University, this was 20 years ago, he never obtained any professional qualifications in accountancy, and has no practical experience of accountancy. Mr Bashir's evidence was that VAT was not included in the syllabus of his accountancy degree.

44. Mr Bashir confirmed that he had been a director of Fazteck since 2011 and that Fazteck was a VAT registered business, and prior to that had been employed in a nursing home business (which business was exempt from VAT).

45. Mr Bashir said that he had acquired very little knowledge relating to bookkeeping and VAT from his business experience, as his primary accounts related activity in business had been merely to file invoices onto the computerised accounting system.

46. Mr Bashir said that Martin Gorrie was the main bookkeeper and financial controller both for Chohan and for Fazteck. His duties were to maintain credit control, purchase ledger, calculate monthly PAYE and quarter end VAT, and submit these details to HMRC electronically for both companies, as he had the login details for both companies and for the bank accounts. Mr Gorrie is a chartered accountant. Included in the bundle of documents was an invoice addressed to Fazteck from Mr Gorrie's company for the provision of his services of

"bookkeeping on site" for each week from 4 May 2015 to 29 May 2015, and a timesheet for those periods, showing that Mr Gorrie worked for a total of 113.3 hours in those weeks.

47. Mr Gorrie suffered a stroke in 2017, and no longer works for Chohan, and Mr Bashir said that he was not able to give evidence at the hearing. Mr Bashir explained that there had been something of a falling-out between Mr Gorrie and himself at the time of Mr Gorrie's stroke. This was because Mr Gorrie had been engaged by Chohan on a self-employed basis and was not an employee. He was therefore not entitled to any sick-pay following his stroke, and Mr Gorrie and Mr Bashir had argued about his entitlement to sick-pay. Mr Bashir said that he had tried to contact Mr Gorrie before the hearing but had no response to his communications. Included in the bundle was an email of 28 January 2021 in which Mr Bashir asks Mr Gorrie to list his duties for Chohan, to which there is no reply. However, also included within the bundle is an email exchange between Mr Gorrie and Mr Bashir in June 2019, in which Mr Bashir enquires after Mr Gorrie's health following the stroke and asks whether Mr Gorrie has re-registered as a chartered accountant. Mr Gorrie replies to these emails.

48. Since Mr Gorrie went sick, Mr Bashir said that he dealt with payroll and VAT matters with the help of a firm of external accountants.

49. Mr Bashir said that it was Mr Gorrie who advised him to de-register Chohan for VAT, on the basis that its turnover was less than the mandatory registration threshold. Mr Gorrie completed the VAT 7 form and gave the form to Mr Bashir to sign. Mr Bashir said that he was focussed on improving the performance and turnover of Fazteck and did not notice the mistakes on the form. However he acknowledges that he signed and dated the VAT 7. As regards the final VAT return, Mr Bashir did not appreciate the need to account for output VAT on the value of Block 4. He cannot recollect submitting the final VAT return. He acknowledged that he should have taken more care.

50. During the course of cross-examination, Mr Bashir confirmed that he sat opposite Mr Gorrie in the office, and because they were physically close to each other, they spoke to each other, and there was no need for there to be any electronic communications between them. Mr Bashir was asked whether he looked at any of the letters sent to Chohan by HMRC, and his response was that he handed them all to Mr Gorrie, as it was Mr Gorrie who dealt with VAT matters. Mr Bashir said that he could not recall reading any of the letters from HMRC.

51. Mr Bashir confirmed that Mr Gorrie had access to Chohan's online account with HMRC and filed all the online forms and VAT returns himself. Mr Bashir said that he did not check Mr Gorrie's work or VAT returns before they were filed, as Mr Gorrie was a qualified accountant and that was his job.

52. Mr Bashir said that he was unaware of the fact that Chohan had opted to tax Block 4 – he did not know what an option to tax meant. As regards his email to HMRC of 18 March 2015, Mr Bashir said that the "emails were put together by the bookkeeper [Mr Gorrie] and I sent them off".

53. Mr Barrett asked Mr Bashir why, in his 28 January 2021 email to Mr Gorrie, he only asked what Mr Gorrie's duties were? Mr Barrett suggested that the only reason why Mr Bashir did not ask about the errors in the VAT 7 and final VAT return was because Mr Gorrie's answers would contradict Mr Bashir's witness statement. Mr Bashir denied this, and said that if Mr Gorrie had replied, it would have confirmed that his duties included preparing and filing the VAT 7 and the final VAT return.

54. Mr Barrett asked Mr Bashir whether he was aware of the errors in the VAT7 and the final VAT return, and Mr Bashir said that he was not. Whilst Mr Bashir confirmed that he had signed and dated the VAT 7, he said that he "cannot recollect submitting VAT 100 [the final VAT

return]". When Mr Barrett asked whether it was Mr Gorrie who had filed the final VAT return, Mr Bashir's reply was that Mr Gorrie "had the login details".

MS DRUMMOND'S EVIDENCE

55. Ms Drummond now acknowledges that the behaviour of Chohan did not involve concealment. But she asserts that a penalty for deliberate behaviour remains appropriate for the following reasons:

- (1) Mr Bashir applied to opt to tax the property.
- (2) Mr Bashir completed and submitted the VAT returns.
- (3) Mr Bashir applied to deregister the company from VAT.
- (4) HMRC dealt solely with Mr Bashir in relation to VAT matters relating to Chohan. There have been four compliance visits by HMRC to Chohan and Fazteck relating to VAT and international trade between 2012 and 2018, and on each occasion, HMRC dealt with Mr Bashir without any apparent difficulties. Ms Drummond noted that when she met Mr Bashir, he was able to answer questions about the VAT compliance of both Fazteck and Chohan himself, without needing to ask for help from anyone else.
- (5) The directors of Chohan are experienced business people. Mr Bashir had been in business operating a care home which was believed to be sold to fund the purchase of Fazteck. Both he and his brother had been involved with both Fazteck and Chohan since their respective beginnings in 2011 and 2014. Given his accountancy degree and business experience, Ms Drummond considered that Mr Bashir has a higher level of bookkeeping and accountancy knowledge than many business people running small and micro businesses.
- (6) The correspondence shows that Mr Bashir knew that he had to register for VAT and opt to tax Block 4 in order to be able to recover the VAT incurred on the purchase price - this demonstrated that he had sufficient knowledge of VAT as it applied to the purchase of rental properties and the need to elect to tax the property in order to recover input VAT on the purchase price and the consequential requirement to charge VAT on rents.
- (7) Chohan's only activity was the purchase of Block 4 and its letting to Chohan. It had no other activities. Its sole reason for registration for VAT was in relation to the purchase and letting of Block 4. Less than two years had elapsed between Chohan registering for VAT and applying to be deregistered. In that limited period of time it was inconceivable that Mr Bashir would have forgotten that he had opted to tax Block 4.
- (8) During the course of Ms Drummond's meetings with Mr Bashir and her correspondence with him, Mr Gorrie was only mentioned in relation to Fazteck – but never in relation to Chohan. The first reference to Mr Gorrie being in any way concerned with Chohan was in a letter from Croner Taxwise in May 2019 asking for reconsideration of the assessment for the deliberate and concealed penalty.
- (9) Chohan have not offered any evidence of Mr Gorrie's involvement in the preparation of the VAT 7 or the VAT returns. Although Mr Bashir maintains that Mr Gorrie is unavailable to give evidence due to ill health, Ms Drummond referred to a local press article dated January 2018, which showed that Mr Gorrie had enrolled on a master's degree course at Dundee University, which she suggests shows that he would have sufficiently recovered from his stroke to be able to offer some corroboration to the information provided by Chohan.

(10) Further, whilst Ms Drummond acknowledged that VAT legislation regarding property can be complex, Mr Bashir understood it sufficiently well to ensure the option to tax in respect of Block 4 was made at the time of VAT registration in order that the input tax could be recovered on the purchase of the property. Having done that, Mr Bashir was aware that he had to charge VAT on the rent - which they Chohan did. When it came to deregistration, there was guidance in the deregistration notice and a reminder in the correspondence from HMRC of the need to account for VAT on stocks and assets and opted property on the final VAT return.

(11) Questions 15 and 17 on the VAT 7 deregistration form, signed by Mr Bashir, were blatantly incorrect. This would result in less scrutiny as part of HMRC's deregistration actions.

(12) Notes are provided on the VAT 7 form guiding an applicant to the VAT Deregistration notice.

(13) Chohan were further provided with guidance regarding the declaration of VAT due on stocks and assets in the letter from HMRC confirming deregistration.

56. In her witness statement, Ms Drummond said that as part of an accountancy degree:

[...] students are likely to study topics such as Business Law, Management Accounting, Taxation, Accounting Standards and Financial Reporting Standards. Whilst any learning may be a general overview level rather than in-depth a student would learn that most aspects of accounting and taxation are governed by legislation or good practice/standards. HB [Mr Bashir] is an experienced business man and therefore whilst not remembering everything he was taught 20 years ago, would be aware that taxation can be particularly complex. However he would also be aware that there is myriad guidance available from HMRC or commercial providers should knowledge be lacking and assistance required.

[...]

Whether or not chartered or certified, experienced in practice or business, I consider that HB has a higher level of bookkeeping and accountancy knowledge than many business people running small and micro businesses.

57. Ms Drummond was cross-examined on these statements by Ms Sheldon and asked whether she had ever asked Mr Bashir what he had studied. Ms Drummond confirmed that she had not, but that she deals with a lot of small business people (such as corner shops, plumbers, electricians), and most of these do not have any accounting background. In contrast Mr Bashir had the benefit of having learned accountancy, and in addition had run other businesses for many years. He had dealt with HMRC on several occasions without any apparent difficulty. She said that Mr Bashir had the benefit of 14 years of business experience in addition to the study of accountancy, and all businesses are involved in having to deal with taxation from day 1.

MR COSSLETT'S EVIDENCE

58. Mr Cosslett's evidence was that the handwriting on the VAT 7 (other than the signature) was unlikely to be that of Mr Bashir - and that the likelihood of it being Mr Bashir's was so small that it can be meaningfully excluded.

59. Mr Cosslett confirmed that as Mr Bashir had acknowledged having signed the VAT7, he had not investigated this handwriting.

60. Mr Cosslett also confirmed that he had not been provided with any samples of Mr Gorrie's handwriting, and therefore was not able to give any opinion as to who filed in the VAT 7 form.

ANDREW MCCAFFERTY'S LETTER

61. Included in the documents bundle was a letter from Andrew McCafferty to Croner Taxwise (the firm representing Chohan at the appeal). Mr McCafferty is a chartered accountant and chartered tax advisor, and is currently a director of DC Consulting, a firm of corporate finance and tax advisors based in Dundee. Mr McCafferty states in his letter that in his opinion the area of VAT and property is one of the most complex areas of tax legislation in the UK. The letter goes on to say:

Turning to Mr Bashir's position in the matter at hand, it is understood that the VAT de-registration form for Chohan Management Limited was prepared by the Chohan accounting assistant and that Mr Bashir signed this form on behalf of the company without fully considering the implications. Mr Bashir operates all aspects of the business of Chohan and I understand has been commercially focussed on the business.

I do not believe that simply by holding an Accountancy Degree from Dundee University 20 years prior to this event means that Mr Bashir should have deep understanding of property-related VAT matters. Whether Mr Bashir should have sought specific VAT advice at that time in connection with the VAT de-registration is a matter of opinion and in hindsight this would appear to have been a more prudent course of action.

Mr McCafferty states in the letter that he "does not seek to comment on the circumstances surrounding the VAT enquiry and subsequent assessment raised". Mr McCafferty did not attend the hearing to give evidence, his letter did not acknowledge that he owed any duty to the Tribunal, and the letter did not confirm his awareness of the Civil Procedure Rules. The letter did not include a statement of truth.

THE LAW

62. Paragraph 1 of Schedule 24 provides that a penalty is due when a person (referred to in Schedule 24 as "P") gives HMRC one of the documents listed and two conditions are satisfied:

- (1) the document contains an inaccuracy which amounts to or leads to an understatement of liability to tax, a false or inflated statement of loss, or the false or inflated claim to repayment of tax; and
- (2) that inaccuracy was careless or deliberate on P's part.

63. The documents listed for the purposes of paragraph 1 include VAT returns.

64. Paragraph 3(1) of Schedule 24 defines what is meant by careless or deliberate:

Degrees of culpability

3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

- (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
- (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, 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).

65. Part 2 of Schedule 24 deals with the amount of any penalty payable. Paragraph 4 provides that in the case of domestic matters (as is the case in this appeal, 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.

66. The "potential lost revenue" in respect of an inaccuracy in a document is defined in paragraph 5 as being the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

67. Paragraphs 9 and 10 of Schedule 24 provide for a reduction in the amount of a penalty in consequence of disclosures by a person, and whether those disclosures are prompted or unprompted. Disclosures are 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. It is not disputed that any disclosure in this case was prompted because Chohan did not tell HMRC about the errors before they had reason to believe they had discovered them or were about to discover them. HMRC had started their enquiries into Chohan's final return prior to any disclosure.

68. Paragraph 15 of Schedule 24 makes provision for appeals against HMRC's decisions relating to penalties, paragraph 15(1) provides for appeals against the penalty itself, and paragraph 15(2) provides for appeals against the amount of the penalty. This appeal falls within paragraph 15(2), as Chohan acknowledge that a penalty is payable, but challenge the quantum on the grounds that its behaviour was careless, rather than deliberate.

69. Paragraph 17(2) deals with the powers of the Tribunal in relation to appeals against the amount of any penalty as follows:

- (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.

CHOHAN'S SUBMISSIONS

70. Ms Sheldon's submissions can be considered under two headings. The first is whether the penalty was issued in connection with the correct document, and the second is whether Chohan's behaviour was deliberate for the purposes of Schedule 24.

Correct document

71. Ms Sheldon referred me to the statement in Ms Drummond's penalty explanation letter of 27 March 2019, which she submits states that the penalty was issued in relation to the inaccuracies in the form VAT 7 (notwithstanding HMRC's subsequent statements in their Statement of Case and in the Review Conclusion letter of 2 August 2019 that the penalty had been issued in relation to the final VAT return). Although she acknowledged that there were inaccuracies in the VAT 7 form, these did not give rise to "potential lost revenue". Ms Sheldon submitted that there must be a causative link between an inaccuracy and the loss of tax, as a penalty is charged on the potential lost revenue. In this appeal, she submits that the loss of tax arises from the error in the final VAT return, and not the error in the VAT 7 form. This can be demonstrated, she says, as had the final VAT return did not contain any errors, there would have been no potential lost revenue, notwithstanding the inaccuracy in the VAT 7. As the potential lost revenue arising from the inaccuracy in the VAT 7 is zero, any penalty must also be zero.

72. Ms Sheldon submits that it is now too late for HMRC to assess a penalty in relation to the inaccuracy in the final VAT return, as paragraph 13 of Schedule 24 imposes a 12 month time limit on raising penalty assessments, running from (in this case) the end of the appeal period for correcting the inaccuracy (which would have expired on 27 April 2020).

Deliberate behaviour

73. Ms Sheldon referred me to the case of *Auxillium v HMRC* [2016] UKFTT 249 (TC) at [63] which considered meaning of “deliberate” in this context:

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

74. Ms Sheldon submits that the test is a subjective one – whether the taxpayer has knowingly provided HMRC with a document that contains an error with the intention that HMRC should rely upon it as being accurate. It is not a question of considering what a reasonable and prudent taxpayer should have done, or whether a taxpayer failed to take all reasonable steps.

75. Ms Sheldon distinguishes the case of *Clynes v HMRC* [2016] UKFTT 369 (TC), where the Tribunal held that a behaviour can be deliberate if a person consciously or intentionally chose not to find out the correct position. She submits that in *Clynes*, the relevant individual ran an accountancy business and had an accounting qualification as a member of the Association of Accounting Technicians. She referred me to the decision of this Tribunal in *Baloch v HMRC* [2017] UKFTT 0665(TC) at [125] where the Tribunal said:

We do not accept HMRC's submission that a failure to check without more amounts to deliberate behaviour, though it may well indicate careless behaviour; that is a failure to take reasonable care to avoid inaccuracy.

76. Ms Sheldon submits that this is not a case where Mr Bashir intentionally decided not to find out the correct position with regards to the VAT 7 form (or any other form). Although Mr Bashir completed an accountancy degree, it was well over a decade prior to the circumstances in this appeal, and in any event he does not have any accountancy qualification and has no background in VAT. At all times he relied upon Mr Gorrie, a chartered accountant, to deal with Chohan's VAT affairs. For these reasons, the circumstances in this appeal can be distinguished from the circumstances in *Clynes*.

77. Ms Sheldon submits that there is no evidence before me to suggest that Mr Bashir worked in unison with Mr Gorrie, and the assertion by Ms Drummond that Mr Bashir was responsible for Fazteck's VAT matters is disputed and is subject to a separate appeal.

78. Mr Bashir accepts that he was careless in relying on his advisor without checking the accuracy of the VAT form, but this is not the definition of deliberate behaviour in these circumstances as Mr Bashir is not a qualified accountant nor VAT specialist.

79. Ms Sheldon submits that the burden of proof to show deliberate behaviour falls on HMRC, and they have failed to discharge it. Even if it could be said that Mr Gorrie's behaviour was deliberate, as he was not a controlling mind of Chohan, his behaviour cannot be attributed to Chohan.

80. Ms Sheldon acknowledges that Chohan were careless in the circumstances of this case, and submits that the Tribunal should consider requiring HMRC to give consideration to suspending penalties under paragraph 14(1) of Schedule 24.

HMRC'S SUBMISSIONS

Correct document

81. Mr Barrett submitted that the references to the VAT 7 in Ms Drummond's penalty explanation letter of 4 April 2017 arose in connection with the penalties being levied for "deliberate and concealed" behaviour. HMRC considered that the effect of the incorrect answers to questions 15 and 17 had the effect of concealing the option to tax. Now that HMRC were no longer pursuing concealment penalties, the incorrect answers on the VAT 7 become less relevant. Mr Barrett submitted that it was obvious that the potential lost revenue had to be determined by reference to the final VAT return, as a taxpayer does not account for VAT on form VAT 7.

82. Mr Barrett also noted that this issue had first been raised on behalf of Chohan in Ms Sheldon's skeleton argument and was not raised in its grounds of appeal. Chohan's grounds of appeal (as set out in their notice of appeal) clearly refer to the inaccuracy in its final VAT return, and its failure to account for VAT on deregistration (in addition to the error on the VAT 7), so there is no question of Chohan not understanding the basis on which the penalty was charged.

83. Mr Barrett referred me to the Review Conclusion Letter of 2 August 2019, which states in terms at paragraph 7 that the VAT error was made on the final VAT return.

84. Mr Barrett submits that there is no merit in Chohan's submissions that the penalty was assessed in respect of the wrong document.

Deliberate behaviour

85. Mr Barrett referred me to *Auxillium* as setting out the meaning of "deliberate" for the purposes of Schedule 24 penalties.

86. Mr Barrett submits that Mr Bashir was involved throughout the whole process of both Chohan's registration and deregistration for VAT. Mr Barrett notes that Mr Bashir describes himself as an accountant on the Companies House registration and he has an accountancy degree. Yet he now says that he does not have a professional accountancy qualification. However, submits Mr Barrett, Mr Bashir has experience of running businesses, which must include dealing with day-to-day bookkeeping and tax matters, and ensuring that documents filed with HMRC are accurate.

87. Mr Barrett notes that Mr Bashir sat close to Mr Gorrie in a small office. It was therefore highly unlikely that Mr Bashir was entirely unaware of what Mr Gorrie was doing. Mr Barrett also noted that no emails between Mr Gorrie and Mr Bashir relating to Chohan were included in the bundle – Mr Barrett submitted that Mr Bashir's evidence (that because they worked physically close to each other, they did not send each other emails) was not credible, and that it was unlikely that there would be no email traffic between them.

88. But in any event, Mr Bashir was the director, and was involved in all communications with HMRC. It was Mr Bashir who dealt with the claim for repayment of £80,000 of input VAT arising on the purchase of Block 4.

89. It is not credible, submits Mr Barrett, that Mr Bashir could have forgotten about filing the option to tax Block 4 at the time the VAT 7 was filed. The option to tax was notified to HMRC less than two years prior to the VAT 7 being filed. Chohan was a single purpose company, and the option to tax and reclaim of the input VAT arising on the purchase would have been significant and memorable given that this was the sole asset of a small business.

90. Mr Barrett submitted that there was no evidence to corroborate Mr Bashir's oral evidence that Mr Gorrie did work relating to Chohan. Although Mr Bashir emailed Mr Gorrie to ask him

about his duties, he did not ask questions about Mr Gorrie's involvement in Chohan's deregistration or the final VAT return. Although a copy of Mr Gorrie's timesheets and his company's invoice were included in the bundle, these state on their face that they relate to work done for Fazteck, and not for Chohan.

91. Mr Barrett acknowledged that the handwriting expert evidence showed that Mr Bashir did not complete the body of the VAT 7, but there was no evidence as to who completed it – in particular, was no evidence to show that it was Mr Gorrie that filled it in.

92. And, submits Mr Barrett, the Tribunal can draw inferences from the fact that Mr Gorrie was not called as a witness. There was evidence that Mr Gorrie had recovered from his stroke sufficiently to be able to study for a degree, and so there was no medical reason why he could not attend the hearing.

93. Mr Barrett referred me to *Clynes* to support his submission that even if Mr Bashir did not prepare the VAT 7 and the final VAT return, if he "consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person "knew that he should do so" (at [86]), his failure to find out the correct position amounted to deliberately filing an incorrect document for penalty purposes.

DISCUSSION

94. The burden of proof is on HMRC to demonstrate that, on the balance of probabilities, Chohan's behaviour was deliberate (see, for example, *Ahmad v HMRC* [2019] UKFTT 0682 (TC) at [4] and [5]).

Who completed the VAT 7?

95. I found the evidence of Mr Cosslett to be reliable and convincing. I find that Mr Bashir signed and dated the VAT 7 form, but that somebody else completed the body of the form.

96. Mr Cosslett had not been provided with any samples of Mr Gorrie's handwriting, so he was not able to provide an opinion on whether it had been completed by Mr Gorrie. Indeed he was unable to comment at all on who might have completed it.

Mr McCafferty's letter

97. I found Mr McCafferty's letter to be of no assistance.

98. As noted above, Mr McCafferty stated in the letter that he "does not seek to comment on the circumstances surrounding the VAT enquiry and subsequent assessment raised". Mr McCafferty did not attend the hearing to give evidence, his letter did not acknowledge that he owed any duty to the Tribunal, and the letter did not confirm his awareness of the Civil Procedure Rules. The letter did not include a statement of truth. The letter is therefore of no evidential value.

99. But in any event, it is entirely self-evident that many aspects of VAT law are complicated, including (but not limited to) VAT relating to property. Yet the overwhelming majority of small businesses are able to file VAT returns themselves, because the activities of the overwhelming majority of small businesses do engage with the complexities of VAT. They do not need to consider: building contracts, the capital goods scheme, care homes, and new builds and renovations (the examples of complex property VAT matters given by Mr McCafferty in his letter). And I find that none of those knotty complexities have arisen in the circumstances of this appeal. I find that the VAT issues in this appeal were not so complex as to require specialist advice in order for Chohan to be able to complete its VAT returns in the circumstances in which it operated.

Ms Drummond's evidence

100. The content of Ms Drummond's evidence insofar as it related to the underlying background facts was not challenged. She was challenged in cross-examination about the reasons why she considered that a deliberate penalty was appropriate, but I found her answers to be consistent with the rest of her evidence and have no reason to doubt her evidence. I found her evidence to be credible and reliable.

Mr Bashir's evidence

101. I found Mr Bashir to be neither a credible nor a reliable witness.

102. I did not believe Mr Bashir when he said that he had little knowledge of bookkeeping, accountancy, and VAT for the following reasons:

(1) Whilst there was no evidence before me of the syllabus of the Dundee accountancy degree, and whilst I can believe that an accountancy degree does not (at least as regards its core mandatory modules) deal with VAT at an advanced level, it is not credible that the Dundee university mandatory core syllabus in accounting did not include double-entry bookkeeping. Nor is it credible that the mandatory core syllabus did not include the principles of VAT and how businesses account for VAT – given that VAT is pervasive and impacts the accounts of any business, not just in the UK, but throughout Europe and much of the rest of the world.

(2) Mr Bashir has been involved at director level in business for many years. Even if his knowledge of more esoteric aspects of accountancy may have faded since he graduated, his day-to-day business activities would have kept alive his knowledge of double-entry bookkeeping and the main principles of VAT (and accounting for VAT).

(3) Mr Bashir describes himself as an "accountant" in his company director registrations at Companies House.

(4) The fact that (according to Ms Drummond's unchallenged evidence) HMRC only dealt with Mr Bashir in relation to Chohan's VAT matters, and that at compliance visits Mr Bashir was able to answer HMRC's questions relating to VAT and international trade without any apparent difficulty.

(5) Although Mr Bashir said that he needed the help of external accountants to deal with VAT and payroll after Mr Gorrie became sick, there was no evidence (such as emails or other correspondence with any external accountants) to corroborate that this was the case.

103. I did not believe Mr Bashir's evidence that Mr Gorrie was solely responsible for Chohan's VAT affairs for the following reasons:

(1) There is no evidence of any kind to corroborate Mr Bashir's statements to this effect.

(2) Although Mr Bashir's oral evidence was that he and Mr Gorrie did not communicate by email (because they sat close to each other), the bundle of documentary evidence includes copies of various emails sent between them. The copies of these emails were dated 2015 and 2017, and were provided by Chohan, so Chohan had access to its email archives, notwithstanding the impact of the fire (as described to Ms Drummond at the meeting on 12 April 2018).

(3) Mr Bashir's oral evidence was that it was Mr Gorrie who drafted the emails that he sent to HMRC, which would have included, for example, the email sent to HMRC on 18 March 2015. If it was the case that Mr Gorrie had drafted emails for Mr Bashir, I would

have expected that the drafts (which Mr Gorrie would have emailed to Mr Bashir) would have been included in the bundle. The fact that Chohan were able to include copies of other emails exchanged between Mr Bashir and Mr Gorrie relating to Fazteck's business (going back to 2015) indicates that Chohan had retained copies of its emails and had access to them. I infer from the fact that no such emails were produced, and I find, that it was Mr Bashir that drafted those emails himself.

(4) The fact that (according to Ms Drummond's unchallenged evidence) HMRC only dealt with Mr Bashir in relation to Chohan's VAT matters, and that at compliance visits Mr Bashir was able to answer HMRC's questions relating to VAT and international trade without any apparent difficulty.

(5) The fact that Mr Bashir did not refer to Mr Gorrie during the course of HMRC's enquiries. His name was first raised, after HMRC had issued its penalty notices, in Croner TaxWise's letter of 11 April 2019.

(6) If Mr Gorrie had been responsible for dealing with Chohan's VAT affairs, I would have expected Mr Gorrie (and not Mr Bashir) to have corresponded with HMRC about Chohan's VAT reclaim on the initial purchase of Block 4, that he would have asked Mr Gorrie to confirm this when emailing him in January 2021, and that Mr Bashir would have mentioned Mr Gorrie in his meetings and correspondence with HMRC. I infer from the absence of any such evidence, and from the fact that Mr Gorrie did not give evidence, and I find, that it was Mr Bashir who dealt with Chohan's VAT affairs, and not Mr Gorrie.

104. For the same reasons, I do not believe Mr Bashir's evidence that he passed on all correspondence from HMRC relating to VAT to Mr Gorrie without reading it. I find that as Mr Bashir dealt with the VAT affairs of Chohan, he would have received and read the VAT-related correspondence from HMRC. Whilst I accept that he might not have read every detail in every lengthy booklet sent to him by HMRC, I find that he would have read the covering letters. I find that, in particular, Mr Bashir read HMRC's letter of 12 April 2016 notifying Chohan that it had been deregistered.

105. I do not believe Mr Bashir when he says that it was Mr Gorrie that dealt with the electronic filing of Chohan's VAT returns, including the final VAT return, for the following reasons:

(1) Although in his witness statement Mr Bashir states that it was Mr Gorrie who completed the final VAT return, when he was asked in cross-examination about whether it was Mr Gorrie who completed the final VAT return, he did not confirm that Mr Gorrie filed it and his answers were equivocal. Mr Bashir said that he "cannot recollect submitting the VAT 100 [the final VAT return]", and that Mr Gorrie "had the login details".

(2) If Mr Gorrie had been responsible for filing Chohan's VAT returns, I would have expected that Mr Bashir would have mentioned Mr Gorrie in his meetings and correspondence with HMRC, and that he would have asked Mr Gorrie to confirm this when emailing him in January 2021. I infer from this, and from the fact that Mr Gorrie did not give evidence, and I find, that it was Mr Bashir that filed Chohan's final VAT return.

106. I do not believe Mr Bashir's evidence that he was unaware of the option to tax Block 4 for the following reasons:

(1) I have found that it was Mr Bashir who filed the notice of the option to tax, and who dealt with HMRC when they enquired into Chohan's VAT repayment claim following its purchase of Block 4.

(2) I agree with Mr Barrett's submissions that it is not credible that Mr Bashir could have forgotten about having opted to tax Block 4 at the time the VAT 7 and the final VAT returns were filed. The option to tax was notified to HMRC less than two years' previously, and the significance of the option (and the associated repayment claim and HMRC enquiry) are unlikely to have been forgotten by Mr Bashir in such a short space of time.

(3) In any event questions 15 and 17 on VAT 7 would have prompted his memory that an option to tax had been made.

Findings of fact

107. I find, on the balance of probabilities, that

(1) Mr Bashir (and not Mr Gorrie) dealt with the VAT affairs of Chohan.

(2) Mr Bashir signed and caused to be filed the VAT 7 after the body of the form had been completed by someone else. I find that he would have read the form before he signed it. I make no finding as to who completed the body of the form.

(3) Mr Bashir prepared and filed the Chohan's final VAT return.

(4) At the time Mr Bashir signed the VAT 7 he was aware that Chohan had opted to tax Block 4.

(5) At the time Mr Bashir prepared and filed the final VAT return, not only was he aware that Chohan had opted to tax Block 4, but he was also aware that Chohan had to account for output VAT on the value of its stock and other assets (including Block 4) on deregistration.

Incorrect document

108. I find that there is no merit in Ms Sheldon's position that the penalty assessment has been made in relation to the wrong document. The reason for the penalty given in the schedule to the penalty explanation letter states that "you failed to account for the VAT on stocks and assets, included the opted property, at deregistration". This can only refer to the failure to account for VAT in the final VAT return, as it is only in the final VAT return that Chohan accounts for the VAT arising on deregistration. In addition, it is clear that the review decision and the statement of case both refer to the final VAT return.

109. I find therefore that it has been clear from the start of this appeal that HMRC's determination of the penalty is by reference to the under-declaration of VAT on the final VAT return. Although the penalty explanation letter refers also to the VAT 7, this is because the original penalty was levied on the basis of concealment – and the concealment issue arose because (submit HMRC) of the answers given to questions 15 and 17. As concealment is no longer being pursued, the emphasis on the VAT 7 in the penalty explanation letter is of less importance.

110. Ms Sheldon during the course of cross-examination of Ms Drummond raised as an issue that deregistration occurred on 23 March 2016, but the final VAT return was filed on 19 May 2016. In consequence, she argued that any failure to account for VAT did not occur "at deregistration", but subsequently. I find that there is no merit in this submission. Ms Sheldon does not distinguish between the date on which the liability to VAT arises, and the dates on which (a) the taxpayer must file its VAT return in respect of that liability, and (b) the due date for payment. Although the final VAT return was filed after deregistration, it was filed in respect of the period from 1 March 2016 to 23 March 2016 – and therefore included any liability to account for VAT arising on deregistration.

Deliberate behaviour

111. It is not disputed that the test for deliberate behaviour is a subjective one. The question that I have to decide is not whether a reasonable taxpayer might have made the same errors as those made by Chohan in this appeal. Rather, I need to consider the knowledge and intention of the particular taxpayer at the time the relevant documents and returns were completed and filed (whether in hard copy or electronically).

112. The Tribunal in *Clynes* held that a behaviour can be deliberate if a person consciously or intentionally chooses not to find out the correct position. Ms Sheldon submits that *Clynes* can be distinguished in this case as Mr Bashir is not a professional accountant, whereas the relevant individual in *Clynes* had an accounting qualification and ran an accountancy business. I disagree. I find that *Clynes* provides an example of "blind eye knowledge". It is dishonest for a person deliberately to shut their eyes to facts which they would prefer not to know. If he or she does so, they are taken to have actual knowledge of the facts to which they shut their eyes. Such knowledge has been described as "Nelsonian" or "blind-eye" knowledge. Although not cited to me, Lord Scott in *Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others* [2001] UKHL 1 at [112] said the following about blind-eye knowledge:

"Blind-eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground - and if it is not, it should be - that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in *Jones v. Gordon* (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty".

113. I find that the principles articulated by Lord Scott relating to blind-eye knowledge are applicable to the subjective assessment of knowledge for the purposes of Schedule 24, and are binding upon me. The fact that the relevant individual in *Clynes* had a professional accounting qualification was not relevant to the decision of the Tribunal, rather it was the fact that the individual consciously and intentionally chose not to find out the correct position.

114. I find that Mr Bashir is neither an honest blunderer nor a stupid man. He is no fool. Not only is he a graduate, but he also he has many years of business experience.

115. Although Mr Bashir may not have filled-in the body of the VAT 7, he does not dispute that he signed and dated it. I find that either he must have had actual knowledge of its contents, or, alternatively, he deliberately refrained from reading it. He was an experienced business person used to dealing with formal documents, and knowing that he should read them before signing them. If in the circumstances of this case he decided not to read the VAT 7 before signing it, I find that his decision not to read it could only have been made - not because he was stupid, naïve or careless - but because, in his own secret mind, he knew it was likely there was something wrong, and if he read it, it would no longer be his suspecting it, but his knowing it.

116. I was also referred to the following tribunal decisions: *Lyth v HMRC* [2017] UKFTT 549 (TC), *Baloch v HMRC* [2017] UKFTT 665 (TC), and *Edwards v HMRC* [2019] UKUT 131

(TC). The Tribunal in *Lyth* considers the possible application of *Clynes*, but reaches the conclusion that it did not need to consider the potential application of *Clynes* as the taxpayer was not aware of the inaccuracy in her return, and did not consciously or intentionally choose not to find the correct position. In *Baloch*, the Tribunal found that the taxpayer had actual knowledge of the inaccuracy in his tax returns, and therefore it too did not need to consider the potential application of *Clynes*. I find that neither *Lyth* nor *Baloch* provide any authority that the concept of blind-eye knowledge does not apply to Schedule 24, or is restricted solely to individuals who have detailed knowledge of tax or accountancy. And even if they did, as decisions of the First-tier Tribunal they are not binding upon me, and in contrast the decision of the House of Lords in *Manifest Shipping Company* is binding.

117. *Edwards* concerns the availability of a reduction in penalties for "special circumstances" and is not relevant to the matters under appeal in this case. I am satisfied, and find, that Ms Drummond considered, and dismissed, the possibility of there being special circumstances, as this is one of the sections in the schedule to her penalty explanation letter.

118. I find also that Mr Bashir was aware that Chohan had to account for VAT on the value of its stock and other assets on deregistration. Mr Bashir was reminded of this requirement in HMRC's letter of 12 April 2016 notifying him of Chohan's deregistration.

119. And I have found that it was Mr Bashir who completed and filed Chohan's final VAT return. And I find that he did so in the knowledge that Chohan had opted to tax Block 4, and in the knowledge that Chohan had to account for output VAT on the value of its stocks and other assets at deregistration.

120. I therefore find that Chohan's behaviour was deliberate for the purpose of Schedule 24.

CONCLUSION

121. I find that Chohan gave HMRC a final VAT return, and that final VAT return contained an inaccuracy which amounted to, or led to, an understatement of its liability to VAT. I find that the inaccuracy was deliberate on Chohan's part but did not include any concealed action.

QUANTUM OF PENALTIES

122. HMRC no longer assert that Chohan's behaviour included any concealed action, and I agree. The penalties therefore need to be recalculated.

123. Paragraph 17(2) of Schedule 24 gives me power to substitute for HMRC's decision as to the amount of the penalties "any other decision that HMRC had power to make".

124. The maximum penalty for deliberate, but not concealed, actions is 70% of the potential lost revenue (paragraph 4). I find that the potential loss revenue for the purposes of paragraph 5 is £89,893.00.

125. I give the following reductions under paragraph 9(1) for the quality of Chohan's disclosure:

(1) Telling HMRC about it (paragraph 9(1)(a)) – nil, I find that there is no reason to depart from HMRC's assessment of the reduction under this heading as I agree that Chohan had not actively engaged with HMRC to provide information or discuss the reasons for the errors.

(2) 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 is fully corrected (paragraph 9(1)(b)) – 5%, I find that HMRC were too generous in the percentage reduction originally given under this heading. The information given by Chohan was minimal, even after taking account of the destruction of records in the fire.

(3) 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 (paragraph 9(1(c)) – nil, I find that there is no reason to depart from HMRC's assessment of the reduction under this heading as I agree that Chohan never provided HMRC with access to its records, even after taking account of the destruction of records in the fire.

126. Paragraph 10 provides that the minimum percentage for prompted disclosure in these circumstances is 35%.

127. The penalty range is therefore 35% to 70% - being 35%. The reduction for disclosure is therefore $(35\% \times 5\%) = 1.75\%$. The applicable penalty percentage is therefore 68.25%.

128. 68.25% of £89,893.00 is £61,351.97

129. I therefore substitute a penalty of £61,351.97 for HMRC's decision.

DISPOSITION

130. I find that Chohan's appeal is allowed in part, in that I have found that its actions were deliberate, but not concealed.

131. I have substituted for HMRC's decision a penalty of £61,351.97.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

132. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 28 MAY 2021