



Neutral Citation: [2022] UKFTT 00432 (TC)

Case Number: TC08648

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2019/06198 and TC/2019/01537

VAT – TOGC or not – yes – assessments confirmed – personal liability notice – director deliberate actions – yes – appeals dismissed

Heard on: 13 October 2022

Judgment date: 21 November 2022

Before

**TRIBUNAL JUDGE ANNE SCOTT
MEMBER: HELEN MYERSCOUGH**

Between

**APOLLINAIRE LTD and
ZAKIR HUSSAIN HASHMI**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Rebecca Sheldon of counsel, instructed by Croner Taxwise Ltd

For the Respondents: Tom Brown, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. Apollinaire Ltd (“Apollinaire”) appeals against a Value Added Tax (“VAT”) Notice of Assessment dated 27 March 2018 issued under section 73 of the Value Added Tax Act 1994 (“VATA”) reducing the recovery of input tax by £98,417.85 and amending the output tax by an increase of £4,772.04 for the VAT period 01/16 (“the First Issue”).
2. Apollinaire also appeals a Notice of Assessments dated 27 March 2018 issued under section 73 VATA for VAT periods 07/16, 10/16 and 01/17 in the total sum of £24,248 (“the Second Issue”).
3. Mr Hashmi appeals the Personal Liability Notice (“PLN”) issued to him under paragraph 19(1) of Schedule 24 Finance Act 2007 (“FA07”) dated 21 August 2018 in the sum of £65,801.50 of which £50,203.65 is in dispute. The underlying penalty assessment was not timeously appealed and on 7 July 2021, Judge Allat decided that a late appeal should not be allowed.
4. HMRC raised the assessments against Apollinaire for inaccuracies in their VAT returns relating to over-declared input tax due to a Transfer of a Going Concern (“TOGC”) and under-declared output tax.
5. HMRC charged the PLN to Mr Hashmi on the basis that he was personally liable as the sole company director of Apollinaire.
6. At the heart of these appeals is the assertion by Mr Hashmi that for the sum of £25,000, in October 2015, he sold his business, Snow Whyte Limited (“Snow”), to a Mr Navinder Singh as a going concern together with the trading name “Benny Hamish”. The purchase price was never paid. He alleges that Mr Singh traded for approximately one month and then on 11 November 2015 Snow sold stock worth £573,756 to Apollinaire.

The hearing

7. With the consent of the parties, the hearing was conducted by video link using the Tribunal’s video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which we were referred comprised a hearing Bundle consisting of 476 pages, an authorities Bundle extending to 340 pages, Skeleton Arguments for both parties and a letter confirming fire damage. We heard evidence for the appellants from Mr Hashmi, Mr Javid and Mr Brewis. Officer Doherty gave evidence for HMRC.
8. 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.

Preliminary issue

9. At the outset Ms Sheldon raised the issue that paragraph 97 of HMRC’s Skeleton Argument which read “The Respondents submit that it is their belief that no sale of Snow Whyte Ltd by Mr Hashmi to a Mr Singh and back again ever took place.” advanced an unheralded argument in the absence of a request to amend the Statement of Case. She requested that HMRC should be barred from advancing that argument.
10. We allowed a very brief adjournment (and there were technical issues in any event) following which Mr Brown confirmed that that wording was not correct. He had meant to argue that Mr Hashmi controlled the movement of the stock at all times and that the issue was whether the transfer of stock from Snow Whyte Limited was a TOGC, whether or not Mr Singh existed.

11. The Tribunal accepted that HMRC had repeatedly articulated the view that they doubted the existence of Mr Singh. Paragraph 97 was treated as deleted.

The facts

12. Apollinaire registered for VAT with an effective date of registration, being its date of incorporation, namely 6 October 2015. On 13 October 2015, HMRC wrote to Apollinaire, trading as Benny Hamish, at K A Javid and Co (“Javid”) confirming the registration for PAYE and the PAYE reference number. Javid was the appellants’ accountant. On the Deductions working sheet for the P11 for Mr Hashmi for the year to 5 April 2016 the employer is described as BENNY HAMISH and the start date is 1 October 2015.

13. Mr Hashmi was the sole director and shareholder of Apollinaire.

14. Mr Hashmi had incorporated a company called Savile Row Formal Limited (“Savile”) on 19 March 2015 and transferred it to his wife on 10 November 2015. His history is that he had been a director of the following companies which either failed to submit returns and/or had tax debts, namely:-

(a) Benny Hamish Italian Couture Limited which had a VAT debt of £5,085.76. Corporation tax returns were not submitted from 2006 to 2009. Determinations were issued for 2006 and 2007 with an outstanding balance from 2007 of £14,151.22. There are no other returns.

(b) Art de Vivre Limited (“Art”). This has a VAT debt of £8,661. The corporation tax returns submitted for 2009 showed tax due of £443.52 but it has not been paid. No returns were submitted for 2010-2012 inclusive.

(c) Snow was incorporated on 11 November 2010. Corporation tax returns were not submitted for 2012-2015 inclusive. Determinations were issued for 2012 and 2013 with losses utilised in 2012 and the tax due of £1,024 in 2013 was partly covered by the losses with the balance being unpaid. Javid submitted a deregistration form for VAT to HMRC which stated that Snow ceased to trade on 30 September 2015. The last available accounts were made up to 30 November 2014. The company was dissolved on 2 August 2016. Its trading name was Benny Hamish.

(d) Jackson the Tailor Limited (“Jackson”). Dormant accounts were submitted until 2008 but no further returns were submitted and the company was dissolved in May 2011.

(e) Ben HAMISH IT Limited. No corporation tax returns were submitted between incorporation in October 2002 and dissolution in August 2009.

(f) Sicilian Italian Couture Limited. This was incorporated in February 1998 and dissolved in September 2004. No corporation tax returns were returned between incorporation in February 1998 and dissolution.

(g) Bennyhamish Limited. No corporation tax returns were submitted between incorporation in January 2011 and dissolution in September 2012.

(h) In 2018 HMRC became aware that he had incorporated a new company called Sicilian Couture Limited but he provided no details to HMRC.

15. Commencing on 3 February 2009, Jackson had a lease of Unit 49 in the St Enoch Centre in Glasgow. On 4 February 2010, the lease was assigned to Art and it was then assigned to Bennyhamish Limited on 3 February 2011 and then to a company called Craftdown Limited on 30 January 2012. That lease terminated on 28 February 2013. A new lease was entered into by a company called Best Creative and Solutions Limited from 1 March 2013.

16. That lease was terminated on 6 April 2015 because Snow, which had been trading from Unit 49 as “Benny Hamish” for some years wanted a new unit at 20 Dunlop Street (“Dunlop”). That had shop fronts and doors on a corner site facing the street outside the St Enoch Centre. The lease of that unit commenced on 2 April 2015. That lease was held by Savile. Invoices were issued by the landlord to “Benny Hamish” at Dunlop.

17. A building warrant application was made for Dunlop but it was withdrawn on 18 August 2015.

18. In the Bundle there was a link to an image from Google Street View in July 2015 which shows Dunlop with prominent signage for “Benny Hamish”, large shop front windows with both mannequins and stock, banners advertising a sale and discounts. People can be seen in the shop and further stock and displays inside can be seen. (Another image in August 2015 which one cannot “zoom” into shows similar mannequins, stock, signage and banners).

19. When we used that link when writing this Decision and, looking from a different angle, we can clearly see a prominent neon sign in red, blue and white saying “OPEN” in August 2015. Having identified that, we can see that a small part of it can also be seen in the July 2015 image.

20. Unit 22 (also referred to as Unit H22) in the St Enoch Centre was also leased and was what was described by the landlord as “the remote storage area in the basement”. It is completely separate from Unit 49 and from Dunlop. There is no direct access. The landlord stated:- “You need to access the storage units using the basement corridors which are common areas in the back of house”.

21. The landlord has confirmed that the original lease of Unit 22 terminated on 6 April 2015. The only other information relating to Unit 22 is an email to “bennyhamish” dated 3 July 2018 where the landlord indicated that the “holding area 22” which is Unit 22 had to be cleared by 5 July 2018. The response from “Benny” was that it would be Mr Hashmi who would “clear work shop H22 and hand over the key”. The email chain was in response to an email from Benny which said “we had the use of UNIT H22 till know (sic) and since we no longer need the unit where should we hand the keys of the unit.”

22. Apollinaire included Unit 22 in its insurance policy for Dunlop which was renewed on 8 July 2016. It is not known when the insurance policy commenced for Dunlop or what name was used. We can make no finding in fact as to when Apollinaire entered into a new lease for Unit 22.

23. Companies House records show that Mr Hashmi was a director of Snow from 11 November 2010 until 9 October 2015 when he resigned and Mr Narinder Singh was appointed as a director. Mr Singh’s full date of birth was not disclosed to Companies House and the address given for him was that of Javid.

24. HMRC’s Real Time Information (“RTI”) for PAYE shows that until 30 September 2015, Snow had 6 full-time employees including Mr Hashmi and they all commenced employment with Apollinaire on 1 October 2015. A Mr Seminara remained in the employment of Apollinaire until 31 August 2016 receiving a pay rise in April 2016. Mr Gaffa remained in the employment of Apollinaire until 31 March 2016. Mr Brewis only left Apollinaire’s employment in 2022. Mr Hashmi and two other individuals with the surname Hashmi remained in the employment of Apollinaire until at least 31 March 2016.

25. On 22 June 2016, Apollinaire’s VAT return for period 01/16, covering the period 6 October 2015 to 31 January 2016, was lodged with HMRC by Javid. It sought a repayment of £98,191.21.

26. On 21 July 2016, HMRC wrote to Apollinaire requesting further information in relation to that VAT repayment.

27. On 3 October 2016, Javid responded and amongst the documentation submitted were six invoices from what purported to be a VAT registered entity called "Snow Whyte". It was not described as a limited company. Its address was "Unit H22 St Enoch Square". The invoices were all dated 11 November 2015. One was for children's clothing and included no VAT in the total of £10,245. That invoice indicated that payment had not been made. The other five totalled £573,756 inclusive of VAT.

28. Although all five of those invoices indicated that payment had been made and no sums were still due, Javid wrote to HMRC on 10 October 2010 stating that the sales were not invoices and payment was made as the stock was sold. An X reading for Benny Hamish from the till for the period 24 November 2015 to 31 January 2016 was also included together with rental invoices showing rental and service charges of £7,485.20 per month inclusive of VAT for Dunlop.

29. The email stated that the business activity of Apollinaire was that of "Male Outfitters". As with the previous email, for unexplained reasons, copies of some of Javid's invoices to Apollinaire were included. Those show that they provided payroll services amongst other matters.

30. On 21 December 2016, HMRC carried out a compliance visit to Javid's premises. Mr Javid advised that:-

(a) Snow had had a store in the St Enoch Centre but when the lease expired they ceased trading. Apollinaire was "created" and a shop that is still part of the St Enoch Centre but is based outside the Centre was leased. Apollinaire operated in that shop. He said that Dunlop had been empty prior to Apollinaire taking on the lease.

(b) Mr Javid stated that he did not know when Snow had ceased to trade and the new shop had opened but that it would be from the first transaction on the till roll. In fact that was 15 October 2015. However, he then stated that the shop was not operating until 24 November 2015 as stated on the X reading for the period 01/16.

(c) Apollinaire had two employees who were paid monthly.

(d) Apollinaire was completely different from Snow which had also traded as Benny Hamish from Unit 49.

(e) Javid completed the VAT returns and the repayment arose because of the purchase of stock.

31. On 28 December 2016, HMRC called Mr Hashmi to clarify a few queries and Mr Hashmi said that:-

(a) He was not sure when Dunlop had opened and he was not sure when Snow (owned by Mr Singh) had ceased operating but they had traded from within the St Enoch Centre.

(b) He said that Apollinaire had only rented Dunlop from Savile from November 2015.

(c) He could not explain why there had been Benny Hamish signage at Dunlop before he allegedly started trading. Initially he denied that he had put up that sign, arguing that he had a "Jackson the Tailor" sign inside the shop. He then conceded that someone else had put up the external sign and he had been given permission to erect the sign prior to trading.

(d) Invoices were provided with the stock but he could not say who provided them.

- (e) He said that he had paid “roughly” £20,000 for the stock in 2016. The payments were made in cash but there was no documentation due to a fire at his home.
- (f) He could not explain why, prior to November 2016, there had been sales without a break in trade. His old till, which had now been discarded, had been purchased on eBay.
32. HMRC had a call from Mr Javid on 12 January 2017 and in the course of that conversation HMRC intimated that the till rolls showed continuous trade from October 2015. Mr Javid said that those were sales by Mr Singh because the till had been transferred with the stock. The officer pointed out that Mr Hashmi had said that the till had been purchased through eBay. Mr Javid denied that. Mr Javid stated explicitly that Dunlop had been empty until Apollinaire commenced trading.
33. On 30 January 2017, HMRC emailed Javid requesting further information by 28 February 2017, including an explanation of Mr Singh’s connection with Snow and Mr Hashmi.
34. Officer Doherty pointed out that:-
- (a) Mr Javid had stated that any sales prior to 24 November 2015 would relate to Snow but that would contradict the deregistration form (for VAT) completed by Javid stating that Snow had ceased to trade on 30 September 2015.
- (b) If it had traded until 24 November 2015 there would have been a TOGC.
- (c) The employees, including Mr Hashmi, had been transferred to Apollinaire with effect from 1 October 2015.
- (d) Google images showed that Dunlop was open for trade in July 2015 yet Javid had stated that Snow operated from a different address and Dunlop had been empty.
35. On 8 February 2017, HMRC made an unannounced visit to Apollinaire’s premises and spoke with Mr Hashmi. The officers recorded that:
- (a) A new till had been purchased from Costco in December 2016. Only Mr Hashmi operated it and if sales were made when he was not present the sale was recorded in a book next to the till and he would put that through when he was next in the shop.
- (b) Mr Hashmi was unable to provide an explanation as to why the Merchant Acquirer (“MA”) terminal for Snow was operational from October 2015 until January 2016 and that covered a period when he was no longer a director. He said that they only had the current MA terminal because it was wireless and did not require a telephone.
- (c) He stated that Snow had traded from Unit 49 after he left the business.
- (d) He said that the till roll that Javid had provided did not belong to Apollinaire and it must have been handed over by mistake.
- (e) The difference between the £36,000 of stock in Snow’s accounts for 2014 and the stock in the six invoices was attributable to Mr Singh. Mr Singh had prepared the November invoices.
- (f) He stated that Apollinaire only had four employees and they had only transferred to Apollinaire from Snow when Dunlop opened in November 2015. He said that he would speak to Javid about why the records suggested that they had transferred on 1 October 2015.
- (g) He confirmed that although Savile leased Dunlop, Apollinaire paid the rent direct to the landlord.

(h) When shown the Google images, he argued that the shop had not been open, the doors were locked, there was no stock in the premises, the window display was a form of advertising and there had been wooden boards behind the display.

(i) The Council had not allowed them to open as they required a ramp for disabled access. A building warrant had been granted in August 2015 and work was completed in November 2015.

(j) The only information that he could provide in relation to Mr Singh was that he had been introduced to him by a friend as being someone who wanted to invest in a company.

36. On 23 March 2017, HMRC wrote to Apollinaire with further queries and requested information by 6 April 2017. In that letter, Officer Doherty pointed out the many contradictions in relation to when Dunlop opened, where and when Snow was trading and the issues with the till roll. In particular he pointed out that the analysis of the till roll showed that Apollinaire was accepting debit notes for customers to pay in instalments and some of those were issued prior to November 2015. He argued that the information from the till roll taken with the Google images meant that the TOGC conditions had been met.

37. He identified the errors in the use of the retail scheme (Apportionment Scheme 1) for calculating output tax. The till had the function to carry out a VAT analysis so the retail scheme should not have been used.

38. He pointed out that input tax had been claimed on purchases in respect of which there was no entitlement to claim. He enclosed a schedule and highlighted invoices for rent and electricity for Dunlop addressed to other businesses. There was an invoice from Star Stitch for £116.10 for alterations apparently done before Dunlop opened.

39. He asked for details about Mr Singh. He pointed out that the employees of Snow had been transferred to the PAYE reference for Apollinaire on 1 October 2015 and asked why Apollinaire was paying them if they were not employees.

40. In the absence of a reply from either Javid or Mr Hashmi, on 10 April 2017, HMRC issued an Information Notice under Schedule 36 Finance Act 2008 ("Schedule 36").

41. On 26 April 2017, HMRC received an email from a different firm of accountants who stated that they were now acting as agent for the appellants. A Mr Wood was the point of contact.

42. On the morning of 2 June 2017, in advance of a meeting with HMRC that day, Mr Wood forwarded an email, that he had drafted but not sent to HMRC, which provided some answers to the letter of 23 March 2017. That stated:

(a) Dunlop had opened on 11 November 2015, Apollinaire having received the keys from the builder on 5 November 2015.

(b) The MA terminal was operational from 18 November 2015.

(c) The till roll had been left in the till when transferred to Apollinaire by Mr Singh.

(d) The VAT deregistration date was irrelevant.

(e) Mr Singh trading as Snow was a separate business that traded from Unit 49 and Mr Hashmi had sold that company to Mr Singh for £20,000. He contradicted that later stating that Mr Singh owed Mr Hashmi £25,000 for Snow. He also stated that Mr Hashmi had paid Mr Singh £20,000 in cash for the stock with the balance to follow.

(f) Mr Hashmi had used the windows of Dunlop to advertise his new business, Benny Hamish. Dunlop itself was a building site.

- (g) Four employees had transferred to Apollinaire on 11 November 2015.
43. At the meeting that followed, Mr Wood confirmed that the till roll had come from Mr Singh. When discussing the transfer of the business, Mr Wood advised that “no lawyers or solicitors” were involved and there was no formal agreement. Mr Hashmi had sold Snow for £25,000 but did not receive any payment. The stock and till were transferred to Apollinaire in November 2015. The £25,000 for the purchase of the business was offset against the stock and till. Mr Hashmi had made a cash payment of £20,000 to Mr Singh but there was no evidence of that.
44. No employees had been transferred to, or paid by, Apollinaire prior to 11 November 2015. Mr Wood was not aware of the MA terminal in use between October 2015 and January 2016 and undertook to look into the matter.
45. On 22 June 2017, HMRC emailed Mr Wood intimating that HMRC’s view of the matter was that there had been a TOGC between Mr Singh trading as Snow and Apollinaire because:-
- (a) Both companies operated with the same trading name, Benny Hamish.
 - (b) The same till was used by both businesses and there was no significant break in trade. Indeed there were transactions both on 10 and 11 November 2015.
 - (c) The same MA terminal was used by both businesses.
 - (d) The same staff were with both businesses.
 - (e) Apollinaire had accepted payments relating to sales by Snow where the deposit note showed provision for payment in instalments.
46. HMRC raised a number of other queries.
47. On 25 July 2017, Mr Wood emailed HMRC disputing a number of points but stating “...notwithstanding the foregoing we are agreeable that the transfer of the stock was a TOGC”.
48. On 1 August 2017, HMRC wrote to Mr Wood enclosing a letter confirming the reduction of the input tax because of the TOGC. A copy was sent to Mr Hashmi at Apollinaire. That letter pointed out appeal rights. No appeal was lodged.
49. HMRC raised numerous other queries pointing out discrepancies in the information provided by Mr Hashmi, Mr Javid and Mr Wood compared with other information obtained by HMRC. It was pointed out that there was no evidence that Mr Singh existed.
50. Mr Wood called HMRC on 18 August 2017 stating that Mr Singh had visited the shop in 2017 to request payment for the stock and Mr Hashmi had refused. The officer requested a reply to the email of 1 August 2017.
51. On 12 December 2017, HMRC wrote to Mr Wood at some length pointing out numerous inconsistencies and asking for clarification of a number of points.
52. On 23 January 2018, having not received a response from Mr Wood, HMRC wrote to Mr Hashmi at Apollinaire pointing out that no reply had been received and intimating that they intended to raise assessments. On the same day HMRC sent a schedule with a calculation of the tax that would be due. The issues of default interest and penalties were raised. A reply to both letters was requested by 22 February 2018. Copies were sent to Mr Wood.
53. He replied the following day.
54. In that email Mr Wood had alleged that Unit 22 was part of Unit 49 so HMRC checked with the landlord, whose reply, dated 21 February 2018, was unequivocal. It read:

“The lease on the storage unit ended 6th April 2015 the same day as the lease for the main unit. The general public do not have access to the storage units as they are back of house only”.

55. On 27 March 2018, the Notice of Assessments were issued since Mr Wood had not replied to a further letter from HMRC. Rights of appeal were identified and a copy sent to Mr Wood. He then requested a meeting with HMRC and Officer Doherty replied on 3 April 2018 pointing out the time limit for requesting a review or appealing to the Tribunal.

56. On 12 June 2018, Mr Wood telephoned asking for an independent review after a meeting with Officer Doherty and his manager.

57. On 15 June 2018, Officer Cameron wrote to Mr Wood, requesting that Mr Hashmi attend, and arranged a meeting for 26 June 2018 but pointing out that he believed that Mr Hashmi had been the controlling mind of both Snow, at all times, and Apollinaire and that Mr Hashmi had generated the six disputed invoices. Therefore a deliberate penalty would be applied.

58. Following that meeting, which Mr Hashmi did not attend, HMRC wrote to Mr Wood with Notes of the meeting, asking a number of further questions, and confirming the relevant legislative provision for the PLN.

59. Mr Wood asked for time to respond but in the absence of a substantive response, on 21 August 2018 the Notice of a penalty assessment in the sum of £65,801.50 in terms of Schedule 24 FA07 was issued to Apollinaire and the PLN to Mr Hashmi. HMRC also wrote to Apollinaire stating that the PLN had been issued to Mr Hashmi but Apollinaire could pay the penalty which would relieve Mr Hashmi.

60. The PLN explained that Mr Hashmi was personally liable because HMRC believed that Apollinaire was likely to become insolvent and Mr Hashmi had a history of dissolving companies to avoid paying the correct amount of tax.

61. On 19 September 2018, the appellant’s new agents, who are still acting, wrote requesting a review. They argued that Apollinaire had purchased only stock from Snow and it had not been a TOGC because “The transfer must put the purchaser in control of a business capable of operation. The transfer must not constitute simply the sale of an asset”.

62. Correspondence ensued with the agents writing to HMRC on 1 November 2018 requesting a review of the TOGC and the PLN.

63. On 2 November 2018, HMRC wrote to Mr Hashmi intimating that there was no reasonable excuse to accept a late request for review in respect of Apollinaire. The review request of the PLN had been accepted.

64. On 23 January 2019, the Review Conclusion Letter upheld £50,203.65 of the PLN.

65. On 12 March 2019, Mr Hashmi submitted an appeal against the PLN to the Tribunal and a late appeal was lodged in regard to the Assessments issued on 27 March 2018 on 20 September 2019.

The relevant law in relation to TOGC

66. Section 3(1) of VATA defines a taxable person as follows:

“A person is a taxable person for the purposes of this Act while he is or is required to be registered under this Act.”

67. Regulation 5 of the Value Added Tax (Special Provisions) Order 1995 provides that:-

“5 (1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business—

- (a) their supply to a person to whom he transfers his business as a going concern where—
- (i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and
 - (ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person ...”.

The relevant law in relation to the PLN

68. In so far as relevant, paragraph 19 of Schedule 24, Finance Act 2007 provides that:

“19(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate... ‘officer’ means—

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46))....”.

69. In relation to a “deliberate inaccuracy”, Ms Sheldon relied on paragraphs 82 and 86 of *Clynes v Revenue and Customs* [2016] UKFTT 369 (TC) which read as follows:

“82. On its normal meaning, the use of the term indicates that for there to be a deliberate inaccuracy on a person’s part, the person must have acted consciously, with full intention or set purpose or in a considered way.

....

86...Our view is that, depending on the circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew he should do so.”

We would add to that, the rest of that paragraph:-

“A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a ‘deliberate inaccuracy’ on that person’s part than making the inaccuracy with full knowledge of the inaccuracy.”

Discussion

70. The burden of proof is on HMRC to show that Mr Hashmi was liable for the penalty imposed on Apollinaire due to his deliberate behaviour with regards to the submission of inaccurate VAT returns. The standard of proof is the civil standard, on the balance of probabilities.

71. The key issue is whether the inaccuracy in the VAT returns was deliberate and attributable to Mr Hashmi. It was not disputed that he was an officer for the purposes of paragraph 19 of Schedule 24, FA07.

72. As Mr Hashmi was the sole director of Apollinaire and of Snow until 9 October 2015, it is his actions, intentions and awareness that fall to be ascribed to those companies and Savile.

73. Officer Doherty's evidence was detailed and wholly credible. For the reasons that we record, Mr Hashmi's evidence was riven with inconsistencies and, in the context of the totality of the evidence, lacking in credibility.

74. The real problem in this appeal was the extensive conflict in the evidence for the appellants. The arguments advanced repeatedly changed in numerous regards. There has been an extensive failure by the appellants to produce evidence of many of the assertions on their behalf, which we found was unsurprising given that those assertions changed frequently.

75. HMRC's case was that Mr Hashmi was at all times the controlling mind of both Snow, whether owned by him or not, and Apollinaire. During the course of the enquiry, Officer Doherty had intimated that he had doubts about the existence of Mr Singh and that is one of the factors that we considered when assessing those conflicts.

76. Before doing so it is probably helpful to address the assessments.

77. The assessments were raised because of inaccuracies in the relevant VAT returns, and for the reasons we set out below, we find that there were such inaccuracies.

78. HMRC raised the assessments because:-

- (a) Mr Wood had conceded that there had been a TOGC.
- (b) Apollinaire had only accounted for VAT from 24 November 2015 but the till roll was evidence of continuous trade from at least 15 October 2015.
- (c) There was conflicting evidence about from where Snow had traded and when.
- (d) Snow had been deregistered for VAT on 30 September 2015.
- (e) On the balance of probabilities Apollinaire was trading continuously from its date of incorporation (6 October 2015) and with the same employees, till, MA terminal and premises.
- (f) Dunlop was the premises used by both Snow and Apollinaire using the same trading name.
- (g) The calculation of the output tax was on a best judgment basis based on the till roll produced by the appellants and no contrary evidence, other than unsupported assertions, had been produced.
- (h) The accounts for Apollinaire for the period ended 31 October 2016 did not include the stock on the disputed invoices.
- (i) The retail scheme had been inappropriately used.
- (j) Input tax had been inappropriately claimed and would be disallowed.

Mr Singh, the shop fitting, Dunlop and Apollinaire's trading

79. There is very little detail about Mr Singh. In his witness statement Mr Hashmi stated that he sold Snow to Mr Singh for £25,000 in October 2015. No date was given. As can be seen, Mr Hashmi resigned as a director on 9 October and Mr Singh was appointed on the same date so one can only assume that that is the alleged date of the sale. In his oral evidence Mr Hashmi stated that he decided to sell Snow some two months before the actual transfer.

80. Mr Hashmi said he had no contact details for Mr Singh. Mr Singh had come into the shop in the summer of 2015 and they had had a chat and that he had met him perhaps four or five times after that. He had met him on one occasion with Mr Javid in the café in the St Enoch Centre.

81. In his witness statement he said that that meeting had been to discuss accounting services but Mr Singh had not wished to engage Mr Javid because of the cost.

82. Mr Javid's account of that meeting was quite different. He did agree that they had met in the café but he said that the purpose of the meeting was for him to witness the agreement to transfer the business. He said that he had merely observed and offered no advice. He said that he had seen Mr Singh on only one other occasion which was at Christmas 2015 when Mr Singh had come to his office to discuss with him the possibility of engaging him as his accountant. He quoted for the services but he had never seen him again.

83. Neither party explored why Mr Singh's address for Companies House was given as that of Javid.

84. We did not find Mr Javid to be a credible witness. In cross-examination, he denied having deregistered Snow yet that had not been denied in correspondence. He also agreed that he knew that there had been no transactions including VAT after 30 September 2015. He also denied having seen the six disputed invoices stating that the hearing was the first time he had seen them. Mr Brown quite properly put it to him that he must have seen them when preparing the disputed VAT return. He then said that they had been handwritten. That is quite simply totally inconsistent with the fact that he had sent the invoices to HMRC and commented upon them (see paragraphs 27 and 28 above).

85. Ms Sheldon argued that the deregistration form was not in the Bundle. It is not. However, there are no less than seven references to it in the Bundle and the fact of deregistration has never previously been challenged. Mr Javid handled the payroll and the PAYE registration for Apollinaire and the deregistration stated that Snow ceased to trade on 30 September 2015 and the employees, including Mr Hashmi were transferred to Apollinaire's PAYE registration with effect from 1 October 2015. On the balance of probability, Mr Javid or his firm did deregister Snow.

86. We observe that when asked why employees worked for Apollinaire before it was incorporated, Mr Javid said that if they started in the middle of the month they would be shown as being on the payroll from the beginning of the month.

87. Mr Brewis said that he only saw Mr Singh rarely and that was approximately once or twice a week when Mr Singh visited Mr Hashmi. He said that his involvement with Mr Singh was minimal. That is odd since allegedly he was his employee for a month. In cross-examination Mr Brewis was adamant that he saw him come to Dunlop once a week. He said that after Apollinaire opened on 5 November 2012, Mr Singh delivered stock "throughout November". That does not sit well with Mr Hashmi's witness statement which said that the stock was delivered on 9 and 23 November 2015.

88. Mr Hashmi said that when he started to sell the more than half a million pounds of stock which he had taken from Mr Singh on a sale and return basis, that had triggered an argument. That did not sit well with a subsequent argument by Mr Wood that Mr Singh had only come looking for payment in 2017.

89. Mr Hashmi's oral explanation was that the original basis for the deal had been that he would sell the suits and pay Mr Singh the cost price and Mr Hashmi would be able to keep the profit. The argument arose because Mr Singh had then told him that he had to pay Mr Singh the entire sale price and the profit margin would be attributed to the stock purchase. Mr Hashmi said that he wanted to end the deal and told him to take the suits away. He said that he had told him that he had paid him £25,000 and Mr Singh still owed him the £25,000 purchase price for Snow. He told him that he would charge him for storage if he did not collect the suits. According to Mr Hashmi, Mr Singh apparently then simply disappeared.

90. Mr Brown put it to Mr Hashmi that the original arrangement that Mr Hashmi had described meant that Mr Singh would have made no profit on his stock and Mr Hashmi conceded that that was the case. That does not seem to us to be credible.

91. Mr Hashmi's evidence in regard to Mr Singh has been inconsistent. In the course of the hearing, he was absolutely insistent that he had permitted Mr Singh to use the shop fronts of Dunlop as a display and that Mr Singh's customers would ring a buzzer at the door and would be taken into the unit and then downstairs to Unit H22. Until November 2015, Dunlop had not been used as a retail unit because there was shop fitting being carried out. He argued that there were only mannequins in the windows and that there was no stock. We will revert to that issue.

92. However, Officer Doherty had recorded in his notes of telephone call for 28 December 2016 that he had asked Mr Hashmi if Mr Singh was operating from Dunlop. The answer was explicit to the effect that Mr Singh had operated from inside the St Enoch Centre and he was unsure when they had stopped operating from there.

93. At that time he said that he had paid roughly £20,000 to Mr Singh in cash but in oral evidence he argued that it was £25,000. When it was put to him that he had told Officer Doherty that he had paid Mr Singh in cash, and he had done so on 28 December 2016 in a telephone call, he said that he had simply never said that.

94. The problem with that is that on 2 June 2017, Mr Wood wrote to HMRC stating that the payment for the stock comprised the £25,000 that Mr Singh owed for the purchase of Snow plus cash of £20,000 and the balance was to be paid later. Incidentally he stated that there was no agreement in relation to the sale of the stock. That was contradicted by Mr Hashmi in oral evidence who stated that there had been an eight page agreement which included the six invoices. However he had originally said he did not know who had delivered the invoices and stock.

95. Mr Hashmi tried to argue that when he said that he had paid things in cash he meant that he paid through the MA terminal. He meant that it was not a cheque. In our view that is not plausible. He said that he used the Snow terminal in order to make the payments to Mr Singh. There is no evidence of that beyond his assertions.

96. In that context a further problem is that initially Mr Hashmi had told Officer Doherty that he had purchased the till that was used by Apollinaire on eBay. When Officer Doherty pointed out to him that there appeared to be sales recorded on the till prior to the date that Mr Hashmi said that the shop had opened, Mr Hashmi was unable to explain it. Thereafter, Mr Javid intimated that the till had been sold to Apollinaire by Mr Singh trading as Snow and that it would be shown on an invoice from Snow. Later it was alleged that the till was simply handed over with the stock and the previous MA terminal.

97. In summary, like HMRC, we have considerable doubts as to whether Mr Singh ever existed.

98. Undoubtedly Snow traded for a number of years in the St Enoch Centre and moved out of Units 49 and 22 on 6 April 2015. We do not accept that the landlord's accountant was lying, as alleged by Mr Hashmi, when he said those leases were terminated and that the public could not access Unit 22. We do accept, as do HMRC, that at a later stage Apollinaire did have access to Unit 22. On the balance of probability that was from July 2015 because that appears to be the commencement date for the insurance.

99. July 2015 is an important date because of the Google images. Mr Hashmi argued that from the summer of 2015, Snow had traded from Unit 22 in the same way as he later permitted Mr Singh to operate (see paragraph 91 above).

100. The July image is clear and we put it to Mr Hashmi that one could see both stock and customers in the shop. He kept insisting that the doors were locked and that there was no stock in the shop. It is certainly not correct to say that there were only mannequins in the windows since we can see stock in the windows. He argued, as had Mr Javid and Mr Wood, that shop fitting was being carried out behind the wooden boards behind the windows.

101. There was in the Bundle a letter from “Craftsman Cladding Limited” which Mr Javid had produced and which was dated 13 January 2017 addressed to whom it may concern and it read:

“Craftsman Cladding carried out shop fitting work for Benny Hamish at Unit 20 Dunlop Street, Glasgow during 2016.

All work was paid pro-forma and finally completed on 5.11.15”.

102. Unfortunately Mr Wood provided exactly the same letter but the year in the first paragraph now reads 2015. Mr Javid had also enclosed an invoice dated 25 September 2015 which indicated that £10,256 inclusive of VAT had been paid for shop fitting.

103. That invoice was addressed to Benny Hamish, so as Apollinaire did not exist, it must have been sent to Snow. Officer Doherty identified the fact that that expense was not included in the accounts for Apollinaire but the input tax was claimed in the VAT return. Of course there are no accounts for Snow for that period.

104. HMRC were unable to contact Craftsman since the company had been liquidated. HMRC had asked for copies of the contract stating what work was required but that was never furnished and eventually it was argued that there had simply been a verbal contract.

105. As we have pointed out at paragraph 19 above we can now see clearly from the Google images that in July, part of the neon “OPEN” sign, which is fully visible in an image from August 2015, can be seen.

106. It is also consistent with the rest of the July image where it can be seen that Snow was trading as Benny Hamish from that address. No doubt there would have been shop fitting required but on the balance of probability that was done at some stage after 6 April 2015 and July 2015.

107. Furthermore, if the shop fitting only cost approximately £10,000 it is not credible that, with a cost for rental and service charges of approximately £7,500 per month, Dunlop would have lain empty for seven months. Of course, we noted the application from Savile to the Council in the Bundle for remission of rates on the basis that Dunlop was unoccupied from 1 April 2015 to 9 November 2015 because of a shop fit but that does not establish that the premises were empty. It only establishes that that is what Savile told the Council.

108. Given the totality of the evidence, we simply do not accept Mr Hashmi’s assertion that Dunlop only opened on 11 November 2015.

109. It is not disputed that Apollinaire contracted with Global Payments utilising an HSBC bank account from 18 November 2015 for MA services. The Snow MA terminal was operational from October 2015 to January 2016. On 8 February 2017, when HMRC carried out an unannounced visit, Mr Hashmi was unable to provide a reason for that beyond the fact that they could not get a phone line in the shop and the then current MA terminal was wireless.

110. As with almost all of the other evidence for the appellants in this case there was a distinct lack of clarity. When first contacted by HMRC, Mr Hashmi was not sure when the business had commenced trading. Mr Javid had initially stated 15 October 2015 but then said 24 November 2015. Mr Wood said that was incorrect and that Dunlop had opened on 11 November 2015. Mr Brewis said it commenced trading on 5 November 2015 and he was

quite emphatic about it because it was Guy Fawkes night. In oral evidence Mr Hashmi said that trading commenced in mid-November once the shop fitting had finished.

111. The inconsistent evidence on employees was not helpful to either appellant. Quite why Mr Javid had said that Apollinaire only had two employees is a mystery. M Hashmi was paid by Snow until transferred to Apollinaire from October 2015 as were all of the other five employees. Although Mr Wood argued that Messrs Gaffa and Seminara never worked for Apollinaire it is abundantly clear that not only did they do so, but they did so for quite some time.

112. We do not accept the assertion that Mr Brewis found that he was to be redundant and sought out Mr Hashmi looking for a job. HMRC have been able to find no trace of Mr Singh and there is no evidence that if he were trading as Snow that he had any employees on the payroll. Mr Brewis who was allegedly his employee was certainly on the payroll for Apollinaire.

Decision on TOGC

113. Even if Mr Singh purchased Snow in October 2015, which we do not accept, it is clear that Mr Hashmi was the controlling mind at all times. Apollinaire employed the employees throughout, the trading name Benny Hamish was used at Dunlop from at least July 2015 and almost certainly before that. It is extremely unlikely that a company which held only £34,000 worth of stock in 2014 suddenly felt the need to deal in half a million pounds of stock. No explanation has been offered as to why the invoices were marked as paid. Mr Javid's evidence on the invoices is frankly not credible.

114. Objectively considered, we find that there was a TOGC between Snow and Apollinaire. At all material times, Mr Hashmi whether as director, or shadow director, for a short period if Mr Singh existed, controlled both companies. The trade before and after Snow ceased to trade, was exactly the same with the same trading name, employees and premises. The explicit evidence from the landlord and the Google images make it clear that certainly from July 2015, if not before, the trade was conducted seamlessly from Dunlop. The till records antedating the alleged commencement dates for Apollinaire of 11 or 24 November 2015, or 5 November 2015 if Mr Brewis is to be believed, point to an obvious transition as does the VAT deregistration and PAYE registration.

The Assessments for Apollinaire

115. On the balance of probability we find that Apollinaire traded from incorporation and all sales should be attributed to it and not Snow from that date.

116. Ms Sheldon argued that the use of the retail scheme was appropriate because children's clothing was zero rated. The issue between the parties was whether the use of the scheme was reasonable. Regulation 68 Value Added Tax Regulations 1995 states:

“The Commissioners may refuse to permit the value of taxable supplies to be determined in accordance with a scheme if it appears to that-

....

(c) that the retailer could reasonably be expected to account for VAT in accordance with regulations...”.

117. She was not assisted by Mr Javid's evidence which was that he had assumed that Apollinaire would not have good records as Mr Hashmi did not give him what he described as a sales list. It was not disputed that Apollinaire had a till that could identify sales at different rates of VAT and was therefore capable of being used to calculate accurately the amounts to be declared in the VAT return. Zero rated sales formed only a small part of the turnover.

118. The till records are more accurate and should have been used rather than the retail scheme.

119. It is conceded that VAT should not have been reclaimed on rental payments etc. That input tax falls to be disallowed.

120. No issue was taken in relation to the quantum of the assessments but for the avoidance of doubt, given the conflicts in the evidence and the lack of response to multiple requests for detailed information, we find that the assessments were made to best judgment.

The PLN

121. The argument for Mr Hashmi was that he had relatively little education, relied entirely on Mr Javid, knew little or nothing about VAT and believed that Apollinaire commenced trading in November 2015 and only the stock, till and MA terminal came from Mr Singh or Snow.

122. HMRC argue that the inaccuracies in the VAT returns were deliberate on the part of Mr Hashmi.

123. Firstly, we agree with HMRC that given Mr Hashmi's corporate history it was likely that Apollinaire would become insolvent. As long ago as the meeting with Mr Javid on 21 December 2016, Mr Javid said that he was unsure if the business would last another year because of competition. Officer Doherty became concerned when Mr Hashmi incorporated Sicilian Couture Limited in 2018 and did not respond to questions about it.

124. The conflicting accounts given by both Mr Hashmi and his advisers throughout this enquiry and the persistent failure to explain those or to reply to correspondence do not suggest that he was an innocent abroad. In particular the assertion that Snow had traded from Unit 49 after 6 April 2015 lead us to the conclusion that his actions were deliberate.

125. The assertion that Mr Javid was never asked for advice on the sale of Snow, and the conflicting accounts in that regard suggest that at a very minimum, Mr Hashmi deliberately failed to take appropriate advice.

126. He knew that Mr Wood had agreed that there was a TOGC and he did not appeal the assessments.

127. He has a history of dissolving companies yet still trading as Benny Hamish or Jackson the Tailor; indeed, we note that Apollinaire traded as Jackson the Tailor from 1 November 2016 until 31 January 2017 whilst the HMRC investigation was ongoing.

128. As can be seen, Mr Hashmi has a long history of failure to submit tax returns for companies that he controlled and most pertinently he did not do so for Snow. That is a deliberate decision.

129. The Google images and the application for remission of rates suggest that that application by Savile which Mr Hashmi controlled was deliberate.

130. For the reasons given, we find that the deliberate inaccuracy was attributable to Mr Hashmi who was at all times the controlling mind of both Apollinaire and Snow. Therefore we find that the PLN was correctly issued.

DECISION

131. The appeals are dismissed. The assessments are upheld. The Personal Liability Notice is upheld.

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.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 21st NOVEMBER 2022