Neutral Citation: [2024] UKFTT 00175 (TC)

Case Number: TC09089

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/01108

VALUE ADDED TAX – civil evasion penalty – attribution to director of company – was director dishonest – yes – sections 60 and 61 Value Added tax Act 1994 – appeal dismissed

Heard on: 22-23 May 2023
Judgment date: 27 February 2024

Before

JUDGE VIMAL TILAKAPALA
DUNCAN MCBRIDE

Between

THOMAS HANLON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Liban Ahmed of CTM Tax Litigation Ltd

For the Respondents: Connor Fallon litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by the Appellant against a decision by the Respondents ("HMRC") under s.61 of the Value Added Tax Act 1994 (VATA) to make him liable as a director of Cardiff Cash & Carry Ltd (the "Company") to a penalty (the "Penalty") arising under section 60 VATA charged against the Company.

2. The penalty of £242,243 was issued on 19 March 2021 in respect of the Company's failure to file VAT returns for VAT periods from October 2016 to November 2017 whilst knowing that it was liable to pay VAT.

3. The Company is now in liquidation and has not challenged the penalty charged against it.

4. The issues for us to determine in this appeal are:

(1) whether the Appellant has behaved dishonestly and whether the Penalty levied on the Company is attributable to that dishonest behaviour, and if so,

(2) whether it is appropriate for all the penalty to be levied on the Appellant.

5. We were given a hearing bundle of 560 pages (including authorities) and a skeleton argument from HMRC. Mr Ahmed also provided us with written closing submissions. In addition, HMRC provided on 30 May 2023, at the request of the Tribunal, a further written submission on the scope of s.61 VATA and Mr Ahmed provided an email response dated 7 June 2023 in response to that submission.

6. We also heard oral evidence from the Appellant and from three HMRC witnesses; Officer Balmer, Officer Midgley and Officer Turner.

Preliminary issues

7. Mr Ahmed sought on 18 May 2023, to introduce several new documents. These included the Appellant's skeleton argument, an extract newspaper article headed "Majeed newspaper article", a report entitled "Hanlon Dist CH Report" and a report heading "MandO Trading CH Report". Copies of emails from Mr Ahmed to HMRC requesting further disclosure from HMRC of information relating to "the criminal prosecution that relates to the consignments associated with this appeal" were also included.

8. HMRC objected to the admission of these documents with the exception of the Appellant's skeleton argument. HMRC's objection was on the basis that the documents were submitted at a very late stage, no application to admit them had been made by the Appellant and no reason given for the lateness. They also argued that the documents would be of no probative value as they did not, inter alia, mention the Appellant or the Company. In respect of the disclosure requests HMRC pointed out that no criminal prosecution had taken place, the disclosure request was made a few days before the hearing and no application to the Tribunal had been made to postpone the hearing.

9. At the hearing, Mr Ahmed argued that the additional documents were necessary as it was unclear until a very late stage what points HMRC would be raising at the hearing, pointing out that the HMRC skeleton was circulated only 7 days before the hearing. HMRC pointed to the fact that details of their case were set out in their statement of case which had been provided in 2022.

10. Having regard to the additional evidence sought to be admitted and its timing and taking into account HMRC's objections, we decided in light of the Tribunal's overriding objective which is to deal with cases fairly and justly, to admit the Appellant's skeleton argument but to give minimal weight to the other documents sought to be admitted. In relation to disclosure HMRC's points were accepted.

Background and facts

11. From the material provided and the evidence heard, we found the following facts:

(1) The Company was incorporated on 23 September 2016 and the Appellant has, since its incorporation, been its sole director.

(2) The Company entered into liquidation on 22 January 2022.

(3) The Company registered for VAT with an effective registration date of 4 October 2016. It was set up for annual rather than quarterly VAT accounting. It deregistered on 21 November 2017.

(4) The Company applied for and was accepted on the Alcohol Wholesalers Registration Scheme (the "AWRS"). The AWRS is an approval scheme under which all businesses that supply alcohol to other businesses for resale must be approved. It is intended to ensure compliance with the excise duty regime. Approval under the scheme requires, inter alia, HMRC to assess applicants against a number of "fit and proper" criteria.

(5) HMRC interviewed the Appellant as part of the AWRS application process. The Appellant agreed at that interview to be the responsible person "for all of the business records and HMRC returns".

(6) The Company submitted no VAT returns during the period for which it was registered. We note here that there is a reference in the notes of the meeting referred to at [11(15)] below to a nil return being submitted. However there is no further reference to that return nor could the Appellant recall it when questioned. We have therefore treated this reference as a likely mistake.

(7) In April 2017 HMRC contacted the Appellant to organise a visit to the Company's premises to discuss the VAT position. This meeting (the "2017 Meeting") took place on 8 May 2017 and was attended by the Appellant, his then solicitor and HMRC officers Pope, Templeman, Balmers and Roberts. HMRC's notes of the meeting show that the Appellant confirmed the following:

> (a) He was the sole director of the Company and there were no other persons with an interest in the Company.
>
> (b) He made the application for VAT registration.
>
> (c) He completed the VAT application incorrectly – by inserting the wrong trade class (non specialised wholesale rather than alcohol).
>
> (d) He had not filed any VAT returns.
>
> (e) He had been using his personal bank account for business use.
>
> (f) The Company had 5 main customers.

(8) At the 2017 Meeting, the Appellant was told that the Company's first VAT return was outstanding. He said that he had not realised VAT returns were needed as the company had only started trading in March. He also told HMRC that he had accountants (McPhersons) who were dealing with the VAT (and his self-assessment returns) and that he would check with them on the VAT.

(9) Following the April 2017 Meeting, the Company was removed from Annual Accounting and placed on a standard quarterly accounting basis. It was acknowledged that it was the incorrect description of the Company's business that had led to it being allowed to adopt annual VAT accounting. The Appellant said that this was a mistake on the form and there had been no intention on his part to mislead.

(10) At the meeting the Appellant was also asked about Hanlon Wines Limited. This was a company of which he had been director and company secretary but which, according to HMRC, went into liquidation owing VAT of £1 million and Excise duty of £35.4 million (later references to Hanlon Wines put the excise duty figure at £46 million). The Appellant said that he was not aware of the unpaid taxes and expected that the problems occurred after his involvement with the Company had ended.

(11) On 6 March 2018 HMRC invited the Appellant to attend a Public Notice 160 ("PN160") meeting to be held on 26 March 2018. PN160 is, in essence, an investigation process designed to deal with indirect tax matters where conduct involving dishonesty is suspected.

(12) On 14 March 2018 the Appellant contacted HMRC to rearrange the meeting and a new date of 17 April 2018 was given. On 15 April 2018 the Appellant contacted HMRC to cancel the rearranged meeting, the reason given being his ill health. On 1 May 2018 HMRC again invited the Appellant to a meeting to be held on 15 May 2018 and on 10 May 2018 the Appellant accepted. However, the Appellant failed to attend that meeting.

(13) On 10 June 2019 HMRC wrote to the Appellant stating that best judgment VAT assessments totalling £302,804 for the VAT periods 6/17 and 9/17 would be issued against the Company.

(14) On 7 February 2020 HMRC again invited the Appellant to a PN160 meeting. The Appellant cancelled the meeting on 16 March 2020.

(15) On 2 September 2020 the PN160 meeting (the "PN160 Meeting") took place. It was held via telephone given the COVID 19 situation at the time.

(16) HMRC's notes of the PN160 Meeting meeting (which had been confirmed at the time as accurate by the Appellant) showed the following:

(a) The Appellant confirmed that he understood that HMRC were investigating the Company's tax affairs and that he was aware of his right not to self-incriminate.

(b) The Appellant stated that he had gone into business with a venture called "M&O Trading" ("M&O") and had allowed individuals from M&O to run large elements of his business. Specifically:

(i) Chas Majeed was responsible for completing all of the Company's paperwork.

(ii) "Sue" was his general manager.

(iii) "Raza" organised all transport.

(iv) Two people from M&O came to the premises to arrange an interview with HMRC to gain access to the AWRS scheme.

(v) "Kaz" or Katherine was completing the paperwork.

(vi) M&O had full access to the Company's bank accounts.

(c) The Appellant confirmed that he did not know the full names or surnames of any of the above people mentioned.

(d) The Appellant said he had "assumed" that M&O's accountants were completing the Company's corporation tax and VAT returns and paying the sums due.

(e) The Appellant admitted that he did not check this at any stage.

(f) The Appellant confirmed that he accepted that responsibility for the business rested with him.

(g) The Appellant confirmed that he knew that returns had not been lodged to date.

(h) The Appellant confirmed that he had no paperwork at all – stating that M&O held it all and would not provide it.

(i) The Appellant said that he knew that "something was wrong" in 2017 but was not 100% sure and chose not to do anything about it, deciding instead to "wait for something to happen from HMRC".

(j) The Appellant confirmed that he did not check to determine if there were duplicate loads or that the Company's transactions were authentic. He left this to "Kaz".

(k) Contrary to his statement in his meeting with HMRC on 8 May 2017 the Appellant stated that he had neither filled in nor checked the Company's VAT registration formed, he had simply signed it.

(l) The Appellant confirmed that he had been dishonest in his interview for the AWRS scheme and had been "coached" for the interview by Mr Majeed.

(m) The Appellant confirmed that he was not threatened by anyone from M&O.

(n) The Appellant confirmed that not filing the returns was dishonest on his part although dishonesty was not his intent.

(o) The Appellant confirmed that he understood input and output tax, that a VAT return should reflect invoices issued and received, that VAT belongs to HMRC and that if there were any issues then HMRC should be contacted.

(p) The Appellant confirmed that he understood that he had evaded VAT.

(q) The Appellant stated that he had not taken any money out of the Company to live on and that his girlfriend and brother were "paying his bills".

(r) The Appellant stated that he no longer had access to his own bank account where the VAT the Company owed should be held. He stated that despite the account being set up by him and held in his name, "they" had told him they were closed.

(s) The Appellant had set up Hanlon Distribution, a logistics company which initially entered into business transactions with the Company. However, Hanlon Distribution "never took off" and was taken over by Daniel Booth.

(t) The Appellant confirmed that he had not acted responsibly nor had he acted openly and transparently. He also confirmed that he had acted dishonestly.

(17) Notwithstanding the fact that the Appellant had confirmed the accuracy of the PN160 meeting notes, at the hearing he denied those admissions and said that he had not admitted to trading dishonestly. He believed instead that he had said that he entered into the business arrangement with M&O in good faith and during the relevant periods believed that the correct taxes and duties were being declared and paid.

(18) On 19 March 2021 HMRC issued a notice of assessment of civil penalty under section 60 VATA to the Company, on the grounds that the Company had dishonestly

evaded VAT totalling £302,804. After mitigation of 20% (10% for co-operation, 10% for disclosure) the penalty was reduced to £242,243. The notice stated HMRCs belief that the liability arose from the behaviour of the Appellant and their intention to recover the full amount from the Appellant.

(19) On 19 March 2021 HMRC also issued a notice of assessment of civil penalty under section 61 VATA to the Appellant making him liable to pay the full amount of the Company's penalty. The notice stated that HMRC considered the Appellant to be wholly responsible for the dishonest actions of the Company in evading tax. This was on the basis that he failed to submit VAT returns for the periods ending 6/17 and 9/17 which led to an under declaration of VAT.

(20) In a letter dated 6 April 2021 the Appellant stated that he believed it was Mr Majeed of M&O who should be responsible rather than the Appellant.

(21) On 14 May 2021 the Appellant requested an independent review of the HMRC decision. The review outcome was issued on 19 November 2021 upholding the decision to issue the section 61 penalty and upholding its quantum.

(22) On 10 December 2021 the Appellant appealed to the Tribunal.

(23) We found the following from the Appellant's witness evidence:

(a) Prior to setting up the Company he had been a salesman for a wine brokerage firm.

(b) He established the Company to take advantage of an opportunity to supply wine to an independent network of off licences and convenience stores. The opportunity arose following an introduction to Chaz Majeed of M&O. The introduction was arranged by Daniel Booth, a friend of the Appellant. Mr Majeed was looking for a salesman to develop his customer base and encourage sales and Mr Booth knew that the Appellant was unhappy at the time in his role at the wine brokerage firm.

(c) Mr Majeed liked him as he was "very old school and would be happy to get out an about and visit businesses to expand the customer base." [sic]

(d) His business plan was for the Company to supply wine to retail shops including those owned by M&O. This plan was put to the Appellant by Chaz Majeed during a meeting at M&O's commercial premises which were at 3 Church Road, Burgess Hill (the "M&O Premises").

(e) He visited the M&O's Premises several times. The premises were located in Burgess Hill, at Delmon House. He thought that all seemed legitimate when he visited.

(f) Despite being established as a wine supplier, the Company actually sold imported beer to several retailers although it sold some wine initially. He did not object to the change in business as he was pleased that the business had actually started.

(g) He is computer illiterate and "hopeless" with paperwork. He had agreed with Mr Majeed that M&O would complete and submit all of the Company's tax returns and manage the bookkeeping and annual accounts on the Appellant's behalf.

(h) He spoke to Mr Majeed and other staff at M&O on a regular basis and had discussed the VAT registration and AWRS requirements for the business with them.

(i) Contrary to what he told HMRC in 2017, he did not personally complete the Company's VAT registration forms, although he accepted they contained his details and identified him as the point of contact.

(j) He accepted that in the AWRS application process he had committed to being responsible for maintenance of the Company's business records – although he had gone on to delegate this to others.

(k) He accepted that he had not mentioned Mr Majeed or M&O in any prior discussions related to the AWRS but said there was no need for him to have done so as Mr Majeed was not a director.

(l) He said that he had, as part of the AWRS process, carried out due diligence on the companies that he was proposing to deliver to - including visiting them. However, all of these records were kept by M&O at its Burgess Hill premises.

(m) He had been told by Mr Majeed that the VAT returns for 06/17 to 09/17 were being prepared. He did not check this.

(n) He gradually became suspicious when he stopped getting calls from Mr Majeed and was then unable to contact anyone from M&O. This was towards the end of 2017.

(o) He and Daniel Booth went to see Peter Hastings - a lawyer who had been involved in the arrangements with M&O. It was only towards the end of 2017 when he had been trying to get in touch with M&O and Chaz Majeed that he went to Burgess Hill and found that their office had been vacated. This was "when it sunk in".

(p) At first he said that the Company had not bought and sold any wine at all – but when shown his letter of 6 April 2021 to HMRC where he said that he had supplied wine – he admitted that an amount of wine was supplied albeit not a regular amount.

(q) He said that he had avoided attending the PN160 meetings as he was advised by the M&O lawyer (Peter Hastings) to not attend as it would risk losing the Company's AWRS and also because documents were being compiled for the meeting. He decided eventually to attend as the lawyer was "no longer around" and he realised that he "needed to get this resolved".

(r) As far as he was aware, payments of excise duty were being made on products coming out of the bonded warehouse. These payments were made "through" Dynamic Storage, the bonded warehouse, and were made as the goods were released from the warehouse. The goods were released to several customers including M23, M27 and M62 Cash and Carry, M&O, New Star and others but only, as far as he knew, when duty was paid.

(s) He said that he was aware of payments being made to Dynamic Storage as they "went through the Company bank statements". He assumed, therefore, that *all* taxes had been paid.

(t) He also said that he believed VAT was not due as the products were being sold from a bonded warehouse. He did not think that any VAT was being evaded until he was visited by HMRC.

(u) He accepted that he was legally required to ensure that VAT returns were submitted.

(v) All documentation relating to the Company was kept by M&O at its Burgess Hill premises. He kept nothing.

(w) He no longer had access to his computer records for the relevant periods as he had lost his password and was unable to recover it as it was linked to someone else's telephone number (this other person may have been Daniel Booth).

(x) He thought that the fraud involved duplicate loads being brought into the country that bypassed the bonded warehouse system. He also thought that there was no way in which he could have been aware of those duplicate loads as this was all down to the fraudulent behaviour of Mr Majeed and M&O. In his view his Company had been "hijacked".

(y) He was not in charge of payments going to Dynamic Storage. Although he accepted they were sent from the Company's Santander account, he said that he was not in charge of operating the bank account and had given access to M&O who were responsible for running it.

(z) He accepted also that his personal TSB account showed payments going to Dynamic Storage. He said that this was because there was a delay in setting up the Santander account for the Company. He admitted that he did not give control of this account to anyone else and that he made the payments to Dynamic Storage himself – although again he assumed that it was for duties that had to be paid. He said that he was told specifically to make these payments.

(aa) He could not explain several payments which had been made to Hanlon Logistics from his personal bank account after the date on which Daniel Booth had taken over the that company and after the date on which the Company's Santander account had been established.

(bb) He said that there was a lot of documentation relating to the payments – all was arranged by "Kas" at Burgess Hill. All of these documents were at Burgess Hill and he was also unable to recover the emails.

(24) We found the following additional information from the evidence of HMRC Officer Midgley:

(a) Officer Midgley was aware of a criminal investigation into the activities of M&O.

(b) Officer Midgley had visited M&O's premises as a result of his involvement in another case and had previously met Mr Majeed.

(c) Officer Midgely was unable to discuss details of other cases in which he had been involved.

Relevant Law

12. S.61 VATA provides that a penalty involving dishonesty which has been assessed upon on a corporate body under s.60 VATA may, in certain circumstances, be recovered from an officer of that corporate body as if that officer were personally liable.

13. The relevant parts of s.60 and s.61 VATA at the relevant time provided as follows:

> 60 VAT evasion: conduct involving dishonesty
>
> (1) In any case where –
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.
>
> 61 VAT evasion: liability of directors, etc
>
> (1) Where it appears to the Commissioners–
>
> (a) that a body corporate is liable to a penalty under section 60, and
>
> (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),
>
> the Commissioners may serve a notice under this section on the body corporate and on the named officer.
>
> (2) A notice under this section shall state–
>
> (a) the amount of the penalty referred to in subsection (1)(a) above ("the basic penalty"), and
>
> (b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.
>
> (3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.
>
> …
>
> (5) No appeal shall lie against a notice under this section as such but–
>
> (a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment; and
>
> (b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

14. The central issue for us to determine is whether the penalty assessed on the Company was, wholly or partly as result of the Appellant's dishonesty. If so, it is then necessary to determine whether all of the penalty is attributable to the Appellant.

The test to determine dishonesty

15. The tests required to show dishonesty were summarised in *Byers v Revenue and Customs Commissioners* [2019] UKFTT 310 (TC) ("Byers") as follows:

> [142] …. Following *Ivey v Genting*, the test for dishonesty to be applied in both criminal and civil proceedings is Lord Nicholls' test in Royal Brunei v Tan, as clarified by Lord Hoffman in Barlow Clowes.
>
> [143] Lord Nicholls' test was applied in determining "dishonest" in the context of a penalty under s 60 VATA by Judge Pelling QC (sitting as a High Court Judge) on Sahib Restaurant Ltd v HMRC (Case M7X 090,9 April 2009, unreported):
>
> > "in my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is knowledge of the transaction sufficient to render his participation dishonest according to normally acceptable standards of honest conduct. In essence the test is objective – it does not require the person alleged to be dishonest to have known what normally acceptable standards of honest conduct were."
>
> [144] That the civil test of dishonesty is essentially objective is confirmed by Lord Hoffman is Barlow Clowes, where it is stated at [10]:
>
> > "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."
>
> [145] While the test for dishonesty is primarily objective, Lord Nicholls has remarked on the subjective element that remains relevant to the test as follows:
>
> > "Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart, dishonesty, are mostly concerned with advertent conduct, not inadvertent conduct."
>
> [146] In respect of how this 'subjective element' is to be taken into account by the court, Lord Nicholls' guidance is:
>
> > "Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances know to the third party at the time. The court will also have regard to the personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did."
>
> [147] A s.61 penalty is predicated on a s.60 penalty being imposable on the body corporate in the first place. Section 60(1) of VAT provides:
>
> > "(1)(a) for the purpose of evading VAT, a person does any act or omit to take any action, and (b) his conduct involves dishonesty …"

> [148] It is clear from the statutory wording under sub-s 60(1)(a) that the conduct involving dishonesty is not restricted to the commission of an action, but includes an omission to act. The statutory wording in this regard accords with case law authority on the meaning of dishonesty, as Lord Nicholls in Royal Brunei stated at p106;
>
> 'Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless".

The burden of proof

16. The burden of proof is upon HMRC to demonstrate that the conduct giving rise to the Company's penalty was in whole or part attributable to the dishonesty of the Appellant. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

Overview of the Appellant's position

17. The Appellant contends that he was the victim of a sophisticated team of individuals led by Mr Majeed who used him and his Company to carry out a large scale excise duty and VAT evasion operation.

18. The Appellant has explained that this was a consequence of him allowing those individuals to deal with the entirety of the Company's business activities, including its tax and reporting obligations and management of its bank accounts, together with him not supervising, checking or asking any material questions. In other words he relied entirely on those individuals and what they told him and simply signed what was put before him.

19. In his evidence, the Appellant outlines at some length how, after the initial set up of the business, he was largely passive in relation to it.

20. He has also stressed that until some time towards the end of 2017 he had no reason to believe that anything untoward was taking place. From his perspective he saw payments being made by the Company which he believed were payments of excise duties and he believed that no VAT was due in respect of the business that he thought the Company was carrying on.

21. The Appellant claims also that he did not receive any payments personally and was reliant on his relatives for money.

22. The Appellant also states that he has no physical or electronic records at all of the business arrangement that he entered into (including proof of any dealings with the individuals mentioned). His reason for having no physical records is that all physical records were kept by the team who disappeared. His reason for having no email records is that he lost the password to his computer and has been unable to retrieve it as the password is linked to the telephone number of one of the individuals involved in the fraud. He has provided no explanation for a lack of text messages or other phone records.

23. The core of the Appellant's case is that he was not dishonest as he relied on the individuals to manage the Company's affairs and he did not realise that the Company was involved in VAT evasion.

24. In his submissions, Mr Ahmed points out that failing to submit VAT forms is not sufficient to show dishonesty and also that there is no evidence, in his view, that the Appellant knew that VAT was due or that it was being evaded. He also contends that even if the Appellant did question the team of individuals running the Company he would not have discovered the VAT evasion.

Overview of HMRC position

25. HMRC contend that the Appellant clearly understood the Company's tax position and what it was doing. In their view the Appellant was responsible for the Company's deliberate VAT and excise duty evasion. They also point to the fact that there is no evidence to show the link between the Appellant and the "team" that he says took over his company. In HMRC's view, the actions of the Company were determined by the Appellant and there was no team of controlling individuals involved.

They point to the following facts:

(1) The Appellant is an experienced company director who has previously had a number of businesses operating in the same area

(2) The incorrect information given by the Appellant in the Company's VAT registration which enabled annual VAT accounting to be permitted.

(3) The Appellant understood VAT and was able to explain how it worked when questioned by HMRC.

(4) The Appellant failed to file any VAT returns even after being told by HMRC (in the May 2017 meeting) that the Company had to file them. (N.b. we note here that record of PN60 refers to a VAT nil return being filed for 3/17 – but also that the Appellant could not recall this and that there is no other mention of it. We therefore place no weight on that reference.)

(5) The Appellant actively avoided co-operation with HMRC, failing to respond to its enquiries and failing to attend 5 consecutive meetings with HMRC.

(6) The Appellant admitted to knowing that something was wrong in 2018 but failed to notify HMRC and instead waited to see what HMRC would do.

(7) The Appellant admitted several times in his PN160 meeting that he had been dishonest and signed off on the notes of that meeting as being accurate.

HMRC put significant weight on the Appellant's inability to produce any evidence to demonstrate that Mr Majeed or M&O were involved in the business. They note also that in the May 2017 meeting the Appellant went into detail about how the business operated but made no mention of Mr Majeed or any other person.

Additionally, HMRC regard as highly unrealistic the Appellant's contention that he does not have any documentation from the entire history of the Company's business and conclude that in reality he is withholding information from HMRC that would enable them to assess his actual activities and so his tax liability.

Discussion

26. As we have outlined above it is necessary to assess the Appellant's knowledge of the VAT evasion activities and to then determine whether by reference to "ordinary standards" or "normally acceptable standards of honest conduct", his conduct would be regarded as dishonest.

27. The first part of the test (the Appellant's state of mind) is a subjective determination and the second part (the standard by which his behaviour is judged) is objective.

28. In making our determination we can also look at all the circumstances known to the Appellant and have regard to his personal attributes such as his experience, intelligence and the reasons for why he acted in such a manner.

29. In considering what the Appellant knew we must also bear in mind the observation of Lord Nicholls in *Royal Brunei Airlines* that:

> "Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless"

30. Here, the Appellant's position is, essentially, that he did not know that VAT evasion was taking place. This is, he says, because he entrusted the running of his Company to third parties and assumed and was, at times, told by those third parties, that they were taking the steps necessary to ensure the Company's compliance with its obligations including its VAT obligations. He asks us to believe that he was naive and overly trusting but not at any time dishonest.

31. Having taken into account the evidence made available to us, we find that HMRC has satisfied us that on the balance of probabilities, the Appellant either (a) was aware of the Company's excise duty and VAT evasion activities, or at the very least (b) chose not to investigate whether the Company was in compliance with its tax obligations (including its VAT obligations) in case he learned something that he would rather not and then proceeded regardless. In either event his behaviour was, we consider, dishonest by ordinary standards or the normally accepted standards of honest behaviour.

32. Our determination is supported by several factors which, include, but are not limited to the following:

(1) The lack of any evidence linking the Appellant and/or the Company with Mr Majeed and/or M&O.

(2) The inconsistencies in the Appellant's explanation of the Company's VAT position.

(3) The fact that the Appellant was put clearly and formally on notice by HMRC at the May 2017 Meeting that the Company's VAT position was being questioned, yet appeared to make no real attempt to investigate the Company's position or to speak to HMRC about his concerns.

(4) The fact that the Appellant is an experienced businessman (having operated businesses in similar fields) with an understanding of the way that VAT works (as shown when questioned by HMRC) and an understanding of the responsibilities of a company director.

(5) The Appellant's difficulty in explaining the commercial agreement purportedly in place between him and M&O. He described it eventually as an arrangement under which he was entitled to a share of the profit for each consignment of goods, this was despite his initial denial of having received any benefit from the arrangements.

(6) The fact that the Appellant had no explanation for the payments being made from his personal bank account to Hanlon Distribution (after the period of time in which that personal account was, according to his testimony, being used for Company business).

(7) The fact that the Appellant admitted several times in his PN160 meeting in September 2020 with HMRC that he had been dishonest. He also signed off on the accuracy of the notes of that meeting.

(8) The Appellant's deliberate attempts to avoid any interaction with HMRC for over two years (from being invited to the first PN160 meeting in March 2018 to finally having the PN160 meeting in Sept 2020)

(9) The inherent improbability of his claim that he has no records at all (whether electronic or in paper form) showing the details of the Company's business or a link between the Appellant and Mr Majeed and his team.

(10) The fact that he had made what seemed to be very limited attempts to try and recover any of his e-mails (his position simply being that he could not access them as the password recovery was linked to someone else's telephone number). Given the purported existence of email records that could have corroborated his defence it is surprising that there was not more effort to recover them.

33. In reaching our conclusion we have given only limited weight to the assertions made by HMRC in relation to Hanlon Wines and its multi-million excise duty and VAT liabilities. This is because, although mentioned several times by HMRC both at the hearing and in the bundle material, HMRC have not provided any material details of that case or the Appellant's involvement in it. Although the Appellant acknowledged that he had established Hanlon Wines, we are unable therefore to assess his role in relation to its tax default.

34. We accept that Mr Majeed and M&O existed. We note here HMRC Officer Midgely's confirmation of his awareness of M&O and of his meeting with Mr Majeed in connection with a different case. However, as HMRC have made clear throughout this case, the Appellant has not been able to provide any evidence of a link between him or his Company and Mr Majeed or M&O.

35. We note also that other than a Companies House document showing the appointment in January 2017 of a Daniel Boothh [sic] as a director of Hanlon Distribution and the resignation of the Appellant as its director, no evidence has been provided of the relationship between Mr Booth and the Appellant nor was Mr Booth asked by the Appellant to corroborate his version of events. We find this surprising given the Appellant's description of Mr Booth as former business partner and acquaintance of his who was instrumental in introducing the Appellant to Mr Majeed.

36. We would add that even if Mr Majeed and his team had acted in the way described by the Appellant we would still, as we have said, find the Appellant to have been dishonest on the basis of deliberately turning a "blind eye" to what was happening.

37. We find accordingly that the Appellant's conduct has been dishonest and that the penalty imposed on the Company under s.60 VATA is attributable to his dishonest conduct whilst he was a director of the Company.

Whether it is appropriate for all of the penalty to be levied on the Appellant

38. S.61 VATA applies where the conduct giving rise to a penalty for a body corporate under s.60 VATA is, in whole or in part, attributable to the dishonesty of a person who is or was at the material time a director or managing officer of the body corporate.

39. S.61(6) VATA defines a managing officer as, so far as relevant:

> "any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director"

40. The Appellant was the sole director and shareholder of the Company and no other persons were named as directors or officers of the Company.

41. We have considered whether, as contended by the Appellant, Mr Majeed could be regarded as a managing officer of the Company within the extended definition in s.61(6) VATA.

42. We have concluded that he should not.

43. Although we accept that Mr Majeed existed, no evidence of his role in relation to the Company has been provided and there is certainly no evidence as to him having been held out as a director, manager, secretary or other officer of the Company. Given that lack of evidence we have no basis on which to conclude that he was a "managing officer" of the company. The only identifiable person with any material role in relation to the Company and its VAT affairs was the Appellant and for the reasons outlined above we regard him as responsible for the Company's VAT evasion. We agree, therefore, with HMRC that the appropriate proportion of the Company's penalty payable by the Appellant is the full amount.

DECISION

44. For the reasons given we dismiss the Appellant's appeal and uphold HMRC's decision as to the Penalty.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release date: 27th FEBRUARY 2024