



TC04823

**Appeal number: TC/2014/05621
TC/2014/05695**

*VAT – penalties – unauthorised issue of invoices showing an amount of
VAT – whether actions taken deliberately – yes – if not deliberate, was there
a reasonable excuse - no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CONTRACTORS 4 U LTD

Appellant

- and -

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

Respondents

AND

ASSET SERVICES NORTH WEST LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR RICHARD CROSLAND**

Sitting in public at Liverpool on 16 September 2015

Mr M Kaney for the Appellants

**Mr S Charles, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

Introduction

5 1. These conjoined appeals are brought against penalties charged pursuant to paragraph 2 of Schedule 41 Finance Act 2008. The penalties were issued in respect of a number of invoices issued by each appellant prior to notification of registration for VAT. These invoices included a charge for VAT made at a time when neither appellant was a unauthorised person.

10 2. The appellants do not dispute that the invoices in question showed VAT and were issued at a time when the issuer of the invoice was not registered for VAT, and so do not dispute that paragraph 2 of Schedule 41 Finance Act 2008 applies in principle.

15 3. However, the appellants each contend that the VAT was included in the invoices on the basis of their understanding of advice received from HMRC. As such, they contend that each relevant appellant's behaviour was not deliberate and that there was a reasonable excuse for the VAT being charged in error such that no penalty should be charged.

20 4. It was agreed between the parties that this Tribunal has no jurisdiction to determine an appeal that is based on assertions of 'misdirection' or 'legitimate expectation' (per *Noor* [2013] UKUT 71 (TCC)). This appeal was brought and proceeded on the basis that the appellants contend that they have a reasonable excuse for the issue of invoices whilst unauthorised, and not on the basis that the appellants were misdirected by HMRC or otherwise have a claim in legitimate expectation.

25 Background

5. Both appellant companies are part of a number of companies, all of which provide services in the recruitment industry. All these companies were together described in the hearing as the 'Bluestones Group', although the companies are not and never have been a VAT group, nor are they a group for corporation tax purposes.
30 The companies have a director in common, Mrs Charlotte Pendergast, and some staff provide services across the 'Group'.

6. The appellants each submitted on 30 July 2013 a VAT 1 Application Form to become VAT registered. The registrations were notified to the appellants on 10 October 2013, with Asset Services North West Ltd being registered with effect from 1
35 April 2013 and Contractors 4U being registered with effect from 1 July 2013.

7. During the registration process HMRC requested, on 20 August 2013, copies of "all business records" for the appellants including (inter alia) "sales ... invoices". On 28 August 2013, during a visit to the appellants' offices, HMRC were advised that there were no sales invoices, as Asset Services North West Limited commenced
40 trading at the end of July 2013 and Contractors 4 U had commenced trading at the end

of August 2013. On 24 September 2013, following a further requisition for information at the meeting on 28 August and by letter on 5 September 2013, each appellant produced one sales invoice.

5 8. On 8 October 2013, HMRC again visited the appellants' premises and on this occasion collected a number of sales invoice and other documents from both appellants. These invoices were dated between 12 July 2013 and 3 October 2013, for both appellants.

9. These were invoices produced before either appellant had been notified of VAT registration. The invoices were all to other companies in the 'Bluestones Group' apart from a number of invoice issued by one of the appellants, Asset Services North West Limited, to a third party customer, Kyle Electrical.

10. The invoices to other 'Bluestones Group' companies showed an amount charged as VAT; the invoice to the non-'group' company, Kyle Electrical, did not.

11. All of the invoices contained the words "To be confirmed" in place of a VAT registration number.

12. Following receipt of these invoices, and correspondence, on 1 April 2014 HMRC raised a wrongdoing penalty against Contractors 4U in the sum of £16,090.44, and on 8 April 2014 raised a wrongdoing penalty against Asset Services North West Ltd in the sum of £8,804.19.

13. On 29 April 2014, the appellants each requested a review of the decision to charge these penalties on the basis that they had been advised by HMRC to use the "Group VAT registration for a new company of ours until a new VAT reg was issued".

14. Following the review, HMRC upheld both penalties on 6 August 2014 and, following further correspondence, the appellants each submitted an appeal in respect of their penalty to this Tribunal. It was agreed that the appeals should be heard together, as the subject matter and circumstances are the same for each.

Law

15. The relevant parts of Schedule 41 Finance Act 2008, dealing with the "issue of invoice showing VAT by unauthorised persons" provide as follows:

"2—

(1) A penalty is payable by a person (P) where P makes an unauthorised issue of an invoice showing VAT.

35 (2) P makes an unauthorised issue of an invoice showing VAT if P—

(a) is an unauthorised person, and

(b) issues an invoice showing an amount as being value added tax or as including an amount attributable to value added tax.

5 (3) In sub-paragraph (2)(a) “an unauthorised person” means anyone other than—

(a) a person registered under VATA 1994,

(b) a body corporate treated for the purposes of section 43 of that Act as a member of a group,

...

10

6B—

The penalty payable under [paragraph] 2 ... is—

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,

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(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

...

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20—

(1) Liability to a penalty under [paragraph] 2 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

25

...”

16. Having applied for a VAT registration number and whilst waiting for that number to be issued, a company should issue invoices for an amount grossed up to include VAT without showing the VAT as a separate amount and advise the customer that the invoice would be re-issued, showing the VAT as a separate amount, when the
30 VAT registration number was received.

Evidence

17. As the appellants do not dispute that paragraph 2 of Schedule 41 Finance Act 2008 applies in principle, the evidence provided to the Tribunal was in relation to the question of whether in issuing those invoices the actions of either or both of the
35 appellants were deliberate and whether, if not deliberate, either or both of the appellants had a reasonable excuse for issue of those invoices.

18. We heard oral evidence from Mr Brian Hardman and Mrs Charlotte Pendergast for the appellants, and from Ms J Woods for HMRC.

Evidence of Mr Hardman

19. Mr Hardman confirmed that he is the Group Finance Manager for the ‘Bluestones Group’, with responsibility for overseeing all group finance matters. He confirmed the Tribunal that he had “good experience of VAT”.

5 (a) *Mr Hardman’s understanding as to advice from HMRC*

20. Mr Hardman stated that he and Mrs Pendergast met with a VAT Officer, Mrs Moxley, and another VAT Officer, Julie Fuge, in October 2012 to discuss VAT issues relating to another company in the ‘Bluestones Group’, Acorn Global Energy Ltd (‘Acorn’). In his witness statement, Mr Hardman said that this meeting took place
10 during October 2012, without giving a specific date. In oral evidence, he stated that the meeting took place on 12 October 2012. This date was arrived at, he explained to the Tribunal, as a result of a comparison of his and Mrs Pendergast’s diaries. Neither had the meeting in their diaries but, looking at the times they had available to meet, that was the “most likely date” for the meeting. He also said that his recollection was
15 that the meeting was in the first month after he joined the company.

21. His evidence was that, at that meeting, Mrs Moxley had commented that Acorn “could use the Group VAT registration as a temporary measure until the new VAT registration is issued”. He had understood this to mean that new companies in the ‘Bluestones Group’ should use the VAT registration number of an existing company
20 within the group in order to charge VAT on invoices produced by a new company whilst waiting for the application to VAT register that new company to be approved.

22. Mr Hardman confirmed that this comment was not confirmed in writing by HMRC, nor had he or his colleague kept a written record of the meeting. Although he had not seen any instances of a company using the VAT registration number of
25 another company, he had thought that the advice was correct on the basis that it came from an HMRC Officer.

23. Under cross-examination, Mr Hardman agreed that he had been in meetings where there had been discussion as to whether the ‘Bluestone Group’ should form a VAT group but was sure that, at this meeting, the advice given was not in relation to
30 the forming of a VAT group.

 (b) *Appellants’ invoices*

24. Mr Hardman’s attention was drawn to the invoices produced by the appellants. He agreed that none of these invoices in fact contain a VAT registration number and that each includes, instead, the phrase “To be confirmed” in place of the VAT
35 registration number. He could not explain why no VAT registration number had been included on the invoices, when his understanding was that Mrs Moxley had advised them that they could use another company’s VAT registration number whilst waiting for the VAT application to be approved. Mr Hardman suggested that this was a mistake, and that they should have put a VAT number on the invoices.

40 25. With regard to the Kyle Electrical invoice, Mr Hardman confirmed that this was the only invoice sent to a company outside the ‘Bluestone Group’ and agreed that it

did not include any amount in respect of VAT. He further agreed that it also did not include any VAT registration number, and included instead the phrase “To be confirmed” in place of a number.

26. When asked why no VAT had been charged on the invoice to Kyle Electrical, Mr Hardman explained that an invoice with VAT had originally been raised. On receipt of that original invoice, the customer had asked the relevant appellant to raise a VAT invoice when the VAT registration number for that appellant had been received. As the customer had requested that they not charge VAT until the VAT registration was received, they had not done so. No credit note was raised in order to do this; the original invoice was amended. Mr Hardman agreed that there was nothing on the invoice produced in evidence to show that it had been so amended, nor any other evidence to show that the amendment had been made.

27. Mr Hardman agreed that this did not fit with his understanding as to advice received. He had chosen not to explain to the customer that they could use another company’s VAT registration number on the basis that he knew that the relevant appellant could raise a VAT invoice later.

Evidence of Mrs Pendergast

28. Mrs Pendergast is a director of each of the appellants. She agreed that a meeting with HMRC had taken place within a month of Mr Hardman starting employment with the ‘Bluestones Group’. She explained that she does not have any particular experience with VAT as it is not her field.

29. Mrs Pendergast explained that her understanding was that they had been advised that the VAT registration number of Bluestones Investments Group Limited, the majority shareholder of the appellants and the other companies in the ‘Bluestones Group’ could be used for new companies until their VAT registration number has been received.

30. When asked about the lack of VAT registration numbers on invoices, Mrs Pendergast explained that as these were internal to the ‘group’, she did not think that it would be an issue that the number was not included.

31. Mrs Pendergast agreed that it would be important to follow advice from HMRC on external invoices, and explained that she thought the advice had been followed initially in the case of Kyle Electrical and the invoice then amended when the customer had asked for a VAT invoice to be sent when the relevant appellant’s VAT registration number had been received. She explained that the invoice would have been amended in Sage, and that the invoices are sent by email and post. She agreed that there should be an email trail evidencing the amendment.

Evidence of Mrs Woods

32. Mrs Woods confirmed that she is an officer with HMRC, working in Special Investigations, and that she had dealt with the appellants’ applications for registration for VAT and the subsequent raising of penalties with regard to the issue of invoices by the appellants whilst unauthorised.

(a) Advice from HMRC

33. Mrs Woods stated that she had reviewed HMRC's records and found no record of a meeting taking place between HMRC and the appellants in October 2012. Mrs Moxley is no longer working for HMRC and so Mrs Woods reviewed her Outlook
5 diary entries and case folders. A meeting had been booked for the end of October 2012, but an email record showed that this had been postponed at the request of Mrs Pendergast because it clashed with the payroll run. Mrs Woods spoke to Julie Fuge who confirmed that the meeting in October had been cancelled. On being asked, Mrs Woods confirmed that no attempt had been made to locate Mrs Moxley to confirm the
10 point with her as well.

34. In reviewing HMRC records, a 'Labour Supply Questionnaire' form completed by Mrs Moxley as the note-taking officer, with Julie Fuge as the witness officer, had been located for Acorn. Mrs Woods stated that this is a form which is completed in respect of labour contractors. The form is dated 2 April 2013 and includes in the
15 'Recommendations as a result of visit[s] made' the note that Mrs Moxley "visited trader with my DMB colleague ... on 21/11/12. Present was Charlotte Pendergast and ... Brian Hardman ... I discussed the possibility of using a group registration".

(b) Whether actions were deliberate

35. Mrs Woods said that she had asked for copies of the sales invoices issued by
20 each appellant on a number of occasions. On the first visit to the appellants' office on 28 August 2013 she had been advised that there were no sales invoices; she subsequently received one sales invoice for each appellant. The remaining invoices were supplied to her on a subsequent visit to the appellants' offices on 8 October 2013.

25 36. Mrs Woods explained that she took the view that the actions in charging VAT on the invoices to 'group' companies were deliberate because of the previous VAT experience of the other 'group' companies and also the inconsistencies in responses from the appellants with regard to invoices: stating in one visit that there were no sales invoices and then, in a later visit, producing sales invoices that pre-dated the first
30 meeting.

HMRC submissions

37. Mr Charles, for HMRC, submitted that paragraph 2 of Schedule 41 Finance Act 2008 imposes strict liability. A penalty is payable where there is an unauthorised issue of an invoice showing an amount as VAT. The appellants do not dispute that this
35 happened. As such, the issue in this case is whether the actions of the appellants fell within paragraph 6B(b) of Schedule 41 Finance Act 2008 in determining the level of penalty: that is, were they "deliberate but not concealed". There is no suggestion that the actions were concealed, so that paragraph 6B(a) is not applicable.

38. Mr Charles submitted that the term 'deliberate' is clearly defined as an action
40 taken consciously when there was an appreciation that there was a choice. He further submitted that there is no requirement that 'deliberate' include any element of seeking

a tax advantage, and that HMRC are entitled to conclude from the circumstances surrounding the relevant actions that those actions have been taken deliberately .

5 39. Mr Charles argued that the appellants' actions were deliberate as the witnesses confirmed that they had understood that they had received advice as to what to do, but chose not follow that advice as they did not include any VAT registration number on invoices showing separate amounts in respect of VAT. They also chose to take a different action when invoicing a third party; even if this was at the request of the third party, the appellants still did not change their actions for internal invoices and so chose to continue to charge separate amounts of VAT.

10 40. If the actions were not deliberate then the issue is whether the appellants have a reasonable excuse for their actions. Mr Charles submitted that the appellants cannot argue that they have a reasonable excuse on the basis that they had understood that HMRC had advised that they could use another company's VAT registration number, when they did not in fact follow the advice that they had understood that they had
15 received.

Appellants' submissions

20 41. Mr Kaney, for the appellants, submitted that the burden of proof on penalties lies with HMRC. In this case, Mr Kaney submitted that HMRC had failed to show that the appellants had acted deliberately and that the evidence put forward by HMRC was based on assumptions which should not be given any weight unless supported by tangible objective facts.

25 42. Mr Kaney submitted that HMRC should have taken evidence from their witnesses of fact as to the contents of the meeting with the appellants in 2012 and that, without such evidence, HMRC have not discharged their burden of proof that the actions of the appellants were deliberate. He considered it extraordinary that neither Mrs Moxley nor Ms Fuge had been interviewed.

30 43. Mr Kaney further submitted that there was no evidence that the appellants had obtained, or intended to obtain, a tax advantage as a result charging VAT prior to receiving their VAT registration. On the contrary, the appellants wanted to get their VAT compliance correct but had chosen the wrong way to do so. This was not on the basis of deliberate wrongdoing, however.

35 44. Mr Kaney also submitted that the actions of the appellants were not deliberate and HMRC had not discharged their burden of proof in establishing that the actions were deliberate and so paragraph 20 of Schedule 41 Finance Act 2008 should apply. The appellants' reasonable excuse was their understanding of the conversation with Mrs Moxley in 2012; the exact date of the conversation should not be considered particularly relevant.

Discussion

40 45. We agree with Mr Charles' analysis, which was not disputed by Mr Kaney, that paragraph 2 of Schedule 41 Finance Act 2008 imposes strict liability: a penalty is

payable if there is an unauthorised issue of an invoice showing an amount as VAT. It is not disputed that there was such an unauthorised issue of invoices.

46. Accordingly, the question is then whether the actions of the appellants in their unauthorised issue of such invoices were deliberate or, if not deliberate, whether the appellants had a reasonable excuse for the unauthorised issue of such invoices.

Were the actions deliberate?

47. We accept Mr Charles' submission that the term 'deliberate' should be interpreted as being an action taken consciously where there was an appreciation that there was a choice. This interpretation was not challenged by the appellants.

48. Mr Charles, for HMRC, argued that the appellants' actions were deliberate on the basis that the witness evidence was that they had understood that the invoices could be issued if they followed a particular procedure but had not in fact followed that procedure. In addition, they had used a different procedure again when issuing invoices to a company that was not part of the same 'group of companies', indicating that they had made different choices in different situations.

49. Mr Kaney, for the appellants, submitted that HMRC had not provided any tangible objective factual evidence that the appellants' actions in the unauthorised issue of the invoices had been deliberate, and that such evidence as had been put forward by HMRC was based only on assumptions as to the state of mind of those acting for the appellants and, as such, HMRC had not discharged their burden of proof.

50. Mr Kaney further submitted that the appellants had not intended to obtain any tax advantage through their actions.

51. Dealing with this last point first, we consider that there is no requirement that a 'deliberate' action, within paragraph 6B of Schedule 41 Finance Act 2008, involve any intention to avoid tax or obtain a tax advantage. The term 'wrongdoing' used in the legislation seems to have created some confusion in this case; that term is, we consider, used in this context to indicate an action that is incorrectly done, and is not intended to require that the action be undertaken with any malicious intent.

52. Having considered the evidence, we agree with Mr Charles that the actions of the appellants in their unauthorised issue of the invoices were deliberate. The evidence of the witnesses was clear: they believed that the appellants were able to issue invoices showing a separate amount of VAT if they used a 'group' company's VAT registration number on the invoice.

53. Despite this belief, neither appellant used a 'group' company VAT registration number of any of the dozens of relevant invoices produced to us as evidence.

54. Given the clear discrepancy between the witnesses' evidence as to their belief and the actions in fact undertaken in the unauthorised issue of the invoices over a period of months, we find that a choice was taken consistently by the appellants each

time that an invoice was issued to follow a different course to that which the witnesses believed was correct.

55. The evidence of the witnesses is also that they were asked by a customer to correct an invoice which was originally issued showing a separate amount of VAT, and that they chose to make that correction. The relevant appellant in this case again chose not to follow the course which was believed to be correct.

56. We do not agree with Mr Kaney's submission that tangible evidence is a prerequisite to finding that an action is deliberate. We consider that in this case evidence as to whether an action has been taken deliberately can be deduced from the actions actually taken.

57. As the appellants, over a period of several months, consistently did not follow the advice which they believed they had been given, we find that the unauthorised issue of the invoices arose from actions taken deliberately by the appellants.

58. Both appeals are therefore dismissed and the penalty for each appellant stands.

15 ***If the actions had not been deliberate, was there a reasonable excuse?***

59. Given our decision that the actions of the appellants were deliberate, the question of reasonable excuse is no longer relevant.

60. However, for the sake of completeness, we have considered the question of whether the appellants could have a reasonable excuse if their actions had not been deliberate.

61. The reasonable excuse put forward was that the appellants had acted on a belief that they could use another 'group' company's VAT registration number in order to issue invoices showing an amount of VAT. It was further submitted by Mr Kaney that HMRC should have interviewed the relevant Officers to establish whether there was a reasonable excuse.

62. Whether the appellants acted in accordance with such a belief does not require any evidence from HMRC. Evidence from the HMRC Officers apparently involved would only assist in cases of either misdirection or legitimate expectation which the appellants have agreed are outside the jurisdiction of this Tribunal.

63. Accordingly, we have made no findings as to whether and when any meeting took place. Although there has been some confusion on the point in the appeal documentation, it was agreed in the hearing that the appellants' appeal in this context can only be on the basis that the appellants consider that they each have a reasonable excuse because they had acted in accordance with their belief that they had been advised by HMRC to use the VAT registration number of another group company.

64. The question to be determined is not whether the belief itself was reasonable, as that was agreed to be outside the jurisdiction of the Tribunal, but whether acting on that belief is a reasonable excuse. The specific date of any meeting or discussion is

therefore not relevant to whether the appellants acted in accordance with that belief and so is not considered further.

5 65. As noted above, the evidence of the witnesses as to their belief as to the position was clear. However, it is equally clear that this belief was not in fact acted upon in the issue of any of the invoices in this case.

66. Accordingly, we find that even if the appellants' actions had not been deliberate, they would have no reasonable excuse for the unauthorised issue of the invoices showing separate amounts of VAT.

67. **Conclusion**

10 68. Both appeals are dismissed.

69. 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.

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20 **ANNE FAIRPO**
TRIBUNAL JUDGE

RELEASE DATE: 14 JANUARY 2016

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