[2019] UKFTT 682 (TC)

TC07455

Keywords VAT – appeals against assessments and penalties- requirements for the contents of witness statements to be in witness' own words considered- restaurants and zero rated supply of cold food – fabricated invoices – best judgement - Khan v Commissioners for HM Revenue & Customs [2006] EWCA Civ 89 and Pegasus Birds Ltd v Commissioners of HM Revenue & Customs [2004] EWCA Civ 1015 considered and applied. Appeals dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00550
TC/2018/00506

BETWEEN

(1) HASSAN AHMAD
(2) RAJ OF INDIA (YORKSHIRE) LTD **Appellants**

-and-

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

TRIBUNAL: JUDGE MALEK
MRS SONIA GABLE

Sitting in public at York House, 31 York Place, Leeds LS1 2ED on 14 -15 October 2019

Mr. Taher Nawaz for the Appellants

Mr. Hilton, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The First Appellant ("Mr Ahmad") appeals against his assessment to penalties, which arose by virtue of the fact that he was a director of Roy Traders Ltd ("ROY") and the Respondents ("HMRC") saw fit to issue him with a personal liability notice ("PLN"). He was assessed to penalties in the amount of £10,502.80. He is also a director of the Second Appellant ("RAJ").

2. RAJ appeals against assessments to VAT and subsequent penalties imposed by HMRC. The relevant decisions are:

(1) assessment in the sum of £26.396.00 for periods 05/09 – 11/16 based upon an apparent lack of evidence of zero-rated sales of cold food being made;

(2) assessment in the sum £7,118.00 of disallowed input tax in periods 02/14, 11/14 – 08/15 and 02/16 –08/16 based upon allegedly fabricated/altered invoices;

(3) assessment in the sum of £1,528.00 of disallowed input tax for periods 05/14, 02/15, 08/15 and 02/16 on the basis that the invoices were allegedly not proper to the company;

(4) penalties in the sum of £11,548.12 for periods 05/09 - 11/16 in respect of false declarations of zero-rated sales (deliberate but not concealed);

(5) penalties in the sum £5,744.70 for periods 05/09 – 08/12, 02/14, 02/15 – 08/15 and 02/16 – 08/16 in respect of the fabricated invoices (deliberate and concealed);

(6) penalties in the sum of £389.63 for periods 05/14, 02/15, 08/15 and 02/16 in respect of the invoices not proper to the company (careless); and

(7) penalties in the sum of £343.50 for periods 08/13 – 02/17 relating to Road Fuel Scale Charge (careless).

THE LAW

The burden and standard of proof

3. In the case of assessments to tax, once validly made and issued, the burden is on the Appellant to show that the assessment is seeking an excessive amount (i.e. that the amount stated is too high or wrong in principle or both).

4. In the case of penalties and the PLN, HMRC accept that the burden lies with them.

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

Statutory provisions and case law

6. The relevant statutory provisions and case law referred to in this judgment are identified in the body of this decision.

THE EVIDENCE AND FINDINGS OF FACT

Evidence

7. Evidence on behalf of HMRC was given by Mr. Burtenshaw. He adopted his witness statement and chose to affirm. He was not, as he freely acknowledged, the officer responsible for the decisions under appeal – that being Ms. Kellow who no longer works for the Respondent. As such there were limits to what he could usefully say. However, we found him

to be a reliable, honest and informed witness. He was cross examined at great length by Mr. Nawaz, during the course of which he remained calm and civil – despite provocation.

8. Evidence for the Appellants was given solely by Mr. Ahmad. Mr. Ahmad gave his evidence through an interpreter - it being the case that English was not his first language. He also chose to affirm and adopted (and signed) a witness statement which had been drafted on his behalf by Mr. Nawaz. Although Mr. Ahmad asked for clarification of some of the questions that were put to him we have no hesitation in concluding that he fully understood (with the aid of appropriate interpretation where required) these questions. Indeed, we viewed Mr. Ahmad's ability and willingness to seek clarification as a good indicator of his understanding of the proceedings. To the extent that Mr. Nawaz argued that Mr Ahmad was a "vulnerable witness" we reject this as it flies in the face of the observable facts and was an argument not based on the evidence.

9. Witness statements should, both as a matter of professional conduct (see for example the Bar Council's guidance on preparation of witness statements in civil proceedings) and of general good practice, be written in the witness' own words. There are, of course, good reasons why these rules should be observed – the most important of which is that doubt may otherwise be cast on the evidence given. In the present case we have serious doubts that the witness statement adopted by Mr Ahmad was written in his own words. It is highly unlikely, for example, that someone who has had "no formal education", requires the aid of an interpreter and appears to know nothing about the tax system (which he says he leaves entirely to his accountant) would be able to assert, as he does at paragraph 9 of his statement, "I *understand that the reason for the earlier registration is that there was a transfer of a going concern (TOGC).....if it was then I have to agree that TOGC applies…*". We, accordingly, treated with caution Mr. Ahmad's evidence, but nonetheless gave it appropriate weight as it was given under oath.

10. In addition to the witness statements and oral evidence that we heard, the parties relied upon a bundle of documents produced by HMRC.

Findings of fact

Registration of ROY

11. ROY was incorporated on 15 November 2011 and dissolved on 23 September 2018. Mr. Ahmad was a director for the entire duration.

12. The corporation tax returns showed turnover of £98,988 from 15 November 2011 (the date of incorporation) to 30 November 2012 and £149,205 for the year ended 30 November 2013.

13. The Respondents' position was that there had been a transfer of a going concern from Tandoori Night Limited (which company was registered for VAT, traded as a restaurant from the same premises and had Mr. Ahmad as a director and shareholder) to ROY on 15 November 2011 and accordingly ROY should have been registered for VAT since that date. It was not actually registered for VAT until 1 January 2014.

14. Mr. Ahmad did not dispute that ROY ought to have been registered for VAT since 15 November 2011. Although he says in his statement that "*I am not sure if the previous business was registered on 15/11/11*" by the time it came to cross examination he appears to have accepted HMRC's assertion that Tandoori Nights Limited was VAT registered on 15 November 2011. Certainly he did not challenge HMRC's assertion. Instead the explanation he offered was that he did not know the VAT rules with regards to registration and that it was for his accountant to register ROY. He simply did whatever his accountant told him to do and he

did not think it strange that the same business now carried on through another company (ROY) suddenly started to pay no VAT.

15. We did not find this explanation at all convincing. Mr. Ahmad appears to be an experienced restaurateur and businessman who, by his own accounts, had previously been involved in a hearing before this Tribunal (or its pre-cursor) in 1999 arising out of assessments to VAT. We do not believe that Mr. Ahmad is as ignorant of the VAT rules as he claims.

Cold food supplies at ROY

16. HMRC officers visited the restaurant owned by ROY on 10 February 2016 and then again on 29 February 2016. They saw no advertisement to suggest that cold food was available for sale and the menu did not make mention of it. Although the relevant officers did not appear before us to give evidence we have their contemporaneous notes and the menu that they took from the restaurant.

17. Mr Ahmad said that there was usually an advertisement in the window, but this had been removed temporarily [par 8.4 of his statement]; that regular customers knew about the service and that leaflets advertising cold food existed. However, there was no evidence, other than Mr. Ahmad saying so, to back these assertions up. The "customer survey / statement" [pg 572] provided by customers suggesting that they had purchased cold food offers no assistance at all. It consists of two signatures with nothing to identify the makers of the "statement". To the extent that it was suggested by Mr. Nawaz that the makers of the "statement" were somehow intimidated (and therefore wished to conceal their identity) by "aggressive and corrupt" HMRC officials, we could find no basis for such a submission. Further, Mr. Ahmad failed to produce a copy of the leaflet that he referred to and we have serious difficulty in believing that the leaflet was anything different to the menu.

18. Mr. Ahmad's evidence was that the process for recording cold food sales was that pink food slips would be used to take down takeaway orders - but it was accepted during cross-examination by Mr. Ahmad that these pink slips would be used for both hot and cold takeaways. He explained during cross examination that one copy of the takeaway order was supplied to the customer and the other went to the kitchen. The latter was usually destroyed because it became greasy and "posed a fire risk". Accordingly, individual bills (which might have had something on the back to show that the order was for cold food) were not available or kept as records. The only thing available by way of documentary evidence is handwritten records which Mr. Ahmad said the manager of the restaurant in question would keep which provide a total of the hot and cold food sales for the evening. Mr. Ahmad did not make the records himself and is not able to add more.

19. It follows from what is said above that the record keeping relating to cold food was entirely insufficient. We further find the explanations provided by Mr. Ahmad for the lack of advertising and the failure to mention the availability of cold food in the menu to be unconvincing. In our judgment, it is more likely than not that ROY supplied hot food only.

Cold food supplies at RAJ

20. HMRC officers visited the restaurant owned by RAJ on 29 February 2016 and then again on 7 July 2016. They again saw no advertisement for cold food, but the menu did mention that frozen food was also supplied. Although the relevant officers did not appear before us to give evidence we have their contemporaneous notes and the menu that they took from the restaurant.

21. The same explanation is given by Mr. Ahmad in relation to the lack of window advertising as he gave in relation to ROY; only in the case of RAJ he adds that, at the time, the restaurant occupied by RAJ was being redecorated and the sign had been temporarily removed by the decorator. We find it curious that the signs appear to be temporarily missing for a period

of some five months (being the time between the visits). As such we do not accept Mr. Ahmad's evidence on this score.

22. Mr. Ahmad accepted during cross examination that there were no prices or other details given for frozen foods on the menu. He said that this was because the charge for both cold and hot food was exactly the same. When challenged about this he explained that there would be added cost in packaging cold food and that larger portions would be provided. This explanation, in our judgment, is inherently unlikely. We can see no reason why packaging for cold takeaway food would be any greater than for hot takeaway food. In addition, the idea that a profit seeking enterprise would deliberately provide bigger portions (without advertising the fact), thereby increasing its costs, seems far-fetched. Again, we do not accept Mr. Ahmad's evidence here.

23. The Appellants take issue with HMRC's claim that their officers were told that orders for frozen food had to be placed 24 hours in advance. We accept that there may have been some confusion over this and nothing in our deliberations turns on this.

24. It was put to Mr. Ahmad that the sale of cold food appear to have stopped following the visit from HMRC. Mr. Ahmad denies that this was the reason why the sale of cold food stopped. He says in his statement that it was because on occasion "*customers did not cook the food properly or broke the rules of not reheating and freezing cold food and we were worried that such complaints could lead to health issues for which we could be blamed for and so discontinued this service*". In cross examination he was asked if that was the case "*why did the restaurant owned by ROY stop selling frozen food months earlier*?". Mr. Ahmed responded with something that gave every appearance of having been made up on the spot. He said that it was because this restaurant was in his home town and he had become scared as a result of someone going to jail following the death of a customer from a peanut allergy. Firstly, we cannot see how proximity to the restaurant in question would make Mr. Ahmad more culpable. Secondly, we cannot see how food allergies are exclusive to cold food such that Mr. Ahmad thought that it was only this part of the operation that ought to cease.

25. The same process is used for recording cold food sales using pink slips as for ROY.

26. It again follows from what we say above that not only was the recording keeping relating to cold food sales inadequate, but that it more likely than not that RAJ only supplied hot food.

VAT returns and input tax claims for ROY and RAJ

27. It was not in issue that Mr. Ahmad was a director and shareholder of ROY and RAJ at all relevant times.

28. Mr. Ahmad says that VAT returns were submitted by the managers most of the time. Other than Mr. Mukith he does not identify who those managers were and none of them gave evidence before us.

29. It is not in any real dispute that the invoices at pages 440-448 (relating to ROY) and at pages 452-458 (relating to RAJ) of the bundle are not genuine VAT invoices. They contain VAT numbers that do not belong to the entities in question and in some cases that do not exist. However, Mr. Ahmad says that in all these cases it was the fault of the suppliers. When asked how he managed to encounter 16 suppliers who each provided him with a false invoice during a period of just two years Mr. Ahmad introduced us, for the first time (as no mention had previously been made of him in his statement), to "Charlie". Charlie is the person whom Mr. Ahmad contacts "*to do the work and Charlie then sends people*". Charlie, of course, was not here to give evidence – it being Mr. Nawaz's 'submission' (made without any evidence in support) that he was on the run from the law and had fled to Spain. Neither were any of the "people" who did the work and whom we assume it is being alleged are sub-contractors. Some

of the invoices contain addresses and contact details and it should not have been difficult to contact these suppliers.

30. In addition, no supporting documents, such as bank statements, relating to ROY and RAJ were produced to show payments having been made either to Charlie or his sub-contractors. The explanation given for this by Mr. Ahmad appears to be that, in the case of ROY, the records were given to the liquidator because the company was dissolved on 23 September 2018 and records belonging to RAJ were "apparently cleared up" by a third party not known to Mr. Ahmad following the disposal of the lease and restaurant owned by RAJ on 4 March 2018 [par 2 page 558]. It is astonishing that Mr Ahmad, knowing that HMRC had serious concerns about these invoices as disclosed in their letters dated 13 October 2016, 31 January 2017 and 7 February 2017 chose, in the case of ROY, not to ask the liquidator for copies of supporting documents (including bank statements) and, in the case of RAJ, not to retain any records at all. In any event, one would have thought that, especially in the case of RAJ, it would be a simple matter to ask for replacement bank statements from the bank. This is an option available to Mr. Ahmad even now. It is the more astonishing when one considers that the HMRC's case is that the Appellants fabricated, or caused to be fabricated, the invoices in question.

31. It was put to Mr. Ahmad directly that he had fabricated these invoices. He responded by saying that he didn't know how to. He also denied that it had been done on his behalf.

32. We found Mr. Ahmad's explanations to be inherently implausible and find that, on the balance of probabilities, these invoices were fabricated by him or on his behalf. We say "on his behalf" because we accept that he may have lacked the IT or word-processing skills to generate these invoices himself. However, we think it unlikely that these invoices were generated by employees or others on a "frolic of their own". Mr. Ahmad, as a shareholder, was one of only two people (the other one being his son) who ultimately stood to benefit financially from the under-declaration of VAT by ROY and/or RAJ resulting from the fabrication of these invoices.

33. In the case of two claims for input VAT in the period 12/14 the sum of £322 (relating to Richard and Sons Building Contractors) and the sum of £366 (relating to Andy Ashton Decorators) was claimed and no evidence in support (such as invoices) was provided to substantiate those claims [page 492 of the bundle refers]. Mr. Ahmad appeared to accept that no invoices relating to these claims had been provided following HMRC's request, but denied that he had falsified a VAT claim.

34. At page 449 of the bundle appears a copy of an invoice from Marble Building Products Limited. HMRC accept that this is a genuine invoice, but contend that the supplies were not made to the RAJ. HMRC point to the fact this is an invoice for the supply and fixing of granite worktops delivered to Mr Ahmad's home address. Mr Ahmad's explanation was that the restaurant is not open during the day and deliveries usually come during the day. In our judgment it is more likely that the granite worktops were delivered to and fixed at Mr Ahmad's home address. It seems to us to be unlikely that anyone should arrange for the delivery of heavy items such as granite worktops to an address from which they would need to be moved again in short order. Accordingly, we do not accept that the supplies described in this invoice were supplied to RAJ.

35. At page 450 of the bundle, there appears an invoice from Currys PC World relating to a TV purchased for £1,351.48. The invoice provides the customer's details as Mr. H Ahmad and gives the address as Mr Ahmad's home address. HMRC point out that this is an expensive TV and that the customer's address appears to have been scribbled out. Mr Ahmad's explanation was again that the restaurant was closed during the day and that the TV was installed in the staff room. He denied that this was an extravagant purchase explaining that he wanted something that would not break down and had a long warranty. Given what we say about the

veracity of Mr. Ahmad's evidence elsewhere in this decision we do not accept Mr. Ahmad's explanation at face value. We are not satisfied that this supply was made to ROY for the purpose of its business.

36. At page 460 of the bundle there is an invoice dated 25 February 2015 in the sum of £5,750 plus VAT of £575. The invoice does not bear the name, address or VAT number of the supplier and is, clearly, not a VAT invoice. Further it does not show to whom it is addressed- merely providing a postcode which appears to be crossed out and the words "Raj of India…yo7 1AH" scrawled in manuscript next to it. Mr. Ahmad says that this is an invoice for rent which had the postcode of the wrong restaurant on it. During cross examination he said, for the first time, that the landlord was a "Derek Bowman" and that he (Mr. Bowman) had provided the invoice and he (Mr. Ahmad) didn't think it mattered which restaurant he chose to make the claim for input tax against. During re-examination by Mr. Nawaz it emerged that Mr. Ahmad owned the premises from which RAJ had traded. Despite highly leading questions put by Mr. Nawaz (such as "*Was it the same landlord at York and Thirsk*?"), Mr. Ahmad was wholly unable to explain why a claim for input tax had been made using an invoice supplied by his landlord for a restaurant that traded out of premises that he in fact owned.

37. In relation to RAJ, HMRC accepts that the invoice at page 459 from MEPCO UK Ltd is a genuine invoice, but asserts that the supply was not made in the course of a business. When asked about this in cross examination Mr. Ahmad responded in broken, but perfectly understandable English (without the use of the court interpreter) to say that it was a restaurant expense and that it related to a work permit that he had obtained for a chef. However, other than Mr. Ahmad's assertion in the face of cross examination (no reference to this having been made in his witness statement) there was no other evidence for us to look at – in particular it might have been helpful to have something from the supplier, MEPCO UK Ltd, to confirm the nature of the supply. Had this been the sole issue before us we might have been minded to give Mr. Ahmad the benefit of the doubt. However, we have to look at Mr. Ahmad's evidence as a whole. Given the doubts and reservations we have expressed elsewhere in this decision, we are unable to do that and find that RAJ has failed to discharge the burden upon it.

38. Mr. Ahmad was also taken to page 462 of the bundle by Mr. Hilton. It was explained to him that this was a schedule relating to VAT claims by RAJ which had been disallowed. Mr. Hilton took Mr. Ahmad to the last 5 entries and said that these claims had been disallowed because the relevant invoices had been addressed to a different company. When asked if that was the case by Mr. Hilton, Mr. Ahmad, quite properly, said that it was difficult for him to answer without seeing the invoices. Mr. Hilton explained that these invoices had not been "uplifted" by Ms. Kellow and moved on with his questioning. Given the burden upon RAJ to displace the assessment and there being no evidence proffered by RAJ we are led to the inevitable conclusion that this part of the assessment must not be disturbed.

Road Fuel Scale Charges

39. The assessments made under this head were not in dispute. Mr. Hilton put to Mr. Ahmad that it was the Respondent's case that the behaviour under this head was careless rather than deliberate and that no records of business mileage were kept and that this meant that he had failed to take reasonable care. Mr. Ahmad said that he took staff back and forth and that it was "*all for my business so I am entitled to claim*".

SUBMISSIONS AND DISCUSSION

40. This case turned, mainly, on the facts. For that reason, we have provided detailed reasoning as to why we came to our conclusions on the facts under the heading of 'Evidence

and findings of fact' above. However, there remain some arguments and further discussion which we have found useful to summarise below.

Assessments to tax - RAJ

41. The burden, as set out above, is on the Appellant to show that the assessment is excessive. It is not clear from the way that Mr. Nawaz presented this case whether he also challenged the assessment on the ground that the assessing officer failed to use her "best judgment". We have to assume, for the sake of his client, that this is an argument on which his client wished to rely.

42. The approach that this tribunal should take when faced with a challenge based on best judgment was described by the Court of Appeal in *Pegasus Birds Ltd v Commissioners of HM Revenue & Customs [2004] EWCA Civ 1015* . Carnwath LJ gave the following the following helpful guidance:

> "… The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment…"

43. In *Khan v Commissioners for HM Revenue & Customs [2006] EWCA Civ 89*, Carnwarth LJ again summarised the position as follows:

> "69. …The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> > 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." *(Bi-Flex Caribbean Ltd v Board of Inland Revenue (1990) 63 TC 515, 522-3 PC* per Lord 10 Lowry)."

44. What these authorities establish is that if the assessments made by HMRC are, *prime facie*, right; whether or not they are best judgement assessments, the burden is on the appellant to show that they are wrong.

45. Mr. Nawaz appeared to work on the premises that the burden was reversed and that it was for the Respondent to show that the assessments were, *prime facie*, correct. That appears to be why he spent an inordinately long time cross-examining Mr. Burtenshaw on whether or not Ms. Kellow, the assessing officer, was "*alive or dead*" and repeatedly said that "*HMRC need to support the assessments and show that they are right*". If he did mean that the burden of proof was on HMRC to find the correct amount of tax payable, then he is, in our view, wrong.

46. In the present case, it was for the Second Appellant to show that it supplied cold food to the value claimed and accordingly the assessment relating to this aspect was wrong. On the facts the Appellant was unable to demonstrate this [see paragraphs 20-26 above]. Mr. Nawaz may be right when he says that there is no legal requirement to retain meal slips – certainly the Respondent did not argue to the contrary. However, given the burden on the Appellant, meal bills (had they differentiated between hot and cold food) would have been an excellent source of primary record evidence to place before this Tribunal. Even a sample might have sufficed.

47. There is no serious challenge to the Respondent's contention that the invoices at pages 452-458 (relating to RAJ) of the bundle are not genuine. In fact Mr. Nawaz in his closing said "*we have to take a dive here. You cannot blame the accountants completely*".

48. We have already set out our conclusions on the evidence in relation to the remaining invoices at paragraphs 36-38 above and say no more here.

Penalties – RAJ

49. On an appeal against a VAT penalty for errors in returns this Tribunal can affirm, cancel or substitute its own decision with any that HMRC had the power to make (see paragraph 17 of Schedule 24 to the Finance Act 2007).

50. As set out earlier in our decision, it is for HMRC to prove on the balance of probabilities that the penalties have been properly calculated and assessed in accordance with paragraph 13 of Sch 24.

51. No arguments in relation to "special reduction" or a failure to assess properly were relied upon by Mr. Nawaz. Notwithstanding this, and so that no prejudice is caused to the Appellant, we considered these arguments and concluded that the assessments had been made in line with paragraph 13 of Sch 24. Further, we note that we would only be able to substitute our decision for HMRC's decision in relation to a "special reduction" if we were satisfied that HMRCs' decision was flawed in the judicial review sense (see par 17(3) and 11 of Sch 24). There was nothing before us which would point to that conclusion. Therefore, the only issue before us was whether or not the penalties had been properly calculated.

52. The manner in which penalties must be calculated by HMRC is set out in part 2 of Sch 24. The standard amount is calculated as follows:

> "(1) The penalty payable under paragraph 1 is—
>
> (a) for careless action, 30% of the potential lost revenue,
>
> (b) for deliberate but not concealed action, 70% of the potential lost revenue, and
>
> (c) for deliberate and concealed action, 100% of the potential lost revenue."

53. There is then a reduction for disclosure which is calculated as follows:

> "9 (1) A person discloses an inaccuracy or a failure to disclose an underassessment by—
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.
>
> (2) Disclosure—
>
> (a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and
>
> (b) otherwise, is "prompted".
>
> (3) In relation to disclosure "quality" includes timing, nature and extent.

> 10 (1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.
>
> (2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.
>
> (3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.
>
> (4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.
>
> (5) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.
>
> (6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure."

54. In relation to the penalty of £11,548.12 for periods 05/09 - 11/16 in respect of false declarations of zero-rated sales, the issue before us was whether the 'action' complained of was deliberate, it not being alleged that it was concealed. The 'action' was the declaration of zero rated sales. On the evidence before us we have concluded that it was more likely than not that RAJ only supplied hot food [par 26 above]. It follows then that the decision by RAJ to claim to have made such sales in its returns could only have been deliberate. Although no issue was taken before us by Mr. Nawaz that the disclosure did not attract an appropriate reduction we have reviewed this point and concluded that an appropriate reduction had been made. This penalty is, therefore, properly calculated.

55. In relation to the penalties in the sum £5,744.70 for periods 05/09 – 08/12, 02/14, 02/15 – 08/15 and 02/16 – 08/16, HMRC took the view that the invoices had been deliberately fabricating and then concealed. Given what we say at paragraph 32, we are of the view that HMRC have established, on the balance of probabilities, that RAJ's action was deliberate and concealed. Although no issue was taken before us by Mr. Nawaz that the disclosure did not attract an appropriate reduction, we have reviewed this point and concluded that an appropriate reduction had been made. This penalty is, therefore, properly calculated.

56. In relation to the penalties in the sum of £389.63 for periods 05/14, 02/15, 08/15 and 02/16 in respect of the invoices not proper to the company, HMRC took the view that RAJ's behaviour was careless. Given what we say at paragraphs 37-38 above, we are satisfied that the action in question was, at the very least, careless. Although no issue was taken before us by Mr. Nawaz that the disclosure did not attract an appropriate reduction we have reviewed this point and concluded that an appropriate reduction had been made. This penalty is, therefore, properly calculated.

57. In relation to the penalties in the sum of £343.50 for periods 08/13 – 02/17 in respect of the Road Fuel Scale Charge, HMRC took the view that RAJ's behaviour was careless. RAJ's witness statement on this point reads as follows:

> "…I would say that I am dependent on qualified accountants to do what is necessary and, unless there is evidence to suggest that I had in any way resisted

> the payment of such amounts as needed to be on returns, which I did not, I would humbly submit that I cannot have deliberately avoided VAT"

58. There is no issue that the action taken by RAJ was deliberate. HMRC say that the 'action' in this instance was careless and not deliberate. There is no statutory definition of carelessness in this context, but it is akin to a failure to take reasonable care.

59. Where a taxpayer is asserting that he relied upon someone else to complete the return in question (i.e. an agent) then the burden is on the taxpayer to show that he took reasonable care to avoid the inaccuracy [see paragraph 18 of schedule 24]. The test, with respect, is not whether there was any 'resistance' in making payment. We must consider whether RAJ took reasonable care to avoid the inaccuracy. Whilst, in certain circumstances, it would be reasonable for a taxpayer to place reliance upon professional advice given; in the present case it is not clear at all whether the accountant had been retained to advise (rather than simply process the returns), and what, if any, advice was sought by RAJ or given by its accountant. In any event that advice would be based upon the facts communicated to the accountant. In the circumstances, we are simply told that RAJ relied upon its accountant and Mr. Ahmad's response to why no records were kept of personal use of the vehicles was that "*I think I am using this [sic car] all for my business so I am entitled to claim*". This is not enough to show that RAJ took reasonable care. A full 100% reduction was applied in the case of penalty for disclosure. This penalty is, therefore, properly calculated.

Personal Liability Notice – Mr. Hassan Ahmad

60. Paragraph 19(1) of Sch 24 provides:

> "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."

61. Paragraph 22(1) of Sch 41 makes identical provision for a failure to notify a liability to register.

62. "Officer" for these purposes includes a director.

63. It is not disputed that Mr. Ahmad was a director of ROY at all relevant times. Neither can it be disputed that ROY has been assessed to a number of penalties that are payable by it for a deliberate inaccuracy and / or a deliberate act or failure. The reason why the latter is the case is because ROY has not seen fit to appeal the penalties levied against it and it is not a party to these proceedings. Accordingly, the penalties to which ROY has been assessed must stand good as, most importantly for present purposes, must the basis upon which they have been assessed (i.e. deliberate inaccuracy/failure/act). The only issue for us then is whether, in relation to each penalty levied against ROY, it can be established by HMRC that the deliberate inaccuracy/ failure/act was attributable to the First Appellant.

64. HMRC say that the starting point is that Mr. Ahmad is a director and that staff at the restaurant referred to him as "the boss". He was, HMRC say, the controlling mind behind the business. None of this is denied by Mr Ahmad.

65. Before dealing with the individual penalties, it is useful to deal with one point which is of general application. It was suggested by Mr. Nawaz that Mr. Ahmad did not personally file the relevant returns. If he means to suggest by that that any inaccuracies within could not, therefore, be attributable to Mr. Ahmad then we think that he is wrong about that as a general proposition. It will, of course, all depend on the circumstances. In some cases, it is conceivable that a director has no knowledge or only the briefest overview of what is comprised in a return. In other cases, a director may have intimate knowledge of every invoice.

66. The first issue we have to consider is whether the deliberate conduct which led to penalties for ROY for registering late was attributable to Mr. Ahmad. We are satisfied, for the reasons given at paragraph 14-15 above that it was.

67. The second issue we consider is whether the inaccuracy relating to the supply of cold food was attributable to Mr Ahmad. We have already concluded that we do not need to consider whether this inaccuracy was deliberate (see paragraph 65 above), but if we are wrong about that then, for the reasons given at paragraphs 16-19 above, we so conclude. Mr. Ahmad says that he did not (a) record the cold food sales or (b) submit the relevant VAT returns. The latter is, for present purposes, irrelevant as the return simply records, from the information supplied, the zero rated VAT supplies associated with cold food. In respect of the former we have concluded that there were no supplies of cold food made by ROY as alleged. We do not find it plausible that Mr. Ahmad did not know what was going on in his own restaurant or that he had nothing to do with the supply of financial information relating to his daily takings to the company's accountant. Both propositions appear to us to be inherently implausible.

68. The third issue we consider here is whether the invoices alleged to be fabricated by or on behalf of ROY were attributable to Mr Ahmad. For the reasons set out at paragraphs 29-32 above, we have concluded that they were.

69. The fourth issue for us to consider is whether the inaccuracies resulting from the claims for input VAT flowing from the altered invoices to be found at pages 449-450 of the bundle are attributable to Mr Ahmad. We conclude that they are. The deliveries of both the granite worktops and the TV were made to Mr Ahmad's home address. It is more likely than not that (a) for the reasons set out at paragraphs 34-35 above, these items were for Mr. Ahmad's personal use, and (b) he was responsible for passing the invoices to the relevant person so that a claim for input VAT could be made on a return or returns.

70. For the reasons set out above, we are satisfied, on the balance of probabilities, that HMRC have shown that the conduct complained of (and which in each case resulted in penalties for ROY for deliberate 'action') are attributable to Mr Ahmad.

CONCLUSION

71. For the reasons set out above, we dismiss the appeals before us and uphold HMRC's decisions in each case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ASIF MALEK

TRIBUNAL JUDGE

RELEASE DATE: 7 NOVEMBER 2019