Neutral Citation: [2022] UKFTT 00313 (TC)

Case Number: TC08582

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2020/00114
TC/2021/01417

INCOME TAX – discovery assessments – timeously and competently made – suppression of takings – resumption of continuity – assessments upheld – PENALTIES – whether behaviour was deliberate – yes – whether special circumstances – no – VAT – liability to be registered for VAT on the basis of direct tax assessments – yes – assessment to best judgement – yes – assessment not appealable in absence of returns – appeal dismissed

Heard on: 25 August 2022
Judgment date: 01 September 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: IAN MALCOLM

Between

ANTHONY CALCUTT

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Calcutt

For the Respondents: Ms Victoria Halfpenny, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. There are three issues in this matter, namely:-

(1) An appeal against Discovery Assessments amounting to £5,877.63 raised for the tax years 2010/11 to 2013/14 inclusive pursuant to section 29 Taxes Management Act 1970 ("TMA").

(2) An appeal against penalties imposed under Schedule 24 Finance Act 2007 ("FA07") in a total of £2,880.02 for the years 2010/11 to 2013/14 inclusive.

(3) Whether the appellant should have been VAT registered with effect from 1 April 2011 to 31 July 2015.

2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which we were referred comprised a Bundle consisting of 1174 pages. A further spreadsheet and Schedule were lodged on the day of the hearing. We heard evidence from the appellant and Officers Hamilton and Hendrick.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. At the outset of the hearing the appellant conceded that he no longer appealed the 2012/13 year. Since he was unrepresented we checked that position with him on numerous occasions during the hearing. He had previously agreed with HMRC that there were deliberate inaccuracies in 2014/15 and he had paid the tax and penalties for that year.

The Facts

5. The appellant is a landscape gardener and has been in self-employment since 2005. He registered for self-assessment in June 2005.

6. On 3 October 2016, HMRC opened a section 9A enquiry under TMA into the appellant's 2014/15 Self-Assessment Tax Return ("SATR").

7. On 15 November 2016, Officer Hamilton met with the appellant at his home and conducted a review of his records. During that meeting the following matters were confirmed, namely:-

(a) The appellant confirmed that he believed his tax return to be complete and correct.

(b) He confirmed that he had no rental income during the 2014/15 tax year.

(c) His accountant prepared his tax return based on the records he produced for him.

(d) The nature of his trade had not changed since he started trading.

(e) His only external income apart from landscape gardening had been office work for which he was ultimately not paid since it had not worked out.

(f) He had received no loans in the year 2014/15 and he remortgaged his property in November 2014.

8. Following the meeting the appellant wrote an undated letter to Officer Hamilton confirming that his mother had in fact lent him money and he enclosed various items for the officer.

9. Officer Hamilton wrote to the appellant on 15 January 2017 highlighting the fact that several payments going into his current account were higher than the corresponding invoice amounts. As an inaccuracy was suspected in relation to the figures in the SATR she sent to him fact sheets CC/FS9, The Human Rights Act and Penalties in order to make him aware of his rights.

10. On 20 January 2017, the officer said that she noted the information about his mother but she had also identified a substantial number of deposits into the bank account which she could not reconcile to the sales invoices. She sought further information. She requested the bank statements for the period 1 April 2014 to 31 March 2015 for other bank accounts. She raised a number of queries.

11. The appellant sent another undated letter to the officer stating that his mother had been helping him out and gave him cash and cheques. He conceded that:-

> "I had forgotten" a bank account and he then said "I had rented my house out for two months while I got myself sorted, my mortgage at the time was £1063 per month and I received 2 monthly rent payments of £1450".

He also conceded that a friend had given him a loan. He apologised for mistakes made.

12. On 27 April 2017, the officer wrote to him seeking more detailed information which should be provided by 26 May 2017.

13. On 31 May 2017, he replied to Officer Hamilton confirming further details about apparent loans and again confirmed that the property had been rented out for "one or two months on a short term let". He stated that there was no rental agreement as he had known the tenant.

14. On 23 June 2017, the officer responded pointing out that information available to HMRC indicated that the property had been rented out for rather longer and she requested a full disclosure by 14 July 2017.

15. There was then an undated letter to the officer confirming that his mortgage payments had been £1,063 per month and that he had received £1,400 per month rent. He stated "If that was for longer than the two months that must be the same year then …".

16. On 22 August 2017, the officer received a completed property declaration from the appellant confirming that he had been renting out the property since October 2013. That disclosed that his gross income from rentals was £2,100 in 2013/14, £14,000 in 2014/15 and £9,240 in each of the following two tax years. In oral evidence he explained that he had rented out the property from October 2013 when his wife left the premises.

17. The appellant provided the officer with signed mandates allowing her to approach the tenants directly. On 12 September 2017, the officer wrote to the appellant requesting copies of tenancy agreements (he had said there were none at the earlier meeting) and details of insurance and mortgage.

18. The appellant provided an undated statement which said "Rent payments are highlighted, I received mainly cash payments. Could not find mortgage statements …".

19. On 16 March 2018, the officer had a second meeting with the appellant. The following issues arose:-

> (a) He confirmed that he still believed that the 2014/15 tax return was correct.
>
> (b) There was a discussion about the rental property and the appellant confirmed that sometimes payments were made by direct debit and sometimes in cash but then conceded that it was mainly in cash.

(c) In the interim the appellant had provided a signed rental agreement which purported to be dated 25/10/13 stating that the initial deposit was £1,400 and the rent thereafter was £400 per month.

(d) The officer pointed out that the bank statements indicated that rent had commenced being paid in July 2014. There were other entries recorded as being rent being paid into the bank account.

(e) The appellant denied that the property declaration that he had completed was correct because he could not remember why he had said there was £14,000 for 2014/15.

(f) In the interests of settlement, although she did not accept that the information about rents was accurate, the officer indicated that she would not be pursuing the issue of rental income. However, she told the appellant that he must keep accurate records going forward.

(g) As far as the business was concerned, the officer pointed out that the information received from third parties did not equate with the invoices produced by the appellant.

(h) Ultimately the appellant conceded that invoices provided to the customers were not necessarily the same as the invoices provided to HMRC. He conceded that the invoices he had provided did not accurately reflect the amount he had been paid for the work but could not offer an explanation beyond stating that he was embarrassed.

(i) The officer pointed out that in 2014/15 the deposits into the bank account totalled £101,341.91 whereas his declared turnover was £75,048. There was no explanation.

20. On 7 June 2018, the appellant wrote to HMRC in response to a request dated 9 May 2018 for an explanation as to why the 2015/16 and 2016/17 profits appeared to be low in comparison to earlier years and he explained that he had had a problem with his knee, a problem with resourcing sub-contractors and family issues.

21. On 13 August 2018, Officer Hamilton wrote to the appellant stating that she had concluded her check of his 2014/15 SATR and because the enquiry had uncovered inaccuracies in the return, she intended to make amendments to the return and she had checked the tax position for the earlier years in terms of section 29 TMA.

22. As far as the 2014/15 year was concerned, having reviewed the deposits into the bank account and the sales invoices, the officer had identified a total discrepancy of £18,105.93. As a result the turnover had increased by 24.13% to £93,153.93.

23. As far as the earlier years are concerned, the officer had considered the years from 2010/11 after the appellant had been separated from his wife and had applied the presumption of continuity. On the basis that the sales figures had been suppressed by 24.13% in 2014 the turnover figure for each of the earlier years was increased by 24.13%. The total amount of additional tax and NICs due to HMRC was £6,408.63.

24. The officer confirmed that, on that basis, the appellant should have been registered for VAT from 1 April 2011 and that HMRC would write to him separately in regard to that issue. She stated that if he had any further information that he wished to submit, then he should send it to her by 12 September 2018.

25. On 12 September 2018, the appellant emailed HMRC stating that his business had never been exactly the same in each year, as some years had been better than others. He indicated that the mistakes that he had made in 2014/15 should not affect the earlier years. He provided no supporting information.

26. On 17 September 2018, Officer Hamilton responded stating that she had said to him on 13 August 2018 that he should send her any further information if that was available. She gave him further time to provide any such information.

27. On 19 September 2018, Officer Hendricks wrote to the appellant, referencing Officer Hamilton's letter of 13 August 2018, confirming that she deemed that his business had a VAT registration liability with effect from 1 April 2011 because his rolling 12 monthly turnover exceeded the VAT registration threshold as at 28 February 2011. The registration threshold at that time was £70,000. She confirmed that the business therefore had a VAT registration liability for the period from 1 April 2011 to 31 July 2015. She asked for further information from him in regard to any zero rated or exempt sales together with a schedule of VAT incurred on business sales for the period under appeal.

28. On 27 September 2018, the appellant wrote to Officer Hamilton providing further records including more invoices.

29. On 17 October 2018, Officer Hamilton responded pointing out that the appellant had previously told her at the meeting on 16 March 2018 that the invoices provided to HMRC did not reflect the actual amount customers paid him. Therefore she did not accept the records provided as evidence of income received. She asked for statements for all bank accounts in his name or the business name for the period 1 April 2010 to 31 March 2014.

30. On 8 February 2019, Officer Hamilton wrote to the appellant stating that she had now completed a full review of the 2012/13 tax year including a reconciliation between jobs invoiced and amounts deposited into the bank and had identified discrepancies between those amounts. There were several large deposits into the bank for which there was no corresponding job.

31. Having established that similar errors had occurred in that year as had occurred in 2014/15, she said that that had confirmed her view that it was reasonable to apply the presumption of continuity. Having reviewed the matter further, she had decided that the total amount of additional tax and NICs due to HMRC was £6,408.63. She also stated that she would be considering a deliberate penalty.

32. On 15 February 2019, Officer Hendricks wrote to the appellant referencing her earlier letter and Officer Hamilton's letter of 8 February 2019. She again asked for information about zero rated or exempt supplies and information about VAT on expenses. She sought a response by 1 March 2019.

33. On 1 March 2019, the appellant wrote to Officer Hamilton asking for details about which large amounts had been deposited without job references. He explained that since his divorce he had had problems with his knee and his mother and friends had loaned him money which he had repaid. Officer Hamilton responded on 15 March 2019 asking for further details of loans and supporting evidence.

34. On 26 March 2019, Officer Hendricks wrote to the appellant stating that, as he had not filed any VAT returns, in terms of section 73 of the Value Added Tax Act 1994 ("VATA"), HMRC were assessing the amount of tax payable by him as being £42,961. That figure was calculated by multiplying the output tax by 15%.

35. Since no returns have been filed, in terms of section 83 VATA that assessment is not appealable.

36. In an undated letter, the appellant wrote to Officer Hamilton enclosing bank statements for the year April 2012 to March 2013 with both jobs and payments having been highlighted. He also enclosed his pay-in books and cheque books. He had marked up the cheque book with

the alleged loan payments. Within those statements, the appellant had written invoice numbers next to several deposits for which the associated invoices showed lower amounts.

37. On 31 May 2019, Officer Hamilton responded stating that the information provided had led her to believe that the turnover had been understated. She gave examples of a deposit of £2,805 on 3 August 2012, for which he had provided a job number but the invoice for that job was only in the sum of £805. Similarly there was another deposit of £1,378 but the invoice was only £1,258. She also raised a number of other issues. In summary, the amount of deposits into the bank account attributable to sales, plus cash invoice but not banked, totalled £71,924.79 whereas the previously declared turnover was £57,997. She informed the appellant that unless he could provide indisputable evidence that his turnover was correct, HMRC would proceed to issue the relevant assessments and close the enquiry.

38. On 14 June 2019, the appellant reiterated his stance that the only issue was in 2014/15 but he provided no further evidence.

39. On 30 July 2019, HMRC issued a Closure Letter and Closure Notice for the year ending 2014/15 and section 29 Discovery Assessments for the years 2010/11 to 2013/14. Those were based on the original figures set out in HMRC's letter of 13 August 2018.

40. On 2 August 2019, a penalty explanation letter was issued to the appellant for the tax years 2010/11 to 2014 on the basis that the appellant's behaviour had been deliberate.

41. On 19 August 2019, Officer Hendricks wrote to the appellant telling him that the VAT assessment had been reinstated and that there would be a failure to notify penalty.

42. On 27 August 2019, the appellant requested an appeal of the decision and postponement of the tax and on 3 September 2019 appealed the penalties.

43. On 30 August 2019, the appellant wrote to Officer Hendricks stating that he had made mistakes in 2014 but he did not accept the figures for the earlier years.

44. On 3 September 2019, the deliberate penalties were issued for the tax years 2010/11 to 2014/15 allowing a total reduction of 60% for telling, helping and giving. The appellant has not appealed the 2014/15 penalty.

45. On 4 September 2019, Officer Hamilton wrote to the appellant enclosing further copies of her letters of 13 August 2018 and 31 May 2019 stating that in the absence of any new information she was unable to change her decision. She pointed out that if he wished to appeal ant decision relating to VAT he needed to contact the VAT officer.

46. On 2 October 2019, the appellant requested a review of the earlier year assessments and associated penalties.

47. On 3 October 2019, the appellant wrote to Officer Hendricks stating that he still did not agree the figures for the earlier years but accepted the decision in the Closure Notice for 2014/15.

48. On 4 October 2019, the appellant appealed the VAT assessment and penalty but on 8 November 2019 changed that to a request for a review.

49. On 15 October 2019, a revised review of the matter letter was sent to the appellant since the earlier letter had not included the opportunity for the appellant to request a formal review.

50. On 27 November 2019, a review conclusion letter was sent to the appellant upholding the discovery assessments and associated penalties.

51. The appeal was notified to the Tribunal on 23 December 2019.

52. On 23 January 2020, a late VAT review request was accepted by HMRC and on 18 February 2020 Officer Hendricks advised the appellant that the assessment was not an appealable matter and informed him how to request a review.

53. On 18 February 2020, Officer Hendricks wrote to the appellant telling him that the review team could not review the VAT assessment because it was not an appealable matter. She explained to him that:-

(a) The assessment could not be appealed unless a return for the period being assessed was made and either the amounts assessed paid or a successful hardship application made.

(b) His options were:-

(i) to submit a return and either pay the £42,961 or apply for hardship and then ask for a review or appeal or,

(ii) ask for a review or appeal against the liability to be registered for VAT for the period or,

(iii) wait for the outcome of his appeal against the direct tax assessment.

54. On 4 March 2020, the appellant advised HMRC that he wished to await the outcome of his direct tax appeal before appealing the VAT assessment.

Discussion

Income Tax

55. The Discovery Assessments were issued under Section 29 TMA.

56. Section 29 TMA is headed "Assessment where loss of tax discovered" and the relevant subsections read:

"Section 29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax

(2) ….

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above".

57. In relation to the discovery assessments, it is for HMRC to show that they made a discovery and that the assessments were issued within the statutory time limits. There is no dispute that in this case there are no timing issues.

58. The officer only discovered the loss of tax after the section 9 TMA enquiry had been opened. Officer Hamilton has furnished a detailed analysis of the bank statements, invoices and other information provided by the appellant and has established that takings were suppressed in each of the years 2012/13 to 2014/15 inclusive. Her analysis is wholly consistent with her estimated figures based on the presumption of continuity.

59. In fact, her analysis for 2013/14 shows greater discrepancies than those assumed under the presumption of continuity. It is therefore in the appellant's favour that the presumption of continuity is used rather than the actual figures.

60. It is then for the appellant to show that the assessment should be set aside or reduced.

61. In *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)*[1] at 667, Lord Hanworth MR stated:

"Now it is to be remembered that under the law as it stands the duty of the [Tribunal] who hear this appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to [the Tribunal] by examination of the Appellant…or by other lawful evidence, that the Appellant is overcharged by any assessment, the [Tribunal] shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the [Tribunal is] to hold the assessment as standing good unless the subject - the Appellant - establishes before the [Tribunal]…that the assessment ought to be reduced or set aside."

62. HMRC relied upon a quotation from Walton J in *Johnson v Scott* (HM Inspector of Taxes)[2]. Sadly, the quotation in the Amended Statement of Case at paragraph 76 is not accurate but, in any event, it is appropriate to put it in greater context and quote a longer section. Walton J stated:-

[1] [1927] 11 TC 657 at 667
[2] [1978] 52 TC 383 at 394

"Indeed, it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all to one person only –the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than overestimates as well. But what the Crown has to do in such a situation is, on the known facts, make reasonable inferences…The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference, of whatever nature, falls to be made, one invariably speaks of a 'fair' inference. Where, as in the case of this matter, figures have to be inferred, what has to be made is a 'fair' inference as to what such figures may have been. The figures themselves must be fair."

63. At paragraph 77 of their Skeleton Argument, HMRC also relied on a quotation from Walton J in *Nicholson v Morris*[3]. Again, the quotation is not accurate but, again, it is appropriate to put it in a greater context and quote a longer section, namely:-

"In this day and age most people have at any rate a bank account, and with a little ingenuity the statements of a bank account can be analysed to provide a wealth of information as to how much a person has received, how much it has cost them to live, and so on and so forth … If not, he may have had other material. … what on earth could I or anybody else at this stage, in the total absence of evidence, substitute for them? The answer is it is a complete and utter impossibility; and that is why, of course the Taxes Management Act 1970 throws upon the taxpayer the onus of showing the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer and chapter and verse for the right answer, and it is idle for any taxpayer to say to the Revenue, 'Hidden somewhere in your vaults are the right answers: go thou and dig them out of the vaults'. That is not a duty of the Revenue. If it were, it would be a very onerous, very costly and very expensive operation, the costs of which would of course fall entirely on the taxpayers as a body. It is the duty of every individual taxpayer to make his own return and, if challenged, to support the return he has made, or, if that return cannot be supported to come completely clean, and if he gives no evidence whatsoever, he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered."

64. Section 50(6) TMA provides that if, on appeal, the Tribunal decides that the appellant is overcharged by an assessment or a self-assessment "… the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good". There is also power, in section 50(7) TMA to increase the assessment if the Tribunal decides that the appellant has been undercharged.

65. The relevant provisions of Section 12B Taxes Management Act 1970 ("TMA") read as follows:

"Records to be kept for purposes of return

(1) Any person who may be required by a Notice … to make and deliver a term for year of assessment or other period shall –

[3] 51 TC 95

(a) Keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(b) Preserve those records until the end of the relevant day, that is to say the day mentioned in subsection (2) below, or where a return is required by notice given on or before that day, whichever that day and the following is the latest …

(2) In the case of a person carrying on a trade, profession or business alone or in partnership –

(a) The record is required to be kept and preserved under subsection (1), or (2A) above shall include the records of the following, namely

(i) all amounts received and expended in the course of the trade, profession or business and the matters in respect of which the receipts and expenditure take place; and

(ii) in the case of a trade involving dealing in goods, all sales and purchases of goods made in the course of the trade …".

66. In this case, not only were there inaccurate records, being the invoices produced to HMRC, but clearly full records were not kept. He had been paid in cash for some jobs and not all the cash had been deposited. Given that all HMRC had were the demonstrably false invoices which were not credible, and there were no other records of cash, it was difficult to accurately assess how much cash had been received but not accounted for. We accepted Officer Hamilton's evidence that she had erred on the side of caution and included cash at the lowest possible level.

67. The basic problem in this appeal is that the appellant has focussed on the fact that, in their Statement of Case, HMRC had established very clearly that the evidence for 2012/13 demonstrates exactly the same problems as in 2014/15. He has therefore now conceded that he does not contest 2012/13 but he continues to argue that he has produced bank statements referenced to invoices, cheque stubs etc for the other years and the presumption of continuity should not apply.

68. However, Officer Hamilton's very clear evidence, supported by the detailed analysis in the Bundle was that she had done exactly the same exercise for 2013/14 as for 2012/13 and 2014/15. The actual discrepancy that had been established for 2013/14 was greater than the presumption of continuity figure. That reinforced her view that her calculations on presumption of continuity were correct.

69. The presumption of continuity is derived from *Jonas v Bamford*[4] which states:-

"Once the Inspector comes to the conclusion that, on the facts which he has discovered, [the taxpayer] has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly upon the taxpayer."

[4] [1973] STC 519

70. The appellant has not produced any credible evidence to displace the presumption of continuity. On the contrary, it was put to him that in order to re-mortgage his home in 2014, obtaining an interest only mortgage of £319,705 for a 15 year term, he would have had to have provided the bank with evidence of net worth that could support that. His declared taxable profit in 2011/12 was £8,834 and in 2012/13 it was £9,452. He said that he could not remember what information he had provided but he conceded "I did earn more". All he could say was that the mortgage was a buy to let mortgage. On the balance of probabilities he must have produced significant evidence of earnings and/or capital to the mortgage lender.

71. Whilst HMRC accept that there will be fluctuations in any business, including that of the appellant, he has conceded that he has always traded in the same way and the ratios in the business remained broadly consistent.

72. The appellant resolutely adhered to his stated position that there had been errors in 2012/13 and 2014/15 only. He was wholly unable to explain why he argued that his figures for 2013/14 were accurate yet Officer Hamilton had produced a detailed analysis of the information which he had provided and on which he apparently still relied. He could not say why he accepted her findings for the years "on either side".

73. As the findings in fact show, the appellant has repeatedly given HMRC incorrect information. He has not kept full and proper records. He has suppressed his takings, by his own admission, in two of the five years investigated by HMRC, and he has failed to produce to the Tribunal any evidence to displace the assessments for the other three years.

74. We find that Officer Hamilton discovered a significant loss of tax.

75. We find that the assessments were appropriately and timeously raised by the Officer and they stand good.

Penalties

76. HMRC relied on *Clynes v HMRC*[5] ("Clynes")at paragraph 86 for the proposition that behaviour is deliberate if a taxpayer "…consciously or intentionally chose not to find out the correct position".

77. In this case the appellant's behaviour goes well beyond that.

78. They also quote *Clynes* at paragraph 82 which reads:-

> "…for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way."

We find that the appellant's behaviour went beyond being only "to some extent".

79. There are numerous Tribunal decisions on the meaning of deliberate in the context of penalties. Although we are not bound by them, we agree with what is stated in the following two cases.

80. In *Auxilium Project Management Ltd v HMRC*[6] the Tribunal said:

> "63. In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer

[5] [2016] UKFTT 369 (TC)
[6] [2016] UKFTT 249 (TC)

failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

81. The appellant knew that he had rental income and he deliberately hid that. Although it does not form part of the assessments, it shows the appellant's attitude to his SATRs. He produced invoices to HMRC that he knew were inaccurate. He knew that the deposits into his bank, even without the cash payments received but not banked, exceeded his declared turnover.

82. Secondly, in *Kinesis Positive Recruitment v HMRC*[7] the Tribunal stated:

> "56. The Tribunal [in a previous case] approached the question of whether behaviour was deliberate by considering whether the action was 'taken consciously where there was an appreciation that there was a choice.' We consider that is a useful starting point but that also regard should be had to the ordinary meaning of the word 'deliberate' which, according to the Oxford English Dictionary, is as follows:
>
> > 'Well weighed or considered; carefully thought out; formed, carried out, etc with careful consideration and full intention; done of set purpose; studied; not hasty or rash.'"

83. We find that there was a conscious pattern of behaviour by the appellant over a period of years that was deliberate. He most certainly has not taken reasonable care with his tax returns in the relevant period.

84. In terms of paragraph 4 of Schedule 24 FA07 the maximum penalty for deliberate behaviour is 70% of potential lost revenue. That can be reduced due to the quality of disclosure to a minimum of 35% for deliberate inaccuracies.

85. HMRC have categorised his behaviour as "deliberate but not concealed" and disclosure was prompted. They have applied a 60% reduction for "quality of disclosure" (10% for telling, 20% for helping and 30% for giving) in terms of paragraph 9(1) of Schedule 24 FA07.

86. We consider that reduction to be generous in all the circumstances of this case. HMRC did consider whether to reduce the penalty further in terms of paragraph 11 of Schedule 24 FA07 as a Special Reduction because of special circumstances. They decided not. We agree. The Officer's conclusion was not flawed. She did not take into account irrelevant considerations or fail to take into account relevant considerations.

87. We uphold the penalties.

VAT

88. Officer Hendrick's clear evidence was that she had apportioned the annual turnover figures produced by Officer Hamilton and the turnover figure identified in the appellant's 2015/16 SATR to calculate the period when the appellant would have been liable to VAT which was 1 April 2011 to 31 July 2015.

89. We agree with her decision dated 26 March 2019 that the appellant should have been VAT registered for the entirety of that period. In the absence of VAT returns or full records the VAT assessment could only be made to best of judgement.

90. Although the VAT assessment which followed from that decision is not an appealable decision before this Tribunal because of the lack of returns, for the appellant's benefit we confirm that we find that it was made to best of judgment.

[7] [2016] UKFTT 178 (TC)

91. In *Khan v HM Revenue & Customs*[8], Carnwarth LJ (as he then was) 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 Lowry)."

and at

> "73…But, as to the precise calculation of the amount of tax due, in my view, the burden rests on the appellant for all purposes."

92. Where the issue of best of judgment arises, it is to be determined by reference to the material available to HMRC at the time their assessment was made.

Decision

93. For all these reasons the appeal is dismissed.

94. The discovery assessments and penalties are upheld.

95. The appellant should have been VAT registered for the period 1 April 2011 to 31 July 2015.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 01 SEPTEMBER 2022

[8] [2006] EWCA Civ 89