Neutral Citation: [2023] UKFTT 452 (TC)

Case Number: TC08828

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00788
TC/2021/00790

VAT – whether the first appellant was entitled to the disputed input tax claimed on VAT returns – no – whether the penalty is due on the basis that the behaviour leading to the inaccuracies was deliberate – yes – Personal Liability Notice – whether deliberate inaccuracy – yes – appeals dismissed

Heard on: 1 March 2023
Judgment date: 24 May 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER SIMON BIRD

Between

COONLEY TRADING LIMITED

First Appellant

And

ADEKUNLE OMISAKIN-ADEYELA

Second Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Adekunle Omisakin-Adeyela

For the Respondents: Ms Kelly Clark, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 2 February 2021, Coonley Trading Limited ("the company") appealed two decisions by HMRC namely:-

(a) A Notice of VAT assessments made under section 73 of the Value Added Tax Act 1994 ("VATA") for the periods ending 10/17 to 04/19 inclusive in the sum of £25,272. That was subsequently amended to the sum of £17,454 by a decision in an email dated 7 November 2022 and confirmed by letter on 8 November 2022. Latterly it was further amended by a decision dated 8 March 2023 to the sum of £11,400.

(b) A decision dated 24 December 2020 to charge penalties under Schedule 24 of the Finance Act 2007 ("FA07") in the sum of £16,363.59 due to inaccuracies within the company's VAT returns for the periods 10/17 to 04/19. Those penalties were subsequently amended to £10,385.11 in a decision issued on 3 December 2022 and amended to £7,281 in a decision issued on 24 March 2023.

2. The second appellant appealed a Personal Liability Notice ("PLN") issued to him on 6 January 2021 in relation to 100% of those penalties. As the penalties were amended, the PLN was subsequently amended on 19 December 2022 and on 24 March 2023.

3. We had a documents and authorities bundle extending to 1066 pages and a supplementary bundle extending to 14 pages with a further seven appendices.

4. On 30 March 2023, HMRC lodged a further supplementary bundle extending to 29 pages.

5. On 21 February 2023, the appellants had provided detailed further information to HMRC and in light of that information HMRC had decided to further amend the VAT assessments, the penalties and the Personal Liability Notice. Although those decisions had been intimated to the appellants, it had not been possible to issue those prior to the hearing.

6. Accordingly, in Directions dated 2 March 2023, HMRC were directed to lodge with the appellants and the Tribunal the amended VAT assessments, penalties and Personal Liability Notice together with a Closing Submission explaining those. That was done on 30 March 2023. Direction 2 of those Directions gave the appellants until no later than 14 April 2023 to lodge with the Tribunal and HMRC a reply to the Closing Submissions but as at 17 May 2023 no reply had been received.

7. 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.

8. We heard evidence from the second appellant and Officer Paul Addison.

The background

9. On 5 April 2017, the company registered for VAT detailing its business activities as being that of plumbing and drainage, heating and plumbing contracting. It was a franchise that the second appellant had purchased. The second appellant confirmed that all the quarterly VAT returns "…resulted in refunds to the company" "due to our expenses being more than the sales".

10. On 21 August 2019, the company's claim for a repayment of £1,169 for the VAT period ending 07/19 was questioned by HMRC.

11. On 2 September 2019, HMRC wrote to the second appellant to arrange a visit to check the VAT records of the company. HMRC also requested that the appellants should make sure that the records for the periods from 1 August 2017 to 31 July 2019 were available for the visit.

The list of records included annual accounts, business bank statements, the VAT account and related working papers, accounting books, sales and purchase invoices, documents such as contracts and details of vehicles. The officer stated:-

> "If it is difficult for you to get some of the records together by the date of the visit, please phone me as soon as possible…".

No such call was made.

12. On 25 September 2019, HMRC visited the company and the second appellant who was the director and owner of the company stated that the VAT records were held in storage. He declined an offer of assistance to retrieve the records citing health and safety as a reason. HMRC were provided with invoices dating from April 2019 to July 2019. On 27 September 2019, a series of invoices covering the period 07/19 were received by email.

13. On 1 October 2019, Officer Addison wrote to the company requesting the VAT account records for the period 1 August 2017 to 30 April 2019 since the previous request on 2 September 2019 had not had a reply. The officer pointed out that in addition to sales and purchase invoices he also required working papers, cash books and petty cash books, documents such as contracts and correspondence relating to sales, business bank statements and annual accounts.

14. On 11 October 2019, the second appellant wrote to HMRC stating that he had visited the storage unit and he was "unable to locate the laptop and the relevant paperwork therein". He said that he was considering closing the company due to continuing financial losses. He indicated that he would revert to the officer "… later, but would have to be for some time" (sic).

15. On 15 October 2019, an Information Notice under Schedule 36 Finance Act 2008 ("the Notice") was issued to the company with a deadline for compliance of 13 November 2019. There was no response and a penalty notice was issued on 22 November 2019 in the sum of £300.

16. On 9 January 2020, Officer Addison called the second appellant warning him about further penalties. He was told that the records were in storage surrounded by heavy boxes and were difficult to retrieve. The second appellant stated that the company had not traded since September 2019. He stated that he had terminated his franchise agreement. The officer explained that he still required sight of the records and he gave the appellant until 23 January 2020 to furnish the information.

17. On 4 February 2020, Officer Addison wrote again to the company reiterating the request for the records and confirming that daily penalties were being incurred. There was no response.

18. On 12 March 2020, the Notice of Assessment for VAT of £25,272 was issued. The appellant wrote to HMRC on 3 April 2020 requesting a review but that letter was not received by HMRC.

19. On 14 October 2020, HMRC wrote to the company with a penalty consideration letter. That letter made it clear that the company's VAT returns for the period 1 August 2017 to 31 July 2018 and 1 August 2018 to 31 July 2019 showed a combined deficit between gross outputs and inputs of £154,862.70. It was pointed out that HMRC had been told during the VAT visit that the losses had been supported by an introduction of capital into the company but no evidence had been provided.

20. On 4 November 2020, the second appellant replied enclosing a copy of a personal bank statement from April 2017 and a copy of his letter of 3 April 2020.

21. On 24 December 2020, HMRC issued the Notice of Penalty assessment.

22. On 6 January 2021, the PLN was issued.

23. On 2 February 2021, the company submitted an appeal to the Tribunal which stated that:-

(a) The business ceased trading in June 2019.

(b) Three quarterly returns with the supporting records covering the period August 2017 to April 2018 had been sent to HMRC in December 2020 and had not been taken into account.

(c) The output tax on sales had not been taken into account. The evidence of sales was in the bank statements for the business which had been provided to HMRC.

(d) HMRC's assumptions had been inaccurate.

(e) He had given HMRC all the bank statements for the business and those had been audited at the VAT visit.

24. On 24 February 2021, in response to a query from HMRC as to whether the company wished a review of the penalties as well as the assessments, the second appellant confirmed that both should be reviewed.

25. However, in the Review Conclusion letter dated 8 July 2021, HMRC pointed out that the offer of a review of the decision to raise penalties had been made after the appeal had been made to the Tribunal. Consequently in terms of section 83C(2) VATA, HMRC were prevented from undertaking a review of the penalty decision. The Review Conclusion letter considered only the assessments and upheld the decision.

26. On 23 and 31 May 2022, following receipt of HMRC's Statement of Case in these appeals, the second appellant provided HMRC with:-

(a) Expense and income reports for the period August 2017 to April 2018.

(b) Bank statements dated between August 2017 and May 2018.

(c) Expense and income reports for the period May 2018 to April 2019.

(d) Bank statements dated between May 2018 and May 2019.

27. On 24 June 2022, HMRC responded explaining that the evidence had been considered but it did not alter HMRC's position. It was noted that on two occasions the second appellant had advised that the invoices were in storage but in his appeal he had said that the only invoices available were those relating to the quarters ending October 2017, January 2018 and April 2018 which had apparently been sent to HMRC in December 2020. HMRC confirmed that those invoices had not been received. He was again asked for purchase invoices.

28. Officer Addison stated that he had scheduled the bank statements and they were not commensurate with the level of input tax claimed. He pointed out that he had previously been told that the losses had been supported by the second appellant introducing capital from the sale of his home and he had requested copies of bank statements. The only bank statement which was provided related to a personal account and showed a transfer in of £97,638.48 on 12 April 2017 but there was no evidence that that was subsequently transferred to the company's account. He referenced Regulation 29 of the Value Added Tax Regulations 1995 ("the Regulations") and said that he had discretion to consider claims that were not supported by the correct evidence. He asked whether:-

(1) Suppliers had been approached for copies of purchase invoices.

(2) There was alternative documentary evidence other than an invoice (for example, a suppliers statement).

(3) There was evidence of receipt of a taxable supply on which VAT had been charged.

(4) There was evidence of payment.

29. On 22 August 2022, the second appellant provided HMRC with electronic copies of some purchase and sales invoices for the periods August 2017 to October 2017, November 2017 to January 2018, February 2018 to April 2018, May 2018 to July 2018, August 2018 to October 2018, November 2018 to January 2019 and February 2019 to April 2019.

30. On 7 November 2022, HMRC issued the amended Notice of VAT assessments based on the new information provided. It was confirmed, therefore, that both the penalties and the PLN would be amended to £10,385.

31. On 3 December 2022, the amended Notice of Penalty assessments was issued and on 19 December 2022, HMRC wrote to the company notifying them that a PLN would be issued to the second appellant and on the same day that PLN was issued.

The issues

32. There are three issues, namely:-

(1) Whether the company was entitled to the disputed input tax claimed on their VAT returns for the periods 10/17 to 04/19 inclusive and therefore whether the VAT assessments in relation to the disallowed input tax are correct.

(2) Whether a penalty is due on the basis that the behaviour leading to the inaccuracies in the company's VAT returns was deliberate, which failing, careless.

(3) If the inaccuracies were deliberate, whether those were attributable to the actions of the second appellant who was the director of the company.

Discussion

The VAT assessments

33. We found Officer Addison's evidence to be measured and straightforward. He was very clear that when the second appellant had eventually produced any evidence he gave it careful consideration and that was the reason why the assessments had been substantially amended. He had given the appellants every chance to furnish information including offering to go to the storage unit with a colleague and assist the second appellant in locating the invoices. He had allowed a number of invoices which were personal invoices such as, for example, Vodofone invoices and vehicle expenses which were arguably personal expenditure. He had given the appellants the benefit of the doubt in all of the claims for which there was evidence.

34. We had more difficulty with the evidence from the second appellant. In order to ensure that we had correctly captured what he had said, we recapped his evidence pointing out that in a number of respects it conflicted with the evidence of Officer Addison and we were therefore offering him an opportunity to explain matters. He said that he had nothing to hide and what he was saying was accurate.

35. In summary, he argued that the delay in obtaining information was because of lockdown, and therefore the difficulty in accessing the storage unit, and he himself had had Covid twice. He had not accepted the officer's offer of assistance at the storage unit because of the heavy equipment that was in the unit. He said that the only items that were not available for HMRC were the invoices but that he had searched for them. Of course, as can be seen, HMRC required a great deal more than the invoices.

36. For the first time, he offered as an explanation that he had used personal credit cards for expenditure but he had given those up in July or August 2019 because he was in arrears and he had been unable to access the records. He also said that he had tried to get information from the franchisor but he could not access that email account firstly when the officer was present at the VAT visit, and, secondly when he terminated his relationship with the franchisor because he then lost the email address.

37. Officer Addison disagreed with that and said he had no recollection of logging in or therefore of having difficulties when at the visit. That statement by the second appellant about logging in is inconsistent with his email of 11 October 2019 (see paragraph 14 above) which suggested that the laptop was allegedly in the storage unit.

38. The second appellant could not explain why neither the credit cards nor the franchisor had been mentioned in correspondence, the Notice of Appeal or his witness statement. It was pointed out to him that Officer Addison had repeatedly asked him for any evidence that demonstrated sales and/or expenditure and the hearing was the first time he had heard about the credit cards or the franchisor. At that point the second appellant said that at the visit he had said that he had used money from "different sources". We did not find that convincing given the officer's repeated attempts to obtain any sort of evidence.

39. The second appellant confirmed that he no longer had the storage unit and had given it up some six months ago. He was therefore asked why he had only given information to HMRC a week before the hearing. His answer was simply not credible. He said that he had sent the information previously and in fact the majority of the invoices had been sent in <u>May</u> 2022. It had taken time since the assessment had been issued in November 2022 to work out what he believed that HMRC had missed out.

40. As can be seen, the original invoices were sent to HMRC in August 2022 not May 2022. That argument was in stark contrast with the officer's evidence that what was forwarded to him in February 2023 was a different ledger, invoices and personal bank statements. The bank statements that had previously been provided had been company bank statements. We do not accept the second appellant's explanation. As soon as the documentation was produced in February 2023, the officer, who is no longer in his previous role, spent many hours analysing what we accept was new information and significantly reduced the assessments.

41. The second appellant has been repeatedly asked to provide evidence of the introduction of capital into the business but only his personal bank statement has been produced and that does not suffice in a context where there were huge discrepancies between the gross outputs and gross inputs. There is no entry for capital introduced in any of the company's accounts.

42. HMRC argue that there is no discernible source of funding for the significant number of purchases which the company claims to have made. They also argue that there is no explanation as to the very large deficit between gross outputs and inputs (see paragraph 19 above) which did not represent a credible pattern of trading. The inference suggested by HMRC is that purchases were overstated and that is why there is no available evidence for the disputed input tax.

43. The second appellant simply states in his witness statement that he introduced loan capital and paid invoices personally (there is no mention of credit cards). There is no evidence. We have noted that at the VAT visit the second appellant told the officer that he had bought the franchise and still owed £50,000. On the balance of probability, we find that the proceeds of sale of his home were not introduced into the company.

44. We did not find the arguments about access to the storage unit to be credible. Certainly, access would not have been possible during lockdown but the second appellant was first asked

for the records on 2 September 2019. Notwithstanding the issue of the Information Notice in October 2019 and penalties levied in that regard, he still did not access the storage unit, or if he did, he produced nothing to HMRC.

45. There has been no credible explanation in relation to the records that he allegedly sent to HMRC in December 2020. In oral evidence he said that they had been photocopies. That does not sit well with his statement in his witness statement that he had to "regenerate" those records. Further it does not explain why nothing happened until May 2022. In oral evidence he could not explain that.

46. Paragraph 6(3) Schedule 11 VATA requires VAT records to be kept for six years and it is evident that the company has not kept the full statutory records in relation to the disputed input tax.

47. Regulation 29(2)(a) of the Regulations state that when claiming input tax, the taxpayer must hold the document which is required in terms of the Regulations. No such evidence has been provided for the disputed input tax.

48. The company contends that VAT on sales was not taken into account in the VAT assessments. The assessments relate only to a disallowance of input tax and has been raised against any input tax claim submitted in the VAT returns where there is no documentary evidence. That Ground of Appeal cannot succeed.

49. For all these reasons we find that as far as the first issue is concerned, the VAT assessments in relation to the disallowed input tax are correct because the relevant evidence has not been provided by the company.

Penalties

50. HMRC contend that the company is liable to the penalties because the VAT returns were inaccurate and that the degree of culpability is deliberate in accordance with paragraph 3(1)(b) of Schedule 24 FA07. That deliberate behaviour was not concealed and therefore a penalty is due in terms of paragraph 1 of Schedule 24 FA07.

51. The second appellant, who was responsible for the VAT returns argues that his behaviour was not deliberate.

52. HMRC rely on the Supreme Court in *HMRC v Tooth* [2021] UK SC 17, at paragraphs 42 to 46 for the proposition that for behaviour to qualify as being deliberate, a statement, in this case the VAT returns, made by a taxpayer must be shown to have been deliberately inaccurate at the time it was made. In summary, their argument is that although, very belatedly, the second appellant has produced evidence for some of the claims for input tax, there are still very substantial gaps. Furthermore, he has failed to substantiate the source of funding for the claimed purchases.

53. On the balance of probability we agree with HMRC that the company did not have the funds required to make the alleged purchases and because they have not produced the necessary invoices or any alternative evidence to evidence the alleged purchases, such invoices do not exist. Therefore, in completing the VAT returns the actions of the second appellant, a director of the company, were deliberate.

54. In terms of paragraph 9(2) Schedule 24 FA07 the disclosure was prompted and in terms of paragraph 10 the penalty has been reduced to reflect the quality of the disclosure. A reduction of 5% was given for "helping" as the company did not help to quantify the inaccuracies. It has not. A reduction of 10% was given for "giving" access to the place of business. Although the second appellant is insistent that he provided all that he was required

to provide at that meeting we cannot agree given the terms of the letter of 2 September 2019, and the failures thereafter. We agree with HMRC that the reduction of 15% is appropriate.

PLN

55. As we have found that the deliberate inaccuracy is attributable to the actions of the second appellant, in terms of paragraph 19 Schedule 24 FA07, he is therefore liable to a PLN. There is no doubt that he was responsible for ensuring that the company's claims for input tax were correct at the time the claim was made.

56. We therefore find that the PLN should be upheld.

Decisions

57. The appeal is dismissed.

58. The amended VAT assessments in the sum of £11,400 are in accordance with section 73 VATA and were timeously raised. The claimed input tax in that sum has not been included in the income and expense reports provided; it has not been evidenced.

59. The behaviour leading to the inaccuracies on the VAT returns arose as a result of the second appellant's deliberate behaviour and the amended penalties which were validly raised and issued in accordance with Schedule 24 FA07 are therefore upheld.

60. The decision to issue the second appellant with a PLN for which he is liable to pay 100% of the VAT penalty, is correct.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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: 24th MAY 2023