TC02027

Appeal number TC/2010/05099

VATA s73(1) assessments – s60 penalties – FA 2007 Sch 24 penalties – whether returns and records incomplete or incorrect - whether best judgment used – whether dishonesty shown – whether inaccuracies 'deliberate and concealed' – assessment appeal dismissed – penalty appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOINT SCAFFOLDING LIMITED

Appellant

- and -

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

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mrs Shawar Sadeque

Sitting in public at 45 Bedford Square London on 15 April 2012

Mr Bobby Kaye of Cecil Kaye & Co for the Appellant

Mr Hugh O'Leary of the Solicitor's Office of HMRC for HM Revenue and Customs

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DECISION

Introduction

1 This is as an appeal against a series of assessments under section 73(1) of the Value Added Tax Act 1994, and against penalties awarded under section 60 of that Act and Schedule 24 of the Finance Act 2007. We received oral evidence on behalf of the Commissioners from Mr Bogdon Kuriata, the assessing officer, Ms Christine Enyidedie, Ms Helen Brewer and Mr Clive Childers, all officers of HMRC; there was no witness for the taxpayer, but we received a substantial agreed bundle of documentation. The facts related hereafter are found by the tribunal to the required standard of proof, unless otherwise explicitly stated.

2 The matters at issue may be summarised as: (i) whether the Appellant has shown that its turnover during the periods in question was not understated, and that no tax was therefore lost; (ii) whether the Appellant has shown that the assessments were not made to the best of the Commissioners' judgment; (iii) whether the Commissioners have shown that in the periods for which section 60 penalties were assessed the Appellant's conduct involved dishonesty; (iv) whether for the periods for which Schedule 24 penalties were assessed the Appellant's conduct involved inaccuracy with deliberate concealment.

3 For completeness, it must be added that the Commissioners made a decision on 15 March 2010 that the Appellant should have been registered for VAT from 20 February 2007 and registered it accordingly retrospectively. At the hearing we were told that that decision, which had been appealed, had been withdrawn.

The legislation

4 Value Added Tax Act 1994

Section 60

(1) In any case where-

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable . . . to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

(7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.

Section 73

(1) Where a person has failed to make any returns required under this Act . . . or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

Section 83

(1) . . . an appeal shall lie to the tribunal with respect to any of the following matters-

(n) any liability to a penalty or surcharge by virtue of any of sections 59 to 69B;

(p) an assessment under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act;

5 Finance Act 2007, Schedule 24

1 -

(1) A penalty is payable by a person (P) where –

(a) P gives HMRC a document of the kind listed in the Table[1] below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to-

(a) an understatement of a liability to tax,

. . .

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

3 -

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-

(a) "careless" if the inaccuracy is due to a failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

4 –

(1) The penalty payable under paragraph 1 is-

(a) For careless action, 30% of the potential lost revenue,

[1] The documents listed in the Table include VAT returns.

(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.

15 –

(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of the penalty payable by the person.

17 –

(1) On an appeal under paragraph 15(1), the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may –

(a) Affirm HMRC's decision, or

(b) Substitute for HMRC's decision another decision that HMRC had power to make.

Facts

6 The assessments under section 73 were made on 11 March 2010 totalling £42,741 for the periods 01/08 to 12/09. The section 60 penalties were originally assessed on 24 September 2010 for "dishonest conduct" but, after various errors had been recognised and corrected, the final tally of penalties under section 60 was for £18,788 after a 20% reduction for cooperation, in respect of the periods 01/08 to 12/08. All the assessments were addressed to the Appellant and none was apportioned to a director of the Appellant.

7 The penalties under Schedule 24 were first assessed for periods 06/09, 09/09 & 12/09 for "deliberate inaccuracy with concealment", totalling £14,358 after 10% reduction for cooperation; a further Schedule 24 penalty for the period 03/09 was assessed for £4,095 after a 10% reduction for cooperation, which was again described as relating to inaccuracy which was "deliberate and concealed". The Schedule 24 penalties were thus – although this was not spelled out – awarded by reference to paragraph 3(1)(c), and calculated on the basis of paragraph 4(1)(c). The penalty appeal before us was "for the civil penalty to be cancelled" and fell therefore under paragraph 15(1), the tribunal's powers in respect of the Schedule 24 penalties being those stated in paragraph 17(1).

8 The Appellant company was incorporated on 1 March 2006 with its main business activity being described as "scaffolders"; it was registered for VAT with effect from 1 December 2007. The first control visit was effected by Mr Kuriata on 15 April 2009 at the office of the Appellant's accountants, Cecil Kaye & Co, further visits following on 10 June, 1 July and 4 November that year.

9 As a result of these visits and inspection of the records available, Mr Kuriata was satisfied that there were serious irregularities in the Appellant's records and that they were incomplete and could not be relied on as an accurate record of trading activity. One of the reasons Mr Kuriata considered that the Appellant's records were incomplete or incorrect, was that a programme of random observations of building sites was at this period being undertaken by the four officers who gave evidence, and they noted those at which scaffolding had been erected and boards displayed.

10 They observed the Appellant's board displayed at various locations in South East London on 15 March, 24 May (in two places) and 7 June 2007, 22 February, 21 May and 1 September 2008, and 6 May and 23 July 2009. Out of the nine sightings of the Appellant's board only five were the subject of a sales invoice by the Appellant, namely one each on 15 March and 24 May 2007, and on 1 September 2008 and 6 May and 23 July 2009. That left those seen on 24 May (the second one) and 7 June 2007, and 22 February and 21 May 2008 unaccounted for. But although overall of the nine boards observed only five had been recorded, we note that of the five seen after the date of registration for VAT, the evidence is that three had been recorded while two had not.

11 Beyond the missing records of the business related to the sightings of the Appellant's board at buildings sites, Mr Kuriata was concerned by a number of other matters:

- He was at first informed that the Appellant's business was entirely cash-based, and that sales invoices were only issued after payment for a job had been made; there were therefore no bad debts. Nonetheless, there were payments arriving in the Appellant's bank account for sales invoices said to have been raised before VAT registration, which contradicted that account. It was also contradicted by a detailed list given to Mr Kuriata showing payments received after the relevant invoice date.

- On the other hand, an analysis of the sales invoices against the bank statements showed that about 100 sales invoices were marked as having been paid, but for which there was no corresponding entry in the bank statement.

- There were payments in that could not be reconciled to sales invoices. There was a significant number of bad debts over a year old, and the Appellant continued to work for up to six clients, notwithstanding that it had not been paid. This suggested that payments were being received which did not appear in the bank statements.

- There appeared to be insufficient funds in the bank to fund all the Appellant's stated expenses.

- Mr Kuriata raised queries with the accountants in respect of discrepancies between the company's annual reports and accounts for the years ended 31 March 2007 and 2008, and the bank statements, because he could not reconcile the figures shown in each.

- Deductions on account of the CIS builders scheme shown for 2008 did not tally with the figures shown on sales invoices.

- The Appellant's position with regard to 'fee notes', at one point said to be issued before sales invoices were sent out after payment had been received, was inconsistent over time and the system appeared confused.

12 Before making any assessments, Mr Kuriata called the Appellant's officers to a meeting of the kind described in Public Notice 160 (the PN 160 meeting) at which a taxpayer suspected of underdeclarations is invited to make disclosure of any errors or omissions and to assist HMRC's enquiries, and consequent upon which penalties may be mitigated to reflect the taxpayer's behaviour.

13 The PN 160 meeting took place on 4 November 2009 with a director of the Appellant, Ms Trudy Rollinson, and the Appellant's accountant, who stated that there was nothing to disclose and that all income received by the company had been declared in VAT returns. At the meeting, Ms Rollinson discussed the Appellant's practices in detail, insisting that there had been no cash payments into the business and that the only documents raised as a record of business done were the sales invoices.

14 Following this there was more correspondence and Mr Kuriata modified a number of his calculations, culminating in the issue of a letter on 3 February 2010 setting out his concerns in detail. No substantive reply to that letter was made, despite several invitations to do so, until challenges to its conclusions were advanced at the hearing,.

15 Doubt was cast in cross-examination on some of Mr Kuriata's conclusions. Thus, a sum of £25,000 which Mr Kuriata had been told was introduced into the business in cash in 2007 as "an inheritance", without having passed through any banking account, might have been the accounting treatment of various assets brought from the directors' old employments and shown as a 'directors' loan'. Likewise, a credit report on one director, apparently showing that his house mortgage alone represented some 90% of his drawings from the Appellant, could have been explained by the director having other sources of income as well. A payment by one client, Paintcraft Limited, stated by the accountant to have been for £8,000 as "cash", could now apparently be reconciled to payments into the bank account.

16 We are not satisfied that it has been shown that Mr Kuriata was mistaken as to these matters, and Mr Kuriata was certainly justified in seeing them as unexplained at the time the assessments were made. Mr Kuriata conceded that he had no accountancy qualifications, but pointed out that he had to do the best with the information made available to him. In that context, we find that the Appellant's business records were indeed incomplete and depended heavily, as far as they went, upon subsequent rationalisation by the accountant; and that explanations of the discrepancies identified by Mr Kuriata varied over time, giving rise to the justified conclusion that the records were not complete.

17 The principal means adopted to calculate the underpayment of tax apparent to Mr Kuriata was the deficit in the recording of sales corresponding to the sightings of scaffolding referred to above. On the basis that in only five out of nine instances where the Appellant's scaffolding had been observed appeared in its business records, Mr Kuriata uplifted the declared output by 44% to reach the true level of gross takings. It was not argued that the uplift should be calculated by reference only to the post-registration sightings.

18 Applying the 44% uplift to banked receipts since 24 May 2007, Mr Kuriata calculated that the Appellant had exceeded the registration threshold on 20 February 2007 and therefore put in motion the backdating of the VAT registration to that date. (As we have seen, that action was subsequently withdrawn.) In regard to the penalties, Mr Kuriata allowed 20% mitigation for cooperation in the making of records available, which translated to 10% in the case of the Schedule 24 penalties since a maximum of 50% only of that penalty is mitigable.

19 Mr Kuriata told us that during the course of his enquiries he had formed the conclusion that the underdeclarations he identified were due to dishonest conduct by the directors rather than through negligence or ignorance or, in the case of the Schedule 24 penalty periods, that they were deliberate and concealed. Mr Kuriata said that he inferred dishonesty and concealment from the facts regarding the Appellant's records described above; he said that he thought it incredible that scarcely any records, or in some cases none at all, existed regarding what must have been substantial items of work undertaken by the Appellant company necessitating planning, liaison and coordination with several parties outside the firm.

Submissions

20 For the Appellant it was submitted that Mr Kuriata had failed to understand the company's accounts due to his lack of accountancy qualifications, and that the figures he had produced for underdeclarations of tax could not be considered safe; there had, moreover, been no underdeclarations at all, and it was accordingly not possible for there to have been dishonesty or concealment by the Appellant's officers or on its behalf.

21 It was denied that the Appellant had any trade debtors, and claimed that the debtors shown as such were really cases of pre-payment, and that its records were complete and reliable with all sales properly accounted for. In particular, with regard to the sightings of the Appellant's scaffolding, it was objected that the evidence was not photographic and could not therefore be verified and was not conclusive.

22 On the standard of proof, it was submitted that the tribunal had to decide whether the case provided by HMRC was "credible to be relied upon" considering the mistakes and misinterpretation of the accounts of Mr Kuriata.

23 For the Crown, it was submitted that there had been no direct challenge to the evidence of the sightings, no satisfactory and consistent explanation of the discrepancies found to exist between the banking records and the sales invoices, that there had been no records at all of quotations for work or of working logs or arrangements. It was submitted that the tribunal was entitled to infer dishonesty from the facts of the case in support of the penalties, and that it was evident that details of work had deliberately not been recorded so as to conceal the Appellant's true liability.

24 It was accepted that the burden of proof lay on the Commissioners with regard to establishing dishonesty or deliberate concealment, but that it was for the taxpayer to show that there had been no underdeclaration or that the assessment had been made to the best of the Commissioners' judgment.

Case law

25 The case law as to best judgment is well known. It suffices for present purposes to recall the test described by Woolf J (as he then was) in *Van Boeckel v CCE* [1981] STC 290, at 292: –

> The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the Commissioners had taken insufficient steps to ascertain the amount of tax due before making the assessment.

Therefore it is important to come to a conclusion as to what are the obligations placed on the Commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly, they must perform that function honestly and *bona fide*. It would be a misuse of that power if the Commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the Commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things, frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the Commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the Commissioners of carrying out exhaustive investigations.

What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them.

Conclusions

26 We find, first, that the assessments fully satisfied the criteria for best judgment laid down in *Van Boeckel*, and that Mr Kuriata indeed went the extra mile in trying to establish accurate figures in circumstances in which it was plain that the records kept did not tell the full story about the Appellant's business supplies, and in which he was given a series of conflicting and confusing accounts of what took place. Mr Kuriata did the best he honestly could with the material before him.

27 Secondly, the burden of showing that the assessments made should be reduced or vacated is on the taxpayer, and we do not see the doubts suggested in the cross-examination of the officer or put forward on behalf of the Appellant as discharging that burden. There has been no detailed response to the officer's letter of 3 February 2010 stating the basis for his assessments, although one was several times invited, and the case for the Appellant concentrated on the suggestion that if the officer had understood accounting practice he would not have made the assessments.

28 In particular, no reason has been advanced why the observed sightings of the Appellant's boards were not fully reflected in the sales invoices, nor why there were no records concerning the conduct of the work done, the calculation of its pricing, or the other details which might be expected to be found in the administration of a business with a significant turnover. Instead, the Appellant has simply maintained that the records are complete and that there has been no underdeclaration of tax at all. We have therefore no alternative claim regarding the amount of tax due and, since we have been unable to conclude that the correct amount was declared, we must find that the assessments have not been displaced.

29 The burden of proof with regard to the penalty assessments, however, lies on the Crown to establish on the balance of probabilities that the Appellant, through its controlling mind or minds, acted dishonestly or deliberately concealed the facts relating to its liability. It is notable that no witness evidence was led for the Appellant and that there is no verbal record of any interview with its officers. There is merely the inference which we are invited to draw from the circumstances that there was dishonesty.

30 There may well be cases in which such an inference can properly be drawn from the circumstantial evidence, but we do not see this as one. Given the paucity of information available to us, we see it as equally probable, having regard to the nature of the Appellant's business, that the state of the company's affairs was the result of negligence or carelessness on the part of its officers. At all events, there is insufficient evidence in this case to warrant a finding of dishonesty or of deliberate concealment.

31 In so far as the section 60 penalties are concerned, they must fall altogether in view of our finding that the element of dishonesty has not been established. The penalty appeals in relation to Schedule 24 are specifically against the imposition of the penalties themselves, and not against the amounts of them; our jurisdiction is therefore limited under paragraph 17(1) of the Schedule to affirming or cancelling them, and we must therefore cancel the penalties in the absence of a finding of deliberate concealment.

32 The appeals against the assessments are therefore dismissed, and the appeals against the penalties are therefore allowed.

Further appeal rights

33 This document contains the 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 no 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.

Malachy Cornwell-Kelly
Tribunal Judge

RELEASE DATE: 16 May 2012