



TC04244

Appeal number: TC/2014/00593

VAT – failure to respond to requests for information concerning application to register; issuing invoices and collecting VAT when unregistered; failure to account for VAT; reasonable excuse for delays – no; wrongdoing penalty payable.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LUCAM CONSULTANCY LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER HACKING
 MISS SUSAN STOTT FCA, CTA**

Sitting in Manchester on 17 December 2014

Mr Nigel Gibbon, Solicitor, appeared on behalf of the Appellant

**Miss Joanna Vicary, Counsel instructed by the Office of the Solicitor and
General Counsel to HMRC appeared on behalf of the Respondents**

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DECISION

- 5 1. This was an appeal against the imposition of a wrongdoing penalty in the sum of
£57,768.68 charged under Schedule 41 Finance Act 2008.
2. The wrongdoing alleged was the issue of unauthorised invoices showing VAT as
payable at a time when the Appellant was not registered for VAT.
- 10 3. Paragraph 2 of Schedule 41 provides as follows:

- 2 (1) A penalty is payable by a person (P) where P makes an unauthorised issue
of an invoice showing VAT.
- 15 (2) P makes an unauthorised issue of an invoice showing VAT if P—
(a) is an unauthorised person, and
(b) issues an invoice showing an amount as being value added tax or as
including an amount attributable to value added tax.
- 20 (3) In sub-paragraph (2)(a) “an unauthorised person” means anyone other
than—
(a) a person registered under VATA 1994,
(b) a body corporate treated for the purposes of section 43 of that Act as
a member of a group,
(c) a person treated as a taxable person under regulations under section
25 46(4) of that Act,
(d) a person authorised to issue an invoice under regulations under
paragraph 2(12) of Schedule 11 to that Act, or
(e) a person acting on behalf of the Crown.

- 30 4. On behalf of the Appellant Mr Gibbon contended that, on the facts of the
matter, his client had a reasonable excuse for the delay in registration for VAT.
The delays had been the result of an unfortunate series of incidents. Additionally
Ms Foy had not been well served by an employee at a time when Ms Foy was in
poor health.

35 *The facts*

5. As presented by counsel for the Respondents through their witnesses the
essential facts are as follows

- 40 6. The Appellant company was incorporated on 7 November 2012 as a private
company limited by shares. Its share capital of 10 ordinary shares of £1 each was
held by Amanda Foy who is also shown as the company’s sole director.

- 45 7. The proposed registered office of the company at incorporation was stated to
be:

31, Seaside Lane
Easington Colliery
Peterlee
50 County Durham

United Kingdom
SR8 3PG

5 8. The main business of the company is that of recruitment of personnel in the health field.

10 9. By submission of form VAT 1 dated 5 December 2012 the Appellant notified the Respondents that it was liable to register for VAT and requested that the registration take effect from 1 January 2013.

15 10. On 19 December 2012 Officer Williams of the Respondents telephoned the Appellant and left a message requesting that the Director (Ms Foy) should call her back. Neither Ms Foy nor anyone else on behalf of the Appellant responded to the Respondents' message.

20 11. A so-called "Get-in-Touch" letter dated 21 December 2012 was sent to the Appellant at its registered office. That letter referred to the fact that a telephone call had been made on 19 December 2012 in an attempt to discuss matters relating to the VAT application and requested a telephone call to the number given so that an appointment might be arranged. The letter included the statement:

"If I do not hear from you within 5 working days from the date of this letter, your application to register will be cancelled."

25 12. There was no response to this letter either within the 5 day period or at all.

30 13. An e-mail was sent to Ms Foy by the Respondents on 4 January 2013. Although there was initially some contention about just what the e-mail stated it was clear that this was a rather brief message sent to the Appellant at the e-mail address she had advised in her VAT application which read:

35 *"Re transaction 415PMC6DC3JIU3M in respect of VAT, please log on to the HMRC portal and access the communications area to check new information about this transaction. Use the same user id and password as you used to create the transaction"*

40 14. Had Ms Foy logged on as requested she would, say the Respondents, have seen a message advising that:

45 *"Your recent VAT application received by HM Revenue & Customs (HMRC) on 5 December 2012 has been refused. HMRC cannot agree to this application because you have not replied to a request for further information and/or documentation. If you do have any further information that you want HMRC to consider, please send it now"*

The message goes on to state that there is a right of review in respect of the decision and ultimately a right to appeal the matter to the Tribunal Service. Details for contact purposes were included.

5 15. The Appellant made no contact with the Respondents and took no further steps either to progress its application for registration or enquire as to the status of the application.

10 16. On 20 August 2013, following an investigation into a PAYE debt, Officer McLellan of the Respondents telephoned the Appellant's accountant, Clive Bowyer. During that conversation Mr Bowyer told the officer that no VAT number had been received although an application for registration had been made. Subsequent to this and promptly thereafter a fresh VAT 1 application was filed.

15 17. On 17 September 2013 HMRC Officers McLellan and Holmes visited Clive Bowyer at his offices during the course of which visit sales invoices raised by the Appellant were inspected. These invoices showed that VAT had been charged. Examples of such invoices included in the hearing bundle show that no VAT registration number is shown on the invoices but in the box for this information
20 the notation "TBA" appears which we were told was intended to indicate that a VAT number would be advised.

25 18. On 24 October 2013 a Notice of Direction was issued to the Appellant amending the Appellant's VAT return period to the end of October 2013 and requiring a return for the period 1 January 2013 to 31 October 2013 to be furnished by 1 November 2013. This notice was delivered personally on 31 October 2013. The Appellant failed to provide the return as required or at all. On 1 November 2013 an assessment in the sum of £116,684 was raised in respect of
30 VAT due.

19. The assessed sum has not been paid. The assessment itself has not been appealed nor has a review been requested.

35 20. On 9 December 2013 a penalty explanation letter and accompanying schedule was issued by the Respondents informing the Appellant of an intention to charge a penalty in the sum of £57,768.68. The letter invited the Appellant to supply to the Respondents any further information it wished the Respondents to consider by 6 January 2014. Again there was no response to this communication.

40 21. On 8 January 2014 the Notice of penalty assessment was issued.

The Appellant's account

45 22. Evidence was given at the hearing on behalf of the Appellant by Amanda Foy, Andrea Patricia Baines and David Clive Bowyer. No witness statements had been provided so that it was necessary to take evidence in chief at some length. It should also be added that, unlike the Respondents, the Appellant had not provided

a skeleton argument so that the evidence heard provided the Respondents with the first opportunity to fully understand what the Appellant had to say about the matter.

5 23. Ms Foy told the Tribunal that she had been engaged in the health care field
for 20 years having in particular worked for a recruitment company for the last 10
years. It was a business with which she was familiar. Asked whether she had been
in business on her own account before setting up the Appellant company, Ms Foy
10 stated that she had not. This was, she said, her first business. The company was
incorporated on 7 November 2012. Ms Foy said that she set it up herself with
some help from a friend at a travel agency. She chose to use her friend's business
address in Peterlee as the company's registered office.

15 24. At the outset there were 6 people engaged in the business including Ms Foy.
The accounts, PAYE and similar functions were handled by an employee called
Jemma who Ms Foy had been assured was a competent person to undertake these
duties.

20 25. Ms Foy confirmed that she completed the VAT 1 form herself including in it
her name and home address as well as her mobile phone number and contact e-
mail address. The estimate given for turnover in the next 12 months was
£624,000. Ms Foy stated that she understood that the process of registration for
VAT was not quick.

25 26. With respect to the attempts to contact her by telephone, correspondence and
e-mail Ms Foy gave the following explanations.

30 27. Concerning the initial telephone call from Officer Williams on 19 December
2012 asking her to contact the Respondents Ms Foy said that she did not receive
this message. The mobile she used was also used by others in the office and any
message left had not been communicated to her. She was not aware of any of the
other members of staff having taken this call but two members of staff had left
and she had been unable to check whether one of them might have received the
call or deleted any voice mail left.

35 28. Asked what arrangements she had made to have correspondence forwarded
to her from the company's registered office Ms Foy said that it had been agreed
with her friend Nicola Parkes that all correspondence concerning the company
would be sent onto her home address.

40 29. With respect to the letter sent to the company's then registered office at 31,
Seaside Lane, Easington, Peterlee dated 21 December 2012 (the so-called "Get-in-
Touch" letter) Ms Foy stated that she had not received any correspondence from
that address. Specifically she stated to the Tribunal that she had no knowledge of
45 the letter. She said that she had spoken to Nicola Parkes, and that no
correspondence of any kind had ever been sent to her by Nicola.

5 30. Ms Foy was then taken to a copy of a letter dated 17 December 2012 sent to her home address by HMRC which stated that correspondence from Companies House had been returned undelivered and that it appeared that Companies House had not been advised of the new registered office of the company. Ms Foy had responded to this advising the new registered office address for the company as c/o Clive Bowyer FCCA MAAT, Court Building, Alexandra Park, Prescott Road, St Helens, Merseyside, WA10 3TP.

10 30. When cross examined about her statement that she had received no mail at all from Nicola Parkes in accordance with the agreed forwarding arrangement of which she had spoken, Ms Foy corrected herself and said that she thought that the question concerned only correspondence from HMRC and that she had in fact received some other correspondence from the Seaside Road address. Ms Foy apologised for the confusion.

15 31. The heading on the above letter of 17 December 2012 from HMRC mistakenly refers to “31, Eastside Lane, Easington Colliery, Peterlee, County Durham, SR8 3PG which is not the address included in the Appellant’s VAT 1. It is now Ms Foy’s belief that there was a genuine error in the addressing of the “Get-in-Touch” letter although she candidly admitted that she had not noticed this at the time. The “Get-in-Touch” letter was however correctly addressed according to the copy exhibited. Any mistake about her company’s registered office address was a mistake made by Companies House and not by HMRC which had correctly addressed its letter of 21 December 2012 to the “Seaside Road” address. In any event the post code used by both Companies House and HMRC was correct.

30 32. Ms Foy was asked about the message (incorrectly described in the documents bundle as a “Refusal e-mail”) dated 4 January 2013. As indicated above this document was not itself an e-mail but a message accessible on logging into the appropriate section of the HMRC website. The e-mail requesting the Appellant to do this was also dated 4 January 2013.

35 33. Ms Foy agreed that the e-mail had been received but having logged onto the HMRC site as instructed the message was not to be seen. This, she said, had been done by Jemma whilst in her presence.

40 34. The next time Ms Foy became aware of the problem with the VAT application was, she said, in August 2013 following contact with her accountant. Asked by Mr Gibbin what she thought was happening concerning her VAT application, Ms Foy said that she thought it was simply taking a long time. She was experiencing health problems at the time and effectively left this matter to Jemma.

45 35. A letter was produced written by Ms Foy’s doctor, Dr Jon D’Arcy, which confirmed that from April 2012 to the present time (the letter is dated 19 May 2014) Ms Foy:

5 *“has had far more dealings with both primary and secondary health care services than she might have expected at her age predominantly resulting directly or indirectly from the complications of her cholecystectomy. This has included significant periods of illness, but also significant periods of uncertainty and although she attended her work it is quite likely that her ability to function properly with her responsibilities was impaired by her medical condition”*

10 36. Dr D’Arcy concludes by stating that:

“For a period of approximately 2 years Amanda’s functioning has been compromised and I trust that factor will be taken into consideration in any decision that is reached”

15 37. In light of her health problems Ms Foy had asked Jemma to keep her informed of any developments concerning the VAT application. She had been assured by Jemma that everything had been dealt with. Ms Foy stated that she had taken into consideration that VAT would have to be paid. She liaised with Jemma weekly about financial aspects of the business and frequently “popped into” the office even when she was not herself working. The staff helped, she said, to “keep me afloat” at the time.

25 38. The company factored its debts but said, Ms Foy, retained some money for VAT. There had been no intention to do other than to pay over the VAT.

30 39. Jemma left the company’s employ in August 2013 when Andrea Baines took over. Ms Foy said that she thought that Jemma had secured another position elsewhere. It emerged however that Jemma had not been attending properly to her work and that a considerable effort of the part of Andrea Baines was needed to restore some order to the company’s accounts. The invoices were in many instances incorrect and it was very difficult to match them to payments. The ledger was not up to date and it became necessary to rewrite the accounts back to the start date of the company.

35 40. Asked about the letter of 9 December 2013 indicating that a penalty was being considered Ms Foy said that she did not see this at the time as she was on holiday. It was only later when the penalty had been assessed that she became aware of this.

40 41. Ms Baines who gave evidence to the Tribunal confirmed Ms Foy’s evidence concerning the problems occasioned as a result of the departure of Jemma. Asked about the e-mail messaging system used by HMRC Ms Baines stated that it was common in her experience to receive an e-mail saying that there was a message and that the recipient should log on to read it but that only 3 times out of 10 was a message there when this was done.

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42. Evidence was also given to the Tribunal by Mr Bowyer, of the company's external accountants.

5 43. Asked about the letter of 9 December 2013 concerning possible penalties Mr Bowyer said that he could say with some certainty that that letter would not have been received by him on 10 December 2013. It was more likely to have been received up to 14 days after its date allowing for the internal HMRC procedures of authorisation, review and dispatch. In all the circumstances including the intervention of Christmas the deadline of 6 January 2014 was unreasonable in Mr
10 Bowyer's view.

15 44. Mr Bowyer agreed that he had been appointed by the Appellant as its accountant in late January 2013 and that he was aware at that time that an application for registration for VAT had been made by the company. He had not been unduly concerned about the ongoing apparent delays in concluding this process as in his experience this could take up to 6 months. He assumed that the delay was a result of the volume of work at HMRC.

20 45. Asked why he did not respond to the letter of 9 December 2014, a copy of which had been sent to him, Mr Bowyer said that, as by the time he had received this he had also received the penalty assessment, there seemed little point. He asked Ms Foy to secure a letter from her doctor explaining her health problems so as to enable this to be considered in mitigation of the penalty. Mr Bowyer explained that his role was essentially an advisory one and that he did not see it as
25 part of his responsibility to respond to the letter of 9 December 2013.

30 46. Mr Bowyer said that he thought that the Respondents had acted very aggressively in imposing unrealistic deadlines for action. There had been some real problems in getting the demanded VAT return completed due to difficulties with the SAGE system used.

35 47. It was put to Mr Bowyer in cross examination that he must have realised that the delay in the original VAT application was extraordinary. Even allowing for his stated view that 6 months was not unusual, a delay of 8 months must have set alarm bells ringing? Mr Bowyer agreed that in hindsight he should have followed up this matter at an earlier date.

40 48. Towards the end of the hearing an issue arose as to whether or not it was the case that HMRC had not been able to trace any record of the original VAT application. This matter was cleared up when Officer McLellan explained that when first asked to trace the original application the full reference for the application was not cited. When, some short time later, this was obtained, the fact that the application had been rejected on 4 January 2013 became apparent. This was not in the view of the Tribunal a point of any great significance as it related to
45 Mr Bowyer's initial contacts with HMRC post August 2013 by which time the substantive issues concerning communications with the Appellant and the inclusion of VAT on the company's invoices had taken place.

49. One further aspect of the evidence given by Ms Foy does need to be related. This concerns the impression originally given to the Tribunal by Ms Foy that the company was formed by her as a new start-up and that she had not had any previous business experience.

50. It was put to Ms Foy in cross examination that the true picture was rather different. It emerged that Lucam Consultancy Ltd was the fourth iteration of a business first formed as Bold Recruitment Solutions Ltd then Bold Associates Ltd and then Cherry Total Ltd. Each of these enterprises appears to have become insolvent in turn providing the genesis of the next venture. Some of the people involved in these businesses have or had a connection with Ms Foy's business. It is, we were told, true that Ms Foy had not participated in Cherry Total Ltd. However her brother Paul Baines had been a director of that company. He was also the ex-husband of Andrea Baines who did work for Lucam Consultancy Ltd.

51. Susan Haunch who had also some involvement in one or more of the above companies worked part time for Lucam.

52. The impression with which the Tribunal was left was therefore, somewhat different from, and rather less kindly than, its original perception of the venture as a completely new start-up.

The Tribunal's consideration of the appeal

53. The Tribunal was not impressed with the evidence of Ms Foy. She had shown a lack of candour in explaining the arrangements for the start-up of the company. She had at one stage completely denied having received any correspondence from the Peterlee address which she had used as her first registered office and had been obliged to retract this. Generally her evidence was given defensively and in a manner which the Tribunal found to be less than convincing.

54. The Tribunal finds it surprising that a telephone call by HMRC asking for contact to deal with the matter of the current VAT application would not have been received and effectively communicated to Ms Foy. This could, we accept, have been carelessness within the office by someone who failed to understand the importance of the call.

55. Despite the incorrect heading on the HMRC letter of 12 December 2012 (referring to 31, Eastside Lane which was the address apparently used by Companies House) the letter actually sent on 21 December 2012 by HMRC was correctly addressed and we can see no reason why it would not have been received in the normal course of post. Ms Foy eventually agreed that her friend had forwarded post to her. There is no credible explanation why this "Get-in-Touch" letter was not sent on to Ms Foy's personal address as she had agreed with her friend.

56. The evidence given as to the non-appearance on the HMRC website of the message following the e-mail which it is agreed was received on 4 January 2013 is again without explanation. Even if the message was posted some short time after the e-mail was itself received the fact that HMRC had gone to the trouble of sending an e-mail to the Appellant coupled with the fact that the company's VAT application was pending should have alerted the Appellant to take action to contact HMRC. In effect simply shrugging this communication off as having no significance was irresponsible. It may be that Ms Baines' experience of communications with HMRC is not the happiest but in the view of the Tribunal some step should have been taken to find out what HMRC wanted to speak about.

57. To then carry on invoicing customers with VAT included for a period of 8 months making no attempt to try and find out what was happening to the application was again highly irresponsible. Even Mr Bowyer had to admit that after this length of time something should have been done.

58. At no stage in this unhappy saga has anyone appeared to have exercised any degree of urgency in dealing with what had become a very serious situation. Even after the penalty had been imposed it took some time to deal with the final return. Computer problems were said to be the cause. We take leave to doubt whether this was the only cause of this further delay. Mr Bowyer told us that he had formed the view that HMRC were being aggressive and unreasonable. By his own admission he had seen no reason to respond to the letter of 9 December 2013. We doubt that he was motivated to genuinely resolve his client's serious problem with any sense of urgency. We would add that we also reject his evidence to the effect that 6 months could be considered a normal period for processing a new VAT application. Such a period might be involved if extended verification was required but this process itself would undoubtedly involve a degree of liaison between the applicant and HMRC of a kind not in evidence in this case.

The penalty

59. The Respondents have concluded from the facts of this matter that the behaviour of the Appellant is properly to be considered as 'deliberate' and the penalty has been calculated on this basis.

60. Mr Gibbon on behalf of Ms Foy asks the Tribunal to consider that her health problems coupled with the fact that she had been let down by her employee are mitigating factors which should be taken into account in correctly assessing any penalty which might be payable.

61. The Tribunal does not accept that any mitigation can properly be considered appropriate whether by reason of the health problems which Ms Foy suffers or because of an employee's incompetence in a case where there has been an almost studied indifference to the registration process over an extended period of time followed by the collection of substantial VAT whilst unregistered and a failure to

account for this with a consequent loss to the Revenue. That the default concerned, namely the invoicing and collection of VAT whilst unregistered, can only be considered as deliberate given the extended period of time involved.

5 62. We have considered the assessment by the Respondents of the penalty and consider this to have been fair taking account as it does of the limited help provided in understanding what had happened, the problems with access to information and the fact that the default was only discovered by chance following an unrelated PAYE problem.

10 63. The Appellant had had an opportunity after receipt of the letter of 9 December 2013 to come forward with the explanations heard in the Tribunal hearing even after the penalty had been confirmed but continued its apparent policy of doing and saying nothing even when that might have helped.

15 64. We acknowledge that Ms Foy may not have been able to give the attention to the company's affairs which she would have done if fully fit but she was able to continue the business of providing services charging for them and collecting VAT throughout the period the company was unregistered. She had staff and also an external accountant but no one appears to have questioned the correctness of what was being done. On her own account however it appears that even if she had been fit the failure would in all probability still have occurred.

20 65. Mr Bowyer for his part appears to have taken a "compartmentalised" approach to the duties he owed his client to its significant disadvantage. As to why he did not realise the seriousness of his client charging VAT when it was not registered to do so at a date earlier than August 2013 we can only speculate.

25 66. This Tribunal would only be minded to change the decision made by HMRC if it had been shown to have been unreasonable. It cannot be said however that the decision is one which no reasonable panel could arrive at. The penalty itself is based on the loss to the Revenue and is not disproportionate. The Appellant had had ample opportunity to tell HMRC about its problems but has appeared to have been unwilling to do so. It is clear that in arriving at their decision the Respondents have addressed appropriate matters including possible reductions or adjustments as well as the possibility of a suspended penalty.

30 67. We are satisfied that the decision made by the Respondents takes into account all relevant matters and does not include any irrelevant matters. It is a decision with which we agree and accordingly we dismiss this appeal. The penalty is confirmed.

35 68. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with either of the decisions has a right to apply for permission to appeal against it/them pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that

party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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CHRISTOPHER HACKING

TRIBUNAL JUDGE

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RELEASE DATE: 21 January 2015

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