[2016] UK FTT 644 (TC)

TC05377

Appeal number: TC/2015/6682

VAT – penalty under sch 24 FA 2007 – whether inaccuracy deliberate, whether disclosure prompted – effect of para 8 Sch 24.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SALIM MIAH **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
IAN PERRY

Sitting in public in Cardiff on 20 June 2016

Martyn Arthur for the Appellant

Jane Ashworth for the Respondents

DECISION

1. Mr Miah appeals against a penalty assessed by HMRC under schedule 24 FA 207 in relation to his failure to include in his VAT return for the period ending 30 June 2014 VAT of £170,000 on the sale of a property.

2. HMRC assessed the penalty on the basis that the inaccuracy in Mr Miah's VAT return for that period was deliberate but not concealed, that the potential lost revenue was £170,000 and that Mr Miah should be accorded the maximum reduction in the penalty for the quality of his disclosure in HMRC's investigation, but that such disclosure should be treated as prompted.

3. Mr Miah contends that the inaccuracy was not deliberate and that the disclosure was not prompted.

Schedule 24 FA 2007.

4. This schedule provides that a penalty is payable by P if, inter alia, P submits a VAT return which contains an inaccuracy which amounts or leads to an understatement of P's liability to VAT. By paragraph 4 the penalty is 30% of the potential lost revenue if the inaccuracy is careless, but 70% of the potential lost revenue if the inaccuracy is deliberate but not concealed.

5. By paragraph 3(1) an inaccuracy is deliberate but not concealed if "the inaccuracy is deliberate but P does not make arrangements to conceal it". There is no further definition of an inaccuracy being "deliberate". An inaccuracy is "careless" if it is due to P's failure to take reasonable care.

6. Paragraph 5 provides the "normal rule" under which the potential lost revenue is the additional VAT due as a result of correcting the inaccuracy.

7. Paragraph 10 provides that where a person who would otherwise be liable to a 70% penalty makes an unprompted disclosure, the penalty may be reduced to no less than 20%, and in a case of a prompted disclosure to no less than 35%. For a 30% penalty the related minima are 15% and 20%.

8. A disclosure is defined to be unprompted:

> "if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy"

but otherwise it is "prompted".

9. Paragraph 11 provides for the reduction of the penalty in special circumstances.

The Evidence and our findings of Facts.

10. We heard evidence from Mr Miah (who also provided a witness statement) and had before is a bundle of copy correspondence which contained copies of notes made by one or more of HMRC's officers of a meeting with Mr Miah in May 2015. We did not hear evidence from the relevant officers. Mrs Ashworth also gave evidence of the results of her searches of HMRC's systems.

11. We find as follows.

12. Mr Miah purchased the freehold of the Warwick Arms in 2009. The supply of the property to him was VATable and VAT was paid as part of the purchase price. At a later stage Mr Miah recovered the VAT on the purchase.

13. Mr Miah notified his option under paragraph 2 schedule 10 VAT Act to treat supplies in relation to the property as VATable in September 2009, and HMRC acknowledged it on 19 November 2009.

14. For some years before May 2014 Mr Miah had been negotiating with McDonalds Restaurants for the sale of the property to them. Mr Miah engaged the solicitors who had acted for him on his purchase of the property to handle the sale to McDonalds.

15. Mr Miah could not recall when contracts have been exchanged for the sale but on 27 May 2014 he provided (to his solicitors for onward transmission) an invoice for the sale to McDonalds which included VAT of £170,000. It is reasonable to believe that his solicitors would have asked for this in advance of exchange of contracts and completion of the sale in readiness for those events. The invoice was numbered 001.

16. The sale was completed on 18 June 2014. Mr Miah did not know whether exchange of contracts and completion had taken place on the same day. Mr Miah's solicitor did not account to him immediately after completion for the net proceeds of sale. In a letter addressed "To Whom It May Concern" dated 11 June 2015 his solicitors say that prior to completion of the sale of the police placed a restriction on dealing with the property pending the outcome of certain enquiries, and then, later, the police said that the sale could go ahead so long as the net proceeds (after repayment of the bank loan to Mr Miah secured on property) were retained. Mr Miah gave us similar evidence. Although we were not shown the provisions which permitted, or the terms of, the order permitting this freezing of Mr Miah's entitlement to the sale proceeds, we accept that those proceeds were required to be retained by his solicitors pending the completion of the police enquiries.

17. Mr Miah told us, and we accept, that at the end of December 2014 he received a letter from the police (or the CPS) saying that they would be taking no further action. He then spoke to his solicitor who told him that the formal authorisation to release the funds had yet to be received and that that would not be until January 2015. That date seems to have been optimistic. It appears that authorisation was not received until March and that the net proceeds of sale were not released to Mr Miah until 19 March 2015 when they were paid to his bank account.

Mr Miah's VAT returns

18. From sometime before 2002 Mr Miah had run a number of businesses. He had started, and run and sold two restaurant businesses, and in 2014 was running a laundry business. These businesses made VATable supplies which were returned on Mr Miah's VAT returns.

19. After a VAT investigation (in we think 2008/9) Mr Miah had been registered for VAT retrospectively with effect from 2002. He remained registered until April 2015.

20. During 2014 Mr Miah used the services of Mr Khan, an accountant, to prepare and submit his VAT returns. Those returns were made for quarters ending 31 March, 30 June, 30 September and 31 December in each year. After the end of each quarter Mr Miah delivered the business' paperwork to his accountant who prepared the returns, sent a copy to Mr Miah to approve, and later sent Mr Miah a text indicating how much VAT he should pay.

21. Mr Miah told us that his accountant knew of the police investigation in 2014 and that he thought he had told Mr Khan about the sale of the property in 2014. He could not say whether this was that a sale had been arranged i.e. before 18th June, or after completion, that is after 18th June. He said that in January 2015, after the conversation with his solicitor, he had told Mr Khan that the funds from the sale would be released shortly, and, although he did not, provide Mr Khan with a copy of the May 2014 sales invoice, he told him the amount of VAT which arose on the sale. He told us that when he received the funds in March 2015 he told his accountant to put the sale in the VAT return because he now had the funds. Mr Miah told us that he did not know that the sale had to be reflected in his June 2014 VAT return.

22. The effect of the sale of the property was thus reflected in the March 2015 VAT return. Mrs Ashworth told us, and we accept, that this was submitted (in time) on 7 May 2015: the rules for the date of submission of VAT returns allowing in effect just over five weeks from the end of a VAT quarter for a return to be prepared and submitted.

HMRC's investigation.

23. HMRC's records show that on 30 March 2015 an HMRC officer, Mr Mitchell, sent a letter to Mr Miah saying that he was starting an investigation into Mr Miah's tax affairs and indicating that information held by HMRC suggested "that the VAT returns [he had] submitted to HMRC may be incorrect". Mr Miah told us that he had not received this letter. We accept that it was sent. We make no finding as to whether or not it was received.

24. HMRC produced a copy of a series of telephone call attendance notes which Mrs Ashworth told us were made by Mr Mitchell. Mr Miah did not disagree with their contents. Those notes indicated that on 20 April 2015 Mr Mitchell told Mr Miah that he was keen to arrange a meeting to discuss VAT returns.

25. After some false starts a meeting was arranged to 21 May 2015 between HMRC, Mr Khan and Mr Miah.

26. Mr Mitchell sent Mr Miah a copy of his notes of that meeting. In his covering letter he asked Mr Miah to amend anything in the note he thought was wrong or misleading. Mr Miah did not respond himself to that letter but sent it to his new accountant (who had not attended the meeting) .

27. We observed that Mr Miah read slowly and without accuracy. His command of spoken English was more than sufficient for the detail of the hearing but he expressed and demonstrated some difficulties with the written word.. We concluded that he would not have been able to assess the detailed subtleties of the written note.

28. The note recorded that:

(a) HMRC suspected that Mr Miah had submitted incorrect VAT returns;

(b) Mr Miah told the officers that he had sold a property in 2014 "but as the proceeds were not available to him he had not put the sale proceeds on his VAT return"

(c) "as the sale money was to be released shortly he had advised [Mr Khan] and it had been put on the latest VAT return";

(d) Mr Khan said that he had not seen the 27 May 2014 sales invoice in relation to the sale of the property;

(e) Mr Miah said that he had not given the invoice to Mr Khan or made him aware of the sale because he did not want to put on the VAT return: he would not have been able to pay HMRC because he had not received the proceeds;

(f) Mr Miah said he had told Mr Khan about the sale in January or February after his solicitor had said the funds were going to be released;

(g) Mr Khan said he had heard about the sale "in the last three weeks" and so put it on the March 2015 VAT return.

(h) Mr Miah said he could not have paid the VAT and so had kept the sale from Mr Khan and the VAT returns;

(i) *Mr Khan* said he was aware of the tax VAT tax point rules;

(j) Mr Miah said that the funds had still not been released and the return was still unpaid.

29. When Mr Miah's new accountants replied to Mr Mitchell's letter (which appended the note of that meeting), the only matter they disputed was the words recorded at (j), for they said the money was received on 19 March 2015 - before the meeting).

30. There are two seeming discrepancies between the account attributed to Mr Miah in this note and other evidence before us:

31. As recorded at (c) and (j) above, the note records Mr Miah as saying that the funds had not been received – that was at 21 May 2015 - but Mr Miah's solicitors' letter and his bank statements indicate that it was received on 19 March 2015. (Indeed that was the only disagreement expressed by Mr Miah's new accountant.)

32. Mr Khan is recorded as saying that he had heard about the sale "in the last three weeks" - that would have been after 30 April 2015, whereas Mr Miah told us that Mr Khan was told about the sale in January.

33. In relation to this last point it seems to us that if Mr Khan had been told after 30 April 2015 that information could have been recorded in the return submitted on 7 May 2015.

The parties' arguments.

34. Mr Arthur points out that the note of the meeting before us was signed neither by Mr Miah nor by Mr Mitchell. He said we had heard Mr Miah, and by implication that we could not hear from Mr Mitchell.

35. Mr Arthur says that Mr Miah gave consistent clear evidence that he did not know that the issue by him of a tax invoice on 27 May 2014 meant that the supply of the property for VAT purposes took place on that date. The tax point rules were a complex area and Mr Miah could not be expected to have understood the details.

36. Mr Miah did not therefore know that the sale should have been disclosed on the June 2014 VAT return and therefore his actions could not be described as deliberate.

37. Further Mr Arthur says that Mr Miah's evidence was clear that he had asked his accountant January (or possibly February) to put the sale on his next VAT return. As a result, the disclosure of the sale in that return (on 7 May 2015) was not prompted - having taken place before the meeting with HMRC on 21 May 2015 when Mr Miah was told about HMRC's concerns over VAT returns. It was therefore an unprompted disclosure.

38. As a result Mr Arthur says that the penalty should be determined on the basis that it was careless and unprompted. That meant a penalty rate between 30% and nil depending on the quality of Mr Miah's disclosure. HMRC had, in relation to the penalty under the appeal, assessed the quality of disclosure as sufficient to qualify for the maximum reduction. The penalty percentage should thus be reduced to 0.

39. Mrs Ashworth says that the inaccuracy in the June 2014 VAT return was deliberate because Mr Miah deliberately did not give the invoice to Mr Khan because he knew that he did not have access to the funds to pay the VAT. She says that Mr Miah had been engaged in VAtable activities for some time and knew the rules. He knew that VAT was due and that is why he did not tell his accountant about the sale.

40. Mrs Ashworth says that the disclosure was prompted because (i) the 30 March 2014 letter and the 20 April 2014 telephone call would have given Mr Miah "reason to believe that HMRC had discovered the understated VAT, and (ii) any disclosure

was made after those calls and that letter since it was only "in the last three weeks" before the 21 May 2015 meeting of Mr Khan had been told of the sale.

41. Neither Mr Arthur nor Mrs Ashworth contended that there were any special circumstances which affected the non-declaration of VAT. Mrs Ashworth accepted that there could have been special circumstances which related to the non-payment of VAT once declared, but there was nothing which was special about the circumstances of the non-declaration.

Discussion

42. There was no dispute that the time of supply of the property was 27 May 2014 and that the supply should have been reflected in the June 2014 VAT return. There was thus an inaccuracy in that return which had led to an understatement of Mr Miah's liability to VAT.

43. HMRC accept that the onus of proof that any inaccuracy was deliberate fell on them.

44. To our minds something is "deliberate" if it had been thought about. The penalty at the 70% level is dependent upon the inaccuracy having been deliberate. In other words if Mr Miah knew that the sale should have been reported on the June VAT return but decided that it should not be, the inaccuracy in return was deliberate.

45. We consider that Mr Miah knew that the sale was VATable but for the following reasons we do not consider it proved that it should have been reported on the June VAT return.

46. On the one hand we have Mr Miah's evidence that he did not know that it should have been so reported and on the other the implications of the report in the note of the meeting. The question is how we should weigh one against the other.

47. Although we did not have the benefit of Mr Mitchell's evidence about the meeting 27 May 2015, the note was attached to a letter sent by him and contained an internally consistent account of what was said at that meeting. The report of Mr Miah's remark that he had held the invoice back from Mr Khan, and the implicit understanding therefore that, if he gave the invoice to Mr Khan, he would have had to pay VAT, suggest that he knew that the tax point was the date of the invoice.

48. But whilst the note indicates that Mr Khan knew the VAT point rules there is no record of any admission by Mr Miah that he knew them, and the withholding of the invoice or the details of the sale from Mr Khan could also indicate an understanding on Mr Miah's part that VAT was not due until the proceeds had been received. Furthermore, in the unusual circumstances of this sale we did not think that a businessman of Mr Miah's abilities and stature would have been likely to have been clear that the VAT point was the date of the invoice (although we are clear that it was careless not to consider the issue and not to seek advice on it: this was a significant transaction on which it would have been reasonable to seek proper advice as to the accounting for VAT).

49. The result was that on balance we were not persuaded that the evidence showed that Mr Miah knew that the sale should have been reported on the June return and had taken steps to ensure that it was not. On that basis we conclude that the inaccuracy was not deliberate.

50. Was the disclosure to HMRC prompted or unprompted?

51. Paragraph 9 schedule 24 says that "a person discloses an inaccuracy" by:

(a) "telling HMRC about it",

(b) giving HMRC reasonable help in quantifying it, and

(c) allowing HMRC to access to records ...".

52. The relevant disclosure must thus be to HMRC; Mr Miah's disclosure to his accountant was not enough.

53. It seems to us that putting the 27 May 2014 supply in the March 2015 return was not the disclosure *of the inaccuracy* in the terms of this legislation. It may have put the VAT charge back in balance but it did not "tell" HMRC that the June 2014 return was inaccurate.

54. On this basis the first disclosure of the inaccuracy was made by Mr Miah at the meeting on 27 May. By that time Mr Miah had been told in telephone calls that HMRC were concerned about his VAT returns. He had in our view to reason to believe that HMRC had discovered or were about to discover the inaccuracy in the June 2014 VAT return.

55. Further even if including the sale in the March 2015 return did "tell" HMRC of the inaccuracy, it did not do so until HMRC had received the the reurn and that was not until 7 May 2015 after the telephone call of 20 April 2015 in which HMRC's officer had referred to the wish to discuss Mr Miah's VAT returns.

56. We therefore conclude that the disclosure was prompted.

57. Our conclusion is therefore that the inaccuracies in the June 2014 return was not deliberate but was prompted. It was clearly careless. As a result the penalty should be in the range of 15 to 30% of the potential lost tax. We would not disturb HMRC's assessment that the quality of the disclosure warranted the full reduction penalty percentage. We therefore set the penalty and 15% of potential lost revenue.

The potential lost revenue.

58. During the hearing we asked whether paragraph 8 of schedule 24 (potential lost revenue: delayed tax) rather than paragraph 5 schedule 24 (potential lost revenue: the normal rule) should apply to determine the potential lost revenue to which the penalty percentage should apply.

59. Paragraph 8 provides:

(1) Where an inaccuracy resulted in an amount of tax being declared a later than it should have been ("the delayed tax"), the potential lost revenue is -

(a) 5% of the delayed tax each year of the delay, all

(b) the percentage of the delayed tax, for each separate period of delay of less than a year, equating to 5% a year."

60. In accordance with our directions HMRC provided further written submissions on this issue. The Appellant was given the opportunity to reply to them but did not do so.

61. On reflection it seems to us that this provision does not apply. It applies only if the inaccuracy itself "resulted" in a later in an increased declaration. Its focus is on the inaccuracy rather than the conduct which gave rise to the inaccuracy. It does not apply where the delay arises solely because the taxpayer's conduct has had the effect of an increased declaration in a later period. The kind of inaccuracy with which the paragraph is concerned is that for example which may arise if closing stock has been understated. That has the automatic affect it - it 'results' in - the opening stock being understated and the profit overstated in the subsequent period. In Mr Miah;s case the declaration of the sale in the later period was a result of the decision to declare it in that period rather than the lack of recognition in the earlier period.

Result.

62. We conclude that the penalty chargeable should be reduced to 15% of £170,000, that is to say £25,500.

63. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 19 SEPTEMBER 2016