



TC07050

Appeal number: TC/2015/00053

VAT – breach of threshold for mandatory registration – failure to notify liability to register – Commissioners’ decision to register the appellant compulsorily – whether the appellant an employee of the business or the person liable to be registered for VAT – burden of proof – penalty under Sch 41 FA 2008 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SALMAN ALI CHAUDRY

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE HEIDI POON
CHARLOTTE BARBOUR**

Sitting in public at Eagle Building, Glasgow on 21 January 2019

Mr Chaudry in person for the Appellant

Mrs Elizabeth McIntyre, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Chaudry ('the appellant') appealed against the following decisions by the respondents ('HMRC'):

(1) to compulsorily register Mr Chaudry for VAT under Schedule 1(1)(a) of VATA 1994 ('VATA') for the period 1 May 2012 to 30 June 2014 per letter dated 10 April 2015; and

(2) to impose a penalty for the Failure to Notify ('FTN') a liability under Schedule 41 to the Finance Act 2008 ('Sch 41') in the sum of £45,443, by notice dated 25 August 2015.

2. On or around 3 May 2015, HMRC wrote to the appellant that an assessment in the sum of £113,432 had been raised to best judgment, since the appellant had not filed a return to account for the VAT arrears. There is no right of appeal against the assessment in the absence of an actual VAT return having been rendered.

3. Consequently, the quantum of the VAT assessment is not a matter for the Tribunal. The matters for the Tribunal's determination concern the two decisions by HMRC under appeal as set out above.

Evidence

4. Officer Philip Shepherd is a VAT Compliance Officer for HMRC. At the material times, he was based in the Hidden Economy Team in Glasgow, and was the officer overseeing the investigations into the business concerns with which the appellant was associated. Officer Shepherd was the decision maker to register the appellant compulsorily for VAT, and to raise a VAT assessment for the arrears. He also assessed the appellant to a Failure to Notify penalty under Sch 41.

5. Officer Shepherd was called as a witness for the respondents. He provided a witness statement, and his oral evidence was led by Mrs McIntyre and cross-examined by Mr Chaudry. We find Officer Shepherd to be a credible and reliable witness.

6. Mr Chaudry did not provide a witness statement. The Tribunal asked him questions as to matters of fact chiefly in relation to his stated grounds of appeal. He also answered HMRC's questions, his replies of which are incorporated in our findings of fact.

Relevant legislation

7. The legislation in relation to the appeal against the Commissioners' decision concerning VAT registration is contained in the VATA 1994, with the relevant provisions being:

(1) Section 3 provides that a person is liable to register for VAT where the conditions set out under Schedule 1 of the Act are met:

(a) Schedule 1, para 1(1)(a) sets out the timing and the income threshold when a liability to register for VAT arises, which is: ‘at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded [the relevant mandatory registration threshold in force]’.

(b) Schedule 1, para 4 sets out the timing and conditions when a trader may be de-registered for VAT purposes;

(c) Schedule 1, para 5 provides for the notification of liability and registration whereby:

‘(1) A person who becomes liable to be registered by virtue of para 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.

(2) The Commissioners shall register such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

(3) In this paragraph “the relevant month”, in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be registered.’

(d) Schedule 1, para 13 provides for the ‘Cancellation of registration’ where a registered trader can be de-registered if either the business ceases, or if HMRC are satisfied that the trader is no longer required to be registered.

(2) Section 4 of VATA specifies that VAT is chargeable on a supply of goods or services which falls within the scope of being a ‘taxable supply’.

(3) Section 73(1) VATA provides for HMRC to make an assessment to VAT where a person has failed to submit a return, within the time limits provided under sub-s 73(6), being:

‘(a) 2 years after the end of the prescribing accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.’

(4) Section 77 provides for the time limits for the raising of s 73 assessment, which is within 4 years after the end of the prescribed accounting period or importation or acquisition concerned.

(5) In relation to the right of appeal;

(a) Section 83(1)(a) provides for a right of appeal as respects the Commissioners’ decision to register a person for VAT.

(b) Section 83(1)(p)(i) provides for a right of appeal against an assessment under s 73 in respect of a period for which the appellant has made a VAT return.

(c) The corollary is where no VAT return has been submitted, an assessment under s 73 VATA is not an appealable matter.

8. As for the FTN penalty assessment, the relevant provisions are contained in Schedule 41 to FA 2008, of which the following paragraphs are of direct relevance:

(1) Paragraph 1 allows a penalty to be imposed where there is a failure to notify liability to register for VAT as provided under Sch 1, para 5 of VATA.

(2) Paragraph 5 defines the degrees of culpability into categories for the purposes of setting the penalty percentages.

(3) The calculation of a penalty is with reference to ‘Potential Lost Revenue’ (‘PLR’) as provided under para 7, the penalty percentage according to the degree of culpability, and any reduction allowed for disclosure as provided under para 12.

(4) Paragraph 14 provides for ‘Special reduction’ if HMRC think it right because of special circumstances.

(5) Paragraph 17 provides for a right of appeal against a penalty whereby:

‘(1) P may appeal against a decision of HMRC that a penalty is payable by P.

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

(6) Paragraph 19 sets out the Tribunal’s jurisdiction on an appeal under para 17, which is to either ‘affirm HMRC’s decision’, or ‘substitute for HMRC’s decision another decision that HMRC had power to make’.

(7) Paragraph 20 provides that a liability to a penalty under Sch 41 does not arise in relation to ‘*an act or failure which is not deliberate*’ if the taxpayer satisfies HMRC or (on appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure. The provisions specifically exclude ‘insufficiency of funds’ and ‘reliance on a third party’ from being a reasonable excuse.

The facts

Background

9. The appellant was concerned in the trade of an off-licence from two premises in Glasgow: (a) at Shandwick Square, Easterhouse (‘Shandwick Off Sales’); and (b) at Castlemilk (‘Oasis Off Sales’). The enquiry into the VAT registration status of the business was preceded by the following events:

(1) The appellant was interviewed under caution on two separate occasions: on 3 October 2012, and 26 July, 2013, by HMRC in connection with alcohol seized that had evaded excise duty.

- (2) On 3 September 2013, an HMRC investigation team carried out an unannounced visit to the premises at Shandwick Square. During the visit, HMRC were advised that the appellant was the proprietor of the premises; business records were uplifted.
- (3) On 6 September 2013, the review of the records uplifted on 3 September established that the gross takings of the business averaged £16,000 per week.
- (4) On 10 September 2013, an HMRC investigation team made an unannounced visit to the premises in Castlemilk.
- (5) On 4 July 2014, HMRC wrote to the appellant to invite him to a meeting to discuss his business activities.

10. The following background facts from Officer Shepherd's witness statement and evidence are relevant to our consideration:

- (1) That in relation to the Shandwick off-licence premises, Officer Shepherd found that Byron Stores Ltd, was registered with the company address as at Unit 1 Shandwick Square, being the off-licence premises. The company was incorporated on 17 March 2011 and dissolved on 2 November 2012. The appellant was listed as the sole director and company secretary.
- (2) There was no record of any VAT registration number for either Byron Stores Ltd or any other legal entity operating from Unit 1 Shandwick Square.
- (3) In relation to the Oasis Off Sales at Castlemilk, it was found that Urban Company 5 Ltd was listed as being VAT registered at the premises between November 2010 and February 2011, with Joseph Hyde as the sole director.
- (4) On 3 September 2013, when Officer Shepherd conducted an unannounced visit at the Shandwick off-licence with a colleague, he spoke with one of the three members of staff on the premises who identified himself as Mohammed Ahmad. Mr Ahmad told Officer Shepherd that the proprietor of the business was the appellant, who was not present on the premises at the time of the visit.
- (5) The alcohol licence document on the premises was issued by Glasgow City Council and was in the name of a Teresa McGonigle, who told Officer Shepherd the following:
 - (a) the appellant was proprietor of the business; she was an employee of his, working full time at the premises from Monday to Friday;
 - (b) that she was originally the licensee for the public house next door, but took on the alcohol licence for Shad Off Sales when she began working for the appellant; that only the appellant purchased stock for the premises; and that she had no involvement in stock purchases.
- (6) Mrs McGonigle reacted badly to the Customs Officers' seizure of numerous quantities of alcohol for not having had duty paid during the visit, as she would be appearing before the Glasgow City Council's licensing committee.
- (7) On 1 August 2014 when the appellant met with Officer Shepherd at HMRC, he maintained that he was not the proprietor of the Shandwick or Oasis

off-licence businesses; that he was an employee of Urban Off Sales Ltd, which operated both businesses.

The enquiry into VAT registration

11. The chronology of the key events of the enquiry process is as follows:

(1) On 1 August 2014, HMRC held a meeting with the appellant where it was put to him that he was operating two off-licence businesses. Excerpts of Officer Shepherd's Minutes of the meeting record are as follows:

'Mr Chaudry advised that he worked at Shandwick Off Sales in Easterhouse for [one and a half] years prior to the business closing at the end of June 2014. Prior to this, Mr Chaudry said he was claiming Job Seeker's Allowance. Mr Chaudry said he has also been claiming Job Seeker's Allowance since 01/07/2014.'

'Mr Chaudry confirmed that he used to live in London and owned an off licence there. Mr Chaudry said that, following his separation from his family, he came to Glasgow and worked at the Shandwick & Oasis premises due to his knowledge of the off licence trade.'

(2) On 7 August 2014, HMRC wrote to the appellant setting out their belief that he had been operating off-licence from two premises and was therefore required to be registered for VAT. The letter invited an explanation to be given as to why there had been a failure to notify HMRC of the liability to register.

(3) On 2 October 2014, HMRC completed a proforma VAT 1 (application for registration) to register the appellant for VAT as from 1 August 2011.

(4) On 10 October 2014, HMRC wrote to the appellant setting out the penalty under Sch 41 that would be imposed, and an explanation of how the amount of penalty would be calculated.

(5) On 31 October 2014, HMRC received a request for a review of the decision, which was acknowledged on 14 November 2014, followed by a request by HMRC on 15 December 2014 to extend the period in which the review was to be carried out. The appellant agreed to the extension by letter dated 2 January 2015.

(6) On 12 November 2014, the penalty assessment was issued. On 5 January 2015, HMRC wrote to the appellant enquiring if he wished to include the penalty assessment in his request for a review.

(7) On 21 January 2015, HMRC issued the review conclusion decision, which upheld the decision to register the appellant for VAT. The date from which the registration was to take place was referred back to Officer Shepherd to consider.

12. As part of the evidence gathering exercise for the VAT registration enquiry, Officer Shepherd obtained transcripts of the interviews in which the appellant attended with his solicitor, Mr Michael Poggi from Berry Poggi and Company, Carlton Place in Glasgow.

13. The following excerpts of the transcript of 3 October 2012 when the appellant ('App') was interviewed by two HMRC Officers are relevant to our consideration:

'HMRC: ... the matters we're going to be speaking to you about is on 30th of May on the M74, on the 14th of June and 15th of September at two separate off licences that we believe you're connected to ...

HMRC: Are you just an employee, are you the manager, the owner? ...

App: I'm, I'm, I'm running the stores. [...]

HMRC: In what capacity are you running the stores? [...]

App: What do you mean in what capacity?

HMRC: Well are you the manager or are you the proprietor licence holder?

App: I'm the owner of the premises, kind of owner.

HMRC: Kind of, what premises have you got Mr Chaudry?

App: Easter House. Easter House.

HMRC: Easter House which is the Shandwick off sales.

App: That's right, yes.

HMRC: That's the off licence. You've also got ...

App: Off sales Oasis in Castlemilk.

HMRC: Castlemilk. Is that your two concerns?

App: Yes.

HMRC: So you're the proprietor of these two premises.

App: Yes.'

14. The transcript continued with the appellant informing the interviewing officers that he took out a lease about eight to nine months previous (to October 2012 of the interview) from Urban Off Sales for both Shandwick and Castlemilk premises; and confirmed that Teresa McGonigle was the manageress and licence holder of Shandwick Off Sales.

15. The appellant was then asked questions about paperwork and accounting records being kept for the off-licence businesses, in the following exchanges:

'HMRC: ... you give your accounts to an Accountant to do such things as your Tax Returns would that be right to say Mr Chaudry. Have you ever seen a VAT Return?

App: Sorry.

HMRC: A VAT Return.

App: No comment.

HMRC: No, it's a straightforward question do you sign VAT Returns as part of your business?

App: It should, it should have been done yes.'

16. The transcript of the interview under caution on 26 July 2013 recorded the following responses from the appellant:

'HMRC: What is your employment status? [...]

App: I work in a shop.

HMRC: You work in a shop okay. Do you own that shop?

App: Yes

HMRC: You do own the shop

App: Yes

HMRC: You do own the shop, how long have you had the shop?

App: 2 years (Inaudible) a year and something a year and a half.

HMRC: ... have you bought the shop?

[...]

App: Only just rent the shop.

The effective date of registration ('EDR')

17. Following the review conclusion, HMRC amended the effective date of registration twice to a later date and the amended dates were notified to the appellant:

(1) By letter dated 2 February 2015, the appellant was notified that the EDR was amended from 1 August 2011 to 1 February 2012;

(2) By letter dated 31 March 2015, the EDR was amended from 1 February 2012 to 1 May 2012.

18. The reason for the amendments to the EDR was, as explained by Officer Shepherd in his letter to the appellant dated 31 March 2015:

'My original decision was based upon the assumption that you operated the Shandwick Off Sales in Easterhouse and the Oasis Off Sales in Castlemilk. However, as I have no evidence that you did not operate the Castlemilk premises, I have excluded these sales figures from my calculations.'

19. The double negative in the sentence 'no evidence that you did not operate' would appear to be a mistake. In evidence, Officer Shepherd referred to the fact that Urban Company 5 Ltd was listed as being VAT registered at the premises of Oasis Off Sales in Castlemilk between November 2010 and February 2011, with Joseph Hyde as the sole director. That was the evidence being taken into account when the EDR was revised for a second time.

20. What is clear is that the letter of 31 March 2015 notified the appellant that the trading results relating to Oasis Off Sales in Castlemilk had been removed in reckoning when the registration threshold was breached. By using the best estimates of rolling turnover from one premises only, that of Shandwick Off Sales, the breach of the registration threshold was put back by three months to 1 May 2012.

21. The letter of 31 March 2015 also confirmed that the VAT registration would be cancelled as from 30 June 2014, the date the Shandwick premises ceased trading as advised by the appellant in his meeting with Officer Shepherd on 1 August 2014.

22. On 10 April 2015, HMRC notified the appellant that he was registered for VAT with effect from 1 May 2012. The VAT registration threshold in force in May 2012 was £77,000, rising to £79,000 from April 2013.

The VAT assessment and the FTN penalty assessment

23. On or around 3 May 2015, HMRC wrote to the appellant advising that in the absence of a VAT return for the period in which registration was in place (for the period from 1 May 2012 to 30 June 2014), an assessment in the sum of £113,432 has been raised under s 73 VATA.

24. The quantum of the best judgment assessment was substantiated by meticulous analyses of the business records related to Shandwick Off Sales. The spreadsheets that underpinned the assessment figure of £113,432 are included (pp 121- 144), and they show the following:

(1) An analysis of the Daily Gross Takings ('DGT') from the 'X Reading Till Audit Roll Reports' covering the period from 20 April 2012 to 25 March 2013 into categories: can beer, wines, spirits, sweets, tobacco, soft drinks, ciders, miscellaneous, and grocery.

(2) The DGT analysis was used to calculate the average DGT for each day of the week; for example, the total DGTs for 26 Tuesdays in the period of analysis was £48,805.78, which gives an average DGT for a Tuesday of £1,877.15; compared with the average DGT for a Friday similarly derived of £3,613.38.

(3) Using the averaged DGTs for each day of the week as the basis, the rolling turnover for a twelve-month period was projected from 1 February 2012 when Shandwick Off Sales commenced trading to establish when the VAT registration threshold was breached.

(4) Where the actual figures of DGT for the day are available, either from Till Audit Roll, or from the Ledger Diary for 2013, the actual figures are used in substitution of the averaged DGT.

(5) The purchase invoices of Shandwick Off Sales for the month of July 2013 were analysed to establish the input VAT incurred by the business; the monthly actual would seem to be used as the estimate to allow a reduction against output VAT payable for each month from 1 May 2012.

25. By virtue of the provision under s 83(1)(p), the right of appeal against a s 73 VATA assessment is attached to a VAT return (or returns) having been filed for the relevant period. Where a VAT return has not been filed, as in the present case, no appeal is possible against the assessment.

26. On 25 August 2015, HMRC notified the appellant that the penalty assessment has been amended to £45,443, which is an appealable matter by provision under s 83(1)(q).

The penalty explanation

27. On 31 March 2015, the appellant was notified of the basis of calculating the Failure to Notify penalty, following the amendment of the EDR to 1 May 2012:

(1) The 'behaviour' which led to the failure to notify was 'deliberate', having regard to the fact that: (a) the appellant had denied being the proprietor of the Shandwick and Oasis Off Sales; (b) the appellant had provided no evidence to

support his assertion that he was operating the business as an employee; (c) in relation to the appellant's former trade as Star Food and Wine Ltd:

'You were sole director and shareholder of Star Food & Wine Ltd – a company which was VAT registered between March 1999 and June 2002 – which operated an off licence in central London.

Therefore, in my opinion, you have an awareness of your obligation to be registered for VAT purposes and your failure to notify your liability for VAT registration at Shandwick Off Sales was deliberate.'

(2) The 'disclosure' was 'prompted' because the appellant did not tell HMRC about the failure to notify before he had reason to believe that HMRC had discovered it, or were about to discover it.

(3) The penalty range for 'deliberate behaviour' and 'prompted disclosure' is from 35% to 70%.

(4) The reduction given for quality of disclosure: (a) 0% **Telling**: as the appellant had 'denied wrongdoing'. (b) 10% for **Helping**, and (c) 10% **Giving**: as access to business records was provided by staff during HMRC's visit to the premises.

(5) The penalty percentage is set at 63% after giving an overall reduction of 7%, (being 20% multiplied by 35% as the difference between the maximum 70% and minimum 35% within the penalty range).

(6) The Potential Lost Revenue ('PLR') was referenced to the 'Estimation of net VAT arrears' and was set at £72,133 for the period from 1 May 2012 to 2 September 2013 (being the date before HMRC's unannounced visit to the Shandwick Off Sales premises).

(7) The penalty was calculated as £72,133 at 63% to arrive at the assessment of 45,443.

The appellant's production of two undated letters in July 2015

28. Before the issue of the amended penalty assessment in August 2015, Officer Shepherd received two undated letters from the appellant on 10 July 2015. The content of the letters is as follows.

(1) The first letter is supposed to have come from Mrs McGonigle, saying:

'With regards (sic) to Shadwick Off Sales/ Urban Off Sales Ltd.

I was the DPM at the unit for the period and Salman Ali Chaudry was my line manager and it was my understanding that we both worked for Urban Off Sales Ltd.'

(2) The second letter is supposed to have come from a Mr Graham Sutherland of Urban Off Sales Ltd, saying:

'This letter is to confirm that Mr Salman Ali Chaudry of [address] was employed by the above named company in the capacity of manager. From 28/04/2011 until 30/06/2014 at [Shandwick premises address].'

29. Officer Shepherd was asked to indicate the weight he had attributed to these two undated letters in his decision making, and his replies were:

(1) The first letter was disregarded because it was ‘undated and directly contradicted’ what Mrs McGonigle informed HMRC during the unannounced visit to Shandwick Off Sales on 3 September 2013; that Mr Chaudry was the proprietor of the premises; that Mrs McGonigle was ‘very upset’ on realising that there was ‘contraband alcohol found on the premises’ because as the licensee, it was ‘ultimately her responsibility’.

(2) The second letter was also disregarded. A search of the Companies House records showed Graham Sutherland to have been a director originally of Urban Off Sales Ltd, but he had resigned some years ago at a time before the premises were run by Mr Chaudry. Officer Shepherd therefore did not give the letter any weight and gave as his reason: ‘If Mr Sutherland wanted to clarify that the company was the trading entity, I would expect him to come forward to speak to me; I would expect Mr Sutherland to come directly to me.’

The appellant’s case

30. By notice dated 2 November 2014, the appellant notified his appeal to the Tribunal, stating as his grounds the following:

‘I was employed as a manager to run these stores. I (sic) been charged for VAT which is due to my employer, not me. HMRC refused to accept this even though I have provided them with evidence.’

31. The notice of appeal was therefore lodged before: (a) the review conclusion decision was issued on 21 January 2015, (b) the subsequent amendments to the EDR that gave rise to the appealable decision of 10 April 2015, and (c) the penalty assessment amended on 25 August 2015.

32. The appellant asserted that he was only an employee at the Shandwick Off Sales; he relied on the two undated letters to prove his status as an employee. He further asserted that he was not the owner of the premises, and therefore, that he could not have been the owner of the business operating from those premises.

33. The Tribunal asked the appellant if he had any PAYE records to show that he was an employee. The appellant submitted that HMRC should have checked ‘who the landowner is’ for the premises; ‘who do (sic) the landlord give the lease to’; ‘who is paying the rent, the rate, and service charges’. HMRC ‘should find out all these’.

34. The appellant repeatedly referred to the fact that he is not a lawyer and said that he could not afford to have a lawyer; that he had engaged the service of a lawyer from Harper Macleod LLP in Glasgow in the summer of 2018 to represent him in the Alternative Dispute Resolution (‘ADR’) procedure which did not resolve the dispute; that he could not afford to have legal representation as he had not paid the legal fees.

HMRC's case

35. HMRC consider that the appellant was operating the off-licence at Shandwick Square and was required to be registered for VAT. The burden of proof is on the appellant to demonstrate that he was not operating the business.

36. The correspondence produced by the appellant from Mrs McGonigle and Mr Sutherland is not supported by any other documentation and does not demonstrate that the appellant was not operating the off-licence. The content of the correspondence contradicts the information provided during the visit to the premises on 3 September 2013 during which HMRC were advised that the appellant operated the business.

37. HMRC further consider that the appellant was aware of the requirement to be registered for VAT and indicated the same during the interview under caution on 3 October 2012.

38. As to the penalty assessment, HMRC consider that the behaviour leading to the Failure to Notify was deliberate; the disclosure was prompted as set out in the Penalty Explanation. No further reduction could be given due to the general lack of assistance provided by the appellant during the investigations. Furthermore, the Failure occurred more than 12 months after the date from which the appellant was required to be VAT registered.

39. HMRC consider that there were no special circumstances for any special reduction to the penalty, and there is no provision under Sch 41 FA 208 to allow suspension of a penalty levied for a Failure to Notify.

Discussion

40. The appealable matters over which the Tribunal has jurisdiction concern:

- (1) The Commissioners' decision to register the appellant compulsorily for VAT for the period from 1 May 2012 to 30 June 2014; and
- (2) The penalty assessment raised in the sum of £45,443 for the failure to notify the liability to register for VAT.

The Commissioners' decision to register the appellant for VAT

41. It is common ground the supplies made by Shandwick Off Sales were taxable supplies, and as such, if the business turnover in a rolling 12-month period exceeded that of the VAT registration threshold at the relevant time, then VAT registration was mandatory; there is no other option.

42. Based on the obtainable facts, and on the Daily Gross Takings and associated analyses produced, there was a *prima facie* case that the relevant rolling turnover of the business operating as Shandwick Off Sales had breached the VAT registration threshold of £77,000 in force in May 2012.

43. The appellant does not challenge HMRC's decision that the rolling turnover of Shandwick Off Sales had breached the VAT registration threshold, and that Shandwick Off Sales should have been registered for VAT. Neither does he dispute HMRC's decision as regards the timing of the breach as in May 2012, and that the business should have accounted for VAT from May 2012 onwards until the business ceased in June 2014.

44. The onus is on the owner of the relevant business to notify liability to register.

45. The appellant's appeal is staked on the assertion that he was *not* the owner of the business of Shandwick Off Sales; and that he was only running the business as an employee, and was not the person liable to be registered.

46. Whether the appellant is the liable person for the VAT registration is to be decided as a matter of fact. The appeal hinges on a factual issue, and does not concern a matter of law that the appellant could not have made his case without legal representation.

47. For the following reasons, and based on the obtainable facts available to us, we conclude that HMRC have proved, on the balance of probabilities, that the appellant was the person liable to be registered for VAT in connection with the business operating as Shandwick Off Sales:

(1) At the interview under caution on 3 October 2012, the question was specifically put to the appellant in what capacity he concerned himself in two off-licence businesses. He had replied in the affirmative that he was the 'proprietor' of the two premises at Shandwick and Castlemilk.

(2) During the interview under caution on 26 July 2013, the appellant confirmed that he owned the shop which he worked in, and for '2 years' then revised to 'a year and a half'. Shandwick Off Sales commenced trading in February 2012, which was about 'a year and a half' from the time the appellant gave his reply on 26 July 2013.

(3) On 3 September 2013, when HMRC made the unannounced visit to Shandwick Off Sales, Mr Ahmad and Mrs McGonigle, both working in the business, independently named the appellant as the 'proprietor' of the business.

(4) Mrs McGonigle had informed HMRC during the September 2013 visit that the appellant as the owner of the business was the only person responsible for the purchase of alcohol, and that she was unaware of contraband alcohol being sold on the premises. The fact that the acquisition of alcohol was the appellant's responsibility would seem to tie in with the events that led to the two interviews under caution of the appellant. It is more likely than not that the appellant was acquiring contraband alcohol as the 'owner' to sell in his business than as a mere employee working in someone else's business.

(5) The undated letter produced by the appellant and received by HMRC on 10 July 2015 cannot be given any weight. The letter was supposed to have come from Mrs McGonigle, but the content contradicts what she had told HMRC on 3 September 2013. Mrs McGonigle was not called as a witness to testify to the

authenticity of the letter, or to speak to the substance of the statement which contradicts the information she gave in September 2013 to HMRC.

(6) The second undated letter produced by the appellant and allegedly from Graham Sutherland suffers the same deficiency as the first undated letter. There was no date to indicate when the letter was written, or whether it was authentically from Mr Sutherland, who was not available to testify to its authenticity or to speak to the substance of the letter. As Officer Shepherd had stated, Companies House records showed Mr Sutherland to have resigned from his directorship before the date Shandwick Off Sales commenced trading.

(7) There was no corroborative evidence to support the appellant's claim that he was working as an employee in Shandwick Off Sales. If he had been an employee, some form of records must exist: a contract of employment from his supposed employer; the bank statements to testify wages or salary payments; the records with HMRC to confirm that he was as an employee via the Employer's Annual Return, which would state the amounts of Pay and PAYE deducted.

48. The crucial fact is that we find the *business* of Shandwick Off Sales to be the appellant's. Consequently, the appellant was the person liable to be registered for VAT in relation to the taxable supplies made by Shanwick Off Sales.

49. As corroborative evidence, Officer Shepherd had searched Companies House records which stated that the appellant was the sole director and company secretary of Byron Stores Ltd incorporated between 17 March 2011 and 2 November 2012. Furthermore, the registered address for Byron Stores Ltd was the same as the premises address for Shandwick Off Sales.

50. We have heard the appellant's submissions that HMRC should have checked who actually owned the premises, who paid the rate, the service charges and so on. We do not consider that anything turns on this fact: whoever owns the shop premises can be a landlord to the owner of the business which operates from the shop premises.

51. The appellant's evidence, in this respect, was of itself factually inconsistent:

(1) He had said 'yes' to being 'the proprietor of these two premises' (in Shandwick Square and in Castlemilk) in the interview of 3 October 2012;

(2) On 26 July 2013, when he was asked if he had bought the shop at Shandwick Square, he replied: 'only just rent the shop'.

52. In any event, it is unnecessary for the Tribunal to make any finding of fact as respects the ownership of the premises in order to determine the appeal. Even if the appellant did not 'own' the Shandwick premises, and was a tenant to the landlord who owned the Shandwick premises, it does not detract from the fact that the appellant was the owner of the business operating from the Shandwick premises.

53. For reasons as stated, we confirm the Commissioners' decision to register the appellant for VAT as the person liable to be so registered in relation to the business of Shandwick Off Sales for the period from 1 May 2012 to 30 June 2014.

The Failure to Notify penalty

54. The appellant has not contended against the quantum of the VAT assessment for the arrears (which set the Potential Lost Revenue for penalty calculation); nor has he put forward any grounds to contest the quantum of the penalty assessment. We therefore determine the appeal in relation to the penalty assessment as one brought under para 17(1) of Sch 41; that is ‘against a decision of HMRC that a penalty is payable by [the taxpayer]’, as distinct from an appeal ‘against the amount of a penalty payable by [the taxpayer]’ under para 17(2).

55. Paragraph 19(1) provides that on an appeal under para 17(1), the tribunal may affirm or cancel HMRC’s decision. We do not need to consider any substitution for HMRC’s decision that is only applicable to an appeal brought under para 17(2).

56. The onus of proof is on HMRC that there was a prima facie case that a penalty was imposable due to a failure to notify a liability. To the extent that we have confirmed the Commissioners’ decision to register the appellant for VAT, HMRC have discharged the burden of proof in this regard.

57. Turning to the appellant’s personal attributes, he had previously owned an off-licence business in central London and was registered for VAT. Consequently, we are of the view that the appellant was aware of his liability to register for VAT. The appellant admitted to such a liability during the interview under caution on 3 October 2012. When asked whether he signed VAT returns as part of his business, his reply was: ‘It should, it should have been done yes.’

58. We agree with the categorisation of the behaviour that had led to the appellant’s failure to notify his liability as ‘deliberate’.

59. Paragraph 20 of Sch 41 provides for the defence of ‘reasonable excuse’ in relation to ‘an act or failure which is not deliberate’. The consideration of reasonable excuse is therefore not relevant in this instant case.

60. The penalty range of 35% to 70% for ‘deliberate’ behaviour was set by the statute. HMRC have already given a reduction of 10% for Helping and 10% for Giving on account of the information provided by the staff working at Shandwick Off Sales. We consider the reduction given to be sufficient for the quality of disclosure.

61. As to special reduction provided under para 14 of Sch 41, HMRC have considered that there were no special circumstances to merit special reduction, and we agree. Since a failure to notify is clear-cut, and the appellant had previous experience of being VAT registered trader, we are unable to envisage any special circumstances that could apply in the instant case.

Decision

62. For the reasons stated, we affirm the Commissioners’ decision to register Mr Chaudry for VAT purposes for the period from 1 May 2012 to 30 June 2014.

63. The penalty appeal is brought under para 17(1) of Sch 41, which means the outcome of the appeal can only be binary as provided under para 19(1) of Sch 41. The Tribunal can either affirm or cancel HMRC's decision, and we affirm HMRC's decision in relation to the Failure to Notify penalty under Sch 41 to FA 2008.

64. 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.

**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 19 MARCH 2019