Neutral Citation: [2022] UKFTT 285 (TC)

Case Number: TC08567

FIRST-TIER TRIBUNAL
TAX CHAMBER

Alexandra House, Manchester

Appeal reference: TC/2017/02816
TC/2017/02817
TC/2017/05136
TC/2017/05138

Keywords

Heard on: 24 & 25 January 2022 with further written submissions on 8 March & 14 April 2022
Judgment date: 15 August 2022

Before

TRIBUNAL JUDGE JENNIFER DEAN
TRIBUNAL MEMBER MOHAMMED FAROOQ

Between

ADSPEC LTD
and
ADIL HUSSAIN

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Zahur, Altman, Smith & Co Chartered Accountants and Registered Auditors

For HMRC: Ms C. Cowan, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

THE APPEALS

1. These are appeals against the following -

Adspec Ltd

(1) Corporation Tax ('CT') assessments issued to Adspec Ltd ('the Company') for the accounting periods ended ('APE') 3 March 2014 and APE 31 March 2014 – TC/2017/02816.

(2) A Closure Notice issued to Adspec Ltd for CT for the APE 31 March 2015 – TC/2017/02816

(3) A Penalty assessment issued to Adspec Ltd for the APE 3 March 2014, APE 31 March 2014 and APE 31 March 2015 – TC/2017/02816.

(4) VAT assessments issued to Adspec Ltd for the period from 4 March 2013 to 31 December 2013 and from 1 January 2014 to 31 December 2015 inclusive – TC/2017/02817.

(5) A Penalty assessment issued to Adspec Ltd for the period from 4 March 2013 to 31 December 2013 for failing to register for VAT from the appropriate registration date - TC/2017/02817

(6) A Penalty assessment issued to Adspec Ltd for the VAT periods from 1 January 2014 to 31 December 2015 for submitting inaccurate VAT Returns to HMRC - TC/2017/02817

Mr Adil Hussain

(7) A Personal Liability Notice ('PLN') issued to Mr Adil Hussain for the CT Penalty of Adspec Ltd– TC/2017/05136.

(8) A PLN issued to Mr Adil Hussain for the VAT Penalty of Adspec Ltd– TC/2017/05138.

(9) A PLN issued to Mr Adil Hussain for the VAT failure to register penalty - TC/2017/05138.

2. The amounts under appeal are set out in the Appendix to this Decision.

PRELIMINARY MATTERS

3. On 13 January 2022 HMRC applied for permission to lodge a supplementary statement. In short, the HMRC officer who was responsible for the corporation tax aspects of the case, Mr Frost, has since making his statement retired from HMRC. The additional statement from Mr Brooks covers his review of the case and additional evidence sent in by the Appellant since Mr Frost's retirement. Mr Brooks assessed all documents available to Mr Frost and independently reached his own conclusion.

4. We allowed HMRC's application. In our view there was no prejudice to the Appellant; to the contrary Mr Brooks was available for cross-examination by the Appellant in relation to the corporation tax elements under appeal where Mr Frost was not.

5. The second matter related to Mr Brooks' review of the case and his identification of potential additional liabilities which were seemingly overlooked by Mr Frost, namely a charge to tax under s455 CTA 2010. HMRC, fairly in our view, indicated they were content to proceed only on the amounts assessed by Mr Frost and Mr Davies although they noted the that the Tribunal has power to increase, as well as decrease, any amounts assessed.

6. We took the view that given the late stage of proceedings at which the additional charge to tax was identified, we would proceed only on the basis of the figures assessed to ensure the Appellant was not prejudiced by an inability to challenge the potential additional liabilities on limited notice.

BACKGROUND

7. Adspec Ltd sells electronic tablets and accessories imported from China on the internet via Amazon and eBay. Mr Adil Hussain is the sole director of the Company. The corporation tax return for Adspec Ltd for the APE 31 March 2015 was received by HMRC on 31 December 2015.

8. A VAT enquiry was opened into the Company by letter dated 8 January 2016. An enquiry was opened into the CT Return on 2 February 2016 which was run in parallel with the VAT enquiry.

9. Corporation tax assessments were issued to Adspec Ltd on 10 August 2016 for the APEs 3 March 2014 and 31 March 2014 under Section 41 Schedule 18 Finance Act 1998. A Closure Notice was issued to Adspec Ltd on 10 August 2016 for corporation tax for the APE 31 March 2015 under Section 32 Schedule 18 Finance Act 1998. A penalty assessment was raised on Adspec Ltd on 10 October 2016 for the APEs 3 March 2014, 31 March 2014 and 31 March 2015 under Schedule 24 Finance Act 2007.

10. HMRC raised these assessments on the basis that data had been made available to them showing the level of imports made by the Company and by Mr Adil Hussain as a director of Adspec Ltd. HMRC analysed the data and determined that the quantity of imported goods was significantly higher than shown on the Company VAT returns. Using figures from a 3rd party showing e-commerce sales HMRC concluded that there was a significant level of understated sales during the period reviewed.

11. HMRC requested the Company to provide information and documentation to enable a detailed review of the business to take place. To date these documents have still not been provided.

12. In view of the lack of co-operation and complete lack of business records provided, HMRC raised VAT assessments using best and reasonable judgement from information held in respect of the VAT due on the apparent understated sales.

13. The apparent omissions identified by the VAT review were used to form the basis of the revised corporation tax assessments.

14. HMRC submitted that as an officer of the Company, Mr Hussain was directly responsible for omitting from the Company accounts a significant volume of purchases that were far in excess of those recorded. Mr Hussain similarly failed to record the income arising from the associated sales within the Company accounts. Coupled with the general lack of co-operation with the enquiry, HMRC contended that they were correct to charge various penalties on the Company for deliberate inaccuracies arising. Furthermore, HMRC contended that as the failures are directly attributable to Mr Hussain, the penalties arising are due to be paid by him by way of PLNs.

15. An independent statutory review of the CT assessments and Closure Notice was carried out and a review conclusion letter was issued on 28 February 2017. The Review Officer identified some computational errors in the assessments raised and concluded that the assessments for APE 31 March 2014, 31 March 2015 and associated penalty assessments should be varied with the amounts due for APE 3 March 2014 and 31 March 2014 being increased.

16. VAT assessments were raised on Adspec Ltd under Section 73(1) of VATA 1994 for the period from 4 March 2013 to 31 December 2013 and from 1 January 2014 to 31 December 2015 inclusive. A penalty assessment was raised on Adspec Ltd for the period from 4 March 2013 to 31 December 2013 under Schedule 41 Finance Act 2008 for failing to register for VAT from the appropriate registration date. The Effective Date of Registration (EDR) for VAT purposes was amended to 4 March 2013 from 1 January 2014.

17. A penalty assessment was raised on Adspec Ltd for the VAT periods from 1 January 2014 to 31 December 2015 under Schedule 24 Finance Act 2007 for submitting inaccurate VAT Returns to HMRC.

18. The Appellant notified an appeal to HMRC against the VAT assessment and penalties by letter dated 4 November 2016 and the Appellant requested an independent statutory review of the decisions. Due to an oversight HMRC did not carry out the review until 26 September 2017, after the Appellant notified an appeal to H M Courts & Tribunal Service on 28 March 2017. The outcome of the review was that the decisions and associated penalty assessments should be varied. The original VAT assessment showed the wrong end period. The assessment was withdrawn and reissued in the same amount as the quantum was correct and HMRC were still in time to re-issue the assessment.

19. The Notices of Appeal set out the following grounds of appeal:

> '…no concrete evidence has been provided as to how the officers have arrived at such figures. Import figures have been provided and assessments made accordingly. Though no evidence is provided with regards to how they have calculated the selling prices, profit margins and split between accessories and tablets. I believe the assessments are way out of proportion. The penalties are based on the assessments and therefore would like to appeal these also.'

> 'I would like to state that this is my first time running a business and I had to learn a lot in a short time. I have not meant to transgress any guidelines or rules. I may have been naiver in my business dealings and my record keeping which meant I was careless due to the fact I was too busy trying to run the business. I would refute any suggestion however that this was a deliberate act. Any errors were not as a result of consciously seeking to under declare income or profits.'

ISSUES IN DISPUTE

20. The issues to be determined by this Tribunal are –

(1) Whether trading receipts on sales undertaken through online trading platforms have been omitted.

(2) Whether for the APE's 3 March 2014, 31 March 2014 and 31 March 2015 there are omitted profits which ought to have been assessed for CT but had not been assessed.

(3) Whether there was a deliberate inaccuracy in relation to company Returns submitted for CT resulting in a penalty due under Schedule 24 FA 07.

(4) Whether there was a failure by the Company to register for VAT at the appropriate time and account for VAT on sales resulting in VAT due for the period from the backdated date of registration 4 March 2013 to 31 December 2013.

(5) Whether additional VAT is due on undeclared sales for the periods 1 January 2014 to 31 December 2015 inclusive.

(6) Whether that failure to register for VAT at the appropriate time results in a penalty due under Schedule 41 FA 08.

(7) Whether there was a deliberate inaccuracy in relation to VAT Returns in the period from 1 January 2014 to 31 December 2015 resulting in a penalty due under Schedule 24 FA 07.

(8) Whether the sole Company Officer Mr Adil Hussain falls liable to personally pay the Company penalties for CT and VAT by way of Personal Liability Notices.

EVIDENCE

21. HMRC led evidence from HMRC officers Mr Brooks and Mr Davies. The statement of Mr Frost was also relied upon. Mr Hussain gave evidence on behalf of the Appellants. For reasons we will set out, we found the evidence of HMRC cogent and compelling. To the contrary, we found Mr Hussain's evidence was vague and lacked credibility.

Unchallenged background facts

22. Mr Davies explained that HMRC had identified three addresses that received imported goods sold via the Company. Inspections were attempted of those addresses on 2 December 2015 however Mr Hussain was not available at any of the premises visited. Mr Davies visited one of those addresses, the Storeroom Business Centre, with two other HMRC officers where a member of staff confirmed that he worked for Mr Hussain but did not know his whereabouts.

23. Whilst at the Storeroom the member of staff had confirmed his name as Mr Rashid who worked in packaging and dispatch of tablets and accessories. He had confirmed he was paid £8 per hour, approximately £600 per month (paid by bank transfer) and that there were two members of staff who dealt with dispatch which was done via Royal Mail.

24. Following the issue of a Notice to inspect goods by Customs, International Trade and Excise (CITEX) to the Company on 8 January 2016, Mr Davies accompanies two other officers on a visit to the Company on 2 February 2016. They met with Mr Hussain and his agent, Mr Zahur. During the meeting Mr Hussain confirmed the following:

(1) He is the sole director of the Company;

(2) He deals with all aspects of running the Company;

(3) He researches and sources the goods to be sold which were mainly 7" and 10" android tablets which are branded with the Company's name and imported;

(4) Imports were handled by his suppliers in China and Hong Kong;

(5) He was not involved in any other limited companies, has no sole proprietor businesses and was not involved in any partnerships;

(6) Very few sales were made through the Company's website www.adspecltd.com;

(7) He held three eBay accounts: Adspec, G62-online and adhus786;

(8) Approximately 85% of sales were made through eBay with adhus786 being the busiest stream;

(9) He also sold through Amazon and attended no more than one trade show per year;

(10) Payments for eBay transactions were mainly made via PayPal but he could not quantify the percentage;

(11) Amazon does not take payment via PayPal; card payments are taken by Amazon with payment made to Adspec on a fortnightly basis;

(12) His VAT returns were reconciled from PayPal and his bank statements and were completed by the accountants.

25. In oral evidence Mr Davies explained that there was a risk of under-declared sales if the bank statements were used because platforms such as eBay charge fees and therefore payments to the Company are net of those fees. The correct figure to use would be the gross figure and deduct the fees as input tax. Mr Davies added that HMRC needed to see the three eBay accounts

and the Amazon account to assess the sales and see the whole picture, however these were not provided.

26. An imports questionnaire was completed by Officer Patterson and limited records were provided by Mr Hussain who stated that his business laptop was not available for checks on electronic records for the eBay, PayPal and Amazon accounts. Mr Hussain agreed to make the laptop available along with other records within 3 weeks however when followed up by officer Patterson by email on 4 and 15 February 2016 no response was received. Mr Frost issued a Notice of Inspection of business and a Notice to produce documents under Sch 36 FA 2008 proposing a visit to the business on 10 March 2016 however three hours prior to the visit the Appellant's representative notified HMRC that Mr Hussain had cancelled the meeting due to personal and health reasons and that he would not correspond with HMRC.

27. Mr Zahur agreed to provide copies of the detailed VAT summaries he held for the Company which were received on 16 March 2016. The summaries only provided monthly totals for sales and monthly totals for purchase expenses and overhead expenses with no other detail or underlying figures. Mr Frost found the information was insufficient for an audit trail and lacked the detail required to undertake checks into the turnover and tax position of the Company.

28. Mr Davies was provided with data from HMRC's systems relating to the Company's level of imports which he compared to the Company's VAT returns. The information obtained related to the number of units imported which was identified by the commodity codes for android tablets. HMRC also obtained one of the Company's eBay accounts which showed sales and price points. The comparison showed that the levels of imports would result in sales significantly higher than those declared. Based on data from an e-commerce site used by the Company which listed sales between 22 October 2013 and 18 November 2015, together with the import data, Mr Davies analysed the number of sales at different price points to establish the percentage of sales at each price point. Each price point percentage was then applied to the import data figure to establish the number of sales made at each particular price. In doing so, Mr Davies explained he had used best judgment to determine the level of under-declared sales and the VAT due. He added that there were also two other eBay accounts and the Amazon account which he did not have access to.

29. Mr Davies concluded that there had been substantial levels of imports prior to the Company's VAT registration date of 1 January 2014. HMRC systems showed a total of 15,308 items had been imported in 2013, prior to the Company's registration for VAT.

30. Mr Davies's analysis of average weekly sales of android tablets indicated that in the 12 months to 31 December 2013 the Company had exceeded the VAT registration threshold. Mr Davies concluded that the VAT registration should be backdated to 4 March 2013 which was the date of incorporation.

31. As there had been no response by the Appellant to a penalty notice for failing to comply with the notice to provide information and documents, Mr Davies issued best judgment assessments to protect revenue and amended the VAT registration date. Mr Davies charged inaccuracy penalties on the basis that the Company had imported large volumes of tablets which were sold using online platforms and the sole director had failed to co-operate; very few records were provided and the notice requesting access to full records and the business laptop was not complied with. No explanation was provided by Mr Hussain and Mr Davies concluded that his actions were deliberate and that it was more likely than not that he knew his returns were inaccurate and that there was a significant understatement of sales. Mr Davies also took the view that it was highly likely that the Company would become insolvent and therefore Mr Hussain, as sole director, should be issued with a personal liability notice.

32. As no VAT return was submitted for the period 4 March 2013 to 31 December 2013, Mr Davies issued a further VAT assessment using his earlier analysis of sales.

33. Mr Frost was responsible for issuing the closure notices, discovery assessments and penalty assessments under appeal. At the meeting with officer Davies of HMRC on 2 February 2016 Mr Hussain was given an enquiry notice advising that HMRC would be looking into the Company's corporation tax return for the period ended 31 March 2015. Mr Frost was provided with the notes of that meeting at which Mr Hussain had confirmed that he was the sole director and dealt with all aspects of running the Company including controlling various eBay accounts and an Amazon account through which sales were made.

34. Mr Frost was provided with a breakdown of Mr Davies' analysis from import data and eBay sales and he apportioned the omitted sales calculations net of VAT across the corporation tax periods. The closure notice was issued to the Company on 10 August 2016 for accounting period 31 March 2015 along with discovery assessments for accounting periods ending 3 March 2014 and 31 March 2014 as Mr Frost concluded from the non-cooperation from Mr Hussain and his refusal to provide his business laptop that no further information would be forthcoming.

35. Mr Frost issued discovery assessments on the basis of his discovery that the Company's Corporation tax returns were insufficient following receipt of Mr Davies' calculations of omitted sales and VAT calculated by reference to import data held by HMRC. It was the examination of the import data in conjunction with the ebay selling data that led to Mr Frost's discovery.

36. Mr Brooks received the direct tax elements of the case on 28 September 2021 and reviewed the decisions made by Mr Frost who had issued the closure notice, discovery assessments and penalty assessments in relation to omitted trading receipts through online platforms.

37. Mr Brooks reviewed all previous and subsequent correspondence, including information regarding the basis upon which the Company accounts were prepared (bank deposits only) and the Company's Natwest business current account for the period 15 March 2013 to 31 December 2015. Mr Brooks wrote to Mr Hussain setting out the overall position as he saw it and the additional documentation required if Mr Hussain wished HMRC to reconsider the level of assessment.

38. No response was received from the Appellant. Mr Brooks concluded following his review that the Company and Mr Hussain had been uncooperative, possibly evasive, and that the bank statements did not displace the assessments as they did not show a complete trading picture. Mr Brooks noted that he had to consider with regard to stock purchased, where the sales were recorded and where the monies from these sales was retained. He considered it possible that monies could have remained in the Company's Amazon, eBay and Paypay accounts without having been withdrawn. Funds could also have been personally withdrawn by Mr Hussain and not recorded in the Company accounts.

Contentious evidence and findings of fact

39. The analysis of HMRC's import data and 3rd party information regarding eBay sales showed a substantial level of omitted sales from which Mr Frost calculated the omitted profits chargeable to corporation tax. There was no documentary evidence provided to contradict HMRC's case that sales had been under-declared and for the reasons we will set out in due course we accepted this to be the case.

40. As Mr Hussain had confirmed at the meeting with HMRC on 2 February 2016 that he had sole control over the online platforms used by the Company and he had approved the

Company accounts, Mr Frost concluded that the sales were deliberately understated, and Mr Hussain knew that the returns were inaccurate.

41. The level of penalties was determined by the behaviour which led to the inaccuracies and reduced by factors such as the quality of disclosure. Mr Frost concluded that the submission of an inaccurate return was deliberate but as there was no evidence of any attempt to conceal the under-declarations the penalty fell within the range of 35 – 70% of the potential lost revenue. No reduction was given for telling as Mr Hussain did not admit to the inaccuracy or any wrongdoing nor did he provide any explanation as to how the inaccuracy arose. 10% reduction was given for helping as Mr Hussain admitted which platforms he used at the interview on 2 February 2016 but thereafter there was no further cooperation to help quantify the omissions. A 15% reduction was given for the information provided by Mr Hussain in relation to VAT summaries but there was no response to requests for other relevant information and he refused HMRC access to his laptop. The total reduction given was 25%. The reductions are then applied to the difference between the maximum and minimum penalty percentages and equated to an overall penalty percentage of 61.25% of the PLR.

42. Mr Frost considered that Mr Hussain was personally liable for the penalty as the deliberate inaccuracies can only be attributed to him as the sole director and he concluded that there was a significant risk of the Company being put into liquidation due to the substantial liabilities due and the fact that both the Company and Mr Hussain had stopped cooperating with HMRC. This led to the issue of the PLN to Mr Hussain on 13 October 2016.

43. Mr Brooks reiterated that Mr Hussain had confirmed that the Company prepared its VAT and CT returns from deposits into the account. The statements showed deposits from Amazon and also figures from PayPal which were in round figures because, as he understood the position, the PayPal figures were not automatic transfers but rather amounts which Mr Hussain had transferred himself which, he explained, did not necessarily cover the full amount in the PayPal account. He added that the Amazon payments included in the accounts would be net of costs and without access to the Amazon account he could not see if the full amount was declared. The lack of underlying records meant that the full picture remained unknown to HMRC.

44. Mr Hussain explained that where he was paid through PayPal the money would go into the PayPal account and then into the NatWest account, but he could choose how much to take out of the PayPal account. Mr Hussain thought he had two personal bank accounts in addition to the business and PayPal accounts. The payments received from Amazon sales went into the business bank account once Amazon took their fee every two weeks. Similarly, PayPal took its fee immediately and then he received the money but he could not recall the process through eBay. He agreed that he could log in to the PayPal account to see transactions.

45. We found Mr Hussain's evidence was vague and we preferred the evidence of Mr Brooks and Mr Davies. It was accepted that Mr Hussain was responsible for transferring amounts from the PayPal account to the business account. However, in the absence of the PayPal records we could not be satisfied that the amounts transferred represented the whole amount and we agreed with HMRC that the full records showing eBay transactions and payments and Paypal log of transactions and payments in/out was required to verify the Company's sales and income.

46. The bank statements showed that Mr Hussain introduced capital of £19,500 between May and November 2014 yet, Mr Brooks highlighted, over the Company accounting year 1 April 2014 to 31 March 2015 Mr Hussain was only paid a salary of £7,200 and the same for the previous year which raised the question as to how he sourced the difference and funded his personal living costs.

47. Mr Brooks explained in cross-examination that he did not attempt to establish where the money went or whether the Appellant lived a lavish lifestyle as ability to pay and evidence of wealth are not requirements for the issuing of PLNs. He added that the money could be in the Appellants' personal accounts which he had requested but which were not provided.

48. Mr Hussain claimed that he lived on a low wage as he resides with his family and has few outgoings. He added that no regard had been given to his savings when HMRC queried how he had introduced capital into the Company plus it is a well-known practice in his culture to exchange cash on Eid or birthdays instead of gifts. He had also received money from family members and friends. His current situation is now similar or worse than the statement of assets and liabilities dated 5 October 2020.

49. Mr Hussain was unable to recall why he had told HMRC that he paid the employee approximately £8 per hour/£600 per month yet the bank statements sent to Mr Brooks showed Mr Rashid was paid £1600 on 1 July 2014 and £1375.12 on 26 August 2014. He could also not explain why there were 12 entries of £1300 or more per month. Mr Hussain could not recall telling HMRC that he also paid the other employee, Mr Ahmed Hussain, by bank transfer nor could he explain why there were no payments to Mr Hussain shown in the bank statements save one for £1857 on 5 February 2015 which does not equate to £600p/m although he stated that possibly he could not afford to pay so had delayed payment for three months.

50. We found the Appellants' evidence regarding the source of capital vague; whilst we accepted that cash may have been gifted on occasions such as Eid, the Appellant gave no further details on the subject. We noted that amounts were received into the business bank account, for instance on 2 April 2013 and 10 April 2013 in the sums of £6,000 and £9,000 from "Mohammed M borrowing" and "Muzzam Mohammed loan" respectively. However, no corroborating evidence was provided either from the person purportedly making the loan, the terms/agreements pertaining to the sums nor any information as to the source of it. Furthermore, whilst we also accepted Mr Hussain may have had savings, again no information was forthcoming as to the amount of any such savings and we noted Mr Hussain had failed to provide his personal bank statements which were requested by HMRC and there was therefore no evidence to support the claim. In all of the circumstances we found this evidence unconvincing.

51. We also noted that the information provided by Mr Hussain regarding employees' payments of £600 per month was not borne out by the evidence. The bank statements showed that Mr Rashid had been paid just short of £3,000 between 1 July and 26 August 2014 and there were a number of entries showing payments of £1,300 or more per month. We found this was indicative of the unreliable nature of the information provided by Mr Hussain and in the absence of a cogent explanation for the payments we inferred that Mr Hussain did not retain robust records capable of supporting his claims.

52. Mr Brooks stated that Mr Hussain's mental health issues had never been raised with him but he would have been willing to allow the Appellant additional time if required. He noted that at the time of the enquiry Mr Hussain was still running the Company and he assumed was capable of making the necessary decisions for the business regarding buying and selling, he therefore considered that Mr Hussain had made an informed decision not to cooperate with HMRC. He had also continued to correspond with the Appellant until recently to afford him the opportunity of providing the information requested by HMRC.

53. Mr Hussain stated that initially he had cooperated with HMRC and provided all the information available to him at the meeting including his usernames for his online accounts. He believed that this information would be sufficient for HMRC to obtain all the information from the accounts as he was unaware of HMRC's powers. Later he stopped cooperating which

is being used as an excuse by the officers; although he agreed that HMRC did not have sufficient information he queried how they could make a reasonable decision on the information they did have. Mr Hussain explained that he had told his representative that he was not responding because he was suffering from stress and had sought help from his doctor. He stated he had mentioned his health issues to the officers before the assessments were issued and that they had not taken this into account when alleging his actions were deliberate due to his lack of cooperation which left Mr Hussain feeling ignored and unheard. He explained that even though he had a representative his reaction was to push issues under the carpet and he even ignored his representative as he could not cope with the enquiry, so he chose to do nothing. Even though time has passed he has not necessarily improved, and he found it unfair for people to comment on his situation.

54. As to the Appellant's mental health issues, Mr Davies explained that this was only raised approximately 18 months after the assessments were issued when he received a medical note. Health issues would always be taken into consideration, but Mr Davies reiterated that he had only sought access to the business laptop and records, noting that the Appellant was represented and had been offered ADR but had stopped communicating with his representative as well as HMRC. The view that the inaccuracies were deliberate and not careless was based on the fact it was Mr Hussain's choice not to declare all income. Mr Davies noted that the Adspec account he had accessed was not the busiest account as the Appellant he had told HMRC that 85% of sales were made through eBay and that adhus786 was the busiest account.

55. We were satisfied that the Appellant had raised his health issues in correspondence, for instance personal problems were cited as the reason for cancelling a meeting with HMRC on 10 March 2016 although no further details were given at that point and we noted that there was no suggestion that the enquiries were the cause of the difficulties, for instance a record of a telephone call between officer Davies and Mr Zahur on 11 March 2016 noted:

> "Phone call to Amir Zahur…as a follow up to yesterdays cancelled meeting. Mr Zahur confirmed Mr Hussain has appeared to wash his hands of the whole situation - he advised Mr Hussain has cited health & personal issues as the reasons. He confirmed he was aware Mr Hussain's wife was pregnant, that Mr Hussain had also seen a doctor in relation to his own health (condition unknown) and that he was also aware Mr Hussain was stressed in relation to reliability issues on a number of 'hoverboards' he had sold. Mr Zahur is under the impression he is unlikely to hear from Mr Hussain in the near future as his own attempted contact has been ignored…"

56. In early 2017 the Appellant highlighted that he had sought medical help for diagnosed depression and provided a doctor's note in support. The issue was acknowledged by HMRC on a number of occasions, for instance it was specifically taken into account in correspondence in March and April 2017 and in the statutory review of penalty notices dated 26 September 2017 HMRC stated:

> "I am aware that Mr Hussain has been to see a medical professional who has made a diagnosis and had has prescribed medication for him as well a referral for further health care. I have seen the information that has been supplied to the tribunal and it shows that medical help was sought in April 2017. You will appreciate that the errors in this case date back to April 2013 and the enquiry began in 2016. At this point it is not clear how your illness has impacted on the inaccuracy or on your ability to cooperate with the intervention. If you have further information regarding the extent of your illness we would require further evidence showing that."

57. We accepted Mr Hussain had suffered, and continues to suffer, with mental health difficulties. However, we did not accept that this had been ignored by HMRC nor did we accept that there was evidence to demonstrate that it played any part in the submission of inaccurate returns during the relevant periods or prevented him from co-operating with the subsequent enquiries by, for example, providing his laptop. We also rejected the Appellants' claim that he believed he had provided HMRC with sufficient information by way of his online usernames.

It was clear from the repeated requests from HMRC for information that they did not have sufficient information and required access to the accounts.

58. Mr Hussain stated that his returns were correct and if they did contain any inaccuracies, he was unaware of this. If he had made mistakes this was due to his young age and the fact that this was his first business, but he did not intentionally mislead HMRC or submit incorrect figures. He stated that at the time of the enquiry he still had big plans for the Company and even after HMRC concluded their investigation he had not wanted to close the business. He was proud of his company and it had been his dream. Mr Hussain claimed that no account was taken of expenses such as purchasing the goods or postage which was information contained on the returns. Mr Hussain stated that he received many faulty goods and at the start of the business he had scrapped many of the items due to faults. Furthermore, just because the goods were purchased it did not necessarily follow that they were sold.

59. Mr Davies was asked whether he had considered that refunds may be shown in one of the accounts he had not seen as his analysis was based only on one account. He explained, and we accepted, that he could not make an allowance where no information had been provided; although some stock received might be faulty HMRC could not quantify the volume given the lack of cooperation from the Appellant and the fact that HMRC only had access to one out of the four trading streams which was obtained using a 3rd party information request.

60. HMRC in closing, fairly in our view, revised their calculations to take account of costs of purchase. In the absence of any evidence from the Appellant to show that the adjustments were incorrect, we accepted the adjustments.

61. We agreed with HMRC that a record of faulty items and any refunds received would be expected. In the absence of any evidence to demonstrate that the Appellant had not received a refund or that any adjustment was necessary to take account of postage we rejected the Appellant's argument. Similarly, we rejected the Appellant's argument that HMRC failed to take shipping costs and fees into account. Instead, we preferred the evidence of HMRC that the bank statements showed net figures which could lead to a deduction for fees being made twice. Without the source information to show the true picture we found no basis upon which we could conclude that any adjustments should be made in this regard.

62. Mr Brooks confirmed that no special circumstances had been identified but he had considered the issue. He had taken the view that the Appellants' behaviour could have been classed as concealed but decided not to interfere to the Appellant's detriment with Mr Frost's decision in this regard. Mr Brooks also explained that where additional turnover/income is identified as omitted from the Company's submitted accounts, general accountancy practice where there is no evidence to the contrary, is to debit the DLA because if monies are not identified as credited to the Company bank account or retained in another account held by the Company, it has more likely than not been deposited into account(s) of the controlling director/shareholder for their personal use which would create an overdrawn DLA for Mr Hussain due to the Company loan to him for which the Company is liable to a s455 charge until the debt is repaid to the Company. He highlighted that the returns were inaccurate by a significant sum – almost three times the declared amounts – which he concluded must have been known to the Appellants and therefore deliberate. He added that no clear reasons were given for the Appellants' lack of co-operation; although health issues had been mentioned in a letter to Mr Davies in 2016, Mr Brooks' involvement came many years later and it was unknown whether the health issues had continued nor was it known whether Mr Hussain was suffering at the time of submitting the returns.

63. Mr Brooks explained that it was Mr Frost who made a judgement call about issuing PLNs in 2016 as he believed the Company was heading towards liquidation. The Company was struck

off in 2017 which, he believed, demonstrated that the decision to issue PLNs was correct. The evidence of both Mr Frost and Mr Davies was that they believed there were grounds to issue PLNs given the substantial liabilities of the Company which led them to conclude that it may become insolvent. Mr Brooks explained that he supported the issue of PLNs as the Company ceased trading in December 2016 as stated in a letter from Altman, Smith & Co in a letter dated 30 August 2018. As far as he was aware the Company could not be wound up while enquiry was open and there did not need to be evidence that the Company would become insolvent; the HMRC documents to which he was referred were no more than guidance. It had not been his decision to issue PLNs and therefore he did not know what, if any evidence was obtained in support of the decision however with hindsight he thought it was a valid one.

64. Mr Brooks reiterated that the records would be held on the Appellants' eBay and Amazon accounts which could be used to support the information declared on the returns. There was no evidence to support an adjustment for expenses such as postage and although they were claimed as costs in the Company accounts he had seen no evidence in support.

65. Mr Brooks added that he could not take into account margins as no records or information was supplied to support any adjustment. The payments from Amazon were paid net of fees, but fees were included in the accounts which were drawn up from deposits into the Company bank account which indicated there could be double reduction. Without the records HMRC could not verify whether the same occurred with PayPal and eBay and therefore no adjustment could be made without the records to show the true position.

66. Mr Hussain could not recall the margins on sales which differed throughout the year due to supply and demand but stated that they were low to the point where he questioned whether, after postage, fees and returns, the business was worth it. He gave an example whereby receipt of faulty batches on which he had paid postage negated any profit. He said that the 73% margins alleged by HMRC were unrealistic and that margins in the industry were known to be between 5 and 20% at most; his were less as the goods were unbranded and his company name on the goods was not established.

67. Again, we found the Mr Hussain's evidence vague. Although he dismissed the mark-up as ridiculous, he provided no documentary evidence or details in oral evidence to support his assertion. We accepted the evidence of Mr Brooks that there was no evidence to support any adjustment for fees or postage and for reasons we will set out in due course we accepted that the reason for issuing PLNs was not without foundation.

68. In the absence of any records to support the assertion, we did not accept Mr Hussain's claim that the turnover reached the VAT threshold in December 2013. We accept that the legal requirement is for registration 30 days after the month in which the threshold was exceeded. However, without the full business records of purchases, sales and payments and taking into account the import data and eBay information which contradicted the Appellants account, we rejected Mr Hussain's evidence as vague and unsupported.

APPELLANT'S CASE

69. In summary, the Appellant maintains that HMRC failed to consider the full picture and that he fully cooperated with the enquiry via his agent. Although he cancelled one meeting, Mr Hussain attended another meeting at which he cooperated fully; he was advised by his doctor and accountant to miss the follow up meeting due to the stress he was suffering as a result of the enquiry. The accountant continued to provide information to HMRC. It was the Appellant's first business and he tried to do everything correctly; he had a lot to learn in a short period regarding record-keeping, VAT and cash flow.

70. There is no basis upon which to raise any penalty assessments as nothing was done deliberately or intentionally. If he had intended to deliberately under-declare sales, he would not have disclosed all four of his trading accounts to HMRC. As the penalties are a percentage of the assessments, they should not be calculated until the substantive appeals are determined.

71. The backdated effective date of VAT registration is without foundation; HMRC's computations are based on figures of imports but there is no evidence that taxable supplies were made in the period 1 January 2013 to 31 December 2013 which exceeded the VAT threshold. Imports do not necessarily mean sales.

72. The assessments are not to best judgment nor are they arithmetically sound or intelligently interpreted. In *McCourtie v CEC* LON/92/191 the Tribunal considered the principles in Van Boeckel and added the following propositions:

(1) The facts should be objectively gathered and intelligently interpreted;

(2) Calculations should be arithmetically sound; and

(3) Any sampling technique should be representative.

73. HMRC analysed eBay sales over a 24 month period (1 January 2014 to 31 December 2015) which they used to arrive at average price points. They then used the number of units imported on the import data to project total sales of £979,193. Due consideration was not given to the very low mark up on electronics and the fact that the goods came from China and the majority were faulty which resulted in their return to the supplier or they were scrapped.

74. In assessing sales, HMRC only used data from one eBay account which does not give a true reflection of the Company. HMRC could have used its powers to obtain records for other accounts but failed to do so which demonstrates incompetence. Furthermore, Mr Hussain had made HMRC aware of all 3 eBay accounts which does not support the allegation that he was omitting sales and fabricating records.

75. HMRC have also failed to take into account expenses when selling with Amazon or Ebay; there are seller premiums upwards of 10-15%, shipping costs which can be upwards of 15% of the sale price and merchant processing fees such as PayPal which are in the region of 3%. Purchase costs were alco not taken into consideration and the mark-up of 73% is outrageous, particularly in the electronics industry.

76. Over a three-year period HMRC contend that the Appellant made £1,758,635.60 profits which was not viable and there is no evidence to support actual sales of such value. There is no evidence of these amounts being received by the Company or the director; a statement of assets and liabilities shows that as at 30 August 2018 Mr Hussain had no real assets. A further statement dated 5 October 2020 shows personal cash and assets of £450.40, liabilities in excess of £1000 plus loans from friends, company assets of £786.14 and liabilities in excess of £50,000. There is no evidence of a lavish lifestyle or where the funds went. Furthermore, the capital introduced into the Company by Mr Hussain cold have come from savings and Mr Hussain stated that he received loans from family and friends.

77. The penalties assume that inaccuracies are due to deliberate behaviour however Mr Hussain did not intend to transgress any guidelines or rules. He may have been naïve which meant he was careless, but he did not deliberately under-declare any sales or profits. Any lack of cooperation or cancelled meetings was due to medical reasons and HMRC were provided with evidence to show he was suffering from depression which has been ignored. The telling, helping and giving element is not indicative of the behaviour in itself in relation to any inaccuracies but is used to determine the reduction of any penalty however HMRC officers used it to show how they assessed deliberate behaviour.

78. Relying on HMRC's guidance CH81140 and CH402704 the Appellant submitted that the inaccuracies were, at worst, careless and that HMRC had failed, as required by CH84615 to ask the Appellant about the inaccuracy and ensure that he was aware of his Article 6 rights. It was submitted that there was no evidence to support the officer's suspicions that the Company may become insolvent as a strike off notice only occurred in March 2017 and was postponed; it therefore did not exist at the time the PLN was issued in 2016. Either the Guidance was ignored or not known to the officers which indicates their negligence and incompetence.

79. In submitting that there was no evidence to suggest that the Appellant knowingly or intentionally submitted inaccurate returns the Appellant relied on *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) in which the Tribunal stated:

> 'In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

80. The factors set out above together with Mr Hussain's financial position makes personal liability unjustified and unproductive; it is not in the public interest and the liabilities would not be recovered as shown by the statement of assets and liabilities.

81. The Appellant submitted that requests for independent reviews were ignored; they were made on 18 November 2016 but not carried out until 26 September 2017 after debt proceedings were initiated and in one case after an appeal was notified to the Tribunal.

82. A special reduction under para 11 Sch 24 FA 2007 is requested on the basis of Mr Hussain's financial situation; this was not considered by HMRC.

83. The fact that HMRC have varied assessments due to computation errors demonstrates HMRC's incompetence and lack of due care. The penalties and assessments should be struck out or at least limited to the Company.

HMRC'S CASE

84. The Company records were requested in the meeting with the Appellant and his agent on 2 February 2016. To date, despite repeated requests the business records and laptop have never been provided. HMRC submitted that this indicates that sufficient records have not been maintained to support the returns. The only records provided by the Appellant were 42 pages of bank statements in July 2021 which were considered by the officers. Whilst HMRC acknowledge that the Appellant had mental health issues, he was afforded a significant amount of time – 6 years - in which to produce the information requested and Mr Brooks continued to correspond with him until a late stage in proceedings advising that he was willing to review any information that the Appellant provided. In the absence of any information being provided by the Appellant to verify the returns, HMRC had no alternative but to use the limited information available to them from 3rd parties relating to goods imported for resale.

85. The onus for VAT assessments is on the Appellant to demonstrate that they have not been made to the Officers best and reasonable judgement. HMRC contend that no compelling evidence has been provided by Adspec Ltd to discharge that onus.

86. The Appellant contends that this is his first business and he has tried to do everything correctly and also that he had a lot to learn in a short time about record keeping, VAT and cash flow and did not do anything wrong on purpose. HMRC contend that regardless whether or not this was the Appellant's first business, there is publicly available information, plus the Appellant's own accountant, from which he could establish what records needed to be maintained, for how long and in what format.

87. HMRC recalculated the profits of the Company using specific data made available in respect of the volume of goods imported by Mr Hussain and Adspec Ltd. The mark-up exercise was carried out as precisely as possible in the officer's best and reasonable judgement subject to the Company's failure to co-operate with the enquiry and to supply statutory records requested.

88. HMRC contended that the principle of best judgement is well established and has been adopted in line with the High Court Appeal case of *Van Boeckel v C&E* QB Dec 1980 , [1981] STC 290. HMRC consider the principles adopted by *Van Boeckel* can be summarised as follows –

- The Commissioners should not be required to do the work of the taxpayer

- The Commissioners must perform their function honestly and above board

- The Commissioners should fairly consider all material before them and on that material, come to a decision which is reasonable and not arbiter and

- There must be some material before the Commissioners on which they can base their best judgement.

89. HMRC submitted that by using the principles in *Van Boeckel*, they have clearly demonstrated that best and reasonable judgement was used in establishing the under-declared sales of Adspec Ltd resulting in additions to profits for CT and additional VAT due on the under-declared sales. HMRC submit that the assessments made were not frivolous, vexatious, or capricious but were made on a considered basis utilising the limited information that was available to the officers. HMRC have seen no documentary evidence or other records maintained by the Appellant, submitted as requested to support any of these purported expenses now being referred to.

VAT assessments and backdated Effective Date of Registration

90. HMRC contended that to date the Appellant has provided no meaningful data or accounts to support the assertion that the VAT assessments raised by HMRC are excessive.

91. The Company completed a VAT 1 registration form to register for VAT with a voluntary registration date of 1 January 2014. HMRC argued that the data made available to them clearly demonstrates that Adspec Ltd exceeded the VAT registration threshold prior to the stated registration date of 1 January 2014. HMRC contended that based on evidence seen, the revised effective date of registration is 4 March 2013.

92. The Appellant was notified of the revised, backdated registration date by letter dated 17 August 2016 and asked to provide any new information within 30 days. The Tribunal are advised that no response was received.

Discovery Assessments – Corporation Tax

93. HMRC do not understand the validity of the assessments raised on Adspec Ltd to be in dispute but accept that a positive case must be advanced to demonstrate that the assessments are validly raised (see *Burgess; Brimheath Developments Ltd v Revenue and Customs Commissioners* [2014] UKFTT 301 (TC)). HMRC submitted that the statutory conditions for raising the assessments are met as Adspec Ltd generated additional turnover and trading profits in the periods assessed that ought to have been assessed to tax but had not been assessed and that in accordance with Para 41(1)(b) the assessment to tax for each of the periods assessed is or has become insufficient.

94. In *Revenue and Customers Commissioners v Tooth* [2018] UKUT 38 (TCC) the meaning of a discovery is set out as follows:

> "… The word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed."

95. HMRC contended that as a consequence of the enquiry into the Company Tax Return of Adspec Ltd there was a discovery from information newly made available to them that an amount that ought to have been assessed to tax had not been assessed. HMRC contended that an examination of the import data made available in conjunction with the data provided by E-bay created an awareness of previously unknown facts that materially altered HMRC previous understanding of the Company's tax affairs.

96. HMRC contended that the behaviour that caused the inaccuracy is deliberate, and the condition at Para 43 is met. HMRC submitted that, as previously stated, by not keeping robust records and fully considering the accuracy of the records, the actions of the Appellant is considered to be deliberate.

97. HMRC submitted, relying on the case of *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) that for each accounting period and VAT period, the inaccuracy was a deliberate one.

98. Within the Appellants skeleton argument, it is repeatedly stated that Mr Hussain '…did not intend to transgress any guidelines or rules…' and '…if there are any errors , these are not due to consciously under declaring any sales or profits.' HMRC contend that a repeated failure to maintain adequate and robust records to support the entries in a Return is in itself a deliberate act and cannot be reasonably attributed to a lack of experience.

As a significant volume of purchases were omitted from the Company accounts (far in excess of those actually recorded) and as income from the sale of these omitted purchases was not recorded or declared, this was a deliberate attempt to avoid paying the correct amount of Corporation Tax and VAT by the Company through Mr Hussain

Penalties

Corporation Tax and VAT Penalties - charged under Schedule 24 FA 07

99. The level of penalty charged depends on whether the inaccuracy is considered to be careless or deliberate. The term careless, for the purpose of the legislation, is if the inaccuracy is due to a failure by the taxpayer to take reasonable care.

100. HMRC contended that for the purposes of Sch 24 the Appellant's behaviour leading to the inaccuracy was deliberate, not careless. The Company imported numerous tablets throughout the period in question and sold them through various electronic platforms such as eBay and Amazon. Factual import data has been matched to transactions on known e-platform accounts indicating the declared sales have been deliberately understated. Mr Hussain failed to provide any explanation for this. HMRC therefore argued that he would have known that the Corporation Tax Returns and VAT Returns were inaccurate due to the significant understatement of sales.

101. Paragraph 9(2) (a) Schedule 24 FA 07 the penalty can be reduced by certain factors such as whether a disclosure was made and if it was prompted or unprompted and also the quality of the disclosure.

102. HMRC consider the disclosure was prompted as the Appellant did not tell them about the inaccuracy in the Company Tax or VAT Returns before he had reason to believe that HMRC had discovered it or were about to discover it.

103. Further reductions are given for the quality of the disclosure covering telling, helping, and giving and the relevant abatements have been given as follows –

• 0% for telling –Mr Hussain has not admitted to the inaccuracy and has failed to provide any explanation of how or why the inaccuracy occurred. The full reduction available for telling is 30%.

• 10% for helping –during a meeting, Mr Hussain provided details regarding the e-platforms that the Company used. However, since then Mr Hussain has no longer actively co-operated with the enquiry himself or through a representative or responded to further requests for information or documentation. The full reduction for helping is 40%.

• 15% for giving –Mr Hussain provided some information in relation to the VAT enquiry but failed to respond to requests for relevant information or provide any access to the business laptop. The full reduction for giving is 30%

104. The penalty is calculated by taking the difference between the minimum and maximum penalty (70% - 35%) then multiplying this by the further reduction of 25% which equals a penalty percentage of 8.75%.

105. This figure of 8.75% is deducted from the maximum of 70% resulting in a chargeable penalty of 61.25% of the potential lost revenue.

Special reduction/special circumstances

106. HMRC have considered the facts of the case and do not consider that there are any special circumstances that would lead to a further reduction in the penalty and no special reduction is due.

107. HMRC contended that the deliberate nature of the multiple inaccuracies renders special reduction inappropriate. In addition, the Appellant has not advanced any compelling reasons as to why a special reduction should apply in this case.

Suspending the penalty

108. Only penalties for a careless inaccuracy can be considered for suspension. Suspension of a penalty is therefore not appropriate in this case

VAT – Failure to notify penalty charged under Schedule 41 FA08

109. A failure to notify penalty has been charged on Adspec Ltd under Schedule 41 FA 08 for failing to register for VAT from the appropriate registration date. Similar to the penalty charged under Schedule 24 FA 07, the penalty can be reduced by certain factors.

110. The Appellants' behaviour was deliberate in that the Company imported significant levels of goods for resale prior to the initial date of VAT registration. HMRC contended that the level of imports strongly indicate that the Company was trading prior to 1 January 2014 and as the Company was incorporated on 4 March 2013, this is the correct date of registration for VAT.

111. The disclosure was prompted as the Appellant did not tell HMRC about the failure to notify. The same reductions were given for helping and giving as those for the penalties under Sch 24 FA 2007 on the same basis and the calculations were carried out in the same way.

112. HMRC have considered the facts of the case and do not consider that there are any special circumstances that would lead to a further reduction in the penalty and no special reduction is due.

Personal Liability Notices

113. HMRC are required to issue a PLN to all relevant officers of the Company for all or part of a company penalty where the Company's deliberate inaccuracy can be attributed to the

relevant company officer/s and there is reason to suspect that the Company may soon become insolvent.

114. HMRC contended that as the sole Director of Asdpec Ltd, Mr Adil Hussain is the only relevant company officer of Adspec Ltd and the deliberate inaccuracy is attributable to the actions of an officer of the Company – Mr Adil Hussain is therefore personally liable to the Company penalty.

115. In view of the significant liabilities involved and Mr Hussain's sudden refusal to co-operate with both them and his Agent, HMRC believed that it may be his intention to liquidate the Company.

116. HMRC contended that as the conditions are met to transfer the liability to the relevant company officer, they were correct to issue a PLN to Mr Hussain transferring 100% of the Company penalty on both the CT and the VAT assessments under Schedule 24 FA 07 and 100% of the Company penalty on the VAT assessment under Schedule 41 FA 08 to him.

117. HMRC considered the claim by Mr Hussain that the errors that arose are due to his inexperience in running a business and that any failure to co-operate with enquiries was, at least in part, due to suffering from depression. Whilst HMRC are not unsympathetic to Mr Hussain's current ill health, contend that the errors in the Return arose from the deliberate actions of Mr Adil Hussain and cannot be reasonably attributed to a lack of experience or ill health at the relevant time.

Discussion and Decision

118. The following legislation and authorities are relevant to the matters under appeal.

Provisions relating to corporation tax

119. Under paragraph 21 of Schedule 18 to the Finance Act 1998 ("Schedule 18"), a company is required to keep such records as may be needed to enable it to deliver a correct and complete return for each accounting period and to preserve those records for the period specified in the relevant provision. Under paragraph 21(5) those records include, inter alia, records of all receipts and expenses incurred in the course of the Company's activities and all sales and purchases made in the course of the trade. Under paragraph 24 of Schedule 18, an officer of HMRC is entitled to enquire into a company's tax return. Under paragraph 32 of Schedule 18, an enquiry is completed when an officer of HMRC issues a notice to the Company (a "company closure notice") to the effect that the enquiries have been completed.

120. Under paragraph 41 of Schedule 18, if an officer of HMRC discovers as regards an accounting period of a company that an amount which ought to have been assessed to tax has not been assessed, an assessment to tax has become insufficient or a relief which has been given is or has become excessive, then the officer may make an assessment in the amount or further amount which ought in his or her opinion to be charged in order to make good to the Crown the loss of tax. Paragraphs 42 to 45 of Schedule 18 provide that the power to make a company discovery assessment in relation to an accounting period for which the Company has delivered a tax return is exercisable only:

(1) if the circumstances described above were brought about carelessly or deliberately by, inter alia, the Company or a person acting on behalf of the Company; or

(2) if, at the time when an officer of HMRC ceased to be entitled to give a notice of an enquiry into the relevant return or issued a closure notice in relation to any such enquiry, "the officer could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of [the relevant circumstances]"

121. Paragraph 46 and 46(2A) of Schedule 18 provide for a longer period beyond the four year time limit for making an assessment. Where a case involves a loss of tax brought about carelessly by the Company or related person an assessment may be made at any time not more than 6 years after the end of the accounting period to which it relates and an assessment to corporation tax in a case involving a loss of tax brought about deliberately by, inter alia, the Company or a person acting on behalf of the Company may be made at any time not more than 20 years after the end of the accounting period to which it relates.

122. In relation to the meaning of "deliberate", the FTT gave the following guidance in *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC):

> 'In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

Provisions relating to VAT

123. Under paragraph 6, Schedule 11 of VATA 1994 every taxable person shall keep such records as the Commissioners may by regulations require. Under section 73 VATA 1994 where a person has failed to keep any documents and afford the facilities necessary to verify such returns or where it appears to HMRC that such returns are incomplete or incorrect, they may assess the amount of VAT due to the best of their judgment.

124. The time limits for raising VAT assessments are given in Section 73(6) VATA 1994 as not later than:

(a)2 years after the end of the prescribed 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.

125. The case of *Van Boeckel* [1981] STC 290 sets out the following principles to apply in considering whether an assessment has been made to best judgment:

(1) HMRC should not be required to do the work of the taxpayer;

(2) HMRC must perform their function honestly and above board; and

(3) HMRC should fairly consider the material before them and on that material come to a decision which is reasonable and not arbitrary, and there must be some material before the commissioners on which they can base their judgement

126. In *McCourtie*, Dr Brice stated:

> "In my view, the use of the words 'best of their judgment' does not envisage the burden being placed upon 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."

127. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015, Carnwath LJ set out the following relevant guidance in relation to 'best judgment' (at [38]):

> "i) The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not

allow it to be diverted into an attack on the Commissioners exercise of judgment at the time of the assessment.

ii) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment" grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.

iii) In particular the Tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The Tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done."

128. Under Section 50 TMA, on any appeal against an assessment to corporation tax or income tax, if the tribunal decides that the appellant has been over-charged or under-charged, the relevant assessment shall be reduced or increased but, otherwise, the assessment will stand good. In *Haythornthwaite & Sons Ltd v Kelly* (1927) 11 TC 657, Lord Hanworth explained it in the following terms (at page 667)—

"Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject - the Appellant - establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

129. Where assessments are made within normal time limits the burden is on the appellant to satisfy the Tribunal that those assessments are wrong or excessive. Where assessments are made by reference to extended time limits and rely on a finding of careless or deliberate conduct the burden is on HMRC to establish that conduct. Thereafter, the burden is on the appellant to establish that the amounts of the assessments are excessive.

Penalties

130. The Appellant voluntarily registered for VAT with effect from 1 January 2014. Liability to be registered arises under Schedule 1 VATA 1994 where the VAT registration threshold is exceeded.

131. Paragraph 1 of Schedule 41 Finance Act 2008 ("Schedule 41") provides that "A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation")." Included in the Table is the obligation in paragraph 5 of Schedule 1 of the VAT Act 1994 to notify HMRC of liability to register for VAT.

132. The amount of the penalty depends on the behaviour which led to the failure to notify (paragraph 5 of Schedule 41), which sets a standard penalty of 70% of potential lost revenue for a deliberate but not concealed failure and a standard penalty of 30% for a non-deliberate failure. Paragraphs 12 and 13 set out circumstances in which the penalty can be reduced. In the case of a prompted disclosure, the minimum penalty which may be imposed is 35% for a deliberate but not concealed failure. No penalty is imposed if P has a reasonable excuse for the failure (paragraph 20 of Schedule 41).

133. Schedule 24 to the Finance Act 2007 contains the provisions relating to penalties in respect of both corporation tax and income tax. In so far as is relevant Schedule 24 provides:

(1) HMRC may assess a taxpayer for a penalty if a return contains a deliberate and unconcealed inaccuracy (paragraphs 1 and 3).

(2) The penalty for an inaccuracy which is deliberate and unconcealed is 70% of the potential lost revenue (paragraph 4)

(3) This can be mitigated to 35% if a taxpayer makes a prompted disclosure (paragraphs 9 and 10).

(4) HMRC may reduce the penalty for special circumstances (paragraph 11).

(5) A taxpayer may appeal against a penalty assessment (paragraph 15).

(6) On an appeal, the Tribunal may affirm HMRC's decision or substitute for it another decision that HMRC has the power to make (paragraph 17(2)).

(7) If the Tribunal substitutes its own decision it can rely on paragraph 11 (i.e. special circumstances) to a different extent to HMRC, but only if HMRC's decision in respect of the application of paragraph 11 is flawed.

PLNs

134. The PLNs were issued to Mr Hussain on the basis that the Company's deliberate inaccuracies, namely submitting inaccurate returns (sch 24 FA 2007) and failing to register the Company for VAT at the correct time (sch 41 FA 2008), are attributable to the Company officer.

135. Paragraph 22 of Schedule 41 FA 2008 provides as follows:

"Companies: officers' liability

22(1) Where a penalty under any of paragraphs 1, 2, 3(1) and 4 is payable by a company for a deliberate act or failure which was attributable to an officer of the Company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership 'officer' means-

(a) a director…

136. Schedule 22 contains three conditions before liability for a penalty payable by the Company can be imposed on an individual:

(1) A penalty must be payable by the Company for a deliberate failure.

(2) The individual on whom HMRC seek to impose liability must be an "officer" of the Company (as defined in sub-paragraph 3 of paragraph 22).

(3) The deliberate failure must be attributable to that officer.

137. Paragraph 19 of Schedule 24, Finance Act 2007 provides that:

19(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the Company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

(a) the officer as well as the Company shall be liable to pay the penalty, and

(b) HMRC may pursue the officer for such portion of the penalty (which may be 100%) as they may specify by written notice to the officer.

138. Para 19(2) sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty and under para 19(3) "officer" includes a director.

ONUS OF PROOF

139. In relation to assessments raised under the discovery provisions the burden of proof lies with HMRC to show that the conditions are satisfied and that the assessments are valid. Once this has been established the onus shifts back to the Appellant to provide evidence to either reduce or set aside HMRC figures, otherwise the assessments shall stand good in accordance with section 50 TMA 1970.

140. The onus of proof rests with HMRC in relation to the penalty assessments and PLNs.

141. The onus of proof in relation to an amendment to the EDR for VAT registration rests on the Appellant to demonstrate that the EDR is incorrect.

142. The onus for VAT assessments is on the Appellant to demonstrate that the assessments have not been made to the Officers best and reasonable judgement. The bar for making a best judgment assessment is a low one. The authorities clearly establish the well-known principle that there must be some basis for the assessment which cannot be arbitrary or capricious or irrational. However, provided HMRC fairly consider the material before them and come to a decision based on that material which is reasonable and not arbitrary, an that decision is a result of an honest and genuine attempt to assess the VAT properly due, then an assessment which reflects that decision has been made to best judgment.

Discussion and Decision

143. The only records that have ever been provided to HMRC were copy bank statements sent in on 1 July 2021 from the purported sole business bank account. Transfers into this account from PayPal were, as accepted by Mr Hussain, controlled by him and we were not satisfied from his evidence that the transfers represented the entirety of the funds in the PayPal account; as he accepted in cross-examination, as far as he could recall, he chose the amount to transfer.

144. We consider that without access to the full and complete records of the Company, specifically the Amazon, eBay and PayPal accounts, HMRC were unable to verify the Company's sales or complete an audit trail of purchases through to sales and payment. The records, in our view, were fundamental and the absence of them severely undermined the Appellants' case.

Discovery assessments

145. The Appellants did not dispute that assessments have been validly raised within normal and extended assessing time limits. The normal time limit for issuing assessments is four years from the end of the accounting period to which it relates (see Paragraph 46(1) Schedule 18 FA 1998). As the assessments to corporation tax were made on 10 August 2016, we were satisfied that all of the assessments were validly raised within the time limits.

146. The Appellants did not dispute that there was a discovery leading to a loss of tax. However, following *Burgess and Brimheath*, HMRC addressed the relevant statutory provisions to demonstrate that the conditions of para 41 Sch 18 FA 1998 were met. We accepted the evidence that during the enquiry HMRC obtained evidence, such as import data and 3rd party information relating to one of the Appellant's eBay accounts, examination of which demonstrated that the Appellant under-declared his sales income not only for the enquiry period to 31 March 2015 but for earlier periods.

147. We were satisfied from the evidence that the relevant statutory conditions were satisfied and that HMRC made a discovery in that Adspec Ltd had under-declared sales that resulted in additional turnover and trading profits in the periods assessed that ought to have been assessed to tax but had not been assessed.

148. We were also satisfied that the behaviour that caused the inaccuracy was deliberate, and the condition at Paragraph 43 is met. Either the Appellant kept records but deliberately failed to provide them to HMRC to verify the accuracy of his returns because he knew the returns were inaccurate or he failed to keep full, accurate and robust records such as could support the returns submitted. We rejected the Appellant's submission that the behaviour could be considered careless; in short, careless is a failure to take reasonable care. The Appellant has provided very little of the information requested by HMRC, including the statutory records and laptop requested. For the reasons set out above, we do not accept that Mr Hussain's state of health prevented him from doing so but rather we found that it was a deliberate decision not to cooperate with the enquiries. We were satisfied that a prudent and reasonable person would have co-operated with the HMRC enquiry and would have provided his records to demonstrate that the entries on his returns were correct or taken steps to reconstruct those records. We do not consider the Appellant's behaviour is consistent with a taxpayer who is acting carelessly, rather than deliberately, and we were satisfied from the evidence that it was reasonable to infer that the behaviour leading to the inaccuracy was deliberate.

VAT assessments and backdated effective date of registration

149. The Appellant does not dispute that assessments have been validly raised within normal and extended assessing time limits. The time limits for raising VAT assessments are given in section 73(6) VATA 1994. We were satisfied that the assessments were validly raised within the time limit prescribed by s73(6)(b) VATA.

150. We were satisfied that without the records, HMRC used the limited information available, namely import data from HMRC's systems and information from one eBay account to ascertain the level of goods imported and establish a true figure of sales.

151. We rejected the Appellant's contention that HMRC should have used their powers to obtain further 3rd party information. As is made clear in *Van Boeckel* and *McCourtie* HMRC should not be required to do the work of the taxpayer. Similarly, we rejected the Appellant's evidence that he believed, having given HMRC the usernames of his eBay accounts, they could obtain all necessary information. That evidence is contradicted by the documentary evidence, which we accepted, which clearly demonstrates that the officers wrote to the Appellant on a number of occasions setting out the information they required, including Mr Hussain's business laptop.

152. In oral evidence Mr Hussain was vague as to whether and what records he kept. Whilst we bore in mind the mental health issues suffered by Mr Hussain and we noted his evidence that he "pushed the matter under the carpet" due to stress, we concluded that this was not sufficient in circumstances where the obligation to comply with tax requirements rested with Mr Hussain who had the benefit of representation, to explain why his state of health prevented him from providing his laptop or records to HMRC either personally or via his agent. Furthermore, Mr Hussain confirmed in evidence that he did not seek assistance from either his representative or HMRC. In those circumstances we accepted HMRC's submission that he was unwilling rather than unable to provide the business records and that the decision was a deliberate one.

153. We also inferred that Mr Hussain's decision not to provide his records was indicative of his knowledge that the records did not support the figures declared on his corporation tax or VAT returns. Whilst Mr Hussain claimed that the assessments issued by HMRC were incorrect, he failed to provide any evidence, whether oral or documentary, to support his claim.

154. We considered the evidence of Mr Davies, which we found credible and which we accepted. He recalculated the underdeclared sales for VAT using specific data made available to HMRC in respect of the volume of goods imported by Mr Adil Hussain and Adspec Ltd. He

also used information provided by Mr Hussain at the meeting with HMRC as to the range of goods sold and the various purchase and selling prices of these goods We were satisfied that Mr Davies carried out his analysis and calculations using the limited material available to him and that his calculations were not arbitrary or unfair.

155. We rejected the Appellants' submission that an adjustment should have been made for expenses such as postage, fees and faulty goods. No evidence was provided in support of this submission. Furthermore, we accepted HMRC's submission that in respect of VAT, it is not known whether Mr Hussain used Royal Mail for deliveries to customers where costs may not incur a charge to VAT or alternatively if one or more courier firms were used who may or may not be registered for VAT as no records were provided. There was also no evidence to support any adjustment for faulty goods and we therefore could not be satisfied that the Company was not reimbursed or compensated in the event of faulty items. In respect of fees, Mr Hussain accepted that payments from certain sources, such as Amazon, were paid net of fees and in those circumstances HMRC were left without gross figures or any evidence as to the amount of actual fees.

156. Similarly, as noted by Mr Brooks, the NatWest Bank statements provided showed deposits from PayPal were in round sums and not regular deposits at regular intervals. As the PayPal account was never provided to HMRC the true figure of sales made through eBay using PayPal remains unknown and in the absence of the source documents we concluded that the Appellant had not displaced the assessments or demonstrated that they were incorrect.

157. It was suggested on behalf of the Appellant that HMRC's assessments were wrong as they had provided no evidence to show where any surplus funds may have gone nor was there any evidence of Mr Hussain loving a lavish lifestyle such as would support the allegation of underdeclared sales. We did not accept this submission; there is no legal requirement for HMRC to demonstrate where any surplus wealth might have gone. Furthermore, we noted that Mr Hussain had failed to provide his personal bank statements which were requested by Mr Brooks and we considered that his failure to do so supported the conclusion that the undeclared sales income could have remained in his PayPal account or been transferred to his personal accounts.

158. We did not accept the criticism that Mr Brooks failed to carry out a full review. It was clear to us that he considered the findings of Mr Frost in full and the material upon which those findings were made. Mr Brooks, in the course of his review, highlighted that Mr Frost had failed to consider a charge to tax under s455, which for reasons we have already stated we have not upheld. He also continued to correspond with the Appellant, setting out further information required and keeping the matter under review which, in our view, demonstrated the care with which Mr Brooks conducted his review.

159. We found that the VAT assessments were made to best judgment and are not frivolous, vexatious, or capricious.

160. We noted the Appellants' submission that imports do not necessarily equate to taxable sales. However, the Company made substantial imports prior to 1 January 2014. Mr Hussain confirmed he had no other means of trading other than through the Company and we inferred from the significant amount of stock imported that it was more likely than not that the business was selling the stock either as a wholesaler or to individual customers which would in turn generate taxable sales income for the Company. No alternative explanation was provided by Mr Hussain as to what was done with significant units of electronic goods and accessories and in the absence of any evidence to the contrary, we accepted the evidence of HMRC that the material available to them demonstrated that Adspec Ltd would have exceeded the VAT registration threshold prior to the date of voluntary registration of 1 January 2014. We were

therefore satisfied that HMRC were correct to backdate the effective date of VAT registration to 4 March 2013.

161. We concluded from the Appellant's unwillingness to engage with HMRC, his failure to provide records and the substantial volume of undeclared sales which must have been known to Mr Hussain as director with sole control of the Company that we can infer that the Appellant's behaviour in failing to register was deliberate.

Penalties – VAT and Corporation tax

162. As we have found that the behaviour which led to the failure to notify and the act of submitting inaccurate returns was deliberate, we were satisfied that penalties could be charged. The amount of the penalty that can be charged starts at 100% of the additional duties due and can then be reduced by certain factors such as whether a disclosure was made and if it was prompted or unprompted and the quality of the disclosure.

163. The Company imported numerous tablets throughout the period in question and sold them through various electronic platforms such as eBay and Amazon. Import data has been matched to transactions on known e-platform accounts indicating the declared sales have been deliberately understated. Mr Hussain failed to provide any explanation for this. In those circumstances we have found that Mr Hussain knew that the CT returns and VAT returns were inaccurate due to the significant understatement of sales.

164. As there was no disclosure of those failures by the taxpayer, we agree with HMRC that the disclosure was prompted and the penalty range is 35% to 70%.

165. HMRC have given reductions of 10% for helping on the basis that Mr Hussain provided details of the e-platforms used during his initial meeting with HMRC. Thereafter he did not cooperate with the enquiries either personally or through his agent and he failed to respond to requests for his laptop and business records.

166. A 15% reduction was given for providing information for materially the same reasons. Whilst we considered that these are generous reductions in the circumstances, we decided not to exercise the tribunal's powers to increase the penalty or interfere with the reductions given. The total reduction was therefore 25%. There was no dispute as to the calculation of the penalties and we were satisfied that the quantum was correct and that the penalties imposed under Schedule 24 FA 2007 in respect of VAT and corporation tax were within time. There was also no challenge to the calculation of the penalty under Schedule 41 FA 2008 and we found no basis upon which to interfere with it.

167. Under para 11 Sch 24 FA 2007 HMRC may reduce a penalty on the basis of special circumstances. The Appellant claimed that his financial situation is such that he cannot pay the penalties which could potentially leave him bankrupt and reliant on the state. Para 11 (2))a) specifically excludes ability to pay:

> (2) In sub-paragraph (1) "special circumstances" does not include -
>
> (a) Ability to pay…

168. Although not specifically argued as amounting to "special circumstances" we considered the Appellant's state of mind. However, we concluded that given the deliberate nature of the multiple inaccuracies, the absence of detail as to how the Appellant's health prevented his engagement with HMRC or caused the inaccuracies, together with the fact that the Appellant had the benefit of assistance through his agent, we agreed with HMRC that there was no basis for applying a special reduction in this case.

169. Paragraph 14 Schedule 24 FA 2007 states that in certain circumstances HMRC may agree to suspend a penalty however only penalties for a careless inaccuracy can be considered for suspension and therefore the statutory provisions do not apply.

VAT – Penalties charged under Schedule 41 FA 2008 – Failure to Notify Penalty

170. A failure to notify penalty has been charged on Adspec Ltd under Schedule 41 FA 2008 for failing to register for VAT from the appropriate registration date. Like the penalty charged under Schedule 24 FA 2007, the penalty can be reduced by certain factors.

171. We have accepted that the Appellants' behaviour was deliberate in that Adil Hussain and Adspec Ltd imported significant levels of goods for resale prior to the initial date of voluntary VAT registration and that the level of imports strongly indicate that the Company was trading prior to 1 January 2014. We also agree with HMRC that the correct date of registration for VAT is that date of incorporation on 4 March 2013.

172. For the reasons set out above, we are satisfied that the disclosure was prompted as the Appellant did not tell HMRC about the failure to notify and therefore range for a deliberate inaccuracy with a prompted disclosure is a minimum penalty of 35% and maximum of 70% of the PLR.

173. We saw no basis upon which to interfere with the reductions given by HMRC which were 10% for helping in respect of the details of e-platforms used provided by Mr Hussain at the meeting with HMRC and 15% for giving on the basis that Mr Hussain provided some information in relation to the VAT enquiry but failed to respond to any requests for further information, giving a total reduction of 25%.

174. There was no dispute that the penalty had been correctly calculated and we were satisfied that the quantum was correct.

175. Paragraph 14 Schedule 41 FA 2008 specifies that HMRC may reduce a penalty to a figure because of special circumstances. For the same reasons we have set out above, we agreed with HMRC that there are no special circumstances in this case which merited a further reduction or removal of the penalty.

176. We do not consider that the imposition of a penalty for failure to notify a liability to register is without foundation. The amount of the penalty reflects the level of VAT which the business failed to account for and cannot be regarded as unfair given the legislative aim of ensuring that businesses comply with the requirements of the VAT regime.

Personal Liability Notice

177. HMRC have the power to issue a PLN to all relevant officers of the Company for all or part of a company penalty where the Company's deliberate inaccuracy can be attributed to the relevant company officer/s and there is reason to suspect that the Company may soon become insolvent.

178. The Appellant challenged whether HMRC has reasons to suspect that the Company may become insolvent. The evidence of both Mr Frost and Mr Davies was that they considered there was a significant risk of the Company being put into liquidation as there were substantial liabilities due from the Company and both the Company and Mr Hussain had stopped co-operating with HMRC.

179. We noted that from an early stage in the enquiries, despite repeated requests, Mr Hussain failed to provide his business laptop, cancelled a further meeting and subsequently withdrew any co-operation with both HMRC and his own representative.

180. Even allowing for Mr Hussain's mental state, we considered that HMRC had reason to suspect that the Company may soon become insolvent given the substantial liabilities involved and Mr Hussain's unwillingness to engage. We therefore concluded that the statutory conditions to issue a PLN transferring 100% of the Company penalty on both the CT and the VAT assessments under Schedule 24 FA 2007 and 100% of the Company penalty on the VAT assessment under Schedule 41 FA 2008 to Mr Hussain as company director were met.

181. Mr Zahur highlighted HMRC's Guidance on the issuing of PLNs in support of his submission that the inaccuracy could be considered careless and that because at the point the PLNs were issued the Company was still trading there was no basis for the PLNs being issued.

182. The relevant notices are:

- CH84610 – 'Officers of a company's liability to pay a penalty' states that an officer of the Company may be personally liable to pay all or part of a company penalty where the Company is liable for a penalty arising from a deliberate inaccuracy in a return or other document and where the deliberate inaccuracy is attributable to the action or actions of an officer of the Company. An officer of the Company must have either gained or attempted to gain personally from the inaccuracy or the Company **is insolvent or likely to become insolvent**.

- CH84645 'Insolvency or imminent insolvency' states that once you have attributed the deliberate inaccuracy in the Company return or other document to the Company officer if there are grounds to suspect that –

  • The Company **may soon become** insolvent **or**

  • The Company has become insolvent but has not yet been struck off or dissolved

  CH84645 also states that any grounds for suspicion that the Company 'may become' insolvent should be **supported by evidence**.

- CH84615 'Deliberate inaccuracies attributable to an officer of the Company' states that during the course of a compliance check, HMRC officers should examine the underlying actions or failures that resulted in the deliberate inaccuracy. It goes on to say that officers need to establish that the deliberate behaviour by the Company was attributable to one or more officers of the Company. The Guidance directs the HMRC officers to ask the officer or officers of the Company about **their personal involvement** and the circumstances that led to the deliberate inaccuracy **or their potentially deliberate failure to take action to stop the inaccuracy occurring.**

- CH81140 'careless inaccuracy' states that the law defines careless as a failure to take reasonable care. The Courts are agreed that reasonable care can best be defined as the behaviour which is that of a prudent and reasonable person.

- CH81150 states that a deliberate but not concealed inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy. It is not necessary for HMRC to demonstrate that the person knew what the accurate figure was only that **they knew the figure they put on the document was not accurate**.

  Within CH81150 are examples of actions that when taken into consideration with other facts of the case may lead an officer to conclude that there was a deliberate inaccuracy in the return or document, and these include –

  • Knowingly failing to record all sales and

  • Deliberately failing to take action that they know is necessary to ensure a return is accurate.

- CH402704 gives examples of certain elements which individually or collectively may indicate that the inaccuracy was due to the person not taking reasonable care to include –

  • No check of the figures

  • Advice not sought where necessary

  • Not giving an Adviser or HMRC the full facts when seeking advice

  • Not using the records or systems at their disposal , etc

- CH402705 'evidence of deliberate failure to file, inaccuracy, etc' states that deliberate behaviour is when a person knows they are required to notify HMRC about a relevant obligation, **is able to do so, but does not do so**. In many instances HMRC may not have any direct evidence and will have to use indirect evidence to prove the deliberate behaviour by making reasonable inferences based on the available facts.

183. We begin by reiterating that we were satisfied that the legislative provisions which apply to the issuing of the PLNs were met and in those circumstances, we found HMRC's Guidance provided limited additional assistance as its status is only guidance. However, having considered the Guidance documents we note the following:

- We accepted the evidence of the officers that they believed the Company was likely to become insolvent;
- We found that the officers had reasonable grounds for their suspicions and that the evidence to support those grounds were the substantial liabilities of the Company and its failure to engage with HMRC;
- Mr Hussain was asked about his involvement with the Company at the initial meeting with HMRC at which it was established that Mr Hussain had sole control of the Company and responsibility for submitting accurate returns. Mr Hussain's decision to not engage with HMRC prevented HMRC from exploring further the circumstances in which the deliberate inaccuracies arose or any efforts Mr Hussain made to prevent the inaccuracies;
- We have found that a prudent and reasonable taxpayer would have co-operated with the HMRC enquiry and would have provided records to demonstrate that the entries on the returns were correct or taken steps to reconstruct those records. In choosing not to do so, Mr Hussain's actions went beyond the definition of careless.
- Given the level of imports by Mr Hussain and Adspec Ltd relating to goods sold through the business, Mr Hussain would have known that the sales figure declared to HMRC was understated.

184. We considered that HMRC's Guidance was followed where applicable and that in all of the circumstances, the deliberate inaccuracies were attributable to Mr Hussain, as the director of the relevant company, and therefore the PLNs were correctly issued.

Conclusion

185. For the reasons given above we find as follows as a matter of principle:

(1) HMRC made a discovery and the discovery assessments were validly raised. We found that the Appellant did not discharge the evidential burden of displacing the assessments.

(2) The figures in respect of corporation tax are amended in accordance with HMRC's revised computation to take into account a further deduction for cost of sales relating to the purchase price of the goods imported.

(3) We found that the VAT assessments were not arbitrary and that they were made to best judgment. We concluded that the Appellant had not demonstrated that the assessments were not made to best judgement or that the amended effective date of VAT registration was incorrect.

(4) We found that HMRC had discharged the burden of demonstrating that the PLNs and penalty assessments were validly raised and that they fully considered the actions of the Appellant that may reduce the level of penalties charged and applied those reductions accordingly. We noted the Appellants' claim that he was not given the opportunity to challenge the level of penalties charged for each inaccuracy however we were satisfied on the material before us that the Appellant was in fact afforded the opportunity to provide evidence as to why he thought the amount, or the behaviour was wrong or to explain why special circumstances might apply following the issue of the Penalty Explanation Letters and prior to the imposition of the penalties. However, the Appellant failed to do so.

186. We do not increase or make an adjustment to the assessments to take account of the additional charge to corporation tax identified by Mr Brooks under Section 455 CTA 2010.

187. The appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

188. 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.

JUDGE JENNIFER DEAN
TRIBUNAL JUDGE

Release date: 15 AUGUST 2022

APPENDIX

Amounts under Appeal

The amounts currently in dispute are as follows -

Adspec Ltd

APE	Assessed	Amended on Review/closing	Legislation
03/03/14	£81,117.20	£78,362.05	S41 Sch18 FA98
31/03/14	£6,216.62	£5,514.57	S41 Sch18 FA98
31/03/15	£47,755.60	£31,337.20	S32 Sch18 FA98
03/03/14	£49,684.28	£47,996.76	Penalty - Sch 24 FA07
31/03/14	£3,807.67	£3,377.67	Penalty - Sch 24 FA07
31/03/15	£29,250.30	£19,194.04	Penalty - Sch 24 FA07

VAT Period	Amount	Legislation
04/03/13 to 31/12/13	£111,720	S73 (1) VATA 94
01/01/2014 to 31/12/15	£89,120.00	S73 (1) VATA 94
04/03/13 to 31/03/13	£68,428.50	Penalty - Sch 41 FA08
01/01/14 to 31/12/15	£54,588.62	Penalty – Sch 24 FA07

VAT registration backdated from 1 January 2014 to 4 March 2013

Adil Hussain

CT Penalty -	£70,568.47	PLN - £70,568.47	Para 19 Sch 24 FA07
VAT Penalty -	£54,588.22	PLN - £54,588.22	Para 19 Sch 24 FA07
VAT Penalty -	£68,428.50	PLN - £68,428.50	Para 22 Sch 41 FA 2008