TC04391

Appeal number: LON/08/0157

VAT – dishonest evasion penalty – section 60 VATA – conduct of company allegedly attributable to dishonesty of appellant – recovery of 100% of penalty sought from appellant under section 61 VATA – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOHAMMED AZAM **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
CHRISTOPHER JENKINS

Sitting in public in Bedford Square, London on 13-14 September 2012, 5-6 June, 20 June and 27 August 2014 with subsequent written closing submissions

T Nawaz FCA of T Nawaz & Co Limited for the Appellant

Christiaan Zwart of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This long-running appeal relates to a dishonest evasion penalty of £111,349 imposed under section 60 Value Added Tax Act 1994 ("VATA") on a company called Easy Recruitment Services (UK) Limited ("Easy") which HMRC seek to recover from the appellant under section 61 VATA on the basis that the conduct giving rise to the penalty was attributable to the dishonesty of the appellant, the sole director of Easy at the relevant times.

2. The grounds of appeal set out in the notice of appeal were essentially three-fold:

(1) the VAT assessment on which the penalty was based was issued well outside the permitted time limit;

(2) there was no basis for the assessment; and

(3) neither the VAT assessment nor the penalty assessment had been received.

3. It was stated in written submissions after the hearing on behalf of the appellant that the Tribunal did not need to concern itself with the questions of whether the penalty assessment had been served on the appellant or whether it had been issued within the appropriate time limit. Grounds (1) and (3) above were therefore effectively dropped and the true dispute between the parties revolved around ground (2). The appellant had two broad lines of attack on the assessment:

(1) first, it was argued that there was sufficient unclaimed input VAT to set against (and possibly eliminate) the unpaid output VAT upon which the penalty was based; HMRC were well aware of this and the penalty assessment could not therefore be said to have been made on "best judgment", and

(2) second, the appellant's bona fide delegation of the conduct of his company's VAT affairs offered (in the circumstances, including his illiteracy) a complete defence to any claim that he was guilty of dishonesty in relation to those affairs.

In addition, in written submissions following the hearing, an argument under Article 6 of the European Convention on Human Rights was raised.

The facts

Introduction

4. We received written witness statements from the following:

(1) Pauline Turone, who described herself in her witness statement (made on 1 February 2006) as "finance director and joint owner of Stubbins Marketing Limited" ("Stubbins").

(2) Officer Elaine Rushant (formerly Skeats), the HMRC officer who imposed the penalty under appeal.

(3) Officer Noelle Forsythe, the HMRC officer who was a member of HMRC's "labour provider unit" and who investigated the VAT affairs of Easy and raised the assessment for VAT to which the penalty under appeal relates.

(4) Officer Shaikh Malique, the HMRC officer who was a member of the labour provider unit who had carried out an employer compliance review at Easy and referred his concerns arising from that review to Officer Forsythe.

(5) The appellant.

We also received a bundle of documents (about which we make some comment below).

5. All the above witnesses apart from Mrs Turone attended the hearing and gave oral testimony in addition. Mrs Turone was medically unfit to attend. We decided not to exclude her witness statement altogether, but where it addressed matters which could reasonably be expected to have been tested in cross examination, we placed less weight on it than would otherwise have been the case. Much of it in any event turned out to be uncontroversial. We note that her witness statement was dated 1 February 2006 and was made during the course of a visit to Stubbins by Officer Rushant and her line manager during the course of the enquiry and before any decision had been taken to impose a penalty on Easy or the appellant.

6. Originally there had also been a witness statement from Mohammed Rashid, the accountant for the appellant and Easy at certain times relevant to this appeal, but his evidence was withdrawn after it was made clear he would not be attending the hearing for cross examination.

7. The appellant stated that he could not read or write in English (though it became apparent during the course of cross examination that his illiteracy was not complete). His spoken English was also slow but we are satisfied from the answers that he gave that he understood the questions put to him properly. He made no request for an interpreter for the hearing. He had no difficulty reading or writing numbers, and could sign his own name.

8. A core part of the appellant's evidence was that due to his illiteracy he relied extensively on others to deal with the VAT affairs of Easy. He was therefore not in a position to give informative answers to many of the questions that were put to him. When asked about other matters, his recollection was patchy. We are very aware that the events giving rise to the appeal had taken place mainly in 2004 and 2005, many years before the hearing. We have been very careful to bear in mind that the burden lies on HMRC to establish the relevant facts.

9. The bundle of documents was disorganised almost to the point of incoherence. In particular, the exhibits to Officer Malique's main witness statement dated 16 March 2010 consisted of a large disorganised mass of copy documents, for which the respondents provided an attempt at a schedule only on 13 September 2012. The origin of many of these copy documents was not clearly identified, and we have little confidence in the schedule dated 13 September 2012 (which, for example, identified the various copy bank statements of Easy and the appellant as being part of exhibit SMA, which was referred to in Officer Malique's witness statement as being "details of [Stubbins'] current labour suppliers, including Easy", obtained from Stubbins). It is quite apparent that these bank statements must have been among the documents removed by HMRC from Easy (rather than obtained from Stubbins), but Officer Malique's witness statement makes no identification of them as such, indeed his only reference to the documents so removed is as "the records", together with a copy of a very short form schedule of documents removed amongst the bundle of copy documents exhibited to his witness statement – which schedule included an item "suspension file/folder" of "bank statements" and an item "one envelope of bank statements".

10. This is merely one part of a wider picture which emerged (see below) of HMRC's apparent carelessness and lack of attention to detail in relation to the control of the records they removed from Easy. This has caused an immense amount of wasted time and effort in making sense of the disjointed picture which emerges from the documents.

11. From the evidence before us, we find the following facts.

Background

12. The appellant had worked for Stubbins as an employee packing fruit and vegetables. Starting from about 2003, he employed flower pickers for other traders for a period of time. We heard no details of those arrangements, beyond the appellant's statement that "the staff supplied were genuinely mine and so far as I am aware there is no query or any issue relating to PAYE or VAT with regard to such staff".

13. The appellant was initially in business as a sole trader under the trading style "Easy Recruitment Services". By an application dated 24 October 2003 (received by HM Customs & Excise on 12 November 2003) he applied for the VAT registration in his name to be transferred into the name of Easy (which had been incorporated on 18 September 2003) with effect from 1 October 2003, on the basis that his business had been transferred as a going concern to Easy. The nature of the business was described as "recruiting labour and supplying to clients @ an hourly rate + VAT". The appellant said he had simply signed this form without it being read to him, relying on the person in his office who had brought it to him for signature. He gave no evidence as to how or why he reached his decision to incorporate his business. On 18 January 2004 HM Customs & Excise wrote to the appellant and Easy confirming their transfer of the VAT registration from the appellant to Easy with effect from the 1 October 2003 date requested.

14. It appears therefore that Easy carried on business providing labour to other businesses for a period of approximately a year before entering into any arrangement with Stubbins. We heard nothing of those earlier arrangements.

15. At the hearing, HMRC attempted to introduce late evidence concerning a company called Amazone Consultancy Limited, which they appeared to suggest may have subsequently taken over the Stubbins workforce under the appellant's control. We refused this late application and any suggestion therefore that the facts of this appeal were connected in some way with ongoing behaviour of the appellant must be rejected.

Easy's provision of staff to Stubbins

16. We did not hear any detailed evidence about how the relationship between Easy and Stubbins commenced, beyond the appellant's assertion that he had been asked by Stubbins to set up in business and act as a contractor to supply them with staff. There was no need for him to recruit any workers as Easy effectively took over the workers who were already at Stubbins (many of whom had, he informed us, been there for some time previously).

17. The bare facts appear in outline from Mrs Turone's witness statement and, more particularly, the copy documents exhibited to it. These were as follows:

(1) a "contract for supply of temporary staff to Stubbins Marketing Ltd from Easy Recruitment (UK) Ltd", a document a little over a page in length, apparently signed on 11 November 2004 by the appellant (on behalf of Easy, though the word "Services" was omitted from its name) and Mrs Turone (on behalf of Stubbins). This contract was on Stubbins notepaper and appears to have been drawn up by it. It is stated to cover "the Easy Recruitment (UK) Ltd staff working at Stubbins Marketing Ltd, Station Approach, Waltham Cross, Herts";

(2) a typed letter dated 5 September 2004 from Easy to Stubbins, also signed by the appellant, thanking Stubbins "for choosing us for supply the best & dedicated staff to cover all your needs";

(3) a further typed letter from Easy to Stubbins dated 1 October 2004, also signed by the appellant, recording a "new rate for temp staff" of £5.55 per hour from 4 October 2004 (the national minimum wage having increased from £4.50 to £4.85 per hour from 1 October 2004);

(4) a bundle of 52 invoices and one credit note issued by Easy[1] to Stubbins for the supply of staff over the period of their relationship from 30 August

[1] Up to 15 November 2004, the invoices were headed simply "Easy Recruitment Services", only adopting the correct heading "Easy Recruitment Services (UK) Ltd" from that date. Easy's VAT registration number was shown on all the invoices, however, and it was not argued that this was anything other than a typing error. Payment for all the invoices was made to Easy, and neither party suggested the supplies to Stubbins were made by anyone other than Easy.

2004 to 20 March 2005. The first invoice (dated 6 September 2004) covered the supply of staff over the week commencing 30 August 2004 and we infer that this was the date on which the first supply took place. These invoices were generally issued on a weekly basis, and in each case were broken down by day, giving the number of hours worked and applicable hourly rate for each day. The hourly rate started at £5.20 per hour, then rose to £5.55 with effect from 4 October 2004. Generally there was more than one invoice for a week, broken down between day and night shifts and "Rhymny shift" (which was not explained to us). On each invoice, the amounts were added up and then VAT was added at the applicable rate. The authenticity of these invoices was not disputed by the appellant. We observe however that although Mrs Turone's witness statement referred to these as being "all" the invoices received from Easy over the relevant period, there were in fact 70 invoices referred to on the sales ledger also exhibited to her witness statement (see below); thus the witness statement omits 18 invoices and, to compound the confusion, three of those 18 "missing" invoices appear elsewhere in the disorganised bundle of documents attached to Officer Malique's witness statement. There is no way for us to know whether it was Mrs Turone who made the omission or whether HMRC have simply missed some copying from her original witness statement; but the failure to notice and at least explain this inconsistency throws further doubt on the accuracy, completeness and reliability of HMRC's evidence;

(5) print outs from the Stubbins accounting system (made on 27 January 2006) of its purchase ledger relating to Easy, listing all invoices and credit notes received from Easy and all payments made to it as recorded in Stubbins' records. This covered the period from 6 September 2004 to 30 June 2005. All payments were by cheque. The appellant did not dispute that the sum shown in the purchase ledger as having been paid to Easy (£668,844.89 exclusive of VAT) was broadly correct;

(6) registration form under the "Code of Practice for Labour Providers to the Agriculture and Fresh Produce Trade" filled in by Easy, signed by the appellant and dated 20 January 2005, annotated "posted 21.1.05 1st class", containing Easy's formal statement of intent to comply with the Code of Practice;

(7) employer's liability insurance certificate in the name of Easy, valid from 8 January 2004 to 7 January 2005.

18. The appellant confirmed that he had signed the two letters, the contract and the registration form. The Code of Practice includes a provision under which businesses such as Easy would be required to provide evidence that they had met obligations with regard to collection and payment of PAYE and NIC, provision of properly itemised payslips and compliance with national minimum wage regulations. Officer Malique said (and we accept) that the various copy payslips in the bundle before us had been provided to him by Stubbins, who would have received them as part of their checks on Easy to ensure it was complying with the Code of Practice.

19. In her statement, Mrs Turone said this:

> "The staff provided by Easy Recruitment Services (UK) Ltd were not in any way the responsibility of Stubbins Marketing Ltd. Stubbins did not pay the staff's wages and any problems with staff were taken up directly with Easy Recruitment Services (UK) Ltd. The staff were the full responsibility of Easy Recruitment Services (UK) Ltd hence we obtained a copy of the certificate of employers liability insurance…
>
> Each week Easy Recruitment Services (UK) Ltd sent an invoice to Stubbins with the names, addresses, payslips and national insurance numbers of the people provided by Easy Recruitment Services (UK) Ltd that week. The invoices were sent by post and were paid by cheque which was handed to one of the minibus drivers who brought the staff from Easy Recruitment Services (UK) Ltd."

20. The appellant claimed that the staff were employed and paid weekly in arrears in cash by a company to which Easy had subcontracted their provision, and not by Easy. Whoever paid them, it is clear that the bulk of the money to do so originated from Stubbins, and we consider the flow of money later in this decision, as well as the supposed subcontract.

21. The appellant claimed that everything that Easy had done in relation to the supply of staff was effectively done on the instructions of Stubbins. A core part of his evidence was that this included the sub-contracting of the employment of those staff to another company nominated by Stubbins. He had hoped to establish this to the Tribunal's satisfaction by cross-examination of Mrs Turone. Whilst we accept that Stubbins would have expected Easy to take over the existing workforce (and to that extent, it could be said it was acting on instructions from Stubbins to deal with the previous employer of the workforce in order to facilitate a smooth transition) we do not accept the appellant's evidence that he was specifically required to subcontract the employment of the workforce in order to achieve some "nefarious" purpose of Stubbins. We can see no reason why Stubbins would have laid down such a requirement, short of a full scale conspiracy between Stubbins and the subcontractor under which the subcontractor was intended to disappear without accounting for output VAT collected by it on its supplies and then share the defrauded VAT with Stubbins or individuals within it. There was no evidence of any such conspiracy before us, and the evidence of the money flows (see [57] below) points strongly the other way; it would have been crucial to the successful operation of such a fraud that Easy paid the subcontractor in full and quickly and there is no evidence that it did so, even if it were accepted that the various large cash withdrawals made from Easy's account were paid over to such a subcontractor.

The investigation, the penalty and the appeal

22. In late 2004, Officer Malique carried out what he described as a "liaison visit" to Stubbins in his capacity as an employer compliance officer (dealing with PAYE and NIC compliance). The purpose of such visits was to "discuss their responsibilities and to ensure that their suppliers are legitimate and compliant

businesses". During the course of that visit, Officer Malique was given details of Easy, and copies of various documents which had been supplied by Easy to Stubbins (including sales invoices for the supply of staff and supporting documents, including copy payslips).

23. Officer Malique then attended Easy's business premises at Hoe Street, Walthamstow, on 15 April 2005 for a pre-arranged visit along with a colleague Essayas Habtmichael to carry out a formal review of Easy's PAYE/NIC records. The appellant was not present at this meeting as he was "meeting a client". For Easy, those present were Mohammed Rashid of Imperial Accounting (who explained that he was in the process of taking over as Easy's accountant, having been approached to do so by the appellant the previous month), Zia Ahmed (Easy's bookkeeper, dealing with its payroll) and John Aspinall (described as contracts manager, who gave an explanation of the day to day operations of Easy).

24. Officer Malique was informed that Easy ran two separate payrolls, one for the permanent office employees (on Sage) and one for the temporary employees (on Olipay). Mr Rashid explained that he had spotted certain errors in the way Easy operated PAYE, specifically in relation to forms P45 and P46. It rapidly became clear that Easy had been underdeducting tax by allowing many employees the single person's allowance in their coding without proper authorisation to do so.

25. Officer Malique asked for copies of Easy's paid purchase and sales invoices. In the sales invoices supplied to him there was no trace of any invoices addressed to Stubbins, nor could Mr Ahmed identify any of those invoices in Easy's own computerised sales ledger. After Officer Malique showed him a copy invoice dated 11 October 2004 from Easy addressed to Stubbins (which he had previously obtained from Stubbins) however, Mr Ahmed said that the contract with Stubbins had started in August 2004. Officer Malique showed him the attachments to the 11 October 2004 invoice (a list of employees with names, addresses and National Insurance numbers and various copy payslips with "ERS (uk) Ltd" shown on them as the "company name"), and pointed out that he had not been able to find the names of any of these supposed employees in the P35 listing that Mr Ahmed had supplied him with. Mr Ahmed replied that this was because the workers in question were employed by a company called Buckingham Consultants Limited ("BCL"), to which Easy had subcontracted them (at an earlier stage in the meeting, Mr Rashid and Mr Ahmed had told Officer Rafique that Easy had "sub-contracted down to an agency to provide labour to some of their end users" and had produced weekly invoices from BCL to Easy covering the period from August 2004 to January 2005). When Officer Malique asked why the workers appeared to be receiving payslips which apparently showed Easy as their employer, Mr Ahmed could not provide an answer.

26. At the end of this meeting, Officer Malique and his colleague took away with them all the accounting records of Easy that were in the office, providing a very short summary receipt which included the item "Invoices – Buckingham (Brown Folder)".

27. Included in the bundles before us was a copy of a one page "Subcontract Agreement" on headed notepaper of BCL (though the company registration number

and VAT registration number given on that document in fact belonged to an entirely unrelated company called "Buckinghamshire Consultants Limited"); this agreement was expressed to be entered into on 26 August 2004 between BCL and "Easy Recruitment Services" (the appellant's former trading style). It provided as follows:

"**SUB CONTRACT AGREEMENT**

- This Agreement is entered into this 26th day of August 2004 between Buckingham Consultants Limited of 85-87 Bayham Street, Camden Town, London NW1 0AG and Easy Recruitment Services, 416 Hoe Street, Walthamstow, London, E17 9AA. On the following conditions:

- Buckingham Consultants Limited will provide Temporary Staff to Easy Recruitment Services as per requirement throughout the United Kingdom on mutually agreed hourly rates.

- Buckingham Consultants Limited will ensure that Temporary Staff so supplied are legal workers and will duly be vetted by them.

- Buckingham Consultants Limited will also be responsible for payment of Tax, PAYE of Temporary Staff and VAT.

- Buckingham Consultants Limited will comply with all requirements of the minimum wage and working directive.

- Easy Recruitment Services will advise the requirements for Temporary Staff well in advance to Buckingham Consultants Limited.

- Easy Recruitment Services will settle the invoices, in full, submitted by Buckingham Consultants Limited on week-to-week basis promptly."

28. Officer Malique agreed he had seen this document before, and thought it was among the records he had picked up on 15 April 2005. We find that it was. The appellant stated that he had been present at the start of the meeting at which this agreement had been signed on behalf of Easy by John Aspinall. He said that two men had arrived from BCL with the agreement and as the appellant had to leave in order to go and collect some staff, he asked Mr Aspinall to deal with it. He said that BCL had already worked with Stubbins for five or six years and Stubbins had given his name to them, which is how they came to see him. He insisted he was just "doing what Stubbins wanted" in signing up to the subcontract arrangement reflected in this document. We have already commented on this suggestion at [21] above.

29. Copies of some of Easy's records were apparently delivered back to it by Officer Habtmichael on 29 April 2005 at the request of Mr Rashid, to enable preparation of Easy's VAT return for the period January to March 2005. We note however that Easy's VAT return for that period was dated 28 April 2005 (i.e. the day

before the supposed delivery of copies of some of the records to Easy) and was received by HMRC on 4 May 2005. There is dispute about the return of these records, as the appellant maintains they were not received and he does not recognise the purported signatory on the receipt for their return. Officer Habtmichael did not give evidence, though included in our bundles was an email from him to Officer Malique dated 3 May 2005 in which he confirmed that he had dropped off the relevant copy documents at Easy's offices. He went on to say:

> "I have advised Mr Zia Ahmed to call on us again if he needs any more documentation… It was interesting to note that Mr Zia initially claimed to be independent pay roll clerk who only came in once a week to do the payroll, when asked to sign for the documents delivered he said he needed to consult with his manager Mr Hussein who eventually ended up signing for them."

30. The appellant's main complaint in relation to Easy's records is that HMRC have lost large parts of them, rendering it impossible for him to demonstrate his innocence, and we will return to that point later; in the present context, to the extent it is relevant we consider on a balance of probabilities that Officer Habtmichael did indeed return to Easy copies of the relevant records for the period from January to March 2005 as stated on the signed receipt. We also note that the signature on the receipt bears some resemblance to the signature of Mr Hussein on the VAT return for period 09/04 referred to below. Much confusion surrounded the whole issue of return of the original records, in particular a dispute over whether they had ever been returned to one "Aner Kelm". As this clearly relates to a later episode, we consider it no further at this point.

31. On 31 May 2005 (received on 6 June 2005) Mr Rashid wrote to Mr Malique, sending him the appellant's explanation for the apparent discrepancies, as follows:

> "According to Mr Azam he has supplied the labour to Stubbins Marketing Ltd through Buckingham Consultants Ltd. I would clarify the position that how did the system work that the actual contract has been taken by Easy Recruitment Ltd from Stubbins Marketing Ltd and sub-contracted to Buckingham Consultants Ltd. Therefore all of workers who did work for Stubbins Marketing were on Buckingham Consultants payroll. The Buckingham Consultants did raise the invoices work done for Stubbins Marketing to Easy Recruitment and the Easy Recruitment have raised their invoices according to their contract to Stubbins Marketing. The Easy Recruitment has kept their own portion of income and has paid the rest of to Buckingham Consultants. According to their contract it was Buckingham Consultants responsibilities to pay all of PAYE/NIC to the Inland Revenue on behalf of their employees who did work for Stubbins Consultants (I believe you have got the copy of contract). I understand in view of this process that the Buckingham Consultants have no direct access to Stubbins Marketing, therefore Mr Azam had received payment and did communicate direct to Stubbins Marketing because this contract was actually taken by Easy Recruitment Ltd.

> I have spoken to Mr Azam about the wage slips you have shown to me. According to him it was a printing mistake by one of Buckingham Consultants payroll operator, but soon after the director took the notice (sometime during the week 7 or 8) they did make a correction in their payroll. Mr Azam (Easy Recruitment) only did work with Stubbins Marketing for 19 weeks, therefore he is not supplying nor supplied any work force after that period to Stubbins Marketing. The contract was low paid therefore the Easy Recruitment have taken the worker registration scheme cost on behalf of Buckingham Consultants."

32. Pausing at this point, it is worth noting that in the bundle of documents before us, there were copy payslips in the name of ERS (UK) Ltd dated as late as 9 January 2005, so clearly the statement that the "printing mistake" had been corrected by about week 7 or 8 (which would be around the beginning of November 2004) is wrong; and the statement that Easy had only worked with Stubbins "for 19 weeks" is clearly also wrong, as that would only take matters up to 9 January 2005 whereas invoices from Easy to Stubbins up to 21 March 2005 are included in our bundle (a period of 29 weeks) and were not disputed by the appellant (though, interestingly, we note that the last payment from Stubbins to Easy which can be traced through the available bank statements of Easy is in respect of invoices for week 19 of the contract, subsequent payments apparently having been made into some other account). Therefore either Mr Rashid was incorrectly conveying the information supplied to him by the appellant or the appellant's account has changed since that time.

33. Officer Malique considered there to be a VAT risk arising from the material he had gathered on 15 April 2005 and he therefore involved his colleague Officer Forsythe, who worked on VAT issues at HMRC's integrated "Labour Provider Unit". All the documents held by Officer Malique thus became available to Officer Forsythe, though it appears she did not consider them all.

34. Officer Forsythe carried out some work on the documents made available to her (and possibly also on further information provided by Stubbins). She concentrated on Easy's output tax liability; she was not aware at that stage of the supposed subcontract with BCL, even though it had clearly been referred to at the meeting in April 2005 with Officer Malique and in subsequent correspondence. She prepared a calculation, in preparation for a meeting with Easy on 17 August 2005, of all the output tax which she considered to have been underdeclared on the basis of the Easy invoices she had seen and the Stubbins purchase ledger of invoices from Easy. That calculation was set out in a letter dated 17 August 2005. It related to periods 06/04, 09/04, 12/04 and 03/05, and can be summarised as follows:

VAT Period	**Output tax declared in return**	**Output tax on non-Stubbins invoices seen**	**Shortfall on non-Stubbins output tax**	**Output tax on Stubbins invoices seen**	**Total underdeclared output tax**
06/04	£16,013.86	£20,417.81	£4,403.95	0	£4,403.95

09/04	£23,758.00	£30,293.51	£6,535.51	£21,520.59	£28,056.10
12/04	£29,964.94	£29,998.75	£33.81	£57,515.13	£57,548.94
03/05	£20,360.23	£20,360.23	0	£38,175.46	£38,175.46
Totals			**£10,973.27**	**£117,211.18**	**£128,184.45**

35. Officers Malique and Forsythe made a joint visit to Easy on 17 August 2005, when they met Mr Rashid and a different payroll clerk, Amir Khan. The appellant did not attend, apparently having been unexpectedly delayed in Pakistan. No note of the visit was provided to us, but it appears to have been a short meeting, in which the Officers outlined their concerns, presented the letter setting out the extent of the VAT issues as Officer Forsythe saw them and arranged a further visit for 5 September 2005 for her to carry out a full audit of business records to verify the extent of any further VAT under-declarations. In cross examination, Officer Forsythe admitted (by reference to her manuscript note of the meeting, no copy of which had been made available to the appellant or the Tribunal) that BCL was mentioned at that meeting, but that she did not regard it as relevant to VAT as it was mentioned in the context of supposedly the wrong name (Easy) appearing on worker payslips.

36. On 5 September 2005 Officer Forsythe visited Easy again and met a Mr Raheen Muhammed, Easy's new book keeper (since mid-July). Again, no note of the meeting was produced to us. The appellant was not present due to illness. Mr Muhammed provided Officer Forsythe with a copy of Easy's computerised sales activity listing for the period from 1 October 2003 to 30 June 2005 and of the appellant's similar listing for the period 1 January to 30 September 2003 (before his business was transferred to Easy). This did not change any of the conclusions that Officer Forsythe had reached in relation to the undeclared output tax summarised above. Mr Muhammed did not mention BCL (though if he was a new employee and the bulk of Easy's records, including the folder of BCL invoices, were still with HMRC that is perhaps not surprising).

37. Following this meeting, Officer Forsythe therefore decided to refer the case internally for consideration of civil evasion proceedings. A decision was taken to adopt the case for such proceedings, but only in respect of the undeclared output tax on the supplies to Stubbins. An opening letter dated 17 November 2005 was accordingly written by Officer Rushant to the appellant, stating that HMRC believed there to be VAT irregularities in Easy's affairs, which HMRC proposed to investigate with a view to imposing a civil penalty for fraudulent conduct under section 60 VATA if their suspicions were confirmed. She proposed a meeting, with a view to agreeing the nature, extent and reason for the irregularities and the commissioning of a report by Easy for HMRC to verify.

38. The appellant declined to take up the offer of a meeting. He did however return HMRC's questionnaire on 2 December 2005. That questionnaire contained four short questions. The first was "Have any transactions been omitted from, or

incorrectly recorded in the books and records of Easy Recruitment Services (UK) Ltd of which you are a Director?". The appellant's reply was "Not to my knowledge". He also confirmed that Easy's books, records and VAT returns were correct and complete to the best of his knowledge and belief.

39. In contrast to the statements he had made on the questionnaire, however, just a few days later the appellant signed and submitted to HMRC a voluntary disclosure dated 5 December 2005 (which he said in evidence had been prepared by an unidentified member of his staff and simply put before him for signature). This appears to have been received by HMRC on 12 December 2005, along with a cheque for £22,355 also signed by the appellant. The form disclosed "errors highlighted whilst an internal audit". It addressed both input tax and output tax for the periods 01/04 to 03/05 inclusive, and can be summarised as follows:

Period	Type	Payable to HMRC	Repayable by HMRC
01/04	Input tax		£19
03/04	Output tax	£4,394	
	Input tax	£223	
06/04	Output tax	£6,087	
	Input tax		£466
09/04	Output tax	£7,535	
	Input tax	£89	
12/04	Output tax	£1,562	
03/05	Output tax	£1,301	
	Input tax		£151
	Totals	**£22,991**	**£636**
	Net payable	**£22,355**	

40. The appellant claimed to have no knowledge of how this document had been prepared, and he was not asked to explain how it could have been prepared in the supposed absence of the bulk of Easy's records. It clearly does not reflect the VAT (input or output) which he says arises in connection with the arrangements with Stubbins and BCL. We find that he was aware, at least in general terms, of the fact that it was intended to be a disclosure to HMRC of inaccuracies in Easy's VAT

returns, and that it required a payment to HMRC of £22,355 in respect of those inaccuracies.

41. The voluntary disclosure was referred to Officer Forsythe for consideration. She considered that she had already discovered the bulk of the under-declarations reflected in it. She therefore rejected it in a letter dated 17 March 2006, notifying Easy that she intended to raise an assessment in the sum of £23,101. The computation of this liability was not explored at the hearing, and we were unable to determine it after the hearing on a detailed perusal of her letter, save to the extent of being satisfied that none of it relates to the arrangements with Stubbins; it is therefore clear that the penalty the subject of this appeal does not relate to this liability and therefore we consider it no further.

42. As the appellant had indicated that he did not wish to co-operate with HMRC's enquiry by meeting them, Officer Rushant carried on with her investigations. She visited Stubbins on 1 February 2006 with her line manager and obtained the witness statement from Mrs Turone referred to above. Visits were also carried out to other apparent customers of Easy during the summer of 2006, but it was decided not to proceed any further in relation to those matters. It is important to note that Officer Rushant was not concerned with a detailed consideration of the amounts of the liabilities – that was work which she considered had already been carried out by Officer Forsythe and Officer Rushant said there would have been no reason for her to duplicate that work.

43. Matters had also progressed on the PAYE/NIC side. Under Officer Malique's supervision, staff in the Labour Providers' Unit had attempted to establish some kind of audit trail of the supposed BCL subcontract (reconciling the invoices and payments between Easy and Stubbins with the invoices from BCL and large cash payments debited to Easy's bank account into which the Stubbins payments had been made). They were attempting to establish the potential commerciality of the supposed arrangements. They were unable to do so. There was also apparently a hearing before the General Commissioners on 9 August 2006 in relation to PAYE/NIC matters. We heard no evidence about the substance of those proceedings or their outcome.

44. There was included in the bundles before us a copy of an undated and unsigned report from Officer Rushant to the HMRC Board in which she summarised the history of the case as she saw it and recommended the imposition of a dishonest evasion penalty of 95% of the undeclared output tax relating to Stubbins, with liability for the penalty being imposed personally on the appellant. This report was clearly written between August 2006 (as events in that month were referred to) and January 2007 (as this report must have predated the issue of the penalty in question, which took place on 29 January 2007). From the appellant's reply to HMRC's statement of case, it seems likely that the original of this report was dated 7 November 2006, which would fit the chronology.

45. It would appear that Officer Rushant's recommendation was approved by HMRC's Board. Accordingly, on 10 January 2007 Officer Rushant wrote to the

appellant informing him of her intention to impose a dishonest evasion penalty of £111,349 on Easy, and of the intention to recover 100% of that penalty from the appellant personally, in view of HMRC's stated opinion that the dishonest conduct of Easy was entirely attributable to the appellant. The appellant's agent replied on 15 January 2007, arguing that the penalties were "unlikely to be valid", and referring to some correspondence with the Labour Providers' Unit in October 2006, which "showed there was no problem with regard to Buckingham", which was "the only supplier that was relevant to this case". By letter dated 29 January 2007, Officer Rushant replied that "the assessment will have no connection with Buckingham", and formally assessed the amount of £111,349 against the appellant in respect of the penalty (being 95% of the VAT payable by Easy in respect of the supplies to Easy, according to Officer Forsythe's calculations).

46. Officer Forsythe had not been involved while the fraud investigation was under way, but was now told to issue an assessment to Easy in respect of the unpaid VAT of £117,210, which was formally done on 22 February 2007. Easy's agent Mr Rashid acknowledged receipt of the assessment by letter dated 1 March 2007, and purported to appeal the assessment. Officer Forsythe asked, in a letter dated 12 March 2007, for any evidence in support of the appeal. By letter dated 12 April 2007, Mr Rashid appears to have sent to Officer Forsythe copies of the invoices from BCL, noting that they had not been "taken as input invoices during your assessment calculation".

47. Officer Forsythe replied by letter dated 24 April 2007, stating (quite wrongly) that "this is the first time sub-contractor invoices have been mentioned", and asking for a list of documents and information to enable her to consider them.

48. On 15 May 2007 Mr Rashid replied, stating that he was unable to get information from Easy because "the marketing manager and admin officer have took the record and the director is after them (I believe the marketing manager has set up his own company)". At the hearing, the appellant gave evidence (which we accept) that Mr Aspinall and Mr Ali (Easy's administration manager) had taken Easy's records and computer in May 2007 and had set up in competition with Easy, leaving the appellant unable to carry on business. He had tried to take them to court, but had been unsuccessful and the landlord repossessed the office, taking any remaining property and records of Easy.

49. On 1 June 2007, a 7-day bankruptcy warning was issued by HMRC to the appellant in respect of the £111,349 penalty. The bundles before us contained a copy of the appellant's notice of appeal to the VAT & Duties Tribunal against the issue of the penalty, which was dated 13 June 2007. It does not appear to have been accepted by the Tribunal at that time, however (probably due to the lack of a decision letter accompanying it), and a further 7 day bankruptcy warning letter was issued by HMRC on 6 September 2007.

50. At around the same time, HMRC were pursuing Easy for the VAT liability which they maintained was due. On 26 September 2007 a liquidation petition was presented and on 16 January 2008 Easy was put into compulsory liquidation (one day

after appeals were formally registered by the VAT and Duties Tribunal from both Easy (in relation to the VAT) and the appellant (in relation to the penalty)). The liquidator subsequently withdrew the appeal on behalf of Easy.

The appellant's conduct of Easy's affairs

(a) Delegation

51. A key part of the argument put forward by the appellant was essentially that, as a result of his illiteracy, he delegated the general administration of Easy's business to employees and that he could not be regarded as dishonest as a result of any shortcomings in their performance of their duties. He also claimed a number of times that Easy just did what they were told to do by Stubbins; and this included taking on the existing workforce at Stubbins on the basis that they would be employees of BCL but Easy would act effectively as an intermediary between them and Stubbins in relation to the provision of the workers' services.

52. We accept the appellant's evidence that he did not sign the VAT returns for the three periods in question. It is, however, clear that there was no reliable system in place for the preparation, verification and signature of Easy's VAT returns (and none of its returns was signed by the appellant until April 2006). The return form required the name of the signatory to be manually inserted, as well as being signed. The state of Easy's returns from incorporation up to the first return which the appellant says he signed can be summarised in the following table:

Period	Stated signatory	Appellant's handwriting?	Signature	Appellant's signature?
01/04	M. Azam	No	Unknown	No
03/04	M. Azam	No	Unknown	No
06/04	M. Azam	No	Unknown	No
09/04	E.Hussein	No	Presumed E Hussein	No
12/04	Mohammad	No	Unknown	No
03/05	Preety	No	Unknown	No
06/05	None	No	None	No
09/05	Mr Mohammed Azam	No	None	No
12/05	M. Azam	No	Unknown	No
03/06	Mr M. Azam	No	The appellant	Yes

53. The three returns for the periods giving rise to the current penalty (09/04, 12/04 and 03/05) were therefore apparently prepared and signed by three different people. The appellant described Mr Hussein as a general assistant and not a book keeper. He said that Mr Hussein "comes with me on everything, listens in on calls, helps me to pick up staff". His best guess at the "Mohammad" who had supposedly signed the 12/04 return was Zia Ahmed, an accountancy student who had acted as Easy's book keeper for two to three hours per day. "Preety" was also a book keeper, he said; his explanation as to why she had signed just one return was that "maybe she joined new and started book keeping". Having had no involvement at all with the production of any of the VAT returns, he said he was unable to provide any explanation as to why they did not reflect the output VAT arising from the invoices issued to Stubbins or the input VAT supposedly arising from the invoices issued by BCL. We accept that the appellant did not sign the three returns in question.

54. He was similarly vague about the voluntary disclosure dated 5 December 2005, which he agreed he had signed. He said it was simply brought to him for signature by somebody in the office – he could not remember who – and he had signed it (along with the accompanying cheque to HMRC) without further enquiry. He confirmed that he never asked people (either in the office or outside it) to read out to him documents they were asking him to sign.

55. The clear picture that emerges, on the appellant's evidence, is that he simply delegated the preparation of Easy's VAT returns and its VAT affairs generally, and took no further interest in their accuracy, even when signing a voluntary disclosure (and associated cheque) after he was clearly aware that HMRC were formally questioning that accuracy. Whilst he claims to have been aware of a subcontract arrangement with BCL (and stated that Zia Ahmed, the book keeper with responsibility for VAT at the time, also knew about it), he took no steps to ensure that it was properly reflected in Easy's records or VAT returns; even after HMRC's concerns as to the accuracy of the returns and records was put to him in the clearest and most formal way possible, he signed a formal confirmation in consultation with professional advisers in which he confirmed the accuracy of those returns and records, followed within a matter of days by a voluntary disclosure in which he acknowledged significant inaccuracies (but still quite clearly failed to make appropriate entries in connection with the supposed subcontract). Overall, we consider the appellant showed (at the very least) a reckless disregard for the accuracy of the returns and other information which was being delivered to HMRC in relation to VAT by Easy under the arrangements he put in place for its delivery.

56. The appellant was clear that he was the sole signatory on Easy's bank account and he accepted he was the sole director of Easy and responsible for its affairs.

(b) Receipts and payments

57. Stubbins made all their payments to Easy by cheque. By reference to the sales ledger produced to her by Stubbins, Officer Forsythe calculated that Easy had made undeclared gross sales to Stubbins of £786,989.42 and associated underpayments of output VAT, as follows:

Period	Gross sales to Stubbins	Undeclared VAT @ 7/47ths (rounded down)
09/04	£144,495.41[2]	£21,520
12/04	£386,137.03[3]	£57,515
03/05	£256,505.98[4]	£38,175
Totals	**£786,949.42**	**£117,210**

58. Copies of Easy's bank statements for the period from its opening on 17 October 2003 up to 29 March 2005 were included in our bundle, having (we infer) being removed by HMRC at the visit on 15 April 2005. These statements showed the payment into Easy's bank account of the bulk of the cheque payments listed in the Stubbins purchase ledger (amounting in total to £587,581.16), at least up until early February 2005[5]. From that time up to 29 March 2005, however, £142,815.35 of further payments shown in the Stubbins ledger do not appear in the bank statements and further payments after that date totalling £50,884.47 are obviously not reflected in the bank statements. The appellant said at the hearing that he "may" have paid the missing amounts into a second business account, but gave no further details. He did not dispute that the Stubbins figures were substantially accurate, and we find that they were.

59. Large cash withdrawals were made by the appellant from Easy's account. These commenced on 6 October 2004, when £30,000 in cash was withdrawn. There followed regular withdrawals on roughly a weekly basis of between about £20,000 and £30,000 up to the end of January 2005. In February 2005, the appellant withdrew three cash payments totalling £44,000 then, after an exceptional gap of nearly three weeks from 16 February up to 8 March, 2005 he made a further three cash withdrawals (two on 8 March and one on 18 March) totalling £56,066.87. All the withdrawals (apart from the last one on 18 March 2005 for £11,066.87) were for round sum amounts (mostly thousands, but occasionally multiples of £500). The total of these large cash withdrawals shown on the statements for the whole period was £510,066.87. No correlation can be discerned between the dates and amounts of the BCL invoices and the dates and amounts of the cash withdrawals.

[2] £144,602.34 total invoices less £106.93 credit note during the period.

[3] £386,867.59 invoiced during the period, less one invoice for £694.52 which appears to have been omitted.

[4] £256.505.97 invoiced during the period, less one invoice for £185 which appears to have been omitted.

[5] This assumes that a credit of £35,500.41 to the account on 18 October 2004 includes the cheque of £34,852.98 issued by Stubbins on 14 October 2004, and that a credit of £33,035.27 to the account on 26 October 2004 includes the cheque of £31,370.27 issued by Stubbins on the same day.

60. The appellant gave an account of what he had done with the cash. He said that he personally withdrew the large amounts of cash which he took away from the bank in a bag. He collected it from one of two branches, near his home or near the office, whichever was the more convenient on the day. He said he gave it to the two men who had originally come to the office to sign the BCL contract with Easy; they came every week to collect it. He said he generally gave them the cash himself but sometimes Mr Aspinall had paid it to them. This was the only contact that supposedly took place between Easy and BCL.

61. The appellant maintained that when he paid over the cash, he received the BCL invoice and a hand written receipt which he passed to staff in his office for retention. He claimed that the receipts must have been with Easy's records which had been taken by HMRC and subsequently lost. Clearly if HMRC had made a proper schedule of the documents they had taken, there would be some reliable evidence to either confirm or rebut this suggestion; however no such evidence was available. From comparing the dates and amounts on the BCL invoices with the dates and amounts of the cash withdrawals however, it can readily be seen that there is no discernible correlation between the two and the appellant's claim that the BCL invoices were paid using the cash withdrawn simply cannot be supported by the evidence.

62. The appellant said he understood that BCL used the cash he handed over to pay the staff their wages on a Friday. Whether the staff were paid by BCL or by Easy, clearly substantial cash funds to pay them will have been needed on a weekly basis from Friday 6 September 2004. The appellant said that when Easy did not have the funds to pay BCL, he borrowed the necessary money "from friends" in "chunks" of about £2,000 to £3,000. An examination of the timing of the various invoices and payments casts some significant doubt on this suggestion. By the time Easy received its first payment from Stubbins (which was not credited to Easy's bank account until 1 October 2004), Easy had supposedly received invoices from BCL totalling over £137,000 and even if it had paid those invoices on one week's credit (rather than on presentation, as the appellant stated), it would still have had to pay over £107,000 funded out of small individual loans before receiving any payment from Stubbins; we consider this implausible. Whilst its bank account was in credit by amounts roughly in the range from £15,000 to £25,000 over the period from 6 to 30 September 2004, the activity on the account over that period broadly followed the previous pattern and there is no indication of any attempt to draw out of it amounts in respect of either the BCL invoices or cash payments to staff. Whilst we are not in a position to reach any conclusions about how the payments were actually funded, the implausibility of the appellant's suggestion (and the lack of any evidence to support it) casts doubt in our minds on his evidence as a whole.

63. In short, therefore, the available documentary evidence either does not support or positively undermines the appellant's oral evidence. We do not accept the appellant's account of what was done with the cash and whilst much of it must have found its way into the hands of the workers by some route or another, we find it was not used to pay BCL.

The BCL subcontract

(a) BCL

64. BCL was incorporated on 17 December 1999 with company number 03896377. Companies House records show that its last filed accounts covered the period up to 31 December 2003, stating the company to be dormant. Its last annual return was made up to 17 December 2005 and it was dissolved on 11 September 2007. Its stated activity code denoted "Business and Management Consultancy". Its registered office was in Barnet, North London and its Directors were a Mr & Mrs Kolubayev. We were not told whether this company ever had a VAT registration. Beyond the use of its name on the invoices held by Easy, there is no evidence to suggest that there was any connection between this company and Easy at any time.

(b) Buckinghamshire Consultants Limited

65. All the supposed invoices from BCL to Easy gave the company registration number 4477973 and VAT registration number 805 5266 37. These numbers were proper to a different company, called Buckinghamshire Consultants Limited, which was incorporated on 4 July 2002. Included in the bundle before us was a copy of this company's application dated 27 January 2003 to register for VAT. Its stated business was "software development", it gave its principal place of business as an address in Camden Town (the same address as appears on the BCL invoices) and the application was signed on its behalf by one Dilip Supyavamshi from Slough, who identified himself as a director. An abbreviated summary of its VAT history was included in the bundle, but no further company search information. The VAT return history showed that the company had been very erratic in its submission of returns, and such returns as had been submitted were all nil returns; various small assessments had also been raised in respect of periods for which no return had been submitted (including periods 09/04, 12/04 and 03/05). A final nil return appears to have been received from it on 17 January 2006. Clearly, therefore, this company had not accounted for the output VAT shown on the supposed invoices carrying its VAT number from BCL to Easy, nor was there any evidence to suggest that either (a) VAT had been accounted for by any other company, or (b) there was any actual relationship between this company and Easy. This company was dissolved on 12 December 2006.

(c) Commencement of the relationship

66. The appellant's evidence about the supposed commencement of the relationship with BCL and the signing of the supposed contract with BCL (and our view on such evidence) is set out at [28] and [21] above.

(d) The real picture

67. It is clear from the above facts that the BCL invoices upon which the appellant seeks to rely were not issued by either of the two Buckingham/Buckinghamshire companies but were instead generated fraudulently by some other person in order to create an apparent obligation to pay VAT (and corresponding entitlement to input VAT) for Easy. The appellant claims that he did not know, and had no way of

knowing, of the fraud. He points the finger instead at Stubbins, who he says required him to enter into the subcontract with BCL in order to achieve some unlawful "nefarious" purpose of their own.

68. There was included in our bundle (at the instance of the appellant's advisers) a redacted copy of a letter dated 29 June 2005 from a different office of HMRC to an unnamed third party, advising that third party that:

> "I have taken the opportunity to examine invoices relating to 2 subcontract labour providers, [X Limited] and Buckingham Consultants Limited 805 5266 37 for whom large amounts of input tax have been reclaimed. I have reason to believe that there has been unauthorised use of both these VAT registration numbers. In order to protect your tax position and the public revenue, you are advised that any input tax in relation to transactions involving either of these VAT registrations taking place on or after the date of this letter will be disallowed."

69. On behalf of the appellant, Mr Nawaz invited us to infer from this letter that until June 2005 HMRC themselves were not aware of any problems with invoices issued by BCL and therefore the appellant could not have been aware of any such problems at the earlier dates given on the BCL invoices held by Easy. There are two difficulties with this. First, it completely ignores the alternative view that the appellant was well aware that the BCL invoices were fraudulent. Even if that were not the case, it ignores the fact that instead of simply claiming the input VAT on those invoices (which would be the normal course for an entirely innocent trader), Easy had simply stored them separately (sufficiently carefully to warrant their own marked "brown folder") but without claiming the VAT on them as input VAT.

70. It is also clear that the BCL invoices were already in Easy's possession by April 2005 and that Zia Ahmed (the person said by the appellant to be responsible for VAT matters at Easy) knew about the contract with Stubbins and the supposed subcontract arrangements with BCL but did not enter either the BCL invoices or Easy's invoices to Stubbins on Easy's computerised accounting system.

71. Against this background, on the basis of our assessment of the appellant's credibility, we find he was well aware that there was no subcontract arrangement with BCL and he was aware that the BCL invoices had been fraudulently created. As they were not actually reflected in Easy's VAT returns, this can only have been done in order to provide a second line of defence if Easy were challenged by HMRC over its failure to account for output tax on its supplies to Stubbins.

Easy's business records

72. Another part of the appellant's argument was that HMRC had lost all the original business records of Easy and he was therefore unfairly handicapped in his defence of the penalty they sought to impose on him. Whilst much of the argument at the hearing before us revolved around the return to Easy in April 2005 of sufficient copy records to enable it to prepare its VAT return, in fact it appears from a close reading of the bundle before us that the real dispute concerns later events. In a

witness statement dated 12 April 2011, the appellant referred to a witness statement of Officer Malique dated 10 November 2010 (no copy of which was in the papers before us) in which it had apparently been indicated that Officer Habtmichael had returned ERS's records to it at its principal place of business on 9 September 2005; they had supposedly been received by someone called "Aner Kelm" (understood to be female) but no written receipt had been obtained. The appellant stated that no person with that or any similar name had been employed at Easy at that time, and he had no recollection of the records being returned.

73. It is clear that HMRC retained some records after 2005, as the bundle before us included a letter dated 16 April 2008 from Officer Malique to the Official Receiver, in which he enclosed "a copy of our evidential bundle prepared for the General Tax Commissioners" and an additional "few records", comprising two boxes. The schedule attached to the letter is extraordinarily vague, and apart from a few individual documents which are clearly of no great significance to this appeal, the bulk of the material was clearly subsumed under the headings "x6 lever arch folders of employee work records" and "approx 98 loose employee work records".

74. Officer Malique accepted in cross examination that the list of material uplifted from Easy in April 2005 was, on its face, far more extensive than the list of material handed over to the Official Receiver in April 2008. He accepted that the VAT records may have been separated from the employer records, and he did not know when (if at all) the VAT records were sent back.

75. In her witness statement dated 4 November 2009, Officer Rushant had said:

> "we currently hold the original business records for Easy Recruitment Services (UK) Limited for the period of the fraud. These clearly showed that the company's contract with Stubbins was completely 'off-record'. There are no sales invoices in the records for the supply of any staff to Stubbins by Easy Recruitment Services (UK) Limited. The supplies to Stubbins do not appear in the sales day book either."

76. This self-same paragraph also appeared in her fraud report of November 2009.

77. It appears that after a case management hearing in this appeal on 15 February 2010, in which an application by the appellant for access to the business records of Easy held by HMRC was considered, Judge Stephen Oliver QC directed HMRC to provide to the appellant, within 42 days, "copies of such, if any, of the original business records of ERS as are referred to" in Officer Rushant's witness statement. This resulted in a further witness statement from her, in which she said that her earlier reference to HMRC holding the original business records in fact referred to "the original business records that were hand delivered to the Official Receiver on 16 April 2008".

78. We are driven to the conclusion that no clear picture can now be gleaned of what happened to the bulk of the business records uplifted from Easy. Copies of some were clearly returned in April 2005 – but only copies, and only sufficient to enable Easy to produce its VAT return. As to the originals of the documents that

would be relevant to this appeal, these were so poorly scheduled and controlled by HMRC that they are certainly unable to satisfy us that they were indeed returned to Easy at any stage, or to the Official Receiver. Where the appellant asserts that any particular document was or might have been included in the records uplifted by HMRC, therefore, they have significantly handicapped their own case by not having any coherent evidence to rebut such assertions.

79. Nonetheless, some core facts about the records are clear. As at 15 April 2005, Easy's records included a folder of invoices supposedly from BCL which had not been entered on its accounting systems (nor, accordingly, had they been reflected in its VAT returns); and neither its records nor its accounting system included any trace of the sales invoices issued by Easy to Stubbins (and nor, therefore, had they been reflected in its VAT returns). Irrespective of the other uncertainties referred to above, these facts when considered with the documents before us and the oral evidence we heard, are more than sufficient to support the findings of fact we have made.

The law

80. We have set out relevant extracts from sections 60, 61 and 70 Value Added Tax Act 1994 ("VATA") in an appendix to this decision.

81. Sections 76 and 77 VATA contain provisions governing the mechanics of assessments and time limits, but there was no material dispute about their effect and we therefore do not need to set them out in full in this decision.

Submissions of the parties

82. Because of the unexpected length of time it took to hear the evidence, there was insufficient time for the parties to make their submissions orally; provision was therefore made for them to deliver their submissions in written form after the hearing. Mr Zwart on behalf of HMRC delivered submissions of 18 pages plus 24 pages of annexures; Mr Nawaz on behalf of the appellant delivered a nine page response to HMRC's submissions and 36 pages of his own submissions (which sought, amongst other things, to assert as fact matters about which no evidence had been presented to the Tribunal). We have considered both sets of documents carefully, but of necessity it is impossible to provide in this decision anything more than a summary of the most important submissions made on behalf of each party.

Submissions of HMRC

83. The question of what constitutes "dishonesty" for the purposes of section 60 has been considered a number of times and the formulation of the Court of Appeal in *R V Ghosh* [1982] 2 All ER 689 at 696 is commonly referred to. As Lord Lane LCJ put it at 696g:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is

> the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant must have realised that what he was doing was by those standards dishonest… It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did."

84. This approach was endorsed in *Ghandi Tandoori Restaurant v Customs & Excise Commissioners* [1989] VATD 3303, where the Tribunal said (when referring to the "mental element" of dishonesty):

> "We think that that element can only be that when he did, or omitted to do, the act with the intention of evading tax, he knew that according to the ordinary standards of reasonable and honest people that what he was doing would be regarded as dishonest."

85. Mr Zwart submitted that recklessness could amount to dishonesty for these purposes. He referred to the VAT Tribunal decision of *Howroyd v Customs & Excise Commissioners* [1991] BVC552, where the Tribunal said this:

> ".. we consider that if a return contains a mist-statement, and the person who makes the return has no honest belief in the truth of the statement (and in particular, if he makes the statement recklessly, not caring whether it is true or false), that is dishonesty according to the ordinary standards of reasonable and honest people."

86. Mr Zwart also referred us to the opinion of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918, summarised in the headnote as follows:

> "Where a company's rights and obligations could not be determined either by the primary rules of attribution, expressed in its constitution or implied by law, for determining what acts were to be attributed to the company, or by the application of the general principles of agency or vicarious liability, the question of attribution for a particular substantive rule was a matter of interpretation or construction of that rule. If the court decided that the substantive rule was intended to apply to a company then it had to decide how the rule was intended to apply and whose act or knowledge or state of mind was for that purpose intended to count as the act, knowledge or state of mind of the company. Although in some cases that could be determined by applying the test of whose was the 'directing mind and will' of the company so that his fault or knowledge became the company's fault or knowledge, that test was not appropriate in all cases. Since the policy of the 1988 Act was to compel, in fast-moving markets, the immediate disclosure of the identity of persons who became substantial security holders in publicly listed companies, the application of the Act to corporate security holders required a rule of attribution by which the knowledge of the person who, with the authority of the company, acquired the relevant interest was to be attributed to the company, since otherwise the policy of the Act would be defeated and there would be a premium on the

> board paying as little attention as possible to what its investment managers were doing. Accordingly, on the true construction of s 20(3) and (4) of the 1988 Act, a company knew that it had become a substantial security holder when that fact was known to the person who had authority to do the deal and it was then obliged to give notice under s 20(3). It followed that K's knowledge was to be attributed to the appellant."

87. Mr Zwart submitted that the appellant was lying about the existence of any sub-contract with BCL. He pointed to the conflicting information given to HMRC about the duration of the supposed contract (see [32] above), the fact that even the BCL contract was inconsistent because of the mismatch between the BCL name and the registration number on the contract and the failure to include any entries in respect of the BCL contract in the voluntary disclosure made on 5 December 2005 (in spite of the confirmation given on the responses to the "fraud" questionnaire to the effect that no transactions had been omitted from Easy's books and records). He also submitted that the appellant was lying when he described uncorroborated large cash payments to unnamed individuals as the means of paying the BCL invoices.

88. In the circumstances, he submitted that the appellant's conduct displayed the necessary element of dishonesty, within the meaning of sections 60 and 61 VATA, to justify both the dishonest evasion penalty imposed on Easy and the recovery of that penalty from the appellant personally.

Submissions of the appellant

89. The main thrust of Mr Nawaz's submissions was along three lines:

(1) No penalty should be due at all, as the input tax on the BCL invoices would effectively cancel out any unpaid output tax liability on the supplies to Stubbins (upon which the penalty was based);

(2) The appellant had not in any event been dishonest; and

(3) The conduct of the appeal (and in particular the lapse of time between the events of 2004-05 and the hearing) had resulted in the breach of the appellant's rights under Article 6 of the European Convention on Human Rights ("ECHR"), as a result of which the appeal should be allowed in any event.

90. Mr Nawaz referred us to three cases. The first two were *Van Boeckl v CCE* [1981] STC 290 (which he referred to as a decision of the Court of Appeal, but which is in fact a High Court decision) and *CCE v Pegasus Birds Limited* [2004] STC 1509 (which was a decision of the Court of Appeal). These are two cases concerned with "best judgment", and their import can perhaps best be given by setting out the headnote from the latter decision:

> "The tribunal's primary task on an appeal against an assessment to VAT was to find the correct amount of tax. The tribunal, faced with a best of

> their judgment challenge, should not automatically treat it as an appeal against the assessment as such, rather than against the amount. Where a tribunal reached a figure for the VAT payable which differed from that assessed by the commissioners the relevant question then was whether the commissioners' mistake was consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable or was of such a nature that it compelled the conclusion that no officer seeking to exercise best judgment could have made it. Even if the latter conclusion was reached it did not follow that the assessment should be set aside. Although the tribunal's powers were not spelt out, it was implicit that it had power either to set aside the assessment or to reduce it to the correct figure. There was nothing in the statute or principle which required the whole of the assessment to be set aside. Much would depend on the nature of the breach. Accordingly, even if the process of assessment was found defective in some respect applying the established test, the question remained whether the defect was so fundamental that justice required the whole assessment to be set aside, or whether justice could be done simply by correcting the amount to what the tribunal found to be a fair figure on the evidence before it. In the latter case, the tribunal was not required to treat the assessment as a nullity, but should amend it accordingly."

91. As we understood it, Mr Nawaz's submission based on these two cases, in summary, was not that the penalty assessment in this case was totally invalid, simply that the application of "best judgment" would require, in the light of the supposed input tax from BCL which had been consistently ignored by HMRC[6] (and the further £12,000 approximately of VAT for the three relevant quarters which had been paid with the voluntary disclosure dated 5 December 2005), a substantial reduction or total cancellation of the penalty.

92. The third case he referred to was *Han & Yau v CCE* [2001] STC 1188. In this case, the Court of Appeal confirmed that proceedings such as this are to be regarded as "criminal" in nature, such as to engage Article 6(3) of the European Convention on Human Rights. This provides for various "minimum rights", including the right -

> "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"

93. To this, we would add the provisions of Article 6(1), as follows –

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time…"

94. In summary under the Article 6 heading, we understood Mr Nawaz to be arguing that the length of time between the relevant events and the hearings, HMRC's

[6] The total input tax shown on the BCL invoices was £109,018.50, compared to Officer Forsythe's calculation of £117,211.18 of output tax due from Easy in respect of its supplies to Stubbins; the difference between these two figures is £8,192.68.

failure to give adequate reasons at an early stage for disallowing the input VAT on the BCL invoices, their loss of Easy's records and their parallel proceedings for bankruptcy to enforce the penalty before it had even been upheld by the Tribunal amounted to a denial of the appellant's rights under Article 6, such that the appeal should be allowed.

95. Finally, Mr Nawaz submitted that the evidence before the Tribunal could not support any finding of dishonesty on the appellant's part. In his submission, the evidence showed that the appellant was entirely reliant on others, to whom he had delegated Easy's VAT affairs; the output tax due on the supplies to Stubbins was almost cancelled out by the input tax on the BCL invoices (and the voluntary disclosure made in December 2005 accounted for any balance); he had not signed the relevant VAT returns; his account of the trading and financial relationship with BCL was entirely plausible and should be accepted; and with the lengthy delay since the events in question and HMRC's loss of Easy's records, they were unable to prove the necessary facts to the requisite standard.

Discussion and decision

Introduction

(a) Preliminary points

96. It was agreed that the burden lies on HMRC to establish the facts necessary to support their decision. We also agree with the submission of Mr Zwart that the relevant standard to which the facts must be proved is the civil standard, i.e. the balance of probabilities – see *In re B* [2008] UKHL 35.

(b) Section 60 VATA

97. In the present case, as the appellant was the sole director of Easy, for the purposes of section 60 we consider his state of mind to be central to a determination of whether (i) Easy did any act or omitted to take any action for the purpose of evading VAT and (if it did), whether (ii) Easy's conduct involved dishonesty.

98. In the light of *Meridian Global*, in a situation where the appellant had delegated full authority to his office staff to administer Easy's VAT affairs, we also consider that the actions, knowledge and state of mind of the individual or individuals who actually dealt with Easy's VAT affairs pursuant to that delegation should be attributed to Easy as well, otherwise the clear policy of section 60 could be thwarted by a board of directors "paying as little attention as possible" to the fraudulent behaviour of its delegees.

99. We must therefore (a) consider whether it was the "purpose" of the appellant and/or the individual(s) who prepared the relevant VAT returns that Easy should evade VAT, (b) examine the relevant acts and omissions of the appellant and such individual(s) on behalf of Easy to determine whether they were done in pursuance of such a purpose, and (c) determine whether such acts and omissions were dishonest.

100. To a degree these issues are bound up together (we find it difficult to imagine, for example, how conduct whose purpose was to evade VAT could be found to be honest) but nonetheless we must apply the wording of the legislation as it stands and this calls for a separate examination of each of the required elements.

(c) Section 61 VATA

101. If we find that the test for imposition of a penalty under section 60 is satisfied following the above investigation, we must then separately go on to consider whether the test in section 61 VATA is satisfied, i.e. whether the conduct giving rise to the penalty under section 60 VAT was, in whole or in part, attributable to the dishonesty of the appellant. Clearly this enquiry must focus on the appellant alone, the dishonesty of any other person being irrelevant.

Are the requirements of section 60 VATA satisfied?

102. Easy did not claim any input VAT in respect of the BCL invoices on its returns, so its "evasion", if any, is its failure to declare the output VAT on the Stubbins sales.

103. We have found that both the appellant and the individual to whom he had delegated responsibility for VAT affairs were aware of the supplies to Stubbins and the corresponding output VAT liability. They were also both aware of the BCL invoices and claimed to be aware of a subcontract arrangement with BCL which had generated those invoices. However, no reason of any sort has been given why the output VAT (on the supplies to Stubbins) and the input VAT (on the BCL invoices) were not simply included in the original VAT returns (or in the subsequent voluntary disclosure). We find it incredible, in the circumstances, that this could be the result of an innocent oversight. The only inference we feel able to draw is that whoever was preparing the figures for entry on the VAT return was very well aware that the BCL invoices were not legitimate; either of his own volition or on the basis of instructions from the appellant, he did not include either the Stubbins output VAT or the BCL input VAT in the returns and kept all mention of the Stubbins output VAT out of Easy's records, as this would hopefully conceal both from a "routine" VAT inspection and allow the expropriation of the VAT paid by Stubbins, whilst keeping the fraudulent BCL invoices away from HMRC's sceptical eyes but "in reserve" as a second line of argument in case HMRC discovered the fraud.

104. In those circumstances, we have no hesitation in finding that the penalty under section 60 VATA was properly imposed on Easy.

Are the requirements of section 61 VATA satisfied?

105. For the purposes of section 61 VATA we must consider whether "the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of" the appellant.

106. The appellant disclaims all knowledge of any fraud, based essentially on two arguments:

(1) there was no fraud; and

(2) even if there was, he was entirely innocent because of his delegation of the VAT affairs to others within Easy.

107. As we have already found, the BCL invoices did not reflect any real underlying supply to Easy for which input VAT could properly be claimed, and the appellant was well aware of that fact. In those circumstances, we consider that the failure to account for output VAT on the supposed basis that such output VAT could be in some way informally "set off" against the supposed input VAT on the BCL invoices was clearly dishonest evasion. The first of the above arguments is therefore doomed to fail.

108. As to the second line of argument, we consider it to be equally without substance. In a situation where the appellant, on his own evidence, had complete and sole control of Easy's bank account, it is appropriate to consider what has happened to the money which was received from Stubbins. In essence, over £193,000 of cheques issued by Stubbins were never paid into Easy's normal business account but the appellant said he "may" have paid them into another account. He has not produced copies of any statements for any other account to show what happened to that money (and there is no suggestion that those records might have been included in the records uplifted by HMRC in April 2005). The appellant was the only person with authority to sign for withdrawals from the account for which we have seen statements, into which over £587,000 was paid from Stubbins. Large cash withdrawals were made by him from that account, totalling some £510,000; this amount might have been roughly sufficient to pay the net wages of the workers (we note that the gross wages payable for the hours worked over the entire life of the Stubbins contract, at national minimum wage rates and before any deductions for PAYE and NIC, would have been approximately £617,400) but it would have been nowhere near enough to pay the sum of just under £732,000 supposedly due to BCL under the BCL invoices. In short, the appellant has carefully managed the money received from Stubbins in a way which is entirely inconsistent with his evidence of the supposed arrangements with BCL, and large amounts of that money have simply disappeared without explanation.

109. In the circumstances, we reject the suggestion that the appellant was innocent of any dishonesty by reason of his delegation of Easy's VAT affairs to others. We find that the appellant was well aware that the BCL subcontract was a fraudulent fabrication, and he either instructed Easy's book keeper to exclude the Stubbins output tax from Easy's VAT returns or he knew of the omission and took no steps to correct it. We therefore find that the conduct giving rise to Easy's penalty was attributable to the appellant's dishonesty.

Other matters

110. We do not consider that any of the Article 6 points raised by the appellant can assist him. There has certainly been a long delay between the events the subject of this appeal and the hearings. HMRC have clearly performed very poorly in relation to the management of and control of the records they seized. But neither of these facts

in our view affects the fundamental fairness of the appeal; the burden of proof lies on HMRC and the lapse of time and their poor control of the records seized has impacted more adversely on their case than the appellant's. The only significant contemporaneous documents which might have gone missing are the hand written receipts from BCL which the appellant claims were included in the records. Given the facts surrounding the issue and storage of the BCL invoices themselves we do not consider that the absence of such handwritten receipts in any way prejudices the appellant's case. The appellant has had ample opportunity to bring forward other witnesses to support his account of events and to produce bank statements (if necessary, copies obtained from the bank) for the other account(s) into which money from Stubbins "may" have been paid, but he has not done so.

111. As to HMRC's supposed failure at an early stage to give adequate reasons for their disallowance of the input VAT shown on the BCL invoices, it is clearly true that HMRC had initially simply disregarded (rather than expressly disallowed) this supposed input VAT. It was clear however from at least 24 April 2007 that HMRC would not be accepting the input tax claim without evidence sufficient to satisfy them as to its validity, and the appellant has failed to provide the necessary evidence.

112. As to the claim that HMRC's parallel pursuit of bankruptcy proceedings in some way interfered with the appellant's Article 6 rights, the submissions of Mr Nawaz were of the most vague and generalised nature and we see nothing in the point.

113. Finally, we see no basis to interfere with the mitigation of 5% applied by HMRC to the section 60 penalty. Nor, in the absence of any evidence as to how the voluntary disclosure of 5 December 2005 was calculated, do we see any basis for reducing the penalty by reference to the £12,198 of underpaid output tax included in that disclosure in respect of the three periods 09/04, 12/04 and 03/05.

114. It follows that the appeal must be DISMISSED.

115. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 7 May 2015

Appendix

Extracts from sections 60, 61 and 70 VATA

60 – VAT evasion: conduct involving dishonesty

(1) In any case where –

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

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

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

(2) The reference in subsection (1)(a) above to evading VAT includes a reference to obtaining any of the following sums –

(a) …

(b) a VAT credit;

…

in circumstances where the person concerned is not entitled to that sum.

(3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person's conduct shall be construed –

(a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated; and

…

…

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

61 – VAT evasion: liability of directors etc

(1) Where it appears to the Commissioners –

(a) that a body corporate is liable to a penalty under section 60, and

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a 'named officer'),

the Commissioners may serve a notice under this section on the body corporate and on the named officer.

(2) A notice under this section shall state –

(a) the amount of the penalty referred to in subsection (1)(a) above ('the basic penalty'), and

(b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

…

(5) No appeal shall lie against a notice under this section as such but –

(a) …

(b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body referred to in subsection (1)(b) above is, in whole or in part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

70 – Mitigation of penalties under sections 60, 63, 64 and 67

(1) Where a person is liable to a penalty under section 60… the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

(3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are –

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.