[2016] UKFTT 295 (TC)

TC05068

Appeal number: TC/2015/3124

VAT – penalty - personal liability notice – para 19 sch 24 FA 2007 – jurisdiction of Tribunal – whether liable – amount of penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr JASON ANDREW **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mrs Beverley Tanner

Sitting in public at Centre City Tower, Birmingham on 21 March 2016

Mr Hugh Roberts for the Appellant

Ms Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant ("Mr Andrew") appeals against a personal liability notice issued by the Respondents ("HMRC") pursuant to para 19 sch 24 Finance Act 2007 on 5 February 2015 in the amount of £281,805 ("the PLN").

Facts

2. We make the following findings of fact, most of which are uncontroversial.

3. Mr Andrew was a sub-postmaster in Staunton, Gloucestershire. On 21 August 2013 a company was incorporated under the name Intel Communications Limited ("the Company"). The Company subsequently changed its name to Staunton Communications Ltd. Mr Andrew was the sole director and shareholder of the Company from incorporation to dissolution.

4. On 21 August 2013 Mr Andrew, as director of the Company, filed Form VAT1 applying for the Company to be registered for VAT, describing the business activity as "telecommunications consultancy activities" and giving estimated turnover in the first twelve months as £80,000. The Company was registered for VAT with effect from 1 September 2013.

5. The Company's VAT returns for VAT quarters 10/13 and 01/14 were Nil returns. On 27 June 2014 the Company submitted its VAT return for period 04/14, which declared sales of £2,444,870 and purchases of £2,439,877, with reported input tax of £487,975.50. All the returns were completed by Mr Andrew.

6. In July 2014 HMRC visited the Company's premises and interviewed Mr Andrew.

(1) Mr Andrew stated that the Company's sales were of "airtime minutes" and had been carried out by an individual known to him as "James". Mr Andrew was not sure of James' surname, although he thought it might be Gilmore. James was now uncontactable.

(2) Mr Andrew was unable to produce any contracts or agreements to demonstrate that the Company either owned or rented the hardware necessary (namely a "switch") to deal in airtime minutes; nor any "call data records" to demonstrate that supplies had actually been made.

(3) Mr Andrew produced four sales invoices issued by the Company to TP Telecom at a Leicester address stating sales of airtime minutes between 11 February 2014 and 11 March 2014 for approximately $4m (£2.4m). Mr Andrew was unable to provide any bank statements to show payments having been received for the supplies.

(4) Mr Andrew produced a spreadsheet listing purchases from MC Aerials and Satellites Ltd ("MC Aerials") at a Newark address. Mr Andrew confirmed he did not have any purchase invoices from MC Aerials.

7. Following the visit the Company was deregistered for the purposes of VAT with effect from 21 July 2014.

8. A further interview took place on 9 September 2014.

(1) Mr Andrew stated that he had initially met James by chance at a pub in Leicester. He had then arranged to meet him for a second time at a pub in Gloucester. Following the second meeting Mr Andrew had incorporated the Company for the purpose of commencing a business trading in airtime minutes. James had told him he would "make good money".

(2) HMRC showed Mr Andrew copies of his own passport, council tax bill and a copy of the Company's VAT certificate which had been supplied to HMRC by TP Telecom. Mr Andrew explained that James had asked him to forward these documents directly to TP Telecom and that he had done so.

(3) Mr Andrew stated that he was unable to supply HMRC with any bank statements to show payments having been received for the supplies; he denied carrying out any trading himself on behalf of the Company; he denied sending emails on behalf of the Company; and he stated he had completed the VAT returns on the basis of figures sent to him by James via email.

9. On 17 September 2014 Mr Andrew filed an application (Form DS01) at Companies House to strike the Company off the register.

10. On 10 November 2014 HMRC raised an assessment in the amount of £487,975 plus interest against the Company. This effectively disallowed the input tax in relation to the declared purchases from MC Aerials, resulting in an under-declaration of VAT in the assessed sum.

11. On 18 December 2014 HMRC charged the Company a penalty in the amount of £281,805 for a deliberate inaccuracy in its 04/14 VAT return ("the Company Penalty") pursuant to para 1 sch 24 FA 2007. The calculation of the penalty reflected a reduction for explanations provided and information given.

12. The Company was dissolved on 13 January 2015.

13. On 5 February 2015 HMRC issued the PLN to Mr Andrew, in the full amount of the Company Penalty. Mr Andrew requested a formal internal review of the decision to issue the PLN and on 1 April 2015 HMRC issued their review, upholding the earlier decision.

14. On 1 May 2015 Mr Andrew appealed to the Tribunal against the PLN.

Law

15. Paragraph 1 sch 24 Finance Act 2007 provides (so far as relevant):

> "**Error in taxpayer's document**
>
> (1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

…"

The Table includes VAT returns.

16. Paragraphs 3 to 5 sch 24 provide (so far as relevant):

"**3. Degrees of culpability**

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

4. Standard amount

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) … the penalty is—

(*a*) for careless action, 30% of the potential lost revenue,

(*b*) for deliberate but not concealed action, 70% of the potential lost revenue, and

(*c*) for deliberate and concealed action, 100% of the potential lost revenue.

…

5. Potential lost revenue: normal rule

(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—

(*a*) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(*b*) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

…"

17. Paragraphs 9 & 10 sch 24 provide (so far as relevant):

"9. Reductions for disclosure

(A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment by—

(*a*) telling HMRC about it,

(*b*) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(*c*) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure—

(*a*) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and

(*b*) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

10.

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage")

has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%.

18. Paragraph 13 sch 24 makes provision for assessing the penalties.

19. Paragraphs 15 to 17 sch 24 provide (so far as relevant):

"15. Appeal

(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

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

…

16.

(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(*a*) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(*b*) in respect of any other matter expressly provided for by this Act.

17.

(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may—

(*a*) affirm HMRC's decision, or

(*b*) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11—

(*a*) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(*b*) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

…

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(*b*), (4)(*a*) and (5)(*b*) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) …"

20. Paragraph 19 sch 24 provides (so far as relevant):

"**19. Companies: officers' liability**

(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.

(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 (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c 46)),

(aa) a manager, and

(b) a secretary.

…

(4) In the application of sub-paragraph (1) in any other case "officer" means—

(a) a director,

(b) a manager,

(c) a secretary, and

(d) any other person managing or purporting to manage any of the company's affairs.

(5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)—

(a) paragraph 11 applies to the specified portion as to a penalty,

(b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,

(c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,

(d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),

(e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and

(f) paragraph 21 applies as if the officer were liable to a penalty.

(6) In this paragraph "company" means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association."

Witness evidence

21. Mr Andrew did not give evidence to the Tribunal.

22. Ms Kirsty Jolliffe confirmed and adopted a witness statement dated 26 November 2015. Ms Jolliffe was one of the HMRC case officers involved in the investigation. In response to a question in cross-examination by Mr Roberts, Ms Jolliffe confirmed that at a meeting on 9 September 2014 Mr Andrew had stated that he intended to shut down the Company, but she denied that she had suggested or endorsed this course of action.

Respondents' case

23. For HMRC, Ms Vicary submitted as follows.

24. In relation to the Company Penalty, "P" in para 1 sch 24 was the Company. Thus only the Company enjoyed a right of appeal against the Company Penalty. The Company had not appealed against the Company Penalty and, as the Company was now dissolved, there was no prospect of any appeal against the Company Penalty. Accordingly, the Tribunal had no jurisdiction to consider the imposition or amount of the Company Penalty. Paragraph 19(5)(e), which had been raised by the Tribunal, did not allow an officer subject to a PLN to reopen the matter of the para 1 penalty assessed on the company; otherwise there would be problems where (unlike in the current appeal) there were several officers, one or more of whom accepted the (apportioned) PLN but the others successfully appealed against the imposition of the penalty on the company.

25. For information, in issuing the Company Penalty HMRC had considered that:

(1) The Company's conduct was deliberate but not concealed. Thus the basic penalty under para 4 sch 24 was 70% of the potential lost revenue.

(2) The potential lost revenue was the input tax claimed on the 04/14 VAT return: £487,975.50. The Company had issued invoices charging VAT on its sales, resulting in output tax becoming due (para 5 sch 11 VAT Act 1994) and thus only the purchases (ie inputs) stood to be adjusted.

(3) The disclosure of the inaccuracy was considered to be prompted. Thus the penalty range under para 10 sch 24 was between 35% and 70% of the potential lost revenue.

(4) A reduction of 12.25% was allowed to reflect a degree of co-operation with HMRC's investigation, giving a penalty of 57.75%. The rationale was explained in the schedule to the 18 December 2014 assessment of the Company Penalty. There were no special circumstances to be taken into account. In the event, taking all the facts together, the reduction might be seen as generous.

(5) The resulting Company Penalty was £281,805.00.

26. The PLN assessed on Mr Andrew was for the full Company Penalty. As stated above, the fact of a deliberate inaccuracy was established by reason of the unchallenged Company Penalty. The deliberate inaccuracy was entirely attributable to the actions of Mr Andrew:

(1) Mr Andrew was the sole director and shareholder of the Company.

(2) He had been a sub-postmaster for over nine years and was therefore a person experienced in the running of a business and aware of his obligation to keep records.

(3) He stated that he allowed the Company to be run by a person, known to him only as "James", and whom he had met only twice in a pub.

(4) He completed the Company's VAT returns solely on the basis of information provided to him by James. He had been unable to provide copies of emails between himself and James.

(5) He completed the Company's VAT returns notwithstanding the fact that he had no evidence to substantiate the declared sales or purchases.

(6) He completed the 04/14 VAT return declaring the Company's sales at £2,444,870 notwithstanding that:

(a) the turnover for the previous quarters had been nil;

(b) on the VAT1 he had estimated that taxable supplies would be £80,000 in the first year;

(c) he had no evidence of any payments ever having been made to the Company;

(d) he had no call data records to demonstrate that any supplies had ever been made by the Company;

(e) he had no evidence that the Company owned any of the hardware necessary to deal in airtime minutes; and

(f) he had no purchase invoices or other evidence of payments having been made to support purchased supplies to a value of £2,439,877.

27. Thus it was correct that the amount of the PLN should be the full amount of the Company Penalty.

Appellant's case

28. For Mr Andrew, Mr Roberts submitted as follows.

29. It was unjust if Mr Andrew was not permitted to challenge the validity of the Company Penalty; it would result in the Company Penalty being "rubber stamped" despite points Mr Andrew wished to raise. It was accepted that there was an inaccuracy in the relevant VAT return. However, Condition 1 in para 1 sch 24 was not met because the correct reading of para 1(2) sch 24 was that there must be both (i) "an understatement of a liability to tax"; and (ii) either "a false or inflated statement of a loss, or a false or inflated claim to repayment of tax". While it was accepted that (i) was satisfied here, neither part of (ii) was met.

30. The correct name of the Company was Staunton Communications Limited, as evidenced by the change of name certificate issued on 3 September 2013. The penalty assessment was in the name of "Staunton Communications Ltd" and thus the Company Penalty assessment was invalid, as it had used an abbreviation of part of the Company's name. Mr Roberts confirmed that this point had not been raised prior to the hearing.

31. Paragraph 19(2) sch 24 expressly provided that if the Company Penalty had been paid then there was no liability for a PLN. There was nothing in HMRC's pleadings to state that the Company Penalty had not been paid. In response to a question from the Tribunal Mr Roberts confirmed that the Company had not paid the Company Penalty, and Mr Roberts confirmed that Mr Andrew did not wish to pursue further this ground of appeal.

32. The calculation of the potential lost revenue was incorrect. HMRC had disallowed the input tax claim but had not adjusted for the purported output tax. Mr Andrew's subsequent researches had indicated that the customer TP Telecom did not exist and was not VAT registered. Further it was clear that no payment had been received by the Company from TP Telecom. The purported sales appeared to be a fantasy on the part of James and the Company. Accordingly, the output tax should be reduced to Nil.

Consideration and Conclusions

Is the Tribunal permitted to examine the Company Penalty?

33. The position of HMRC is as summarised at [24] above: that as the Company did not appeal against the Company Penalty and there is no prospect of any such challenge (the Company having been dissolved), the Company Penalty is final and determined, and cannot now be questioned by the Appellant.

34. The appeal rights of the officer are conferred by para 19(5) sch 24:

> "Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1) …
>
> (e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, …"

and para 15(1) & (2):

> "(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.
>
> (2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.
>
> …"

35. We have considered carefully whether the wording on appeal rights in sch 24 entitles the officer to challenge the company penalty – at least insofar as aspects relevant to the personal liability notice which he or she is appealing. Our concern is that where a company penalty has crystallised without any challenge by the company, that may be not because the company has actively considered the matter and decided not to appeal to the Tribunal but simply because events such as liquidation or dissolution overtake the company, or because the issue of personal liability notice(s) totalling the entire company penalty render the company with no remaining interest in contesting the company penalty (because para 19(2) prevents double recovery of penalties). Any officer of the company who faces an apportionment of that penalty (by way of a personal liability notice) would, on HMRC's analysis, be faced with an unchallengeable company penalty. We think that (at least in cases more complicated than the current appeal) that could give rise to problems for the Tribunal in achieving a fair and just result on the officer's appeal against the personal liability notice.

36. The provisions of sch 24 FA 2007 replaced for VAT purposes (with effect from 1 April 2008) the former legislation on civil evasion penalties in ss 60-61 VAT Act 1994 (ss 60-61 are preserved for certain limited purposes not relevant to this appeal). Section 61 was the equivalent of para 19 sch 24 in that it allowed HMRC to apportion part or all of the company penalty (called by s 61 the basic penalty) to a named officer of the company. Section 61(5) stated the appeal rights of both the company and the named officer. Section 61 was itself the successor legislation to s 14 Finance Act 1996, and was in identical form. Section 14(5) & (6) provided:

> "(5) No appeal shall lie against a notice under this section as such but—
>
> (a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment; and
>
> (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 corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.
>
> (6) For the purposes of the Value Added Tax Act 1983, any appeal brought by virtue of subsection (5) above shall be treated as an appeal under s 40 of that Act; and the reference in subsection (1A) of that section to an amount assessed by way of penalty includes a reference to an amount assessed by virtue of subsection (3) or subsection (4)(a) above."

37. Section 14 Finance Act 1996 was considered by the VAT Tribunal in *Nazif & anor v CCE* (1995) (LON/92/70P). Although that case concerned predecessor legislation, and in any event is not binding on this Tribunal, we agree with the conclusions stated by the VAT Tribunal in that case, and it is necessary to quote a lengthy passage:

> "Subsection (5) of s 14 expressly rules out any appeal against a notice under that section 'as such' but does confer separate rights of appeal upon the company, if it is assessed under subsection (4)(a), and upon a named officer who has been assessed under subsection (3). Where the company is assessed, because it is not proposed to recover the whole of the penalty from one or more named officers, the company may appeal against the decision 'as to its liability to a penalty as if it were specified in the assessment.' A named officer who is assessed may appeal against the decision that the conduct of the company is in whole or in part, attributable to his dishonesty' and also against the decision 'as to the portion of the penalty which the Commissioners prepare to recover from him.' There is no doubt but that subsection (5) does itself create free standing rights of appeal, that is to say rights independent of any right of appeal under s 40(1) of the Value Added Tax Act 1983. That is made clear by the first limb of subsection (6) of s 14.
>
> Mr Pleming [counsel for Customs] suggested that subsection (5) confers only limited rights of appeal and the named officer's rights of appeal are confined to the matters therein mentioned. I do not accept that submission. The result would be to curtail the named officer's rights so much, not just ruling out the kind of questions raised by Miss Lonsdale [taxpayer's counsel] but also effectively excluding any substantive challenge to the basis of the penalty itself, that it cannot, in my view, have been Parliament's intention. It is not a conclusion to be reached without some very clear directions that that is the effect.

…

Where the named officer is assessed part or the whole of the company's liability is in effect transferred. That portion, whether it be the whole or a part, is under s 14 made recoverable from the named officer 'as if he were personally liable under s 13 of [the 1985 Act] to a penalty which corresponds to that portion.' Neither of the matters in respect of which he is given an express right of appeal under subsection (5)(b) of s 14 refers in terms to the amount of the penalty. But paragraph (p) of s 40(1) of the 1983 Act gives a right of appeal against a decision with respect to the amount of any penalty specified in an assessment under s 21 of the 1985 Act. Nowhere in s 14 is there any provision excluding an appeal under s 40(1)(p). The hypothesis upon which the named officer is assessed in respect of the portion of the basic penalty is that he is personally liable to a penalty under s 13 of that amount. If, notwithstanding that that is the basis upon which he is to be regarded as liable and so assessed, the Legislature did not offend him to be able to challenge on appeal the amount of the penalty, and its make-up, one would have expected to find that spelt out in s 14. On the contrary, the second limb of s 14(6) appears to confirm the existence of such a right. Subsection (1A) of s 40 of the 1983 Act provides that, without prejudice to s 13(4) of the 1985 Act (which empowers the Commissioners or, on appeal, the Tribunal to reduce the penalty under that section where the taxpayer has given co-operation) '... nothing in subsection (1)(p) above shall be taken to confer on a Tribunal any power to vary an amount assessed by way of penalty, interest or surcharge except insofar as it is necessary to reduce it to the amount which is appropriate under ss 13 to 19 of that Act.' Section 14(6) directs that the reference in s 40(1A) to an amount assessed by way of penalty includes a reference to an amount assessed by virtue of s 14(3) on a named officer or by virtue of s 14(4)(a) on the company. Indeed it would be an astonishing result if the officer were to be unable to question the amount of the basic penalty when the company has that right, so long as some portion however small is not being recovered from the officer, and when the company is unlikely to have the interest to pursue any such right, assuming it has one which is very doubtful, where the whole basic penalty has been assessed upon that officer.

By similar reasoning, in my judgment, the right of appeal with respect to a decision with respect to any liability to a penalty by virtue of s 13 which is given by s 40(1)(o) of the 1983 Act is available to a named officer assessed under subsection (3) of s 14. Whilst there is nothing elsewhere in the section to confirm the existence of that right, as in my view there is with regard to the right of appeal under s 40 (1) (p), the draftsman has not sought to exclude it expressly. In Ch II of the 1985 Act, which includes ss 13 and 21, there are examples of rights of appeal being given in respect of specific matters in the sections dealing with particular penalties and surcharges which sit alongside and do not entrench upon the general rights of appeal under s 40(1)(o) and (p). That appears in regard to the right under s 19(6) of the 1985 Act - see the analysis in *Dollar Land (Feltham) Ltd v Customs and Excise Commissioners* [1995] STC 414, which Mr Pleming referred to as a very recent reminder of how the Tribunal's powers are circumscribed."

38. Our view is that those same concerns and considerations apply to the appeal rights provisions in sch 24 FA 2007. The effect of a para 19(1) notice (ie a personal liability notice) is in effect to transfer part or all of the liability for the company penalty to the officer and make that portion recoverable from the officer; para 15 provides a general right of appeal against a penalty (imposition or amount); para 19(5) applies those rights "as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer"; and there is no express exclusion of the ability of the officer to question the amount of the company penalty. We agree with the conclusion of the VAT Tribunal in *Nazif* that if "the Legislature did not offend him to be able to challenge on appeal the amount of the penalty, and its make-up, one would have expected to find that spelt out in [sch 24]". We conclude that the Tribunal has jurisdiction to consider relevant points concerning the company penalty in an appeal against a personal liability notice that apportions part or all of that company penalty to an officer.

39. Below we deal first with the Company Penalty and then with the PLN.

Our conclusions on the Company Penalty

40. Mr Andrew raises three objections to the Company Penalty. The first is that the name of the Company on the assessment raising the Company Penalty had "Limited" abbreviated to "Ltd". Mr Roberts cited no authority in support of the argument that this invalidated the assessment. Section 59(1) Companies Act 2006 provides "The name of a limited company that is a private company must end with "limited" or "ltd."." The Company and Business Names (Miscellaneous Provisions) Regulations 2009 (SI 2009/1085) contemplate (in sch 2) the interchangeability of ""LIMITED" or (with or without full stops) the abbreviation "LTD"." We consider that the use of the abbreviation "Ltd" has no effect on the validity of the Company Penalty assessment. Accordingly, we do not accept this objection.

41. The second objection relates to the interpretation of para 1(2) sch 24:

> "Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax."

42. Mr Roberts contends that Condition 1 requires (a) and either (b) or (c). Ms Vicary contends that Condition 1 requires one or more of any of (a) or (b) or (c). We have no hesitation that Ms Vicary's view is the correct and natural interpretation, and thus the existence of an understatement of tax is sufficient of itself to satisfy Condition 1. Accordingly, we also do not accept this objection.

43. The third objection concerns the calculation of the potential lost revenue for the purposes of quantifying the Company Penalty – para 5 sch 24 refers. Mr Roberts contends that the approach of HMRC in denying the input tax is incorrect because it ignores the output tax on the same return which, he says, should also be adjusted

because the reported sales are as dubious as the reported purchases. We do not agree with that contention. Paragraph 5 sch 11 VAT Act 1994 is clear that where a person issues an invoice showing VAT chargeable then the amount shown on the invoice as VAT is recoverable from that person even if the invoice is not a proper VAT invoice, or the supply did not actually take place:

> "**5 Recovery of VAT, etc**
>
> (1) VAT due from any person shall be recoverable as a debt due to the Crown.
>
> (2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person who issued the invoice an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as is to be taken as representing VAT on the supply.
>
> (3) Sub-paragraph (2) above applies whether or not—
>
> (a) the invoice is a VAT invoice issued in pursuance of paragraph 2(1) above; or
>
> (b) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or
>
> (c) the person issuing the invoice is a taxable person;
>
> and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT be recoverable as such and shall otherwise be recoverable as a debt due to the Crown."

44. Thus the VAT charged by the Company on the declared sales to TP Telecom is properly recoverable pursuant to para 5 sch 11. The inaccuracy in the return was the purported purchases and the under-assessment for the purposes of para 5 sch 24 (or "understatement" in the language of para 1(2) sch 24) was the amount of the input tax denied on those purchases. Accordingly, we agree the calculation of the potential lost revenue as being that amount of denied input tax: £487,975.50. Thus we also do not accept this third objection.

45. Mr Andrew did not specifically raise any issue in relation to the quantum of the Company Penalty (other than the point concerning the calculation of the potential lost revenue dealt with above) but for completeness:

(1) We agree with HMRC that the inaccuracy was deliberate. The Company was aware that it did not hold valid VAT invoices to support the purported purchases from MC Aerials.

(2) We agree with HMRC that the disclosure of the inaccuracy was prompted. No information was provided until HMRC visited the Company and raised their concerns.

(3) We note that the standard penalty of 70% was reduced to 57.75%, on account of the disclosure provided by the Company, and we see no reason to

disturb that calculation. If anything, the reduction was generous in the circumstances of the case.

46. For the above reasons, we confirm the Company Penalty in the amount of £281,805.

Our conclusions on the PLN

47. We must decide two issues. First, whether the deliberate inaccuracy in the Company's 04/14 VAT return "was attributable to" Mr Andrew. Secondly, if so, whether the portion of the Company Penalty specified by HMRC to be payable by Mr Andrew (namely 100%) is appropriate.

48. On the first issue, Mr Andrew completed and signed the VAT return. He says he did so on the basis of figures provided to him by "James" but copies of the relevant emails have never been provided (either for this appeal or during the course of HMRC's investigation). He did not hold any VAT invoices from MC Aerials to support the claim for input tax on the return. There is no evidence that he took any meaningful steps to satisfy himself on the accuracy of the information before completing and signing the return, and in our view that constitutes recklessness, which it is well-established is sufficient for these purposes: per Lord Herschell in *Derry v Peek* [1886-90] All ER Rep 1 at 22:

> "… fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."

49. Thus we conclude that the deliberate inaccuracy in the Company's 04/14 VAT return was attributable to Mr Andrew for the purposes of para 19 sch 24.

50. On the second issue, Mr Andrew was the sole director and shareholder of the Company throughout its existence. We have considered whether "James" could be considered to be an officer of the Company for the purposes of para 19 by virtue of being a "manager" of the Company under the extended definition in para 19(3)(aa). However, apart from Mr Andrew's oral descriptions to HMRC of James' involvement, no evidence of James' role or status (or indeed, existence) has ever been provided. As Ms Jolliffe stated in her witness statement, "… in any event all I had was Mr Andrew's word that "James" was involved." Given that lack of evidence we have no basis to conclude that James was a "manager" within para 19(3)(aa). The only person identifiable as having any role in the filing of the inaccurate return was Mr Andrew, and he was fully responsible. Accordingly, we agree with HMRC that the appropriate portion of the Company Penalty to be payable by Mr Andrew is the full amount of £281,805.

51. For the above reasons we uphold the PLN and dismiss the appeal.

Decision

52. The appeal is DISMISSED.

53. 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.

Peter Kempster
TRIBUNAL JUDGE
RELEASE DATE: 29 APRIL 2016