



**TC05589**

**Appeal number: TC/2016/03681**

*VAT – under-assessment penalty – did the appellant take reasonable steps to notify HMRC of the under-assessment – held: it did not – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DHAREX LTD**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S      Respondents  
REVENUE & CUSTOMS ("HMRC")**

**TRIBUNAL: JUDGE ZACHARY CITRON  
MR NIGEL COLLARD**

**Sitting in public at Fox Court, London on 13 September 2016**

**The Appellant was not represented**

**Mrs Fariha Hanif, Officer of HMRC, for the Respondents**

## DECISION

1. This case was about whether the appellant failed to take reasonable steps to  
5 notify HMRC that an assessment of VAT was an under-assessment.

2. The appellant's director, Mr Narsingh Kalsariya, did not attend the hearing and the appellant was not otherwise represented. We were satisfied that both the appellant and Mr Kalsariya had been notified of the hearing and that it was in the interests of justice to proceed with the hearing.

### 10 **The appeal**

3. By letter dated 7 June 2016, HMRC concluded their review and upheld the decision in their letter dated 3 May 2016 charging a £461.80 under-assessment penalty (the "under-assessment penalty") under Schedule 24 Finance Act 2007 in  
15 respect of the appellant's 11/15 VAT return.

4. The appellant appealed by notice of appeal dated 5 July 2016.

### **Evidence**

5. We had a bundle prepared by HMRC containing documents related to the  
20 appeal and correspondence between the parties. It also contained HMRC's notes of telephone conversations their officials had with Mr Kalsariya on 28 April 2016 and 6 June 2016 – we did not put much weight on uncorroborated evidence in these notes, as we did not hear evidence from the individuals involved.

### **Findings of fact**

6. The appellant carried on a management consultancy business and registered for  
25 VAT from 12 August 2015. Mr Kalsariya was the director of the appellant at the relevant times.

7. The appellant did not submit its VAT return for the 11/15 period (its first) by  
30 the due date (31 December 2015, extended to 7 January 2016 for electronic payments and VAT return submissions).

8. HMRC issued the appellant with a computer-generated estimated VAT  
assessment for the 11/15 period (the "assessment") on 15 January 2016, for the sum  
of £332. Mr Kalsariya received the assessment, which stated that if the assessed  
amount was too low, the appellant must tell HMRC within 30 days by sending a  
35 correct VAT return and VAT payment, or contact HMRC via their VAT helpline or  
written correspondence to alert HMRC of the under-assessment.

9. The appellant paid the amount of £332 to HMRC on 10 February 2016.

10. HMRC wrote to the appellant on 11 March 2016 stating that their records showed that the appellant had not sent HMRC its VAT return for the 11/15 period but that the appellant had paid the assessment. They said they were now opening a  
5 “compliance check” to make sure that the assessment was correct. They asked for the completed VAT return. They also stated that if the assessment was too low, the appellant may be liable to a penalty. HMRC sent the appellant a further reminder on 6 April 2016.

11. The appellant submitted its VAT return for the 11/15 period on 7 April 2016,  
10 for the sum of £2,897, and paid this in full on 12 April 2016.

12. HMRC wrote to the appellant on 25 April 2006 asking for information relevant to whether they would charge a penalty for late submission of the 11/15 VAT return.

13. We find that the main reason for the late submission of this VAT return was delay on the part of the appellant in appointing a new accountant (in place of the  
15 accountant who had assisted the appellant with its registration for VAT). In particular we find that:

(1) Mr Kalsariya was unfamiliar with VAT;

(2) the appellant therefore could not submit the 11/15 VAT return until such  
20 time as Mr Kalsariya had appointed a new accountant and the accountant was ready to submit the return;

(3) due to his unfamiliarity with VAT, Mr Kalsariya had not been sure, prior to receiving the assessment, when the 11/15 VAT return was due;

(4) for the same reason, Mr Kalsariya did not realise that an under-assessment  
25 penalty could be imposed on the appellant for failure to notify HMRC of an under-assessment within 30 days of the assessment (although this information was in the assessment letter he received);

(5) if Mr Kalsariya had turned his mind to the question, he would have  
30 realised that the assessment was too low, but he would not have known by exactly how much (as he was relying on the new accountant to give him this information); and

(6) Mr Kalsariya was experiencing a family health problem in the first few  
35 months of 2016, but we find that this problem, at least as it affected Mr Kalsariya himself, was of a moderate and non-critical nature (as it did not, for example, prevent the appellant from paying the amount of VAT in the assessment on 10 February 2016).

## **The law**

14. The “paragraphs” referred to in what follows are to paragraphs of Schedule 24 Finance Act 2007.

15. Paragraph 2 provides:
- (1) A penalty is payable by a person (P) where—
    - (a) an assessment issued to P by HMRC understates P's liability to a relevant tax, and
    - 5 (b) P has failed to take reasonable steps to notify HMRC, within the period of 30 days beginning with the date of the assessment, that it is an under-assessment.
  - (2) In deciding what steps (if any) were reasonable HMRC must consider—
    - (a) whether P knew, or should have known, about the under-assessment, and
    - (b) what steps would have been reasonable to take to notify HMRC.
  - 10 (3) In sub-paragraph (1) “relevant tax” means any tax mentioned in the Table in paragraph 1 [which includes VAT]
  - (4) In this paragraph (and in Part 2 of this Schedule so far as relating to this paragraph)—
    - (a) “assessment” includes determination, and
    - 15 (b) accordingly, references to an under-assessment include an under-determination.
16. Paragraph 4C provides that the penalty payable under paragraph 2 is 30% of the potential lost revenue.
17. Paragraph 5 provides that the “potential lost revenue” in respect of a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the assessment.
- 20
18. Paragraph 9 provides:
- (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.
  - 25 (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
    - 30 (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.

19. Paragraph 10 provides:

(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.

| <i>Standard %</i> | <i>Minimum % for prompted disclosure</i> | <i>Minimum % for unprompted disclosure</i> |
|-------------------|--|--|
| 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%.                                       |

20. Paragraph 11 provides that, if they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 2.

21. Under sub-paragraph 15(1), a person may appeal against a decision of HMRC that a penalty is payable by the person. On such an appeal, the tribunal may affirm or cancel HMRC’s decision (sub-paragraph 17(1)).

22. Under sub-paragraph 15(2), a person may appeal against a decision of HMRC as to the amount of a penalty payable by the person. On such an appeal, the tribunal may (a) affirm HMRC’s decision or (b) substitute for HMRC’s decision another decision that HMRC has power to make (sub-paragraph 17(2)).

## Appellant's arguments

23. In the appellant's notice of appeal, Mr Kalsariya explained that he had been in the process of appointing an accountant for his new business but due to family circumstances and family health problems, he had not been able to approach an accountant to do the work. He said that he could not work out the due date of submission of the appellant's 11/15 VAT return because it was the first one. He said that as soon as he received the assessment, he paid the estimated demand raised by HMRC and did not intend to withhold any outstanding amount. He said that, in the meantime, he approached an accountant to undertake accounting work for the appellant; that these accountants were now taking care of all his tax affairs; and that the appellant's subsequent VAT returns were filed on time with payment.

24. Mr Kalsariya said that his intention was good and submitted that the 11/15 VAT return was filed late with reasonable cause.

25. Mr Kalsariya asked the Tribunal to cancel the under-assessment penalty as this was his first VAT return and any default was not intentional.

## HMRC's arguments

26. HMRC submitted that it was the appellant's statutory responsibility to ensure that VAT returns were submitted on time. HMRC submitted that the appellant should have contacted HMRC if it was unsure of the submission date – they cited *Talon Holding Ltd* LON/91/658Z (VTD 6897), a penalty case where, in looking at "reasonable excuse", the VAT tribunal noted that the taxpayer had not sought advice from its local VAT office, from its accountants, or from other companies in the industry.

27. HMRC further submitted that ignorance of the VAT return date does not provide a reasonable excuse, as a diligent business person would make themselves aware of their legal responsibilities. They cited *The Clean Car Company Ltd* (LON/90/1381X), where the VAT tribunal chairman said:

"It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered."

28. HMRC submitted that there is nothing in the appellant's representations to indicate it is appropriate to make a special reduction under paragraph 11.

29. Noting the appellant's statements that it did not intend to hold back amounts due as VAT, HMRC drew our attention to the following statements in tribunal decisions:

(1) *Sanjeev Verma v HMRC* [2011] UK FTT 737 (TC) (Judge Roger Berner and Roger Whiting) at [13]:

“[The appellant] says his inaccuracies were the result of innocent omissions and that he had no intention to defraud. An omission may be innocent, in the sense of not having been deliberate, but such an innocent omission may still be the result of a failure to take reasonable care.”

5 (2) *M Holt (Manchester) Ltd* (MAN/91/6) (Chairman Colin Bishopp):

“I am unable to accept that an innocent mistake, without more, amounts to a reasonable excuse for the purpose of s14(6)(c) Finance Act 1985”.

(3) *David Collis v HMRC* [2011] UKFTT 588 (TC) (Judge Roger Berner and Harvey Adams) at [29]:

10 “That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer ... to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question.”

15 30. HMRC submitted that these statements supported their view that the appellant failed to take reasonable steps to notify HMRC within 30 days of the assessment that the assessment was an under-assessment.

31. HMRC submitted that there is no provision for suspension of penalties issued under paragraph 2.

32. HMRC made the following submissions as to the amount of the penalty:

20 (1) Any disclosure made by the appellant was “prompted” for the purposes of paragraph 9, as it cannot be said that at the time disclosure was made by the appellant, the appellant had no reason to believe that HMRC had discovered or were about to discover the under-assessment;

25 (2) this means the minimum % (under paragraph 10) was 15% - as the standard % (under paragraph 4C) was 30%;

(3) HMRC applied an 80% penalty reduction in the light of the factors in paragraph 9 ie out of a maximum reduction of 15% (30% less 15%), it allowed a reduction of 80% of this amount, equalling 12%. So a 3% penalty was added to the minimum % of 15%, giving rise to a 18% penalty;

30 (4) The potential lost revenue was the difference between the assessment (£332) and the amount due under the VAT return (£2,897.56), being £2,565.56;

(5) 18% applied to £2,565.56 gives rise to the under-assessment penalty of £461.80.

### 35 **Discussion**

33. The Tribunal’s jurisdiction in this case was to affirm or cancel HMRC’s decision that the under-assessment penalty is payable by the appellant. The Tribunal also had jurisdiction to confirm HMRC’s decision as to the amount of the under-assessment penalty, or to substitute another decision as to amount which HMRC had  
40 power to make.

34. The legal issue in this appeal was whether the appellant failed to take reasonable steps to notify HMRC, within 30 days of the assessment, that it was an under-assessment.

5 35. The legislation sets out two matters which HMRC must consider in deciding what steps (if any) were reasonable:

(1) Whether the appellant knew, or should have known, about the under-assessment; and

(2) What steps would have been reasonable to take to notify HMRC

36. We considered the same two matters.

10 37. We found that the appellant did not affirmatively know about the under-assessment, until such time as its newly-appointed accountant had prepared the VAT return for the 11/15 period (and that time was more than 30 days after the assessment). However, we also found that the appellant *should have known* about the under-assessment, because a reasonable and prudent taxpayer in its situation would  
15 have taken care to understand the significance of the assessment being an under-assessment (as this point was highlighted in the assessment itself) and would then have turned its mind to calculating if there was an under-assessment.

38. We found that the steps that would have been reasonable to take to notify HMRC include accelerating the appointment of the appellant's new accountant  
20 (particularly as, by the time of the assessment, the appellant had already been registered for VAT for five months and so should have realised it needed an accountant in place, as Mr Kalsariya knew little about VAT); and also contacting HMRC through one of its helplines.

39. We then considered, more broadly (in line with the legislative test at sub-  
25 paragraph 2(1)(b)), what steps a reasonable, prudent and conscientious person in the appellant's situation, would have taken to notify HMRC of the under-assessment. We considered that such a person, having been served with the assessment explaining the need to inform HMRC of the under-assessment within 30 days, would have taken steps within that time period either to make sure a suitably qualified adviser was  
30 appointed, or to telephone an HMRC helpline for advice. We considered that such a person would have done such things, even if, as here, the director of the company was experiencing moderate and non-critical health or family problems We found that the appellant did none of those things.

40. We also found that the penalty was correctly calculated, that there were  
35 sufficient reductions for disclosure under paragraphs 9 and 10, and that there are no special circumstances here for the purposes of paragraph 11.

41. Having made these findings – in particular, that the appellant failed to take reasonable steps to notify HMRC, within 30 days of the assessment, that the assessment was an under-assessment, which is the critical fact under the law – we had  
40 no alternative but to dismiss the appeal; the fact (which we accept) that Mr Kalsariya had no intention to hold back VAT due does not affect this outcome.



## **Conclusion**

42. At the end of the hearing, we dismissed the appeal, and so confirmed HMRC's  
5 decisions (1) that the under-assessment penalty is payable, and (2) as to the amount of  
the under-assessment penalty.

43. 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  
10 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.

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**ZACHARY CITRON  
TRIBUNAL JUDGE**

**RELEASE DATE: 6 JANUARY 2017**