



TC05702

**Appeal number: TC/2014/03407
TC/2016/02858**

VAT – compulsory deregistration – whether there was a viable business for entitlement to register for VAT – refusal of input VAT claims – whether input tax creditable – penalty for inaccuracies in VAT returns – category downgraded from ‘deliberate’ to ‘failure to take reasonable care’ – whether special circumstances – appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**NICHOLAS GAYLE
T/A PHOTOGEN PROMO MUSIC ADVERTS LTD
& PHOTOGEN PMA LTD**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
IAN MENZIES-CONACHER**

Sitting in public at the Tribunal Centre, Fox Court, London, on 2 August 2016

Mr Gayle in person for the Appellant

Mr David Ridley, Officer of HMRC, for the Respondents

DECISION

Introduction

1. Photogen Promo Music Adverts Ltd with VAT registration number ('VRN')
5 168 7088 63 and Photogen PMA Ltd (VRN 221 65555 28) are related companies under the common control and sole ownership of Mr Nicholas Gayle.
2. The appellant, Mr Gayle, appealed against HMRC's decisions to refuse the repayment claims and the cancellation of the VAT registrations of his business entities. The appeal in relation to Photogen Promo Music Adverts Ltd is under the
10 reference TC/2014/03407 ('the first appeal'), and the appeal in relation to Photogen PMA Ltd is under the reference TC/2016/02858 ('the second appeal').
3. The appeals by the two entities relate to the same issues and were heard in sequence.
4. Officer James Nicholas, VAT Assurance Officer gave evidence on behalf of the
15 respondents. Officer Nicholas was part of the Pre-Repayment Credibility team, which undertook the enquiry checks into the appellant's repayment claims.
5. Mr Gayle appeared in person and gave evidence.
6. The onus of proof in these appeals is on the appellant to establish that (a) at the
20 time of his VAT registrations, he was entitled to be so registered; and (b) the amounts of input VAT claimed by his business entities had been incurred in the course of making supplies that were subject to output VAT.

Matters in dispute

7. In relation to the first appeal, the matters in dispute are:
 - 25 (1) The cancellation of the VAT registration from its date of registration, being 6 August 2013;
 - (2) The refusal of the VAT repayment claim of £4,997 for period 10/13;
 - (3) The refusal of the VAT repayment claim of £1,982 for period 01/14;
 - (4) The penalty assessment for inaccuracies in returns 10/13 and 01/14 in the respective sums of £1,274 and £505.
- 30 8. In relation to the second appeal, the matter in dispute concerns the cancellation of the VAT registration from 5 November 2014, being the date of its original registration, and the refusal of the repayment claim of £1,317 for return period 09/15.

Relevant legislation

Registration for VAT

9. The entitlement to become VAT registered is provided under paragraph 9 of Schedule 1 to the Value Added Tax Act 1994 ('VATA') as follows:

- 5 ‘9 Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he –
- (a) makes taxable supplies; or
- (b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,
- 10 they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.’

10. The cancellation of VAT registration is provided under paragraph 13(3) of Schedule 1:

- 15 ‘13(3) Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they can cancel his registration with effect from that day.’

11. The definition of ‘registrable’ is given at paragraph 18 of Schedule 1:

- 20 ‘18 In this Schedule “**registrable**” means liable or entitled to be registered under this Schedule.’

12. For the purposes of VATA, the meaning of business is stated at section 94(1):

- ‘94(1) In this Act “**business**” includes any trade, profession or vocation.’

13. Where there is no liability to register for VAT, and a person has applied to register voluntarily, VAT Public Notice 700/1 states at paragraph 3.9 the following:

- 25 ‘3.9 ... You may *only* register if you are in business. We define business as a continuing activity carried on with the intention of making supplies for a consideration. Non-business activities can include those carried on as a hobby or supplies made in a purely private capacity (for example the sale of personal belongings). The terms business and non-business are explained in greater detail in
- 30 *Notice 700 The VAT Guide.*’ (emphasis added)

Penalty for inaccuracies in returns

14. The penalty regime for inaccuracies in a document furnished by a taxpayer for the purposes of establishing his tax liability is provided under Schedule 24 to the Finance Act 2007. Paragraphs relevant to the penalty appeal are cited as follows, and the excerpts are from the version of Schedule 24 as in force in November 2014 when the penalty assessment was first raised, which was before the amendments to Schedule 24 as enacted in the Finance Act 2015.

35

‘Error in taxpayer’s document

1 (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

5 (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, or

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

10 (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.

15 15. The penalty calculation is with reference to the category of behaviour according to paragraph 3 of Schedule 24:

‘Degrees of culpability

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

20 (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

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

16. The calculation of penalty is with reference to the potential lost revenue multiplied by the penalty percentage as provided at paragraph 4 of the Schedule.

‘Standard amount

30 **4**(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, 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

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

17. The standard amount of penalty can be reduced for two reasons: disclosure and special circumstances, as respectively provided at paragraphs 9 and 11:

‘Reductions for disclosure

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

- 5 (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
- 10 (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—

- 15 (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”.
- 20 (3) In relation to disclosure “quality” includes timing, nature and extent.

...

Special reduction

25 11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include--

- (a) ability to pay, or
- (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- 30 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –
 - (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.’

35 18. On an appeal of a Schedule 24 penalty assessment, the Tribunal’s jurisdiction is provided at paragraph 17 as follows:

‘Appeal

...

- 40 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.
- 5 (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.
- 10 (4) On an appeal under paragraph 15(3) –
- (a) the . . . tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, ...'

15 **The Facts in relation to the first appeal: Photogen Promo Music Adverts Ltd**

The repayment claim on VAT return for period 10/13

19. On 6 August 2013, the appellant registered for VAT by submitting a completed form VAT1, stating the business activities of Photogen under section 6 of the form as:

'Main activities

20 Internet adverts, magazine, photography – distribution market and printing T-shirts, telephone skills'

Other activities

Business stage of first option, software design element'

20. The application was received by HMRC Euston Enquiry Centre, and processed by the Registration Team in Shipley. The application was successful and the appellant was allocated VRN 168 7088 63.

21. The first VAT return under this registration number was submitted for the period 6 August 2013 to 31 October 2013 for a net VAT repayment due of £4,997 ('the 10/13 return').

30 22. The second VAT return under this registration number was submitted for the quarter from 1 November 2013 to 31 January 2014 for a net repayment due of £1,982 (the '01/14 return').

Pre-Repayment Credibility Query

35 23. On 17 December 2013, Officer Nicholas received a 'Pre-Repayment Credibility Query' for the 10/13 return, and on the same day, wrote to the appellant to request information to support the repayment claim.

24. On 31 December 2013, Officer Nicholas received a letter from the appellant in response, with 73 pages of enclosures and an envelope of some 41 till receipts and credit/debit card slips. Of the information and documentation enclosed, Officer Nicholas stated in evidence that '[s]ome of this had been received on at least two
5 previous occasions in respect of Mr Gayle's earlier VAT registrations'.

25. On 10 January 2014, Officer Nicholas wrote a five-page long letter, which is a summary of his review of the information provided by the appellant. Some pertinent examples of Officer Nicholas' observations are given below to illustrate the nature of the documentation provided to support the repayment claim.

10 (a) *For purchase or sales invoices*

(1) 'A valuation for insurance for an 18ct white gold ring, undated. This is not an invoice, you have not purchased the ring, and no VAT is itemised. However, even if a tax invoice had been provided, no input tax would be claimable. You advised my colleague, Mr Waterfield, during a meeting on 14 December 2011
15 that the ring was a personal possession and you did not plan to sell it. You provided this document when applying for a VAT registration in 2011 under the reference number 222/76846/11, which was refused.'

(2) 'HMRC Tax Credits Award letter. This is a notification of a payment of Working Tax Credit for the period 5/4/2014. It is not a tax invoice, and clearly no VAT is due. It does not reflect business income to you, but is a government
20 benefit.'

(3) 'Robins & Day [a car dealer]. The five pages all are estimates, not invoices, so none of the VAT quoted on the documents is claimable. You appear to have purchased replacement keys for the Peugeot car. During the meeting
25 with my colleague Mr Waterfield on 14/12/2011, you advised him that you only held a provisional, not a full, driving licence, so I am unclear why your have provided these documents.'

(4) 'Cash Advance Repayment Schedule from Cash Converters Kilburn, dated 24/7/13. I understand that you regularly sell your music equipment to Cash Converters and then buy it back when you have enough money. This does
30 not constitute a business, but is apparently a means of managing your cash-flow.'

(5) 'Two Fixed Sum Loan Agreements with Capital Cash Ltd of Kilburn dated 18/7/13 and 23/8/13. These are two loans obtained by you, but are not
35 sufficient evidence of a business.'

(6) 'Five "Chequeless" Loan Receipts from The Money Shop. Not evidence of input tax or a business.'

(7) 'Credit Agreement with Instant Cash Loans dated 9/4/13. Not evidence of input tax or a business.'

40 (8) 'Thirty-two different buy back agreements with your local Cash Generator, dated between 5/6/13 and 23/12/13. I understand that you regularly "sell" your music equipment (and other household goods) when you need

money and then “buy” them back some weeks later ... These sales and purchases do not constitute a business, but are a means of generating short term income ...’

(b) Bank statements

5 26. In respect of the bank statements provided, Officer Nicholas’ comments on the nature of the transactions shown on some of the bank statements are as follows:

‘Two pages of a Santander Bank statement covering the period from 31/7/12 to 17/8/12 and 11/10/12 to 14/11/12. These are summarised below.

Receipts – apart from transfers from other accounts, are as follows:

10 Cash deposits of £6.00, £10.00, £10.64, £30.00, £19.50, £40.00, £10.00, £50.00 and £1,419.40 (tax refund from HMRC).

Expenditure – At Netflix (a business that provides downloaded films), Iceland, Vodafone, Paypal, Yalova (apparently a local convenience store), Tesco, and Z tools. Not evidence of input tax or a business.’

15 27. The biggest sum of ‘income’ from the documentation produced by the appellant relates to the £1, 419.40 as shown on the Santander bank statement. The sum concerns a Self Assessment refund, as verified by a letter from HMRC in October 2012, addressed to a ‘Mr N N Gayle Latin’. (Mr Nicholas queried the name difference and asked for an explanation of the addition of ‘Latin’ to the appellant’s name.)

20 *(c) Till receipts and debit card slips*

28. There are 13 review comments under this category. The following examples illustrate the general nature of these receipts:

25 (1) ‘Twenty-one till receipts titled “Agreement” for deposit of your goods (mostly music equipment) to Cash Generator in Willesden, London, dated between March and October 2013. None of these receipts is a VAT invoice.’

(2) ‘Four visa debit receipts for payment to Access Self Storage Ltd. These are not VAT invoices.’

30 (3) ‘Sapphires Ltd debit card receipt for £330.00, dated 8/3/2008. There is no description of services or goods purchased, no VAT registration number, no VAT itemised. It is dated more than 4 years prior to the date of registration, and would not be claimable.’

35 (4) ‘Three till receipts from Budget Store UK Ltd, all dated 12/12/2013 for purchases of “household goods” for £1.00, £0.69 and £9.50. These are not VAT invoices, there is no VAT registration number on the receipts, no VAT is itemised and they are also dated outside the return period.’

(d) Queries on alleged business activities

29. Officer Nicholas also asked the following questions regarding the business activities that the appellant had claimed to be engaged in:

5 (1) Internet adverts magazine – what does this mean? Are you selling a magazine?

(2) Photography distribution market – how many photographs do you currently have for sale? How are you planning to sell them? Have you sold any in 2013?

10 (3) Printing T-shirts – how many in stock? How do you plan to sell them? How do you win new sales? Provide a photograph of a t-shirt design. When was last sale of t-shirt made?

(4) Telephone skills – please explain what this means.

15 (5) Business stage of first option software design element – please explain what this means; what computer technical skills you have obtained since 2011 (when it was established by Officer Waterfield that no computer installation training had been undertaken). Have you made any such computer type sales in 2013?

20 (6) Guerlain cosmetics – this activity was also investigated in 2011 by Officer Waterfield and no evidence was found of taxable supplies being made or likely to be made; whether anything has changed in this regard since 2011.

The appellant's responses

30. The appellant's responses came in several communications, by letters and signed forms in January 2014.

31. From the letter response of 13 January 2014, the appellant's response to some of the questions asked in the enquiry letter of 10 January 2014 is quoted as follows:

30 (1) 'In reference to an invoice reflecting a diamond ring white gold I wish to state now that it is an invoice and the address and insurance value quote and costs of the ring is all included, when I spoke to Mar Waterfield I merely meant the price at that time could not be matched and if I was indeed offered a reasonable price then the ring would be sold.'

(2) 'Clearly HMRC tax credits award letter period ending 5/4/14 is a form of benefit identity I did not presume that tax was due at this stage.'

35 (3) 'Access Self Storage – clearly each page is an estimate of prices and amounts paid totalling way over £10.00 – I will enclose for your inspection a receipt dated 10/4/13 amount £104.00 this was included in the receipts but the compliance unit failed to see that.'

(4) Regarding the Peugeot car, the appellant stated he owned it, and that he intended to claim VAT for this in the return period 01/14.

40 (5) For the transactions made with Cash Generator for music equipment and other personal possessions, the appellant stated that they were 'business sales'.

(6) As to why he added 'Latin' to his name, the appellant's reply was that he could speak Latin, so he added the word Latin to the end of his name when dealing with the Income Tax section of HMRC.

5 (7) The appellant made several references to his website to answer questions on his business activities, but the 'website' was his personal Facebook page ending 'gipwa'. There was no supporting documentation to show how he had made any sales or received any enquiries from potential customers who might have accessed his Facebook page.

10 32. A second response came in the form of *VAT 652 Notification of Errors in VAT Returns* and was dated 16 January 2014, and received by HMRC on 17 January 2014. The appellant sought to amend his VAT repayment claim to £1,750 with the following words:

15 'I wish to make an amendment of the 10/13 tax VAT return from the figure of £4,997 to the figure of £8,752 I wish to insert the figure of £7,002 into Box 7 of the 10/13 period and the tax taken off is £1,750.'

33. Another form VAT 652 dated 13 January 2014, though pre-dating the form dated 16 January 2014, was received by HMRC on 21 January 2014. This time, the appellant notified that the amount of VAT refundable to be amended to £5,700, giving the explanation as follows:

20 'I was previously VAT registered under a VAT number called 910 3558 49, during that time I was using my usual work materials but since my new registration 168 7088 63 I must now apply using notice 700.'

25 34. The fourth response came in the form of a letter dated 20 January 2014, received 22 January 2014, in which the appellant stated:

30 'I wish to notify HMRC of the fact that I will be cancelling my last VAT return 10/13 due to the recent letter received on 10 January ... In this respect the VAT return excluding the Peugeot 206cc should be £8,752 VAT owe £1,750 and in Box 7 of 10/13 VAT return the VAT figure should be £7002.'

Enquiry conclusion

35 By letter dated 6 February 2014, Officer Nicholas responded to the appellant's collective communications of January 2014, point by point, in considerable detail. In the main, there was no fresh documentation to alter those observations noted in Officer Nicholas' letter of 10 January 2014.

36. As no further documentation was provided, or any satisfactory explanation given, to support any input VAT having been borne in relation to business activities, for there to be refundable input VAT, Officer Nicholas concluded as follows:

40 'In summary, therefore, I confirm my view that you do not have a viable business, and are taking no obvious, practical steps to make what HMRC would consider to be genuine sales. Your letters do not

contain any additional, useful information to support either the amount of VAT your originally claimed in the 10/13 return of £4,997.00 or the “amended” amount of £1,750.00.’

5 37. As regards the appellant’s suggestion in his 13 January 2014 letter that Officer Nicholas had arrived at his conclusion based on the fact that the appellant’s previous VAT registrations had been cancelled, Officer Nicholas’ reply was as follows:

10 ‘I confirmed that this the fifth time you have made an application for VAT registration. The numbers for the three successful applications, which were all subsequently cancelled, were provided in my letter of 10 January 2014. A further application was refused before registration could be confirmed.

15 You appear to suggest that I have based my view on whether or not you have a viable business on your previous VAT applications and registrations. This is not the case. I have examined in detail the documents that you have provided and considered carefully your comments in your various letters, and my decisions are based entirely on them alone.’ (emphasis original)

20 38. Officer Nicholas’s 6 February 2014 letter concluded by stating that a formal assessment reducing the 10/13 return to nil would be issued. In relation to the second return already submitted for period 01/14, showing a VAT repayment due of £1,982, Officer Nicholas stated that the 01/14 return would be treated in the same way as the 10/13 return and be reduced to nil.

39. The conclusion also advised the appellant of his deregistration from VAT with immediate effect, and of the right to a formal internal statutory review.

25 *Statutory review*

40. The appellant requested a statutory review. The scope of the review covered the Commissioners’ decisions to:

- 30 (1) reduce input tax claim in the amount of £4,997 on the 10/13 return to nil;
(2) reduce input tax claim in the amount of £1,982 on the 01/14 return to nil;
(3) cancel VAT registration with effect from 6 August 2013.

41. By letter dated 28 March 2014, the review conclusion was communicated. In a methodical and meticulous manner, Officer Hancox reviewed the facts from the appellant’s January 2014 communications and production of documentation, and related the relevant legislation for the consideration of the matters in front of her.

35 42. The review letter went on to ten pages, and Officer Hancox upheld the Commissioners’ decision that Mr Gayle was not in business, and therefore had no entitlement to be registered for VAT.

Request for reinstating his VAT registration

43. On 16 May 2014, the appellant sent a letter to the Wolverhampton Registration team requesting the reinstatement of his VAT registration, and enclosing further information and documentation to support this. The request was referred to Officer Nicholas for consideration.

44. On 29 May 2014, Officer Nicholas replied to Mr Gayle by letter, giving his reasons why the information and documentation submitted did not warrant the reinstatement of his VAT registration, as there was no material change to the circumstances to support that there was a viable business.

10 *Notice of Appeal lodged with the First-tier Tribunal*

45. By Notice dated 18 June 2014, Mr Gayle appealed to the Tribunal, stating the date of decision appealed against as 8 May 2014, namely the statutory review decision.

46. On 11 July 2014, Officer Nicholas again received a Pre-Repayment Credibility Query in relation to the Final VAT Return (9999) under the VRN 168 7088 63.

47. On 16 July 2014, Officer Nicholas wrote to give the appellant a final opportunity of providing information and documentation to support this repayment and to demonstrate that he had a viable business, and for a reply within 14 days.

48. On 21 July 2014, a form VAT 652 from the appellant was referred to Officer Nicholas by the Error Corrections Team, apparently to amend his Final return. The information on the form appeared to be rather confused, and explained nothing about the repayment as originally submitted.

49. On 25 July 2014, the appellant wrote to reiterate that he had already sent information and documentation, but there was no new material to establish the viability of his business or to explain the Final repayment claim.

50. On 29 July 2014, a further letter was received from the appellant requesting more time to reply to Officer Nicholas' letter of 16 July 2014, giving the reason that his accountant had mislaid various papers and receipts supposed to have been sent.

51. On 16 October 2014, the Final return was reduced to nil, as no further information had been received despite the grant of further time since 29 July.

The Facts in relation to the penalty assessment

Penalties in relation to 10/13 and 01/14 returns

52. By letter dated 6 February 2014 as related above, the decisions to refuse the repayment claims for periods 10/13 and 01/14, and to cancel his VAT registration were communicated to the appellant.

53. On 20 February 2014, two weeks after the 6 February letter, Officer Nicholas wrote to the appellant explaining the penalties that would be raised in connection with the inaccuracies in the VAT returns for periods 10/13 and 01/14.

54. The letter enclosed copies of the Penalty Factsheets CC/FS7a ('Penalties for inaccuracies in returns and documents'), and CC/FS9 ('The Human Rights Act and penalties'), which are to be read in conjunction with the correspondence that would follow to raise penalties in respect of the inaccuracies in the 10/13 and 01/14 returns.

55. On 8 May 2014, a notice of penalty assessment was issued to impose a total penalty of £4,152.50 in relation to the inaccuracies in the two VAT returns; £2,973.21 for 10/13 return, and £1,179.29 for 01/14 return; both periods were assessed at an overall 60% of the potential lost revenue concerned.

56. The penalties were assessed on the basis that the errors were 'deliberated but not concealed', with the threshold percentage of 70% mitigated to 60%.

Downgrading the penalty category

57. On 15 October 2014, Officer Nicholas discussed with his line manager, Officer Waterfield, the possibility of downgrading the penalty categorisation from 'Deliberate' to 'Failure to take Reasonable Care', in the light of a possible mental health condition mentioned by the appellant in earlier correspondence.

58. Officer Waterfield was in charge of the credibility check of the appellant's previous repayment claims in 2011, and had had meetings with the appellant during the 2011 enquiry into his VAT registration and repayment claims.

59. By letter dated 5 November 2014, the appellant was notified that 'the behaviour which triggered the penalties has been downgraded from "Deliberate" to "Failure to Take Reasonable Care".' The penalty assessment is accordingly reduced from £2,973 to £1,274 for the 10/13 return, and from £1,179 and £505 for the 01/14 return.

60. On 11 November 2014, a revised penalty determination assessment calculation ('PDAC') was authorised to be processed to give effect to the penalty reduction.

61. In an undated letter received on 13 November 2014, the appellant confirmed to HMRC that he still wished to take the case to the Tribunal. (The Notice of Appeal lodged dated 18 June 2014 had already been lodged.)

The appellant's previous applications to register for VAT

62. The references to the appellant's previous applications for VAT in the parties' correspondence relate to the four previous occasions when Mr Gayle had applied to become VAT registered.

63. While each of the subsequent applications to register for VAT was assessed on its own merits without recourse to the appellant's previous applications, the history of

the appellant's applications to register for VAT is of relevance in the consideration of the penalty assessment.

64. We have therefore noted these previous applications to register for VAT, and of their outcome, insofar as they are of relevance in our consideration of the penalty assessment.

5

VRN	Reg Date	Name	Dereg Date	Appeal ref
911 0201 02	5 Oct 2006	Nicholas Gayle	16 Jan 2008	LON/2008/1012
910 3558 49	15 Mar 2007	Nicholas Gayle T/A Photogen	30 Jun 2008	LON/2008/1678
992 5558 68	28 May 2010	Nicholas Gayle T/A Photogen	1 Sept 2010	TC/2011/00433
N/A	N/A	Nicholas Gayle	N/A	Not appealed
168 7088 63	6 Aug 2013	Nicholas Gayle T/A Photogen Promo Music Adverts Ltd	12 Dec 2014	TC/2014/03407
221 6555 28	5 Nov 2014	Nicholas Gayle T/A Photogen PMA Ltd	8 Dec 2015	TC/2016/02858

65. The first of the present appeals concerning the VAT application in August 2013 was the fifth time the appellant applied to register for VAT. Four of the five applications were successful, with one application rejected.

10 66. The August 2013 application was one of the four successful applications for which a VRN had been allocated. The other four applications, three of which are included in the documents bundle for the hearing, bear the following details:

15 (1) Form VAT1 dated 26 April 2007; under section 17 registration requested to be backdated from 5 October 2006; main business activities stated as: 'photography, picture framing, printing, shirts, photocopier machine, telephone services in connection with telephone lines'; other activities as: 'Cosmetic / Dept. including Make up and Beauty Facial / Body Cake'; estimated turnover in the next 12 months as £0.00, giving 'just began only new' as the reason.

20 (2) Application dated 8 June 2007, not included in the documents bundle; (the date of the application is taken from the Decision notice related to this appeal; see §69 below.) This application requested the registration to be backdated from 15 March 2007.

25 (3) Form VAT1 dated 28 May 2010, requesting to be registered from the same date; main activities as: 'Photography, printing, magazine, publishing, telephone, cosmetics, music, dancing'; for other activities: 'computers entertainment etc.'; estimated turnover for the next 12 months as £45,000.

30 (4) Form VAT1 dated 29 June 2011; main activities as: 'photography buying and selling celebrity photos plus facial and hair products and computers + cosmetics plus software'; other activities: 'music, magazine, printing T-shirts'; estimated turnover in the next 12 months as £50,000; and for section 18 asking if 'VAT on purchases expected to regularly exceed the VAT on your taxable supplies', the answer was 'Yes', 'Because I sell only celebrity photos of

superstars and I also buy them and print on T-shirts.’ (This application is included in the documents bundle, though the application was rejected.)

67. The first two registrations were compulsorily deregistered by HMRC on 30 June 2008 on the ground that there was no viable business for Mr Gayle to be registrable, and the VAT repayment claims in relation to those two registrations were refused.

68. Mr Gayle lodged a set of appeals against HMRC’s decisions in 2008, which came to be determined by Judge Hellier at the former VAT and Duties Tribunal under the matters of: (i) appeal against his deregistration; (ii) appeal against the disallowance of input tax of £6,902 and £548.

69. Judge Hellier’s Decision was released on 20 March 2009 as *Nicholas Nehemiah Gayle v HMRC* (LON/2008/1012 & 1678; V20982), and at [2] of the Decision it is noted that:

‘On 26 April 2007 Mr Gayle applied to be VAT registered. He made a second application on 8 June 2007. HMRC accepted both applications and gave him two VAT numbers.’

70. On the first matter, the Tribunal in 2008 concluded at [51] that based on the evidence, Mr Gayle was not registrable for VAT as at 30 June 2008. On the second matter, the Tribunal allowed £219.38 as ‘the total input tax creditable’, out of the total £6,952 and £548 claimed.

71. The third application dated 28 May 2010 was also successful with a VRN allocated, and the decision by HMRC of 1 September 2010 to cancel this registration was appealed against to the First-tier Tribunal. HMRC applied to strike out the appeal. Having heard Mr Gayle in person and HMRC’s representative, the application to strike out the appeal was granted by Tribunal’s direction dated 21 April 2011, with the reason given as: ‘That there is no evidence of business activity by the Appellant’.

The Facts in relation to the second appeal: Photogen PMA Ltd

The sixth application to register for VAT

72. On 5 November 2014, the appellant applied to register Photogen PMA for VAT as a new company incorporated on 3 November 2014; this is the appellant’s sixth attempt to apply to be registered for VAT.

73. Significantly, this application is to register the company ‘Photogen PMA Limited’ for VAT, and is a departure from the previous applications whereby the appellant applied to register for VAT in his personal capacity as the sole proprietor.

74. Another notable departure from the pattern of previous applications is that the sixth application was made online instead of on paper form VAT1 as with all previous applications.

75. For business activities, the description is given as ‘Web-developer photographer internet advertisement music distributor’, and the main sector activity code is stated as ‘74201’ with sub-code being ‘004’.

5 76. In terms of chronology, the timing of the 5 November 2014 application took place about three weeks after the appellant’s Final return under VRN 168 7088 63 was reduced to nil on 16 October 2014.

10 77. The 5 November 2014 application also coincided with the revised penalty assessment dated 5 November 2014, whereby the appellant was notified that the penalties had been downgraded to ‘Failure to Take Reasonable Care’ and reduced to £1,274 and £505 for the 10/13 and 01/14 returns respectively.

78. The sixth application was therefore coterminous with the appellant’s receipt of communications regarding the penalty assessment in consequence of the VAT repayment claims for the 10/13 and 01/14 returns under the cancelled registration.

15 79. The timing of the sixth application on 5 November 2013 pre-dated the appellant’s confirmation on 13 November 2013 that he would appeal to the Tribunal. The confirmation was in response of HMRC’s letter of 5 November 2013 in respect of the reduced penalty assessment.

80. The sixth application was successful and the appellant was allocated with a new VRN 221 6555 28.

20 *The 09/15 return for VAT repayment for £1,317*

81. On 7 October 2015, Officer Nicholas received a Pre-Repayment Credibility Query regarding this registration for the 09/15 return. The sum of VAT repayment sought was £1,317. Officer Nicholas stated in evidence that this registration by Mr Gayle was ‘unbeknown to him’ until he received the credibility query.

25 82. On the same day, a letter was sent to the company requesting supporting information and documentation for the repayment. On 22 October 2015, a reminder was sent as no reply had been received.

30 83. On 29 October 2015, information and documentation was received from the company, and concerned chiefly the employment of an employee, which the appellant related as follows (quoted verbatim):

35 ‘I have enclosed for your purposes an update of the employers payment summary/employee: arsenas aleksandravicius, all payments amount to the vat due to HMRC I have recorded the vat due via receipts and I will enclose these for your inspection, the employment of Mr aleksandravicius began in Feb: 2015 and ended in the month of may 2015: a total of ONE HUNDERED AND SEVENTY SIX POUNDS ONLY.’

84. Further information provided included three *supposedly* ‘purchase’ invoices numbered 0012, 0013, and 0015, each for £50.00, and dated 23/9/2015, 27/9/2015 and 31/10/2015 respectively. However, these invoices were not produced by the ‘suppliers’ to the company; these invoices were generated by Photogen PMA and ‘invoiced to’ its suppliers.

85. These invoices would seem to have adopted the format of what one would expect from a ‘sale’ invoice, not a purchase invoice. On the face of the invoices just below the Photogen PMA’s name and address is the entry that states: ‘VAT Number: *not required*’; no VAT had been charged on these invoices.

86. The three invoices have the same proforma layout, and bear identical narrative for ‘description’ as follows, reproduced below verbatim:

Description	Quantity	Unit price	Amount
9203738 Companies House Registration Document Pma Contract – Photogen Promo Music Adverts Limited Nicholas Nehemiah Gayle Company Director: Music Association	1	£0.00	£0.00
This Document Confirms That the Company Trading As Photogen – Promo Music Adverts Limited Holds the Sole Responsibility of persons incorporated as part of the Photogen	1	£0.00	£0.00
Group and will be held responsible for all expenses incited – During Trade.	1	£0.00	£0.00
<i>cost towards journey for purchase of pool table</i>	1	£50.00	£50.00

87. The fourth entry (here in italics) represents the only variation for ‘description’ for the three invoices: (i) The ‘*cost towards journey for purchase of pool table*’ is for invoice 0012; (ii) ‘*02/OCT/2015 Yaghi accountants customer I’d: CT/SA/901*’ for 0013; and (iii) ‘*payment of fifty pounds only for one day work*’ for 0015.

88. On invoice 0015, it is stated as ‘Invoice To’ *Photogen Promo Music Adverts Limited Arsenas Aleksandrivicus*, followed by a postal address. The other two invoices only bear the email addresses of the ‘suppliers’.

89. In relation to the first invoice, the appellant provided further information in writing to HMRC that it was payment for help ‘in the removal of a pool table bought from cash converters in Edmonton as [he] could not move it [himself]’. In evidence, the Tribunal asked the question: ‘How do you run a business with a football table?’ The appellant’s reply was: ‘for staff to relax over’.

90. As for staff, the appellant referred to Mr Aleksandrivicus as his employee, and informed the Tribunal that he paid ‘his full wages out of [his] own benefits’ received from the government; that Mr Aleksandrivicus was to drive a mini-cab to advertise the company; that the employee was kept on for only two to three months as the appellant could not afford it.

Further request for information

91. On 3 November 2015, Officer Nicholas sent a letter to the company requesting further information about the 09/15 return; a meeting was also proposed.

5 92. On 10 November 2015, an undated letter was received from the company containing further information and documentation. Referring to the three invoices produced, the appellant gave the following explanation in writing:

10 ‘The reason for a delay in the vat details on these three invoices are because at the time that these invoices were being prepared the company PHOTGENPMA was not vat registered and as by compulsory the vat number 221 6555 28 was not submitted on the form, as a precautionary method I apologize for my error in this instance and in future I will provide each document with the correct vat number ...’

15 93. Other information being provided in the letter consists of a long, continuous stream of entries that run in dense text for over a page of A4; each entry bears various details of payment and an excerpt of which is as follows:

20 ‘eps vat payment to Cumbernauld £50.00/ ... £1,083.00 to robertsons jewellers 199 edgware road w2 les vat due £201.66 business purposes.../Harvey Thompson £559.82 vat due £111.80 .../ cash converters Edmonton debit card £179.00 175754 amount £40.00 vat due £8.00 ...’

25 94. On 16 November 2015, Officer Nicholas replied that the information and documentation received was still insufficient to support the VAT repayment claim, and referred again to a possible meeting at the company’s accountant, Yaghi & Co, to resolve outstanding matters. The letter also informed the appellant of the possibility of deregistering the company for VAT, as there did not appear to be a viable business undertaken by the company.

Meeting with the company’s accountant

95. On 18 November 2015, the appellant replied to agree to a meeting.

30 96. On 8 December 2015, Officer Nicholas and Mr Ridley (who presented the case to the Tribunal) attended a meeting with the appellant and his accountant, Mr Yaghi. The meeting took place at Mr Yaghi’s office.

35 97. During the meeting, it became clear to Officer Nicholas that it was the previous registration in Mr Gayle’s name as sole proprietor that would be discussed, rather than the registration of Photogen PMA Ltd.

98. The meeting resolved nothing; no new information was produced.

99. During the course of the meeting, the appellant dispensed with the services of his accountant Mr Yaghi.

Deregistration

100. On return to his office after the meeting, Officer Nicholas immediately reduced the 09/15 return to nil, and instructed the Deregistration Unit to deregister the company. The deregistration was made effective as from 5 November 2014.

5 **The appellant's case**

The first appeal

101. The grounds for appeal as stated on the Notice of Appeal dated 18 June 2014 are as follows:

10 'HMRC decision is wrong on the account I was told that upon making
a Vat Registration if your error of VAT input was a minor effect, then
a [sic] ERROR OF CORRECTION could be applied. Realising the
error by letter of notice in which I did but sadly I was deregistered
before I had enough time to refer to my error of correction to whom the
amount was payable...' (a mixture of upper and lower cases within
15 words have been normalised here)

102. The appellant had reckoned that the appeal should have been made to the Tribunal the latest by 4 June 2014, and for reasons why the appeal was late, he gave the following reasons:

20 'Due to communication breakdown with HMRC on a matter of input
tax and deregistration and who the money was payable to.'

103. For the section on the Notice of Appeal asking what the appellant thought the decision(s) should have been, the following was stated:

'HMRC should confirm if the deregistration of Vat Number 168 7088
63 was the reason no payment is due. I am being charged for error.'

25 *The second appeal*

104. In an undated letter sent to VAT Registration Service at Grimsby by recorded delivery, and received on 16 December 2015, the appellant stated the following:

30 'Can you please tell me in my complaint, why I have been deregistered
for not providing proof of business as I have a big company situated at
www.photogenpma.co.uk. Also at [two facebook addresses].' (The
entire letter is in block capital, which is not reproduced here.)

105. By letter dated 22 December 2015, Grimsby Office replied explaining why the VAT registration had been cancelled and requested a Final return to be submitted.

35 106. In an undated letter received by HMRC on 18 January 2016, the appellant
stated:

'This letter is [sic] notify you that i will be appealing against the
decision by HMRC to de-register VAT NUMBER: 22165528.'

5 The meeting with David Ridley and James Nicholas on the 8
DECEMBER AT YAGHI ACCOUTNANCY was unfair and without
merit and invalid of a respectable decision by means of common
knowledge as Photgenpma is a Business that is thriving and doing very
well, the prospect of Business for the company has increased
tremendously, and it is for this reason that i am asking for a review of
the decision ... the visit by HRMC was not intelligent as it is suggested
that there is no Business in effect.’

The penalty appeal

10 107. At the hearing, the appellant indicated that no one had discussed the penalty
with him; that he did not hear there was a penalty, not once.

HMRC’s case

15 108. Mr Ridley started his submissions by referring to the history of the appellant’s
applications to register for VAT. A summary tabulating the six times since October
2005 [*sic* 2006 as per section 17 entry on the VAT1, see §64(1)] when five out of the
six successful applications were eventually compulsorily deregistered, and one
application was unsuccessful.

109. The Tribunal was taken through the appeal history of the previous applications.

20 110. Mr Ridley referred to the fifth and sixth applications as ‘a serial attempt to
register for VAT, with each individual registration being checked and in each case,
the same conclusions being drawn.’

25 111. First, HMRC have concluded that there is no *bona fide* business related to the
two registrations because there is: (i) no serious undertaking earnestly pursued; (ii) no
reasonable or recognisable continuity; (iii) no measure of substance amounting to a
sale. For these reasons, the registrations have been cancelled.

30 112. Secondly, in relation to any input VAT claim, the VAT must be incurred in the
furtherance of the taxable person’s business before it can be treated as an input VAT.
In the present appeals, no taxable supplies can be identified; no evidence has been
produced to demonstrate that the business activity operates on a commercial basis.
For these reasons, all input VAT claimed on these registrations have been disallowed.

35 113. Finally, in relation to the penalty on the first registration under appeal, HMRC’s
view was that the action was deliberate, but have subsequently downgraded to ‘failure
to take reasonable care’ by taking into account the appellant’s disability problem. The
penalty has been imposed because the department has a series of registrations, and ‘to
get the point across that a penalty is imposable for such behaviour’, and for the second
registration, the appellant was represented by an accountant.

Discussion

114. The issues for the Tribunal’s determination in these appeals are as follows:

- (1) Whether the appellant is registrable for VAT at 6 August 2013 and 5 November 2015;
- (2) Whether any of the VAT repayment claims are creditable;
- (3) Whether the penalty assessment of £1,779 respective to the inaccuracies in the 10/13 and 01/14 returns (£1,274 and £505) should be confirmed.

Whether the appellant was registrable for VAT

115. The definition of ‘registrable’ is given at VATA Sch 1 para 18 as meaning ‘liable or entitled to be registered under this Schedule’.

116. In the present appeals, the appellant was not, at all material times, making taxable supplies in a 12-month period that had exceeded the turnover threshold to make him *liable* to become VAT registered.

117. The only premise upon which the appellant’s registrations can be considered by the Tribunal is therefore whether he was *entitled* to register for VAT at 6 August 2013 and at 5 November 2015, being the dates he sought to become VAT registered.

118. The legislation concerning an *entitlement* to become VAT registered is under VATA Sch 1 para 9 (see § 9 above).

119. A person who seeks voluntary registration has to satisfy the Commissioners that he (a) makes taxable supplies, or (b) is carrying on a business and intends to make such supplies in the course or furtherance of that business.

120. The legislative reference to the Commissioners being satisfied is a clear indication that Commissioners are the decision-maker in this matter. On appeal against such a decision by the Commissioners, the Tribunal’s jurisdiction can only be supervisory. In this regard, we follow Ferris J’s formulation at [19] in *Gray (t/a William Cory & Son) v C&E Comms* [2000] STC 880:

‘... It says that a certain conclusion will follow *if the commissioners are satisfied* that a particular state of affairs exists. A VAT tribunal, or this court itself, can only interfere with the decision of the commissioners if it is shown that the decision is one which no reasonable body of commissioners could reach.’ (emphasis added)

121. The Commissioners’ interpretation of the law in respect of what constitutes a business for VAT registration purposes is set out at paragraph 3.9 of the VAT Notice 700/1 (see §13 above), where ‘business’ is defined as a ‘continuing activity carried on with the intention of making supplies for a consideration’. The Notice also gives examples of ‘non-business activities’, such as ‘those carried on as a hobby or supplies made in a purely private capacity (for example the sale of personal belongings)’.

122. In the Commissioners’ view, the appellant was not carrying on a viable business at all material times to be entitled to register for VAT. The Tribunal will only interfere with the Commissioners’ decision if it is one which no reasonable body of commissioners could reach.

123. What constitutes a business for VAT purposes has been considered by case law, and the Tribunal will consider the reasonableness of the Commissioners' decision by applying the indicia set out in *C&E Comms v Lord Fischer* [1981] STC 238.

5 124. Firstly, was any activity 'a serious undertaking earnestly pursued'? The appellant has listed a host of activities in his VAT applications. For the first appeal, no fewer than six activities can be named: (i) internet adverts magazine; (ii) photography distribution; (iii) printing T-shirts; (iv) telephone skills; (v) business stage of first option software design element; (vi) Guerlain cosmetics. There is no evidence that any of these activities constitutes a serious undertaking earnestly
10 pursued; the activities are disparate and lack coherence as a cohort; there is no focus in building up any of the listed activities into a viable business; there is no evidence of any customer base for any single one of these activities; there is no supply chain established; there is no focus or strategy to promote or target any one activity to turn it into a viable concern.

15 125. Secondly, was any activity pursued with any reasonable and recognisable continuity? The Tribunal concludes that the only discernible activity that was carried out with some continuity was the generation of short-term finance by the appellant either through the sale of personal effects via the cash converter medium or by raising an instant cash loan, none of which can amount a business in the sense of making a
20 supply for a consideration with the intention to profit.

126. Another activity that can be described as having been carried out with continuity is the appellant's persistent attempt to become VAT registered, and apparently for the sole purpose of furnishing VAT repayment claims. This persistent effort in becoming VAT registered accords with the evidence Mr Gayle gave at the
25 former VAT and Duties Tribunal, at [19] of Judge Hellier's decision, in which he explained that his repayment claims in those appeals, totalling £6,902 and £548:

'... would enable him to run his business and to employ someone, and that his employee would assist in the *business of claiming further VAT repayments.*' (emphasis added)

30 127. The appellant seems to have made a 'business of claiming VAT repayments' as the be all and end all. The Tribunal is concerned that the appellant is under the misconception that the claim of input VAT from a myriad of receipts totally unrelated to any discernible business activity can amount to a legitimate activity. The law provides that *only* input VAT incurred in relation to making taxable supplies in a
35 viable business is reclaimable. Any claim of input VAT cannot be justified outside the context of a viable business making taxable supplies.

128. Thirdly, did any activity have a measure of substance? We conclude that there is no evidence of any taxable supply having been made at all material times. The three
40 invoices generated by the appellant for the repayment claim under VRN 221 6555 28 at first give the appearance of being the appellant's invoices to his addressees, as each invoice has been '*invoiced to*' the addressees, two only to their email addresses, and one to a postal address. However, by the appellant's own account, these invoices were

created to record his expenditure, with the one to a postal address being his ‘employee’ for a short duration.

129. The only income receipts of any substance in the evidence relate to the appellant’s state benefits received and the tax repayment from HMRC arising from the tax that has been deducted at source on these benefits. These receipts of substance are not receipts from a trading activity that can be characterised as a business.

130. Applying the indicia established in *Lord Fisher*, the Tribunal therefore concludes that there is no evidence that the appellant was, at all material times, either (a) making taxable supplies, or (b) carrying on a business and intended to make such supplies in the course or furtherance of that business. The conditions required for there to be an entitlement to become VAT registered under VATA Sch 1 para 9 are not met by the appellant for all periods concerned. The Commissioners’ decisions to cancel the two VAT registrations respective to their original dates of 5 August 2013 and 5 November 2015 are correct in law and there is no reason for the Tribunal to interfere with the Commissioners’ decisions.

Whether any of the input VAT creditable

131. The amounts of VAT repayment claimed by the appellant are: £4,997 for 10/13, £1,982 for 01/14 and £1,317 for 09/15, an overall total of £8,296 (not counting what was claimed in the Final return for VRN 168 7088 63, of which the Tribunal does not seem to have a note).

132. We have concluded that the Commissioners’ decisions to deregister the appellant compulsorily are correct in law. The reduction to nil of all repayment claims follows therefore from the cancellation of those VAT registrations from their effective dates. Where there is no valid VAT registration, there can be no valid VAT claim.

133. As a matter of law, input VAT can only be reclaimed on expenditure incurred in the course of making taxable supplies. Since we have concluded that there was no taxable supply being made by the appellant at all material times, there can be no creditable input VAT claims by him.

134. For completeness, we will comment on the nature of the documentation on which the VAT repayment claims were based. The Tribunal was taken through many of the receipts submitted by the appellant to support his VAT claims, and some examples have been related earlier in our findings of fact. Whether it was the labour cost to transport the football table, or the note of valuation for a piece of jewellery, or the receipts from cash converters or cash loan lenders, these are neither valid VAT receipts, nor receipts for purchases that relate to expenditure incurred in furthering the making of taxable supplies. Other receipts for household goods, or Netflix or mobile phones, while bearing the VRNs of the suppliers, are not for purchases in relation to making a taxable supply.

135. We conclude therefore that none of the input VAT claims is creditable, and the Tribunal upholds the Commissioners’ decisions to reduce all claims to nil.

The penalty assessment

136. The Tribunal is satisfied that there are inaccuracies in the VAT returns submitted by the appellant, and the penalties under Schedule 24 of the Finance Act 2007 are correctly imposed.

5 137. There had been no fewer than four VAT returns in these two appeals related to periods: (i) 10/13 return for £4,997; (ii) 01/14 return for £1,982; (iii) the Final return for an unspecified amount; and (iv) 09/15 return for £1,317. HMRC are entitled to impose penalties on all amounts of potential lost revenue arising from these four returns. The Tribunal note specifically that penalties have been imposed *only* in
10 relation to the 10/13 and 01/14 returns.

138. Turning to the categorisation of behaviour that has led to the inaccuracies, we are of the view that the behaviour was ‘deliberate’. The appellant was able to complete the VAT applications with a fair command of knowledge and accuracy, to the extent of being able to supply the sector activity code ‘74201’, with sub-code
15 being ‘004’, for ‘web-developer photographer internet advertisement music distributor’ in his online application. Whether the coding is correct or not has not been ascertained, but the Tribunal has to give regard to the level of competence and degree of awareness as demonstrated by the appellant in these applications.

139. The Notice of Appeal for the first appeal was completed by the appellant in his
20 handwriting and also shows that the appellant is conversant with the procedure involving the making of a decision by HMRC, his right to request a statutory review, and to appeal to the Tribunal. He was able to give the requisite information for making the appeal with accuracy, such as the date of ‘HMRC notice of conclusions of Review’, the date ‘HMRC offered a Review’, ‘the latest time by which appeal ought
25 to have been made’. The second appeal to the Tribunal was made by way of a typed letter, and the appellant was able to give the requisite information to lodge an effective appeal within the time limit.

140. The Tribunal is mindful of the appellant’s behaviour that has led to the sixth application to register for VAT. We are troubled by the fact that the appellant
30 proceeded to make his sixth VAT application on 5 November 2014, almost immediately after his Final return for VRN 168 7088 63 was reduced to nil on 16 October 2014 (see §45-51).

141. The date the appellant made his sixth application was also the date of the letter to notify him that ‘the behaviour which triggered the penalties has been downgraded
35 from “Deliberate” to “Failure to Take Reasonable Care”’ (see §57-61).

142. With the Final return for VRN 168 7088 63 being reduced to nil on 16 October 2014, and the penalty notification of 5 November 2014, both firmly in the foreground at the time the sixth application was made, the appellant knew or ought to have known
40 that there had been no material changes in his activities to satisfy the Commissioners that he could be, at 5 November 2014, entitled to become VAT registered.

143. The Tribunal is very conscious of the costs to the public purse in the way executive and judicial resources have been expended due to the appellant's behaviour to register for VAT, time and again, for no legitimate reasons.

5 144. To obtain a VRN, so far as the appellant is concerned, has turned into the means for the end of lodging VAT repayment claims, often in thousands of pounds, that have been proven to be utterly without merits. HMRC have expended inordinate amount of time and resources in dealing with these repayment claims. The readiness to give the appellant the benefit of the doubt, time and time again, in succession of each repayment claim lodged within a short time frame meant that each claim had been
10 looked at afresh without prejudice. The patience and meticulous attention accorded to the appellant's claims by Officer Nicholas have been exemplary.

145. No penalties were imposed on the previous attempts to make VAT repayment claims that were subsequently all nullified. The imposition of penalties in this case is fully in order as a form of sanction against the kind of behaviour that cannot be
15 allowed to repeat with impunity.

146. The Tribunal is aware of the appellant's state of mental health, which does amount to special circumstances. HMRC have taken this factor into account by downgrading the behaviour category to 'failure to take reasonable care', with the consequence that the penalties have been reduced from £2,973 to £1,274 for the 10/13
20 return, and from £1,179 and £505 for the 01/14 return.

147. At the hearing, the appellant stated that he had no idea about the penalty assessment. In terms of actual notice of the penalty assessment, the Tribunal is satisfied that there has been effective service of the notice to impose the penalties; the notifications and communications on the penalty matter are detailed at §52-61.

25 148. In terms of constructive notice of the penalty assessment, the Tribunal concludes that the appellant knew or ought to have known of the content of the penalty reduction notification dated 5 November 2014 by dint of his reply to HMRC, received on 13 November 2014.

30 149. The penalty reduction notification dated 5 November 2014 bears the heading '*Penalty Charges for periods 1013 & 0114*', and notifies the appellant of the reduced penalties to £1,274 and £505. The letter concludes with Officer Nicholas requesting:

'I should be grateful if you would confirm as soon as possible whether or not you still wish to take this matter to the First Tier Tribunal.'

35 150. The appellant confirmed to HMRC in writing, in an undated letter received on 13 November 2014, the following:

'This letter is to notify /HMRC AT BERKELEY HOUSE N32JY Of my intention to continue with my appeal process this letter is to confirm that situation.'

40 151. The Tribunal concludes that there has been actual and constructive notice of the penalty assessment. The penalty amounts are correctly determined, and the

determination has taken into account special reduction. The penalty assessment is upheld in full by the Tribunal.

Decision

152. For the reasons stated, both appeals are comprehensively dismissed.

5 153. 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 10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

15

**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 2 MARCH 2017