



TC06429

Appeal number: TC/2016/05065

VAT - failure to register - penalties in default of returns by taxpayer Company which had traded above VAT registration threshold - retrospective registration - VATA 1994 Schedule 1 paragraphs 1 and 3 - Finance Act 2008 Schedule 41 - penalties for late registration - proprietor had limited understanding of English language and UK tax system - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DOMELL BUILDERS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN LOUSADA**

**Sitting in public at the Tribunal Appeals Service, Centre City Tower,
Birmingham on 19 October 2017**

The Appellant did not attend and was not represented

Mrs Pat Checkley, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

5 1. This is an appeal by Domell Builders Limited (“the Appellant”) against “Failure
to Notify” penalties under Schedule 41 Finance Act 2008 in the total sum of £884,
following a decision by the Respondents (“HMRC”) that the Appellant should have
been registered for VAT for the period 1 March 2015 (the effective date of
10 registration [“EDR”]) to 16 August 2015, during which it had traded above the VAT
registration threshold.

2. The proprietor of the Appellant Company, Mr Jakub Widlak, does not dispute
that he failed to notify the Company’s liability to be registered for VAT at the proper
time, and that the relevant default period is as stated by HMRC.

15 3. Mr Widlak requests leniency with regard to the penalty on the grounds that his
understanding of the English language and the UK VAT system is poor. He admits an
error was made but says that the error was entirely unintentional. He also feels that
there was a lack of advice from HMRC.

Factual Background

20 4. The Appellant trades as a Building Contractor from 68 Carrington Road,
Wednesbury, England, WS10 0HX. The Company was incorporated on 4 November
2014.

5. Mr Badrud Choudhury of Financial Associates (Birmingham) Ltd submitted a
completed VAT Registration Form VAT1 for the Appellant Company on 11 August
2015 which notified that:

- 25
- Mr Widlak had an interest in another business J & J Building Services.
 - Was compulsorily registering Domell Builders Ltd, with main activities of
‘General Building i.e. painting, plastering etc.’
 - The taxable turnover, had gone ‘over the registration threshold in the past period
of 12 months or less’.
- 30
- The date he had expected this to happen was 1 January 2015.
 - The Company’s turnover was recorded as £130,000.

6. Mr Choudhury also submitted form VAT600FRS so that the Appellant could
apply to join the Flat Rate Scheme (“FRS”). Mr Widlak declared that he was eligible
for the FRS identifying the trade sector as “General Building” and a rate of 9.5%.

7. Mr Choudhury says that Mr Widlak had previously submitted a VAT600FRS in January 2015 but omitted to include a completed form VAT1. HMRC say they have no record of receiving the VAT600FRS.

5 8. HMRC confirmed that the Company would be registered for the purposes of VAT with effect from 1 January 2015 - VAT Registration Number 220 1183 70 – and confirmed that the FRS could be used with effect from 1 January 2015.

9. On 7 October 2015 HMRC notified the Company that there had been a Failure to Notify registration at the proper time. Notification should have been made no later than 2 March 2015 but the Application to Register was not received until 17 August 10 2015. HMRC advised that a penalty could be imposed, and issued a questionnaire which was returned completed 27 January 2016. This identified a VAT figure of £8,419.55 as being payable.

10. A ‘Penalty explanation’ letter was issued to the Company on 5 February 2016 notifying the intention to charge a penalty in the sum of £884, together with a ‘Penalty 15 Explanation’.

11. On 5 April 2016 a Notice of Penalty assessment, charged in accordance with Schedule 41 FA 2008, of £884.00 was issued. A Statement of Account was also issued.

12. On 9 May 2016 the Agent notified an appeal by Mr Widlak. He said that the 20 Company had ceased to trade and that:

- The error made by Mr Widlak was entirely unintentional and was due to his lack of understanding of the English language. He had been self-employed in the UK for only a short period of time and had not understood the tax system and VAT in particular.
- 25 • The error remained undetected until he engaged this accountant.
- The error was readily admitted, there has been complete cooperation and in his view the penalty was excessive.
- The agent asked HMRC to apply common sense and waive the penalty.

13. On 27 May 2016 the Company’s VAT registration was cancelled.

30 14. An independent review was undertaken on 3 September 2016 and upheld the FTN penalty in the sum of £884.00.

15. The Appellant lodged an appeal with the Tribunals Service on 20 September 2016.

Evidence

35 **Relevant legislation**

16. The law relevant to the appeal is contained in:

VATA 1994

5 'Taxable supplies'

Section 4(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

10 Sch 1, Para 1(1) sets out when an unregistered person making taxable supplies becomes liable to be registered:

1(1) Subject to sub paragraph (3) to (7) below, a person who makes a taxable supplies but is not registered under this Act becomes liable to be registered under this schedule

15 a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded (relevant VAT threshold); or

b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of thirty days then beginning will exceed (relevant VAT threshold)

20 Sch 1, Para 1(3) - sets out the rules regarding exception from registration.

A person does not become liable to be registered by virtue of sub-paragraph (1) (a) or (2)(a) above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this subparagraph, he would become liable to be registered will not exceed £(threshold)

Sch 1, Para 5, - sets out the rules regarding notification of liability and registration.

30 Sch 1, Para 6(2), - permits the Commissioners to register with effect from the period when liability arises.

Section 67 –

Failure to notify and unauthorised issue of invoices

(1) In any case where -

35 (a) a person fails to comply with any of paragraphs 5, 6, 7 and 14(2) and (3) of Schedule 1 with paragraph 3 of Schedule 2 with paragraph 3 or 8(2) of Schedule 3 or paragraph 3, 4 or 7(2) or (3) of Schedule 3A, or

40 he shall be liable, subject to subsections (8) and (9) below, to a penalty equal to the specified percentage of the relevant VAT or, if it is greater or the circumstances are such that there is no relevant VAT, to a penalty of £50.

(3) In subsection (1) above “relevant VAT” means (subject to subsections (5) and (6) below) -

5 (a) in relation to a person's failure to comply with paragraph 5 6 or 7 of Schedule 1, paragraph 3 of Schedule 2 paragraph 3 of Schedule 3 or paragraph 3 or 4 of Schedule 3A, the VAT (if any) for which he is liable for the period beginning on the date with effect from which he is, in accordance with that paragraph, required to be registered and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of, his liability to be registered; and

(c) in relation to a person's failure to comply with a requirement of regulations under paragraph 2(4) of Schedule 11, the VAT on the acquisition to which the failure relates; and

10 (4) For the purposes of subsection (1) above the specified percentage is -

(a) 5 per cent where the relevant VAT is given by subsection (3)(a) or (b) above and the period referred to in that paragraph does not exceed 9 months or where the relevant VAT is given by subsection (3)(c) above and the failure in question did not continue for more than 3 months;

15 (b) 10 per cent where that VAT is given by subsection (3)(a) or (b) above and the period so referred to exceeds 9 months but does not exceed 18 months or where that VAT is given by subsection (3)(c) and the failure in question continued for more than 3 months but did not continue for more than 6 months; and

(c) 15 per cent in any other case.

20 Section 68(8) provides that a failure to register under s 67(1) shall not give rise to a penalty if the Tribunal is satisfied that there is a reasonable excuse for the failure to register.

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

(1) Where a person is liable to a penalty under section 60, 63, 64, 67 or 69A, the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

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

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

(4) Those matters are -

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

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

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

71 Construction of sections 59 to 70.

40 (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct -

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

5 Section 83 - sets out matters that carry a right of appeal.

[(1)] ²¹Subject to [sections 83G and 84], an appeal shall lie to [the Tribunal] with respect to any of the following matters -

[...]

(p) an assessment—

10 (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act he shall be liable, subject to subsections (8) and (9) below, to a penalty equal to the specified percentage of the relevant VAT or, if it is greater or the circumstances are such that there is no relevant VAT, to a penalty of £50.

Paragraph 12 to Schedule 41 Finance Act 2008 states:

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(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by -

(a) telling HMRC about it,

20 (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure -

25 (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 relevant act or failure, and

(b) otherwise, is “prompted”.

(4) In relation to disclosure “quality” includes timing, nature and extent.

Paragraph 12 to Schedule 41 Finance Act 2008 states:

30 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(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.

35 (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.

The Appellant’s case

40 17. The Appellant’s grounds of appeal as set out in its Notice of Appeal are:

“The HMRC’s decision is incorrect in at least two aspects.

Firstly, the reductions given in respect of the “quality” of the disclosure, namely Telling, Helping and Giving, were excessive, perverse and unreasonable given the circumstances and the evidence presented.

5 Secondly, HMRC has incorrectly disallowed special circumstances to apply even though they were truly uncommon or exceptional. Our contention is that taking everything together, namely - Mr Widlak's lack of understanding of the English language, being new to self-employment, lack of knowledge of the local tax system and in particular VAT, have combined together to make his unintentional and unprompted error technically excusable if not removable on record.”

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HMRC’s case

18. Mr. Widlak completed the VAT1 Form via his agent confirming that he should be compulsorily registered for the purposes of VAT on 11 August 2015, advising that the EDR should be 1 January 2015.

15 19. Schedule 1 of Value Added Tax Act 1994, Para 1 requires a person to be registered for the purposes of VAT where, (for the 2015-16 Tax year):

Liability to be registered

20 *1(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—*

(a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded [F1£82,000]; or

25 *(b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed [F2£82,000].*

20. The Appellant advised that outputs in the period 1 March 2015 to 16 August 2015 had been £88,629.55. This required the Company to be registered for the purposes of VAT.

30 21. A VAT Return would have been due for a first notional period based on calendar quarter ends which would have been 31 March 2015 with a Return Due Date of 7 May 2015.

Failure to Notify Penalties (Schedule 41 Finance Act 2008):

35 22. Section 1 of Schedule 41 FA 2008 states that a person is liable to a penalty where they have failed to comply with specific obligations. Included within the list of specific obligations are the obligations under paragraphs 3 and 8(2) of Schedule 3 to VATA 1994 (obligations to notify liability to register).

23. The outputs notified for the period 1 March 2015 to 31 August 2015 were £88,626.79 and by applying the FRS 9.5% rate to this figure, the net amount of Potential Lost Revenue was £8,419.55.

24. Paragraph 6(1) and (2) of Schedule 41 sets out the standard penalty percentages that should be charged. These are: Deliberate and concealed - 100%. Deliberate but not concealed - 70%. Any other case - 30%. HMRC contends that in this case the Appellant's failure was non-deliberate and the standard penalty percentage is therefore 30%.

25. Paragraph 12 of Schedule 41 gives HMRC the power to reduce the standard penalty based on the Appellant: telling, helping and giving information to HMRC, in relation to the failure to notify.

26. HMRC say that they take into account factors such as complying and working with HMRC to calculate and pay the VAT due. The Appellant's reply to the FTN penalty questionnaire, issued 7 October 2015, was not received by the requested reply date of 6 November 2016.

27. In the agent's letter of 20 January 2016 it appears that the letter of 7 October 2015 was received but only after a delay of 1 to 2 weeks. It is not stated exactly when but if the delay was 1 to 2 weeks then it would have been received before the due reply date. However HMRC did not receive a reply until 20 January 2016 some two months later.

28. HMRC allowed 15% for 'Telling' - maximum allowable 30%; 20% for 'Helping' - maximum allowable 40% and 30% for 'Giving' - maximum allowable 30%. HMRC has therefore mitigated the penalty by 65% (out of a maximum of 100%).

29. Paragraph 13 of Schedule 41 goes on to give the penalty maximum and minimum ranges for the type of disclosure. Having given full reduction for disclosure and telling, helping and giving, HMRC contends that the penalty has therefore been correctly assessed at 30% of the unpaid VAT.

30. The Penalty has therefore been calculated as follows:

$$\text{PLR} = \text{£}8,419.55 \times 30\% = \text{£}2,525.86 \text{ less } 65\% = \text{£}884$$

Special reduction

31. Paragraph 14 of Schedule 41 gives HMRC scope to reduce the penalty by way of special reduction. However, having considered all of the facts in this case, HMRC submits that there are no special circumstances.

32. The onus of proof is with HMRC to demonstrate that the penalties were calculated and issued correctly. The standard of proof is the ordinary civil standard of the balance of probability.

33. HMRC submits that a special reduction is not appropriate.

Decision

34. On the facts, the Failure to Notify penalty has been calculated and issued correctly. This is not disputed by the Appellant.

5 35. The only other issue is whether the Appellant has shown a reasonable excuse for its late registration and whether there should be a special reduction. Ignorance of the law is not a reasonable excuse. A failure to understand legal obligations when working and/or operating a business in a new country does not absolve a person of responsibility to meet their obligations. There is advice and guidance readily available to persons new to business and the responsibility to become informed lies with that person. The Appellant's circumstances were not uncommon or exceptional. There were no special circumstances in this instance and therefore there can be no special reduction in the penalty.

10 36. 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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 5th APRIL 2018