



VAT penalty – deliberate behaviour

FIRST-TIER TRIBUNAL

TAX CHAMBER

TC07228

Appeal number: TC/2018/00072

BETWEEN

DAVID SCOTT

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE SARAH ALLATT

IAN ABRAMS

Sitting in public at Taylor House on 20 June 2019

The Appellant in person

Mr Victor Olamide, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against schedule 24 Finance Act 2007 Penalties totalling £11,671.54 deriving from a decision to assess dated 21 March 2017.

BACKGROUND

2. The Appellant is a sole trader in the healthcare industry. He has been registered for VAT since 2009. During the period 2011 – 2015 the Appellant had a series of distressing family events. The Appellant received a compliance visit from HMRC in August 2015. At that visit HMRC asked for sales and purchase invoice records but found a number of matters that needed further investigation.

3. A second visit took place in January 2016, and HMRC were not satisfied with matters relating to sales invoices, reclaims of input VAT, recharges of expenses to clients, and fuel scale charges.

4. An ADR meeting was held but a number of matters remain unresolved.

THE PENALTIES

5. The penalties come under 4 headings:

6. Input tax incorrectly claimed, where the penalty after a reduction is £8,109.89.

7. Undeclared taxable sales, where the penalty after a reduction is £1,740.79

8. Incorrect treatment of recharge of disbursements, where the penalty after reduction is £116.15 and is suspended.

9. Undeclared Road Fuel Scale Charge where the penalty after reduction is £138.75 and is suspended.

10. The suspended penalties are both charged for ‘careless’ behaviour. The other penalties have been charged for ‘deliberate’ behaviour.

THE APPEAL

11. Mr Scott appeals the penalties on the basis that the errors were not deliberate. It is accepted by all parties that his family circumstances in the period 2011 – 2015 were extremely difficult and required his constant attention.

12. According to the statement of case from HMRC they believe the suspended penalties are not in dispute. It appeared to us in the hearing that Mr Scott was not challenging these penalties. He was previously unaware of the correct methodologies for recharges and fuel. It appears to us that these penalties have been correctly charged (and correctly suspended).

13. We heard from Mr Scott who explained the background to his business and his method of working. Mr Scott works in the healthcare industry and is heavily involved in research in a number of areas including sleep disorders, asthma and chronic fatigue syndrome. When he was first registered for VAT he did not have a high income stream, and his customers were primarily from overseas. From 2011 onwards his income was higher, and he started to have customers in the UK.

14. Mr Scott did not employ a bookkeeper nor seek the advice of anyone with regards to his VAT returns.

15. His method of producing and recording invoices was very manual and he did not keep a spreadsheet of all relevant invoices.
16. His business has been owed a significant amount of money from a customer and it appears highly likely this will not be repaid.
17. Mr Scott charged output VAT on sales to UK customers but no output VAT was recorded in any VAT return.
18. Mr Scott was unable to explain exactly how this happened, but reiterated that this was not deliberate.
19. In relation to input VAT, there were a number of issues. We were provided with, but not taken through, a summary of the discrepancies relating to input tax over all the periods. Broadly speaking, the discrepancies fall into four main categories. Firstly, a number of periods contain amounts declared as input tax which should have been declared as output tax. Secondly, for some, but not all, periods Mr Scott was unable to produce a purchase listing, or invoices, that added to the amount claimed as input tax. Thirdly, there were a number of items claimed that were not allowable (primarily fuel and meals) and fourthly, there were items claimed where HMRC believe that the full amount should not be allowable (phone usage, golf club membership).
20. Mr Scott's primary contention in relation to the input tax point was around the golf club membership. He has a membership which, after a number of years being a member, allows the member to benefit from certain concessions including the use of the meeting rooms at the golf club for no additional charge.
21. Mr Scott explained that the golf club had rooms that could fit large groups of people, which he was unable to do in his home office. He agreed he did use the golf club to play golf as well. It was noted from the bundle provided that initially he had also reclaimed the VAT on Healthspa membership at the same club, although he did not challenge the disallowance on that item.
22. HMRC are prepared to allow 10% of the golf club membership as allowable. It appears from the evidence in the bundle we were given that Mr Scott originally claimed 100% of this, and before us he argued that the true figure for business expense should be at least 40%. He estimated he had 1-2 meetings a week there over the periods in question. HMRC contend that some of the meetings were for a business not related to this VAT registration, and also contend that the primary reason for having a golf club membership is to play golf. Mr Scott does play golf at the golf club.
23. Mr Scott did not advance any arguments in relation to the input tax that should have been declared as output tax, nor on the reasons he was unable to produce a listing of purchases, nor on the disallowable amounts.
24. Mr Scott admitted errors had been made, but submitted that these were not deliberate, but partly due to his lack of a systematic method of preparing the returns, and partly due to the considerable business and family stress that he was under during the periods in question.
25. HMRC submit, in relation to the incorrectly claimed input tax, that this behaviour was deliberate. This is based on a number of factors, including the lack of a purchase listing, the claiming of VAT on blocked expenses, and that valid receipts for the full amount could not be found for a number of periods.
26. HMRC submit, in relation to the undeclared taxable sales, that this was deliberate. We heard from Mr Woolston of HMRC who had undertaken the compliance visits. Mr Woolston

recalls that he had understood Mr Scott to admit to him that he had charged VAT on sales but deliberately failed to declare this to HMRC.

27. Mr Scott vehemently denies this and Mr Woolston upon checking his notes, had not recorded Mr Scott as using the word deliberate, or indeed a similar word, but that Mr Woolston had inferred that meaning from what Mr Scott had said.

THE LAW

28. The penalty regime with which this appeal is concerned appears in Schedule 24 Finance Act 2007. The relevant provisions are set out below. Paragraph 1 provides:

“(1) A penalty is payable by a person (P) where –

- (a) P gives HMRC a document of a kind listed in the Table below, and
- (b) Conditions 1 and 2 are satisfied.

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

- (a) an understatement of a liability to tax,
- (b) a false or inflated statement of a loss, or
- (c) a false or inflated claim to repayment of tax.

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

The list of documents to which these provisions apply includes a VAT return.

Paragraph 3 provides in so far as relevant:

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

- (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,
- (b) “deliberate but not concealed” if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it..”

DISCUSSION

29. The only issue before the Tribunal is whether the inaccuracies in the returns were “deliberate”.

30. We did not hear argument before us on the meaning of deliberate, nor were we referred to any case law.

31. Schedule 24 Finance Act 2007 does not further define the word “deliberate”. HMRC's manuals state that “a deliberate inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy” (HMRC Compliance Handbook CH81150).

32. This Tribunal has previously considered the meaning of the word ‘deliberate’ in this context in the cases of Auxilium Project Management Ltd [2016] UKFTT 0249 (TC) and Patrick Cannon [2017] UKFTT 0859 (TC), which we have reviewed when deciding this case.

33. We agree with the previous decisions made by this Tribunal that a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return

was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.

34. The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT 575 (TCC) at [37]).

35. However, there is also the question of whether the deliberately shut his eyes to the true factual position, referred to in *Cannon* as ‘Nelsonian blindness’.

36. Taking firstly the position of the undeclared taxable sales. No output tax was declared by Mr Scott in any of the returns, and yet he did issue invoices which charged VAT, albeit this was a minority of his sales. It appears to us that this should properly fall into the category of ‘deliberate’ even though Mr Scott claims it was not a deliberate error. The fact that output tax charged on an invoice should be declared on a VAT return and the VAT paid to HMRC is such a basic concept of the VAT system that anyone registered for VAT should be aware of it. The fact that no output tax was ever declared is an error so fundamental that Mr Scott must indeed have closed his eyes to the true position.

37. Taking secondly the question of input tax incorrectly claimed, where a variety of errors were made. It is clear that at best Mr Scott’s VAT return preparation was careless. The question is whether the errors made in the input tax reach the description ‘deliberate’.

38. We bear in mind that Mr Scott was voluntarily registered for VAT. Having taken on the responsibility of preparing VAT returns, we presume primarily to gain the benefit of being able to reclaim input tax, Mr Scott is required to make an effort to prepare them correctly. He appears to have made very little effort to prepare the returns correctly, variously claiming deductions for input tax when the item should have been declared as output tax, and making no disallowances for personal use of, for example, phones.

39. However we also note that after the ADR meeting HMRC agreed to 85% of the landline and 90% of the mobile phone use as being for business. It is therefore clear that there was high business use of these items.

40. It is clear to us that for many periods in question the behaviour does reach ‘deliberate’ again by Mr Scott deliberately closing his eyes to the correct method where that method ought to have been obvious.

41. Into this category we put all the returns where input tax was claimed that should have been declared as output tax, and all returns where an incomplete purchase listing was provided. Again these errors appear to us to mean that Mr Scott simply took no steps to ensure the return was accurate, claiming input tax on purchases that he must have known were not correct.

42. This leaves 6 periods (10/10, 4/11, 7/11, 10/11, 4/12 and 10/12) where the errors in the input tax were failing to disallow amounts relating to fuel, meals, golf club membership and phone expenses.

43. We would characterise these mistakes as inept, and falling far below what any reasonable taxpayer should do in this situation. However we are not convinced that, in these particular cases, Mr Scott knew that there was an error in these documents when he submitted them to HMRC.

44. No submissions were made by Mr Scott on the reductions to the penalties made for ‘Telling, Helping and Giving’. We have considered the reductions calculated and agree with the method applied.

DECISION

45. The penalties in respect of the Fuel Scale Charges and incorrect treatment of disbursements are upheld.
46. The penalties in respect of the undeclared taxable sales are upheld
47. The penalties in respect of input tax incorrectly claimed are upheld for the periods 01/11, 01/12, 07/12, 01/13, 04/13, 07/13, 10/13, 01/14, 04/14, 07/14, 10/14, 01/15 and 04/15.
48. The penalties for the periods 10/10, 04/11, 07/11, 10/11, 04/12 and 10/12 are amended to be non-deliberate.
49. We uphold the decision on the percentage reduction of the penalties for ‘Telling, Helping and Giving’.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

**SARAH ALLATT
TRIBUNAL JUDGE**

Release date: 25 June 2019