



TC07877

VAT – deliberate penalty

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/05968

BETWEEN

P D PROPERTIES & INVESTMENTS LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE SARAH ALLATT
MRS SHEILA CHEESMAN**

Sitting in public by video hearing on 14 & 15 September 2020

Mr Liban Ahmed for the Appellant

Mr Miles Matthews, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns whether a penalty issued HMRC for deliberate behaviour in relation to the submission of an inaccurate VAT return was correct, or if instead the behaviour was careless, or neither careless nor deliberate.

BACKGROUND

2. This case concerns the VAT return for the quarter ended April 2018 submitted by PD Properties & Investments Limited (PD Properties). In March 2018 the company had sold a property, and raised an invoice for the sale correctly including VAT of £370,000 on the sale. However this sale was not declared on the relevant VAT return.

3. The following facts are not disputed:

4. PD Properties was formed to own a property in Purfleet and rent it out to EUF Group Ltd and EUF Express Air Ltd.

5. At the relevant time Mr Davis was the sole director of PD Properties Ltd.

6. Mr Davis was also a director of EUF Group Ltd and EUF Express Air Ltd.

7. PD Properties had no staff, and the accounts and administration were performed by staff of EUF Group Ltd.

8. The normal business of PD Properties was to rent out the building it owned, and to make loans if required to EUF Group and/or EUF Express Air Ltd.

9. In 2018 the EUF businesses were in financial difficulties mainly due to the effect of Brexit on the sterling exchange rate.

10. A sale of the property owned by PD Properties was negotiated in January 2018 to RVL Properties Ltd.

11. HMRC confirmed to the company in February 2018 that there was an option to tax on the property.

12. The property was to be leased to EUF Group and EUF Express Air Ltd, therefore it was expected that the sale would be a Transfer of a Going Concern and would not therefore attract VAT.

13. However, it transpired late in the sale process that RVL Properties Ltd were going to 'flip' the property and immediately sell it to Rainham Securities Ltd. Therefore VAT would be due on the sale.

14. There is no paperwork surrounding the change of VAT treatment and the contracts provided to us mention the Transfer of a Going Concern.

15. The invoice was correctly raised including VAT.

16. The invoice was not included on the VAT return for the quarter ended April 2018, nor the quarter ended July 2018.

17. On 15 October 2018 HMRC wrote to PD Properties with an enquiry into the return for the quarter ended April 2018.

18. This was in relation to an entry of a large zero rated sale.

19. This turned out to be in relation to a loan consolidation. Further questions were raised by HMRC on 27 November 2018 including asking about whether the warehouse was still owned by PD Properties.

20. After these questions were raised, PD Properties submitted the VAT return for the quarter ended October 2018, and included the sale of the warehouse, explaining that this had been an error.
21. After further correspondence, HMRC charged a penalty for deliberate behaviour with a 90% reduction for 'telling, helping and giving' on 21 June 2019.
22. This was upheld by a review on 6 August 2019.
23. PD Properties then appealed to this Tribunal.

EVIDENCE

24. The Tribunal heard evidence from Mr Ransom of HMRC, and from Mr Davis, director of PD Properties.
25. We found Mr Ransom to be a clear and credible witness.
26. Mr Ransom started investigating PD Properties in September 2018. HMRC were also investigating EUF Group Ltd and EU Express Air Ltd. These companies had large assessments raised by HMRC.
27. Mr Ransom told us that the large zero rated sale first brought the company to his attention. The other returns for the company showed just the renting of the warehouse.
28. Mr Ransom had looked at the draft contracts (showing no VAT due) and the final invoice (showing VAT due on the warehouse). Mr Ransom was aware that the companies of which Mr Davis was a director had financial difficulties at the time.
29. Mr Ransom was aware that Mr Davis was having a very difficult time personally and in relation to the businesses. He took this into account when issuing the penalty but in his view the omission was so significant it met the bar for deliberate behaviour rather than a simple error.
30. Mr Ransom, under cross examination, said that he was unaware of the process to complete the VAT return and unaware of who exactly completed it and their level of experience.
31. Mr Ransom was aware that for many years the VAT returns had been completed for all the companies (PD Properties, EUF Group and EU Express Air) without any issues.
32. Mr Ransom was unaware as to the exact cash position of the company when the VAT was due, but he considered the cash difficulties of the other companies as a possible motive for the omission of the VAT due.
33. Mr Ransom acknowledged that Mr Davis was likely to be expecting a VAT investigation into PD Properties due the investigation of the other companies.
34. Mr Ransom confirmed he stood by his decision.
35. We heard evidence from Mr Davis. We found Mr Davis to be an inconsistent witness and his evidence was lacking in detail about some crucial facts.
36. Mr Davis confirmed that EUF Group, whose administration and accounts staff did the administration for PD properties, would have been aware of the sale of the warehouse.
37. Mr Davis said that the member of staff who completed the VAT returns was experienced, and that the VAT return was done by the same person before and afterwards.

38. He confirmed that the VAT return for PD Properties was simple compared to those for EUF Group Ltd and EUF Express Air Ltd.
39. Mr Davis explained that the invoice in question had been raised on his instruction, although not by him. It had then not been put onto the system, and hence had not been included in the VAT return.
40. Mr Davis said that he did not check the VAT return, nor did he submit it. He did accept that as a director of the company it was his responsibility to ensure the return was correct and complete.
41. The employee who raised the invoice but did not enter it on the system no longer worked for the company.
42. Mr Davis could not remember whether he received anything in writing regarding the change in nature of the sale of the warehouse with regard to VAT. He said that the change happened at the last minute.
43. Mr Davis confirmed that he checked the back account of PD Properties and saw that the cash was in the account. Some cash was used to pay out his business partner, and some to redeem the mortgage, and some to loan to EUF Group Ltd.
44. Mr Davis confirmed that even when he looked at the 4/18 VAT return in October 2018 in order to answer questions from Mr Ransom, it did not occur to him that the warehouse sale was missing.
45. Mr Davis also confirmed that the corporation tax return for PD Properties for the period when the property was sold was submitted late. He said 'everything was very messy'.
46. Mr Davis confirmed no cash reconciliations were performed for the company and hence there was no 'system' method of picking up the error.
47. Evidence from the bundle and shown to the Tribunal during the hearing also shows the following:
48. In the week that the VAT payment ought to have been made, the bank account for PD Properties contained no lower than £397k and no higher than £494k. The VAT payment should have been £370k.
49. Mr Davis in June 2019 had told Mr Ransom that the error was due to the sale being posted to the system as if no VAT had been charged. In his oral evidence he said that explanation was not correct and the invoice had not been entered into the system at all.
50. There was not a continuous consecutive numbering system applied to invoices for PD Properties and so the invoice raised was not obviously 'missing'.
51. The VAT return for 04/2018 shows the invoices for rent raised in January (PUR010012018) and 9 March (PUR010032018). Invoicing generally made reference to the month of the invoice and that was generally sufficient as so few invoices were raised. The invoice raised for the sale had a number FH1012018. Mr Davis explained that the FH stood for 'Freehold' and the '101' was the first (freehold) invoice raised in January 2018 (which was when the draft invoice was first created).
52. The HMRC review letter refers to an explanation being given to HMRC that 'the accountant fell ill during this time (of the completion of the property) and the records were not updated/input correctly. We cannot find any other mention of this explanation in the records nor was it referred to by either side.

53. Mr Davis told HMRC in an email (19/6/2019) that ‘it was my own investigations after such conversations [on the zero-rated sale] which led me to look at all returns which ultimately unearthed the error. However in oral evidence he did not mention this, and the chain of events on emails shows that Mr Ransom enquired as to the ownership of the warehouse before Mr Davis brought the subject up.

THE LAW

54. There is no dispute as to the law as it applies here. It is set out in Schedule 24 Finance Act 2007. All references to paragraphs below, and elsewhere in this decision are, unless otherwise stated, reference to paragraphs in Schedule 24:

55. The respondents may assess a taxpayer for a penalty if a tax return contains an inaccuracy (paragraphs 1).

56. Paragraph 3 details behaviour that is ‘careless’ or ‘deliberate’.

57. Paragraph 4 sets out the penalties payable.

58. Paragraph 9 sets out reductions for disclosure.

59. There is no dispute as to the fact that there was an inaccuracy. There is no dispute that the correct reductions for disclosure have been given. There is no dispute that HMRC have met all requirements such as time limits for charging the penalty.

60. The only dispute is as to whether the behaviour was ‘deliberate’, ‘careless’ or neither.

61. HMRC has the burden of proof to show that the penalty was charged correctly and such that the behaviour was deliberate.

62. The Appellant’s case is that the behaviour was neither careless nor deliberate, or in the alternative that the behaviour was careless but not deliberate.

63. The Tribunal was referred to a number of other First Tier Tribunal cases with some similar facts, where behaviour had been found to be careless, deliberate, or neither.

DISCUSSION

64. HMRC’s case is that the behaviour of the taxpayer was deliberate, and they are entitled to draw inferences of this deliberate behaviour from the conduct of the taxpayer (and by extension, Mr Davis) before and after the submission of the return. HMRC point out that ‘deliberate’ can extend to ‘intentionally chose not to find out the correct position’. As such, an omission such as this one could be deliberate if it was omitted when it was known that it needed to be included, or that it was not known that it needed to be excluded.

65. HMRC say that the fact that the other companies under the control of Mr Davis provides a motive for this deliberate behaviour. The extra cash available to PD Properties would have meant lower interest charges payable by the other companies than the bank loans they had.

66. HMRC point to the fact that Mr Davis’s attitude to the VAT return process was casual at best. He did not check the return before or after submission. He did not check the return even when the return was enquired into in relation to another transaction.

67. The size of the transaction was not only extremely significant for PD Properties, but fundamental to the nature of its business, so could not have been forgotten. The size of the excess money in the back account was too significant to be overlooked, especially at a time when money was tight in the businesses under the control of Mr Davis.

68. HMRC say that Mr Davis's explanations are unconvincing and inconsistent. There is a distinct lack of detail, for example regarding the last minute change in the nature of the supply.

69. The Appellant says that there was enough cash to pay the VAT at the time when it was due, as evidenced by the bank statement. They say that HMRC do not have enough evidence to prove any kind of motive.

70. It was pointed out for the Appellant that even if the Appellant wished to withhold the VAT for cashflow reasons, there was no motive not to submit the return correctly, as the return could have been submitted but the tax not paid. They submit this points to the fact that the omission was an oversight rather than deliberate.

71. Mr Ahmed for the Appellant made the point that Mr Davis was under considerable stress at the time of the VAT return, and that this was causing him anxiety at home and at work. The stress was the viability of the businesses due to the large currency movements since the Brexit referendum, and the fact that HMRC were enquiring into the other two companies, and withholding repayments that also threatened the viability of the businesses, and had issued large assessments of tax due.

72. Mr Ahmed pointed to other First Tier Tribunal cases where illness had caused anxiety, and the anxiety had been felt to be a mitigating factor in the submission of an incorrect VAT return.

73. Mr Ahmed also makes the point that the cash flow difficulties, although severe, were not a motive for deliberate omission of the VAT, as the assessments referred to above were being appealed and so there was no immediate need to pay them.

74. Mr Ahmed says that HMRC 'considered just one fact' and made limited investigations. The fact that Mr Davis was behind the company, and the VAT was not declared, were the only things taken into consideration before issuing the penalty, and a meeting offered by Mr Davis to explain the situation was declined.

75. Mr Ahmed said that at the time the penalty was raised, motive was not a consideration for HMRC, and this was only raised after the imposition of the penalty.

76. Mr Ahmed re-iterated that all other VAT returns for PD Properties, and EUF Group and EUF Express Air (completed by the same team) were correct and had been so going back many years. Therefore the systems were robust enough for Mr Davis to assume that this return was correct.

TRIBUNAL CONSIDERATIONS

77. Although there are a number of other FTT decisions where the nature of 'deliberate' and 'careless' have been considered, each case turns on its facts. It is common ground that 'deliberate' requires a conscious decision.

78. We consider that HMRC, and this Tribunal, can properly use inferences drawn from behaviour subsequent to the submission of the VAT return to draw conclusions about the state of mind of Mr Davis, and therefore the nature of the error, at the time of the submission.

79. It is common ground that the only decision before us is the nature of the error.

80. We bear in mind that:

81. Mr Davis instructed the invoice to be raised including VAT.

82. Very few invoices were raised by PD Properties.

83. Someone decided to number the invoice in a different way to other invoices produced by PD Properties, although with similarities.
84. The sale was fundamental to the business of PD Properties.
85. The size of the VAT due was extremely significantly different to usual, and the difference it made to the cash balance of PD Properties was also extremely significant.
86. Mr Davis made a number of inconsistent statements regarding the nature of the error. He variously said, to HMRC in emails and in oral evidence, that the invoice was placed on the system incorrectly, and that it was not put on the system at all, that he checked the VAT return once Mr Ransom enquired into it and discovered the error, and that he did not check the return further and concentrated only on the transaction Mr Ransom enquired into. He also agreed that he was looking carefully at the cash balances of PD Properties and yet maintained that he did not notice that the balance was £370,000 (around 300%) more than it should be.
87. We find it implausible that Mr Davis forgot the nature of the transaction in regard to VAT in a matter of 3 months, when the transaction was of fundamental significance to the company.
88. We also find it implausible that Mr Davis would be so casual about the cashflow of the company, whilst simultaneously very anxious about the cashflow of his other companies, that he would overlook an extra £370,000 in the bank account.
89. We find the fact that PD Properties had cash in the bank account sufficient to pay the VAT at the relevant time does not detract from the fact that the cash flow in other of Mr Davis's companies was very tight, and therefore does not mean there was no rational reason for the deliberate submission of an incorrect return.
90. We disagree that the fact that PD Properties could have submitted a correct return and simply not paid the VAT, should it have wished to lend the money elsewhere, points to the error being non-deliberate.
91. We bear in mind that the transaction itself was extremely simple, and that the invoice itself showed that the VAT was due. The error therefore consists of leaving off VAT properly paid to the company from the VAT return. This differs from a number of the cases shown to us, where the error was more nuanced in a variety of ways.
92. We find the following facts:
93. Mr Davis was under stress due to the cash position of his various companies.
94. Mr Davis was aware that VAT was due on the sale of the property.
95. Mr Davis was aware that the cash balance of PD Properties was higher than it should be and did not investigate this at all.
96. Mr Davis did not investigate this as he knew that the VAT return had been submitted incorrectly.
97. We consider that had the error been careless, the significant extra cash in the company would have triggered an investigation leading to the discovery of the error and the rectification.
98. We conclude that this incorrect submission was deliberate. We base this on the size and nature of the transaction meaning it would be impossible to forget, particularly given the tight cashflow situation of other of Mr Davis's companies. We also conclude that the different numbering of the invoice, together with the omission from the system entirely, and the lack of investigation by Mr Davis at any point before a direct question was asked of him

around the sale of the warehouse, point to the fact that he knew of the incorrect submission and that it was deliberate.

DECISION

99. We find that HMRC has proved, under a balance of probabilities, that the error in the submitted VAT return was deliberate. The penalty is therefore confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

100. 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: 10 OCTOBER 2020