



TC01869

Appeal number: TC/2010/06005

VAT – dishonest evasion penalty – recovery from company officer – dishonest evasion of company admitted – whether conduct giving rise to penalty attributable to Appellant’s dishonesty – held yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAMES EDWARD ROXBURGH

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KEVIN POOLE
GARETH JONES MBE**

Sitting in public at 45 Bedford Square London WC1 on 20 and 21 February 2012

The Appellant appeared in person

Robert Wastell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is concerned with whether HMRC should be permitted to recover
5 from the appellant a dishonest evasion penalty imposed by them on 2Go2 Limited
("2Go2"), a company of which he was at all material times a director.

2. 2Go2 is in liquidation. It has not appealed against the imposition of the
dishonest evasion penalty on it. The appellant admits that 2Go2 was guilty of
dishonest evasion. However he disputes that the conduct that gave rise to the penalty
10 was, to any extent, attributable to his dishonesty.

3. He therefore appeals against HMRC's decision that the conduct of 2Go2
which gave rise to the penalty was attributable to his dishonesty. If that appeal does
not succeed, he appeals against HMRC's decision to recover 100% of the penalty
from him.

4. The penalty was imposed on 2Go2 under section 60 Value Added Tax Act
15 1994 ("VATA 94"), and HMRC seek to recover it from the appellant under section 61
VATA 94. The appeal is brought under section 61(5) VATA 94. These provisions
have all been repealed, but are still in force in relation to the VAT accounting periods
to which this appeal applies.

5. There were also two matters to be resolved as preliminary issues. First,
20 HMRC claimed that the appeal had been made out of time without good reason and
should not be entertained by the Tribunal. Second, the appellant sought to have
evidence of the VAT dealings of some of his other businesses excluded from the
evidence before the Tribunal.

25 **First preliminary issue – application to appeal out of time.**

6. HMRC submitted first that the Tribunal should not entertain this appeal as it
had been made out of time. This submission was dealt with as a preliminary issue at
the hearing.

7. The dishonest evasion of 2Go2 which formed the basis of the penalty occurred
30 during its VAT accounting periods 06/06 to 05/08 (covering the time period from 1
April 2006 to 31 May 2008).

8. HMRC served a notice dated 6 March 2009 on the appellant, informing him of
their decision to recover from him the full amount of the penalty which they
considered 2Go2 to be liable for under section 60 VATA 94.

9. By letter dated 1 April 2009, the appellant's advisers notified HMRC of their
35 client's wish to appeal the recovery of the penalty from him. Their letter (which was
received by HMRC on 6 April 2009) included the following text:

“The contents of your letter 6th March are duly noted, please accept this letter as an appeal against your Civil Penalty notice both in connection with the amount of the penalty and the personal attribution under section 60 VAT Act 1994.”

5 10. HMRC replied to the advisers’ letter with a letter dated 23 April 2009. In addition to responding to various other queries that had been raised in the advisers’ letter dated 1 April, HMRC’s letter concluded with the following text:

10 “As also outlined in the letter dated 6 March 2009, if you wish to appeal the decision you need to request a reconsideration by the VAT Appeals & Reconsiderations Team at:

[Address given]

asking for the matter to be reconsidered and where the evidence to support your request will be examined.

15 You also have the right to appeal to an independent Value Added Tax Tribunal. The procedure and time limits for making an appeal are set out in Notice 700, Section 28, or in the Explanatory Leaflet issued by the President of the Tribunals obtained from our National Advice Help Line on 0845 010 9000.”

20 11. HMRC heard nothing further until a letter dated 17 June 2010 from the appellant was received by them, which said the following:

“Dear Sir or Madam,

I would like to appeal

25 I write in response to your letters reference the civil penalty charge, as stated in your letter a penalty charge can be placed if a director has been dishonest. I would like to appeal this Notification of the Civil Penalty, and I would like to know how I go about appealing it.

I have been answering questions on an investigation since 2009 till May 2010. Nearly all the question in the investigation was about VAT of 2Go2 ltd.”

30 12. HMRC replied to this letter by a letter dated 24 June 2010. They referred to the fact that there was a legal 30 day time limit from the original decision letter within which a request for a review should be sent to HMRC or an appeal should be lodged with the independent tribunal. HMRC said they did not consider the appellant had a reasonable excuse for failing to comply with this time limit and they were not therefore prepared to carry out a review of their decision. They said that the appellant could apply to this Tribunal to ask it to accept a late appeal.

40 13. The appellant’s notice of appeal was received at the Tribunal on 20 July 2010. It included no reasons as to why the appeal was out of time and the Tribunal therefore wrote to the appellant on 23 July 2010 informing him that he must supply such reasons within 21 days or the appeal file would be closed. The appellant requested extra time to respond due to his accountant’s absence on holiday and finally wrote in by letter dated 23 August 2010 giving reasons, which broadly broke down as follows:

(1) He had been answering questions (mostly about VAT) on 2Go2's tax affairs since 2009.

5 (2) There had also been a loan to 2Go2 from Lloyds, secured on his house, for £118,000. His requests for reduced payment instalments had been rejected by the bank.

(3) He could not afford to pay for professional advice and the Citizen's Advice Bureau would not help him because it was a business debt. This had slowed everything down.

10 (4) He had been looking for full time work as he only had part time work and was looking after his children.

(5) He had needed to speak to his old accountant as he thought he might have contacted the Tribunal on his behalf.

14. Pursuant to paragraph 4 of schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeal Order 2009 (SI 2009/56) the provisions of "any other enactments that are applicable to the decision" as they applied before 1 April 15 2009 are expressed to apply to this appeal. Mr Wastell submitted that whether the old VAT Tribunal Rules 1986 or the new Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 applied, the result was the same, namely that the Tribunal has a discretion as to whether or not to entertain the appeal outside the 30 day time limit for 20 its submission.

15. Mr Wastell pointed out that there had been a gap of nearly 14 months between HMRC's letter dated 23 April 2009 and the appellant's letter to them dated 17 June 2010 in which he said he wanted to appeal. He asked us to find that there was no good reason for the delay. He referred us to a number of authorities, including 25 *Ogedegbe v HMRC* [2009] UKFTT 364 (TC) and *R (on behalf of Cook) v HMRC* [2009] EWHC 590 (Admin), the essence of which was that extensions of statutory time limits should be an "exceptional" matter. He accepted that the Tribunal had a broad power to permit appeals to proceed out of time (whether under the 2009 Tribunal Procedure Rules or the 1986 VAT Tribunal Rules), but submitted that this 30 power should be exercised sparingly in general, and not at all in the present case. He referred particularly to the non-exhaustive list of factors referred to by Lord Drummond Young in *Commissioners of Inland Revenue for Judicial Review of a Decision of the General Commissioners of Income Tax (Hugh Love)* [2005] CSOH 135, cited with approval by Dyson LJ in *Cook*, upon which he had the following 35 comments:

(1) *Reasonable excuse for not observing the time limit.* Mr Wastell submitted that the appellant had no real excuse at all. The matters set out in his letter could not be regarded as giving rise to any sort of reasonable excuse for the lengthy delay.

40 (2) *Reasonable expedition following excuse ceasing to operate.* Given his submissions on the excuse itself, this aspect was not relevant.

5 (3) *Prejudice*. It was undoubtedly true that the appellant would suffer significant prejudice if his appeal was not permitted to appeal. But this was the situation in all applications to appeal out of time. There was nothing special about the appellant's situation and HMRC on the other hand were having to devote large resources to this case, with the relevant facts now being up to six years in the past. He also submitted that the prima facie strength of the appeal should be considered under this heading and he submitted that the appeal had little merit in any event.

10 (4) *Public interest*. There were three subsidiary points mentioned by Lord Drummond Young under this heading. First, it was desirable that matters should be *brought to a conclusion within a reasonable time* without the possibility of being reopened; here, Mr Wastell again pointed to the long time that had elapsed since many of the relevant events occurred. Second, the possible *effect of these proceedings on other litigation* already concluded should be considered; there were no particular submissions in relation to this point. Third, there should be a general *respect for policy on time limits* laid down by Parliament; the appellant in this case had shown a complete disregard for the time limits and that should weigh against him.

20 (5) *Quality and decay of evidence*. Where relevant events took place a long time ago and memories are becoming unreliable, or pieces of evidence have disappeared, that should weigh against allowing a late appeal. In the present case, the majority of HMRC's evidence was in documentary form and difficulties with remembering old events were more likely to be a problem for the appellant.

25 16. The appellant pointed to the fact that his advisers had expressed their wish to appeal in the very first letter following the issue of the HMRC decision of 6 March 2009. He also pointed out that there had been a hearing for directions before the Tribunal in December 2010 when a point about the extent of the appeal had been clarified, but HMRC had not even raised the question of whether the appeal should be
30 entertained as being out of time.

17. Having considered the submissions of both parties, we decided that this was one of those exceptional cases where permission for the appeal to be brought notwithstanding the lengthy delay should be given. In reaching that view, we were particularly influenced by the following facts:

35 (1) The appellant's advisers had specifically stated in their first letter dated 6 April 2009 that it was the appellant's wish to appeal the decision.

40 (2) The time limit for appealing had been reached at about the same time as the whole system of appeals and reviews was being fundamentally changed – and indeed even HMRC had clearly not taken on the board the new arrangements, as seen by the reference in their letter dated 23 April 2009 to the VAT Tribunal (whose name had been changed some time before to the VAT and Duties Tribunal, and which had been abolished on 1 April 2009).

(3) There was no evidence that HMRC had done anything in terms of enforcement of the March 2009 decision until the summer of 2010; it was just possible that the appellant might have considered this lack of enforcement action meant that his appeal was under consideration in some way.

5 (4) HMRC had not even mentioned the issue of the late appeal at the December 2010 case management hearing, suggesting they had dropped the matter (and possibly thereby barring themselves from bringing it up again at a future stage).

10 18. Having decided that permission ought to be given for the appeal to proceed, in spite of the fact that it had been notified to the Tribunal out of time, we then went on to consider the application from the appellant for the exclusion of certain evidence.

Second preliminary issue – application to exclude evidence

15 19. The appellant asked that all the evidence relating to the VAT defaults of his other businesses should be excluded in this case. His argument was that he was to be judged by reference to whether he had been dishonest in relation to the VAT affairs of 2Go2, and evidence of the shortcomings of VAT compliance by businesses with which he had previously been involved would be unfairly prejudicial.

20 20. Mr Wastell on the other hand argued that in a case where dishonesty was in issue, it was vital to have a full picture of the appellant's record so that the events involving 2Go2 could be put in their proper context. He also submitted that the other evidence was vital in demonstrating what knowledge the appellant had about the workings of the VAT system, which was a key factor in any attempt to demonstrate that he had been dishonest.

25 21. We decided that the evidence as to the VAT affairs of the other businesses which the appellant had been involved in should be admitted. We emphasised however that when considering such evidence, we would distinguish carefully in our minds between those parts of it that we considered were directly relevant to the issues we had to decide in this appeal and any peripheral evidence which should be disregarded as being simply prejudicial, without any probative value in relation to the
30 issues before us in this appeal.

The substantive appeal – the facts

Introduction

35 22. We had written witness statements from the appellant and from officers Veena Miah, Roger Reed and Benjamin Martin-Dye of HMRC. All four of them also gave oral evidence.

23. The essence of the appellant's case was that he had little or no personal involvement in the VAT affairs of 2Go2 (or the previous businesses in which he had been involved). He said that the VAT affairs were all looked after by his wife Zoe Roxburgh, with various help from outside advisers and bookkeepers. He accepted

that there had been dishonesty in the conduct of 2Go2's VAT affairs, but he said that he personally was not involved.

The appellant's previous businesses

24. There were at least three known businesses in which the appellant had been involved since the mid-1990s. The appellant did not significantly dispute any of the evidence given to us by officer Miah in relation to their VAT affairs.

25. The three businesses in question were:

(1) Parcel Direct Limited ("PD1"), which was registered for VAT with effect from 1 December 1996 and deregistered on 8 January 1999, going into voluntary liquidation with a debt due to HMRC of some £28,000. The appellant was the sole director, his wife Zoe Roxburgh being the company secretary. Its business was described as "courier services". The appellant told us it was a member of the WPS overnight delivery service. The business model was that WPS provided the central "hub" for a nationwide delivery service, with local operators providing the local services across the country. As one such local operator, PD1 would collect parcels for delivery from customers in its area and pass them to WPS for nationwide distribution; it would then deliver any parcels in its area which came to it through the WPS hub. He said that WPS had "gone bust" in 1999 and that destroyed PD1's business, which was why it was unable to pay the £28,000 VAT debt. The appellant's estimate of the turnover of PD1 was around £60,000 to £70,000 per year, and he was not able to explain why its VAT debt on insolvency should have been so high – Zoe had dealt with its VAT. The appellant did say that he was aware of the obligation to prepare and submit VAT returns and pay the VAT to HMRC, but he left all that to his wife, as his role was "operations".

(2) PD Limited ("PD2"), which was registered for VAT with effect from 1 September 1998 and deregistered on 25 June 2003, having gone into voluntary liquidation owing HMRC £30,305.56 on 11 April 2003. Its business was described in its VAT registration application (which was signed by the appellant) as "vehicle rental and contract courier services". The intention to hire vehicles out to self-employed drivers never came to fruition, so the business was essentially delivery services. The appellant said that at its height, the turnover of PD2 was about £500,000 per year, it yielded about £20,000 net profit and he and his wife took salaries of about £50,000 out of it. During 2002, however, it lost half of its business "overnight" when the CPUs it was transporting to Europe were found to be involved in carousel fraud by a trader or traders who were distantly connected with PD2's customers. From HMRC records, however, it is apparent that PD2 was consistently late with its VAT returns and/or payments – by VAT period 05/02 (ie the three months ended 31 May 2002) it was incurring 15% default surcharges and the return for that period was the last VAT return it made. From that time on, it simply ignored all centrally issued VAT assessments and surcharges and paid just

5 £100 on account of its 05/02 VAT liability (on 6 September 2002), leaving the remaining £4,936.46 of its liability for that quarter unpaid. It eventually went into liquidation in April 2003 without rendering any further VAT returns or payments. The appellant was the director of PD2 and his wife Zoe was its company secretary. The appellant said he had only found out about its VAT debt when it became insolvent – up to that time, it had been dealt with by Zoe and she had simply not spoken to him about it.

10 (3) PD(UK) Limited (“PD3”), which was registered for VAT with effect from 12 December 2002. The VAT registration application form (which was signed by the appellant) described its intended business as “courier services in the UK and EC”. The appellant said that it was set up to run a newspaper delivery contract in the Home Counties which he had obtained. It was not a very profitable contract (he said it barely generated a profit of £20 per week, though it was not clear whether this was a total figure, or a figure “per van” involved).
15 PD2 had 8 or 9 leased vans which were underemployed since the loss of a large part of its business and he set PD3 up as the company to run the contract. It enabled PD2 to meet the lease payments on the vans and it made some contribution to overall turnover. We found his account of the reasons for setting up PD3 separately in this way extremely unconvincing. The appellant was the director of PD3 and his wife Zoe was the company secretary. It made
20 no VAT returns over 6 consecutive periods from 05/04 to 08/05 before HMRC officer Ranjeev Puri visited on 24 November 2005. In the meantime, HMRC had been raising centrally issued assessments in the absence of VAT returns. The size of those assessments ranged from £345 to £486. Officer Puri visited
25 two more times, on 2 February and 28 March 2006. The appellant said he did not remember being at the three meetings, but we accept the evidence of Officer Puri’s notes that he was there each time. When the returns were eventually brought up to date (to include all returns up to period 11/05) on 28
30 March 2006 (all returns being signed by Mrs Zoe Roxburgh), it was established that PD3 had been consistently underpaying its true VAT liability by simply paying the central assessments. PD3 ceased trading and deregistered for VAT on 16 May 2006 with an outstanding debt to HMRC of £8,669.99, having submitted a further small return for its period 02/06 but without ever submitting a return for its final period up to cessation.

35 26. In relation to each of these businesses, the appellant claimed to have been unaware at the time that VAT problems were building up. He said that he relied on his wife to deal with “the office” side of things, including VAT, and she had let him down. She did not attend to give evidence to confirm this account.

40 27. The appellant gave very unclear evidence as to what he said or might have said to his wife when the VAT problems on each of PD1, PD2 and PD3 came to light. In relation to PD3, the visits from officer Puri coincided with the time of birth of the appellant’s child (in early December 2005). At the last meeting with officer Puri in March 2006, the appellant told him that there were “procedures in place” to ensure that VAT was dealt with properly in future, but in cross examination the appellant
45 said that he had simply asked his wife whether she wanted any help.

History of 2Go2

28. 2Go2 was incorporated by the appellant in February 2003. The appellant said he had done so because he “thought it was a good name”. It did not start to trade however until March 2005. In its first year, the turnover was £164,000. Its business
5 was removals, predominantly for private individuals moving within the UK, but also with some commercial work and some international removals to places such as Majorca and Luxembourg. VAT was charged on all supplies from the time it was registered for VAT.

29. 2Go2 applied for VAT registration on 30 September 2005, stating in its
10 application form that it had exceeded the registration threshold on 31 August 2005. The registration application form was signed by the appellant.

30. The appellant claimed to have “set 2Go2 up” with adequate bookkeeping capacity straight away, employing an individual he called “Rosie” in October 2005. No evidence was given to the Tribunal by this Rosie, though there was some evidence
15 that a person by that name was employed, as the name is mentioned in officer Miah’s handwritten notes of a later meeting (see [41]). The appellant’s evidence in relation to her was however somewhat vague. If Rosie had been employed specifically to deal with VAT compliance, she clearly did not do so and it would seem implausible that:

(1) she was allowed to remain in employment after the VAT failures in PD3
20 came to light as a result of the visits of officer Puri in November 2005 to March 2006 (the appellant gave evidence that she was employed until the end of 2006 or early 2007); and

(2) she did not feature at all, nor was she mentioned in the three visits made by officer Puri to PD3 in November 2005 to March 2006.

25 31. We consider it more likely (and find as a fact) that if Rosie existed at all, she had nothing to do with VAT compliance and simply performed general book keeping duties.

32. This begs the question as to why, when Mrs Roxburgh had proved herself
30 incompetent on VAT matters (according to the appellant’s evidence) on three successive occasions (the last coming to light immediately after 2Go2 had applied for VAT registration), he took no effective steps to ensure that VAT was dealt with properly by 2Go2.

33. In fact, 2Go2 only ever submitted two VAT returns, both late. The first return
35 (for 2Go2’s first period 12/05) was received by HMRC on 4 May 2006 after extensive chasing (including a telephone call from the appellant to HMRC on 23 March 2006 saying they were double checking the return before submitting it). The second (for period 03/06) was received by HMRC (after telephone chasing from them) on 27 December 2006. Both returns were signed by Mrs Roxburgh.

34. No subsequent returns were submitted by 2Go2 for any period. It received
40 central assessments from HMRC (computer generated estimated assessments of its

liability, based on the first two returns) and simply paid them, together with whatever default surcharges were imposed by HMRC for late payment and/or delivery of the returns. This state of affairs carried on until 2Go2 went into liquidation in May 2008.

5 35. Apart from some chasing telephone calls, HMRC did not follow up the non-receipt of VAT returns until March 2007, when officer Martin-Dye was requested to make an assurance visit to check 2Go2's books and records and generally progress matters. That visit took place on 15 March 2007, when officer Martin-Dye met Mrs Zoe Roxburgh. He could not say for sure whether he had also met the appellant. The appellant denied he had been there, though he said he knew of the visit. Mrs
10 Roxburgh told officer Martin-Dye that 2Go2's turnover for the year ended 28 February 2006 was £164,189 and officer Martin-Dye became concerned that the company might have registered late for VAT. He was unable to make any substantial progress at that visit, however, because he was told there were no books and records available for him to examine. He therefore left and for some reason the intended re-
15 booking of a follow up visit never took place.

36. The appellant said he had been aware of this visit taking place, and when the officer went away with nothing further happening, he assumed matters had passed off successfully. It was however shortly after this meeting, on 20 March 2007, that 2Go2 instructed a firm of accountants to provide book keeping and accounting services
20 (including support on VAT returns, which were known to be significantly in arrears). The instructions were from the appellant, though Mrs Roxburgh was also involved. The accountants were unable to complete the outstanding VAT returns due to the failure of 2Go2 to answer their questions. The records of 2Go2 were incomplete and "in a very poor state". The accountants ceased to act in November 2007 when their
25 fees were not paid, though in practical terms it appears their involvement ended in July 2007. A firm of book-keepers were appointed by 2Go2 in July 2007, but they had no involvement with VAT.

37. Whilst chasing up the other missing returns over the following few months, HMRC received telephone calls from the appellant (not Mrs Roxburgh) on a number
30 of occasions:

- (1) On 13 April 2007, he rang up with a promise of payment of £1000, saying he was also paying outstanding NIC to HMRC (the appellant claimed he was simply passing this message to HMRC on behalf of his wife);
- 35 (2) On a date between 20 and 27 June 2007, he rang up with another promise of payment;
- (3) On 3 August 2007, he said he was hoping to get the outstanding returns submitted by the later part of the following week.

38. It is clear, therefore, that (in spite of his evidence on oath that he only became aware of the problems in August or September of 2007) and we find as a fact that the
40 appellant was well aware there were continuing VAT problems no later than officer

Martin-Dye's visit. 2Go2 simply carried on as before, without submitting any VAT returns and paying central assessments and the default surcharges that were imposed.

39. From records eventually obtained from 2Go2's liquidator, the following picture eventually emerged of the amounts of VAT centrally assessed, VAT actually due and turnover in each of the relevant VAT accounting periods:

VAT period	VAT central assessment	Correct VAT	VAT Shortfall	Turnover ex VAT
06/06	£400	£4,342	£3,942	£60,510
09/06	£515	£14,105	£13,590	£122,304
11/06	£423	£2,279	£1,856	£44,188
02/07	£704	£5,540	£4,836	£74,069
05/07	£769	£10,535	£9,766	£99,617
08/07	£922	£13,223	£12,301	£119,780
11/07	£942	£6,649	£5,707	£79,661
02/08	-	£2,071	£2,071	£73,752
05/08	-	£4,572	£4,572	£38,872
Totals	£4,675	£63,316	£58,641	£712,753

40. The lack of VAT returns from 2Go2 was unfortunately not followed up by HMRC until the summer of 2008. HMRC's system had highlighted the lack of returns from 2Go2 and officer Miah was requested to follow it up. She called Mrs Roxburgh to book a routine visit and was told that due to staffing problems she would have to get someone to call back the next day. No such call was received, so officer Miah attended the supposed principal place of business with another officer, to be told that 2Go2 only rented a parking space there. Officer Miah tracked down a business address for 2Go2 through the internet and visited it on 16 June 2008 with officer Reed. The security guard would not allow them access, but told them that 2Go2 had gone into liquidation two weeks beforehand.

41. The officers therefore decided to visit the appellant's home address in Virginia Water. They did so, to find Mrs Roxburgh there. She seemed quite panicked and contacted the appellant by telephone and asked that they speak to him. The appellant arrived shortly after. He confirmed that 2Go2 had been put into liquidation and gave them the details of the liquidator. Mr Roxburgh referred the officers to the liquidator

to answer questions about why 2Go2 had not submitted any VAT returns for such a long time.

42. Records were subsequently obtained from the liquidator which demonstrated quite clearly that 2Go2 had been charging its customers VAT and not accounting for the VAT to HMRC. As can be seen from the table set out above, the difference between the amounts comprised in the central assessments for the periods from 06/06 up to the liquidation in May 2008 and the amounts properly payable by way of VAT was £58,641. No good reason has been given by the appellant as to why the full amount of VAT was not paid over to HMRC – he did not assert that there had been any particular problems with bad debts. He accepted that 2Go2 had simply diverted the VAT for use in its business, including payments out to the appellant.

43. There was evidence before us of payments from the business account of 2Go2 to pay for air fares, holiday cottage hire and other obviously non-business expenditure. The appellant did not dispute this, he simply asserted that these payments were by way of benefits in kind or repayment of his loan account with the company.

44. HMRC invited the appellant to attend a meeting to explain the circumstances of 2Go2's default to assist them in determining whether a civil evasion penalty was appropriate. They sent him a copy of HMRC's Public Notice 160, which explained the procedure, and the fact that mitigation of any penalties was potentially available if co-operation and disclosure were given. The appellant declined to attend a meeting unless HMRC provided an agenda in advance of the points intended to be covered. In accordance with their usual procedure, they declined to do so and the appellant therefore refused to attend. HMRC had to carry out their own investigation without assistance from the appellant and therefore decided that no mitigation would be offered in respect of any basic penalty for which 2Go2 was liable.

45. Following further investigation, HMRC eventually reached the view in the spring of 2009 that 2Go2 had been guilty of dishonest evasion of VAT, was liable to a penalty under section 60 VATA 94 and that the conduct giving rise to that penalty was in whole or in part attributable to the appellant's dishonesty. They therefore served a notice on him dated 9 March 2009 which notified him that they were proposing to recover the penalty in full from him.

The law

46. Sections 60 and 61 VATA 94 provide, so far as material, as follows:

35 **“60. VAT evasion: conduct involving dishonesty.**

(1) In any case where –

(a) for the purpose of avoiding VAT, a person does any act or omits to take any action, and

40 (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

...

5 (6) Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence (whether under this Act or otherwise), that conduct shall not also give rise to liability to a penalty under this section.

10 (7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.”

“61. VAT evasion: liability of director etc.

(1) Where it appears to the Commissioners –

15 (a) that a body corporate is liable to a penalty under section 60, and

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (“a named officer”),

20 the Commissioners may serve a notice under this section on the body corporate and on the named officer.

(2) A notice under this section shall state –

(a) the amount of the penalty referred to in subsection (1)(a) above (“the basic penalty”), and

25 (b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

30 (3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

35 (4) Where a notice is served under this section –

(a) the amount which, under section 76, may be assessed as the amount due by way of penalty from the body corporate shall be only so much (if any) of the basic penalty as is not assessed on and notified to a named officer by virtue of subsection (3) above; and

40 (b) the body corporate shall be treated as discharged from liability for so much of the basic penalty as is so assessed and notified.

(5) No appeal shall lie against a notice under this section as such but

5 (a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment; and

10 (b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or in part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

15 (6) In this section a "managing officer", in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director, and where the affairs of a body corporate are managed by its members, this section shall apply in relation to the conduct of a member in connection with his functions of management as if he were
20 a director of the body corporate."

47. Although these sections were repealed by the Finance Act 2007 they were subject to transitional provisions in articles 2 and 3 of the Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order (SI 2008/568) and still apply
25 in relation to dishonest conduct relating to returns due to be submitted prior to 1 April 2009.

The appellant's submissions

48. No appeal has been made against the amount of the "basic penalty" in this case (as referred to in section 60 VATA 94). The appellant did not dispute the
30 amount of tax evaded by 2Go2 or that it had been guilty of evading that tax dishonestly. He did not argue that any mitigation of the basic penalty was appropriate under section 70 VATA 94. He said that he was simply not aware of the VAT defaults until August or September 2007, whereafter he took what steps he could to correct the position. He obtained a further bank loan (secured on his private house) to
35 inject the necessary funds into 2Go2 to settle its liabilities. His sole argument was that the company's dishonest evasion was not attributable to his own dishonesty to any extent, even though he was the sole director throughout. The problems had all arisen because of his wife's incompetence. Therefore he should not be personally liable for the penalty, or he should only be liable for some lesser proportion of it than
40 the whole.

HMRC's submissions

49. First, after accepting that the burden of proof lay on HMRC, Mr Wastell submitted that the standard of proof was a simple "balance of probabilities" test, as explained by Lord Hoffman in *In re B* [2008] UKHL 35; there was no need, he said,

for any higher standard to be imposed simply because an allegation of dishonesty is involved. We accept this submission.

50. Mr Wastell submitted that the appellant's evidence as to his total personal non-involvement with 2Go2's VAT affairs was completely incredible. It flew in the face of the documentary evidence. He invited us to reject the appellant's evidence completely and find that he was well aware of the company's dishonest evasion of VAT at the time the VAT collected from customers was simply withheld from HMRC.

51. Mr Wastell referred us to the case of *Zen Internet Limited v HMCE* [2004] UKVAT 17793. At [16] in that case, the meaning of "dishonesty" was considered, and the test set down by Lord Lane CJ in *R v Ghosh* [1982] 1 QB 1053 at 1064 was cited with approval:

"whether according to the ordinary standards of reasonable and honest people what was done was dishonest."

52. He also referred us to other cases which make it clear that "evasion" does not necessarily imply intended permanent withholding of the VAT that is due, and can include the action of simply paying centrally issued assessments raised in the absence of returns. We accept this submission. The cases in question were *R v Dealy* [1995] 1WLR 658, *Johnson v HMCE* [1998] UKVAT 15868, *Storey v HMCE* [2002] UKVAT 17793 and *Conlon v HMRC* [2008] UKVAT 20877. We do not consider it necessary or appropriate to set out long extracts from those cases in this decision in support of Mr Wastell's submissions.

Conclusion

53. We reject the appellant's evidence that he had no knowledge of the intentional withholding of VAT returns and payments due to HMRC. We consider his evidence both flies in the face of the documentary evidence before us and is also inherently implausible. Having seen the appellant give evidence, we have little doubt that he either instructed his wife to withhold the returns and payments or he was well aware that she was doing so, acquiesced in that conduct and deliberately did nothing to put matters right.

54. We find that his conduct in doing so was, "according to the ordinary standards of reasonable and honest people", dishonest.

55. We find that (as was not disputed by the appellant) 2Go2 was liable to a dishonest evasion penalty under section 60 of £58,641.

56. We find that the conduct giving rise to 2Go2's liability to such a penalty was attributable wholly or partly to the appellant's dishonest conduct, and that the appellant was a director of 2Go2 at all material times.

57. We therefore find that HMRC were entitled, under section 61 VATA 94, to serve a notice on the appellant stating that they proposed to recover from the appellant

the whole of the penalty in question. We find that they duly served such notice and assessed and notified the penalty to the appellant in their letter dated 6 March 2009.

58. We consider that in the circumstances it is entirely appropriate for the whole of the basic penalty to be recoverable from the appellant.

5 59. We therefore dismiss the appeal.

60. 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.

10

15

KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 6 March 2012