[2012] UKFTT 76 (TC)

TC01772

Appeal number TC/2011/02656

Penalty for inaccurate VAT return – deliberate inaccuracy in the return – inaccuracy attributable to an officer of the company – Schedule 24 Finance Act 2007 – quantum of penalty confirmed – appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

(1) ASTORIA PROPERTIES LIMITED
(2) JASON LEE CHURCHILL

Appellants

- and -

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

TRIBUNAL: JONATHAN CANNAN (TRIBUNAL JUDGE)
DEREK ROBERTSON (MEMBER)

Sitting in public at Manchester on 10 January 2012

The Appellants did not appear

Mr W Conroy of HM Revenue and Customs for the Respondents

DECISION

Background

1. When this appeal was called on for hearing there was no appearance on behalf of the Appellants. The Notice of Appeal identified P & N Accountants as the Appellants' representative. Enquiries were made of that firm and the Tribunal Office was told that Mr Churchill, the Second Appellant had told them that he would be attending the hearing himself.

2. The Tribunal was satisfied that the Appellants had been notified of the hearing and that it was in the interests of justice to proceed with the hearing pursuant to rule 33 of the Tribunal Rules. As at the date of the release of this decision the Appellant has not contacted the Tribunal to explain his absence.

3. This appeal concerns the imposition of penalties on both the First Appellant and the Second Appellant pursuant to Schedule 24 Finance Act 2007. The Respondents contend that the First Appellant was liable to a penalty because it lodged a VAT return for period 07/09 which understated its liability to output tax in the sum of £76,500 and that it did so deliberately.

4. The Respondents further contend that the deliberate inaccuracy in that VAT return was attributable to the Second Appellant who was a director of the First Appellant.

5. In each case, the penalty which is the subject of the appeal is in the sum of £36,146. Notices of penalty assessments were issued on 24 March 2011 and 28 March 2011 respectively.

6. Mr Conroy, for the Respondents, relied upon a witness statement of Penelope Kay and its exhibits from which we make the findings of fact described below. In making those findings of fact we also had regard to the Appellants' Notice of Appeal and the documents annexed to it.

Statutory Framework

7. Schedule 24 Finance Act 2007 makes provision for HMRC to impose penalties on taxpayers who make errors in certain documents sent to HMRC, including VAT returns. A penalty is payable where certain conditions are satisfied. Firstly the document must contain an inaccuracy which leads, for present purposes, to an understatement of a liability to tax or an inflated claim to repayment of tax. Secondly the inaccuracy must have been careless or deliberate on the part of the taxpayer.

8. Paragraph 19 Schedule 24 Finance Act 2007 provides that where a penalty is payable by a company for a deliberate inaccuracy which is attributable to an officer of

the company, the officer is liable to pay such portion of the penalty as HMRC may specify by written notice to the officer.

9. The amount of the penalty payable for deliberate inaccuracy is 70% of the 'potential lost revenue'. Provision is made for reductions in the level of penalty following a prompted or unprompted disclosure to reflect the quality of the disclosure. In the case of a prompted disclosure of a deliberate inaccuracy the minimum penalty remains 35% of the potential lost revenue. In the case of an unprompted disclosure of a deliberate inaccuracy the minimum penalty remains 20% of the potential lost revenue. Apart from a reduction for disclosure, HMRC may also give a 'special reduction' where there are 'special circumstances'.

Findings of Fact

10. Based on the evidence of Penelope Kay and the documents produced by the Appellants we make the following findings of fact.

11. The First Appellant was registered for VAT. In June 2009 it sold a property to an associated company, Bridge Properties (Yorkshire) Limited ("Bridge"). On 11 June 2009 it raised an invoice to Bridge in the sum of £510,000 together with VAT at 15% amounting to £76,500. The Second Appellant was the Company Secretary of Bridge.

12. In the ordinary course the First Appellant should have declared the output on this transaction in its 07/09 VAT return due by the end of August 2009. Bridge would be entitled to reclaim the input tax in its 06/09 VAT Return, due by the end of July 2009.

13. Mr Martin Wilmott was a partner in Hawsons who acted as the First Appellant's accountants. On 3 August 2009 he sent an email to solicitors who were advising Bridge in relation to a proposed Company Voluntary Arrangement. The email was copied to the Second Appellant. It records that Mr Tom Boyce, the bookkeeper for both companies, had completed the 06/09 VAT return for Bridge, but he had not claimed the input tax on the property transaction because he had been unaware of it until the last few days. Mr Wilmott had suggested to Mr Boyce that he would help him with a voluntary disclosure otherwise Bridge would have to wait a further 3 months before receiving the associated refund.

14. The email also stated in terms:

> "*Of course Jason [the Second Appellant] has to consider the position in Astoria [the First Appellant] as they in turn will need to declare it on their next return.*"

15. The following day there was a meeting between Hawsons and the Second Appellant. There is no evidence before us as to what was discussed at that meeting. On the 5 August, however, Mr Wilmott emailed the Second Appellant at 16.28 as follows:

"*I have had a word with one of my tax partners about the possibility of delaying the reporting of the VAT on the land sale and purchase. Whilst I understand your point that the transaction could be voided factually it has completed on 11th June and the completion date is the tax point.*

I understand that Tom was not aware of the VAT on this transaction and so has not included it on Astoria's or Bridges VAT returns.

I am therefore going to assist Tom in making the relevant voluntary declarations and to submit them to HMRC."

16. It appears therefore that the Second Appellant was seeking advice from Hawsons as to the possibility of delaying inclusion of the output tax on the First Appellant's VAT return. The significance of the date of this email is that on the same date the Second Appellant signed the First Appellant's VAT return. It appears that he did so either before he had received the advice he had requested, alternatively ignoring the advice he received in this email. Further, there is no obvious reason why the 07/09 return had to be signed on 5 August 2009. Rather, we would have expected the Second Appellant to await the advice of Hawson's and then complete the VAT return in accordance with that advice. He conspicuously failed to do that. On the balance of probabilities we find that the Second Appellant signed the VAT return on 5 August 2009 knowing that it ought to have included output tax from the land sale of £76,500.

17. The reason why the Second Appellant deliberately lodged an inaccurate VAT return was that the First Appellant was not in a position to pay the resulting VAT liability. The evidence we have seen establishes that both the First Appellant and Bridge were in financial difficulties. A further email from Martin Wilmott on 6 August 2009 records as follows:

"*Also the VAT was not declared by Astoria and that too has to be corrected. The problem in this company is having the cash to pay the resultant liability.*"

18. At the time of the transaction in June 2009 the First Appellant was the subject of a winding up petition by HMRC. The undisputed debt was significantly in excess of £450,000. HMRC was paid from the proceeds of sale of the land. Subsequently, on 5 October 2009 Bridge entered a company voluntary arrangement and on 23 February 2010 the First Appellant entered a company voluntary arrangement.

19. Mr Wilmott certainly offered to do the necessary voluntary disclosures to HMRC in relation to the First Appellant and Bridge in order to regularise the position. We find, however, that the need to correct the First Appellant's return was brought about by the deliberate actions of the Second Appellant in failing to include the output tax on its return.

20. It is not clear to us from the evidence we have seen exactly why the 06/09 VAT return for Bridge failed to claim the associated input tax credit. What is clear is that no voluntary disclosure was made either for the First Appellant or for Bridge.

21. In his Notice of Appeal the Second Appellant states that this was the fault of Hawsons, who failed to make the voluntary disclosures. The evidence we have seen does not satisfy us that Hawson's were in any way culpable. No voluntary disclosures were made. Hawsons have said in correspondence to HMRC that this was because their client never followed up the offer of assistance, did not supply the necessary information to make the disclosures and ultimately were instructed to do no further work because of a dispute over fees.

22. The Second Appellant was clearly aware that no voluntary disclosures had been made because he signed the 09/09 VAT return of Bridge on 2 October 2009. That return included the June 2009 land transaction and sought an input tax credit of £76,500 giving rise to a tax repayment of £82,726. If the Second Appellant genuinely believed that Hawson's had made a voluntary disclosure in relation to Bridge he would have discussed the matter with them at that time before including the input tax on this return. There is no evidence of any such discussions.

23. When HMRC received the Bridge VAT return they opened an enquiry into the repayment. By letter dated 12 October 2009 HMRC requested documentation and explanations in relation to the claim. The Second Appellant replied by letter dated 14 October 2009. He described the land transaction and stated that the First Appellant would be including this amount in its 10/09 VAT return. Again, he would not have said that if he genuinely believed that Hawson's had already made a voluntary disclosure.

24. On 12 November 2009 the Second Appellant wrote to HMRC as follows:

> "*There were some problems relating to the transaction and a form was sent to yourselves when it was picked up by Martin Wilmott that the VAT had been omitted from the return*"

25. There is no explanation from the Second Appellant as to what this form was or what has become of it. It has not been produced in evidence to us. It is not credible that the Second Appellant would have signed Bridge's 09/09 return on 2 October 2009 and indicated his intention to include the output tax on the First Appellant's 10/09 return without requesting sight of the form he claimed had been submitted. We find that the Second Appellant was well aware that no such form had been submitted. At this stage the Second Appellant was doing nothing more than trying to erect a smokescreen to cover the fact that he had deliberately made an inaccurate return.

26. Penelope Kay, a Higher Officer of HMRC, then took over the enquiry and made efforts to obtain relevant documentation. She made separate requests on 1 March 2010, 31 March 2010, 13 April 2010 and 11 June 2010. It was not until a visit in July 2010 that the Second Appellant provided the relevant documents.

27. We can accept, as the Second Appellant contends, that there may have been some doubt as to whether the land transaction might have to be reversed. There appears to have been some confusion over what interest was being transferred. He also indicates that it has been the subject of a criminal investigation not connected with the

appropriate treatment for VAT purposes. Whatever the nature of that investigation we have seen nothing to suggest that the transaction should have been treated as anything other than a taxable supply in June 2009. Indeed, during the course of HMRC's enquiries an assessment was made on the First Appellant on 27 April 2010 for the underlying tax of £76,500. There has been no appeal against that assessment.

28. The Second Appellant makes various criticisms of Hawsons in relation to other dealings he has had with them. We are not satisfied that those criticisms are made out, nor indeed that they are relevant to matters in issue in this appeal.

29. In all the circumstances we consider that the Respondents have satisfied the burden on them of establishing a deliberate inaccuracy in the VAT return of the First Appellant which was attributable to the Second Appellant.

30. We are conscious that in making these findings of fact we have not heard oral evidence from the Second Appellant. In the absence of such evidence we have based our findings on the documents presented to us, and the inferences we consider it appropriate to draw from those documents.

Quantum of the Penalties

31. The penalties were calculated on the basis that the potential lost revenue was £76,500. The standard penalty, subject to reduction for disclosure, was 70% of that sum. HMRC considered that there was a prompted disclosure meaning that the minimum penalty was 35%.

32. We agree on the basis of the facts found above that the disclosure given by the First and Second Appellants was a prompted disclosure.

33. HMRC have imposed a penalty of 47.25% of the potential lost revenue to reflect the quality of the Appellants' disclosure. We see no reason to interfere with that assessment. It has not been suggested that there are any special circumstances and we do not consider there to be any in the circumstances of this case.

Conclusion

34. For the reasons given above we dismiss this appeal.

35. The Appellants or either of them may apply for this decision to be set aside under Rule 38 of the Tribunal Rules. A party wishing to do so must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of this decision to that party.

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.

TRIBUNAL JUDGE
RELEASE DATE: 24 January 2012