[2016] UKFTT 178 (TC)

TC04964

Appeal number: TC/2015/03036

VAT – unauthorised issue of invoice – test for behaviour to be "deliberate" – whether disclosure "unprompted" – whether "special circumstances" – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KINESIS POSITIVE RECRUITMENT LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
ANDREW PERRIN

Sitting in public at Fox Court, Brooke Street, London on 24 February 2016

Peter Torino of Aims Accountants for the Appellant

Mark Ratcliff, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. The appellant company (the "Company") appeals against a penalty imposed under paragraph 2 of Schedule 41 of the Finance Act 2008 ("FA 2008") for the "unauthorised issue of an invoice showing VAT".

Evidence and preliminary matters

2. The Company made its appeal to the Tribunal some four months later than the time limit imposed by s83G of the Value Added Tax Act 1994 ("VATA 1994"). Mr Tom Gibbons, the sole director of the Company, explained that the Company had experienced difficulty in securing reasonably priced representation to enable it to pursue its appeal. We did not regard that as a particularly strong explanation: to make an in-time appeal, the Company just needed to fill in a standard form Notice of Appeal within the applicable time limits and many appellants before this Tribunal do that without any professional assistance. However, since Mr Ratcliff did not object to the Tribunal admitting the appeal late, we exercised our discretion under s83G(6) of VATA 1994 to do so.

3. For the Company we had oral evidence from:

(1) Mr Tom Gibbons; and

(2) Mr Andrew Carter of Medexfactors, a debt factoring business that factors the Company's book debts.

Both Mr Gibbons and Mr Carter had prepared brief witness statements and were cross-examined. We considered them to be honest and reliable witnesses.

4. We also had a witness statement on behalf of the Company from Claire Kelly who provided administration services to the Company. Ms Kelly did not attend the hearing. However, Mr Ratcliff made no objection to the admission of her witness statement as evidence perhaps because her statement largely duplicated evidence that Mr Gibbons and Mr Carter had given. We have therefore admitted Ms Kelly's witness statement as evidence, but have taken into account the fact that she did not attend the hearing to be cross-examined in assessing its weight.

5. For HMRC we had oral evidence from Officer Claire Keenan, the HMRC officer who had made the decision to issue the Company with the penalty in dispute, who had also prepared a witness statement. Officer Keenan was cross-examined by Mr Torino and we considered her to be an honest and reliable witness.

6. HMRC also prepared a bundle of documents. At the hearing, Mr Ratcliff asked for permission to adduce documentary evidence consisting of a small number of documents relating to discussions between Mr Gibbons and HMRC on matters concerning other companies with which he was involved. Mr Torino did not object to this application and, since the documents referred to related to matters within Mr Gibbons's knowledge, we granted HMRC permission to adduce this new evidence.

Facts

7. The facts set out at [8] to [39] were either found by the Tribunal or were not in dispute.

The Company's original registration for VAT and its cancellation

8. The Company was incorporated on 28 February 2008. It was originally called Kinesis Recruitment Limited, but changed its name to Kinesis Positive Recruitment on 26 July 2013. The Company is affiliated with another company (now called Kinesis Recruitment Limited, but previously called Kinesis Positive Recruitment). Therefore, the two companies effectively swapped their names with each other in July 2013. We will deal with any confusion by referring to the affiliated company simply as the "Affiliate".

9. The Company carries on a business of providing medical and other staff to commercial, NHS and local authority clients. At all material times Mr Gibbons was the sole director of the Company and the only person who played a significant part in the running of the Company's business, although Mr Gibbons did obtain administrative and other support from employees.

10. The Company registered for VAT on 18 June 2008. On its VAT registration form, the Company gave an address in Clapham as its business address. It appointed Havencrest Limited (which traded as Brooks City and which we will therefore refer to as "Brooks City") as its agent and gave an address in Fenchurch Street, London as Brooks City's address.

11. On 29 January 2009, Brooks City, acting on behalf of the Company, faxed HMRC a form VAT 7 (which was an application for the Company's VAT registration to be cancelled).

12. On 12 February 2009, HMRC wrote to the Company (at the Company's address in Clapham) to request further information in connection with the application to cancel its VAT registration.

13. On 12 March 2009, HMRC wrote to Brooks City (at the address in Fenchurch Street) to confirm that the Company's VAT registration had been cancelled. That letter included the following paragraph:

> **Remember, now your registration is cancelled**:
>
> - you must <u>not</u> charge VAT, issue tax invoices or show your VAT registration number on any invoices you issue…
> - you must contact the National Advice Service on 0845 010 9000 if at any time in the future you become liable to be registered.

14. HMRC's letter of 12 March 2009 enclosed a questionnaire asking questions relating, inter alia, to whether the Company had stock in hand. That questionnaire was returned and signed by Gary Lee, an employee of Brooks City, who described himself

as "acting secretary" of the Company. Since that questionnaire was returned, we have concluded that Brooks City received HMRC's letter of 12 March 2009.

15. We concluded that Mr Gibbons was aware that the Company's VAT registration was cancelled in 2009 (since he said as much in response to a question from the Tribunal). In addition, we concluded that Brooks City had been duly appointed as the Company's agent to deal with VAT matters. Since Brooks City received HMRC's letter of 12 March 2009, we have concluded that the Company (by virtue of the knowledge of its agent) was aware that the Company's VAT registration was cancelled on 12 March 2009 and was aware of the extract from HMRC's letter set out at [13].

The unauthorised issue of invoices

16. It was agreed that, between 10 March 2011 and 31 July 2013, the Company issued invoices that showed an amount as being VAT, or as being attributable to VAT, and that it did so at a time when it was not registered for VAT. More generally, the Company accepts that it made unauthorised issues of VAT invoices for the purposes of paragraph 2 of Schedule 41 of FA 2008. The Company accepts HMRC's calculation of the amount attributable to "VAT"[1] that was shown on those invoices of £269,671.38 (indeed the Company itself calculated that figure for HMRC). However, since the Company does dispute its degree of culpability associated with the unauthorised issue of these invoices, it is appropriate to make some findings as to the circumstances in which the invoices were issued.

17. In or around early 2011, one of the Company's major clients, Barnet Enfield and Haringey Mental Health Trust ("BEH") contacted Claire Kelly at the Company and asked her to include VAT on invoices that the Company issued. Prior to this date, the Company did not include any amounts in respect of VAT on its invoices.

18. The Company agreed to BEH's request and, from 10 March 2011, started to include amounts expressed to be attributable to VAT on its invoices. Mr Gibbons raised the issue of the charging of VAT with Gary Lee at Brooks City. Gary Lee said that the VAT treatment of supplies that the Company was making was complicated. He reassured Mr Gibbons that Brooks City would look after the VAT situation (either by ensuring that the Company became VAT registered or by confirming that no VAT need be charged on supplies the Company was making).

19. However, Mr Gibbons considered that there was still a question over what to do with the amounts that BEH were paying in respect of VAT. If VAT was not chargeable on the services the Company was supplying then he was concerned that, by charging an amount in respect of VAT to BEH, the Company would be overcharging BEH. If VAT was properly chargeable on those services, then the VAT

[1] We use the quotation marks because, since the Company was not registered for VAT at the time of issue of the invoices, it did not have an actual liability to account for VAT. However, in the remainder of this decision we will refer to the amount shown on the invoices as VAT (without quotation marks) in the interests of the readability of the decision.

element would need to be paid to HMRC. Therefore, Mr Gibbons concluded, that the VAT element of the BEH invoices was not money that really belonged to the Company: it would either have to be returned to BEH or paid to HMRC. He therefore ensured that this money was kept in a separate account and "ring fenced" from the Company's other funds so that it could be paid over to whomever was ultimately decided to be entitled to it.

20. Mr Gibbons's understanding set out at [19] was, however, not quite right. By virtue of paragraph 5 of Schedule 11 of the Value Added Tax Act 1994, the VAT shown on the "invalid invoices" was recoverable as a debt due to the Crown even if the supplies to which it related were exempt supplies for VAT purposes. On 11 April 2014, in reliance on this provision, HMRC assessed the Company for £269,671.38 (together with interest). The Company has paid that amount in full.

Discussions between the Company and Brooks City

21. Mr Gibbons made a number of calls to Brooks City to ask them to resolve the question of whether the Company needed to be VAT registered which was weighing on his mind. On four occasions or so he asked for an update but was told simply that the VAT issue in question was complicated, that Brooks City would resolve it and Mr Gibbons should not worry, but should instead deal with his business and leave Brooks City to deal with the VAT.

22. Some time in 2011, Claire Kelly asked Mr Carter if he knew the Company's VAT number, perhaps because BEH had asked for it and Ms Kelly could not get hold of Mr Gibbons to ask him the question. She also showed him a specimen of the invoices that the Company was issuing showing an amount attributable to VAT. Although Mr Carter is not an accountant, his general business experience indicated to him that it was not right for the Company to be issuing invoices referring to VAT when it was not registered for VAT. He made his concerns known to Mr Gibbons. While Mr Gibbons trusted Mr Carter and took his concerns seriously, he was aware that Mr Carter was not an accountant and continued to press Brooks City for a definitive answer to the question of whether the Company needed to be registered for VAT. Mr Carter also became involved in the process of discussing the matter with Brooks City and reported that they took the same approach with him that they took with Mr Gibbons of assuring him that the matter was complicated, but was in hand.

23. The discussions between Mr Gibbons, Mr Carter and Brooks City took place largely over the telephone.

Mr Gibbons's and the Company's knowledge at the relevant times

24. Mr Gibbons has a background in nursing. He is not knowledgeable on VAT issues himself. We accepted his evidence that he relied on professional advisers on VAT matters.

25. We have concluded that the Company, when it issued the invoices in question, was genuinely unsure whether it was making taxable or exempt supplies for VAT purposes as it had not received clear advice on this question from Brooks City.

26. However, while he does not have a detailed knowledge of VAT law relating to the distinction between taxable and exempt supplies, we find that, at the material times, Mr Gibbons was himself aware of the link between being registered for VAT and the obligation to account for VAT. More specifically, we have concluded that Mr Gibbons was aware that the Company should not be issuing invoices referring to VAT at a time when it was not registered for VAT purposes.

27. We have reached the conclusion at [26] above because Mr Gibbons has business interests other than the Company. In 2005, he had requested HMRC to delay the effective date of VAT registration ("EDR") of one of his other companies, Kinesis Locum Ltd, so that he would not be obliged to account for VAT on certain invoices that he had submitted after the proposed EDR. His reasons for making that request was that he was concerned that it would look "unprofessional" if the company had to issue a VAT invoice to its customer after services had supplied and been paid for. He would have been aware from those conversations that registration for VAT triggered the liability to account for VAT.

28. In addition, the Affiliate is VAT registered. As part of the process of registering the Affiliate for VAT, Mr Gibbons was sent a letter to his home address on 17 April 2012, which Mr Gibbons accepted he would have received and read that included the following paragraph:

> You should be aware that you must account for and pay any VAT due from the date you are liable to be registered – not just from the date you apply for registration or from when you receive your certificate. You can't charge VAT before you are registered or show VAT as a separate item, but you can change your prices to include VAT from the date you should be registered and before you receive your certificate of registration.
>
> You will need to explain to your customers that you will be sending them VAT invoices later.

29. That paragraph would have made it entirely clear to Mr Gibbons, at least on 17 April 2012, that the Company should not issue invoices referring to VAT when it was not registered for VAT. Mr Gibbons did not say in his evidence that this letter was at odds with his understanding of the position or that until then he had a genuine belief that the Company could issue invoices referring to VAT even when it was not registered for VAT purposes.

30. We have concluded that, at the time it issued the invoices, the Company was aware both (i) that it was not registered for VAT and (ii) that it should not be issuing invoices showing VAT at a time when it was not registered for VAT. We have reached that conclusion because Mr Gibbons was himself aware of those matters and because the Company, through its agent Brooks City, had received HMRC's letter referred to at [13].

31. For reasons set out in more detail below, we do not consider that the question of the Company's or Mr Gibbons's honesty is relevant to whether the penalty is chargeable. However, we do consider that it is appropriate to record our view that, while the Company has made undoubted errors with its VAT compliance, neither it, nor Mr Gibbons, has been in any way dishonest. That is clear from the way in which money that the Company collected from BEH was "ring fenced" and from the way that both the Company and Mr Gibbons have co-operated throughout with HMRC's enquiries.

Mr Gibbons's adoption of his daughter

32. Between 2010 and 2011, Mr Gibbons and his wife were in the process of adopting a child from Russia and Mr Gibbons travelled to Russia on six occasions between 27 December 2010 and 26 August 2011. Those visits lasted for between six and nine days at a time.

33. That process was, inevitably, a distraction from business matters which was further exacerbated by the fact that, following her adoption, Mr Gibbons's daughter suffered from health issues which needed treatment in the UK. Mr Gibbons's own description of this period, which we have accepted, was "I was not absent by any means, but had to take a slight step back". When he was away in Russia he remained in contact with the business and spoke to Claire Kelly once every two days or so over the telephone.

Officer Keenan's investigation

34. On 7 August 2013 Officer Keenan sent a letter to the Company at its business address in Clapham. Her letter included the following paragraphs:

> I am carrying out a compliance check which aims to establish whether the company should be registered for VAT purposes…
>
> I have not been able to trace a VAT Registration Number for the company; for that reason I am enclosing a basic questionnaire which the company must complete and return to me by 6 September 2013.

35. On 9 October 2013, Officer Keenan and Mr Gibbons spoke over the phone and agreed an extended deadline for the provision of certain information about the Company and Mr Gibbons's role as director.

36. On 29 October 2013, SRLV Accountants replied to Officer Keenan's information request having been duly appointed as the Company's agent for tax purposes. That letter included the following paragraph:

> A 'VAT' element has been included on some invoices issued to a Council client and this would appear to be both an error in light of the fact that KRL was not VAT registered and also in light of the fact that we believe the majority of those supplies of nursing staff would qualify for the VAT exemption.

37. Until Officer Keenan received this letter, she was not aware that the Company was issuing invoices showing a VAT element.

38. Officer Keenan made further enquiries of the Company. The Company was co-operative throughout and even provided HMRC with a detailed spreadsheet outlining all the unauthorised invoices that had been issued that enabled Officer Keenan to make the assessment referred to at [20].

39. In due course, Officer Keenan determined that a penalty was chargeable under the provisions of paragraph 2 of Schedule 41 of FA 2008. She calculated the penalty as follows:

(1) She concluded that the Company's issue of invalid invoices was "deliberate but not concealed" and was "prompted" rather than "unprompted" and determined that the penalty range applicable to that degree of culpability was 35% to 70%.

(2) Having decided that the Company's behaviour was "deliberate", she concluded that the question of whether the Company had a "reasonable excuse" was not relevant. However, she nevertheless considered whether the adoption process that Mr Gibbons was going through meant that the Company had a "reasonable excuse" for issuing unauthorised invoices and concluded that it did not.

(3) She discounted the penalty to the maximum possible extent to reflect the high quality of the Company's co-operation and therefore calculated that the applicable penalty percentage should be 35%, being the lowest possible percentage in the range of 35% to 70% outlined at (1).

(4) She applied the percentage of 35% to the figure of £269,671 which she calculated as the "potential lost revenue" to produce a penalty chargeable of £94,384.85.

(5) She concluded that there were no "special circumstances" to justify a further reduction in the penalty.

The law

Statutory provisions

40. Paragraph 2 of Schedule 41 provides as follows:

> **Issue of invoices showing VAT by unauthorised persons**
>
> **2**
>
> (1) A penalty is payable by a person (P) where P makes an unauthorised issue of an invoice showing VAT.
>
> (2) P makes an unauthorised issue of an invoice showing VAT if P –
>
> (a) is an unauthorised person, and

(b) issues an invoice showing an amount as being value added tax or as including an amount attributable to value added tax.

(3) In sub-paragraph (2)(a) "an unauthorised person" means anyone other than –

(a) a person registered under VATA 1994

(b) a body corporate treated for the purposes of section 43 of that Act as a member of a group

(c) a person treated as a taxable person under regulations under section 46(4) of that Act [which applies to persons carrying on, for example, a deceased person's business]

(d) a person authorised to issue an invoice under regulations under paragraph 2(12) of Schedule 11 to that Act [which deals with the compulsory sale of goods for the purposes of satisfying a debt] or

(e) a person acting on behalf of the Crown…

41. As noted at [16], it was common ground that the Company had made an unauthorised issue of an invoice showing VAT for the purposes of paragraph 2(1) and, accordingly, a penalty is *prima facie* payable.

42. Paragraph 6B of Schedule 41 sets out the penalty that is payable under paragraph 2 and provides as follows:

6B

The penalty payable under any of paragraphs 2, 3(1) and 4 is –

…

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

43. Paragraph 8 of Schedule 41 defines the "potential lost revenue" in the context of a penalty under paragraph 2 as the amount shown on the invoice as value added tax or the amount to be taken as representing value added tax. The parties were agreed on how "potential lost revenue" should be calculated and that it was, after rounding, the figure of £269,671 referred to at [16].

44. Paragraph 5 of Schedule 41 defines the various degrees of culpability. Insofar as relevant to this penalty, it provides:

(2) The making by P of an unauthorised issue of an invoice showing VAT is –…

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

45. Paragraph 12 of Schedule 41 permits HMRC to reduce penalties chargeable to reflect the quality of a taxpayer's disclosure and co-operation. By virtue of paragraph 12(3) of Schedule 41:

(3) Disclosure of a relevant act or failure-

(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".

46. Paragraph 13 of Schedule 41 provides that, for an "unprompted" disclosure of a penalty chargeable at 70% of potential lost revenue (which includes the penalty at issue in this appeal), reductions under paragraph 12 cannot reduce the penalty to below 35% of potential lost revenue.

47. Paragraph 14 of Schedule 41 permits HMRC to reduce a penalty chargeable under any of paragraphs 1 to 4 if they think it right because of "special circumstances".

48. Paragraph 19 of Schedule 41 limits the jurisdiction of the Tribunal, on an appeal against a penalty, to substitute its own decision for that of HMRC on the question of "special circumstances". Where, as here, HMRC have made no reduction because of "special circumstances", the Tribunal can only make such a reduction if HMRC's decision is "flawed" when considered in the light of principles applicable in proceedings for judicial review.

49. Paragraph 20 sets out a defence of "reasonable excuse" as follows:

20

(1) Liability to a penalty under any of paragraphs 1,2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC [or the Tribunal] that there is a reasonable excuse for the act or failure.

50. Thus the "reasonable excuse" defence is not available in relation to penalties for deliberate acts or failures. Paragraph 20 and 21 set out provisions that expand on what is capable of amounting to a "reasonable excuse".

Meaning of "deliberate"

51. During the hearing, we asked the parties to make submissions as to what, if any, knowledge of particular matters the Company needed to have in order for its behaviour to be categorised as "deliberate". It seemed to us that there were at least two possibilities:

(1) One possibility is that it is enough for the Company to issue an invoice referring to VAT deliberately. If it does so, and the Company is, as a matter of fact an "unauthorised person" at the time that invoice is issued then, whether or not the Company is aware of that fact, the Company would on that interpretation have "deliberately" made an unauthorised issue of an invoice showing VAT.

(2) Another possibility would be that the Company must intend to issue an invoice referring to VAT but also must have knowledge that it is an "unauthorised person"

52. The interpretation at [51(1)] above would lead to the conclusion that the "deliberate" issue of an unauthorised invoice would be almost a matter of strict liability. A taxpayer might have a defence if it did not "deliberately" issue an invoice referring to VAT for example if it meant to issue some other document. It might also have a defence if it was not aware that the invoice contained an amount relating to VAT (for example if unknown to the taxpayer, automated software was adding a VAT element to all invoices submitted). By contrast, there would be more defences available applying the interpretation set out at [51(2)]. For example, a taxpayer who did not know that it was no longer registered for VAT might have a defence on that interpretation.

53. At the hearing, the parties were agreed that neither of the interpretations set out at [51] should be applied. They considered that both of the following elements must be present before a penalty based on deliberate behaviour could be made:

(1) the taxpayer must deliberately issue an unauthorised invoice that shows an amount of VAT or an amount attributable to VAT;

(2) the taxpayer must know that is wrong, but must carry on with the issue of the invoice regardless. The taxpayer need not know specifically that VAT legislation precluded "unauthorised persons" from issuing VAT invoices but had to know that in some sense what they were doing was wrong.

54. The parties did not refer us to any authority on this question. We do not consider that the parties' agreed approach was correct as the statutory provisions referred to above do not refer to any knowledge of wrongdoing. Rather, paragraph 5(2) of Schedule 41 requires only that there is a deliberate issue of an unauthorised invoice showing VAT. We note that in *Contractors 4 U Ltd v HMRC* [2016] UKFTT 17 (TC), this Tribunal touched on a similar issue and concluded that:

> 51. Dealing with this last point first, we consider that there is no requirement that a 'deliberate' action, within paragraph 6B of Schedule 41 Finance Act 2008, involve any intention to avoid tax or obtain a tax advantage. The term 'wrongdoing' used in the legislation seems to have created some confusion in this case; that term is, we consider, used in this context to indicate an action that is incorrectly done, and is not intended to require that the action be undertaken with any malicious intent.

55. We ourselves note that the term "wrongdoing" does not appear in the provisions that operate to charge the penalty at issue in this appeal. In fact, our own research indicates that this word appears only in the heading to Schedule 41. We do not consider that the use of the word "wrongdoing" in the heading to the Schedule is of itself sufficient to impose a requirement that a taxpayer be aware of "wrongdoing" before a penalty based on deliberate behaviour can be assessed.

56. The Tribunal in *Contractors 4 U Ltd* approached the question of whether behaviour was deliberate by considering whether the action was "taken consciously where there was an appreciation that there was a choice". We consider that is a useful starting point but that also regard should be had to the ordinary meaning of the word "deliberate" which, according to the Oxford English Dictionary, is as follows:

> Well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done of set purpose; studied; not hasty or rash

57. We also note that paragraph 5 of Schedule 41 is asking not just whether the issue of the invoice was "deliberate", but specifically whether the issue of an unauthorised invoice was deliberate. We consider that points against the interpretation set out at [51(1)]. In addition, the dictionary definition of "deliberate" referred to above suggests that, in order to issue an "unauthorised invoice" deliberately, a person must be aware of the facts that make the issue unauthorised. If a taxpayer was not aware that the invoice was "unauthorised", it is not clear how that taxpayer could have "full intention" or a "set purpose" to issue an unauthorised invoice.

58. It follows that, in our view, in order for this penalty to be chargeable on the basis of the Company's "deliberate" conduct it is enough that:

(1) the Company deliberately issued an invoice showing an amount as being VAT or as including an amount attributable to VAT; and

(2) at the time it issued that invoice, the Company was aware that it was an unauthorised person.

We do not, however, consider that beyond the matters set out at [58(1)] or [58(2)], any knowledge of "wrongdoing" is required.

59. We will apply that test to determine whether the penalty is chargeable. However, given that the parties were agreed that the alternative test set out at [53] should be applied, we will also express a view applying the test that the parties agreed.

Discussion

Whether the Company's behaviour was "deliberate" - application of our formulation of the test

60. Applying what we consider to be the correct formulation of the test at [58], we consider that the Company's behaviour was properly categorised as "deliberate". The Company deliberately issued invoices showing VAT to BEH as that was what BEH had specifically asked it to do. It was aware that it was adding amounts in respect of VAT to its invoices and intended to do so. We have concluded at [15] that both Mr Gibbons and Brooks City, the Company's duly appointed agent, were aware that the Company was not registered for VAT. Since there was no suggestion that the Company was capable of being prevented from being an "unauthorised person" by

falling into any other category set out in paragraph 2(3) of Schedule 41 referred to at [40], we are satisfied that the Company was aware that it was an "unauthorised person" at the time it issued the invoices in question.

Whether the Company's behaviour was "deliberate" - application of the parties' approach

61. As we have noted, we do not consider that the parties' agreed formulation of the test was correct. However, even if it were, we have found at [30] that the Company knew, at the time it issued the invoices, that it should not be issuing those invoices as it was not registered for VAT purposes. Therefore, the additional ingredient that the parties thought was important, namely that the Company knew that it was doing something wrong, was present. We stress again, however, that we did not consider the Company (or Mr Gibbons) to have behaved dishonestly.

62. Mr Torino argued that, since the law governing the characterisation of the Company's supplies as exempt or taxable was so complicated, the Company did not know that what it was doing was wrong. We are prepared to accept that the law in this area is complicated. However, provisions of VAT law that preclude "unauthorised persons" from issuing VAT invoices are not complicated and, as we have found, the Company was aware that it should not be issuing VAT invoices when not registered for VAT. The penalty that the Company has received is not for a failure to characterise its services properly as taxable or exempt. It is being penalised for issuing invoices referring to VAT at a time when it was not authorised to do so.

63. It follows that, even applying the parties' agreed approach, the Company's behaviour was "deliberate".

Whether the disclosure was prompted or unprompted

64. We have found at [37] that it was only on 29 October 2013, when the Company's accountants told Officer Keenan, that HMRC became aware that the Company was issuing "unauthorised" invoices. However, this is not enough to mean that the disclosure should be characterised as "unprompted". SRLV Accountants made their disclosure in response to a letter from HMRC that made it clear that HMRC wished to consider whether the Company should be registered for VAT or not. The Company would have realised that this would necessitate some examination of the invoices that it was issuing. Therefore, when the Company received HMRC's letter of 7 August 2013, it would have had reason to believe that HMRC were about to discover that the Company was issuing "unauthorised" invoices. The Company's disclosure was accordingly "prompted", applying the definition set out at [45].

"Reasonable excuse"

65. Since, on either formulation of the test, the issue of the unauthorised invoices was "deliberate", the defence of "reasonable excuse" is not available.

66. Therefore, it is not necessary for us to decide whether the lengthy process involved in Mr Gibbons's adoption of his daughter could amount to a "reasonable excuse". However, for completeness, we record our view that this could not be a "reasonable excuse" given that Mr Gibbons's own evidence did not suggest that the adoption process had any material effect on his ability to manage the Company, or on the Company's decision to issue the invoices.

"Special circumstances"

67. We have accepted that Officer Keenan considered whether any "special circumstances" were applicable that could justify a further reduction of the penalty. Mr Torino did not suggest that decision was "flawed" in the sense set out in paragraph 19 of Schedule 41 and given that the Company would have the burden of showing that the decision was "flawed", that is reason in itself not to disturb Officer Keenan's conclusion on special circumstances.

68. For completeness, we record our view that Officer Keenan's conclusion was not "flawed". It did not contain any error of law. Moreover, Officer Keenan clearly considered the effect of the lengthy process that Mr Gibbons was going through to adopt his daughter. The conclusion that this was not a "special circumstance" was entirely reasonable given what we have said at [66]. Finally, Officer Keenan took into account the fact that the Company and Mr Gibbons were not dishonest in discounting the penalty chargeable to the greatest possible extent. It was therefore reasonable for her to consider that the Company's honest behaviour should not also count as a "special circumstance" not least because it is reasonable for HMRC to conclude that honest behaviour should be the norm, rather than something "special". We do not, therefore, consider that Officer Keenan took into account irrelevant considerations or failed to take into account relevant considerations.

Conclusion

69. For reasons that we have given, the penalty was correctly charged and the appeal is dismissed.

70. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 09 MARCH 2016