[2016] UKFTT 0198 (TC)

TC04986

Appeal number: TC/2015/02352

VAT – assessments to recover input tax under s 73(2) VATA due to lack of evidence to substantiate claims – penalties under Schedule 24 FA 2007- whether deliberate behaviour

FIRST-TIER TRIBUNAL
TAX CHAMBER

GROUP ONE (ARSHAD MEHMOOD) **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
G. NOEL BARRETT

Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 12 January 2016

The appellant did not attend and was not represented.

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

DECISION

Introduction and preliminary points

1. This is an appeal against assessments made by HMRC under s 73(2) Value Added Tax Act 1994 ("VATA") to recover all input tax repaid to the appellant for the periods 09/08 to 03/13 inclusive, and to charge 70% penalties in respect of the periods 03/09 to 03/13 inclusive under Schedule 24 Finance Act 2007 ("Schedule 24") on the basis of deliberate behaviour. The amounts assessed are set out in the table in the Appendix to this decision.

2. The appellant is an individual named Arshad Mehmood. Group One is described in the correspondence as the appellant's trading name and the appeal was brought in that name. References to the appellant should accordingly be taken to refer to Mr Mehmood.

3. The appellant did not attend at the hearing and was not represented. The Tribunal administration succeeded in contacting him by telephone at around the time the hearing was due to start. The appellant confirmed that he knew that the hearing was due to take place on that day. The appellant indicated that he was too ill to attend and was or had been due to have surgery that week, but accepted that he had not made any attempt to contact the Tribunal to inform them. He said that he would prefer an adjournment.

4. We were satisfied that the appellant was notified of the hearing and decided, in accordance with rule 33 of the Tribunal rules, that it was in the interests of justice to proceed. This was for the following reasons:

(1) It is apparent that the appellant has had significant health problems since 2012, including having had surgery on a number of occasions. However, whilst clearly causing the appellant difficulty and disability there is no indication that it would not have been possible for the appellant to have contacted the Tribunal in advance of the hearing had the appellant wished to do so.

(2) There is also no indication that the appellant's health issues at the time of the hearing were an unexpected medical emergency. If surgery was planned it is reasonable to conclude that the appellant would have had some advance notice of it, even if only a few days, such that he should have been able to contact the Tribunal.

(3) In August 2015 the appellant contacted the Tribunal, referring to his ongoing serious health issues and specifically requesting a hearing date in January or February 2016 due to his slow recovery from illness. The Tribunal accommodated this request. Having made such a request and having had the request met, it is hard to see a good reason why the appellant should not attend without having first updated the Tribunal about any change in circumstances.

(4) The notice of hearing, which the appellant clearly received, made it clear that the Tribunal could decide the matter in the appellant's absence if he did not attend.

(5) The documentary evidence included the full correspondence between the parties, which contained details of the appellant's arguments. The appellant had previously confirmed to the Tribunal that, due to health problems, he was unable to access and gather any business records, that he would therefore not be submitting any additional documentation or proposing any additional witness, and that the hearing should proceed on the basis of the prior correspondence. As discussed below, the appellant's case essentially rested on records having been destroyed or (from 2011) not maintained, and we concluded on balance that the appellant's verbal submissions and evidence were unlikely to provide material assistance to the Tribunal.

5. A final preliminary point is that the appellant's notification of the appeal to the Tribunal was several months late, and therefore required the Tribunal's permission. The appellant's reasons related to ongoing correspondence with HMRC, late receipt of the penalty notice, a hardship application and ongoing health problems. HMRC did not object and we decided to admit the appeal.

Legal background

6. Section 73(2), (6) and (6A) VATA provide:

> "(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under

subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

(6A) In the case of an assessment under subsection (2), the prescribed accounting period referred to in subsection (6)(a) and in section 77(1)(a) is the prescribed accounting period in which the repayment or refund of VAT, or the VAT credit, was paid or credited."

7. Section 77 VATA provides so far as relevant:

"(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned…

…

(4) In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate…

(4A) Those cases are—

(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf)…

…

(4B) In subsection (4A) the references to a loss of tax brought about deliberately by P or another person include a loss that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by that person."

8. Schedule 24 FA 2007 provides for penalties in respect of errors in respect of returns set out in the table in paragraph 1, which includes VAT returns. Paragraphs 1 and 3 of Schedule 24 provide so far as relevant:

"1 (1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

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

…

(c) a false or inflated claim to repayment of tax.

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

…

[Table:]

…

> VAT- VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994
>
> …
>
> 3 (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

9. Paragraph 4 of Schedule 27 sets the penalty for deliberate but not concealed action at 70% of the "potential lost revenue", being the tax payable as a result of correcting the inaccuracy (paragraph 5). Paragraphs 9 and 10 deal with reductions depending on the "quality" of disclosure, which includes its timing, nature and extent (paragraph 9(3)). For prompted disclosure in relation to deliberate unconcealed behaviour the penalty may not be reduced below 35% (paragraph 10(2)). Paragraph 9(2) describes disclosure by reference to telling HMRC about it, giving HMRC reasonable help in quantifying the inaccuracy and allowing HMRC access to records. Paragraph 11 allows a reduction to a penalty by reference to special circumstances. Paragraph 13 deals with assessments, and provides that they may be made within 12 months of the end of the appeal period for the relevant tax assessment.

The assessments

10. The original VAT assessments were notified to the appellant on 19 February 2014 and the penalties were assessed on 25 April 2014. Following a review the assessments were amended to make various changes. First, an assessment for 06/08 which had originally been included was removed on the basis that the VAT return for that period had been checked at the time by HMRC and a proportion of the input tax claimed had been allowed. Secondly, the penalty percentage was reduced from 100% to 70% on the basis that the behaviour was deliberate but not concealed. Finally the earliest periods were removed from the penalty assessments on the grounds that Schedule 24 was not in force for those periods. The revised total VAT assessed was £34,025 and the penalties £23,192.40 (the penalty total is shown as a slightly lower £23,186 in HMRC's statement of account due to the way HMRC's system rounds down individual penalties for each period).

11. The original VAT assessments were clearly made within one year of the commencement of the enquiry and we consider that s 73(6)(b) VATA is clearly satisfied. However, the time limits in s 77 VATA must also be met. The basic time limit under s 77(1)(a) is four years after the end of the relevant period. Based on a February 2014 assessment date this means that assessments relating to the periods 03/10 onwards were in time. For earlier periods HMRC must demonstrate that the case involves a loss of VAT brought about deliberately by the appellant or someone

acting on his behalf, including as a result of a deliberate inaccuracy in a document given to HMRC, s 77(4), (4A), (4B).

12. The burden of proof is also on HMRC to show that penalties are due. In order to justify the level of penalty sought HMRC needs to show deliberate behaviour by the appellant.

13. Subject to these points the burden of proof is on the appellant to show that he is overcharged by the VAT assessments.

14. In each case the required standard of proof is the civil standard, being the "balance of probabilities".

Evidence and submissions

15. We heard submissions from Mr Mark Ratcliff, an HMRC Presenting Officer, and witness evidence from Ms Alpa Adatia, an officer of HMRC who works in the Local Compliance team and who handled the enquiry. We accepted Ms Adatia's evidence. Documentary evidence included copies of correspondence relating to the enquiry, the original VAT registration, contact records between the appellant and the HMRC in respect of VAT between the date of registration and the commencement of the enquiry, the assessments and such of the original VAT returns that could be retrieved, together with relevant entries on HMRC's system in respect of all the returns.

16. The appellant produced no supporting evidence of Group One's business activities either during the enquiry or before the Tribunal, beyond statements in correspondence with HMRC and in the notice of appeal. Our understanding of the appellant's contentions as to Group One's activities, its manner of operation and the reasons for the absence of supporting documentation are set out at [23] to [33] below and our findings of fact in respect of these contentions are set out at [34] to [36].

Findings of fact: VAT history

17. On 12 February 2008 the appellant applied to be registered for VAT on a voluntary basis with effect from 20 February, under the name West Foods. A change of name to Group One was notified in October 2008.

18. The first VAT return, for the three month period to 06/08, was checked. Some input tax was allowed but roughly two thirds of it was disallowed. The appellant was informed that this was due to "unsatisfactory evidence of input tax".

19. Subsequent VAT returns, initially in paper form but subsequently on line, were processed by HMRC and repayments generated without further checking or enquiry. Although the appellant suggested that there was another check in 2009 and/or 2010 HMRC have not found evidence of this. In each return the only entries were for inputs and input tax reclaimed. No outputs were shown in any return, whether VATable or not. Inputs over the whole period under dispute range from £2,063 for 09/08 to £13,980 for 03/13, and £195,469 in total. As can be seen from the Appendix the input

tax reclaims increased relatively steadily from £357 for 09/08 to £2,796 for 03/13, with only four instances where the claim was lower than the previous one (and in each case only slightly so: the maximum reduction is £71). The final reclaim submitted, which is not subject to this appeal and was never repaid, was for input tax of £2,728 in respect of the 06/13 quarter.

20. In or around May 2013 the appellant's case was allocated to Ms Adatia. She attempted to make contact with the appellant to review his VAT records. Having failed to make contact she wrote to advise that she would make an inspection visit on 12 June. The visit was abortive. Ms Adatia finally made contact with the appellant and commenced an enquiry during July 2013. During the course of the enquiry the appellant made a number of statements about his health issues, the business, the involvement of his son between 2011 and 2013 and issues with records, but at no stage provided Ms Adatia with copies of or an opportunity to inspect any business records.

21. The absence of information together with apparent inconsistencies in statements made by the appellant and the fact that the appellant started submitting nil returns as soon as the enquiry started led to the assessments being made in early 2014. Ms Adatia concluded that it was reasonable to assume that there were no sales or valid input tax deductions, and that there was deliberate behaviour. All the input tax previously reclaimed was therefore disallowed and penalties were assessed on that basis.

22. The appellant made a hardship application in respect of the VAT due under the assessments, which was accepted by HMRC. The effect is that the appellant has not been required to pay any of the amounts assessed before pursuing the appeal. The basis of the application was that the business had been closed since 2013 due to serious ill health and what was now a permanent disability, such that the appellant was unable to work and had no source of income apart from benefits. In support of the application the appellant produced a significant amount of supporting documentation. As well as medical records and details of his benefits this included a number of online and paper bank statements, including a business bank account with Santander and a statement showing some transactions on that account in 2010, other personal accounts with Santander (including a statement dating from 2009 when one of the relevant accounts was with Abbey), a loan account and current account with Lloyds, a current account with Halifax and a business current account with HSBC.

The appellant's contentions

23. The appellant made a number of different statements to HMRC about his business activities, the reasons for the absence of records and the impact of his ill health. We have summarised these below.

Nature of the business

24. When the appellant applied to be VAT registered he was asked by HMRC to complete a request for information about the business, which he did in early March

2008. In the response to the request the main proposed business was described as "imports of various products eg basmati rice, working gloves, kitchen towel (cotton) and small leather items (wallets, key purses)".

25. It also appears from comments made by the appellant during the enquiry that, in fact, some initial expenditure was incurred to fit out a café or restaurant in a business venture that did not proceed. The notice of appeal referred to the purchase of a lease for a restaurant/coffee shop that was sold after a full fit out due to refusal of planning permission. It was this expenditure that was reflected in the first VAT reclaim (relating to the period 06/08) that was checked by HMRC and is not now in dispute.

26. When HMRC initially made contact with the appellant in July 2013 he described the business as selling food, drink, clothing and tissue paper to distributors and retailers. In later correspondence in September 2013 the appellant stated that most business activities from mid- 2011 to June 2013 were buying branded clothes in cash from stores such as TK Maxx and Marks & Spencer and sending them through personal baggage for export to individual stores overseas. The transporting was done by his son or sometimes by overseas customers. The appellant accepted that he had not gone through the correct procedures to export goods on a free of VAT basis, but indicated that he had not appreciated this at the time and that the reason personal baggage had been used was to avoid customs duties in the (unspecified) overseas territories. He also said that the food and drink business had been carried on for a very short time at some point during 2010-11 and that the tissue paper business activity previously referred to had never commenced.

27. The notice of appeal describes the business activities as follows. It states that between 2009 and 2012 (after the failure of the restaurant venture the subject of the reclaim for 06/08) a new business was started "on a trial basis" with an office and warehouse unit at a storage unit in Acton. The business comprised "selling food and drink (buying from wholesalers, cash & carry and other suppliers/manufacturers) to small grocery outlets, small cafes…". It goes on to say "Lots of samples used to be given from purchase stock as well as lots of wastage occurred of goods due to unsold or expired." The notice of appeal then describes business activities undertaken by the appellant's son in the "later months of 2012 until April/May 2013" in which the son bought men's shirts mainly from TK Maxx, M&S and some other retailers in cash, which were then taken by his son overseas in personal baggage and sold to small local traders.

Absence of records

28. When the appellant was first contacted by HMRC in July 2013 he explained that his son dealt with the business so he needed to discuss matters with him, and that records had been put in storage and his son had the key. Later that month the appellant confirmed that he needed to wait for his son to return from abroad to make the records more "presentable".

29. From September 2013 the appellant's position shifted, and became that reflected in the notice of appeal, subject to some inconsistencies including over dates. The

appellant's revised position was that, in the early years of the business, manual records were maintained and also that some part time administrative help was available. The appellant said that these records were inadvertently destroyed when the storage unit they were in was emptied by the owners of the unit following a dispute with the appellant. There is some inconsistency in the correspondence over dates, with the notice of appeal referring to the loss of records as occurring in 2012. However, based on the responses made during the enquiry we think that the appellant's positon was that this destruction occurred at some point in 2011 while he was spending some months out of the country, and before he became seriously ill following an accident in March 2012.

30. During the enquiry the appellant appeared to accept that even during these earlier periods records may not have been well maintained. An email dated 16 September 2013 refers to everything being in manual form "but honestly not regularly recorded", referring to business management problems and the fact that trading was a new experience.

31. The absence of records for later periods was attributed to a combination of the appellant's ill health, the absence of bookkeeping assistance and the nature of the (cash based) business being carried on. The appellant claimed that he had not appreciated that purchase invoices should have been retained or that specific export procedures needed to be followed for the clothing business. He accepted that there was negligence. However, his ill health meant that the business was not well managed and it also meant that gathering records now was not possible.

32. The appellant also claimed in the notice of appeal that the paper returns he submitted for the earlier years were checked by an HMRC officer, so he could not see why records were now being requested when they should have been asked for earlier if HMRC wanted to see them. He accepted that errors had been made in not keeping his books in proper order but the appropriate sanction should be a warning.

The appellant's ill health

33. The appellant referred throughout the enquiry to his severe ill health and its impact on the business, starting with a debilitating car accident in March 2012. One of the consequences of this was that his son became involved in the business during 2012 and the first half of 2013. The appellant said that his son was also involved when the appellant was absent abroad during 2011.

Findings of fact in respect of the appellant's contentions

34. We do not have sufficient evidence to make any findings about the existence, nature or extent of the appellant's business activities during the periods in question. The evidence available is insufficiently persuasive and also contains some material inconsistencies.

35. We are prepared to accept that some records were destroyed in 2011. However, as discussed below we are not persuaded that the missing records would have supported

the returns actually filed, or that the destruction of records means that no records can be put together.

36. We have no doubt that the appellant has suffered from significant ill health from 2012 onwards, but as discussed below we do not consider that this explains the complete lack of records. In addition, given the severity of the appellant's ill health we would have expected it to have had an impact on business turnover for at least some part of the period in question. The returns submitted indicate no such impact.

Discussion

37. We find that HMRC has demonstrated on a balance of probabilities that the appellant acted deliberately in completing the VAT returns inaccurately, and accordingly that HMRC was entitled to raise VAT assessments for all the periods and to charge penalties on the basis of deliberate behaviour. The appellant has also failed to produce any evidence that persuades us that he is overcharged by the assessments.

Deliberate behaviour

38. Our reasons for concluding that deliberate behaviour was involved are as follows:

(1) Despite a number of requests from HMRC, no supporting documentation at all has been provided to support the input tax claims, whether in the form of invoices, bank statements, books of account, cash records, working papers for the VAT returns or otherwise. We are prepared to accept that some records were destroyed in 2011. However this neither explains the absence of records for periods after that nor the inability to obtain at least some alternative evidence, such as copies of bank statements, for periods before that. It was not suggested by the appellant that the business was entirely cash based before that time.

(2) There are inconsistencies in statements made by the appellant during the enquiry. The description of the business given when the appellant was initially contacted in July 2013 (selling food, drink, clothing and tissue paper to distributors and retailers) was materially different to the description given in September 2013 of a cash based business buying branded clothes from retailers and exporting them. The notice of appeal contains further discrepancies, indicating that the clothing business starting in 2012 rather than 2011 and appearing to indicate that there were no business activities between the failed venture that led to the reclaim for 06/08 and some point in 2009. There were also significant discrepancies in relation to records. As described above, when first contacted in July 2013 the appellant said that records had been put in storage and his son had the key. Later that month the appellant confirmed that he needed to wait for his son to return from abroad to make the records more "presentable". The destruction of records was first mentioned only in September 2013. In each case later assertions appear to contradict earlier statements in material respects. We also note that the assertion that the business moved to a cash

based one around the time that records were allegedly destroyed is an unusual coincidence.

(3) If no records were maintained for later periods (after the loss of records), it is highly questionable how information could have been put together for the returns except by the inclusion of figures which were known not to be correct. In this context it is worth noting that in correspondence with HMRC the appellant made statements to the effect that records for these later periods were "not maintained on regular basis" and (in response to a question relating to all periods) that transactions were "not regularly recorded".

(4) On the basis that severe health issues affected the appellant from 2012 onwards, then even though the appellant's son may have taken on some activities on behalf of his father it would be surprising not to see some interruption or at least temporary reduction in business activities. Furthermore, if the business had indeed changed either from mid-2011 or at some point in 2012, it would also be surprising not to see some longer term change in the pattern of the returns. However, the input tax reclaims increased relatively steadily: see [19] above.

(5) It is wholly unclear how the appellant would have funded the outgoings claimed as inputs. If it was correct that the main business was cash based from 2011 or 2012 then that would also have required very significant amounts of cash. As noted at [19] above, inputs over the whole period under dispute range from £2,063 for 09/08 to £13,980 for 03/13, and £195,469 in total. For 06/11, 09/11and 12/11 the inputs claimed were £10,460, £11,050 and £12,415 respectively. For the corresponding periods in 2012 the inputs claimed were £13,110, £13,480 and £13,340. The alleged clothing business would have required a significant number of trips abroad, copious amounts of personal baggage and very significant amounts of cash. There is no evidence of any significant number of trips, who undertook them or how they would have been funded. The economics also do not make sense to us. It is hard to see how profit could be made once the cost of retail purchases, travel and what would presumably have been excess personal baggage is taken into account.

(6) HMRC point out that the appellant's admitted reason for exporting items in personal baggage was to avoid- or more accurately evade- customs duties in the (unidentified) overseas territory or territories. It is a fair point that this provides some indication that the appellant was prepared to be dishonest in relation to tax obligations. The fact that they were non-UK duties does not make the point irrelevant as the appellant effectively suggested in his notice of appeal.

(7) In stark contrast to the appellant's complete failure to produce any supporting information or records during the enquiry the appellant provided detailed information to support his successful hardship application. He did so despite a statement that he had had major spinal surgery the preceding month. At least some of the bank statements

produced related to accounts labelled as business accounts and the appellant appeared to have had no real difficulty in producing them. This makes it more difficult to accept that the appellant had good reason for failing to produce any records in response to the enquiry.

(8) We reviewed the bank account entries for anything that might support the appellant's contentions, albeit recognising that they are by no means comprehensive in respect of periods covered. We found payment for one air fare in June 2013, consistent with the appellant's claim that his son had left for the Gulf region then, and some very limited payments to clothing retailers such as TK Maxx and Marks & Spencer, but nothing that would suggest anything like the scale of activity claimed in the VAT returns. Cash withdrawals and deposits were modest and not in our view consistent with significant business activity on a cash basis.

(9) There is no coherent explanation for the complete absence of any entries for outputs in the VAT returns. Outputs should be shown even where they do not attract VAT, but even if the appellant (or the bookkeeping assistance he claimed had been available on occasions up to 2011) had not appreciated this despite clear HMRC guidance on how returns should be completed, this cannot explain the complete absence of VATable supplies. The appellant explained to HMRC that some products had been provided as samples or were wasted or expired in some way, but it is hard to see how this would have applied to all products or how the appellant would have continued to fund the business if there were no effective sales. Comments by the appellant during the enquiry also suggest a view that it was not necessary to record sales or charge VAT to an unregistered business, but that is obviously not correct and HMRC's contact records show that the requirement to charge VAT in such a case was confirmed to the appellant by phone in March 2010. The most likely explanations are either that neither sales nor purchases were taking place, or that sales were deliberately not recorded.

39. HMRC also relied on the fact that nil returns started being submitted from mid-2013 onwards, as soon as HMRC started asking questions. This was on the basis that if prior claims were bona fide it seems unlikely that the appellant would have stopped making claims altogether, including at a time when HMRC was simply trying to obtain information rather than moving on to make assessments.

40. We have not placed particular reliance on this point. Although it does appear to assist HMRC's case, it can also be explained by the appellant's son leaving the UK around that time, combined with the appellant's ill health.

The appellant's responsibility to maintain records

41. We note that the appellant argued that HMRC had accepted returns for a number of years and they must take responsibility for not raising an issue earlier: the appellant could not be responsible for failure to maintain records. For the appellant's benefit it is worth pointing out that (a) there is no obligation on HMRC to check or enquire into

every return when submitted (which would in any event be an impossibly onerous task) and (b) there are clear legal obligations on VAT registered businesses to maintain records for six years, as well as to ensure that their VAT returns are correct and complete. Satisfactory evidence of input tax is also required. Whilst it might be considered regrettable from both parties' points of view that HMRC's systems did not prompt an earlier enquiry in this case, there is no doubt that HMRC were entitled to open the enquiry as they did and that it was the appellant's responsibility to maintain records. In particular, merely loading paper returns on to HMRC's system and processing them is an administrative function that does not involve any check by HMRC of the accuracy of the returns.

Special circumstances

42. We have considered HMRC's conclusion that there were no special circumstances justifying a reduction in the penalties under paragraph 11 of Schedule 24. We find no basis to disturb that conclusion. Specifically, we think HMRC was justified in not treating the appellant's undoubted health issues as justifying a penalty reduction under this provision. Those issues did not prevent the business continuing (as maintained by the appellant) and indeed the scale of input tax reclaims increasing, and obviously did not prevent the submission of VAT returns on a regular basis.

Penalty reduction

43. We have however concluded that we should adjust the penalty percentage, as we are permitted to do under paragraph 17 Schedule 24. HMRC levied the maximum percentage penalty of 70% for deliberate but unconcealed behaviour, with no reduction for the quality of the disclosure of the inaccuracies under paragraph 10. Ms Adatia's reasoning was the total absence of records and supporting information provided.

44. As noted at [9] above, paragraph 9 Schedule 24 describes disclosure for these purposes as telling HMRC, giving them reasonable help in quantifying the inaccuracy and allowing access to records. The "quality" of the disclosure includes timing, nature and extent. For prompted disclosure- which this clearly was- the maximum permitted reduction is 35%.

45. Whilst clearly no access to records was provided, we do think that some reduction is justified. The appellant did respond to communications from HMRC. He has accepted that his records were not properly kept and has also accepted that incorrect procedures were followed such that he was not entitled to zero rate exports and reclaim the input VAT. Negligence was expressly accepted. We are also prepared to accept that some records were destroyed in 2011, although we are not persuaded that such records would have supported the returns actually filed. The appellant also gave a certain amount of help and information in response to the enquiry, albeit nothing concrete in terms of records. Reductions to reflect the categories "telling" and "helping" would we think be appropriate.

46. We have considered the (non-statutory) guidance in HMRC's Manuals, CH82430, which suggests as a guide that up to 30% of the maximum percentage reduction should be allowed for telling, 40% for helping and 30% for access. In this case the maximum percentage reduction is 35%. This would suggest a maximum reduction for telling and helping of (30+40=70)x35%= 24.5%. We have concluded that in this case a 10% overall reduction, from 70% to 60%, is appropriate. This balances the limited disclosure and assistance given with the fact that it was not entirely timely, was at times inconsistent and promised information that was not then delivered, particularly in terms of records and bank information, in contrast to the quality of the response to the hardship application. We cannot see any basis to justify a reduction below 60%.

Decision

47. On the basis of our findings that the appellant's behaviour was deliberate and that he has not shown that he was overcharged, the appellant's appeal against the VAT assessments is dismissed and those assessments are confirmed in the total amount of £34,025. We also find that penalties were correctly charged on the basis of deliberate behaviour. However, we are substituting HMRC's decision that the maximum 70% penalty was appropriate with our decision that penalties should be charged at a lower percentage of 60%. We calculate that the aggregate penalty should be £19,879.20 on that basis (before any rounding HMRC applies in producing statements of account).

48. 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 FALK
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2016

Appendix

Period	VAT £	Penalty £
09/08	357.00	-
12/08	539.00	-
03/09	542.00	379.40
06/09	768.00	537.60
09/09	1,183.00	828.10
12/09	1,387.00	970.90
03/10	1,645.00	1,151.50
06/10	1,729.00	1,210.30
09/10	1,695.00	1,187.20
12/10	1,982.00	1,338.10
03/11	2,163.00	1,514.80
06/11	2,092.00	1,464.40
09/11	2,210.00	1,547.00
12/11	2,483.00	1,738.10
03/12	2,468.00	1,727.60
06/12	2,622.00	1,835.40
09/12	2,696.00	1,887.20
12/12	2,668.00	1,867.60
03/13	2,796.00	1,957.20
Total	**34,025.00**	**23,192.40**