[2016] UKFTT 313 (TC)

TC05081

Appeal number: TC/2016/00182

VALUE ADDED TAX – initial and daily penalties for failure to comply with notice under Schedule 36 FA 2008 – whether reasonable excuse – yes for initial penalty; no for daily penalty – whether daily penalty valid – no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MUMBAI KITCHEN (BROMLEY) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DAVID EARLE

Sitting in public at Fox Ct, London EC1 on 14 March 2016

The Appellant did not appear and was not represented

Ms Farah Chaumoo, Presenting Officer, for the Respondents

DECISION

1. This was an appeal against two penalties, one of a fixed amount of £300 and one of daily penalties totalling £900, assessed by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") as a result of the failure by the appellant to comply with a notice issued to the appellant under paragraph 1 Schedule 36 Finance Act ("FA") 2008 "the paragraph 1 notice".

2. Two cases were listed before us for a hearing at 10 am on 14 March, this appeal and a case management hearing in another case. As there was no attendance by or for the appellant at that time, Judge Thomas proceeded to hear the case management matter. When that concluded at about 10.30 there was still no attendance by or for the appellant. We asked our clerk to contact the appellant's accountant on the number we had on record for him, but he was unable to make contact. As the notice of the hearing had been sent to the address given in the Notice of Appeal, and as the Tribunal had been given submissions made by the accountant in addition to those in the grounds of appeal and as HMRC were ready to proceed, we decided that it would be in the interests of justice to proceed.

3. Because of the absence of the appellant or any representative we put a number of questions to Ms Chaumoo, particularly about aspects of HMRC's conduct of the case, which she dealt with with very capably.

Evidence

4. We had a bundle of documents from HMRC which included the Notice of Appeal together with correspondence with the appellant and his accountant and internal HMRC documents, including the entries on the Caseflow system of managing enquiries. Ms Chaumoo put into evidence a further internal document concerning the level of daily penalties in this case.

5. For the appellant we had a witness statement made by Mr Mudabbir Hussain, the appellant's accountant. This was mixture of factual evidence and submissions in relation to the question whether the appellant had a reasonable excuse for its failure to comply with the paragraph 1 notice. To the extent that the factual evidence was not in dispute we accepted it. Where there was a dispute on the facts we deal with it separately. We regarded the opinions in the statement as part of the appellant's submissions.

Facts

6. From the HMRC bundle and Mr Hussain's statement we find the following facts, none of which was in dispute:

(1) The appellant began to operate a takeaway Indian restaurant from premises at 36 Homesdale Rd, Bromley, Kent in April 2009.

(2) As of 20 February 2015 (a Friday) the appellant was not, and had never been, registered for VAT.

(3) On 20 February 2015 Mr Adams, an officer of HMRC, visited the appellant. He had with him a notice of inspection of the business premises, business assets and business documents issued under paragraph 10 Schedule 36 FA 2008 dated 9 February 2015 and bearing the signature of an authorising officer, Mr Puddick.

(4) Mr Adams reported on the Caseflow system that he had visited the premises but that the "trader" (who we take to be Mr Joynal Abadin, a shareholder and director of the appellant) "seemed compliant but was busy". Once the premises were not busy Mr Adams reported that the appellant was "totally uncooperative" and "did not answer any questions". Mr Adams left a letter and questionnaire with the appellant (we were supplied with examples of these documents, not copies of the actual documents) and took away "pink slips for meals" and "some white slips".

(5) On 23 February 2015 (Monday) Mr Abadin called at the offices of Mr Hussain and explained to Mr Hussain what had happened at the inspection.

(6) On that same day Mr Hussain called Mr Adams and said that he understood what was needed and would co-operate. Mr Adams recorded Mr Hussain as saying that if the business needed to register for VAT "he will help us out". Mr Adams thanked him and confirmed that HMRC "would only register his client if that is needed". Mr Hussain was told that the reply to the questionnaire was needed within 21 days or "we will issue sch 36 for information that will allow an extra 30 days".

(7) Mr Hussain asked Mr Chaudhury, an employee in his firm who had six years experience of VAT enquiries of this nature, to register the appellant for VAT and an application was made to register on 6 March 2015. HMRC registered the appellant for VAT with effect from 1 April 2015. The communication in the bundle informing the appellant of that fact was not dated, but HMRC accepted that it was issued before 1 April 2015.

(8) On 25 March 2015 HMRC (Mr Adams) issued a letter to the appellant to which was attached a notice under paragraph 1 Schedule 36 FA 2008. This required the appellant to provide to HMRC:

> (a) in a box headed "Statutory Records" purchase and sales day books, meal slips and bank statements for 9 April 2009 to "current date"
>
> (b) in a box headed "Other documents" the completed questionnaire that was left during the visit".

The letter said that "the notice means that the company must let me have the information and the documents asked for by 22 April 2015" (28 days from the date of the letter). It also warned the appellant that failure to comply could lead to a penalty of £300 without further warning, and after that penalties up to £60 per day may be incurred for non-compliance.

The accompanying letter also included the text:

> "The company cannot appeal against this notice or anything it asks the company to do. This is because I am only asking for statutory records that relate to:
>
> - The supply of goods or services
> - The acquisition of goods from another member state, or
> - The importation of goods from a place outside the member states in the course of carrying on a business"

(9) On 5 May 2015 Mr Adams wrote to the appellant saying that he had not received the information and documents and that he was, as warned, imposing a penalty of £300. That letter was said to enclose a notice of the penalty assessment but we have seen no copy of that document or of the assessment itself.

(10) On 17 June 2015 Mr Adams made a submission to an authorising officer about the level of daily penalty to be imposed. He suggested £30 per day and stated that the tax at risk was £15,000. This was based on a turnover of £90,000 per annum for two years. Local policy was said to be that £30 per day was appropriate where the potential net liability was between £10,000 and £30,000.

(11) On the same day the authorising officer agreed to £30 per day, adding that she had taken into account that:

> "the taxpayer has failed to respond to requests for information, despite a relevant and proportionate time period having been agreed with the taxpayer for submission of information. An initial penalty had failed to gain compliance."

(12) Also on that day Mr Adams wrote to the appellant saying that he had still not received the information and documents and that he was, as warned, imposing a daily penalty of £30 per day for the period 8 May 2015 to 7 June 2015 (which was he said 30 days) the penalty being £900. That letter was also said to enclose a notice of the penalty assessment, but we have seen no copy of that document or of the assessment itself.

(13) On 23 July 2015 Mr Hussain wrote to Mr Adams asking for the penalty notice to be cancelled. Many of the points in this letter relate to the question of reasonable excuse, but the letter also told Mr Adams that the appellant had applied to register for VAT and was registered on 1 April 2015 (and he enclosed the VAT certificate).

(14) Mr Adams replied to Mr Hussain on 11 August 2015 stating that he had consulted his manager and it had been decided not to cancel the penalties. The information was still required even though the appellant had been registered.

(15) On 15 September 2015 a meeting took place between Mr Hussain and Mr Adams. Mr Adams' notes of the meeting as recorded in the Caseflow system show that he said that he was concerned that total sales had not been recorded and an expected split between cash and cards indicated the business should have been registered "a long time ago".

(16) On 14 October 2015 Mr Hussain wrote to Mr Adams asking that matters relating to his client's non-compliance be given to "the reconsideration team".

(17) On 11 November 2015 Ms Slater from an "Appeals and Reviews" team wrote to Mr Hussain accepting "your client's late request for a review".

(18) On 25 November 2015 Mr Adams emailed Mr Hussain to accept his client's offer to pay any VAT that might have become due on the basis that the appellant should have registered on 1 October 2014 together with a penalty. The potential lost revenue for the 6 months to 31 March 2015 was £3,555.

(19) On 7 December 2015 Ms Slater notified the conclusions of her review to the appellant (copied to Mr Hussain) in accordance, she said, with s 83F(6) of the Value Added Tax Act 1994 ("VATA"). The conclusion was to uphold the penalty assessments.

(20) On 6 January 2016 Mr Hussain notified the appellant's appeal to the Tribunal.

7. We have noted one further issue of fact that appears in Mr Hussain's witness statement. In it he says:

> "When I returned to the office I called Mr Adams and found he did [*sic*] not aware on the VAT Registration and Agent Authorisation in place. Had he known that the VAT application was made on 6 March 2015 probably he would not issue notice on 25 March and following notices and therefore there would not be any penalty determination."

8. We assume that the part underlined is Mr Hussain's reporting in indirect speech of what Mr Adams said to him. The Caseflow record does not reveal any record of a phone call to Mr Adams *from* Mr Hussain. A phone call from Mr Adams *to* Mr Hussain is shown on 15 July, 9 October and 11 and 12 December, but there is no record of the contents. As we have noted Ms Chaumoo told us that the Caseflow system does not record every event that takes place: it relies on the officer recording it.

9. We thus have a witness statement of hearsay evidence from a witness who was not present at the hearing. But the officer who could have given evidence as to whether or not he had said what Mr Hussain said he said was also not present and no explanation was given to us about the reason why Mr Adams could not be present.

10. Mr Hussain's letter does not indicate the period of his sickness (which he had mentioned to Mr Adams) nor the date when he "returned to the office". He had supplied evidence of two consultations with a consultant on 19 and 26 February, details of a hospital appointment on 29 October 2015 and a letter from a consultant to his GP to indicate he had had MRI scans of his brain on 24 February and 17 July. We cannot say with any confidence when this conversation would have happened, but at the earliest it must be later than the date of the initial penalty assessment (5 May).

11. We bear in mind that Mr Hussain's witness statement was received by HMRC on 4 March 2016, 10 days before the hearing. If therefore HMRC had wished to challenge anything in the witness statement they had time to arrange either for Mr

Adams to be present or for him to give his own witness statement. In the event Mr Hussain's evidence was not challenged, and we consider that on the balance of probabilities he did talk to Mr Adams and that Mr Adams did express the views attributed to him. But we make no finding as to when this was done, save that it was after 5 May 2015.

The law

12. So far as relevant to this case the provisions of Schedule 36 FA 2008 are:

> *Power to obtain information and documents from taxpayer*
>
> 1—(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this Schedule, "taxpayer notice" means a notice under this paragraph.
>
> *Notices*
>
> 6—(1) In this Schedule, "information notice" means a notice under paragraph 1 ….
>
> (2) An information notice may specify or describe the information or documents to be provided or produced.
>
> …
>
> *Complying with notices*
>
> 7—(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—
>
> (a) within such period, and
>
> (b) at such time, by such means and in such form (if any),
>
> as is reasonably specified or described in the notice.
>
> (2) Where an information notice requires a person to produce a document, it must be produced for inspection—
>
> (a) at a place agreed to by that person and an officer of Revenue and Customs, or
>
> (b) at such place as an officer of Revenue and Customs may reasonably specify.
>
> …
>
> *Right to appeal against taxpayer notice*
>
> 29—(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal ... against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3.

... Penalties for failure to comply …

39—(1) This paragraph applies to a person who—

(a) fails to comply with an information notice, or

…

(2) The person is liable to a penalty of £300.

…

Daily default penalties for failure to comply …

40—(1) This paragraph applies if the failure … mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure ….

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure … continues.

Failure to comply with time limit

44 A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

Reasonable excuse

45—(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure ….

(2) For the purposes of this paragraph—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure …, and

(c) where the person had a reasonable excuse for the failure … but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied … without unreasonable delay after the excuse ceased.

Assessment of ... penalty

46—(1) Where a person becomes liable for a penalty under paragraph 39 [or] 40,

(a) HMRC may assess the penalty, and

(b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

(a) the date on which the person became liable to the penalty,

(b) the end of the period in which notice of an appeal against the information notice could have been given, and

(c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

…

Right to appeal against ... penalty

47 A person may appeal ... against any of the following decisions of an officer of Revenue and Customs—

(a) a decision that a penalty is payable by that person under paragraph 39 [or] 40, or

(b) a decision as to the amount of such a penalty.

Procedure on appeal against ... penalty

48—(1) Notice of an appeal under paragraph 47 must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

Application of provisions of TMA 1970

56 Subject to the provisions of this Schedule, the following provisions of TMA 1970 apply for the purposes of this Schedule as they apply for the purposes of the Taxes Acts—

(a) section 108 (responsibility of company officers),

(b) section 114 (want of form), and

(c) section 115 (delivery and service of documents).

Statutory records

62—(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

…

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

Tax position

64—(1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards—

(a) past, present and future liability to pay any tax,

(b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with [the person's liability to pay any tax,

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.

…

(4) References in this Schedule to a person's tax position are to the person's tax position at any time or in relation to any period, unless otherwise stated.

13. For the purposes of VAT statutory records are defined in the Value Added Tax Regulations 1995 (SI 1995/2518):

31 Records

(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a) his business and accounting records,

(b) his VAT account,

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him,

…

Submissions

14. We are setting out the appellant's submissions on the basis of Mr Hussain's witness statement and other statements he has made, including the "grounds of appeal" in the Appeal Notice.

15. The appellant has a reasonable excuse for not complying with the paragraph 1 notice because:

(1) he immediately notified Mr Hussain of HMRC's requirements and relied on Mr Hussain and his firm to comply with the notice and deal with HMRC generally.

(2) Mr Hussain was ill at the time the notice was issued and for some time afterwards.

(3) Mr Hussain entrusted the work to Mr Chaudhury who was experienced in VAT enquiries, but Mr Chaudhury left the firm while Mr Hussain was ill (P45 was enclosed).

(4) Mr Hussain considered that notification of registration for VAT meant that the questionnaire did not have to be completed or the documents supplied, as he knew that registration was the object of Mr Adams' enquiries.

(5) Mr Adams had informed him that had he known of the registration he would not have issued the paragraph 1 notice or the penalties. The HMRC Registration section should have told Mr Adams of the registration or Mr Adams should have enquired.

(6) Mr Adams did not issue any notices to Mr Hussain's firm despite a 64-8 (Agent authorisation) being in place from 8 April 2015.

16. The client took all reasonable steps because he:

(1) supplied all the business records to Mr Hussain,

(2) came to Mr Hussain's office to communicate with the Officer the next business day after the visit,

(3) registered before the first penalty notice was issued and

(4) communicated all of the notices to Mr Hussain's office via WhatsApp.

17. Mr Hussain cited *Stephen Taylor v HMRC* [2015] UKFTT 192 (TC) ("*Taylor*") as showing identical facts. *Taylor* was a case decided on the papers by Judge Barbara King.

18. For HMRC Ms Chaumoo accepted that she had the burden of showing that the penalties were properly issued. She accepted that she also had to show that the paragraph 1 notice was also properly issued.

19. She argued that all the statutory requirements for the issue of the paragraph 1 notice had been fulfilled.

20. As to reasonable excuse, Ms Chaumoo submitted that:

(1) the appellant was relying on Mr Hussain's indisposition and other matters as a reasonable excuse but that it may not so rely unless it can be shown that it took reasonable care.

(2) forwarding the penalty notice via WhatsApp did not constitute reasonable care, and that the appellant has failed to show what further steps it took to ensure that Mr Hussain had received the documents and that action was being taken to comply.

(3) as the 64-8 was not in place until 8 April it followed that the appellant had to take reasonable care themselves to bring the paragraph 1 notice and the penalty notice to the agent's attention.

(4) the statutory notices all contained warnings regarding the possibility of escalating penalties.

(5) as to *Taylor*, HMRC say that the facts were different and that the escalating warning letters ought to have raised a doubt in the appellant's mind as to whether the agent was dealing properly with the matter.

(6) the appellant did not notify HMRC of any difficulties in complying with the paragraph 1 notice.

Discussion

21. This is a case in which HMRC have not covered themselves in glory. We have added observations at the end of this decision which describe a number of failures on HMRC's part to properly deal with the appeal and review. The failings described there are ones where we thought did not affect the outcome of the case. We had intended to include in those observations something that has disturbed us the most. But since the hearing we have read the decision of Judge Mosedale in *Spring Capital Ltd v HMRC* [2016] UKFTT 0232 (TC) ("*Spring Capital*") in which the question whether a mistake in informing the recipient of a paragraph 1 Schedule 36 notice of their appeal rights vitiates the notice. This is what we consider has happened in this case, so we deal with that as part of the discussion of the appeals.

22. We consider that the paragraph 1 notice was justified in that the documents and information were reasonably required for considering the appellant's tax position. "Tax" includes VAT (paragraph 63(1)(d) – from here on any reference to a numbered paragraph without more is to that paragraph of Schedule 36). Although at the time of the start of HMRC's enquiries and of the issue of the notice the appellant was not registered for VAT, "tax position" includes a person's position as regards any future

liability to pay any tax, so clearly covered a case where HMRC have grounds for thinking that the person should be registered. We agree that HMRC had reasonable grounds for thinking that the appellant might be registrable following their inspection visit and probably before, and we are not casting any doubt on the propriety of the inspection notice under paragraph 10.

23. Our problem with the paragraph 1 notice is the statement in the accompanying letter that there is no right of appeal against the notice (see §5(8)). HMRC are correct to say, as it does, that there is no right of appeal against a notice so far as it seeks statutory records (paragraph 29(2)). But in this case the notice was careful to distinguish between statutory records (the day books, meal slips and bank statements) and the other information, the answers to the questionnaire. In our view the appellant had a clear right to appeal against the requirement to provide the answers to the questionnaire.

24. And we are not convinced that the documents it sought were in fact all statutory records. Paragraph 62(1) states that statutory records are those which a person is required to keep by an enactment relating to tax. HMRC in their letter identified the statutory records in this case as records that "relate to the supply of goods or services, the acquisition of goods from another member state, or the importation of goods from a place outside the member states in the course of carrying on a business". These are all VAT terms, so we need to consider regulation 31 of the VAT Regulations which governs what records must be kept for the purpose of that tax.

25. Regulation 31 applies to "every taxable person" and among the records that must be kept are "his VAT account" and copies of all "VAT invoices". At the time the paragraph 1 notice was issued the appellant was not registered for VAT. Was it a taxable person? Section 3(1) VATA 1994 says that a person is a taxable person "for the purposes of this Act while he is, or is required to be, registered under this Act."

26. The appellant clearly was not registered. Was he required to be? That seems to us to be a difficult question. We know from the outcome of HMRC's enquiries that the appellant made a settlement to include VAT for the first quarter of 2015 and the last of 2014. We do not know the appellant's reasons for entering into that settlement but it does not automatically follow from the fact that the appellant entered into the settlement that it was required to be registered before 1 April 2015. And even if it properly should have been registered on 1 October 2014, the request for records dated back to the start of trading in 2009. We do not consider that the vast majority of the records sought can be statutory records within paragraph 62, and we refer to the request for them as a request for the "so-called statutory records".

27. It might be argued that as the appellant was a company within the charge to corporation tax the records were statutory records within the meaning of paragraphs 21 and 22 Schedule 18 FA 1998. But that was not how HMRC justified the paragraph 1 notice, and in our view the meaning of "statutory records" must be derived from the *relevant* enactment, not just any enactment relating to tax that happens to also apply to the person concerned.

28. The next question is whether the undoubted misstatement of the appellant's appeal rights affects the validity of the paragraph 1 notice. In *Spring Capital* the appellant argued at [63] that the penalties (for failure to comply with a Schedule 36 notice) "should be mitigated because (alleged) misinformation from HMRC meant that the appellant was allegedly denied a legal remedy which it would otherwise have had and the exercise of which would have allegedly reduced its liability to penalties."

29. In that case Judge Mosedale decided that the relevant information was in fact a "statutory record", but she did go on to say:

> "86. I accept that a taxpayer may have genuine concerns with the validity of an information notice and if it challenges the notice without complying with it, it risks penalties. In my view, well-founded but ultimately wrong concerns might amount to a reasonable excuse, but otherwise that is a risk a taxpayer is exposed to if it chooses to challenge an information notice without compliance. The alternative scenario cannot have been intended by Parliament: the logical outcome of the appellant's submission is that penalties for and compliance with an information notice can be avoided for years while hopeless appeals are taken to the Tribunal."

30. In this case the appellant did not seek to appeal against the paragraph 1 notice or raise any concerns about its validity, except in this respect. Mr Hussain has argued that the appellant had complied with the part of the notice that undoubtedly was not concerned with statutory records by applying to register for VAT before the issue of the notice. We accept that the information required by the online VAT 1 form for registration is very similar, for obvious reasons, to the questionnaire that Mr Adams left for completion and which was the subject of the paragraph 1 notice. Thus Mr Hussain could be said to be arguing that the request for the completed questionnaire was not "reasonably required for checking [the appellant's] tax position".

31. While the statement in the letter is very regrettable we do not think that it vitiates the paragraph 1 notice. Even if the appellant had a right of appeal we do not think that Mr Adams would have consented to withdrawing the requirement to forward the so-called statutory records in relation to which there was no hint of compliance. But we do consider later whether we can take the misstatement into account when considering the issue of "reasonable excuse".

32. Since we have held that the paragraph 1 notice was validly issued, we must now turn to the penalty assessments themselves. There was undoubtedly failure to comply with the paragraph 1 notice so far as the so-called statutory records were concerned so the making of the assessments and the issue of the notice of the assessments is justified. But we have not seen either the notice of the £300 penalty or the assessment itself or any copy of them. The evidence that the £300 penalty assessment was in fact made consists of an entry in the Caseflow on 29 April "it07 for initial penalty" and on 5 May 2015 (the date of the letter) "safe stencil". Ms Chaumoo confirmed our view that this was a reference to the process of making the assessment. The evidence that the notice was issued consists only of the reference to it in the accompanying letter of 5 March.

33. As to the daily penalty, the letter of 17 June 2015 does not refer to an accompanying notice of assessment. It merely says "I am charging the company a further penalty. … **The total amount of the penalty is £900.**" [HMRC's emphasis]. There is nothing on the Caseflow to show that the same process of making the assessment as applied to the initial penalty was carried out in relation to the daily penalty. Ms Chaumoo confirmed that not every event is necessarily on the Caseflow. But we find it strange indeed that one but not both assessments are mentioned. We would expect either both or none.

34. Mr Hussain wrote to HMRC on 23 July 2015, the first communication from the appellant following the penalty letters. He refers to "penalty notices for the above mentioned client. Your letter dated 17 June 2015 and 5 May 2015 came to our notice…". Since the letters themselves are headed "penalty notice" we consider that it is the letters that Mr Hussain is referring to and that his letter does not prove that the daily penalty assessment was made or issued or that notice of the initial penalty assessment was issued.

35. Our conclusion on this is that we are satisfied on the balance of probabilities that the initial penalty assessment was made, in the light of the Caseflow entries. We are satisfied that the notice of that assessment was issued and accompanied the letter of 5 May. We are however somewhat perturbed by another entry in the Caseflow: "post returned … 16/06/2015". This followed "letter to trader … 08/05/2015" which we assume is the "penalty notice" letter of 5 May. However since Mr Hussain refers to the letter of 5 May we do not take this any further.

36. We are however not satisfied that, on the balance of probabilities, any assessment was made of the daily penalty or that the letter of 17 June is a notice of it. Indeed if the assessment was not made, nothing can be a valid notice of it.

37. We now turn to the question of whether the appellant had a reasonable excuse. We know nothing of the appellant or its shareholder Mr Abadin except that he gave all information promptly to Mr Hussain and that he clearly relied entirely on Mr Hussain to comply with the paragraph 1 notice.

38. We do not know if Mr Abadin can read English or understand statutory notices of the type in issue here. We do not know if the reason he did not answer Mr Adams' questions at the site visit (see §5(4)) was because he did not understand them. But in any event we would not expect the owner of a small takeaway restaurant to understand fully what they were being asked to do in response to a Schedule 36 notice. We find that it is a perfectly reasonable decision of Mr Abadin to entrust compliance with the notice to Mr Hussain, a man with a tax qualification (ATT).

39. We accept that Mr Abadin promptly told Mr Hussain of the HMRC visits and the questionnaire and other requirements. He also kept Mr Hussain's office informed of developments via WhatsApp. This is evidence of a person taking reasonable care over his company's tax affairs. Should he have done more? HMRC say he should have contacted Mr Hussain to find out what was going on. We look now at *Taylor* the case which Mr Hussain relies on.

40. In *Taylor* the appellant had employed an agent to file his tax returns for the five years before the one in question and those returns had all been filed on time. The appellant had supplied the information necessary in good time. The agent discovered on 6 February that, while she had filed all other client returns on time, she had overlooked Mr Taylor's.

41. Judge King found that Mr Taylor had thought that he had employed a reliable person to submit his tax returns on his behalf and had no reason to suspect that had failed to do so in January 2014. She held that Mr Taylor had taken reasonable steps to avoid the failure.

42. The relevance of *Taylor* to this case was considered by the HMRC reviewing officer. She stated that the facts of this case differed from those in *Taylor*. She noted that Mr Abadin instructed Mr Hussain to provide Mr Adams with the requested information in February 2015. This is a reference to the questionnaire, not the paragraph 1 notice. She goes on to point out that when the paragraph 1 notice was issued Mr Abadin would have been aware that Mr Hussain had not provided the information and that he should have ensured that the deadline was met. Equally it was his responsibility to ensure that once the initial penalty was issued the revised deadline was complied with, and also after the second penalty and the continuing requests he should have done something.

43. We agree that the situation here is different from that in *Taylor*. That was a marginal case involving a failure of no more than six days where it was unrealistic to expect Mr Taylor to do anything beyond what he had done. But we do not accept that the appellant here had any duty to ensure compliance by Mr Hussain merely because the questionnaire had been issued. No one was under any statutory duty to provide information before the issue of the notice and Mr Abadin could reasonably take the view that registering for VAT was sufficient to discharge any duty he had to chivvy Mr Hussain.

44. We also take into account Mr Hussain's evidence of his own sickness and absence from the office (it is clear that he had a brain scan a day or two after the meeting with Mr Abadin after the HMRC visit on 23 February) and Mr Chaudhury's departure.

45. We have not in the end taken the misstatement about appeal rights into account as amounting to a reasonable excuse. There were arguably some documents which were statutory records and in relation to which there were no appeal rights and there was a failure to supply those within the time limit laid down in the paragraph 1 notice. And we have also ignored what might be regarded as partial compliance with that notice in registering for VAT. Partial compliance is non-compliance.

46. In our view the appellant's action show that it took reasonable care to comply with its responsibilities and, combined with Mr Hussain's indisposition and Mr Chaudhury's departure, we hold that the appellant had a reasonable excuse for the failure to provide the documents and information by 24 April 2015.

47. As to the daily penalty we have found that they were not assessed. Were we wrong about that we would have considered that any reasonable excuse that existed in relation to the initial penalty would have ceased. Since the failure to comply was clearly not remedied without undue delay, we would have held that there was no reasonable excuse for the continuing failure.

48. We have considered therefore whether, were we wrong about the lack of assessment, we should vary the penalty of £30 per day. Paragraph 48(4)(b) gives us the right to vary a penalty under paragraph 40 (daily penalty).

49. We have concerns about the process adopted by HMRC to establish the appropriate level of daily penalty as shown on the document that Ms Chaumoo put in evidence at the hearing. Firstly Mr Adams estimated the tax at risk at £15,000, based on an estimated turnover of £90,000 a year. Mr Adams says he had no records or documents, so he must have based these figures on the observations during the inspection visit and the figures on the pink slips etc. There is no evidence that he cross-checked with for example the statements of turnover in the VAT 1 registration form or the returns made for the purposes of Corporation Tax.

50. A figure of tax at risk of £15,000 falls in the "local policy" range for a £30 per day penalty of £10,000 to £30,000. But we do not understand why HMRC have "local" policies for something which should clearly be a nationwide policy if it is based on levels of tax at risk.

51. We also think that the authorising officer took into account irrelevant matters. She said that she took into account the fact that the appellant failed to meet an agreed timetable for submission of the documents. First, there is no evidence that a timetable was agreed rather than imposed by HMRC. Second, until the issue of the notice in late March the appellant was under no obligation to supply the documents and information requested. Nor do we understand why she took into account the fact that an initial penalty had failed to gain compliance when authorising a particular level of penalty. It is a prerequisite for a daily penalty that the taxpayer has failed to comply and been given an initial penalty, so how can this be a relevant factor?

52. The submission to the authorising offer about the level of daily penalties refers to paragraphs in HMRC's Compliance Manual. Paragraph CH26680 says that a first daily penalty should be set at the lower end of the range and CH26760 gives an example of a newsagent for whom books and records were sought under a Schedule 36 notice. In that case the suggested penalty was £20 per day. CH270200 on procedure says:

> "Before you do this [*consider issuing daily penalties*] you should review the case with your line manager and try to make contact with the person to whom you sent the notice to see if you can help them to comply."

There is no evidence on the Caseflow record that this was done by Mr Adams.

53. The submission by Mr Adams says that "No information has been supplied by the trader to date". This is in response to a question: "What has happened since the notice was issued …". The registration details, being in large part the details on the questionnaire had of course been supplied, and if Mr Adams had tried to contact the appellant or Mr Hussain's office he may have discovered that.

54. In *Spring Capital* Judge Mosedale also considered whether partial compliance could be grounds for a reduction in the penalty. She held that it could, but that there would have to be something special about the circumstances to justify a reduction on that ground, since partial compliance is non-compliance. We respectfully agree with Judge Mosedale.

55. We also note that in *Spring Capital* the penalty was also £30 per day. From *Spring Capital Ltd v HMRC* [2016] UKFTT 0246 (TC) (not the same decision but about the same notice) we can see that the tax at risk in that case was corporation tax on a claimed deduction of £1.278 million.

56. We have considered whether we, as an appeal tribunal, can take into account facts that arose after the penalty assessment was issued. What we have in mind is the fact that it appears that the case was settled without the so-called statutory records ever being supplied or the questionnaire answered and that the amount for which it was settled was substantially below the "local policy" lower limit of the £30 per day range. But our right in this case is to substitute a decision that HMRC "had power to make". We think that that must refer to the circumstances obtaining at the time HMRC did decide on £30 per day.

57. Taking into account all the matters referred to above we would have varied the penalty to be £10 per day. In so doing we have taken into account the fact of what was effectively partial compliance in registering for VAT. Because the appellant had not informed Mr Adams that it had registered then we would normally not have made any such reduction, but given Mr Adams' failure to attempt contact despite the guidance in the Compliance Handbook, we regard the effective partial compliance as a special circumstance justifying a reduction.

58. Our other main reason for reducing the penalty is the fact that this is a first occasion on which daily penalties are charged and £30 is not in the lower end of the range as suggested by the Compliance Handbook. £30 per day was regarded as suitable for a case where the tax at risk was vastly in excess of even the HMRC estimate in this case.

59. We stress again though that this discussion is theoretical given our decision on the daily penalty.

Decision

60. In accordance with paragraph 48(3) Schedule 36 FA 2008 we cancel the initial penalty of £300 assessed under paragraph 39 of that Schedule.

61. In accordance with paragraph 48(3) Schedule 36 FA 2008 we cancel the daily penalty of £900 assessed under paragraph 40 of that Schedule.

Further observations

62. We have already mentioned the failure of HMRC to correctly inform the appellant of its appeal rights against the paragraph 1 notice and of its taking into account irrelevant matters when deciding whether to authorise a daily penalty at a particular level.

63. But there remains a fundamental problem with the way HMRC have conducted the enquiry in this case and it relates to the way it has handled objections to the penalty assessments.

64. The penalty notice letters of 5 May 2015 and 17 June 2015 refer to "What you can do if you disagree". They both go on to say:

> "If the company disagrees with our decision, it can appeal. The company needs to write to us within 30 days of the date of this notice, telling us why it thinks our decision is wrong. We will then contact the company to try to settle the matter. If we cannot come to an agreement, we will write to the company and tell it why. We will then offer to have the matter reviewed by someone who has not previously been involved. We will also tell the company about its rights to go to an independent tribunal."

We assume that this is standard wording for all Schedule 36 penalty letters. We observe only that the wording does not differentiate between the two decisions against which an appeal may be made, as to the imposition of a penalty at all and as to the amount.

65. Mr Hussain then wrote to HMRC on 23 July 2015 (which was more than 30 days after both penalty letters). In this letter he asks for the cancellation of the penalty notices.

66. Mr Adams replied on 11 August to inform Mr Hussain that he was out of time to "lodge a review or appeal".

67. Mr Hussain replied on 14 October (there having been a meeting with Mr Adams to discuss a possible settlement of the VAT liability) and again asked for cancellation of the penalties and for the information he enclosed to be sent to "the re-consideration team".

68. On 11 November Ms Foster of the Appeals & Review unit of HMRC Individuals and Small Business Compliance wrote to Mr Hussain referring to his letter of 14 October

> "accepting HMRC's offer of a review. The letter was received on 23 October 2015, this is outside the 30 day period in which you can request a statutory review (the decision letters were date 05/05/15 and

> 17/06/15 your client's review request should have been received by HMRC by 17/07/15).
>
> HMRC will accept your client's late request for a review as correspondence has been received during the review request period."

69. On 7 December 2015 Ms Foster, the reviewing officer wrote to the directors of the appellant in these terms:

> "I refer to your Agent's letter of the 14 October 2015 in which they requested a statutory review of the Schedule 36 penalties….
>
> Under section 83F(6) of the VAT Act 1994, I am required to write to you with the conclusion of my review. …
>
> …
>
> If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. …"

70. The provisions of Schedule 36 relating to procedure for appeals are in paragraph 48:

> "(1) Notice of an appeal under paragraph 47 must be given—
>
> (a) in writing,
>
> (b) before the end of the period of 30 days beginning with the date on which the notification [*of the assessment*] … was issued, and
>
> (c) to HMRC.
>
> (2) Notice of an appeal under paragraph 47 must state the grounds of appeal.
>
> …
>
> (5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

71. Part 5 TMA (the Taxes Management Act 1970) relates to appeals against income tax, corporation tax and CGT assessments. It includes ss 49 to 49I relating to appeals and reviews, and nothing in paragraphs 48 or 49 affects the operation of those sections.

72. Mr Adams was correct in his letter of 11 August to (implicitly) accept that Mr Hussain had made an appeal in his letter of 25 July and correct to say that the appellant was out of time to appeal, and arguably correct to say he was out of time for a review, as a review can only be offered or requested if an appeal has been given to HMRC, where "given" means given in time and accepted. But what Mr Adams failed to do was to consider s 49 TMA which relates to late appeals. He does not appear to have considered whether the appellant had a reasonable excuse for its failure to make its appeal in time, nor did he inform the appellant of its right to apply to this tribunal for permission to give a late appeal to HMRC.

73. In his letter of 14 October Mr Hussain reiterates his appeal and ask for the reconsideration team to look at the case. Mr Adams clearly regarded that as a request for a review, and correctly so. But he did not appreciate that there had to be a validly given notice of appeal before he could accept a request for a review (s 49A(1) TMA). He must therefore be taken to have then accepted a late appeal without knowing it.

74. The letter of 11 November from Ms Foster contradicts itself. It refers incorrectly to the appellant's being offered a review and then correctly to its requesting a review. It incorrectly states that there is a 30 day time limit from the date of the penalty notice for requesting a review, and also only gives one day as the purported time limit when there were two notices issued on different days. Section 49A lays down no time limit for either HMRC offering or the appellant requesting a review.

75. It follows that there is no such thing as a late request for a review of a Schedule 36 penalty, so HMRC were correct, though they did not know it, in accepting the request for a review.

76. The reviewing officer was wrong however to carry out the review as Mr Adams had not notified the appellant of his view of the matter in question (s 49B(2) TMA) within 30 days of receiving what Mr Adams regarded as a valid request for a review.

77. Finally the reviewing officer was wrong to say that it was s 83F(6) VATA that required her to notify the appellant of her conclusions. VATA and the appeal and review provisions in it are wholly irrelevant to appeals against Schedule 36 penalties.

78. It seems clear to us that it is the erroneous assumption by all the officers concerned that the VAT rules apply to Schedule 36 penalties that has led to this catalogue of errors and misleading statements. While the implications of paragraph 48(5) Schedule 36 FA 2008 may not be familiar to Mr Adams and other officers in compliance roles, an Appeals and Review team should surely know them.

79. We do remark however that all the other penalty provisions which a VAT officer is likely to encounter, even in the non-VAT specific provisions in Schedule 24 FA 2007 or Schedule 41 FA 2008, provide for the VAT appeal and review rules to apply (see eg paragraphs 16(1) Schedule 24 FA 2007 and 18(1) Schedule 41 FA 2008). It seems very odd that the multi-track approach of Schedule 24 FA 2007 etc was not followed here and there seems to be no good reason why it could not have been.

80. In this case no harm was done as the appeals did come before the Tribunal. But the combination of the unfamiliar concept in VAT matters of a time limit for appeals (paragraph 48(1)(b) Schedule 36) and an unfamiliar provision relating to late appeals which is not in the body of Schedule 36 could lead to injustice and to appeals and requests for a review being unjustifiably rejected. It could also lead to the Tribunal considering that there has been a late notification of an appeal to it when there has not, with the attendant expense of an unnecessary permission application and possibly a hearing.

81. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 9 MAY 2016