[2017] UKFTT 505 (TC)

TC05955

Appeal number TC/2016/00554

FIRST-TIER TRIBUNAL

TAX

VAT – penalties - ss 60 and 61 VATA 1994 - failure to file returns and account for VAT - investigation of Appellant's tax affairs under Code of Practice 'Civil Investigation into Cases of Suspected Serious Fraud' - notice issued under s 61(1) VATA 1994 transferring the whole of the liability for penalties issued to Appellant's Company under s 60 VATA 1994 to the Appellant - whether actions of company attributable to dishonesty by Appellant – Yes - consideration of disclosure and co-operation - whether mitigation of 50% correct - No - mitigation increased to 60%

MR YUNUS OOMERJEE **Appellant**

- and -

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

TRIBUNAL: MICHAEL CONNELL (JUDGE)
CATHERINE FARQUHARSON (MEMBER)

Sitting in public at Fox Court Brooke Street London on 5 April 2017

Mr Arif Anwar for the Appellant

Mr Christopher Shea, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Yunus Oomerjee ("the Appellant") under s 83(1)(o) Value Added Tax Act 1994 (VATA 1994), against a notice issued under s 61(1) VATA 1994 transferring the whole of the liability for a penalty issued to AKY Contractors Ltd under s 60 VATA 1994 to the Appellant, because it appeared to the HMRC that the conduct giving rise to the penalty was wholly attributable to the Appellant's dishonesty.

Matters at issue

2. Was the behaviour giving rise to the penalty wholly attributable to the Appellant's dishonesty?

3. Was the s 60 VATA 1994 penalty properly imposed, and if so was the correct amount of mitigation for disclosure and co-operation allowed?

Background

4. AKY Contractors Ltd ("AKY") was registered for VAT from 1 October 2008 and made returns under VAT Registration Number 940 3916 28. VAT returns had historically been filed by the Appellant's accountant. The Appellant's wife had previously provided the accountant with financial information and records for the purpose of submitting tax returns. The accountant appears to have ceased acting for the Appellant in early 2010 at around the same time of the Appellant's marriage break up.

5. The last VAT return made was for the period ending 04/10 showing:

Output Tax	£48,167.52
Input Tax	£46,970.60
Net Tax Assessed	£1,196.92
Outputs	£307,595
Inputs	£278,638

Thereafter no returns were filed until the period ending October 2013, when they resumed.

6. In the absence of returns for periods 07/10 to 07/13, central assessments were issued as detailed in paragraph 15 below.

7. Throughout the default periods the Appellant was the sole director and shareholder of AKY Contractors Ltd.

8. On 2 December 2011, following receipt of information which suggested that the central assessments were severely inadequate, a notice of enquiry was issued into the affairs of AKY and the Appellant. The enquiries were made under the Code of Practice 'Civil Investigation into Cases of Suspected Serious Fraud', commonly referred to as a COP9 enquiry.

9. On 31 January 2012, the Appellant appointed a new accountant, Mr Arif Anwar.

10. An initial meeting with the Appellant and his new accountant took place on 14 June 2012. The Appellant says that until then, he was unaware that his previous accountant had not filed any of his VAT returns from 07/10. The Appellant was warned that he must bring his tax affairs up to date and file the outstanding VAT returns. Mr Anwar said that in order to deal with the outstanding returns he would need the Appellant's accounting records from his previous accountant, which he had requested but still not received. It was also agreed that the Appellant would instruct Mr Anwar to prepare a Disclosure Report.

11. Correspondence between Mr Anwar and HMRC continued and a second meeting was held 13 November 2012 to discuss progress with regard to completion of the Disclosure Report. A 'deadline' was set by HMRC of 14 December 2012.

12. A third meeting was held with Mr Anwar and the Appellant on 5 March 2014 to discuss the delay in providing the Disclosure Report and filing of the outstanding VAT returns. Mr Anwar said that the information and records that he had been able to obtain from the Appellant's previous accountant was totally unsatisfactory. HMRC expressed the view the submission of outstanding VAT returns was required without any future delay.

13. On 31 March 2014 the following information was provided by Mr Anwar:

Period	Output Tax	Input Tax	Net Tax
07/10	22,340.00	13,000.00	9,340.00
10/10	57,998.00	33,126.00	24,872.00
01/11	82,002.00	33,216.00	48,786.00
04/11	50,750.00	33,216.00	17,534.00
07/11	70,445.00	33,216.00	37,229.00
10/11	50,503.00	30,713.00	19,790.00
01/12	49,008.00	30,713.00	18,295.00
04/12	75,855.00	30,713.00	45,142.00

07/12	61,998.00	30,713.00	31,285.00
10/12	18,290.00	19,052.00	(762.00)
01/13	45,710.00	19,052.00	26,658.00
04/13	50,984.00	19,052.00	31,932.00
07/13	27,432.00	19,052.00	8,380.00

14. HMRC pointed out that returns were still required, which had to be filed electronically. Mr Anwar says that he had difficulty filing the returns online and eventually delivered paper returns on 24 April 2014.

15. On 28 May 2014, assessments were issued in accordance with the figures provided by the Appellant's paper returns. [No assessment was issued for the period 10/12 as the return for that period showed a repayment and it was necessary for the company to make a return to claim the repayment.]

	Tax per Return	Central Assessment	Difference/Officer Assessment
07/10	9,340.00	£1,424.00	£7,916.00
10/10	24,872.00	£1,494.00	£23,378.00
01/11	48,786.00	£1,561.00	£47,225.00
04/11	17,534.00	£1,434.00	£16,100.00
07/11	37,229.00	£1,640.00	£35,589.00
10/11	19,790.00	£1,654.00	£18,136.00
01/12	18,295.00	£2,074.00	£16,221.00
04/12	45,142.00	£2,247.00	£42,895.00
07/12	31,285.00	£2,776.00	£28,509.00
10/12	-762	£3,172.00	
01/13	26,658.00	£3,672.00	£22,986.00
04/13	31,932.00	£3,374.00	£28,558.00.
07/13	8,380.00	£3,754.00	£4,626.00
		Total	£292,139.00

16. HMRC assert that no appeal can be made against the Officer assessments, as under s 83(1)(p)(i) VATA 1994, an appeal can only be made for a period in respect of which a return has been made.

17. On 23 December 2014, Mr Anwar submitted the Disclosure Report.

18. On 3 February 2015, a fourth meeting was held to discuss the Disclosure Report. HMRC pointed out that although the information had enabled assessments to be made, the electronic VAT returns remained outstanding.

19. HMRC also noted that the Disclosure Report showed significant differences between the amount of input tax and that previously submitted. HMRC expressed concern and requested the working papers.

20. Without the working papers being supplied, AKY entered into a member's voluntary liquidation and a liquidator was appointed on 13 March 2015.

21. On 29 May 2015 notices were issued charging a penalty of £146,067 under s 60(1) VATA 1994 against AKY and transferring the liability to the Appellant under s 61 VATA 1994. HMRC explained how they had calculated the penalty. The amount of penalty due before mitigation is an amount equal to the tax evaded, which was £292,139. They explained that the penalty can be mitigated for disclosure and co-operation. This included meeting HMRC when asked to do so, giving information when required, answering questions truthfully and honestly and providing all relevant facts to help HMRC to work out the correct amount of evaded tax. HMRC explained that their policy was to allow a maximum of 80% mitigation. They had allowed a total of 50%, by giving 20% out of a 40% maximum for disclosure and by giving 30% out of a maximum of 40% for co-operation.

22. Mr Anwar says he wrote to HMRC Debt Management and Banking on 23 July 2015 with a copy of a letter dated 3 June 2015 addressed to HMRC appealing against the penalty assessment and asking for a review. HMRC say they have no trace of receiving the original letter of 3 June 2015.

23. On 31 July 2015 HMRC wrote to the Appellant's representative, Mr Anwar, asking for confirmation as to whether a review or an appeal was being requested. HMRC also said that if a review was being requested, reasons for not agreeing with the decision should be provided.

24. On 26 November 2015, as no reply had been received, HMRC wrote to the Appellant to say that the assessment was being released for collection and advised the Appellant's representative that he had 30 days in which to notify an appeal to the Tribunal Service.

25. Notice of Appeal was served out of time by the Appellant on 31 January 2016.

26. HMRC do not object to the Tribunal accepting the late appeal.

Relevant Legislation

27. The VAT Regulations 1995 require a registered person to make a return and mandate that in the Appellant's case they should have been by electronic returns. The relevant regulations are as follows:

> Making of returns
>
> 25(1) Every person who is registered or was or is required to be registered shall, in respect of every period of a quarter or in the case of a person who is registered, every period of 3 months ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day

of the month next following the end of the period to which it relates, make to the Controller a return [in the manner prescribed in regulation 25A] showing the amount of VAT payable by or to him and containing full information in respect of the other matters specified in the form and a declaration, [signed by that person or by a person authorised to sign on that person's behalf], that the return is [correct] and complete.

Regulation 25A(3) VAT Regulations 1995 for periods on or after 1 April 2012

Subject to paragraph (6) below, a person who is registered for VAT must make a return required by regulation 25 using an electronic return system [that that person is required or authorised to use] whether or not such a person is registered in substitution for another person under regulation 6 [transfer of a going concern).]

Regulation 25A(3) & (5) VAT Regulations 1995 for periods on or after 31 December 2009.

25A(3) A specified person must make a specified return using an electronic return system.

25A(5) In this regulation a "specified person" means a person who -

(a) is registered for VAT with an effective date of registration on or after 1st April 2010 whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern), or

(b)is registered for VAT with an effective date of registration on or before 31st March 2010 and has as at 31st December 2009 or any date thereafter an annual VAT exclusive turnover of £100,000 or more whether or not that person's turnover subsequently falls below this level.

Section 73 VATA 1994 allows HMRC to make an assessment when a person has failed to make a return and the relevant sub-sections are as follows:

Failure to make returns etc

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may

Assess the amount of VAT due from him to the best of their judgment and notify it to him.

(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-

2 years after the end of the prescribed accounting period; or

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.

Section 77 VATA 1994 limits the normal time for making an assessment to no more than four years after the end of the accounting period but also extends that period to twenty years where there is a loss of VAT brought about deliberately. The relevant subsections are as follows:

77 Assessments: time limits and supplementary assessments

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

(a) more than 14 years] after the end of the prescribed accounting period or importation or acquisition concerned, or ...

Section 77(4) VATA 1994

(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 (subject to subsection (5)).

(4A) Those cases are—

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

Section 60 VATA 1994 allows HMRC to charge a penalty, equal to the VAT evaded, where a person has acted dishonestly for the purposes of evading VAT. The relevant subsections are as follows:

VAT evasion: conduct involving dishonesty

(1) in any case where -

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

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

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

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

Section 61 VATA 1994 allows HMRC to serve a notice transferring the liability for the s 60 penalty to a director or managing officer of a body corporate to whom the dishonesty giving rise to the Section penalty is attributable. The relevant subsections are as follows:

61(1) Where it appears to the Commissioners -

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

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

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

61(2) A notice under this section shall state -

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

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

61(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

61(4) Where a notice is served under this section -

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

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

61(5) No appeal shall lie against a notice under this section as such but -

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

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

61(6) In this section a "managing officer", in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director; and where the affairs of a body corporate are managed by its members, this section shall apply in relation to the conduct of a member in connection with his functions of management as if he were a director of the body corporate.

Schedule 24 (Commencement and Transitional Provisions) Order 2008 contains a saving provision allowing the continued use of s 60 and s 61 VATA 1994 for dishonestly not making a return, notwithstanding that s 60 and s 61 VATA 1994 were generally omitted from various dates in 2008-09. This is pending the full enactment of the new penalties in Schedule 55 Finance Act 2009. The relevant provision is as follows:

4 Saving

Notwithstanding paragraph 29(d) (consequential amendments), sections 60 and 61 of the Value Added Tax Act 1994 (VAT evasion) shall continue to have effect with respect to conduct involving dishonesty which does not relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC.

Section 70 VATA 1994 allows HMRC, or on appeal the Tribunal to mitigate penalties under s 60 VATA 1994 to such amount as they think proper.

70 Mitigation of penalties under sections 60, 63, 64 and 67

Where a person is liable to a penalty under section 60, 63, 64[67 or 69A] [or under paragraph 10 of Schedule 11A], the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b)the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.

Section 83 VATA 1994 provides the right of appeal against assessments. The relevant provision is as follows:

83(1) (n) any liability to a penalty or surcharge by virtue of any of sections [59 to [69B1];

(o) a decision of the Commissioners under section 61 (in accordance with section 61(5));

(p) an assessment--
under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or
under [subsections (7), (7A) or (7B)] of that section; or
under section 75;

Case law Authority

28. The Court of Appeal laid down a two stage test for criminal dishonesty in *R v Ghosh* [1982] 2 All ER 689 saying:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

29. The case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* [2005] UKPC 37, states that the test is summarised as follows:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

30. The Barlow Clowes test was discussed and approved by the Court of Appeal in *Adnan Shaaban Abou-Rahmah and others v Al-Haji Abdul Kadir Abacha and others* [2006] EWCA Civ 1492.

HMRC's Submissions

31. A person subject to a penalty under s 60 VATA 1994 is liable to a penalty equal to the VAT evaded or sought to be evaded. This is the VAT shown in the assessments issued to the Appellant on 28 May 2014. The figures were based on the information he provided.

32. AKY is not entitled to submit appeals against the assessments because no electronic returns have been submitted. The Appellant was the sole director at the time and must bear responsibility for that.

33. Even if it was possible to submit an appeal, it is clear from the Disclosure Report that the Appellant would not be in a position to produce evidence to support a reduction of the assessment. The report says:

> "It has been virtually impossible to produce any meaningful VAT returns. This has been as a result of the complete lack of any formal accounting in AKY since the departure of Kemal Mathuru……Whether the liability is £309,301 or £130,584, we can be sure it is something within that range."

34. The penalty is based on the assessments issued and the total VAT liability shown of £292,139. This sum has now been written off due to the voluntary liquidation of AKY.

35. HMRC assert that AKY is liable to a penalty under s 60 VATA 1994 because the Company evaded VAT by dishonestly failing to make returns.

36. By failing to keep any records from which VAT returns could be produced and failing to submit VAT returns, AKY was acting dishonestly and as the Appellant was the sole responsible director, that dishonesty is directly attributable to him.

37. The Appellant has significant experience in the construction industry. This is self-evident from the Appellant's Disclosure Report which explains that he began as an apprentice in 1987 and has worked in the construction industry ever since.

38. In 1988 he began sole trading as Cedar Builders. The business ended in Bankruptcy in 1993.

39. The Disclosure Report explains that the Appellant subsequently traded as Manhattan Group. In March 2005 this business was incorporated and the Appellant's wife, Kemal Mathru Oomerjee, was appointed the sole director and shareholder.

40. From 2005 to 2009 Manhattan Group ran under the direction and control of Kemal Mathru Oomerjee. The Appellant was paid a salary as an employee under PAYE.

41. The Disclosure Report also explains the history of AKY. The Company's only director was always the Appellant. On incorporation on 15 April 2008, it had two issued shares one issued to the Appellant and the other to his wife.

42. On 1 September 2010, as part of a separation agreement, Kemal Mathru Oomerjee transferred her one share in the Company to the Appellant.

43. In the period covered by the penalties it is clear that the Appellant was an experienced businessman, and would have understood the responsibilities and pitfalls of his chosen trade.

44. The Appellant must have been aware of the necessity to keep records and submit VAT returns. HMRC say the failure to do so can only be regarded as wilful and dishonest.

45. The Appellant says he was unaware of any irregularity in the books until he received the COP 9 enquiry notice. The Appellant failed to keep the formal accounting records that were necessary for returns to be filed. As there were no records from which returns could have been completed, it is not credible for the Appellant to claim that he thought his accountant was dealing with the returns.

46. The Appellant was also aware of the central assessments, the default surcharge notices issued by HMRC and collection correspondence; all of which would have indicated that AKY was failing to comply with its responsibilities.

47. The general failure of the Appellant to comply with his own and the Company's responsibilities under the Taxes Acts is a pattern of behaviour that would generally be regarded as dishonest.

48. The Appellant's failure to remedy matters even after he had received the COP 9 enquiry notice clearly demonstrates that his earlier failure to submit returns was not through lack of knowledge.

49. The Appellant was reminded throughout the enquiry that it was necessary for him to regularise the Company's tax affairs and bring them up to date.

50. An honest person finding that his tax affairs were in such arrears would immediately seek to put matters right. The Appellant just carried on issuing invoices, collecting VAT and not making returns or paying the VAT over to HMRC.

51. As all these failures were personally attributable to the Appellant, HMRC were correct in transferring the liability for the penalties to him under s 61 VATA 1994.

52. Under s 70 VATA 1994, HMRC has the discretion to mitigate penalties. HMRC has adopted a policy of allowing a maximum of 80% mitigation depending on the extent of disclosure and co-operation by the tax payer.

53. HMRC may allow up to 40% mitigation for an early and truthful explanation as to why the VAT arrears arose and of their true extent ("disclosure").

54. At the opening meeting, the Appellant failed to acknowledge that he had been aware of the VAT defaults. When confronted with the fact no VAT returns had been submitted since 04/10, he agreed that he understood why he had been asked to attend the meeting. He said his non-compliance was due to his marriage break up, his total inexperience with regard to tax matters and the fact that he was very disorganised.

55. HMRC allowed 20% mitigation for disclosure.

56. HMRC may also allow up to 40% for a tax-payer fully embracing and meeting responsibilities under the investigation procedure by supplying information promptly, acknowledging irregularities, attending meetings and answering questions ("co-operation").

57. HMRC considered that whilst a Disclosure Report had been commissioned from which the amounts of evaded VAT were eventually determined, there had been a two and a half year delay in the report being submitted. VAT information for the periods 07/10 to 07/13 was not received until 31 March 2014. HMRC accept the Appellant attended the opening meeting and three further meetings. He had also answered all the questions put to him.

58. HMRC allowed 30% mitigation for co-operation.

59. Taking the total mitigation of 50% into account, a penalty was raised for 50% of the evaded duties, resulting in the penalty being reduced from £292,139 to £146,067.

The Appellant's Contentions

60. The Appellant refutes HMRC's assertion that the Company's actions giving rise to the penalties were attributable to his dishonesty. He also feels that the quantum of mitigation allowed by HMRC does not reflect the level of disclosure and co-operation he provided.

61. He asserts that the submissions made by HMRC in arriving at the penalty quantum are unsafe as they ask the Tribunal to accept as facts, submissions which he says are conjectures and suppositions without any factual basis.

62. The Appellant accepts HMRC's submissions, save where asserted below.

63. VAT returns were submitted by the Appellant's representative Mr Anwar and receipt acknowledged by HMRC on 24 April 2014.

64. The assessments were issued as a result of the information provided by the Appellant. His cooperation was key in arriving at the assessments. The Appellant agrees that there were delays in providing the outstanding information to HMRC, but says that was entirely because he had always relied upon his ex-wife to complete the Company's business paperwork (this is not repudiated by HMRC) and when she suddenly left, he merely followed the existing system of sending all paperwork to her for sending on to his previous accountants. He had assumed that they would continue to file the required returns. His ex-wife left in mid-2010

and it appears his accountant stopped filing the VAT returns shortly after that, even though he had been paid £10,000 per annum to maintain the records of AKY and attend to filing of all necessary returns. He had a reasonable expectation that they would do the job he was paying them to do.

65. The Appellant accepts the COP 9 Report produced by Mr Anwar took much longer than he expected. However the delay was not the result of any non co-operation or deliberate act of omission on his part. It arose as a result of all of the problems caused by his old accountant.

66. On being asked by Mr Anwar to supply records such as bank statements, purchase invoices and copy VAT returns, in order for the COP 9 report to be compiled, the previous accountant was simply unable to deliver anything of any description that could be reasonably and conscientiously used as a basis for the COP 9 work.

67. Mr Anwar says that the old accountant's work was shoddy and unacceptable, at every accounting level. Although these professional lapses do not assist the Appellant, they prove that the Appellant's failure to keep adequate records was not an act of dishonesty, but reflection on his poor choice of accountant.

68. Although the Appellant was always the sole director of AKY, his ex-wife was both company secretary and a 50% shareholder from 15 April 2008 to 1 April 2010, when she left the family home and the business. However the intention was that she would continue to assist in the running of AKY.

69. The Appellant is not an educated man and his experience of company administration and maintaining records without professional help is nil. Failure to keep proper records in the absence of employing a professional accountant is culpable, but not when the Appellant as sole director of AKY is virtually illiterate and was employing a professional accountant to represent him. That is clearly not wilful, nor is it dishonest.

70. It took Mr Anwar a professional forensic accountant (who is also a Senior Statutory Auditor) having over thirty-three years post qualification experience in public practice, two and a half years to sift through the masses of paperwork, lost bank statements and invoices that had been accumulated by the previous accountant, to complete his report. The Appellant had diligently provided the previous accountant with all his records and had paid him to compile them and submit his returns as required.

71. The Appellant accepts that he cannot hide behind the multiple failures of his accountant, but there is no evidence offered by HMRC that he knew his returns were not being submitted.

72. The Appellant was not aware of the defaults as all mail from HMRC was sent unopened to his accountant. The failures were caused by the consistent and systemic failures of a professional firm to provide the services that the Appellant had paid them to provide.

73. If the Appellant had the ability to remedy failures, he would have clearly done so as soon as the COP 9 enquiry was initiated against him. It was a reflection of the amount of work involved that despite the overwhelming stress of that investigation it still took Mr Anwar two years to get the VAT returns compiled.

74. The Appellant says that at the opening meeting he genuinely did not know of the failures on the part of his previous accountant. Thereafter he diligently and honestly provided whatever information was required of him. Mitigation at 20% is insufficient to reflect the level of disclosure he provided.

75. The Appellant attended all meetings requested of him. He supplied whatever information he was able to promptly. His quantification of his VAT liabilities was accepted by HMRC in their final assessments.

76. Mitigation for co-operation at 30% does not reflect the amount of co-operation provided by the Appellant.

Conclusion

77. There are two issues which the Tribunal must consider. Firstly, whether s 60 VATA 1994 applies, that is whether for the purpose of evading VAT, the conduct of the Company which gave rise to the penalties involved dishonesty, so that pursuant to s 61 VATA 1994, where a body corporate is liable to a penalty, such dishonesty was attributable to the Appellant who was at the material time a director and managing officer of AKY.

78. HMRC's checks into the tax affairs of AKY arose because VAT returns were not being submitted. We do not accept the Appellant's assertion that he was unaware VAT returns were not being filed until after receiving the COP 9 enquiry notice in December 2011. The Appellant was aware that central assessments were being made from 07/10 and would have also been aware that the Company's VAT liability was far greater than as assessed. We therefore find the Appellant's actions were dishonest and that consequently HMRC were correct to charge the company a civil evasion penalty under s 61(1) VATA 1994 which was transferred to the Appellant under s 60 VATA 1994.

79. The assessments raised by HMRC, by way of correction of the central assessments, were made on the basis of information provided by the Appellant. There appears to have been a possibility that VAT input figures were greater than originally returned and that consequently the penalty was greater than it might otherwise have been. That is however a consequence which the Appellant will have to accept and arises from the fact that either he failed to check that his previous accountant was filing returns on his behalf, or was aware that returns were not being filed.

80. The second issue we need to consider is whether the amount of mitigation for disclosure and co-operation was correctly allowed.

81. The penalty which may be imposed by HMRC is in an amount equal to the tax evaded, which in this instance was £292,139.00. The penalty can be reduced if HMRC are informed promptly why VAT has not been accounted for. We find that the Appellant, taking into account the constraints imposed by his previous accountant's failure to deliver to his new accountant, Mr Anwar, copy records and information, provided as much information as he was able to. He attended meetings and answered all questions put to him. He also provided

Mr Anwar with all relevant information to enable HMRC to determine the correct amount of outstanding VAT.

82. Given all the facts and circumstances we consider that 25% mitigation should be allowed for disclosure and that 35% mitigation should be allowed for co-operation. That is a total of 60%, which reduces the penalty to 40% of £292,139.

83. The appeal is accordingly dismissed, subject to a reduction of the penalty from £146,067 to £116,855.

84. This Decision contains full findings of fact and reasons for the decision. A party wishing to appeal this decision must apply within 28 days of the date of release of this Decision. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 20 JUNE 2017