[2020] UKFTT 0054 (TC)

TC07550

VALUE ADDED TAX – penalty for dishonest evasion of VAT – liability of officer of company – ss 60 and 61 Value Added Tax Act 1994 – was appellant dishonest – ability of officer to appeal against the amount of the penalty – amount of reduction for co-operation during HMRC's investigation – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/03373

BETWEEN

GEOFFREY CHARLES JARVIS **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
DUNCAN MCBRIDE

Sitting in public at Bristol Civil & Family Justice Centre on 11 December 2019

Tim Brown, counsel for the Appellant

Christopher Thompson-Jones, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Mr Jarvis, has a mechanical engineering background. Through various companies, he has, for many years, carried on a business manufacturing specialist machinery for use in the construction and civil engineering industries.

2. One of these companies was GP Machinery Limited. GP Machinery had a poor VAT compliance history since it started trading in 2010.

3. Following a VAT investigation which started in November 2014, HMRC assessed GP Machinery to a VAT evasion penalty under s 60 Value Added Tax Act 1994 (VATA) totalling £284,718, being 90% of the VAT of £316,354 which HMRC believed to be due for the VAT periods 05/11 – 02/15 inclusive.

4. Mr Jarvis was the sole director and shareholder of GP Machinery. As HMRC believed that the default was due to Mr Jarvis' dishonest conduct, they issued him with a notice under s 61 VATA in order to collect the penalty from Mr Jarvis personally.

5. Mr Jarvis now appeals against his liability to the penalty on the basis that he was not dishonest. He also appeals against the amount of the penalty on the basis that HMRC's VAT assessments on which the penalty is based are excessive and that the 10% reduction allowed by HMRC against the maximum which could be charged does not properly reflect the level of co-operation shown by him during the course of HMRC's investigation.

THE LEGAL FRAMEWORK

6. Section 60 VATA authorises HMRC to charge a penalty equal to the amount of VAT at stake where a person dishonestly evades VAT. Section 60(7) VATA requires HMRC to show that the evasion involves dishonest conduct.

7. Section 61 VATA allows HMRC to serve a notice on a director of a company which is liable for a dishonest evasion penalty under s 60 VATA requiring the director to pay all or part of the penalty. The key provisions of s 61 VATA are as follows:

> "**61 VAT evasion: liability of directors etc**
>
> (1) Where it appears to the Commissioners -
>
> (a) that a body corporate is liable to a penalty under section 60, and
>
> (b) 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.
>
> (2) A notice under this section shall state -
>
> (a) the amount of the penalty referred to in subsection (1)(a) above ('the basic penalty'), and
>
> (b) 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.
>
> (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.

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

(a) 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

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

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

(a) 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 specified in the assessment; and

(b) 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."

8. The first issue we need to determine is whether Mr Jarvis has been dishonest for the purposes of s 61(1)(b).

9. Both parties agreed that the test the Tribunal should apply is that set out in *Ivey v Genting Casinos (UK) Limited T/A Crockfords* [2017] UKSC 67. Lord Hughes summarised the test at [74] as follows:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

10. Mr Jones, on behalf of HMRC, submits that the objective part of this test requires the Tribunal to consider what a reasonable and prudent taxpayer would have been expected to have known or to have done in the circumstances. Mr Brown disagrees with this and says that, once it is established what Mr Jarvis knew, the only question is whether the actions which he took (or failed to take) in the light of that knowledge were, objectively, dishonest – i.e. it is irrelevant what a reasonable tax payer would have been expected to know or would have done.

11. We agree with Mr Brown that Mr Jones has misinterpreted the test for dishonesty. He has, to some extent, confused it with the question as to whether or not a taxpayer might be said to have a reasonable excuse for their failure. We must look only at what Mr Jarvis knew or

believed and, as Lord Hughes says, we must then determine whether his conduct was dishonest by applying the standards of ordinary decent people. We should not take into account what somebody else might have known or believed. Similarly, the fact that a reasonable taxpayer may have acted in a different way is not something we should take into account. The only question is whether an ordinary, decent person would consider what Mr Jarvis did or did not do to be dishonest.

12. At the Hearing, the Tribunal raised the question as to whether, in the light of s 61(5) VATA, the recipient of a notice under s 61 VATA had the ability to appeal against the amount of the underlying penalty assessed on the company.

13. Mr Brown referred to the decision of the First-tier tribunal in *Matthew Hodges v HMRC* [2015] UKFTT 0227 (TC) where the First-tier Tribunal clearly considered (but without explaining why) that an individual who has received a notice under s 61 VATA can indeed challenge the amount of the penalty and, in doing this, can ask the Tribunal to consider the amount of the underlying VAT assessment on which the penalty is based. The tribunal's conclusion appears to have relied on the power to mitigate penalties contained in s 70 VATA. However, Mr Brown and Mr Jones were unable to add anything to this at the Hearing. The Tribunal therefore directed both parties to provide written submissions on this point. We are grateful for the submissions which we have received.

14. Section 70(1) VATA provides as follows: -

> "(1) Where a person is liable to a penalty under sections 60, 63, 64, 67, 69A or 69C 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."

15. Mr Jones, on behalf of HMRC submits that the tribunal in *Hodges* was wrong in concluding that it could reduce a penalty for which a director is made liable under s 61 VATA as, whilst s 70 VATA refers to s 60 VATA, it does not refer to s 61 VATA.

16. Mr Jones does however concede that a person on whom penalty has been assessed in accordance with s 61 VATA may appeal against the amount of that penalty under s 83(1)(q) VATA which permits an appeal against the amount of any penalty specified in an assessment under s 76 VATA (s61(3) VATA confirming that a penalty for which an officer of a company is liable under s 61 VATA is to be assessed under s 76 VATA). This, he says, is confirmed by s 84 (6) VATA which provides as follows: -

> "(6) Without prejudice to section 70, nothing in s 83(1)(q) shall be taken to confer on a tribunal any power to vary an amount assessed by way of penalty, interest or surcharge except in so far as it is necessary to reduce it to the amount which is appropriate under sections 59 to 70 ……. ; and in this subsection 'penalty' includes an amount assessed by virtue of section 61(3) or (4)(a)."

17. Mr Jones however makes the point that the combined effect of s 83(1)(q) and s 84(6) is that the tribunal may only reduce the amount of a penalty for which an officer of a company is liable to 'the amount which is appropriate' under ss 59 to 70 VATA. He notes that the legislation does not confirm whether, for this purpose, the tribunal can consider the underlying VAT assessment on which the penalty is based.

18. Unfortunately, Mr Jones' conclusion is not entirely clear. He invites the tribunal to follow a pragmatic approach and to consider whether the penalty should be reduced to an amount which is appropriate in accordance with s 84(6) VATA. However, he concludes by submitting that the tribunal does not have jurisdiction to adjust any VAT assessment or any penalty charged on the company in accordance with s 60 or s 61 VATA.

19. Mr Brown has helpfully drawn the tribunal's attention to the decision of the first-tier tribunal in *Jason Andrew v HMRC* [2016] UKFTT 0295 (TC) in which the tribunal considered whether it had jurisdiction to investigate the amount of the penalty which had been charged on the company in the context of a personal liability notice issued to an officer of the company under the provisions of paragraph 19 of schedule 24 Finance Act 2007 which, for VAT purposes, has replaced s 61 VATA. In concluding that it did have such a power, the tribunal relied on the reasoning of the VAT tribunal in *Nazif and another v Commissioners of Customs and Excise* (1995) (LON/92/70P).

20. The legislation being considered in *Nazif* was s 13 Finance Act 1985 (the predecessor to s 60 VATA) and s 14 Finance Act 1986 (the predecessor to s 61 VATA) together with s 40 Value Added Tax Act 1983 which contained (at s 40(1)(p)) the predecessor to s 83(1)(q) VATA and (at s 40(1A)) the predecessor to s 84(6) VATA.

21. All of these provisions were in substantially identical terms to the current legislation. The only point which it is necessary to note is that s 14(6) Finance Act 1986 provided as follows: -

> "(6) For the purposes of the Value Added Tax Act 1983 any appeal brought by virtue of section (5) above shall be treated as an appeal under section 40 of that act; and the reference in subsection (1A) of that section to an amount assessed by way of penalty includes a reference to an amount assessed by virtue of subsection (3) or subsection (4)(a) above."

22. There is no equivalent of s 14(6) Finance Act 1986 in s 61 VATA. This is because the first part of it is dealt with by s 83(1)(o) VATA which specifically provides for an appeal against an decision under s 61 VATA in accordance with s 61(5) VATA and the second part is dealt with by the fact that s 84(6) VATA specifically confirms that a penalty includes an amount assessed by virtue of s 61(3) or (4)(a) VATA.

23. With that background in mind, the VAT tribunal in *Nazif* explained its reasoning as follows: -

> "Subsection (5) of s 14 expressly rules out any appeal against a notice under that section 'as such' but does confer separate rights of appeal upon the company, if it is assessed under subsection (4)(a), and upon a named officer who has been assessed under subsection (3). Where the company is assessed, because it is not proposed to recover the whole of the penalty from one or more named officers, the company may appeal against the decision 'as to its liability to a penalty as if it were specified in the assessment.' A named officer who is assessed may appeal against the decision 'that the conduct of the company is in whole or in part, attributable to his dishonesty' and also against the decision 'as to the portion of the penalty which the Commissioners [propose] to recover from him.' There is no doubt but that subsection (5) does itself create free standing rights of appeal, that is to say rights independent of any right of appeal under s 40(1) of the Value Added Tax Act 1983. That is made clear by the first limb of subsection (6) of s 14.
>
> Mr Pleming suggested that subsection (5) confers only limited rights of appeal and the named officer's rights of appeal are confined to the matters therein mentioned. I do not accept that submission. The result would be to curtail the named officer's rights so much, not just ruling out the kind of questions raised by Miss Lonsdale but also effectively excluding any substantive challenge to the basis of the penalty itself, that it cannot, in my view, have been Parliament's intention. It is not a conclusion to be reached without some very clear directions that that is the effect.

Section 40(1) of the 1983 Act provides that 'An appeal shall lie ... against the decision of the Commissioners with respect to any of the following matters -

(o) any liability to a penalty or surcharge by virtue of any of ss 13 to 17 and 19 of the Finance Act 1985;

(p) the amount of any penalty, interest or surcharge specified [in] an assessment under s 21 of that Act.'

It is plain from subsection (4)(a) of s 14 that what is there assessable upon the company is the remaining portion of the basic penalty to which it is liable under s 13 of the 1985 Act. The intention in subsection [(5)(a)] of s 14 thus appears to be to enable the company to challenge that liability to the basic penalty and its amount, including maintaining that a reduction or greater reduction should be given for co-operation, notwithstanding that only a part is being recovered and has thus been assessed upon the company. But the express exclusion of any right to appeal in respect of the notice as such and the absence of any express right of appeal mean that the company cannot maintain, for example, that a bigger portion should have been assessed on the named officer, as it might wish to if in the meantime its ownership had come into different hands.

Where the named officer is assessed part or the whole of the company's liability is in effect transferred. That portion, whether it be the whole or a part, is under s 14 made recoverable from the named officer 'as if he were personally liable under s 13 of [the 1985 Act] to a penalty which corresponds to that portion.' Neither of the matters in respect of which he is given an express right of appeal under subsection (5)(b) of s 14 refers in terms to the amount of the penalty. But paragraph (p) of s 40(1) of the 1983 Act gives a right of appeal against a decision with respect to the amount of any penalty specified in an assessment under s 21 of the 1985 Act. Nowhere in s 14 is there any provision excluding an appeal under s 40(1) (p). The hypothesis upon which the named officer is assessed in respect of the portion of the basic penalty is that he is personally liable to a penalty under s 13 of that amount. If, notwithstanding that that is the basis upon which he is to be regarded as liable and so assessed, the Legislature did not [intend] him to be able to challenge on appeal the amount of the penalty, and its make-up, one would have expected to find that spelt out in s 14. On the contrary, the second limb of s 14(6) appears to confirm the existence of such a right. Subsection (1A) of s 40 of the 1983 Act provides that, without prejudice to s 13(4) of the 1985 Act (which empowers the Commissioners or, on appeal, the Tribunal to reduce the penalty under that section where the taxpayer has given co-operation) '... nothing in subsection (1)(p) above shall be taken to confer on a Tribunal any power to vary an amount assessed by way of penalty, interest or surcharge except insofar as it is necessary to reduce it to the amount which is appropriate under ss 13 to 19 of that Act.' Section 14(6) directs that the reference in s 40(1A) to an amount assessed by way of penalty includes a reference to an amount assessed by virtue of s 14(3) on a named officer or by virtue of s 14(4)(a) on the company. Indeed, it would be an astonishing result if the officer were to be unable to question the amount of the basic penalty when the company has that right, so long as some portion however small is not being recovered from the officer, and when the company is unlikely to have the interest to pursue any such right, assuming it has one which is very doubtful, where the whole basic penalty has been assessed upon that officer."

24. We agree with the tribunals in *Nazif* and *Andrew* that, for the reasons explained by the tribunal in *Nazif* an officer of a company from whom HMRC seek to recover all or part of a

penalty under s 61 VATA does have the right to question the amount of the penalty which has been charged on the company under s 60 VATA.

25. This however still leaves Mr Jones' point that s 84(6) VATA only allows the tribunal to vary the amount of the penalty 'in so far as it is necessary to reduce it to the amount which is appropriate under sections 59 to 70'. In our view, this must refer to the amount which is appropriate under s 60 VATA and not s 61 VATA as it is s 60 VATA which determines the amount of the penalty which is due.

26. Section 60(1) VATA provides that the penalty should be equal to the amount of VAT evaded. This is supplemented s 60(3) VATA which provides that: -

> "(3) the reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person's conduct shall be construed –
>
> (a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated;"

27. It is clear from s 60(3) VATA that, in considering the correct amount of the penalty under s 60 VATA, the tribunal must investigate (in this case) the actual amount by which the output tax was falsely understated and should not therefore rely solely on HMRC's assessments if Mr Jarvis is able to show, on the balance of probabilities, that the understated output tax should be different to the amount which HMRC have taken into account in their assessments.

28. Turning to s 70 VATA, we do not accept Mr Jones' submission that this does not apply to the penalty which HMRC seek recover from Mr Jarvis under s 61 VATA. It is clear to us that the reason s 70 VATA does not refer to s 61 VATA is that amount of the penalty is fixed by reference to s 60 VATA. Section 61 VATA is only a mechanism for collecting all or part of the penalty from an officer of the company. This follows from s 61(3) VATA which provides that the penalty "shall be recoverable from the named officer as if he were personally liable under s 60 to a penalty". In essence the reason why a reduction may be made under s 70 VATA is very similar to the reason explained by the VAT tribunal in *Nazif* why the officer is able to question the amount of the underlying penalty charged on the company.

29. Based on the above, the issues for the Tribunal are as follows:

(1) was Mr Jarvis dishonest;

(2) if so:

(a) have HMRC overstated the amount of VAT evaded with the result that the amount of the penalty is too high; and/or

(b) should the amount of the penalty be reduced by more than 10% to reflect Mr Jarvis's co-operation during HMRC's investigation.

THE EVIDENCE AND THE FACTS

30. We had before us two volumes of documentary evidence consisting of various correspondence and documents compiled by HMRC. This included some documents evidencing past tax non-compliance by Mr Jarvis and other companies controlled by him which had not been included in the original bundles but which HMRC now sought permission to include as part of the evidence before the Tribunal.

31. Mr Brown initially objected to the inclusion of any documents relating to Mr Jarvis' income tax non-compliance on the basis that this was irrelevant to the matters before the Tribunal. However, given that Mr Jarvis had not objected to the inclusion of documents relating to VAT non-compliance by other companies connected with Mr Jarvis (and which

were therefore not directly relevant to the matters under appeal), Mr Brown withdrew his objection to the income tax documents being included.

32. We accepted Mr Jones' submission that these documents were relevant to Mr Jarvis' possible dishonesty and, on the basis that they had been provided to Mr Jarvis in reasonable time before the hearing, granted permission for them to be included as part of the evidence.

33. We also heard oral evidence from HMRC's investigating officer, Ian Stone and from Mr Jarvis.

34. Mr Stone's evidence was straightforward and we have no difficulty accepting it.

35. Mr Jarvis on the other hand was somewhat evasive in his answers to the questions put to him. For example, when asked a question about a statement made in a piece of correspondence, his standard approach would be simply to read out the statement. When pushed, more often than not, he would simply say that he could not remember. Whilst we appreciate that the period in question goes back almost 5-9 years, we would have expected Mr Jarvis to be able to provide more assistance in relation to some of the questions which he was asked. His approach has affected the weight which we have put on his oral evidence.

36. Based on the evidence before us, we find the following facts.

37. Mr Jarvis started to carry on his manufacturing business in the late 1980's or early 1990's, initially through a company known as GP Services Limited.

38. In around 1994, Mr Jarvis personally acquired premises in Somerset from which the business was operated. The companies paid Mr Jarvis rent for the use of these premises.

39. In August 2000, Mr Jarvis incorporated two new companies, GP Manufacturing Limited and GP Machinery Limited.

40. GP Manufacturing Limited traded between April 2002 and October 2009. It was placed into insolvent liquidation in February 2010 owing HMRC in excess of £300,000 in respect of VAT and associated default surcharges, penalties and interest.

41. GP Machinery Limited started trading in September 2010 and, at the same time, registered for electronic submission of VAT returns.

42. In May 2011, HMRC got in touch with Mr Jarvis as GP Machinery had not submitted VAT returns for the 12/10 and 03/11 VAT periods. Mr Jarvis was reminded of the need to submit VAT returns electronically in a letter dated 5 May 2011 and again during a subsequent visit by HMRC to his premises on 17 May 2011.

43. These two VAT returns were submitted electronically on 20 May 2011. Together, the VAT returns showed a repayment due to GP Machinery of approximately £7,500. However, despite HMRC's visit in May 2011 and a number of subsequent requests for information, no back-up documentation was provided. As a result, HMRC issued VAT assessments for both periods based on the information which they held and which together totalled approximately £33,750.

44. No further VAT returns were received by HMRC prior to the due dates for subsequent VAT periods and so HMRC issued central assessments for estimated VAT liabilities which were typically around £2,000 for each VAT period account.

45. During this period, HMRC also issued default surcharge liability notices to GP Machinery for each relevant VAT accounting period.

46. Mr Jarvis says that he submitted paper VAT returns for GP Machinery in respect of all the relevant VAT periods (05/11 - 02/15) together with cheques for any VAT due. This is

central to the question of dishonesty and is discussed further below. Our conclusion is that, on the balance of probabilities, Mr Jarvis did not submit paper VAT returns nor pay any VAT in respect of these periods.

47. In October 2013, HMRC wrote to GP Machinery warning that they were intending to take action to wind up the company as a result of its unpaid VAT liabilities. This letter included a schedule showing the amounts outstanding which included some of the VAT due for the 12/10 and 03/11 VAT periods as well as the amounts due under the central assessments for all of the subsequent VAT periods.

48. It is not clear when the winding up petition was presented but we infer that it was in early June 2014 as no transfers out of the GP Machinery bank account took place other than expenses charged by the bank after that time until 28 August 2014. GP Machinery paid £47,698 on 1 August 2014 in order to clear the amount due. At the time, as a result of the winding up petition, GP Machinery's bank account was frozen. Mr Jarvis therefore arranged for GP Machinery's factoring company to make a direct payment to HMRC of the amount due.

49. On 11 July 2014, GP Machinery issued an invoice to a customer which included, in handwriting, a request to make payment to Mr Jarvis' personal bank account. Mr Jarvis denies having added the handwritten payment request himself or having asked anybody else to do so. We do not find this evidence credible. The invoice was issued after the winding up petition had been presented but before HMRC had been paid. There was therefore every reason for Mr Jarvis to want the invoice to be paid into his personal account rather than into GP Machinery's account which was frozen. There is no reason why anybody other than Mr Jarvis would ask for the invoice to be paid into Mr Jarvis' personal bank account. We therefore think it is more likely than not that the request for payment to Mr Jarvis' personal bank account was either endorsed by Mr Jarvis himself or by one of his employees at his direction.

50. On 5 November 2014, HMRC wrote to GP Machinery notifying it of a proposed visit on 27 November 2014 to check its VAT records.

51. On 11 November 2014, there was a fire at Mr Jarvis' business premises which destroyed the whole of the premises, including all of the business records which were held at the office in those premises.

52. HMRC's visit went ahead as planned on 27 November 2014. However, this was not productive as Mr Jarvis had not received the letter of 5 November 2014.

53. In January 2015, the investigation was taken over by Ian Stone at HMRC. He issued a notice to inspect GP Machinery's business premises and a notice requiring it to produce information and documents in relation to its VAT position. The inspection took place on 28 April 2015. At this meeting, Mr Jarvis provided Mr Stone with an electronic record of the payments in and out of GP Machinery's bank account.

54. In August/September 2015, Mr Stone requested additional information from Mr Jarvis but this was not provided.

55. On 16 September 2015, Mr Stone wrote to GP Machinery requesting Mr Jarvis to attend a meeting with HMRC in accordance with Notice 160 which applies where HMRC have reason to believe that dishonest conduct has occurred. This meeting took place on 22 October 2015.

56. Following the meeting, Mr Stone wrote to Mr Jarvis on 30 October 2015 with an analysis of the deposits into GP Machinery's bank account and invited Mr Jarvis to identify any deposits which constituted non-trading income. Mr Jarvis promised to do so but did not in fact provide any additional information.

57. Mr Stone therefore issued VAT assessments to GP Machinery Limited on 17 December 2015 covering all of the VAT periods from 05/11 - 02/15 inclusive other than the 08/14 VAT period in respect of which his conclusion was that no VAT was due. The VAT assessments were calculated by applying the flat rate scheme percentage for manufacturing fabricated metal products of 10.5% to the deposits into GP Manufacturing's bank account.

58. In February 2016, GP Machinery appointed a VAT advisor.

59. On 22 March 2016, GP Machinery submitted electronic VAT returns for the VAT periods 05/14 – 05/15 inclusive. Some of these returns showed that a repayment of VAT was due. HMRC requested additional information to verify these returns and subsequently issued an information notice but no further information was provided.

60. GP Machinery was put into insolvent liquidation in November 2016 with VAT and associated default surcharges in excess of £600,000 due to HMRC.

DID MR JARVIS' CONDUCT INVOLVE DISHONESTY

61. It is clear from s 60 VATA (and HMRC accept) that the burden of showing that there has been dishonest conduct rests with HMRC.

62. Mr Jones, on behalf of HMRC, submits that Mr Jarvis has acted dishonestly in simply accepting the liability shown by the central assessments and not notifying HMRC of the true extent of the VAT liabilities of his businesses. He points to the fact that GP Manufacturing Limited went into insolvent liquidation owing over £300,000 of VAT, surcharges, penalties and interest as evidence of a pattern of behaviour.

63. Although Mr Jarvis said in evidence that he was not, at the relevant time, able to use computers, Mr Jones noted that GP Machinery's first two VAT returns were submitted electronically and also that GP Machinery has submitted forms to Companies House online.

64. HMRC do not accept that Mr Jarvis did in fact submit paper tax returns (together with cheques when VAT was due) for the accounting periods in question. Mr Jones identified a number of facts which he argues point towards this conclusion:

(1) The central assessments state "we have sent you this notice because we have not received your VAT return for the period …..". If Mr Jarvis had in fact sent in paper VAT returns, why would he not have queried the central assessments?

(2) Mr Jarvis knew (having been told more than once in 2011) that GP Machinery had to submit its VAT returns online. Indeed, its first two VAT returns were submitted online. Why, knowing this, would Mr Jarvis suddenly start submitting paper VAT returns?

(3) It is not credible that GP Machinery would have paid almost £50,000 in August 2014 to clear HMRC's winding up petition if Mr Jarvis had really submitted VAT returns and paid any VAT due. He would have contacted HMRC to find out why HMRC thought that they were still owed VAT for the relevant period.

(4) Mr Jarvis' assertion that GP Machinery issued cheques to pay any VAT due is also not credible in Mr Jones' view. Mr Stone gave evidence that, based on his analysis of the bank records, between December 2010 and March 2014, GP Machinery only issued 12 cheques. Eight of these cheques show up in GP Machinery's bank records. Mr Jones argues that these cannot represent VAT payments as HMRC have not in fact received any VAT payments from GP Machinery. It is therefore only the four cheques which do not show up in the bank records which could represent attempted VAT payments by GP Machinery. However, Mr Jones argues that this is very unlikely to cover all of the necessary VAT payments as, during that period, there were 12 VAT accounting periods.

This would mean that eight of those accounting periods were ones for which no VAT was due.

(5) In any event, even if it is right that the majority of the VAT accounting periods were periods for which VAT repayments were due, Mr Jones argues that it is equally improbable that Mr Jarvis would not follow up with HMRC if he was expecting a VAT repayment which was not received.

65. On the assumption that GP Machinery did not submit manual VAT returns, Mr Jones submits that Mr Jarvis must have known that the central assessments significantly understated GP Machinery's actual VAT liabilities. He referred to the meeting with HMRC on 22 October 2015 at which Mr Jarvis confirmed that he calculated the amount of the purchases and sales for VAT purposes either monthly or quarterly. Based on the figures seen by HMRC, Mr Jones argues that Mr Jarvis must therefore have known the true amount of GP Machinery's VAT liabilities.

66. On the basis that Mr Jarvis did not in fact submit VAT returns and knew that the central assessments were insufficient, Mr Jones submits that Mr Jarvis' conduct in failing to draw to HMRC's attention the understatement of GP Machinery's VAT liabilities amounts to dishonesty.

67. Mr Brown was at pains to distinguish between negligence and dishonesty noting that the Supreme Court in *Ivey v Genting* confirmed at [62] that "negligence is not sufficient".

68. Mr Brown also referred to the decision of the Court of Appeal in *HMRC v Citibank NA and E Buyer UK Limited* [2017] EWCA Civ 1416 in which Lady Justice Hallett DBE refers at [105] to the need for "appropriately cogent evidence", going on to observe at [106] that a requirement for HMRC to prove dishonesty has the effect of "raising the bar, in terms of what it must prove to deny the Respondents' claims and the cogency of the evidence called".

69. Mr Brown did however make it clear that he was not submitting that the standard of proof in civil cases is any different in the case of dishonesty; it is still the balance of probabilities. It does seem to us that it is difficult to reconcile this with the requirement that the evidence must be more cogent if dishonesty is to be proved but that is not something which we need to delve into in this case.

70. Mr Brown submits that Mr Jarvis may have been negligent or possibly even reckless but that he was not dishonest. He refers to Mr Jarvis' evidence that he was not computer literate. He also makes the point that GP Machinery's record-keeping could at best be described at patchy. Whilst GP Machinery should perhaps have instructed an accountant to enable it to overcome these deficiencies, Mr Brown argues that this does not amount to dishonesty.

71. As far as GP Machinery being told of the need to submit electronic returns is concerned, Mr Brown makes the point that Mr Jarvis was simply told that if GP Machinery failed to do so, it may be liable for a penalty. He was not told that he could not submit manual returns. This should not therefore be taken as a reason for inferring that manual returns were not in fact submitted.

72. Turning to the wording of the central assessments, Mr Brown referred to Mr Jarvis' oral evidence in which he said he could not recall having seen any of the central assessments which HMRC say were sent to GP Machinery. Again, Mr Brown argues that this should not therefore lead to a conclusion that Mr Jarvis did not in fact submit manual returns.

73. Based on this, Mr Brown submits that HMRC have not shown that Mr Jarvis was dishonest.

74. Mr Brown also raised a further point which is whether Mr Jones put the allegation of dishonesty to Mr Jarvis in cross-examination, referring to *Megtian Limited v HMRC* [2010] EWHC 18 (Ch) where Briggs J stated at [42] that:

> "the distinction between dishonesty and negligence is of fundamental importance, even in cases such as the present where proof of either of them will suffice for the opposing party's purpose. For that reason, an allegation of dishonesty in civil litigation must be clearly and specifically pleaded, and, if the person against whom dishonesty is alleged gives oral evidence, it must be specifically put in cross-examination."

75. Mr Brown observes that Mr Jones did not use the word "dishonest" in his cross-examination.

76. We do not accept that the allegation of dishonesty was not put fairly to Mr Jarvis during cross-examination. In our view, it is not necessary to use the word "dishonest". What is necessary will depend on the precise facts of the case.

77. In this case, it has been clear since the original penalty assessments were issued that Mr Jarvis was being accused by HMRC of dishonesty in failing to notify HMRC of the understatement of VAT by GP Machinery. That Mr Jarvis understood this is confirmed by the grounds of appeal set out in his Notice of Appeal where he refers specifically to penalties being assessed for dishonest conduct. The grounds of appeal make it clear that Mr Jarvis' reason for saying that he was not dishonest is that he submitted paper VAT returns to HMRC.

78. Mr Jones put fairly and squarely to Mr Jarvis during cross-examination HMRC's submission that Mr Jarvis had not in fact sent such returns to HMRC and Mr Jarvis insisted that he had sent the returns. In our view, the allegation of dishonesty could not have been any clearer.

79. As to whether or not Mr Jarvis was dishonest, our conclusion on the evidence before us is that Mr Jarvis did not submit VAT returns to HMRC. He was content to receive the central assessments which significantly underestimated GP Machinery's liability to VAT but even then only paid them when he was forced to do so by HMRC's winding up petition.

80. Our reasons for coming to this conclusion are essentially those put forward by Mr Jones. First of all, Mr Jarvis was clearly aware in 2011 that GP Machinery should be submitting its VAT returns online. He arranged for it to do so in May 2011. He cannot have forgotten about this when the 05/11 VAT return was due at the end of June 2011. The fact that HMRC did not receive a return for the 05/11 VAT period is therefore much more likely to be because GP Machinery did not submit one rather than that Mr Jarvis decided to send in a manual return rather than an electronic return.

81. Whilst, in his oral evidence, Mr Jarvis could not recall the central assessments, he clearly accepted in his meeting with HMRC in October 2015 that he had received at least some of the central assessments. His explanation was that he simply ignored them given that he had filed paper returns along with cheques where necessary. As with the answers to many of the questions, Mr Jarvis did not deny receiving the central assessments (and indeed the default surcharge liability notices). He simply said that he could not remember having seen them.

82. When coupled with the winding up petition in 2014 and the fact that Mr Jarvis arranged for GP Machinery to pay almost £50,000 in order to avoid being wound up, this points very strongly in our view towards the conclusion that Mr Jarvis had not submitted any VAT returns on behalf of GP Machinery. Had he done so, it is inconceivable that he would not have questioned why HMRC were making demands for further amounts of VAT, default surcharges,

penalties and interest and on what basis they thought that the VAT returns which he says he submitted were inaccurate.

83. Indeed, we think it is more likely than not that Mr Jarvis did receive all of the central assessments and surcharge liability notices relating to GP Machinery and that, had he submitted paper VAT returns, he would have queried these assessments/surcharges.

84. There seems no doubt, based on Mr Jarvis' own evidence that he knew the true amount of GP Machinery's sales and purchases. Of course neither HMRC nor the Tribunal know what these figures are as Mr Jarvis has been unable or unwilling to provide anything other than the records for GP Machinery's bank account. However the fact that Mr Jarvis did not dispute the central assessments, the surcharges or the winding up petition strongly suggests that he was fully aware the true figures were significantly higher than those which GP Machinery was being asked to pay.

85. Our conclusion therefore is that Mr Jarvis did not submit paper tax returns, that he knew that the central assessments underestimated GP Machinery's VAT liabilities and that he did nothing to alert HMRC to this. There is no doubt that, looked at objectively, this conduct is dishonest. HMRC were therefore correct to charge a penalty under s 60 VATA and were within their rights to seek to collect all or part of that penalty from Mr Jarvis under s 61 VATA.

THE AMOUNT OF THE VAT EVADED

86. Mr Brown made no submissions during the hearing as to whether HMRC had overstated the amount of the VAT which had been evaded by Mr Jarvis' dishonest conduct. He invited the Tribunal to look at the evidence and to reduce the amount of the penalty if it considered that the VAT assessments were excessive.

87. In his skeleton argument, Mr Brown makes two points. The first is that Mr Stone was aware that some of the receipts into GP Machinery's bank account represented income which did not relate to taxable supplies.

88. Mr Jones submits that the assessments had been made to HMRC's best judgment using the information which had been supplied (i.e. the bank account information). Mr Stone had attempted to establish the amount of any non-trading receipts into the bank account but had not been given any further information by Mr Jarvis.

89. Based on the evidence, it may well be the case that some of the payments into GP Machinery's bank account do not represent trading income. However, no attempt has been made to quantify those amounts. Even where GP Machinery has subsequently submitted VAT returns for some of the relevant accounting periods, it has been unable or unwilling to provide any information to HMRC as to how the figures on those returns have been calculated.

90. It is also clear from the evidence that there were some receipts which have not been taken into account in HMRC's assessments. This includes payments which were made direct from the factoring company to HMRC and to GP Machinery's advisers when the winding up petition was issued as well as invoices which may have been paid direct to Mr Jarvis' bank account during that period.

91. Mr Brown's second point is that a flat rate scheme percentage of 10½% is inappropriate. Mr Jarvis' evidence in his witness statement was that he aimed for a profit margin of 15%.

92. The flat rate scheme percentage of 10½% applies to manufacturing fabricated metal products. During Mr Jarvis' evidence at the hearing, he explained that GP Machinery designs and builds machinery rather than just working in metal. As an example, he said that if a job is priced at £20,000, only perhaps £2,000 of this might relate to the steel which forms part of the

machinery. The rest of the price might relate to other parts which are bought in rather than manufactured as well as the design and labour.

93. The problem with this is that we do not have any detailed evidence before us as to exactly what sort of machinery was produced by GP Machinery, nor what inputs there might be in relation to any particular product. In order to persuade us that the 10½% flat rate scheme percentage is inappropriate, we would need to have been provided with such evidence.

94. The result of this is that we cannot say, even on the balance of probabilities, that the VAT assessments on which the penalty is based are excessive and so this part of Mr Jarvis' appeal against the amount of the penalty fails.

SHOULD THE PENALTY BE REDUCED

95. As mentioned above, the Tribunal has power under s 70 VATA to reduce the penalty to such amount as it thinks proper. HMRC have allowed a reduction of 10% to reflect the fact that Mr Jarvis attended the Notice 160 meeting with HMRC on 22 October 2015. Their main reason for not allowing a greater reduction was that they did not believe the main thrust of his explanation for the apparent understatement of the company's VAT liabilities which was that he had submitted manual VAT returns.

96. In addition, HMRC submit that, other than attending the meeting and providing records for GP Machinery's bank account, Mr Jarvis did not co-operate with the investigation by providing any other information. For example, he said that he would review the position in relation to non-trading credits and failed to do so. Mr Stone was also asked at least four times whether any of GP Machinery's income had been paid into any other bank accounts and was told that, other than the direct payment from the factoring company to HMRC, this was not the case even though HMRC held an invoice which GP Machinery had requested should be paid into Mr Jarvis' personal bank account.

97. Mr Jones also makes the point that GP Machinery still has 14 periods of account for which it has not submitted any return or, if it has submitted a return, has not complied with HMRC's request for supporting documentation or calculations.

98. Mr Brown on the other hand submits that Mr Jarvis should receive credit for providing the bank records for GP Machinery in April 2015. He also makes a point that Mr Jarvis was only asked to attend one meeting with HMRC and that he did so. Indeed, he had thought that he was going to have to attend a medical appointment on the day of the proposed meeting and asked HMRC if it could be brought forward. Mr Brown argues that this clearly shows that Mr Jarvis was co-operating with the investigation.

99. Not surprisingly, Mr Brown also draws attention to the fact that all of GP Machinery's records were lost in the fire which took place in November 2014, before the first meeting with HMRC. There was not therefore anything else which Mr Jarvis could have provided to HMRC in order to assist with their enquiry.

100. In our view, HMRC's reduction of 10% is reasonable in the circumstances. Given our conclusion that Mr Jarvis acted dishonestly, it follows that we do not accept that he assisted HMRC by giving a truthful explanation of the amount of underpaid VAT nor the reason why the VAT liabilities had been understated.

101. We accept that Mr Jarvis did provide some co-operation in attending the meeting in October 2015 and in providing GP Machinery's bank records. However, he was not all that helpful in answering HMRC's questions at the meeting in October 2015 and did not engage with HMRC in providing additional analysis of the information which Mr Stone extracted from the bank records.

102. Similarly, as we have stated above, we did not find Mr Jarvis approach to cross-examination at all helpful in the oral evidence which he gave at the Tribunal hearing.

DECISION

103. Mr Jarvis' conduct was dishonest and so HMRC are entitled to recover all or part of the penalty from him under s 61 VATA.

104. We are not persuaded on the balance of probabilities that the VAT assessments on which the penalty is based are excessive.

105. In our view a reduction of 10% in the amount of the penalty is appropriate in the circumstances.

106. This appeal is therefore dismissed and the penalty upheld.

107. 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.

ROBIN VOS

TRIBUNAL JUDGE

RELEASE DATE: 27 JANUARY 2020