



Neutral Citation: [2023] UKFTT 576 (TC)

Case Number: TC08851

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Centre City Tower, Birmingham

Appeal references: TC/2021/00566
TC/2021/00567
TC/2021/00568

VAT – Penalties – Whether company liable to penalty – Whether behaviour was deliberate (but not concealed) or careless – Whether appropriate levels of reduction – Whether penalty attributable to actions of its directors – Whether quantum correct – Appeals allowed in part

Heard on: 18 April 2023
with further written submissions from the
Respondents on 22 May 2023 and from
the Appellants on 19 June 2023

Judgment date: 29 June 2023

Before

**TRIBUNAL JUDGE JOHN BROOKS
TRIBUNAL MEMBER TERRY BAYLISS**

Between

**(1) AIZIO ASSOCIATES LIMITED
(2) TIMOTHY CAMPBELL
(3) DAVID BILLARD**

Appellants

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellants: Timothy Campbell and David Billard in person with Mr Campbell also representing Aizio Associates Limited

For the Respondents: Siobhán Brown, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. Aizio Associates Limited (“Aizio”) appeals against a penalty issued by HM Revenue and Customs (“HMRC”), under paragraph 1 of schedule 24 to the Finance Act 2007, on 21 January 2021 in the sum of £21,717.24. However, HMRC, having identified errors in the calculation of the potential lost revenue for the company’s 02/20 and 03/20 VAT accounting periods, accept that the penalty should be £21,457.55.

2. Mr Timothy Campbell (the current director of Aizio) appeals against a Personal Liability Notice (“PLN”) issued by HMRC, under paragraph 19(1) of schedule 24 to the Finance Act 2007, on 22 January 2021. Originally, this penalty was in the sum of £17,717.74 but was reduced to £17,097.72 to reflect the reduction in the penalty imposed on Aizio.

3. Mr David Billard (the former director of Aizio) appeals against a PLN issued by HMRC, under paragraph 19(1) of schedule 24 to the Finance Act 2007, on 22 January 2021 in the sum of £4,359.83.

4. On 10 March 2021 the Tribunal directed that these three appeals proceed and be heard together.

5. On 24 April 2023, following the hearing on 18 April 2023, the Tribunal issued directions inviting the parties to provide written submissions, by 22 May 2023, in relation to whether a VAT return, which was accurate when filed, “contains an inaccuracy” for the purposes of paragraph 1 of schedule 24 to the Finance Act 2007 where input tax claimed on the return is subsequently disallowed in the following circumstances:

- (1) if the evidence to support the claim which was held at the time the claim was made is no longer available; and/or
- (2) there has been no payment (or evidence of payment) for the supply to which that input VAT related

Written submissions were received from HMRC on 22 May 2023 and from the appellants on 19 June 2023, the appellants having applied for, and were granted, an extension of time to respond to the 24 April 2023 directions. Our conclusions in relation to this matter are set out below under the sub-heading *Whether liable to Penalty* at paragraphs 68 to 70.

EVIDENCE

6. In addition to being provided with an electronic bundle of documents comprising 757 pages, we heard from the following witnesses:

- (1) HMRC Officer Christopher Jacques who undertook the VAT visit to Aizio which took place at the home of its director, Mr Campbell, on 16 March 2020;
- (2) HMRC Officer Paul Addison who, following Officer Jacques visit, carried out a compliance check into Aizio’s VAT returns for the period from 1 June 2018 to 31 March 2020;
- (3) David Billard who was the director of Aizio from its incorporation on 31 January 2017 until his resignation as a director on 4 October 2019; and
- (4) Timothy Campbell who is the current sole director of Aizio.

7. Unlike the other witness, Mr Campbell had failed to provide a witness statement prior to the hearing. This was in breach of the Tribunal’s clear and unambiguous case management directions to do so and despite the warning in the directions that such failure might lead to a witness not being allowed to give evidence at the hearing.

8. Although, there was no application that Mr Campbell's evidence be excluded, when his failure to comply with the directions was raised by the Tribunal, HMRC did oppose the admission of his evidence. However, having heard from Ms Brown for HMRC and Mr Campbell, we concluded that given the relevance of his evidence to the issues in dispute it was, on balance, in the interests of justice that Mr Campbell should be permitted to give oral evidence.

9. While we found the HMRC Officers and Mr Billard to be credible witnesses who clearly sought to assist the Tribunal we are afraid that the same cannot be said of Mr Campbell who we did not consider an entirely convincing witness, no doubt exacerbated by his failure to file a witness statement. He raised matters for the first time at the hearing, eg his doubting the veracity of Companies House documents stating that he was a director of Aizio between 10 November 2017 and 9 March 2018 and again from 26 July 2018 to date.

10. There were also inconsistencies in Mr Campbell's evidence, eg he initially said that he contacted the Corporation Tax [telephone] Helpline in March 2020 to report stolen company records and documents but when shown an email that he had sent Officer Jacques on 23 March 2020, he said that he had contacted the VAT and not the Corporation Tax Helpline. In his email to Officer Jacques Mr Campbell had said:

“... I cannot get through on the phone to the Corporation Tax Office to report lost records which the .gov website advises, is there an email address you know of I can use instead, I need some help in getting hold of someone?”

In the circumstances, although we do not discount Mr Campbell's evidence entirely, where it conflicts with that of another witness or documentary evidence we prefer that evidence over his.

11. We should also make it clear that although we have carefully considered all of the evidence it has not been necessary, in this decision, for us to refer to everything that we have read and heard during the course of the proceedings.

FACTS

12. Aizio was incorporated on 31 January 2017. Its director on incorporation was Mr Billard. He resigned as its director on 4 October 2019. Mr Campbell is the current director of Aizio. He was its company secretary from 10 November 2017 to 9 June 2018 and was appointed as its director on 10 November 2017. Companies House records show that Mr Campbell resigned as director of Aizio on 9 March 2018 and was reappointed (as director) on 26 July 2018.

13. The company, which has been registered as dormant has not filed any corporation tax returns. It was registered for VAT, with an effective date of registration, on 1 June 2018. Until his resignation as a director Mr Billard was responsible for filing the company's VAT returns. The final VAT return filed by Mr Billard was for the period 08/19 with all subsequent returns being submitted by Mr Campbell.

14. On his resignation as director Mr Billard provided Mr Campbell with paper copies of Aizio's statutory company records and other information including its VAT records. He did not retain any copies of these documents and ceased to have any involvement with the company thereafter.

15. Mr Billard had scanned some of these documents onto a laptop and provided these electronically to Mr Campbell. That laptop was “wiped clean” when he left the company. Mr Campbell completed the task of scanning all of the documents provided to him following Mr

Billard's resignation. Having done so, as all of the company's records were stored on the laptop, Mr Campbell destroyed the paper records.

16. Mr Campbell who admitted that he "should have known better" did not ensure that the records stored on the laptop were sufficiently backed up so that they could be retrieved if needed, something which, for the reasons we shall come to, may have avoided the need for these proceedings.

17. On 1 March 2020 Aizio filed its VAT return for its 02/20 accounting period (ie the period commencing on 1 February 2020 and ending on 29 February 2020) claiming a repayment of £4,433.71. HMRC selected the return for to be checked before authorising any payment to be made.

18. This check was to be by way of a visit to Mr Campbell's home address by an officer of HMRC to undertake a review of the company's records. The date for the visit, 23 March 2020, was agreed following a telephone call between HMRC and Mr Campbell. However, Mr Campbell, having been told during that telephone call that HMRC would be checking the records from the date of Aizio's registration, was concerned that he would not be able to produce records for earlier periods as they were no longer in his possession.

19. In early March 2020 Mr Campbell had been in Slovakia on business. He had driven there in his Range Rover and had, in addition to his other luggage and belongings, taken the laptop with the company information stored on it with him.

20. It must be remembered that in March 2020 the news reports were dominated by the increasing numbers of Covid-19 cases throughout Europe, particularly Italy, as well as in the UK. Many European countries were beginning to impose lockdowns on their populations, some sporting and other large events were being cancelled and there was a growing concern as to whether the NHS would be able to cope with the inevitable influx of patients. On 16 March 2020 the then Prime Minister announced that "now is the time for everyone to stop non-essential contact and travel". On 23 March 2020 the first national lockdown was imposed and people were ordered to "stay at home".

21. Given the ever growing concerns, bordering on panic, regarding the incidence of coronavirus and the increasing likelihood of national lockdowns in both Slovakia and the UK, Mr Campbell sought to return home as soon as he could. He managed to book a flight to the UK and travelled home carrying a minimum amount of luggage leaving almost everything, including the laptop, in his vehicle in Slovakia. Unfortunately the vehicle with all its contents was stolen. Because of the imposition of national lockdowns and prohibition on travel Mr Campbell was unable to return to Slovakia to retrieve the vehicle and although the theft was reported to the DVLA and his insurers, Mr Campbell was unable to report it to the police in Slovakia who required him to attend a police station there in person to do so.

22. However, notwithstanding the coronavirus situation, the VAT visit was still due to proceed on 23 March 2020. On 13 March 2020, HMRC wrote to Mr Campbell to confirm that Officer Jacques would be the visiting officer and that the:

"... purpose of the visit is to check the company's repayment return for the period 02/20 and to examine the records that relate to this return. If we need to look at records for any other periods, we will let you know."

The 'Schedule of records and information needed for visit' attached to the letter stated:

"Please make sure that the records and information we need to see are available for the visit. They must cover the whole period from the start of your business to the end of your most recent VAT return period."

The records and information we need to see are:

- annual accounts
- business bank statements
- VAT account and any related working papers
- accounting books, for example, sales and purchase daybooks, cash books and petty cash books
- sales and purchase invoices • documents such as contracts and correspondence relating to sales
- your VAT registration certificate if this is your first VAT visit
- the certificate of incorporation for limited companies if this is your first VAT visit

We may also ask to see your records from earlier VAT periods if we think it is necessary.”

23. Mr Campbell, who had explained during the telephone call with HMRC to arrange the VAT visit that he did not have all of the company information, was contacted by Officer Jacques by telephone. During their conversation Officer Jacques confirmed that he did want to see the earlier company information. However, due to Mr Campbell’s concern that a national lockdown was imminent and to avoid any delay in receiving a VAT repayment, it was agreed that the visit be brought forward to 16 March 2020.

24. The report, prepared by Officer Jacques, following the visit on 16 March 2020, records that Aizio was established as an IT company and its core business was the development of software and applications for its clients, in particular a legal services and case management application.

25. The visit report also records that Mr Campbell had also established Mr Office Furniture Limited (“MOF”) and had designed its website. MOF, as its name suggests, sells office furniture on Amazon and through its own website. The items it sells are purchased from Dams Furniture Limited (“Dams”) which arranges delivery of the products directly to MOF’s customers. As MOF was a relatively new company the credit granted to it by Dams was limited. However, as Mr Campbell explained, that credit limit was effectively doubled by Aizio (which was granted the same amount of credit as MOF by Dams) also purchasing goods from Dams which it re-sold, at cost, to MOF. Mr Campbell said that it was intended that these transactions would be tax neutral.

26. Although Mr Campbell provided Officer Jacques with Aizio’s records for the 01/20 and 02/20 VAT accounting periods during the visit he was unable, for the reasons described above, to provide any earlier records.

27. Subsequent to the 17 March 2020 VAT visit Mr Campbell provided, via email, various bank statements from 24 July 2018 to 23 December 2019 and details of purchases by Aizio from Dams for the period from 1 June 2019 to 30 November 2019. On 22 March 2020 Mr Campbell provided Officer Jacques with invoices from Durco Services Limited (“Durco”) issued to Aizio for “Technical/Support Services” for which it paid £44,420 (including VAT) during the period from 1 February to 31 March 2020.

28. On 1 April 2020 Aizio filed VAT return for the 03/20 accounting period claiming a repayment of £3,531.73. This return was also selected for checking by HMRC before any repayment could be authorised. Mr Campbell provided Officer Jacques with a copy of the return and his calculations for the period.

29. On 5 May 2020 Mr Campbell was notified that Officer Addison was assuming responsibility for the enquiry which was to be extended to cover Aizio’s accounting periods from the commencement of its VAT registration on 1 June 2018 until 31 March 2020.

30. However, despite further correspondence between them, including the issue of an information notice under schedule 36 of the Finance Act 2008 to provide documents for the period concerned, Mr Campbell and Officer Jacques and, from May 2020, Officer Addison were unable to resolve their differences.

31. On 6 October 2020 Officer Addison issued a ‘best judgment’ VAT assessment, made under s 73 of the Value Added Tax Act 1994 (“VATA”), against Aizio. This was in respect of the VAT accounting periods, in the amounts and for the reasons set out in the table below:

VAT Assessment issued by HMRC

VAT Period	From	To	Net VAT Due £	Explanation
11/18	01/09/18	30/11/18	5,830.00	Input tax disallowed in absence of satisfactory evidence.
05/19	01/03/19	31/05/19	308.00	Input tax disallowed in absence of satisfactory evidence.
08/19	01/06/19	31/08/19	8,961.00	Output tax not declared. ¹
11/19	01/09/19	30/11/19	6,932.00	Output tax not declared. ¹
12/19	01/12/19	31/12/19	4,569.00	Input tax disallowed in absence of satisfactory evidence.
01/20	01/01/20	31/01/20	2,986.00	Output tax not declared. ¹
02/20	01/02/20	29/02/20	4,403.00	Input tax relates to 3 rd Party and failure to provide proof of payment. ²
03/20	01/03/20	31/03/20	3,166.00	Input tax relates to 3 rd Party and failure to provide proof of payment. ²
		Total	37,155.00	
<p>1. The output tax not declared relates to purchases from Dams by Aizio which were not recharged to MOF</p> <p>2. HMRC contend that the input tax concerned relates to supplies Durco made to MOF not Aizio and that Aizio failed to provide full confirmation that payments were made to Durco</p>				

32. On 9 October 2020, in a letter to Mr Campbell, Officer Addison wrote:

“Following my assessment of 6 October 2020, you will note that for two periods 02.20 & 03.20 the VAT Returns have not been processed. I need change the amount claimed on the Returns and enclose letters accordingly. I also enclose a revised assessment for the earlier periods. The overall amount of the assessments remains the same.”

The revised assessment enclosed with the letter set out the net VAT due for periods 11/18 to 01/20 of £29,586.00.

33. A further letter, also dated 9 October 2020, was sent by Officer Addison to Mr Campbell. This set out a reduction to the amount claimed on the 02/20 VAT return. The input tax claimed by Aizio was reduced from £8,709.35 to £4,275.54 resulting in a net VAT credit reduction of £4,433.81.

34. Also on the same date, 9 October 2020, in a separate letter, Officer Addison advised Mr Campbell of a change to the amount claimed on the 03/20 VAT return. The input tax claimed by Aizio for that period was reduced from £7,118.34 to £3,586.61 resulting in a net VAT

credit reduction of £3,531.73 On 12 December 2020, an Officers assessment, in the sum of £29,586.00 was issued to take into account the periods 02/20 and 03/20.

35. Aizio did not appeal against that assessment.

36. On 21 January 2021 HMRC issued Aizio with a penalty, imposed under paragraph 1 of schedule 24 to the Finance Act 2007, in the sum of £21,717.24. However, HMRC, having identified errors in the calculation of the potential lost revenue for the company's 02/20 and 03/20 accounting periods, accept that the penalty should be £21,457.55. Aizio appealed against the penalty on 19 February 2021.

37. On 22 January 2021 HMRC issued the PLNs against Mr Campbell and Mr Billard.

38. The PLN against Mr Campbell was calculated on the basis of it being 79.93% of the penalty imposed on Aizio as Mr Campbell, as director of the company, was jointly responsible for Aizio's VAT affairs between 1 September 2018 to 19 August 2019 and solely responsible from 1 September 2019 to 31 March 2020.

39. The PLN against Mr Billard was calculated on the basis that it was 20.07% of the penalty imposed on Aizio because, as a director, he was jointly responsible for Aizio's VAT affairs between 1 September 2018 and 19 August 2019. Both Mr Campbell and Mr Billard appealed against the PLNs on 19 February 2021.

LAW

Penalties

40. Pursuant to s 97 of the Finance Act 2007, provisions imposing penalties on taxpayers who make errors in certain documents, including VAT Returns, are contained in schedule 24 of that Act. All subsequent references to paragraphs, unless otherwise stated, are to the paragraphs of that schedule to the Finance Act 2007.

41. Paragraph 1 provides:

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

(a) P gives HMRC a document of a kind listed in the Table below [which includes a VAT Return] and

(b) Conditions 1 and 2 are satisfied.

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

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

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

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

42. Paragraph 3 provides:

(1) for the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part and P does not make arrangements to conceal it, and

(c) “deliberate and concealed” if the inaccuracy is deliberate on P’s part and P makes arrangements to conceal it (for example, by submitting false evidence in support of inaccurate figures).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless or deliberate on P’s part when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

43. The amount of a penalty, payable under paragraph 1, is set out in paragraph 4. In so far as it applies to the present case, paragraph 4(2) provides that the penalty for careless action is 30% of the potential lost revenue; for deliberate but not concealed action, 70% of the potential lost revenue; and for deliberate and concealed action 100% of the potential lost revenue.

44. The “potential lost revenue” is defined in paragraphs 5 – 8 but for present purposes it is only necessary to refer to paragraph 5(1) which provides:

... the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

45. Paragraph 9 provides:

(1) A person discloses an inaccuracy, a supply of information or withholding of information, or a failure to disclose an under-assessment by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure—

(a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and

(b) otherwise is “prompted”.

(3) In relation to disclosure “quality” includes timing, nature and extent.

46. Under paragraph 10(1) HMRC “must” reduce the standard percentage of a person who would otherwise be liable to a penalty. However, the table in paragraph 10(2) sets out the extend of any reduction which must not exceed the minimum penalty which for a prompted deliberate and not concealed error is 35% of the potential lost revenue and for a prompted careless error is 15%.

47. HMRC may also reduce a penalty because of “special circumstances” under paragraph 11 although the ability to pay or the fact that a potential loss from one taxpayer is balanced by a potential payment from another are precluded from being special circumstances by paragraph 11(2).

48. Paragraph 19(1), which provides for the imposition of a PLN on a director, states:

Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

An “officer” of a company includes its director (paragraph 19(4)(a)). Also HMRC are precluded from collecting more than 100% of a penalty (paragraph 19(2)).

49. It is clear from the decision of the Upper Tribunal in *Zaman v HMRC* [2022] UKUT 252 (TCC) at [23] that in the absence of an appeal against a s 73 VATA assessment by a company where a PLN on its director is challenged on the basis that an underlying assessment is wrong, it is for HMRC to establish that the PLN was validly issued and, if that burden is discharged, the evidential burden is on the appellant to establish that the assessment should be discharged in the same way as it would have been on the company to establish that it had been overcharged by the assessment if it had decided to bring an appeal against that assessment.

50. On an appeal against a decision that a penalty is payable the Tribunal may, under paragraph 17(1), affirm or cancel HMRC’s decision. However where the appeal is against the amount of a penalty paragraph 17(2) allows the Tribunal to substitute HMRC’s decision for another decision provided that it was within HMRC’s power to make the substituted decision.

51. With regard to a reduction of a penalty in relation to special circumstances (pursuant to paragraph 11), under paragraph 17(3), the Tribunal may only substitute its decision for that of HMRC if it “thinks that HMRC’s decision in respect of the application of paragraph 11 was flawed.” If so, paragraph 17(6) provides that:

“Flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

52. The Supreme Court considered the meaning of “deliberate” in relation to whether there was a deliberate inaccuracy in a document in *HMRC v Tooth* [2021] 1 WLR 2811 in which it said:

“42. ... The question is whether it means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.

43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase “deliberate inaccuracy”. Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely “inaccuracy”. An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate.”

53. Although this was said in relation to a different statutory provision (s 29 of the Taxes Management Act 1970) the Supreme Court recognised, at [33] and [45], the alignment of the language used with that of the schedule 24 penalty provisions. Accordingly for there to be a “deliberate” inaccuracy HMRC have to establish an intention “to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement” (see *Tooth* at [47]).

Right to deduct input tax

54. The right to deduct input tax is contained within ss 24 – 26 VATA which (as in force at the time of the transactions with which these appeals are concerned) provided:

24.— Input tax and output tax.

(1) Subject to the following provisions of this section, “*input tax*”, in relation to a taxable person, means the following tax, that is to say—

- (a) VAT on the supply to him of any goods or services;
- (b) VAT on the acquisition by him from another member State of any goods; and
- (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

...

(6) Regulations may provide—

- (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases; ...

25.— Payment by reference to accounting periods and credit for input tax against output tax.

(1) A taxable person shall—

- (a) in respect of supplies made by him, and
- (b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him. ...

26.— Input tax allowable under section 25.

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

- (a) taxable supplies; ...

26A.— Disallowance of input tax where consideration not paid

(1) Where—

- (a) a person has become entitled to credit for any input tax, and

(b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of 6 months following the relevant date,

he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

55. Paragraph 4(1) of schedule 11 to VATA provides:

(1) The Commissioners may, as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may specify.

...

56. Regulation 13 of the Value Added Tax Regulations 1995 (“VAT Regulations”) provides:

13.—(1) Save as otherwise provided in these Regulations, where a registered person—

(a) makes a taxable supply in the United Kingdom to a taxable person, or

(b) makes a supply of goods or services to a person in another member State for the purpose of any business activity carried out by that person, or

(c) receives a payment on account in respect of a supply he has made or intends to make from a person in another member State,

he shall provide such persons as are mentioned above with a VAT invoice ...

57. Under Regulation 29(1) of the VAT Regulations (with emphasis added):

... a person claiming deduction of input tax under section 25(2) of the Act **shall** do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

Regulation 29(2) provides:

At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) supply from another taxable person, hold the document which is required to be provided under regulation 13 [ie a VAT invoice or such other documentary evidence as HMRC direct]; ...

Assessment

58. Section 73 VATA (with emphasis added) provides:

73.— 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.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

DISCUSSION

Issues

59. The following issues arise:

- (1) Whether Aizio, Mr Campbell and Mr Billard are liable to penalties and, if so, whether this was because of the deliberate but not concealed or the careless behaviour of the individual or individuals concerned (ie Mr Campbell and/or Mr Billard);
- (2) Whether, if liable to penalties, the levels of reduction given for disclosure were appropriate; and
- (3) The quantum of the penalties.

60. Before turning to the issues it should be noted that it is not disputed that it is for HMRC to establish, on the balance of probabilities, that Aizio is liable to a penalty and that the deliberate inaccuracy in the VAT returns was attributable to the behaviour of Mr Campbell and Mr Billard.

Whether liable to Penalty

61. Aizio is liable to a penalty if it submitted a VAT return that contained an inaccuracy which amounts to an understatement of a liability to VAT or a false or an inflated claim to a repayment of VAT and that inaccuracy came about as the result of careless or deliberate behaviour by or on its behalf. If it was because of the deliberate behaviour of an officer of the company, in this case either Mr Billard or Mr Campbell, they too are liable to pay such portion of the penalty as HMRC may specify by written notice or the Tribunal may determine.

62. Ms Brown, for HMRC, contends that Aizio submitted inaccurate VAT returns which was brought about by the “deliberate but not concealed” behaviour of its directors, Mr Campbell and/or Mr Billard. She says that:

- (1) the 11/18, 05/19 and 12/19 returns were inaccurate as Aizio did not provide satisfactory evidence for the deduction input tax;
- (2) the 08/19, 11/19 and 01/20 returns were inaccurate as they omitted to declare any output tax for the re-sale to MOF of items purchased from Dams by Aizio although it had claimed input tax on its purchases; and
- (3) the 02/20 and 03/20 returns were inaccurate in the absence of confirmation that full payment had been made to Durco for services it had provided to Aizio and also that Aizio had not provided any explanation to show how it had used £44,420 worth of services provided to it by Durco.

63. In relation to the 11/18, 05/19 and 12/19 returns Mr Campbell explained that it was not possible to provide evidence to support the deduction of input tax as this was on the laptop that was stolen. He advanced a similar argument in relation 02/20 and 03/20 returns saying that there had been evidence confirming that Aizio had, in fact, paid Durco in full for its services but that this was no longer available.

64. However, neither he nor Mr Billard explained the absence of output tax on 08/19, 11/19 and 01/20 returns in relation to the re-sale of goods to MOF which had been acquired from Dams and on which input tax had been claimed.

65. In our view it is clear that the 08/19, 11/19 and 01/20 returns, which contained claims for input tax but did not declare any corresponding output tax contained an inaccuracy amounting to an understatement of a liability to VAT. Also, especially in the light of Mr Campbell's evidence that the purchase from Dams and re-sale to MOF was to be tax neutral, we consider that it must have been known by whoever submitted those returns that output tax should have been declared and its omission, knowing HMRC would rely on the return as being accurate, was deliberate. However, there was no attempt to conceal that inaccuracy which was therefore deliberate but not concealed with the result that that Aizio is liable to a penalty under paragraph 1 for these periods.

66. As we have found that the 08/19, 11/19 and 01/20 VAT returns contain a deliberate inaccuracy attributable to whoever submitted them to HMRC and it is not disputed that Mr Billard was responsible for submitting the 08/19 VAT return and Mr Campbell the 11/19 and 01/20 returns, it must follow that each is liable to pay such portion of the penalty as attributable him, ie $\frac{1}{3}$ Mr Billard and $\frac{2}{3}$ Mr Campbell.

67. However, with regard to the remaining VAT periods, given Mr Campbell's unchallenged evidence regarding the company's records being held on the laptop that was stolen along with his vehicle in Slovakia, we do not consider that HMRC have established that the VAT returns for 11/18, 05/19, 12/19, 02/20 and 03/20 contained an inaccuracy at the time they were submitted.

68. This raises the issue on which further submissions from the parties were sought, namely whether a VAT return which was accurate when it was filed "contains an inaccuracy" for the purposes of paragraph 1 of schedule 24 to the Finance Act 2007 where input tax claimed on the return is subsequently disallowed for lack of evidence in support of the claim or that payment has been made. In both cases there is no question that the input tax concerned can be denied (see s 26A VATA and Regulation 29 of the VAT Regulations) and, if it has been claimed or paid, that the input tax may be recovered by HMRC by way of an assessment under s 73 VATA.

69. HMRC, in their written submissions in response to the Tribunal's directions (see paragraph 5, above) recognise that if the Tribunal accepts Mr Campbell's evidence, as we have, the returns should be considered accurate at the time they were submitted and that an invoice being destroyed or lost would not "make that return retrospectively inaccurate as a matter of fact". Similarly, with regard to evidence of payment HMRC accept that if available at the time the return is filed it will be accurate and does not become inaccurate if such evidence subsequently becomes unavailable. Mr Campbell in his written submissions makes essentially the same points.

70. We agree with this analysis. In our judgment it does not follow that a subsequent denial of input tax creates an inaccuracy in a return which did not exist at the time the return was made.

71. A liability to a penalty under paragraph 1 arises when a person "gives" HMRC a document that "contains an inaccuracy" amounting to an understatement of a liability to tax etc. A VAT return is given to HMRC when it is submitted. In the present case when the returns for the periods 11/18, 05/19, 12/19, 02/20 and 03/20 were given to HMRC they did not contain an inaccuracy. It therefore follows that paragraph 1 cannot and does not apply and accordingly neither Aizio nor Mr Campbell or Mr Billard is liable to a penalty for these periods.

Reduction for Disclosure

72. HMRC have made the following adjustments for disclosure, as required by paragraph 10 of schedule 24:

- Telling – 0% as there has been no admission as to filing inaccurate VAT Returns (maximum deduction 30%).
- Helping – 20% as there has been a failure by Aizio to quantify the inaccuracy (maximum deduction 40%).
- Giving access – 15% as the Aizio (through Mr Campbell) allowed the VAT visit to proceed (maximum deduction 30%).

Ms Brown contends that full mitigation was not given in relation to “giving access” to reflect the fact the Appellant has failed to provide all the records requested despite the issue of an Information Notice. However, we are of the view, given his unchallenged evidence as to why all of the records could not be produced, that this should be increased to 25% as all or almost all of the information available was provided to HMRC.

73. The total reduction to the penalty is therefore 45%.

Quantum

74. The amount of the penalty is determined by applying the total reduction to the penalty to the difference between the minimum and maximum penalty percentages to arrive at the penalty percentage. Given our conclusion that the behaviour was deliberate but not concealed the maximum penalty is 70% of the potential lost revenue. The potential lost revenue is as set out in the table in paragraph 30, above (the ‘Net VAT Due’ column). For the VAT periods for which we have found that Aizio is liable to a penalty, ie 08/19, 11/19 and 01/20, this amounts to £18,879.

75. The total penalty which we have found to be £10,251.62 is calculated as follows:

The maximum penalty percentage less the minimum penalty percentage:

$(70\% - 35\% = 35\%);$

This difference multiplied by the total for quality of disclosure reductions which gives a percentage reduction to the penalty:

$(35\% \times 45\% = 15.75\%);$

The maximum penalty less the element of reduction for quality of disclosure which provides the total penalty percentage:

$(70\% - 15.75\% = 54.25\%);$

The Potential Lost Revenue multiplied by the total penalty percentage:

$(\text{Potential Lost Revenue } \pounds 18,897 \times 54.25\% = \pounds 10,251.62).$

76. Having carefully considered the circumstances of the case we are unable to find anything “special” for it to be right to reduce the penalty and in this regard we agree with HMRC whose decision in relation to special circumstances we do not consider to be flawed.

DECISION

77. Therefore, for the reasons above:

- (1) Aizio’s appeals against the penalties for the periods 11/18, 05/19, 12/19, 02/20 and 03/20 are allowed.
- (2) Aizio’s appeals against the penalties for the periods 08/19, 11/19 and 01/20 are dismissed and the penalties in the sum of £10,251.62 confirmed

(3) The PLN against issued against Mr Campbell is confirmed in the sum of £3,417.20 (ie $\frac{1}{3}$ x £10,251.62).

(4) The PLN against issued against Mr Billard is confirmed in the sum of £6,834.42 (ie $\frac{2}{3}$ x £10,251.62).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

78. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

Release date: 29th JUNE 2023