Neutral Citation: [2024] UKFTT 00052 (TC)

Case Number: TC09034

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/11664

VAT – company assessments – company penalty for deliberate behaviour – PLN issued to appellant – late appeal – application for permission to make late appeal – HMRC application to strike out appeal if permission granted – appellant's application rejected – appeal would have been struck out in any event

Heard on: 8 December 2023
Judgment date: 3 January 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

LAURENCE ONWUFUJU

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Ben Hayhurst litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision deals with two matters. Firstly, whether I should exercise my judicial discretion and permit the appellant to make a late appeal against the imposition of a personal liability notice dated 11 April 2022 in an amount of £1,712,097.10 ("**the PLN**"). Secondly, if I do allow the appellant's application, whether I should go on to strike out the appellant's substantive appeal against the PLN which, in HMRC's view, has no reasonable prospects of success.

THE LAW

Substantive appeal

2. The rules, case law, and legislation which are relevant to striking out, penalties and the obligation to account for VAT are set out in the appendix. Words and phrases defined therein have the same meanings in the body of this decision. However, in a nutshell:

(1) When considering whether the appellant's case has a reasonable prospect of succeeding, I need to consider whether he has a realistic as opposed to a fanciful prospect of success i.e. the claim must carry some degree of conviction and is more than merely arguable.

(2) Where a penalty for submitting an inaccurate return 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.

(3) For there to be a "deliberate" inaccuracy HMRC have to establish an intention to mislead HMRC on the part of the taxpayer as to the truth of the relevant statement.

Late appeal

3. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which should be followed when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), ("***Martland***") in which the Upper Tribunal considered an appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal".

THE EVIDENCE AND THE FACTS

4. I was provided with two bundles of documents. The appellant gave oral evidence. Oral evidence was given by Officer Jason Harris on behalf of HMRC. From this evidence I find the following:

Background

(1) Webstar Dixon Limited ("**the company**") was incorporated on 25 October 2011. It was registered for VAT on 1 December 2013 and listed its business activities as the wholesale of pharmaceutical products within the UK, EEA, and overseas, and as a wholesale pharmaceutical goods importer and exporter.

(2) The appellant was appointed a director on 6 June 2016. At that time he owned 100% of the shares in the company.

(3) He had been made bankrupt on 7 April 2015, the petitioner being HMRC. Officer Harris' unchallenged evidence was that the appellant had been involved in ten other companies which had demonstrated serial noncompliance with VAT legislation. Many of these companies had deregistered and had been dissolved owing money to HMRC.

(4) The appellant is currently shown as operating as an accountant in Essex.

(5) In a telephone conversation with HMRC on 24 June 2019, the appellant told HMRC that the company provided marketing advertising logistics and distribution services to UK clients wanting to market their products in West Africa.

(6) In 2022 the company was put into liquidation.

The assessments and the PLN

(7) In the VAT periods 04/16 to 10/18 the company issued invoices to Medpro Healthcare

Ltd ("**Medpro**") of a net value of approximately £12,229,286. Each invoice also charged Medpro VAT at 20% which amount was identified on each invoice.

(8) In all of those periods, the company submitted nil VAT returns (in other words for each period it submitted a VAT return in which it assessed its liability to output tax as being zero).

(9) On 27 March 2020 HMRC issued a VAT assessment to the company for periods from 04/17 to 10/18 assessing underdeclared VAT at £1,149,918. On 28 May 2020 HMRC issued a VAT assessment to the company for the periods 04/16 to 01/18 assessing underdeclared VAT at £1,295,939 (together "**the assessments**"). The total VAT at stake is therefore £2,445,853.

(10) On 11 April 2022 HMRC assessed the company to a penalty of £1,712,097.10 ("**the company penalty**"). This penalty was raised under Schedule 24 to the Finance Act 2007 as a result of inaccuracies in the company's VAT returns and was based on the figures set out in the assessments. It was based on deliberate behaviour and calculated at 70% of the value of the assessments. The explanation in the penalty schedule for the conclusion that the behaviour was deliberate was that the company deliberately did not declare the sales which were made to [Medpro] and would have known that the VAT returns were inaccurate. Information held showed that the company had issued invoices for net sales of £22,667,558. The company had failed to declare this to HMRC. The company admitted that it had told HMRC that it had received payments of £2,141,720 from Medpro. The appellant, although not a named director of the company during some of the periods assessed, was its controlling mind and thus a shadow director (and thus brought within the ambit of the penalty provisions). As a director of the company, the appellant had also failed to declare VATable sales to HMRC in his directorships of two further companies. This clearly showed a pattern of deliberate behaviour. The disclosure was prompted because the appellant had not told HMRC of the inaccuracy.

(11) The company appealed against the assessments (see below) but following the company entering into liquidation, these appeals were withdrawn by the official receiver. The company did not appeal against the company penalty.

(12) On 11 April 2022 HMRC issued a notification to the company and to the appellant that they were making the appellant personally liable for the company penalty under paragraph 19 (1) of Schedule 24 to the Finance Act 2007. In other words the PLN.

(13) The PLN is addressed to the appellant's correct address.

(14) The evidence that this was actually sent to that address came from Officer Harris. He was taken to a screenshot which, in his view, demonstrated the HMRC process which is used generally (and in the case of this appellant, in particular) when letters are compiled by an HMRC officer and then sent to a taxpayer.

(15) Officer Harris was the officer who compiled the PLN and it was sent to the appellant and also to the company along with a schedule and a payslip. He used a precedent letter to compile the PLN, introducing into it the specific details of this appellant. He generated the PLN on 11 April 2022, i.e. the date of the covering letter.

(16) Once compiled, these documents were then backed up and transferred, overnight, to a third-party contractor. The role of that third-party contractor was to print off the documents which had been batched up and sent to it, and then send those documents to their designated recipients, in the post.

(17) The system demonstrates that it had "created" something on 13 April 2022 which, according to Officer Harris, was the date on which the PLN and the company paperwork were printed off ready to be sent out by the third-party contractor to the appellant.

(18) Once Officer Harris had created the letter and it had been batched up, there was no possibility of his further involvement. He could not review or amend it. As far as he was aware it was issued by the third-party contractor on the date on which it was created.

(19) As far as Officer Harris was concerned, the letter would have been sent out by the third-party contractor, straight away. Officer Harris did not, himself, do anything to delay the posting of the PLN.

The information requests

(20) In the Summer of 2019, HMRC endeavoured to engage with the company (and the appellant) in order to obtain records justifying the company's VATable sales and the nil VAT returns which it had submitted during the relevant periods. This culminated in HMRC issuing a Schedule 36 information notice on 18 July 2019 asking for the company's sales and purchase day books, cash book, petty cash records, and sales and purchase invoices. The company failed to comply in response to which HMRC issued penalties.

(21) The appellant's position was that throughout the investigation the company had tried in every way possible to provide the information requested but its records were held by an accountant who had disappeared. The name and address of the accountant had been given to HMRC. The company could not supply what it does not have. This position was repeated in a number of letters from the appellant to HMRC, including that which accompanied the appeal of 24 June 2020.

The Insolvency Service

(22) Email correspondence between Mr Ross Wheeler, an examiner working for the Official Receiver, and the appellant shows that the appellant failed to attend an interview which had been arranged for 13 March 2022. That interview was then rearranged for a later date in March. The appellant responded in an email of 3 May 2022 explaining that he thought there was little point in having a meeting because he had none of the financial records which Mr Wheeler wanted to see. Mr Wheeler, however, wanted to interview the appellant in any event and indeed wanted him to complete a booklet and provide details of any assets owned by the company including monies held in the bank. A further face-to-face meeting was booked for May 2022 which was inconvenient for the appellant and the interview was rearranged for 14 June 2022. In an email of 13 June 2022, the appellant explained that as per his previous emails, the company held no relevant records as they had been passed on to the accountants. He also attached a letter which he claimed to have sent to the bank requesting bank statements to which he had received no response. He wanted to cancel the meeting scheduled for the following day.

(23) In an email of 13 June 2022, Mr Wheeler told the appellant that he was required to attend and indeed had a duty to do so. If he failed to attend Mr Wheeler could apply for a public examination by the court which, if the appellant failed to attend, could be followed up by an application for an arrest warrant.

(24) A meeting between Mr Wheeler and the appellant was held on 14 June 2022. Following that Mr Wheeler told the appellant in an email of 17 June 2022 that he had tried to make contact with the company's accountants but could find no trace of them from Internet searches and it

appears that the address given was a residential address. The appellant responded to this on 20 June 2022. Mr Wheeler, once again, sought all the company's books and records from the appellant on 21 June 2022, to which, two days later, the appellant responded saying that; he did not have them; there was little point in setting a 7 day deadline; he had been to the accountant's premises and that the accountant was no longer there; and as a director he had done what he could humanly do. He had taken all steps as a responsible person to obtain the records.

The appeals

(25) On 24 June 2020, the company appealed against the assessments. The grounds of appeal were that the "assessment raised by HMRC is based on the assumption that we as a company did not have any attributable cost to the supply tax calculated".

(26) HMCTS rejected the company's appeal on the basis that it had neither been granted hardship, nor had paid the tax outstanding. The company therefore made a second appeal, on 22 July 2020, having made an application for hardship (the application was made to HMCTS rather than to HMRC).

(27) The grounds of appeal in this second appeal were that "the assessments from HMRC only takes into account of output VAT they have from other sources without attributing any nuts associated with the outputs". I presume the reference here to nuts is to inputs.

(28) It was the appellant's evidence that the PLN did not drop through his letterbox until 27 June 2022. That was when he first became aware of it.

(29) On 27 June 2022, the appellant lodged an appeal against the PLN. The notice of appeal declared it to be in time. His grounds for appeal included the fact that the company was still disputing the alleged VAT; HMRC had taken it on themselves to wind up the company before the hearing had been undertaken; he had done no wrong and he believes the value assessed by HMRC on the company was wrong.

(30) The 30 day period for appealing against the PLN expired on 11 May 2022. His appeal is therefore 47 days late.

(31) On 14 April 2023, HMCTS asked for an explanation why the appeal had not been made in time to which the appellant replied on 18 April 2023 telling the tribunal that the PLN had not been received by him until 27 June 2022.

F and BP's

(32) On 25 February 2021, HMRC sought further and better particulars of the appellant's grounds of appeal. Judge Cannan directed that the appellant should provide further and better particulars which set out a summary of all facts and matters on which the appellant would rely in his appeal.

(33) In response the appellant asserted:

> **"4) CONCLUSION**
>
> The appellant's grounds of appeal is:

i) The respondent has calculated the VAT based on the alleged list of invoices obtained from Medpro Healthcare Limited without taking account of associated cost of these invoices.

We the appellant has gone through our limited records and can find payments from Medpro Healthcare Limited totaling £2,141,720 in the period of assessment

From recollection the margin maintained for sale of goods was between 3% and 5%. We have opted to go for the lower percentage as these does don't include other administrative cost which carries associated input tax.

At 3% the associated margin would have been £64,251.60 and the related output tax would have been £12,850.32

ii) We the appellant have contacted Medpro Healthcare Limited and were made to understand that these invoices listed by the respondent have been discounted from their VAT returns yet the respondent still seek the appellant to make payment.

If this is the case the respondent should not be seeking any payment from the appellant

iii) The respondent has not been able to supply to the appellant these alleged invoices yet still hold to the claim of £2,625,883.

The Appellant seek Credit for all the assessment as we have asked for prove of these invoices from the respondent but has not been provided.

We are of the opinion that these are list if figures that has no relationship to actual invoices.

From the points above we the appellant seek a reversion of ALL the assessment or if Medpro Healthcare Limited assertion turnout not to be whole correct the value of £12,850,32 is due to the respondent not £2,625,883".

Medpro error correction

(34) On 17 September 2020 Medpro submitted form VAT 652 entitled "Notification of Errors in VAT Returns to HMRC". In explanation as to why the error had occurred, Medpro referred to a covering letter. That letter, dated 18 September 2020, explained that:

"The error arose as a result of the VAT number for Webstar Dixon being revoked, termination notice issued and the invoices not paid within six months. This was brought to our attention in July 2020 for invoices that were in dispute.

These invoices were in dispute awaiting credit notes and agreed that payment deadlines vacated until licences for West Africa obtained and final account balance discussed and agreed. It would not be normal to have so much payable without such an agreement in place. We have requested a further written confirmation from [the appellant] a director of the companies involved".

(35) The amount of VAT identified in this error correction notification was £3,288,938. It was adjusted in Medpro's VAT return for 06/20. Medpro paid this amount to HMRC. This included all of the invoices supplied by the company during the VAT periods in question.

The appellant's supplemental oral evidence

(36) In addition to the evidence reflected in the foregoing facts, the appellant said the following in his oral testimony: he could not appeal against the PLN until 27 June 2022 because it was not until that date that he received notification of it; as far as he was aware, Mr Wheeler of the Insolvency Service would have known of the PLN at the time of the meeting on 14 June 2022 yet he made no mention of it at that meeting; there was little point in having a meeting with Mr Wheeler since, as he had told HMRC, and repeated to Mr Wheeler, he did not have the company's books and records which were with the accountant; the company's appeal of 24 June 2020 against the assessment of 28 May 2020 was an in time appeal; the reason it was out of time in relation to the assessment of 27 March 2020 was because at that time the company was operating from a serviced office: the manager of that serviced office had changed prior to that time, and the distribution of letters within the serviced office had become inefficient; that first assessment, therefore, had not come to the company's notice in March 2020; notwithstanding the plethora of companies of which he was a director, he had always kept up with his statutory obligations; he was not aware of the fact that the company had sent invoices to Medpro.

DISCUSSION

The late appeal application- part 1

Submissions

5. In summary the appellant submitted as follows:

(1) He did not receive the PLN until 27 June 2022 and he made his appeal on that date.

(2) He has experience with tax appeals and so would have appealed in time if he had received it earlier.

(3) HMRC have not proved, to the required standard, that the PLN was sent to him on 11/13 April 2022.

(4) If it had been issued and sent to him on or around that date, Mr Wheeler would have known about it and mentioned it in his correspondence with the appellant and at their meeting on 14 June 2022.

(5) There was a good reason why he did not provide the VAT records to HMRC or to Mr Wheeler. They were with his accountant. He is therefore not a serial defaulter when it comes to providing information or missing meetings.

(6) There was also a good reason why the company appeal against the assessment of 25 March 2020 was made late. This was because of the dilatory postal distribution regime adopted by a new office manager at the company's serviced office.

6. In summary Mr Hayhurst submitted as follows:

(1) The VAT assessment issued to the company on 25 March 2020 was appealed out of time.

(2) The appellant is an experienced company officer and therefore knew that he should have appealed against the PLN within 30 days.

(3) Furthermore, he has considerable experience of litigating proceedings before the tax

tribunal through some of his other companies.

(4) He is a director of a tax consultancy and thus has experience with the tax system.

(5) He has failed to comply with directions made in this appeal (he is still in default of obligations under a letter sent to him by the tribunal on 20 November 2023 and is also in default with an Unless order). More broadly, as demonstrated by the correspondence with Mr Wheeler, he has demonstrated a repeated pattern of non-compliance which aggravates the seriousness of his failure to comply with the 30 day time limit.

(6) The appellant was not a credible witness. He claimed to have brought the appeal in time, when it was clearly 47 days late. He said he had complied with the requirements of Mr Wheeler, which again he has not.

My view

7. With these facts and submissions in mind, I now turn to consider the three stage Martland test.

8. At stage one I need to consider whether the delay in making the appeal is serious and significant. This is for two reasons. Firstly, if it is not and the delay is very short, then that might be an end to it and there might be no need to go on to consider the reasons for the delay and the final evaluation stage. Secondly, if the delay is serious and significant, that is something to be weighed in the balance at the final evaluation stage.

9. Although not expressed in clear terms, I think that the appellant is suggesting that the appeal is not late in the first place because although the PLN appears to be dated 11 April 2022, it was not in fact issued on or around that date, and was only issued later, around 27 June 2022, and so his appeal which was made on that date is not late.

10. I do not accept any such submission. I am satisfied from the documentary evidence and evidence of system by Officer Harris, that having drafted the PLN, it was batched up and sent to the third-party contractor for posting. It was then posted by that third-party contractor on or around 11/13 April 2022 to the correct address. It was not tampered with, reviewed, amended, or affected by any act or omission of Officer Harris or any of his colleagues at HMRC once it has been sent to the third-party contractor. There is adequate evidence of satisfactory system here for me to infer that it was issued by Officer Harris on the date it bears, namely 11 April 2022.

11. I therefore find that the appeal on 27 June 2022 against the PLN is late by approximately 47 days. This is sufficiently serious and significant to warrant an investigation as to the reasons for the delay, and for the delay to weigh in the balance at the final evaluation stage.

12. I now turn to the reasons given by the appellant as to why he made a late appeal. His position is very straightforward. It is that he did not receive the PLN until 27 June 2022, and appealed against it on that date.

13. Under section 7 of the Interpretation Act 1978 ("**section 7**"), which applies to service of documents authorised or required by legislation, "service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

14. For the reasons given at [10] above, I'm satisfied that, on the balance of probabilities, the PLN was properly addressed to the appellant and posted to him on or around 11/13 April 2022.

15. The burden then shifts to the appellant to satisfy me, again on the balance of probabilities, that he did not receive the PLN until 27 June 2022.

16. His evidence is simply that he did not receive it. Corroboration is provided by firstly his submission that had he received the PLN on or around 11 April 2022, as a person with considerable experience of the tax system, he would have appealed it. The fact that he didn't is, of itself, evidence that it was not received on or around that date. The second is that the appeal against the assessment of 28 May 2020, issued to the company, was appealed in time on 24 June 2020. There is a sensible explanation for why the assessment of 27 March 2020 was not appealed in time. The office manager had not distributed that assessment to the company within 30 days of its promulgation.

17. I then need to proceed to the third stage of the Martland test. I need to conduct a balancing exercise assessing the merits of the reasons for the delay, and taking into account its seriousness and significance, with the prejudice which would be caused by granting or refusing permission. And I remind myself that when conducting this balancing exercise, litigation must be conducted efficiently and at proportionate cost, and statutory time limits should be respected.

18. I must take into account all relevant factors, and one of these is any obvious strength or weakness of the applicant's case.

19. Given that this was fully argued in connection with the strike out issue, I shall now consider it, and then return to the final stage of the Martland evaluation.

The Strike out

Submissions

20. In summary, Mr Hayhurst submitted as follows:

(1) The company's grounds of appeal are clearly that the company had input tax for which HMRC have given the company no credit. Yet neither the appellant nor the company, notwithstanding extensive requests for this, have provided any primary information that any input tax had been incurred by the company in respect of the supplies made to Medpro.

(2) HMRC cannot be impugned for failing to consider alternative evidence of any input tax suffered by the company in light of the repeated requests for information.

(3) There is no evidence, therefore, that any input tax was suffered by the company on the supplies to Medpro.

(4) Any claim for input tax deduction is now out of time as more than four years have elapsed in relation to all the VAT periods which are in issue in the assessments.

(5) The company was neither using, nor was entitled to use, cash accounting.

(6) The invoices issued by the company to Medpro are evidence of taxable supplies on which it was obliged to account for output VAT on a quarterly basis. The company did not do this. It submitted nil returns and accounted for no output tax.

(7) For the company to be able to make a claim for bad debt relief, the claim would have to have been made within four years and six months from the date of the supplies. The invoices are all made between April 2016 and October 2018, and the four and a half year period, therefore, for the latest of these ended in April 2023. The company is therefore out of time to claim VAT debt relief.

(8) The error correction made by Medpro in respect of the company invoices does not affect the assessments. That is a matter for Medpro. If VAT has effectively been paid twice (by the company under the assessments for which no input tax recovery has been allowed and by Medpro by virtue of the error correction) and that is just the way the VAT system works. The company could have made a claim for bad debt relief which it has failed to do.

(9) HMRC have supplied details of the invoices (bar one) which underpin the assessments.

21. In the summary, the appellant submitted as follows:

(1) The issues in the substantive appeal against the assessments have not been tested. It is wrong therefore that HMRC say that there is a debt owed by the company to HMRC, and this can be passed on to the appellant under the PLN.

(2) HMRC are seeking to get double recovery both from the company (and, through the PLN, from the appellant) and from Medpro.

(3) The company is not liable to pay VAT on the invoices which have been reversed out by virtue of the error correction notice submitted by Medpro. Therefore, there can be no company penalty, nor PLN visiting the penalty on the appellant.

(4) He did not come to the hearing prepared to deal with evidence of inputs. He thought it was all about his liability under the PLN. He did not think that the issue would involve the relationship between the company and Medpro.

(5) He was not responsible for issuing the invoices to Medpro. There were other people at the company who dealt with the invoices. He did not know that Medpro had received invoices from the company.

My view

22. Dealing with this last point first, I do not accept the appellant's submission or as a fact, that there were other people at the company dealing with the invoicing, and that he did not know that the company had made supplies to Medpro as evidenced by the invoices. Nor indeed that he was unaware that supplies to Medpro were an issue in this application for strike out.

23. It has clearly been in the notice of objection since 19 June 2023. Furthermore, as an experienced tax litigator, and a self-professed tax expert, the appellant was more than able to research the issues regarding the PLN, and the late appeal, which clearly involve an examination of the underlying issues. And the application for strike out set them out in stark terms.

24. So it has, or should reasonably have, been abundantly clear to the appellant that in order to oppose the strike out application, he needed to consider and bring evidence in relation to his assertion (or rather the company's assertion in its notices of appeal) that HMRC had given no credit for input tax to which the company was entitled in respect of the supplies to Medpro.

25. Furthermore, and irrespective of that general principle, the company was specifically directed by Judge Cannan to provide detailed particulars of its grounds of appeal, one of which involved the issue of input tax recovery. Yet the appellant brought no evidence before me to suggest that there was any input tax incurred on the supplies made to Medpro.

26. It seems to me that the appellant was grasping at straws when, in the last throes of the hearing, he said that was not aware of the fact that the company had sent invoices to Medpro. This was the first time that it was mentioned in all of the correspondence and the oral testimony.

27. The company's pleaded case that it has suffered input tax for which it has received no credit is only relevant if it has made corresponding outputs. The appellant challenges the double recovery position of HMRC on the basis that the company had made taxable outputs, and Medpro would get no recovery for deductible input. Yet there can only be double recovery, in theory, if the company made taxable outputs. So to make this assertion in the first place, the appellant must have been aware of such taxable outputs.

28. I reject the appellant's assertion of ignorance of invoicing Medpro and find as a fact that the appellant was fully aware that the company had made supplies to Medpro in the amounts evidenced by the invoices which are the subject matter of the assessments, and that those invoices reflected underlying supplies.

29. The appellant made no serious challenge to HMRC's submission that there were supplies because there were invoices.

30. Nor did the appellant make any serious challenge to the validity of the PLN. He did not, for example, suggest that he was neither a director nor shadow director during the period in question, nor that there was some technical deficiency in the way in which the company penalty had been calculated, nor that he had not behaved deliberately, nor that there was some other reason why the company penalty could not be visited, in whole, on him via the PLN.

31. The evidence clearly shows that the company made supplies to Medpro. HMRC have provided evidence of the value of the supplies and the details of the invoices in the main bundle. The assessments are based on those invoices. The appellant as director or shadow director of the company was fully aware of the supplies made by the company to Medpro and of the invoices. The company should have accounted for output VAT on those invoices on a quarterly basis. It did not do this. It submitted nil returns. It was not paid for those invoices, but is now out of time for making a bad debt claim. The company penalty was based on deliberate behaviour by the company. It is effectively deliberate behaviour by the appellant.

32. There will be a deliberate inaccuracy in a VAT return where there was an intention to mislead HMRC on the part of the taxpayer as to the truth of the information set out in that return. In light of the appellant's knowledge of the supplies in question as well as his experience, with other companies, of the VAT system, it is clear to me that he knew full well that VAT should have been accounted for on the supplies to Medpro. But by omitting that VAT from the VAT returns, he intended to mislead HMRC as regards the VAT due on those returns. This is clearly deliberate behaviour and justifies the company penalty and the PLN.

33. The fact that a Medpro reversed out its input tax recovery claim by submitting the error correction notice does not affect the company's liability to output VAT, nor to the company penalty number, nor the appellant's liability under the PLN.

34. The appellant has provided no evidence of the company's right to input tax recovery, nor

has he suggested any alternative evidence that HMRC might take into account to justify a claim by the company. In any case, any claim by the company for such input tax credit is now out of time.

35. When considering whether appeal should be struck out, I must consider whether the claimant has a realistic as opposed to a fanciful prospect of success. And a realistic claim is one that carries some degree of conviction. It must be more than merely arguable.

36. I can take account not only of the evidence before me but also what further evidence might actually be available at trial. And I must hesitate to strike out if I think that a fuller investigation of the facts than those which were before me, might affect the outcome of the case.

37. I have no hesitation in saying that in my view, the appellant's prospects of succeeding in the substantive appeal against the PLN are fanciful. He has behaved deliberately as has the company. The company was liable to pay VAT on supplies to Medpro which it did not account for. The company has provided no evidence of allowable input tax suffered by it which is attributable to the making of those supplies. And yet it has had more than ample opportunity to do so.

38. Given that the company, and the appellant to date, has provided no evidence of such allowable input tax, I cannot see that it will be able to do so at a hearing at which there will be a fuller investigation of the facts.

39. In light of this, if I were to give permission for the appellant to bring his appeal against the PLN, out of time, I would then strike out his substantive appeal against the PLN.

The late appeal application- part 2

40. I now return to the final evaluation stage of the Martland test.

41. In light of the assertion by the appellant that he was unaware of the invoices provided by the company to Medpro which, as I said above, I have found not to be a credible or reliable assertion, I do not find the appellant to be a credible or reliable witness.

42. Like HMRC, therefore, I do not accept his version of events regarding receipt of the PLN only taking place on 27 June 2022. Nor do I accept his explanation as to why the appeal against the company assessment of 27 March 2020 was made out of time. In both cases it is my view that he (in the case of the PLN) and the company (in the case of the company assessment) received the relevant document on or around the date on which it was issued. And the presumption that it was properly served, in both cases, has not been rebutted by the appellant's evidence. I do not accept his submission that had he received the PLN in April 2022, he would, as an experienced professional, have appealed in time. This could be said of many cases where late appeals are brought and for some reason a time limit has been missed. I do not know the reason why the time limit was missed in the case of this appellant, nor by the company in respect of the company assessment. But I do not accept as submitted by the appellant, that simply because the submission of the appeal was made late, that is evidence of late receipt.

43. So, at the final evaluation stage, when I must balance the reasons given for the late appeal against the prejudice which will be caused to either party in giving or rejecting the application, I find that the balance weighs heavily against the appellant.

44. I have also found that there are fundamental weaknesses to his case, and that if I were to give permission, I would strike it out as it has no realistic prospect of success.

45. Finally, at this final evaluation stage I must pay particular heed for the need for litigation to be conducted efficiently and at proportionate cost and that time limits should be respected. This is especially true in the case of the appellant who has considerable experience of the tax system and tax litigation and has failed to give this litigation the respect it warrants.

46. Given the foregoing, I reject the appellant's application to bring his appeal against the PLN out of time.

DECISION

47. I reject the appellant's application to bring his appeal against PLN out of time.

48. Even if I had given permission, I would have struck out his appeal against the PLN.

Right to apply for permission to appeal

49. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 3rd JANUARY 2024

APPENDIX

STRIKE OUT

The F-tT Rules

1. The relevant Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") are Rules 2 and 8:

Rule 2(3) requires me to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

> "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly".

Rule 8 deals with strike out:

> **"8. Striking out a party's case**
>
> (1) …
>
> (2) …
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out…".

Case law

2. The legal principles which I must consider have been neatly set out in the Upper Tribunal in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396:

> **"Approach to applications to strike out - legal principles**
>
> 31 At [30] of the decision, the judge applied the summary of principles set out by the Upper Tribunal in *HMRC v Fairford Group plc* [2014] UKUT 329; [2015] STC 156 ('*Fairford Group plc*'). The Upper Tribunal held (at [41]) that:
>
> > "In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings

(whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all".

32. It was common ground that the application should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Part 24).

33. Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

"i) The court must consider whether the claimant has a 'realistic' as opposed to a fanciful prospect of success: *Swain v Hillman* [2001] 1 All ER 9;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add

to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725"".

PENALTIES

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 extent 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%.

10. 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).

11. 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 a director and a shadow director (paragraph 19(4)(a)). Also, HMRC are precluded from collecting more than 100% of a penalty (paragraph 19(2)).

12. 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.

13. 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.

14. 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.

15. 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".

16. 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]).

VAT

17. The right to deduct input tax is contained within ss 24 – 26 Value Added Tax Act 1994 ("**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.

18. 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.

…

19. Section 36 VATA deals with Bad debts.

(1) Subsection (2) below applies where—

(a) a person has supplied goods or services and has accounted for and paid VAT on the supply,

(b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and

(c) a period of 6 months (beginning with the date of the supply) has elapsed…

20. 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 …

21. Under Regulation 29(1) of the VAT Regulations:

… 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.

22. 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]; …

23. Regulation 40 (1) states that "any person making a return shall in respect of the period to which the return relates account in that return for

(a) all his output tax….

24. Regulation 165A deals with the time within which a claim for bad debt relief must be made:

165A

(1) Subject to paragraph (3) and (4) below, a claim shall be made within the period of 4 years and 6 months following the later of—

(a) the date on which the consideration (or part) which has been written off as a bad debt becomes due and payable to or to the order of the person who made the relevant supply; and

(b) the date of the supply.

(2) A person who is entitled to a refund by virtue of section 36 of the Act, but has not made a claim within the period specified in paragraph (1) shall be regarded for the purposes of this Part as having ceased to be entitled to a refund accordingly…