[2020] UKFTT 0028 (TC)

TC07534

Appeal number: TC/2018/04781

VAT – hearing in the absence of the appellant – late notification penalties – whether unjust and/or in breach of the appellant's human rights – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAGHIR AHMED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MRS RAYNA DEAN

Sitting in public at Manchester on 13 January 2020

The Appellant did not attend and was not represented

Ms S Brown, presenting officer, for the Respondents

DECISION

The appellant did not attend and was not represented. The Tribunal had no telephone number for the appellant but telephoned the mobile telephone number in the papers for his representative, who advised that he had informed HMRC and the Tribunal a few days earlier that he no longer represented the appellant. He had understood that the appellant was instructing a new agent to deal with the matter but had no other information.

We considered that it was clear that the appellant was aware of the hearing as he had unsuccessfully attempted to have the hearing adjourned some time earlier.

HMRC argued that the hearing should take place in the absence of the appellant on the basis that it was obvious that the appellant had been notified of the hearing and had made no objection to its proceeding, having been warned of the consequences of not appearing.

We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules since there was no explanation as to the non-appearance by or for the appellant. The appellant's attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

Background

The appellant appeals against a penalty assessment for £20,405.43 made pursuant to Schedule 41 Finance Act 2008 for failure to notify HMRC of the need to register for VAT.

The appellant operated a takeaway restaurant known as "Chunki Chicken Ltd". Following an unannounced visit to the premises on 14 September 2017, HMRC wrote to the appellant requesting information to enable them to review his tax position. The information requested was:

(1) A trader questionnaire;

(2) Confirmation of the date the business was acquired and details of the person or persons from whom the business was acquired;

(3) Records of the weekly or monthly gross sales, including Z readings and record books for the period of trading;

(4) 'Just Eat' invoices for all accounts for the period of trading;

(5) Names, national insurance numbers, start dates and hourly rates of pay for all employees.

On 31 October 2017, the appellant's representative supplied copies of bank statements for an account in the name "Mr S Ahmed" for the period April 2015 to March 2016 and an employee P11 working sheet headed "Saghir Ahmed T/A Chunki Chicken 2015-16. An accompanying letter advised HMRC that they should refer to the profits declared on Mr Ahmed's self assessment return for details of the business income, and that the 'Just Eat' information could be obtained from the bank statements. It was established that the appellant had operated the business as a sole trader from January 2014 until he incorporated the business in February 2017.

HMRC responded, noting that the 'Just Eat' information in the bank statements reflected only net card payments received and not the gross sales; that the turnover in the self-assessment returns was less than the 'Just Eat' information for the period, and that the actual business records were required, including the 'Just Eat' invoices.

A notice under paragraph 1 of Schedule 36 Finance Act 2008 was issued on 3 November 2017 as the information had still not been provided. As information had still not been provided by 3 December 2017, a penalty of £300 was issued. Further penalties were issued, of £310 on 10 January 2018 and £600 on 22 February 2018.

A handwritten list of cash and online sales for the period January 2016 to February 2017 was sent to HMRC on 2 March 2018. As the appellant could not access his 'Just Eat' account, he authorised HMRC to obtain the information directly.

The appellant had two 'Just Eat' accounts for the premises, one in the name of "Chunki Chicken" and one in the name of "Shawarma King". The handwritten sales information previously provided by the appellant contained only the online sales for the Shawarma King account.

On 7 March 2018, HMRC advised that a best judgement decision was being made on the basis of the information provided to date. The sales information provided showed that cash sales accounted for 16% of all sales; this information was used to uprate the 'Just Eat' and 'Hungry House' online sales data obtained by HMRC to calculated the turnover of the business.

The calculated turnover showed that VAT registration was required from July 2015; VAT arrears were calculated using the Flat Rate Scheme up to the date of incorporation on 20 February 2017. The appellant was advised that penalties would also apply.

The appellant's representatives responded on 27 April 2018, stating that "Chunki Chicken" and "Shawarma King" were two separate businesses. One of the businesses, stated to be "probably Shawarma King" belonged to the appellant, the other was run separately in partnership. HMRC asked for more details.

On 30 May 2018, as no further response had been received, HMRC wrote to confirm that the appellant was liable to be registered for VAT from 1 July 2015 to 20 February

2017 with a VAT liability of £33,315 and that further correspondence would be issued regarding the penalty.

On 4 June 2018, the appellant's representatives wrote to HMRC to advise that the appellant wished to appeal the assessment and penalty notices on the basis that the appellant's wife operated the "Chunki Chicken" business and that he operated the "Shawarma King" business. The 'Just Eat' accounts were both in the name of the appellant because of his wife's credit history. No further details were provided with regard to the separate businesses.

The penalty explanation and schedule were issued on 29 June 2018, and the penalty assessment issued on 31 July 2018.

A notice of appeal was submitted to this Tribunal on 22 July 2018.

On 25 September 2018, the appellant's representative notified HMRC that the appellant accepted the VAT liability on the basis of the flat rate scheme for takeaways but was appealing the penalties as they were unjust and breached his human rights.

Appellant's case

The case put forward for the appellant in his witness statement in the bundle of documents was as follows:

> (6) It is unreasonable for HMRC to charge the penalties as the appellant's representatives had provided HMRC with the information requested and had explained that there were two separate businesses each below the VAT threshold;
>
> (7) The case of *Belcher and Belcher* (TC5891) showed that businesses run separately by a husband and wife should not be considered together for VAT purposes;
>
> (8) The appellant had agreed to the assessment because he could not afford a prolonged case and professional fees.

In addition, in a letter dated 3 August 2018 from the appellant's representatives, it was argued that the penalty should be reduced to zero because the appellant had shown good behaviour and:

> (9) When the appellant took over the business, he was not informed by the previous owner or by his adviser that it was on a going concern basis and that the business needed to be registered for VAT purposes;
>
> (10) One of the businesses was for the appellant's wife and it was below the VAT threshold, so the appellant assumed that neither business needed to be registered for VAT;
>
> (11) Correspondence between HMRC and his representatives had not always been received when the accountants moved to new premises;
>
> (12) The appellant's previous accountants were not helpful in supplying information.

In a letter dated 25 September 2018 to HMRC, the appellant's representative stated that the appellant accepted the VAT liability but wished to appeal against the penalties on the basis that they were unjust and in breach of his human rights.

HMRC's case

HRMC contended that all assessments had been raised in accordance with the relevant legislation and at the relevant time. The appellant was required to notify his liability to VAT in accordance with paragraph 1(1) of Schedule 1 of the VAT Act 1994 but failed to notify liability and registration at the right time in accordance with paragraph 5(1) of Schedule 1 of the VAT Act 1994.

Schedule 41 Finance Act 2008 allows HMRC to impose penalties on a person in respect of a failure to notify HMRC that they are chargeable to tax. A penalty cannot be charged where the failure to notify is not deliberate and there was a reasonable excuse for the failure.

HMRC contend that deliberate behaviour occurs when a person is aware of an obligation and has the opportunity to comply with the obligation but still fails to do so. HMRC submitted that they were not required to demonstrate that the behaviour was deliberate by specific reference to the appellant's state of mind, but that the behaviour can be inferred from the circumstances as a whole, as set out in the cases of *Mehaffey* [2017] UKFTT 571 at §90 and *Contractors 4 U Ltd* [2016] TC04823 at §56.

With regard to the appellant's grounds of appeal, HMRC submitted as follows:

> (13) Despite requests for evidence that the appellant's wife owns or runs one of the businesses, nothing has been provided to support that contention;
>
> (14) The appellant's wife has not accounted for any self-employed income on her tax returns, which HMRC submitted was evidence that she did not own or run one of the businesses;
>
> (15) There had been very little cooperation from the appellant with regard to the information requested by HMRC, even though formal information powers were used;
>
> (16) The assessment was raised according to best judgement, in line with the decision in *Van Boeckel* [1981] STC 290;
>
> (17) The requirement for VAT registration is widely publicised and any prudent business should have taken steps to confirm that they were meeting their tax obligations;
>
> (18) It is the appellant's responsibility to monitor his own compliance with the turnover thresholds and the rules are not unduly complicated or difficult to understand.

The penalty assessment was calculated on the basis that, as the behaviour was deliberate and the disclosure was prompted, the penalty range was from 35% to 70% of the potential tax lost. HMRC considered that the appellant had not acknowledged the

liability to register, had given minimal help and had not volunteered any information relevant to the failure to notify, and had provided only a small amount of the records and information requested. Accordingly, they had allowed no reduction for telling HMRC about the failure; 15% reduction for helping HMRC understand the failure and 10% for giving access to records. This gave a penalty percentage of 61.25% which, applied to the potential lost revenue, gave a penalty of £20,405.43.

The question of proportionality in relation to penalties was considered in *Ludwik Gorgon* [2016] UKFTT 0852, where the tribunal concluded that the penalty regime in Schedule 41 of Finance Act 2008 as a whole is not disproportionate because it contains provisions under which a penalty is linked to the seriousness of the offence, and has provisions under which a penalty can be removed where there is a reasonable excuse for the failure, and also contains a discretion for HMRC to remove the penalty where there are special circumstances. HMRC had considered whether special circumstances applied in this case but had concluded that there were no special circumstances which merited a further reduction or removal of the penalty.

The VAT surcharge regime was also considered in *Trinity Mirror* p2015] UKUT 0421 where the Upper Tribunal concluded (at §15) that parliament has a wide discretion in devising a suitable scheme for penalties, with a wide margin to allow the imposition of (inter alia) penalties unless the assessment is devoid of reasonable foundation.

HMRC submitted that the safeguards built into Schedule 41 of Finance Act 2008 ensure that the regime is proportionate and that it was considered by Parliament to be fully compatible with the Human Rights Act. The penalty in this case is not exceptional and cannot be said to be plainly unfair or devoid of reasonable foundation.

HMRC submitted that, on the facts of the case and the lack of any evidence provided by the appellant, the penalty assessment had been correctly charged as a deliberate inaccuracy.

HMRC submitted in the alternative that, if the Tribunal considered that the behaviour was not deliberate, that the appellant had no reasonable excuse for the failure as the appellant's actions could not be considered to be those of a prudent and reasonable person who wanted to comply with their tax obligations.

Relevant law

Paragraph 1 of Schedule 41 Finance Act 2008 ("Schedule 41") provides that "A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation")." Included in the Table is the obligation in paragraph 5 of Schedule 1 of the VAT Act 1994 to notify HMRC of liability to register for VAT.

The amount of the penalty depends on the behaviour which led to the failure to notify (paragraph 5 of Schedule 41), which sets a standard penalty of 70% of potential lost revenue for a deliberate but not concealed failure and a standard penalty of 30% for a non-deliberate failure. Paragraphs 12 and 13 set out circumstances in which the penalty

can be reduced. In the case of a prompted disclosure, the minimum penalty which may be imposed is 35% for a deliberate but not concealed failure. No penalty is imposed if P has a reasonable excuse for the failure (paragraph 20 of Schedule 41).

Discussion

As the appellant has accepted the VAT liability, the issue for this Tribunal to decide is solely whether the penalty was properly raised.

Was the behaviour deliberate?

The key question is whether the behaviour which led to the failure was deliberate. Although the appellant has accepted the VAT liability, he has also argued that no liability to register arose because there were two businesses, both trading under the VAT threshold, and that he was only responsible for one business.

However, the appellant has consistently failed to provide any evidence that there was a separate business owned by his wife. In correspondence with HMRC, the contention that his wife had any involvement was not raised until HMRC had issued their best judgement decision and, at that time in April 2018, it was stated that the appellant was in partnership with her in relation to the Chunki Chicken business. In June 2018, in correspondence with HMRC, the contention is put forward that the Chunki Chicken business belonged entirely to the appellant's wife.

The appellant's witness statement states instead that the Chunki Chicken business was run by the appellant, which is consistent with his incorporation of that business in February 2017. His witness statement also states that he ran the other business, 'Shwarama King', with his wife. However, no evidence of this partnership was provided, nor that there was a separate business other than that one of the 'Just Eat' accounts in the name of the appellant is described as relating to 'Shawarma King'. It was not disputed in correspondence that the handwritten sales information provided by the appellant contained only the online sales relating to the 'Shawarma King' 'Just Eat' account.

HMRC's evidence, which was not challenged in correspondence, was that the appellant's wife had not declared any self-employment income. We note also that no explanation is given in correspondence for the fact that the appellant's self-assessment returns show turnover below the level of even one of the 'Just Eat' accounts.

We have considered the relevant case law and agree that deliberate behaviour does not need to be specifically proven as a state of mind and that it can be inferred from the circumstances. Considering the evidence in this matter, we find that we can infer that the appellant's behaviour in failing to register was deliberate. The appellant has provided very little of the information requested by HMRC, including the statutory records requested. He has provided inconsistent information as to the ownership of the business or businesses and has failed to provide any supporting evidence as to any separate owner for either business nor indeed any evidence that "Shawarma King" and "Chunki Chicken" were run as separate businesses. We do not consider that this

behaviour is consistent with a taxpayer who is acting carelessly, rather than deliberately, in failing to notify HMRC of their obligations.

We note that the case of *Belcher and Belcher* referred to by the appellant involved two businesses which were clearly independently operated, and where that was made clear to HMRC from the outset. That contrasts with this case, where no evidence of independent operation has been provided and it was not until several months had passed in enquiry that there was any suggestion from the appellant that there might be more than one business.

Given that we consider that the behaviour which led to the failure to notify was deliberate, we do not need to consider whether there was a reasonable excuse for the failure. However, to address one point raised by the appellant which might be regarded as suggesting that he might have believed he had a reasonable excuse for failing to notify: the appellant states that he had not been advised that acquiring the business as a going concern meant that he had to register for VAT. The assessment was not raised on the basis of the acquisition of a going concern but, instead, on the basis of cumulative assessed turnover in a rolling twelve month period. Even if the appellant had not been advised of the need to register for VAT, the obligation to comply with VAT requirements rests with the trader and not any third parties.

Reasonableness of the penalty

As we find that the behaviour which led to the failure to notify was deliberate, and there was no disclosure of that failure by the taxpayer, we agree with HMRC that the penalty range is 35% to 70%. HMRC have given reductions of 15% for helping and 10% for providing information. We consider that these are remarkably generous in the circumstances but have decided not to exercise the tribunal's powers to increase the penalty.

With regard to the appellant's contentions that the penalties are unjust and breach his human rights, we have considered the relevant case law and note in particular the decision in *Trinity Mirror* as to the wide discretion that is conferred on Government and Parliament in devising a suitable scheme for penalties whereby *"…a high degree of deference is due by courts and tribunals when determining legality."* and *"…The state has a wide margin of appreciation, so wide as to allow the imposition of taxes, contributions and penalties unless the legislature's assessment is devoid of reasonable foundation…*". We note that the decision in *Trinity Mirror* followed the decision in *Total Technology* [2012] UKUT 418, which had reviewed the VAT penalty regime and concluded that it was not incompatible with the European Convention on Human Rights. Although both *Trinity Mirror* and *Total Technology* relate to the VAT surcharge aspect of the penalty regime in particular, we consider that the decisions take a sufficiently broad approach to their review of the penalty regime to be applicable in this case.

We do not consider that, in this case, the imposition of a penalty for failure to notify a liability to register is devoid of reasonable foundation. We also do not consider that that the results of applying the penalty regime in this particular case are disproportionate:

the amount of the penalty reflects the level of VAT which the business failed to account for, and cannot be regarded as plainly unfair given the legislative aim of ensuring that businesses comply with the requirements of the VAT regime.

Decision

The appeal is dismissed and the penalty upheld.

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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 16 JANUARY 2020