Neutral Citation: [2024] UKFTT 1097 (TC)

Case Number: TC09371

FIRST-TIER TRIBUNAL
TAX CHAMBER

Birmingham Civil & Family Justice Centre

Appeal references: TC/2021/02619 (1)
TC/2021/02617 (2)

VAT – sections 60 & 61 VATA – personal liability notices in respect of dishonest evasion penalties – whether penalties properly chargeable to the companies – yes, in reduced amounts – whether penalties recoverable from the appellants – yes, but in the appropriate reduced amounts – whether sections 60 & 61 VATA applied where part of conduct complained of was simply paying estimated assessments in amounts known to be too small – Paragraph 4 of the Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 (SI 2008/568) considered – held yes, in the circumstances – appeal allowed in part

Heard on: 4-5 December 2023
Judgment date: 6 December 2024

Before

TRIBUNAL JUDGE KEVIN POOLE
SHAMEEM AKHTAR

Between

MARIUS KARPAVICIUS (1)
MONIKA PAKULIENE (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: The Appellants appeared in person without representation.

For the Respondents: Esther Hickey, litigator of HM Revenue and Customs' Solicitor's Office.

DECISION

INTRODUCTION

1. The Appellants, respectively former directors of companies called Heptra Limited ("Heptra") and Heptra Solutions Limited ("HSL"), appeal against personal liability notices addressed to each of them pursuant to section 61 Value Added Tax Act 1994 ("VATA"), imposing personal liability on them for dishonest evasion penalties assessed on Heptra and HSL respectively for their persistent failure to file VAT returns and pay their VAT liabilities. For Heptra, the default covered the VAT accounting periods 05/16 to 05/17 and 08/18 to 05/19 inclusive and for HSL the default covered the VAT accounting periods 02/17 to 11/18 inclusive

2. By the time of the hearing, the amounts of the personal liability notices issued to the Appellants (respectively "MK" and "MP") which HMRC were seeking to defend were £133,105 (MK) and £121,652 (MP), though this changed during the course of the hearing.

3. At the end of the hearing, we indicated to the parties that we wished to receive further written representations from them on the scope of the Tribunal's jurisdiction under section 61(5)(b) VATA to revise the portion of any penalty recoverable from an officer of the company, and in particular whether the existence of any facts which the Tribunal might consider to be extenuating circumstances could justify the allocation of less than 100% of any penalty to a sole director. Confirmatory directions were issued following the hearing and representations from the parties were duly received.

4. When in the final stages of preparing our decision, an additional legal point arose as to the validity of the penalty referable to MP in the light of the drafting of the saving provision which continued the effect of sections 60 and 61 VATA in certain cases after their abolition for most purposes from 2009. Directions were issued to the parties to seek their representations on this additional point, which were duly received from HMRC alone.

THE FACTS

Introduction

5. We received an electronic bundle of documents running to 1,139 pages which included written witness statements by each of the Appellants and by HMRC officer Andrew Barnett. We also heard oral testimony from officer Barnett and both Appellants.

6. We find the following facts.

History of the business of Heptra

7. Heptra was incorporated on 22 February 2012 under the name "Karpavicius Sterling Limited". MK owned both its issued shares from incorporation and became its sole director on incorporation. On 12 April 2013, HMRC received Heptra's application for voluntary VAT registration with effect from 1 May 2013, giving its main business activity as "Transport Company" with an estimated annual turnover of £35,000. The application was lodged on behalf of Heptra by their accountants and included their own address (9 Ludlow Gardens, Quadring, Spalding, Lincs PE11 4QH) as Heptra's principal place of business, whilst also giving the email address and mobile phone number of the accountants by way of contact details. The address given for MK in the form was Whaplode Manor Mews, Washway Road, Saracens Head, Holbeach, Spalding PE12 8AZ, which was an incomplete address. Whaplode Manor Mews comprised three separate properties, and MK lived at No. 3. The VAT registration application was granted on 29 April 2013.

8. The standard method of submission of Heptra's VAT returns was initially by MK (and later MP) inputting all relevant invoices into Sage software and then Heptra's accountants

generating the VAT return and submitting it online to HMRC. They would notify MK of the amount of VAT to be paid by Heptra.

9. Heptra submitted a VAT return for period 05/13 (a repayment claim of £354.80) and a nil VAT return for period 11/13. It made no return for period 08/13, simply paying the automated central assessment of £73. Given that HMRC would have been issuing correspondence to Heptra at its principal place of business, we infer that the accountants simply forwarded this assessment to MK.

10. On 1 October 2013 MK resigned as a director (being replaced by another individual not relevant to these proceedings). On 4 November 2013 the company name was changed to Heptra Limited. On 13 November 2013 Heptra's accounts were filed with Companies House for the period from incorporation up to 28 February 2013. They showed only assets of £2,414 cash, representing £2 share capital and a creditor of £2,412. No details of any turnover were included though a note in HMRC's summary of VAT returns included in our bundle suggested a turnover of £27,216 was reported for that period.

11. On 26 February 2014 Heptra was granted an Operator's Licence and started trading as a haulage company, initially for a customer based in the Netherlands (to which no VAT was charged).

12. On 21 March 2014, MK was reappointed as Heptra's sole director, a post he retained until the eventual dissolution of the company in October 2021.

13. Heptra's VAT return for period 02/14 was submitted on 31 March 2014, claiming a repayment of £2,097.83. Since Heptra was at this stage in a VAT repayment position, on 8 April 2014 it applied through its accountants to change to monthly VAT returns. After submitting a return for the two month period ended 30 April 2014 (claiming a repayment of £1,063.20), it then submitted monthly returns for roughly the next year.

14. In August 2014 Heptra's business with its main Dutch customer ended and it started to work for UK customers. Its VAT return for the month of September 2014 was the first return since that for period 08/13 to show a VAT liability (of £3,221.12), which it paid on time. For the month 10/14 the position was similar. From that point, its returns fell into arrears. Heptra's cash flow was tight and it started to use invoice discounting. The business struggled for various reasons and MK nearly closed it down altogether at the end of 2014.

15. On 27 March 2015, MK received an email from his accountant headed "VAT CATCH UP", as follows:

> Morning Marius
>
> I have now completed work on your VAT Returns for periods October to January and the figures are as follows: –
>
> November £1,154.83
>
> December £3,372
>
> January £1,730.13.
>
> The next return will be due for February 2015 due by 7th April and I will get onto that subject to agreement re the scheduling in of the above returns and payments of amounts due and settlement/arrangements to pay of my Invoice for work done to date which is attached.
>
> I await your instructions

16. The three returns mentioned in that email, for 11/14, 12/14 and 01/15, were submitted together on 31 March 2015, and a single payment of £6,256.96 was made on 7 April 2015 which settled the net liability due under all three returns.

17. On 16 April 2015, in an email from the accountant to MK, the accountant said this:

> Hi Marius
>
> I have now completed February VAT and amount payable is £3,200.30.
>
> Do you want me to submit this return as it will be payable immediately?

18. The return for period 02/15 was submitted on the same day and the liability of £3,200.30 was paid on 17 April 2015. We infer therefore that MK had instructed the accountant in response to this email.

19. At the same time, a decision was taken to request a return to quarterly VAT returns, as Heptra was not expecting to be seeking repayments of VAT on a regular basis because of the changed nature of its customer base. It was moved back onto quarterly returns, but only with effect from 1 June 2015, HMRC requiring monthly returns for March, April and May.

20. On 5 May 2015, MK emailed the accountant, saying that he had entered all March invoices and transactions to Sage; he asked the accountant to "please check attached file with VAT details", attaching a file called "Heptra Ltd VAT Return – March.pdf". This return, claiming a repayment of £2,116.71, was submitted to HMRC on the same day. This appears to have signalled a slight change in the working practices for preparation and submission of the returns. Up to that point, it would appear that MK had inputted all the necessary data into Sage, but had then left it to the accountants to produce the VAT return (accessing the Sage data from their own computers), report on the VAT liability (or repayment) and then submit the return online (subject to MK instructing them to do so, if a payment was required). Now, MK was actually producing the VAT return and simply sending it to his accountants for submission.

21. On 8 June 2015, MK emailed his accountants again, attaching the VAT return documents for April, and asking them to submit the return that day. For some reason, there is no record on HMRC's system of a return having been submitted for period 04/15.

22. On 30 June 2015, the accountants emailed MK: "Need information ASAP for May Vat so I can submit Return." In reply, MK emailed on 3 July 2015, as follows:

> Yesterday I finish VAT for April and May. All reports in your office. My computer has crashed so I have problem to put everything in to Sage.

23. HMRC received a single return online for period 05/15 on the same day, showing a VAT liability of £776, which was paid on 7 July. It would seem that the figures for April and May 2015 were combined into this single return.

24. Heptra's next VAT return was due for period 08/15 in early October 2015. On 23 October 2015, MK emailed his accountants, saying "I late my VAT. This week is very busy. No time to sleep even." It was only on 12 November 2015 that MK emailed his accountants as follows:

> Please check attached VAT files. When you will submit please let me know and I will do payment.

25. This email had three attachments, identified as "VATDET_TMPDATA.pdf", "VATRET.pdf" and "VATSUM_VCA.pdf". The following day, HMRC received online the VAT return for period 08/15, which had clearly been lodged online by the accountant. On the same day, payment of the £10,870.69 due under that return was made to HMRC. It is clear, therefore, that MK had input all the necessary information and produced all the material

necessary for filing the VAT return, was well aware of its contents, and the accountants had merely used their online access to deliver the return.

26. The returns for periods 11/15 (a repayment claim of £10,026.64) and 02/16 (a liability of £13,099.66) were only submitted much later on 23 December 2016, when payment was made of the net balance of £3,073.02 on both returns.

27. The reason for the returns getting behind was that MK was overstretched and did not make time to input all the necessary information into SAGE. He was also starting HSL (see below).

28. MP was employed by Heptra in September 2016 as an administrative assistant to deal with the backlog in its paperwork which had built up, and we infer that it was her involvement which had led to the filing of the returns for 11/15 and 02/16. However, Heptra then made no further VAT returns in respect of any period from 05/16 until March 2019, following the HMRC visit referred to below. No automated central assessments were issued by HMRC during this time, apparently because Heptra was considered by HMRC to be a repayment trader.

29. The details of the business arrangements between Heptra and HSL were somewhat vague, but there was clearly a great deal of trading between them, with HSL initially acting as an agency supplying the services of drivers to Heptra as well as external customers, while Heptra held the tractor units which it hired out to customers along with drivers. The administration of both businesses was carried out together, largely by MP. Essentially, as a result of financial pressures, Heptra was not obtaining sufficient cash to meet its VAT liabilities and whilst it kept on producing the necessary information for preparation and submission of its VAT returns, it did not forward any of it to its accountants or ask them to submit any returns because it did not have the funds to make any VAT payments.

30. This state of affairs persisted until the intervention from HMRC in February 2019 – see below.

31. Heptra accounted for its VAT on a cash accounting basis rather than an invoice basis.

History of the business of Heptra Solutions Limited

32. HSL was incorporated on 2 December 2015, with MK as its sole director and holder of the two issued shares of the company. MK's intention was that this business would mainly act as a temporary employment agency for drivers.

33. On 4 December 2015, HSL applied for VAT registration. The main business activity was described as "freight transport operation by road". The estimated turnover for the first year was given as £20,000. Its registration was granted, with effect from 7 December 2015. On its application for registration (submitted on its behalf by its accountants), the principal place of business was given as Whaplode Manor Mews, Washway Road, Saracens Head, Holbeach, Spalding PE12 8AZ, the residential address of MK but without the Mews number (3) being included. MK's personal address was also included, with the same omission.

34. HSL did not initially submit any VAT returns; for the periods 02/16, 05/16, 08/16 and 11/16, automated central assessments were issued to it for very small amounts, which it simply paid; indeed, when an automated assessment for £84 was received for HSL's first accounting period 02/16, MK forwarded it to his accountants and asked them to "check" it, "submit and let me know and I will do payment". In response on 13 May 2016, the accountants said there was nothing to submit, that if the automated assessment was simply paid then that would "stop any further debt letters for this period" and that he should then submit the outstanding returns and pay what was actually due. MK arranged for the central assessment to be paid on 16 May. The same was done in relation to the assessments for periods 05/16, 08/16 and 11/16.

35. Following MP's employment as administrative assistant in about September 2016 (see above) a belated attempt was made to bring the VAT positions of HSL and Heptra up to date (see below).

36. On 16 February 2017, MK resigned as a director of HSL and was replaced by MP as its sole director.

37. For period 02/17, HSL also received a small central assessment, and paid it. On 12 May 2017, it finally submitted some returns:

(1) a return for period 02/16, making a repayment claim of some £7,806.36;

(2) a return for period 05/16, showing a liability of £7,050.18;

(3) a return for period 08/16, making a repayment claim of £10,440.83;

(4) a return for period 11/16, showing a liability of £7,268.13.

38. In correspondence in the summer of 2017 about the 02/16 return, it was stated by HSL that it was supplying drivers to other hauliers and sometimes obtaining drivers from Heptra in order to do so. In that correspondence, HMRC wrote to HSL at "Whaplode Manor Mews", without the initial "3" but the letters did reach HSL because MP replied to them. On HSL's letters to HMRC (and the copy invoices enclosed with them), the full address (including the leading "3") was given.

39. On 18 August 2017, MK transferred his shares in HSL to his father Zenonas Karpavicius.

40. HMRC eventually released the claimed repayment for 02/16 by letter dated 13 September 2017 but also, on 25 October 2017, wrote to HSL to remind it that its VAT returns for periods 02/17, 05/17 and 08/17 were still outstanding (the repayment for period 02/16 being set off against the liability for period 05/16, leaving a small credit balance). A follow up letter in similar terms was sent on 19 February 2018, now stating that the return for period 11/17 was also outstanding. Another follow up letter was sent in similar terms on 25 August 2018, now stating that the return for periods 02/18 and 05/18 were also outstanding. These letters were all sent to HSL at the same address (i.e. Whaplode Manor Mews, but without the leading "3"). In the meantime, HSL had simply been paying the small automated assessments which continued to be sent to it.

41. Over this period, it appears that HSL was suffering from similar cash flow problems as Heptra. Like Heptra, HSL used cash accounting for VAT purposes.

HMRC investigation

42. By early 2019, therefore, the following VAT returns were outstanding:

(1) From Heptra – for periods 05/16 to 11/18 inclusive (11 returns), and

(2) From HSL – for periods 02/17 to 11/18 inclusive (8 returns).

43. On 21 February 2019 HMRC officers made an unannounced visit to Heptra. In the first place, they did not attend at its stated principal place of business at the accountants' address but at Whaplode Manor Mews. They were not able to find MK there, but spoke to an occupant at Number 1, who said he recognised the name Heptra, though he did have regular mail addressed to people and companies he did not know; his practice was to return such letters to sender marked "not known at this address". He also said there was a "Lithuanian gent" at Number 3, whose name he did not know. The officers left correspondence at Number 3, asking MK to contact them.

44. By searching on the internet they discovered another address for Heptra at Cresswell Road, Pinchbeck near Spalding, a commercial unit. They went to the address and found MK

and MP both there, who asked that the visit should address both companies, without MK and MP needing to be interviewed separately in relation to them. MK gave some details of Heptra's business and MP gave some details of HSL's business. The officers asked why no VAT returns had been submitted for so long. Their note of the meeting said this:

> JH explained the consequences of non-return submission, including penalty regime, MK just kept repeating that he was awaiting contact from HMRC about the VAT returns. JH advised he knew he must be submitting returns as he was VAT registered and had previously done so before his address changed. JH also pointed out that the annual returns for the CT had been completed for periods where some VAT returns had not been submitted and therefore the figures should at least be known. MK said he was just awaiting contact from HMRC. SH asked what his accountant had said about the submission of VAT returns, MK admitted that his accountant had said to submit but MK had wanted to wait.
>
> …
>
> JH asked why MP had been paying the central assessments but not submitting the returns. MP found the latest letter re central assessments and officers pointed out the number of times the letter said to contact HMRC and the contact details it gave. JH also asked if MP used the same accountant as Heptra Ltd. MP said yes and JH asked if the accountant had reminded her to submit the returns, she said she left it to the accountant and she was paying what the letter asked for.

45. Both HMRC officers having retired, neither of them was present to give evidence about the detail of the meeting.

46. MK's evidence before us was that he had known that VAT returns were required, but as his accountants had previously advised there was no point submitting the returns if he could not pay them, he had followed that course and waited for HMRC to contact him. We accept that the accountants had on one occasion informed him that if he paid a central assessment, that would stop HMRC pursuing immediate payment, but that advice was also subject to the caveat that he should nonetheless submit the returns and pay what was due under them (see [34] above). We do not accept that MK could have properly inferred, either from his dealings with his accountants or from the lack of any contact from HMRC, that it was appropriate for him simply to defer instructing his accountants to submit VAT returns until HMRC chased for them.

47. MP's evidence before us was that HSL's accountants had told her that unless it could pay its VAT liabilities, there was no point in submitting the returns. This appears to be a somewhat more emphatic statement than was recorded as having been made by her at the meeting on 21 February 2019; and when she was later asked in writing by the Insolvency Service to explain why HSL had not submitted its returns on time, her response was this:

> Heptra Solutions failed to submit these returns on time because company started to receive assessment payment requests and company paid those, we were thinking that if we will pay those estimates we will not going to receive penalties for late payments of any kind.

Clearly this would have been a logical point to explain that she had been advised there was no point in submitting the returns if the VAT could not be paid, but she did not do so. We also note that the first of the missing returns, that for period 02/17, was actually a repayment claim. Given all the surrounding circumstances, we do not accept her evidence that she was specifically advised by the accountants that there was no need to file the returns if the VAT on them could not be paid. We consider the real reason was initially the pressure of work, but as

the financial difficulties of the companies became more acute, we consider MP simply "buried her head in the sand".

48. At the meeting, the officers required the two companies to bring their returns up to date within 14 days.

49. The following VAT returns were subsequently submitted By Heptra:

on 6 March 2019:

(1) A return for period 05/16, showing a tax liability of £3,307.08;

(2) A return for period 08/16, showing a tax liability of £4,885.74;

(3) A return for period 11/16, showing a tax liability of £31,896.81;

(4) A return for period 02/17, showing a tax liability of £29,317.72;

(5) A return for period 05/17, showing a tax liability of £29,381.85.

on 12 April 2019:

(6) A return for period 08/18, showing a tax liability of £13,462.78;

(7) A return for period 11/18, showing a tax liability of £54,324.30;

(8) A return for period 02/19, showing a tax liability of £39,637.18.

on 5 July 2019:

(9) A return for period 05/19, showing a tax liability of £35,808.09.

It will be noted that returns for periods 08/17, 11/17, 02/18 and 05/18 were never submitted; there was some suggestion that the return submitted for period 08/18 inadvertently included all the figures which should have been included in those returns, however it appears most likely that this suggestion arose as a result of confusion with the situation of HSL, as to which see below. We find that no return was ever submitted for those periods. In the absence of any liability figures, HMRC have not sought to impose any penalties in respect of those periods.

50. The following VAT returns were subsequently submitted by HSL:

On 6 March 2019:

(1) A return for period 08/18, showing a tax liability of £93,299.39;

On 12 April 2019:

(2) A return for period 11/18, showing a tax liability of £30,912.77;

(3) A return for period 02/19, showing a tax liability of £27,070.29;

On 26 June 2019:

(4) A return for period 05/17, showing a tax liability of £12,516.87;

(5) A return for period 08/17, showing a tax liability of £11,933.55;

(6) A return for period 11/17, showing a tax liability of £21,368.45;

(7) A return for period 02/18, showing a tax liability of £16,271.30;

(8) A return for period 05/18, showing a tax liability of £21,401.61;

On 5 July 2019:

(9) A return for period 05/19, showing a tax liability of £38,875.95 (it will be noted that this return was submitted on time);

On 6 September 2019:

(10) A return for period 02/17, showing a tax liability of £14,728.41.

51. It was subsequently realised that HSL's return submitted for period 08/18 had in fact included information for a number of previous periods and accordingly when HSL's returns for periods 05/17 to 05/18 were submitted on 26 June 2019, the accountants also submitted an error correction form which stated that the correct liability for period 08/18 was in fact only £27,427.92, a reduction of £65,871.47. It seems that a full breakdown of the impact on the other returns was never provided, nor were detailed revised figures for period 08/18.

52. Following the 21 February 2019 meeting, the Appellants also arranged for the two companies to make payments on account of their respective liabilities. Heptra paid a total of £94,925 between 8 March and 27 August 2019 and HSL paid a total of £44,000 between 8 March and 28 June 2019, both in roughly weekly instalments. Whilst these payments were being made, the further VAT liabilities of the two companies arising in line with their respective VAT returns were not paid in addition – as a result of which the companies were not in reality making any material inroads into the arrears of VAT from earlier periods, though we accept that the directors were paying as much as the companies were able to afford without being able to access any additional cash through external finance (which they attempted to do, but without success).

53. In May 2019, a further meeting took place with HMRC at the accountants' offices. MK was present, but not MP. It became clear to MK at that meeting that both companies would need significant new external funding if they were to be able to meet their existing and ongoing VAT liabilities, including substantial penalties. This became all the clearer when an HMRC debt collector left a letter in a communal post box at MK's home address which he received shortly before the end of May 2019, warning that Heptra's debt of £169,213.46 needed to be paid in full urgently in order to avoid further enforcement action.

54. There is some reference in the papers before us to there having been some formal time to pay agreement in place, but subsequently cancelled, for reasons that are not clear. It was quite simply impossible to piece together a full picture of the contacts between HMRC and the companies, due to the incompleteness of the documentary record before us, the unavailability of the HMRC officers who had actually been involved, and the vagueness of the oral evidence from MK and MP. What is clear however is that there was a great deal of confusion about the contact addresses for both the companies and the two Appellants over the relevant period.

55. The accountants had initiated some of that confusion by omitting to include the mews number on the initial registration documents for MK, which meant that some post addressed to him there did not reach him. Matters were not improved by the failure to provide a current business address for either company, or by the fact that in the course of closing down the businesses, they ceased to have any presence at the new address and MK also moved away from his home address without notifying HMRC (they discovered his new home address through other HMRC records). Furthermore, on advice from the accountants, some letters to the companies which were received were returned to HMRC marked "not known at this address" when they were sent to personal addresses of the directors (see, for example, [56] below). HMRC formed the strong impression that both the companies and the directors were trying to "disappear", and this undoubtedly coloured their approach. We are satisfied that this was not actually the case, but given the sequence of events we can understand why HMRC could have reached this view.

56. As attempts to procure external funding failed, MK and MP met with their accountants and insolvency practitioners on 3 July 2019. They were advised that the companies needed to be run down and liquidated, and that it would be cheaper if they dealt with selling off the assets

themselves rather than handing the matter over immediately to insolvency practitioners. The last payment "on account" from HSL to HMRC was received on 28 June 2019, though further weekly payments on account were made by Heptra until 27 August 2019. Over this period there was clearly some further correspondence from HMRC to HSL, but our bundle contained a copy of an exchange of emails between MP and the accountants on 16 July 2019 in which MP said two further letters for HSL had been received (presumably at her home address) which hadn't been opened "as this company have nothing in this address", and asking whether she should open or return them. The accountants responded that they should be returned unopened, marked "not known at this address".

57. MK and MP decided to close down both companies, though the timing of their final decision to do so it not clear. HSL surrendered their operator's licence on 1 August 2019, but apparently continued supplying drivers on an agency basis for some time after that. As late as 16 August 2019, HMRC met with MK at the business premises of the companies and there was no evidence before us to suggest that HMRC were informed at that time of any intention to close down the companies. MP was not present at that meeting as she was on holiday at the time. HMRC left two letters for HSL with MK, who said he would pass them on, and they also left copies of those letters at MP's home address. We infer that she returned this correspondence unopened, on the basis of the advice previously received from the accountants.

58. In view of the cessation of payments by the companies and the lack of any apparent progress, HMRC wrote to MK at his mews home address and at the trading premises of Heptra on 24/25 September 2019, proposing a meeting at the company's premises on 9 October 2019 to discuss penalties. When they attended that day, they found the premises occupied by a different business altogether and were told that Heptra had left some time previously.

59. On the same day, HMRC left a letter for HSL at the same trading premises and also delivered a letter to MP at her home address, proposing a meeting on 22 October 2019 at HSL's business premises. We infer she also returned this correspondence unopened on the basis of the previous advice.

60. HMRC attended at the trading premises again on 22 October 2019, with the same result as before. There was no sign of Heptra or HSL and they were told that both had left some time previously.

61. HMRC therefore sent letters on 23 October 2019 to both Heptra and HSL, stating that since they could not establish that either business was still operating, they proposed to de-register them for VAT unless a response was received by 30 October. In response to this, the accountants amended Heptra's registered principal place of business on 29 October to MK's mews address. No response was received from HSL. In the absence of any response from HSL, HMRC deregistered it for VAT purposes from 9 November 2019 as a missing trader.

62. On 8 November 2019, HMRC wrote to Heptra at its "new" address (3 Whaplode Manor Mews), requiring it to deliver all its business records to HMRC's offices by 20 November 2019, and also proposing a meeting at those offices on that date. No response was received.

63. In the absence of any response, HMRC attended at 3 Whaplode Manor Mews on 21 November 2019, to find that MK had left some time previously and the premises were undergoing renovation. They wrote to Heptra again at the mews address on 21 November, stating that since they had been unable to establish that the business was still operating, they intended to deregister it for VAT purposes unless they heard from it by 28 November. It appears that deregistration with effect from 21 November 2019 was subsequently processed.

64. On 31 January 2020, HMRC wrote to MK at his new private address (having discovered it through other HMRC records). They proposed a meeting at their offices in Peterborough to

discuss the matter, including the potential civil penalties they were considering in relation to Heptra. On 10 February 2020, MK emailed HMRC to inform them that "Heptra Ltd is under the care of Begbies Traynor (SY) LLP. If you have any further question please get in touch them directly." On 21 February 2020, HMRC replied, asking MK to "please see attached documents as until 27 February the liquidator is not formally responsible". It is not clear what documents were attached, but presumably HMRC had been in touch with Begbies Traynor, to be informed that Heptra was not yet in liquidation.

65. On 27 February 2020, resolutions were passed to place both companies into creditors' voluntary liquidation. HMRC were notified of the creditors' meeting and on 10 March 2020 they submitted an email to the liquidators with questions which they wished to have put to MK and MP at the meeting on 11 March.

66. Twenty nine questions were asked in relation to Heptra, and twenty eight in relation to HSL.

67. One of the questions asked in relation to Heptra was this:

> 7. Why didn't you submit your VAT returns as they became due, you had been submitting, so why stop? The missing periods are 08/17 to 05/18 inclusive and 08/19, 11/19 and your final return to 22 Nov 19, the date HMRC de registered you as a missing trader. Why had post been returned as "gone away" which set HMRC to suspend the issue of letters to you regarding VAT. Your self-assessment, PAYE and VAT accounts show each and every house at Whaplode Manor Mews and yet you amended the Principal Place of Business back to Whaplode Manor Mews in Nov 19?

68. The note of MK's reply is as follows:

> The Company was submitting VAT returns for a while then stopped for a prolonged period. MP confirmed that post was returned as 'gone away' due to the premises changing. MP stated that HMRC changed the address on the system to the Company's previous address so BA *[the accountant]* changed this back to Whaplode Manor Mews.

69. In relation to HSL, two of the questions asked were as follows:

> Why didn't you submit your VAT returns as they became due, you had been submitting, so why stop after period11/16 was submitted. When you stop submitting them did it have anything to do with the subsequent returns not being repayment returns? Why submit five VAT periods on the VAT return for 08/18? The returns for 08/19 and your final period to 9 Nov 19 when HMRC de registered you as a missing trader, remain outstanding.
>
> Why did you continue to pay central assessments issued to the company which correspondence clearly told you how to rectify? Why did you not take the advice of your accountant?

70. The note of MPs replies to these two questions is as follows:

> in relation to the first: "Same answer as question 7" and, in relation to the second: "MP could not comment on the payments to central assessments."

71. The following statement was put to both MK and MP:

> The company has a Tax Evasion penalty being considered, which if not paid by the company, will be transferred to the original director personally. These penalties are mitigated by the director's assistance in helping HMRC understand how the evasion occurred. This penalty starts at 100% of the VAT amount missing. The directors are encouraged to maintain contact with HMRC whilst this process continues.

72. The note of MK's response to this statement was as follows:

> HMRC raised a query in respect of Tax Evasion which was for the liquidators and not a question for the director.

73. MPs response was noted as simply cross referring to MK's response.

74. The Covid 19 pandemic then intervened. Nothing more seems to have happened until 16 October 2020, when HMRC issued notices of assessment of civil evasion penalties to both companies. On the same day, they issued notices to MK and MP of their intention to recover the penalties from them personally. The Appellants requested statutory reviews and the two decisions were confirmed by letters dated 26 March 2021. The Appellants then appealed to the Tribunal on 20 July 2021. HMRC made no objection to the late appeals, which have been formally admitted by the Tribunal.

75. On 23 and 24 October 2021 the two companies were formally dissolved following completion of the liquidation. Heptra was subsequently restored to the register on 10 March 2022, but HSL remains dissolved.

76. Matters were held in abeyance whilst ADR was pursued. An ADR meeting was held on 2 November 2022, following which HMRC issued notices of adjustment on 8 February 2023 to Heptra and MK and to MP. The effect of these notices was to allow for an increase in the mitigation allowed to the respective company penalties from 15% to 45%, with corresponding reductions in the amounts of those penalties. MK and MP were notified therefore that the amounts in respect of which they were being made personally liable were reduced accordingly (each remaining 100% liable for the reduced company applicable to the relevant company).

THE LAW

Legislation

77. Sections 60 and 61 VATA provided, so far as relevant, as follows.

> **60 VAT evasion: conduct involving dishonesty**
>
> (1) In any case where –
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.
>
> …
>
> (7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.
>
> **61 VAT evasion: liability of directors etc**
>
> (1) Where it appears to the Commissioners –
>
> (a) that a body corporate is liable to a penalty under section 60, and
>
> (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),

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

(2) A notice under this section shall state –

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

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

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

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

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

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

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

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

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

78. Sections 60 and 61 were repealed pursuant to Finance Act 2007 and the associated "Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 (SI 2008/568)" ("the 2008 Order"), as part of the overhaul of penalties for errors in tax returns or failures to report errors in HMRC assessments (the new regime for which was contained in the body of Schedule 24).

79. By virtue of section 97 Finance Act 2007, Schedule 24 of that Act came into force "in accordance with provision made by the Treasury by order". Schedule 24 included, in paragraph 29(d), a provision by virtue of which sections 60 and 61 VATA were "omitted". The 2008 Order provided that the commencement of the new regime (and therefore this "omission" of sections 60 and 61 VATA) applied with effect from various dates between 1 April 2008 and 1 April 2009 (depending on the underlying subject matter). Without more, this would mean that no valid penalty or personal liability notice under those sections could have been imposed on the Appellants in this case, as all the relevant events occurred after 1 April 2009. However, the 2008 Order contained the following saving provision, upon which HMRC rely in these appeals:

4. Saving

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

80. Bizarrely, paragraph 7 of the Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 contains an exact copy of paragraph 4 of the 2008 Order.

81. Section 70 VATA provides, so far as relevant, as follows:

> **70 Mitigation of penalties under sections 60, 63, 64, 67, 69A and 69C**
>
> (1) Where a person is liable to a penalty under section 60…., the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

82. Section 76 VATA provides, so far as relevant, as follows:

> **76 Assessment of amounts due by way of penalty, interest or surcharge**
>
> (1) Where any person is liable –
>
> …
>
> (b) to a penalty under any of sections 60 to 69X…
>
> …
>
> The Commissioners may, subject to subsection (2) below, assess the amount due by way of penalty, interest or surcharge, as the case may be, and notify it to him accordingly; and the fact that any conduct giving rise to a penalty under any of sections 60 to 69C or the regulations may have ceased before an assessment is made under this section shall not affect the power of the Commissioners to make such an assessment.
>
> …
>
> (9) If an amount is assessed and notified to any person under this section, then unless, or except to the extent that, the assessment is withdrawn or reduced, that amount shall be recoverable as if it were VAT due from him.

83. Section 83(1)(o) and (q) VATA provide as follows:

> **83 Appeals**
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters:
>
> …
>
> (n) any liability to a penalty or surcharge by virtue of any of sections 59 to 69B;
>
> (o) a decision of the Commissioners under section 61 (in accordance with section 61(5));
>
> …
>
> (q) the amount of any penalty, interest or surcharge specified in an assessment under section 76;

Caselaw

84. Ms Hickey directed us chiefly to *Byers v HMRC* [2019] UKFTT 310 (TC), mentioned below.

Arguments

85. Ms Hickey argued that the conduct of each company in failing to submit the relevant VAT returns and failing to pay the relevant VAT liabilities due on those returns was, viewed objectively, dishonest and the dishonesty was attributable to MK (in relation to Heptra) and to MP (in relation to HSL). This was sufficient to fix them with liability for the penalties on the basis of *Ivey v Genting Casinos (UK) Limited t/a Crockfords* [2017] UKSC 67.

86. She also submitted that the amounts of the penalties, following the additional mitigation allowed after the ADR meeting and the further reduction of HSL's penalty as mentioned in the course of the hearing, were clearly correct and the appeals should therefore be dismissed, subject only to reducing the amount due from MP in line with the additional concession made during the course of the hearing.

87. The Appellants argued that there had been no dishonest conduct on the part of either company and therefore no dishonesty could be attributed to them. In addition, they argued that they had cooperated as fully as they could with HMRC after the 21 February 2019 meeting, providing many of the missing returns and immediately starting to make payments on account of the VAT liabilities, which ended up being significant amounts. They had attempted to obtain loan finance to cover the balance, but without success. As to their lack of response to some communications, they said they had largely been acting on advice to reject company correspondence which was incorrectly sent to private addresses, that their receipt of post at 3 Whaplode Manor Mews had been erratic at best and of course had ceased altogether when MK had left the premises altogether in 2019. The correspondence which had also been sent to the two companies at the former trading premises had of course also not been received after they had ceased to operate at those premises at around the same time. We took them to be arguing that even if dishonesty were established, the mitigation that was being allowed in relation to the penalties was insufficient in the light of the degree of co-operation and disclosure which had actually been given.

DISCUSSION

The section 60 penalties - liability

88. Ignoring procedural questions for the moment, we think it appropriate to consider the correctness of the "basic penalty" in each case (i.e. before the effective transfer of it to the respective Appellants). HMRC have done this at least three times – when they first imposed the penalties in October 2020, when they reduced them in February 2023 and when they were reconsidering them during the course of the hearing or the period leading up to it.

89. The essence of HMRC's case on the penalties is that Heptra, through their deliberate omission to deliver VAT returns, and HSL, through both their deliberate omission to deliver VAT returns or to notify HMRC of the insufficiency of the small central assessments being issued to them, were seeking dishonestly to evade VAT.

90. For this purpose, we note that "evasion" does not necessarily involve an intention to withhold payment of the VAT in question permanently – see *R v Dealy* [1995] 1 WLR 658, followed in *Smith & Byford Ltd v HMCE* [1996] V&DR 386, which said this:

> In *R v Dealy* [1995] STC 217, [1995] 1 WLR 658, which concerned a prosecution for fraudulent evasion of VAT under what is now s 72, the Court of Appeal held that the word "evasion" in that section does not imply any sense of permanence and that there was no need for the Crown to prove a permanent intention to deprive. The direction of the judge that a deliberate decision not to send in a return in order to get out of paying the tax at the time when it was owed sufficed was approved as was the judge's statement,
>
> "If you evade something, you get out of its way, you dodge it ..."

> There is no logical reason why "evading" in s 60 should be construed any differently. It follows that the Commissioners must establish that for the purpose of delaying payment of the tax due the Company dishonestly failed to notify the Commissioners of the errors in the two returns. The burden of proof is placed on the Commissioners under s 60(7).

91. On this basis, we are satisfied that (subject to what is said below about specific periods) the omissions of the two companies can properly be regarded as "for the purpose of evading VAT", and accordingly the condition in section 60(1)(a) VATA is satisfied.

92. The key question then arises whether the omissions of the two companies amounted to conduct which "involves dishonesty" for the purposes of section 60(1)(b). The Appellants contended strongly that there had been no dishonesty because the companies had always intended to pay the VAT eventually, when their financial positions allowed it.

93. Here we agree with Ms Hickey that the test to be applied in considering the question of dishonesty is fairly summarised in *Byers v HMRC* [2019] UKFTT 301 (TC), and we set out below the relevant section from that decision, with which we respectfully agree:

> **The test for dishonesty**
>
> 141. The fact in issue in this appeal is whether the evasion of BSL's VAT was attributable to Mr Byers' dishonesty as a director. It is a fact that the Tribunal has to find, by applying the test for dishonesty as formulated in case law.
>
> 142. The test for dishonesty apposite to civil proceedings was distinguished from the two-stage test in *Ghosh* applicable in criminal proceedings until the Supreme Court decision in *Ivey v Genting*, which makes it clear that *Ghosh* is no longer good law, even for criminal proceedings. Following *Ivey v Genting*, the test for dishonesty to be applied in both criminal and civil proceedings is Lord Nicholls' test in *Royal Brunei v Tan*, as clarified by Lord Hoffmann in *Barlow Clowes*.
>
> 143. Lord Nicholls' test was applied in determining 'dishonesty' in the context of a penalty under s 60 VATA by Judge Pelling QC (sitting as a High Court Judge) in *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported):
>
> > 'In my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is knowledge of the transaction sufficient to render his participation dishonest according to normally acceptable standards of honest conduct. In essence the test is objective – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were.' (emphasis added)
>
> 144. That the civil test of dishonesty is essentially objective is confirmed by Lord Hoffmann in *Barlow Clowes*, where it is stated at [10]:
>
> > 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.'
>
> 145. While the test for dishonesty is primarily objective, Lord Nicholls has remarked on the subjective element that remains relevant to the test as follows:

> 'Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart, dishonesty, are mostly concerned with advertent conduct, not inadvertent conduct.'
>
> 146. In respect of how this 'subjective element' is to be taken into account by the court, Lord Nicholls' guidance is:
>
> 'Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.'
>
> 147. A s 61 penalty is predicated on a s 60 penalty being imposable on the body corporate in the first place. Section 60(1) of VATA provides:
>
> '(1) (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty …'
>
> 148. It is clear from the statutory wording under sub-s 60(1)(a) that the conduct involving dishonesty is not restricted to the commission of an action, but includes an omission to act. The statutory wording in this regard accords with case law authority on the meaning of dishonesty, as Lord Nicholls in *Royal Brunei* stated at p106:
>
> 'Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.'

94. Applying the above test, whether or not the Appellants subjectively consider their conduct to have been dishonest, we consider that by ordinary standards, it is dishonest knowingly to omit to deliver VAT returns (or fail to rectify obvious insufficiencies in centrally issued assessments) in order to defer for an indefinite period of time the date when VAT would have to be paid (or would, in the absence of payment, be actively pursued by HMRC). In saying this, we are not to be understood as saying that every delay in submitting a VAT return amounts to conduct involving dishonesty – it will be a question of fact and degree in each case. But here (subject to what is said below), we consider that the extended period over which the conduct persisted, and the amounts involved, clearly mark the conduct out as dishonest.

Section 60 penalties – Basis figures

95. On this basis, and subject to the specific further points mentioned below, we consider that Heptra's and HSL's omission to file VAT returns (or to notify HMRC of the insufficiency of centrally issued assessments) up to and including those due in respect of the period 11/18 amounted to dishonest conduct. So far as the returns for periods 02/19 and 05/19 are concerned, we take a different view. By the time those returns needed to be filed, it was already clear as a result of HMRC's visit on 21 February 2019 that the companies were now very much on HMRC's radar and therefore we do not consider that Heptra's omissions to file its 02/19 and 05/19 returns on time can be considered to have been omissions involving dishonesty for the purpose of evading VAT, as they were only filed a little over a month late and Heptra was well aware of HMRC's interest by that time, was attempting to bring its returns up to date and was making significant efforts to "catch up" with its VAT liabilities.

96. We should also mention that HMRC have imposed a penalty in relation to HSL's non-filing of its return for period 02/17, the amount of the penalty being based on a VAT liability of £14,728.41 for the period in question. In fact, however, although HSL did indeed file its return for this period very late (not until 26 June 2019), the return claimed a repayment of £17,620.31 and it was only when HMRC disallowed the input tax that this was converted into a liability. We do not consider that HMRC have established the original repayment claim to have been dishonestly made, accordingly we do not consider that any penalty ought properly to have been charged to HSL in respect of the period 02/17, since the delay in submitting the return could not have been intended to evade VAT in a situation where a repayment was being claimed.

97. Further, as HMRC acknowledged at the hearing, the penalty which had been charged for HSL's period 08/18 was excessive as it did not take account of the error correction which had been filed to correct that return from showing a tax liability of £93,299.39 to a figure of £27,427.92 (bearing in mind that the original return had unintentionally shown the aggregate liability for multiple periods).

98. Finally, if part of HSL's dishonest conduct was its payment of small central assessments instead of its full liability, then clearly the amount of the central assessments which it had actually paid ought to be deducted in calculating the VAT which HSL had intended to evade by its conduct.

Section 60 penalties – mitigation

99. HMRC initially allowed 15% mitigation. This figure was attributed entirely to "disclosure" (15% mitigation out of the maximum they considered available of 40% for being "told promptly about what was wrong and why"). They did not allow any mitigation for "cooperation" (out of the 40% they considered potentially available for "meeting us when asked to do so, giving us information when we ask for it, answering all our questions truthfully and honestly and giving the relevant facts to help us work out the correct amount of tax").

100. After the ADR meeting which took place on 2 November 2022, HMRC reviewed their position and increased their "disclosure" mitigation to 35% and allowed 10% for "cooperation" on the basis that the Appellants had attended the ADR meeting and answered questions at it; no higher figure was allowed because "you failed to attend previously arranged meetings and provide business records when asked to do so".

101. Thus HMRC increased the mitigation from 15% to 45% and on 8 February 2023 issued formal notices of a corresponding reduction in the previous notices and assessments.

102. We would take no issue with HMRC's increase in the "disclosure" mitigation, but in the light of the obvious difficulties which arose for various reasons over postal communication (misaddressing, both MK and the companies leaving their premises at a critical time) and the Appellants' immediate action following 21 February 2019 to attempt to bring the returns up to date and make payments on account to HMRC (ultimately stymied by the insolvency of the companies), we would consider mitigation of 30% to be more appropriate for "cooperation". The total mitigation we would consider appropriate would therefore be 65%, resulting in a penalty rate of 35%.

Section 60 penalties – conclusion

103. On this basis, our calculation of what would have been appropriate penalties to be imposed under section 60 VATA is as follows:

Heptra

104. Total undeclared VAT for periods 05/16, 08/16, 11/16, 02/17, 05/17, 08/18 and 11/18 - £166,576.28.

105. Penalty at 35% - £58,301.

HSL

106. Total undeclared VAT for periods 05/17, 08/17, 11/17, 02/18, 05/18, 08/18 and 11/18 (£207,703.94), after deducting the total payments made in respect of automatic assessments (£1,123) and reducing the 08/18 return by £65,871.47 in accordance with the error notification supplied - £140,709.47.

107. Penalty at 35% - £49,248.

Section 61

108. It is important to bear in mind however that these appeals are against liabilities imposed on the Appellants under section 61 VATA, and not against the underlying penalties imposed on Heptra and HSL under section 60 VATA; as such, the appeals are subject to the special rules in section 61 VATA. It is clear that the Appellants have no direct right of appeal against the underlying penalties imposed on Heptra and HSL, that right of appeal vests only in those companies and neither company sought to exercise that right.

109. The structure of section 61 requires both a notice to the effect that some part of the penalty is being recovered from the company officer and an assessment notified to the officer in respect of that part. As section 61(5) makes clear, there is no right of appeal against the "notice" element, but (a) the company in question has a right of appeal against the decision of HMRC that it is liable to a penalty under section 60 and against the amount of the penalty (not just the amount, if any, that HMRC are seeking to recover from it); and (b) the officer has two rights of appeal – firstly against HMRC's decision that the company's dishonest conduct is wholly or partly attributable to his/her dishonesty and secondly against HMRC's decision as to the portion of the penalty which they propose to recover from him/her.

110. Thus even in a situation such as the present, where HMRC are seeking to recover the entire penalty from an officer, it is only the company (and not the officer) which has the right to appeal directly against the amount of the underlying penalty. Where (as here) the company has gone into liquidation (and, in the case of HSL, been dissolved and not reinstated) and the officer has had no ability to influence it to make an appeal against the amount of the penalty, there is therefore an obvious potential injustice if the amount of the penalty is clearly excessive but cannot be challenged by the officer who is being called upon to pay it.

111. In the present case, HMRC have already reduced the amounts of the penalties they seek to recover from the Appellants of their own volition, once by issuing formal notices and once informally at the hearing. They are clearly therefore sensitive to the apparent injustice in the Appellants' position. Indeed, at the hearing Ms Hickey suggested that the Tribunal might have jurisdiction under section 83(1)(q) VATA to reduce the amount payable by MP regardless of the fact that no amended penalty notice could be issued to HSL as it no longer existed.

112. Turning to the explicit rights of appeal conferred on the Appellants by section 61(5) VATA, we address them in turn.

113. First, the question arises as to whether the conduct of Heptra and HSL is "in whole or in part, attributable to" the dishonesty of MK and MP respectively. In a situation where each of them was the sole director of the relevant company and was personally responsible for the omissions in question, there can be little doubt that this requirement is satisfied and accordingly any argument that the appeals should succeed on this ground is doomed to fail.

114. Second, the Appellants each clearly have a right of appeal as to "the portion of the penalty which the Commissioners propose to recover from" him/her. The question that arises is whether this right of appeal has the effect of permitting the Tribunal to secure a fair and just

outcome by reducing the portion of the total penalty recoverable from each Appellant so as to render them respectively liable for 100% of the reduced penalty which we consider ought to have been imposed on the company in question.

115. The issue upon which the Tribunal sought the representations of the parties in writing immediately following the hearing was as to the constraints, if any, which applied to the exercise of the Tribunal's jurisdiction to decide what proportion of a penalty should be recoverable from an officer. It is fair to say that the Appellants' representations do not move matters forward much, beyond repeating that they did not consider themselves to have acted dishonestly and therefore the penalties should be cancelled or their personal liabilities should be reduced to nil.

116. HMRC's representations were a little more focused. After reciting the legislation, they accepted that there was "nothing within section 61 which fetters the tribunal's discretion to adjust the amount of the penalty apportioned to the director if it considers it appropriate to do so." However, they also referred us to a different part of the *Byers* decision, where the question of apportionment was considered in the light of a High Court decision in *Customs and Excise Commissioners v Bassimeh* [1995] STC 910. Both *Byers* and *Bassimeh* were concerned with a situation in which there were multiple officers involved, and only one of those officers had been made liable for 100% of the penalty which had been assessed on the company. The VAT and Duties Tribunal had reduced the portion of the overall penalty which could be recovered from that director in the light of the involvement of multiple officers in the company's conduct. *Bassimeh* laid down the approach which should be followed in such cases, but has nothing to say about the wider question that arises in this case, namely whether there is any reason why the Tribunal's jurisdiction to adjust the proportion of the total penalty recoverable from a sole director should not be used so as to ensure that the sole director is only made liable to pay an appropriately quantified penalty.

117. Given the obvious injustice that would result if the Tribunal had no option but to confirm that the Appellants are respectively liable in full for penalties which the Tribunal considers excessive, and given that *Bassimeh* does not address the wider question at all, we see nothing to preclude us from exercising the jurisdiction in question in order to achieve what we consider to be a fair, just and reasonable outcome.

118. It follows that, subject to what is said below about the validity of the notice to MP by reference to the 2008 Order, we would allow the appeals in part as follows:

(1) So far as MK is concerned, we would reduce the portion of the penalty recoverable from him to the sum of £58,301 (being the amount of the penalty which we consider would have been properly chargeable to Heptra – see [105] above), and

(2) So far as MP is concerned, we would reduce the portion of the penalty recoverable from her to the sum of £49,248 (being the amount of the penalty which we consider would have been properly chargeable to HSL – see [107] above).

Validity of section 61 Notice to MP by reference to the 2008 Order

Introduction

119. The 2008 Order was not brought to our attention at the hearing and it was only in the later stages of drawing up this decision that its potential relevance became apparent to us. We therefore sought representations on it from the parties.

120. The point is this. As was mentioned at [79] above, by virtue of the 2008 Order, sections 60 and 61 were "omitted" from VATA with effect from a date or dates prior to all the events related to these appeals, subject only to the saving contained in paragraph 4 of that Order. Thus

unless the saving applies in these cases, the notices would have been issued under legislation that had previously been revoked and must therefore be invalid.

121. The saving provided that liability under sections 60 and 61 after that time can only arise in respect of "conduct involving dishonesty which does not relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC."

122. To simplify the matter, if in the present case the conduct involving alleged dishonesty does "relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment", then no liability can arise under sections 60 and 61 in relation to that dishonesty (the obvious rationale being that such matters are intended to be dealt with under the replacement regime set out in Schedule 24 of the Finance Act 2007).

123. In the present case, the dishonesty which HMRC alleged against HSL, as set out in their statement of case, was that:

> 50. The Company had received requests from the Respondents for the missing returns to be submitted but did not do so.
>
> 51. The Respondents contend that the Company chose to pay estimated central assessments issued by the Respondents in the absence of those returns, knowing that these were substantially less than the true liability to tax and that this act was attributable to [MP] as a Company Officer.

124. It seemed to us to be arguable, having decided that HSL's conduct involved dishonesty and that dishonesty was attributable to MP, that the dishonesty in question did "relate to" a failure to notify HMRC of the various under-assessments made by them, even if it could equally validly be described in broader terms.

HMRC's representations

125. In their representations, HMRC acknowledged that "insofar as the Appellant's conduct is specifically about the failure to notify HMRC that the estimated assessments issued against [HSL] understated the amount of VAT due, such conduct cannot, on its own, form the basis of a penalty under section 60 of VATA or any consequential liability of the Appellant under section 61." But they went on to submit that "the failure to notify under-assessments is not the only aspect of the company's and the Appellant's conduct which HMRC set out in its skeleton argument dated 5th September 2023 and it is submitted that sections 60 and 61 are still applicable with respect to that other conduct."

126. By way of explanation, they recorded that HSL had initially submitted VAT returns in 2016, but had then stopped doing so. They argued that whilst the failure to notify the under-assessments was "part of the overall scheme of dishonesty", there was other underlying dishonest conduct, in the form of "the systematic failure to render quarterly returns in the expectation that the company could defer or, as later transpired as a result of the voluntary liquidation of the company, substantially avoid the payment of VAT."

127. In short, they argued that there had been dishonest conduct of two types: failure to notify HMRC of the insufficiency of the automated assessments, and systematic failure to render VAT returns. In their submission, the first type of dishonesty, whilst admittedly not itself capable of giving rise to a penalty under section 60, also demonstrated the deliberate nature of the second type of dishonesty. Furthermore, although the second type of dishonesty could potentially be described, in general terms, as "relating to" the failure to notify HMRC of the under-assessments (the first type of dishonesty), a more nuanced view should be taken. It is worth setting out in full their submissions on this point:

> "… it is respectfully submitted that the provision in Art 4 should be construed more narrowly in a way that is consistent with its context. The context is the

repeal by FA 2007 of the penalty provisions in sections 60 and 61 and their replacement, in part, by a new penalty regime applicable to taxes generally in Schedule 24 to that Act. Paragraph 1 of Schedule 24 makes provision for penalties in respect of inaccurate documents and (more pertinently for the purposes of this submission), under paragraph 2 of that Schedule, provision is made for a penalty to be imposed in cases where (in summary) an assessment is issued which understates a person's tax liability and that person fails to take reasonable steps to notify HMRC of the under-assessment. Section 97 of FA 2007 conferred power on the Treasury to make secondary legislation including transitional arrangements for these new provisions and Art 4 was enacted pursuant to that power. Art 4 preserves, in a limited way, the effect of the old penalty and liability provisions but excludes from their remit conduct which is otherwise addressed in the superseding provisions in paragraphs 1 and 2 of Schedule 24.

5. The important thing to note about the conduct addressed in paragraph 2 of Schedule 24 is that it is specifically described as a failure "to take reasonable steps to notify HMRC" of an under-assessment. Consequently the condition in Art 4 under which the old provisions are to continue having effect for conduct "which does not relate to ... a failure to notify" should, it is submitted, be read (consistently with paragraph 2 of Schedule 24) as meaning that this exclusionary clause should only be applied to conduct that is carried out specifically and directly to bring about the failure to notify and should not extend to other conduct that can indirectly be tied to that failure by means of general association or cause and effect. In case it might be thought that such an interpretation would render the exclusionary provision in Art 4 nugatory, it should be noted that not all incidences of dishonest failure to notify will be preceded or accompanied by other dishonest conduct. For example, in a hypothetical case, a VAT registered trader could have made an honest mistake as a result of which an inaccurate return is rendered, and an assessment is raised by HMRC under section 73 of VATA to correct the mistake but the assessment understates the actual amount due. Having received the under-assessment, the trader then, and only then, indulges in dishonest conduct by deliberately failing to notify HMRC. It is submitted that this stand-alone instance of dishonest conduct would, pursuant to the exclusionary clause in Art 4, be an example of a case where there is conduct that relates to a failure to notify an under-assessment and therefore not liable to form the basis of penalties etc. under sections 60 and 61. On the other hand, other dishonest conduct such as deliberately failing to submit returns in order to evade VAT, even where such conduct is accompanied by or associated with a subsequent failure to notify, would fall within the scope of the old provisions and not be excluded by Art 4.

6. Moreover, it should be noted that "the other conduct" for each of the affected accounting periods in this case occurred in each instance before and separately from the failure to notify conduct. It is submitted that this constitutes a good reason why the Tribunal should, for the purposes of applying Art 4, consider the instances of the different categories of conduct as separate and distinguishable from each other.

7. The approach to applying Art 4 which is set out in the above paragraphs is consistent with the judgment of the First-tier Tribunal in the case of Mr *Terence Walker and Mrs Dawn Walker* UKFTT 375 (TC)[1] which, in paragraph 15 of its decision, rejected the Appellant's submission that "where there is also an under-assessment the grounds are conflated and all the failures

[1] The full reference is [2013] UKFTT 375 (TC)

should be regarded as a failure to correct under-assessments". In the Tribunal's judgment "the various grounds can operate independently of each other". The full text of paragraph 15 is copied out below—

> *"[15] First, HMRC in this case do not rely only on what they allege are dishonest failures to notify under-assessment. They rely also on the repeated failure to submit returns at the appropriate time and the use of monies that Europa should have paid over as VAT in order to fund its business which they maintained were dishonest acts of omissions. In our view were HMRC able to make good their case on these grounds then the saving in Article 4 of the transitional order would apply as these matters do not relate to inaccuracies in documents or under-assessments. We reject Mr Newington-Bridges' submission that where there is also an under-assessment the grounds are conflated and all the failures should be regarded as a failure to correct under-assessments; in our view the various grounds can operate independently of each other."*

8. HMRC considers that the Tribunal in the case of *Mr and Mrs Walker* correctly construed Art 4 and respectfully asks the present Tribunal to adopt the same approach in this case.

MP's submissions

128. MP, perhaps unsurprisingly in view of the technical nature of the issue, did not deliver any submissions in response to those of HMRC.

Discussion

129. We are persuaded by HMRC's submissions and accept, for the reasons they give, that the saving provision of paragraph 4 of the 2008 Order do apply in this case, so as to make the dishonest conduct of HSL and MP subject to sanction under sections 60 and 61 VATA. It follows that our decision as to MP's liability set out at [118(2)] above applies.

130. Of course, since no central assessments were issued to Heptra, this point does not apply in relation to MK.

SUMMARY AND CONCLUSION

131. We find that both Heptra and HSL were properly liable to penalties under section 60 VATA because of their acts and/or omissions for the purpose of evading VAT amounted to conduct which involved dishonesty (see [94] above), but the appropriate amounts of those penalties were £58,301 and £49,248 respectively (see [105] and [107] above). The conduct of the two companies giving rise to the penalties was attributable to the dishonesty of MK and MP respectively (see [113] above).

132. The Tribunal has no jurisdiction in these proceedings to adjust the amounts of the penalties, but exercises its discretion to adjust the portion of the company penalties recoverable from the two Appellants to reflect (in each case) the appropriate amount of the penalty which the Tribunal considers ought to have been imposed on the company.

133. Accordingly, the appeals are **ALLOWED IN PART**, to the extent of reducing:

(1) The amount of the penalty recoverable from MK to £58,301; and

(2) The amount of the penalty recoverable from MP to £49,248.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

134. 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.

Release date: 06th DECEMBER 2024