



INCOME TAX – VAT – Conduct Notice – Tax Agent – Dishonest Conduct – Determination – Schedule 38 to Finance Act 2012 – False Invoices - Appeal Dismissed

TC06617

Appeal number: TC/2017/02767

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COLIN RODGERS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RUPERT JONES
SUSAN STOTT FCA CTA**

Sitting in public at Leeds Magistrates' Court on 24 April 2018

The Appellant not attending nor being represented

David Miles of HM Revenue Customs Solicitors Office for the Respondents

Summary Decision issued on 22 May 2018

DECISION

1. The Appellant appeals against HMRC's determination that he has engaged in dishonest conduct. The determination was given to him in a Conduct Notice dated 13 September 2016 prepared pursuant to powers under Schedule 38 to the Finance Act 2012 ("Schedule 38"). Schedule 38 gives HMRC civil powers to deal with dishonest conduct by tax agents. This appeal proceeds under paragraph 5 of Schedule 38.

Proceeding in absence

2. The Appellant did not attend nor was he represented at the hearing on 24 April 2018 which began at 10.30am and was completed at around 4pm.

3. Prior to the hearing, on 19 April 2018, he wrote to the Tribunal stating that he would not be attending the hearing listed for one and a half days on 24-25 April 2018. This was because of his caring responsibilities for his wife and his inability to pay for a substitute carer in order for him to attend the hearing.

4. A letter dated 23 April 2018 was sent by the Tribunal in reply to the Appellant indicating that he should attend the hearing and reasonable allowances would be allowed to assist him giving evidence. In the alternative, it gave him the opportunity to ring a designated tele-conferencing phone number to participate in the hearing by telephone.

5. That letter, while dated 23 April 2018, was only finally delivered by recorded delivery to the Appellant and signed by him at 12pm on 24 April 2018, the day of the hearing.

6. The hearing had begun at 10.30am in the absence of the Appellant with the Tribunal ringing in to the designated telephone number to check whether he was taking part by phone. This was on the basis the Tribunal had been informed the letter would have been delivered by 9am. On later being notified that the letter would not be delivered until around 12pm, the Tribunal adjourned and did not proceed until 2pm so as to give the Appellant time to consider its contents and either attend by phone or in person.

7. The Tribunal again dialled into the teleconferencing facility in the afternoon of the hearing at around 2pm but the Appellant did not participate by telephone. The Appellant did not attend the hearing in person.

8. The Tribunal was satisfied for the purposes of Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that the Appellant had been notified of the hearing. He would have been aware of the hearing dates of 24-25 April 2018 having been notified in earlier letters from the Tribunal dated 13 March 2018 and HMRC dated 4 April 2018. This notification is put beyond doubt by the Appellant's acknowledgement of the hearing dates in his letter of 19 April 2018.

9. The Tribunal was also satisfied it was in the interests of justice to proceed.

10. The Appellant had not in fact sought an adjournment or postponement of the hearing in his letter of 19 April 2018 – presumably on the basis that his caring responsibilities would not end and that he continued to believe he would not be able to afford a replacement carer.

11. Further, the Appellant did not offer any future alternative dates on which he might be able to attend. Therefore, a postponement was not likely to secure his attendance.

12. The Tribunal had given the Appellant reasonable opportunity to attend in person or participate in the hearing by telephone. He had chosen not to take up these opportunities. The case was already of some age and there was a public interest in the speedy conclusion and efficient conduct of the hearing. HMRC's witnesses were present and ready to proceed.

13. The Tribunal therefore decided to exercise its discretion to proceed in the Appellant's absence.

14. Nonetheless, the Tribunal, by a subsequent direction dated 27 April 2018, gave the Appellant a further opportunity to make written submissions following the conclusion of the hearing.

15. This the Appellant took up in his further letter dated 3 May 2018. In his letter the Appellant did not further substantively advance his case beyond what he had previously stated in correspondence and his appeal grounds.

Recusal

16. Having decided to proceed in absence, the Tribunal Judge also considered whether to recuse himself of his own initiative having been previously instructed as a barrister on one occasion by the solicitor representing HMRC at the hearing. The Appellant was not present to raise any objection to the Judge hearing the case but the fact of the professional contact was disclosed to the Appellant in the correspondence delivered that day.

17. The Tribunal was satisfied that it was not in the interests of justice for the Judge to recuse himself. It decided that no reasonable person would consider there to be an appearance of bias and there was no real danger of bias in the Judge hearing the case. The Tribunal relied on paragraph 25 of the Court of Appeal's judgment in *Locabail (UK) Ltd v Bayfield Properties Ltd (2000) QB 451* in which it held that no objection could be soundly based on a judge having previously received instructions to act for a solicitor in a case before him:

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. **Nor, at any rate ordinarily, could an objection be soundly based on the judge's** social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or **previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him**; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v. Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and

any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[Emphasis Added]

The Law

18. The powers under Schedule 38 to the Finance Act 2012 are one form of potential alternative to criminal prosecution for dishonest conduct by tax agents. Schedule 38 provides for HMRC to pursue such conduct in three stages: 1) the issuing of a conduct notice, which if appealed and confirmed by the Tribunal; 2) enables HMRC to apply to the Tribunal to obtain the tax agent's files; and then 3) charge a civil penalty of up to £50,000 and publish certain details of those dishonest tax agents in certain circumstances.

19. This appeal only concerns the first stage.

20. As is set out in paragraph 3 of Schedule 38, dishonest conduct occurs where a tax agent does something dishonest with a view to bringing about a loss of tax revenue in the course of assisting clients with their tax affairs, whether or not that conduct leads to an actual loss, and whether or not the agent is acting on a client's instruction.

21. Paragraph 3 of Schedule 38 provides:

Dishonest conduct

3(1) An individual "engages in dishonest conduct" if, in the course of acting as a tax agent, the individual does something dishonest with a view to bringing about a loss of tax revenue.

(2) It does not matter whether a loss is actually brought about.

(3) Nor does it matter whether the individual is acting on the instruction of clients.

(4) A loss of tax revenue would be brought about for these purposes if clients were to—

(a) account for less tax than they are required to account for by law,

(b) obtain more tax relief than they are entitled to obtain by law,

(c) account for tax later than they are required to account for it by law, or

(d) obtain tax relief earlier than they are entitled to obtain it by law.

(5) "Tax" is defined in Part 6 of this Schedule.

- (6) “Tax relief” includes—
 - (a) any exemption from or deduction or credit against or in respect of tax, and
 - (b) any repayment of tax.
- (7) A reference in this paragraph to doing something dishonest includes—
 - (a) dishonestly omitting to do something, and
 - (b) advising or assisting a client to do something that the individual knows to be dishonest.

22. Paragraph 2 of Schedule 38 defines a tax agent:

Tax agent

- 2(1) A “tax agent” is an individual who, in the course of business, assists other persons (“clients”) with their tax affairs.
- (2) Individuals can be tax agents even if they (or the organisations for which they work) are appointed—
- (a) indirectly, or
 - (b) at the request of someone other than the client.
- (3) Assistance with a client's tax affairs includes—
- (a) advising a client in relation to tax, and
 - (b) acting or purporting to act as agent on behalf of a client in relation to tax.
- (4) Assistance with a client's tax affairs also includes assistance with any document that is likely to be relied on by HMRC to determine a client's tax position.
- (5) Assistance given for non-tax purposes counts as assistance with a client's tax affairs if it is given in the knowledge that it will be, or is likely to be, used by a client in connection with the client's tax affairs.

23. Paragraphs 4 and 5 of Schedule 38 provide for the issuing of a conduct notice containing a determination that the individual has engaged in dishonest conduct and an appeal against such determination:

Conduct notice

- 4(1) This paragraph applies if HMRC determine that an individual is engaging in or has engaged in dishonest conduct.
- (2) An authorised officer (or an officer of Revenue and Customs with the approval of an authorised officer) may notify the individual of that determination.
- (3) The notice must state the grounds on which the determination was made.
- (4) For the effect of notifying the individual, see paragraphs 7(2) and 29(2).
- (5) A notice under this paragraph is referred to as a “conduct notice”.
- (6) In relation to a conduct notice, a reference to “the determination” is to the determination forming the subject of the notice.

Appeal against determination

- 5(1) An individual to whom a conduct notice is given may appeal against the determination.
- (2) Notice of appeal must be given—
- (a) in writing to the officer who gave the conduct notice, and
 - (b) within the period of 30 days beginning with the day on which the conduct notice was given.
- (3) It must state the grounds of appeal.
- (4) On an appeal that is notified to the tribunal, the tribunal may confirm or set aside the determination.
- (5) Subject to this paragraph, the provisions of [Part 5](#) of TMA 1970 relating to appeals have effect in relation to an appeal under this paragraph as they have effect in relation to an appeal against an assessment to income tax.
- (6) Setting aside a determination does not prevent a further conduct notice being given in respect of the same conduct if further evidence emerges.

24. The test for ‘dishonesty’ in this context can be found in the Supreme Court’s Judgment in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67 (25 October 2017) at paragraphs 62 and 74:

62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] Bus LR 220; [2007] 1 Lloyd’s Rep 115 and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd’s Rep FC 102. The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pp 1479-1480, who had been a party also to *Twinsectra*:

“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. The Court of Appeal held this to be a correct state of the law and their Lordships agree.”

.....

74. These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

25. The onus of proof is upon HMRC to prove the Appellant has engaged in dishonest conduct while acting as a tax agent. The standard of proof is the balance of probabilities.

The Facts

26. The Tribunal received a Bundle of documents which included all the contemporaneous documents and correspondence in relation to HMRC’s enquiry into the Appellant’s conduct.

27. The Tribunal heard oral evidence from three HMRC officers who had served witness statements, Anne English, Keith Newbury and Nigel Robinson. The Tribunal tested their evidence by questioning those witnesses as to the points made on behalf of the Appellant within his statement, correspondence and appeal grounds. The Tribunal was satisfied that HMRC's witnesses were honest and reliable.

28. The Tribunal considered all the correspondence in support of the Appellant's case and Appeal Grounds on behalf of the Appellant, his statement dated 13 November 2017 and letter from Mr Ferguson dated 2 October 2016.

29. The Tribunal makes the following findings of fact on the balance of probabilities.

HMRC's enquiries leading to the decision to issue the Appellant a Conduct Notice

30. In this case it was not in dispute that the Appellant acted as a tax agent for his client Mr Ferguson

31. On 10 September 2015, HMRC Officers English and Furber met the Appellant and his client, Mr Ferguson, as part of HMRC's enquiry into Mr Ferguson's income tax self-assessment ("ITSA") and VAT returns. During the meeting, contemporaneous notes were taken which were issued to the Appellant on 24 September 2015 with no amendments received.

32. In the course of the enquiry into Mr Ferguson's ITSA and VAT returns at the meeting, the Appellant told HMRC officers that he had tried to help Mr Ferguson to reduce his VAT liability by creating false purchase invoices that he could use to support claims of business expenditure that Mr Ferguson had not actually incurred.

33. Officer English asked the Appellant and Mr Ferguson to give her any information relevant to Mr Ferguson's business records. The Appellant told officers English and Furber that there was no contact for a while with his client who had separated from his wife. The Appellant stated he had tried to help out Mr Ferguson by reducing his VAT liability, so he put in invoices for suppliers which Mr Ferguson had not used. It was done in an attempt to help his client. The Appellant admitted that a number of the invoices were false. The invoices from S&S Concrete Flooring and BLK were all false. Officer English referred to other invoices that she had listed following the records' examination and the Appellant confirmed they were all made up.

34. The Appellant said this started in 2011, he had suggested it and the invoices were created on the Appellant's own computer. Officer English asked why this information had not been given at an earlier meeting regarding the enquiry into Mr Ferguson's tax affairs held in May 2015. The Appellant said he had a chat about it straight after the meeting in May when he advised Mr Ferguson that there was no doubt HMRC would find the false invoices.

35. As a result of the Appellant's admission, on 14 September 2015 the matter was referred to HMRC's Agent Compliance Team which investigates tax agents' conduct.

36. On 24 February 2016, one of the HMRC's Agent Compliance Team, Officer Newbury, wrote to the Appellant confirming that he was investigating the Appellant's

suspected dishonest conduct. The letter included a request for a meeting and was accompanied by Factsheet TAFS (which provides Human Rights information).

37. The Factsheet explained the definitions of a tax agent and dishonest conduct and what happens when HMRC decide that a person has been dishonest. The factsheet explained HMRC's ability to ask the tax agent under enquiry or other people for documents or information to help HMRC work out the full extent of dishonesty, charge a penalty for dishonest conduct and publish the person's details. The notice explained the range of penalties for dishonest conduct and the rights of appeal. It also described the rights and obligations, such as the right to be legally or otherwise represented, consult an adviser and the rights under article 6 of the European Convention on Human Rights when considering penalties. The notice also stated there was a right to apply for publicly funded legal assistance or legal aid, and in some circumstances, funding might be available to help bring certain appeals before the tribunal.

38. On 4 March 2016, following a telephone call from the Appellant stating he had received the letter and Factsheet, a meeting was arranged for 15 March 2016 at his home address.

39. On 15 March 2016 HMRC Officers Newbury and Robinson visited the Appellant at his home. They each took a contemporaneous note of the questions they asked and the answers the Appellant gave.

40. At the beginning of the meeting Officer Newbury explained the various procedural safeguards associated with the conduct of the meeting and interview. The Officer explained the legislation and the Appellant's human rights and read the factsheet which had been sent with the letter of 24 February 2016 which explained the process. He ensured that the Appellant understood his rights and obligations as detailed in the Factsheet TAFS.

41. The Officers offered the Appellant a number of procedural safeguards at the beginning of the meeting. He was offered legal representation as of right but declined this. The Appellant was advised that at no point was he under any compulsion and he could refuse to answer questions or stop the meeting. He was advised he did not have to cooperate and if he did speak to the officers they may use what he said or any information he provided in assessing his liability to a penalty. The Officers also advised that the Appellant they could seek to give evidence of the answers given in any appeal proceedings. They advised the Appellant to tell them if he needed a break at any time. They also advised him that his level of co-operation would be taken into account in considering the mitigation of any penalties that may be due. Thereafter the meeting proceeded and both officers took handwritten contemporaneous notes of the questions asked and answers given by the Appellant.

42. The Appellant asked whether the action the Officers were taking could result in a prosecution. Officer Robinson responded it would not, the matter was proceeding on a civil basis as it had been decided not to prosecute based on the information currently held but that the Appellant should not destroy any documents and HMRC reserved the right to consider criminal proceedings if a full disclosure of any dishonest conduct was not made.

43. The Officers explained what HMRC considered to be the Appellant's dishonest conduct.
44. During the course of that meeting, the Appellant confirmed to Officers Newbury and Robinson that what he had told Officers English and Furber about creating false invoices was correct. The Appellant told the officers that he had created the false invoices on his computer at home from where he worked so that his client, Mr Ferguson, could attempt to understate his tax liability.
45. The Appellant stated that he had created dummy invoices to allow Mr Ferguson to reduce his VAT liability and Income Tax & Class 4 National Insurance liabilities. The Appellant explained that he had used genuine invoices, kept the letterheads, blacked out the invoice details and photocopied the new details in the dummy document.
46. The effect of this was to understate Mr Ferguson's Income Tax liability by an estimated amount of £10,000 in his Self-Assessments returns submitted for the years ended 5 April 2012 to 5 April 2014 and to understate Mr Ferguson's VAT liability by an estimated amount of £12,000 from 2011/12 to February 2015.
47. The appellant was asked who came up with the original idea to include false documents. The Appellant replied that the responsibility would have been his as his client did not have sufficient knowledge to do this and he created the dummy invoices and gave them to his client who authorised submission of the returns knowing that dummy invoices were included.
48. On 30 March 2016 Officer Newbury sent the Appellant a copy of the typed up contemporaneous meeting notes which he and Officer Robinson had made and signed. He asked the Appellant to sign, date and return the notes with details of comments regarding material errors, misrepresentations or omissions.
49. On 19 April 2016 the Appellant wrote to Officer Newbury to advise that he had not signed the meeting notes as there were a couple of points he wanted to clarify and expand upon to ensure they were accurate from his point of view. The Appellant wrote again to Officer Newbury on 19 April 2016 with comments on the notes. These comments were mainly general observations, rather than addressing specific items in the notes, except where the Appellant queried why note 49 was included. Note 49 related to the Appellant's conviction in a different case, and the Appellant argued this was irrelevant to the current matter. The Tribunal agrees with the Appellant and has disregarded any evidence on this point by excluding it from its consideration.
50. There was further correspondence between the Appellant and Officer Newbury in May 2016 but it did not result in the Appellant signing the meeting notes.
51. On 13 September 2016, the Conduct Notice was issued to the Appellant.
52. It was Officer Newbury's decision that the Appellant, having again admitted assisting Mr Ferguson understate his VAT, Income Tax and NICs, had engaged in dishonest conduct. The Conduct Notice dated 13 September 2016 was sent to the Appellant.
53. The appellant submitted his appeal against this decision in his letter dated 7 October 2016.

The Appellant's case

54. The Appellant did not attend to give evidence at the hearing of his appeal so his evidence could not be tested in cross-examination. Nonetheless the Tribunal fully considered all the representations he made in writing, including his letters and statement and the letter from Mr Ferguson.

55. In a letter dated 7 October 2016, the Appellant appealed against the Conduct Notice, and supplied a letter from his client, Mr Ferguson, dated 2 October 2016. Mr Ferguson's letter stated that he and the Appellant had been informed by Officers English and Furber that no further actions / prosecutions would be pursued.

56. The Tribunal does not accept the contents of Mr Ferguson's letter for the reasons set out below.

57. In his letter dated 3 November 2016 the Appellant stated that he was appealing the decision as he had been given unequivocal assurances that he would not be prosecuted during the meeting held in September 2015 with Officers English and Furber.

58. In his letter dated 25 November 2016 the Appellant advised that he did assist his client to understate his tax liabilities but his actions in doing so were not deliberate or dishonest.

59. The Appellant's grounds of appeal in his letter dated 25 November 2016 can be summarised as follows:

Although he assisted his client to understate his tax liabilities, his actions in so doing were not deliberate or dishonest.

The assertion by officers English and Furber at the meeting on 10 September 2015 with him and Mr Ferguson that there would not be a prosecution if he co-operated with their enquiry applied to him as well as to Mr Ferguson and that it covered not only criminal prosecution but also civil action such as the giving of a Conduct Notice. HMRC therefore breached a promise when issuing the Conduct Notice.

60. After some correspondence between the parties as to what constituted a valid appeal, HMRC accepted the Appellant's letter dated 25 November 2016 as providing valid grounds of appeal.

61. HMRC's letter of 2 December 2016 which confirmed that HMRC had accepted the grounds for appeal included a statement that the Appellant could request a review of the decision in the Conduct Notice. In a letter dated 28 December 2016 the Appellant requested that the decision to issue the Conduct Notice was reviewed but reserved the right to go to an independent tribunal if he was not happy with the review decision.

62. The decision was referred for review by an independent body within HMRC. On 1 March 2017 HMRC's review Officer sent the Appellant the Review Conclusion letter. The letter confirmed that the decision was upheld and set out the Appellant's right of appeal within 30 days to the Tribunal if he did not agree with the decision.

63. In a letter dated 27 March 2017 the Appellant appealed HMRC's decision to issue a Conduct Notice dated 13 September 2016 to the Tribunal.

64. In his statement dated 13 November 2017 the Appellant stated that categorical assurances were given by Officers English and Furber at the meeting on 10 September 2015 that for full cooperation no further actions or prosecutions would follow.

65. The Appellant stated that six months after the meeting he was contacted by HMRC to say that he was to be investigated for a dishonest act by an agent against the commitment given in the September meeting.

66. He stated that when visited by HRMC Officers Newbury and Robinson (in March 2016) they were arrogant, rude and thought threats were the way forward and the Appellant's only intention was to get them out of his bungalow without upsetting his wife. He had made complaints about their conduct. He stated the notes of the meeting were a complete invention and should not even be allowed to be presented as they were pure fiction. He stated he did not commit a dishonest act but merely tried to help Mr Ferguson which with hindsight was the wrong way to do it but the actions of all HMRC officers excluding Mr Furber were a disgrace and brought the organisation into disrepute.

67. The Tribunal does not accept the account put forward by the Appellant in his statement and letters.

68. The Tribunal is satisfied on the balance of probabilities, having tested the evidence of Officer English in questioning her, that the only assurance given at the meeting with Mr Ferguson and the Appellant on 10 September 2015 was to Mr Ferguson and that it was simply that he would not be prosecuted. No assurances were given to the Appellant whatsoever nor were any assurances given to either the Appellant or Mr Ferguson that HMRC would not take any civil action against either of them.

69. The Tribunal is satisfied on the balance of probabilities, having tested the oral evidence of Officers Newbury and Robinson, that their notes were an accurate record of the meeting and there were no threats issued by them and that the meeting proceeded in a professional and cordial fashion.

Discussion and Decision

70. The Tribunal is satisfied on the balance of probabilities that the Appellant's actions in creating false invoices for his client, Mr Ferguson, in order to attempt to reduce his client's tax liability constitute dishonest conduct while acting as a tax agent. HMRC has satisfied the burden and standard of proof required.

71. The Appellant gave no oral evidence nor explanation as to how his conduct could be conceived of as honest or not deliberate. No reason was given for his actions other than to assist his client untruthfully understate his tax liability to HMRC. Multiple invoices were created by the Appellant on his computer. They were false in material regard purporting to evidence supplies and the incurring of VAT and expenses for income tax that had not taken place.

72. The Tribunal is satisfied to a high degree of probability that the Appellant deliberately creating false invoices to enable understatement of tax properly due from

his client and that this was dishonest. By any objective and ordinary standards, irrespective of the Appellant's beliefs, in deliberately doing so the Appellant's mental state is properly characterised by HMRC as dishonest. In those circumstances the test of dishonesty as set out in *Ivey & Genting Casinos* is met.

73. This was serious dishonesty as the total of the tax understated by Mr Ferguson as a result of the false invoices knowingly created by the Appellant was around £22,000 - £12,000 VAT and £10,000 in income tax liability. There were serial invoices with sophisticated and misleading alterations. The nature of the Appellant's job as a tax adviser was to ensure that his clients submit knowingly accurate responses to HMRC. To create and submit documents knowing them to contain false information and with the intention that HMRC would rely on them to calculate tax liability, with the potential or likely consequence of the right amount of tax not being paid to the exchequer, would be characterised as dishonest by any ordinary standard.

74. While it is not necessary to make any finding about the Appellant's subjective mental state, his belief or understanding, as to whether what he was doing was dishonest, it is difficult to conceive of any tax agent not understanding or believing that acting in this way would be dishonest.

75. Therefore, the Tribunal rejects both the submission that he acted honestly and that he believed he was acting honestly. The Appellant did not give any explanation in writing as to how he believed his actions to be honest or how objectively they could be considered honest nor did he give any oral evidence which could be tested in cross examination. It is more likely than not that the Appellant knew or must have known what he was doing was dishonest.

76. However, very much to his credit, the Appellant volunteered and admitted his actions and his intentions to Officer Anne English at the first meeting with HMRC on 10 September 2015 and again to Officers Newbury and Robinson at the second meeting on 15 March 2016.

77. In relation to the Appellant's second ground of appeal ie. that HMRC breached a promise given to him at the meeting with his client, Mr Ferguson, by Officer English and Furber on 10 September 2015 that HMRC would not take action against him such as issuing a Conduct notice, the Tribunal is satisfied by the evidence of HMRC Officer English that no such promise was made.

78. At that meeting there was a promise made by HMRC Officers not to prosecute Mr Ferguson (with certain exceptions). No promises not to prosecute were made to the Appellant by HMRC. At that stage the enquiry was into Mr Ferguson and not the Appellant.

79. The statement made by Officers English and Furber at the meeting on 10 September 2015 offering a promise not to prosecute only applied to Mr Ferguson. The Appellant was his tax adviser. The meeting was about the enquiry into Mr Ferguson's tax affairs, not the Appellant's, and the Tribunal accepts Officer English's evidence that the officers would only have commented on those matters. HMRC Officers English and Furber understood the obligations of confidentiality imposed on them and their assertion about prosecution were only directed to Mr Ferguson. The matter of the Appellant's suspected dishonesty which had only come to light during

the meeting, was not dealt with at the time but was passed to HMRC's Agent compliance team for further investigation.

80. Further, at the meeting in September 2015 there were no promises not to take civil action against the Appellant or Mr Ferguson. Indeed, Mr Ferguson was told there were likely to be civil penalties against him. Even if the Appellant mistakenly thought the warning to Mr Ferguson applied to him, he would have believed civil penalties might ensue against him – the very opposite of an undertaking that no action would be taken against him.

81. Likewise, the Tribunal is satisfied that no promises were made by the Officers Newbury and Robinson at their meeting in March 2016 that no civil action would ensue against the Appellant. Indeed, he was given full and sufficient procedural safeguards as to the nature of their enquiry and purpose of their meeting to protect him on the basis that a civil action, such a Conduct Notice, might ensue as a result of the answers he gave.

82. Therefore, the Tribunal is satisfied HMRC has not breached any promise to the Appellant. The issuing of a conduct notice is a civil action and not a prosecution. It may potentially lead to a civil penalty but that is a separate stage of proceedings that may result from the dismissing of this appeal and the confirmation of the Conduct Notice.

83. The Tribunal is satisfied that there has been no breach of promise and HMRC are not estopped from seeking the confirmation of the Conduct Notice – there is no abuse of process involved in so doing. Likewise, the Appellant has suffered no prejudice in giving answers that he did – it appears that his voluntary admissions were repeated again to HMRC officers when full procedural safeguards were given to him at a further meeting.

Conclusion

84. The tribunal is satisfied on the balance of probabilities that the Appellant engaged in dishonest conduct as a tax agent with a view to bringing about a loss of tax revenue in the course of assisting his client, Mr Ferguson, with his tax affairs in the manner set out above. HMRC acted within their lawful powers when giving the Appellant a Conduct Notice based on the repeated admissions the Appellant made as to the creation of false invoices for Mr Ferguson to reduce his tax liabilities.

85. The determination within the Conduct Notice that the Appellant acted dishonestly while acting as a tax agent with a view to bringing about a loss of tax revenue in the course of assisting his client with his tax affairs is confirmed pursuant to paragraph 5(4) of Schedule 38 to the Finance Act 2012. For the above reasons the Appellant's appeal is dismissed.

86. 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.

**RUPERT JONES
TRIBUNAL JUDGE**

RELEASE DATE: 31 July 2018