NCN: [2021] UKFTT 381 (TC)

TC08303

VAT – personal liability notice – whether deliberate inaccuracy – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01475

BETWEEN

TAHA OSMAN **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO
MS G HUNTER

The hearing took place on 15 June 2021. The hearing was held via the Tribunal video hearing platform because of restrictions arising from the COVID-19 pandemic. The documents to which we were referred are a documents and authorities bundle of 313 pages and a skeleton argument produced by the Respondents.

Mr M Abraham, accountant, for the Appellant

Mr S Carr, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This is an appeal against a personal liability notice (PLN) in the sum of £29,473.49 issued on 6 December 2019. The PLN was issued under para 19(1) Schedule 24, Finance Act 2007.

2. An interpreter was provided at the hearing for the Appellant (Mr Osman). Following some technical difficulties with the connection with the interpreter, Mr Osman said that he would prefer to continue with the hearing without interpretation although the interpreter remained available in case they were required. We considered that, as he responded without difficulty to questions put to him, it was appropriate to continue with the hearing in that manner.

Background

3. Mr Osman was the sole director of Salford Santos Kebab Limited, a company incorporated on 12 December 2017. The company operated a takeaway food shop, selling burgers, pizza, kebabs and similar food. It was registered for VAT with an effective date of 1 January 2018.

4. Following visits to the shop and the company's accountant, the Respondents (HMRC) issued an assessment in respect of the business for £56,140 on 5 July 2019. The assessment was issued under s73 Value Added Tax Act (VATA) 1994. The assessment was issued due to inaccuracies in the VAT returns as HMRC considered that standard-rated sales had been mischaracterised as zero-rated sales.

5. The company had appointed a liquidator on 6 June 2019. The assessment was issued to the company and the liquidator. A penalty in the amount of £29,473.49 was issued to the company via the liquidator on 2 December 2019. The penalty was calculated on the basis that the assessment arose as the result of a deliberate but unconcealed inaccuracy and that there had been no unprompted disclosure of the inaccuracy. A reduction was given for the quality of disclosure and the penalty was therefore 52.5% of the potential lost revenue. It was considered that there were no special circumstances which would merit a special reduction in the penalty under paragraph 11 of Schedule 24, Finance Act 2007.

6. Due to the liquidation of the company, HMRC issued the PLN to Mr Osman on the basis that Mr Osman's actions had been entirely responsible for the inaccuracy which led to the assessment. A review was requested on 10 January 2020. A review conclusion letter issued on 12 March 2020 upheld the decision to issue the PLN.

7. Mr Osman appealed the PLN to this Tribunal on 10 April 2020. No appeal, or payment, has been made by the liquidator regarding the VAT assessment and the penalty issued to the company.

Evidence and submissions

8. The burden of proof is on HMRC to show that Mr Osman was liable to 100% of the penalty imposed on the company due to his deliberate behaviour with regards to the submission of inaccurate VAT returns. The standard of proof is the civil standard, on the balance of probabilities.

9. Officer Doherty provided a witness statement and gave evidence for HMRC; Mr Osman gave evidence at the hearing.

10. HMRC stated that they had visited the shop on two occasions. On 12 December 2018, in an unannounced visit as part of a compliance check, they had interviewed Mr Osman regarding the day to day running of the business. He had confirmed that he was the sole director of the business. The compliance check arose due to the percentage of sales declared as zero-rated for

VAT purposes. The VAT returns showed an average of 84% of sales being zero-rated, which is not reasonable for this type of business. A takeaway shop of this type would be expected to have very limited zero-rated sales.

11. At a planned visit, on 19 February 2019, Mr Osman had again stated that he was unsure of VAT rates and that HMRC should speak to his accountant. He stated that the majority of sales were pizzas and kebabs. With regard to records, Z-readings were taken from the till each day to reconcile the cash in the till, but these were not retained. It was noted that till rolls were not retained. The business only accepted payments in cash.

12. The accountant confirmed to HMRC that they were provided with z-readings, and that Mr Osman advised them, by telephone, as to the percentage split of sales between standard-rated and zero-rated sales. In their later review request to HMRC, the accountants explained that there had been a consistent misunderstanding between them and Mr Osman as to the percentages, such that the percentages for standard-rated and zero-rated sales had been reversed. This email also stated that the zero-rated sales were estimated due to poor record keeping and calculation errors by Mr Osman.

13. Mr Osman disputed this. He said that he knew nothing about VAT and tax, and so had engaged the accountants. He did not know the difference between standard-rated and zero-rated sales. He only gave the till total to the accountants, not two figures. He did not know that he needed to keep records, and his accountants had never explained to him that he needed to keep these. He considered that the email from the accountants to HMRC provided false information. It was agreed that the figures provided to HMRC were estimates due to poor record-keeping.

14. HMRC had downloaded the available till information. This was found to contain only nine days of sales information. There was no information to show that standard-rated and zero-rated sales were recorded separately on the till.

15. Officer Doherty obtained copies of the shop menus from the internet, as no takeaway menus were available during the visit. He could not recall which website the menus were from: it was not a website operated by the shop but a third-party site to which users could upload photographs of menus. The analysis of the menu indicated that fewer than 1%, by value, of the items on the menu were zero-rated: these were principally hummus and salad items.

16. Mr Osman stated that he did not have a website and did not recognise the photographs of the menus provided. He stated that the menu was completely wrong and that these were not the items sold in his shop, although he agreed that he sold largely the same sort of items. He agreed that most of the food he sold was hot, although he sold some cold items such as hummus, water, salad pittas and salad wraps.

17. HMRC issued a pre-assessment letter for underdeclared output tax, on the basis that 99% of sales were standard-rated. HMRC did not dispute the turnover figures provided in the VAT returns, and so the assessment was based on the total turnover figures provided. HMRC did not allege that there had been any suppression of sales. Although the accountants had stated that they would provide a response, no response was received.

18. Mr Osman thought that these figures were excessive, as he did not make that much money. He subsequently accepted that this was the turnover declared on his VAT returns, although he commented that the figures had been completed by his accountant.

19. Following notice from Companies House that the company had entered voluntary liquidation, the notice of assessment and penalty were issued to the liquidator. It was submitted that, in the absence of any response and without further information from the accountant or Mr Osman, the assessment was raised to best judgement.

20. No response was received. The PLN was then issued to Mr Osman, on the basis that it was his behaviour which had led to the inaccuracies in the return. The accountants requested a review as set out above, on the basis that the percentage of zero-rated sales had been misunderstood and reversed. The review request noted that Mr Osman accepted that the estimates were still incorrect due to poor record-keeping and calculation errors. HMRC considered that, even if reversed, the percentage of zero-rated sales (16% rather than 84%) was excessive and unsupported.

21. HMRC submitted that Mr Osman knowingly and repeatedly provided incorrect information to his accountant, as he had provided them with the split of sales between zero-rated and standard-rated. They considered that it must have been clear to him that the information on the VAT returns was incorrect, as the zero-rated sales declared were completely different to those which he had provided to the accountants. The accountants had confirmed that the figures were in any event incorrect due to poor record-keeping and calculation errors.

22. As Mr Osman was the sole director of the company, HMRC submitted the PLN was correctly raised on him.

23. Mr Osman stated that he did not know anything about VAT and did not understand the difference between standard-rated and zero-rated sales. He did not know whether the shop till could record that information. He did not know that the business had to keep records; he was not a professional and had previously worked as a chef. He relied on his accountants to deal with his VAT returns and did not know how to check the returns. He had engaged accountants because he did not know how to do this, and the accountants had never explained to him that he needed to keep this information.

24. Mr Osman stated that he did not know that the figures were incorrect and had not deliberately provided incorrect figures to his accountants or to HMRC.

25. For Mr Osman it was submitted that he had not acted deliberately, although he was willing to accept that he had been careless with regard to the VAT returns.

Relevant law

26. Paragraph 19 of Schedule 24, Finance Act 2007 provides that:

> 19(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.
>
> (a) the officer as well as the company shall be liable to pay the penalty, and
>
> (b) HMRC may pursue the officer for such portion of the penalty (which may be 100%) as they may specify by written notice to the officer.
>
> 19(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.
>
> 19(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership "officer" means–
>
> (a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)),
>
> (aa) a manager, and
>
> (b) a secretary.

Discussion

27. The key issue is whether the inaccuracy in the VAT returns was deliberate and attributable to Mr Osman. It was not disputed that he was an officer for the purposes of paragraph 19 of Schedule 24, Finance Act 2007.

28. "Deliberate" is not a defined term in the legislation. Case law indicates that the question of whether an inaccuracy is deliberate is a subjective test, depending on the knowledge and intention of the taxpayer, such that

> "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document" Auxilium Project Management Limited [2016] UKFTT 249 (TC) (at §63).

29. Mr Osman states in summary that he did not act deliberately with regard to the VAT returns. He also states that he did not provide any split of standard and zero-rated supplies to his accountant; as he did not know anything about VAT, he could not confirm whether the returns were accurate; he did not know he was required to keep business records.

30. It is clear from Mr Osman's evidence that he knew nothing about VAT requirements, but we consider that a person running a business is obliged to establish what is required of them to comply with their tax obligations. Mr Osman provided no evidence that he had done anything other than appoint an accountant and provide them with some figures when requested. Although he said that no-one had told him that he needed to keep records, neither did he provide any evidence that he had asked his accountants (or, indeed, anyone else) what was required of him with regard to record-keeping.

31. No evidence was provided by Mr Osman's accountants (he was represented by another agent at the hearing) but we consider it implausible that the accountants simply made up the standard-rated and zero-rated split of sales, which is the logical inference from Mr Osman's evidence.

32. It should be noted that we do not consider that Mr Osman was dishonest with regard to the split of standard and zero-rated supplies but we consider that he had taken no steps to establish whether the information provided was accurate and that he was reckless as to whether such information was accurate.

33. We therefore consider that Mr Osman cannot reasonably have believed that the information provided to HMRC in the VAT returns was accurate and, as such, we find that the VAT returns were provided in the knowledge that they were not accurate and with the intention that HMRC should rely on them.

34. We note that there was no appeal against the assessment by the company or its liquidator, and that Mr Osman agreed that the assessment was based on the turnover figures declared in his VAT returns.

Decision

35. On the basis of the above, we find that the deliberate inaccuracy was attributable to Mr Osman, the director of the relevant company, and therefore that the PLN was correctly issued.

36. The appeal is dismissed.

Right to apply for permission to appeal

37. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE FAIRPO
TRIBUNAL JUDGE

Release date: 20 OCTOBER 2021