



TC02172

Appeal number: TC/2012/00552

BELATED NOTIFICATION PENALTY – Mitigation – Appellant overpaid income tax by reason of his failure to register for VAT – Overpaid income tax not reclaimable – Penalty imposed after reclaim became time-barred – Irrecoverable income tax greater than penalty – Whether proper to mitigate penalty to nil amount – Yes – VATA 1994 s.70

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT WELLS

Appellant

- and -

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

**TRIBUNAL: JUDGE SIR STEPHEN OLIVER, QC
NIGEL COLLARD**

Sitting in public in Brighton on 28 March 2012

The Appellant in person

Rita Pavely, for the Respondents

DECISION

1. Mr Robert Wells, the Appellant, appeals against a belated notification penalty of £1,905. 60. The question for the Tribunal is whether, as Mr Wells contends, the
5 penalty should properly be reduced to a nil amount in exercise of the Tribunal's powers in section 70 VAT Act 1994.

2. Mr Wells is a self-employed artist, selling paintings and other artwork through galleries. At all material times he has been paying commission (plus VAT) to the
10 gallery owners and has been paid a net amount from the owners in respect of sales. His self-assessment return for 2006/07 showed his sales for that year at a VAT-inclusive amount of £85,970. Mr Wells had not registered for VAT. In early 2011 HMRC enquired into Mr Wells' tax affairs and discovered that, as his turnover had exceeded the VAT registration limit for 2006/07 (£61,000), he should have registered
15 for VAT from 1 January 2007 with an end date of 31 October 2010. An assessment was issued to him on 27 September 2011 for tax due of £24,218. The belated notification penalty, against which the present appeal has been made, was fixed at £1,905.60 following a review covered by a letter of 17 November 2011.

3. Mr Wells accepts that he should have registered for VAT by 2006/07. He had
20 relied on his accountants and acknowledges that he had no reasonable excuse for failing to have registered. His case, however, is that he had overpaid income tax for the period by £2,593 and, because of a change in the law that took effect from 1 April 2010, his claim to recover the overpayment has become time-barred. Mr Wells' case
25 is essentially this. HMRC have had the overpayment for several years. Had they notified him earlier of his failure to register, a claim for repayment would have been in time. And had the law covering the period for making claims not been changed, he should still have been in time to make a repayment claim. As HMRC have had the benefit of an overpayment of income tax which exceeds the penalty by some £600, he
30 argues that the proper course for the Tribunal to take should be to reduce the penalty to a nil amount.

4. We did not understand HMRC to dispute the facts concerning the overpayment. We have relied for an explanation of the facts on a statement from Mr Wells' accountant in a letter of 30 September 2011 provided in the hearing bundle submitted
35 by HMRC. The passage in the next paragraph contains the relevant details; these follow the accountant's explanation of how the liability to VAT and the penalty have arisen.

40 "To alleviate the liability we have tried to recover some of the liability by correcting your income tax returns for the years 2006/7 to 2009/10. The reduction in income as a result of the VAT charge means that you have paid too much income tax and national insurance in those years. The net overpayment amounts to something in the region of £10,000 and we have
45 already had £1693 repaid for 2009/10. Claims have been made for the earlier years and we are waiting for confirmation from HMRC but we have been told that 2006/7 is out of date as a claim should have been

made before 5 April 2011. I have asked for special relief to apply on the grounds that the problem only came to light on 21 April 2011, some 16 days after the deadline had passed.”

5 HMRC have not, we understand, made any repayment of overpaid income tax for 2006/7.

10 5. Section 70(1) enables the Tribunal, on appeal, to reduce the belated notification penalty in question “to such amount (including nil) as they think proper”. Subsection (4), which excludes certain specified matters from qualifying as mitigating circumstances, has no application here. Parliament has (absent subsection (4)) left the proprieties of the matter to HMRC or, on appeal, to the tribunal without further qualification.

15 6. We think it is proper in all the circumstances to reduce the penalty to nil. A situation where a fault on a taxpayer’s part, such as his failure to notify liability to be registered for VAT, has both given rise to a penalty and caused an irrecoverable overpayment of tax on his profits, may in our view be an occasion where it could be “proper” to abate the penalty. This could be the case where, as here, the inability to recover was attributable to no fault or delay on the part of the taxpayer.

25 7. The overpayment of income tax and the failure to register for VAT were both caused by the same error on Mr Wells’ part. Had he duly registered, he would have accounted for the right amount of VAT and there would have been no overpayment of income tax. And, had the law imposing time limits for repayment claims not changed in the meantime, Mr Wells should have been able to recover the overpaid income tax for the 2006/7 year. Mr Wells cannot, therefore, be blamed for failing to make an in-time reclaim of the overpaid income tax. In the circumstances, HMRC have in any event been enriched by some £600 and would be enriched by a greater amount were we not to mitigate the penalty now. Moreover Mr Wells’ failure to register could have been evident to HMRC from his self- assessment return as early as 2007.

30 8. To the extent that the appeal has been made out of time, we extend the period for appealing. Our decision is to reduce the penalty to nil and allow the appeal.

35 9. 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.

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**SIR STEPHEN OLIVER, QC
TRIBUNAL JUDGE**

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RELEASE DATE: 1 August 2012