



TC03500

Appeal number: TC/2012/05993

VAT – dishonest evasion penalty - whether appellant deliberately failed to register and account for VAT - yes - whether appellant failed to register and account for VAT for the purpose of evading VAT - yes - whether the appellant dishonest - yes - whether penalty should be further reduced - no - appeal dismissed and penalty confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MEMDUH ERMIS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
MRS SHAHWAR SADEQUE**

Sitting in public in London on 27 March 2014

Anna Watterson, counsel, instructed by Lester Dominic Solicitors Limited, for the Appellant

Bernard Haley, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. This is an appeal by Emduh Ermis (“Mr Ermis”) against a penalty of £39,900 under section 60(1) of the Value Added Tax Act 1994 (“VATA”) for dishonest evasion of VAT between 1 September 2005 and 31 March 2010.
- 10 2. Mr Ermis is a sole trader who carries on a takeaway hot food business, trading as Star Kebab House, from premises in Winwick Street, Warrington, Cheshire. As a result of an inquiry in 2009, the Respondents (“HMRC”) determined that Mr Ermis, who was not registered for VAT at the time, should have been so registered from 1 September 2005. Mr Ermis did not appeal the decision to register him from that date or the VAT liability that arose as a consequence. Mr Ermis submitted an application to register in February 2010 and submitted a VAT return for the longer period of 1 September 2005 to 31 March 2010 in September 2010. After further correspondence, HMRC issued an assessment for additional VAT for the period in December 2011 and a civil evasion penalty assessment to Mr Ermis in February 2012. The penalty was confirmed on review in April and Mr Ermis appealed to the Tribunal in May.
- 15 3. For the reasons set out below, we have found that Mr Ermis failed to register and account for VAT when he knew that he was required to do so and that he did so dishonestly. Accordingly, Mr Ermis was liable to a penalty Section 60(1) of VATA. We have decided that, in all the circumstances of this case, the penalty of £39,900, having been reduced by HMRC from the maximum available by 40%, should not be further reduced or increased. Our decision is that Mr Ermis’s appeal is dismissed and the civil evasion penalty is confirmed in the amount of £39,900.

25 Legislation

4. Section 60 of VATA which, insofar as is relevant, provides as follows:

- “(1) In any case where –
- (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
 - 30 (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
- he shall be liable ... to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.
- ...
- 35 (3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person’s conduct shall be construed
 - 40 (a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated; ...”

5. Section 60 was repealed by the Finance Act 2007 (see section 97 and paragraph 29(d) of Schedule 24 and section 114 and paragraph 5 of Schedule 27) with effect from 1 April 2008. Section 97 provided that Schedule 5 would come into force in accordance with provisions set out in an order made by the Treasury. Article 4 of the 5 Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 SI 2008/568 provided that

10 “... section 60 ... 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 inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC.”

A like provision was included in the Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 SI 2009/571.

15 6. The effect of the orders is that section 60 continues to apply to dishonest conduct for the purpose of evading VAT where such conduct does not relate to inaccuracies in any documents or failures to notify HMRC that an assessment is insufficient. Accordingly, section 60 still applies to include dishonest evasion of VAT by failing to notify HMRC of a liability to register for VAT.

7. Section 70 VATA provides for mitigation of penalties levied under section 60 and so far as relevant provides as follows:

20 “(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.

25 (2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

30 (3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are –

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there was, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

35 (c) the fact that the person liable to the penalty or a person acting on his behalf as acted in good faith.”

Issues

8. In this appeal, there is no dispute that Mr Ermis should have been registered for VAT from 1 September 2005. It is also common ground that Mr Ermis was not registered for VAT until February 2010 when he was registered with retrospective effect from 1 September 2005. The issues in this appeal are:

- (1) whether Mr Ermis failed to register and account for VAT in 2005 for the purpose of evading VAT; and, if so,
- (2) whether Mr Ermis did so dishonestly.

Burden of proof

5 9. Section 60(7) of VATA provides that the burden of proof as to the matters specified in sections 60(1)(a) and 60(1)(b) is on HMRC. Accordingly, HMRC must satisfy us on the balance of probabilities that Mr Ermis failed to register and account for VAT in 2005 for the purpose of evading VAT and that he did so dishonestly.

10 10. The standard of proof to be applied is the usual civil standard; that is the balance of probabilities. As stated by Lady Hale in paragraph 70 of her speech in *Re B* [2008] UKHL 35:

15 “Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

20 11. That approach was re-affirmed by the Supreme Court in *In Re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678. We consider that the standard of proof to be applied in this case is, as the Supreme Court held in *In Re S-B*, the ordinary civil standard of proof namely whether the alleged misconduct more probably occurred than not.

Dishonesty

25 12. The test for dishonesty in civil penalty cases is the same as that in criminal cases. The test was established by Lord Lane in *R v Ghosh* [1982] 2 QB 1053. In *Ghosh*, Lord Lane held that the test was a two-stage test: the first stage an objective test and the second stage a subjective test. Lord Lane stated at page 1064:

30 “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, this is the end of the matter and the prosecution fails.

35 If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly.”

40 13. In the context of civil evasion penalties, it has been specifically held that mere carelessness, even recklessness, does not constitute dishonesty - see *Stuttard v HMRC* [2000] STC 342.

Evidence

14. We were provided with a witness statement and heard oral evidence from Mr Ian White, the HMRC officer who investigated the alleged evasion of VAT by Mr Ermis. In addition, HMRC provided a bundle of correspondence and other documents
5 relating to the events that are the subject of the appeal. Not all the documents were referred to at the hearing but Ms Anna Watterson, who appeared for Mr Ermis, did not object to any of them and we have taken them into account in this decision. Mr Ermis did not provide a witness statement but Mr Bernard Haley, who represented HMRC, did not object to him giving oral evidence on oath at the hearing. On the
10 basis of that evidence and on the balance of probabilities, we find the facts to be as follows.

Facts

15. In 2000 or 2001 (Mr Ermis was not sure of the exact date) Mr Ermis took over an existing take away hot food business trading as Central Kebab House from premises at 30 Winwick Street, Warrington. The previous owner of Central Kebab House was registered for VAT and Mr Ermis registered for VAT, as a sole trader, as soon as he took over the business. Mr Ermis traded as Central Kebab House at 30 Winwick Street until June or July 2004 (Mr Ermis was unsure of the exact date) when he ceased trading and went to Turkey for a few months.

20. 16. Mr Haley stated that HMRC's records showed that Mr Ermis's VAT registration had been cancelled with effect from 1 August 2003 because he was classified as a missing trader in the sense that he stopped submitting returns or responding to correspondence. Mr Ermis said that he was not aware of this. He said that he was trading from 30 Winwick Street in 2003. He told us that his accountant,
25 who was not the same accountant who acted for him in relation to the events that are the subject of the appeal, had handled his VAT returns. That accountant was based in London. Mr Ermis said that he sent the accountant his papers, ie records of sales and purchase invoices, every three months and the accountant completed the VAT returns and sent them back to him to sign and pay the VAT due. Mr Ermis said that when he stopped trading as Central Kebab House, he asked his accountant to de-register him.
30 In his witness statement, Mr White said that Mr Ermis was deregistered as a missing trader when his business ceased. We were not shown any evidence to support the date of deregistration being 1 August 2003. HMRC did not rely on the date of deregistration and we do not make any finding about it. HMRC relied on the fact that
35 Mr Ermis was previously registered for VAT and, as we have recorded, that was not disputed.

17. At the end of 2004 or beginning of 2005 (again, Mr Ermis was unsure of the date), Mr Ermis took over some empty shop premises at 41 Winwick Street, Warrington that subsequently became Star Kebab House. Mr Ermis carried on the same business at Star Kebab House as he had at Central Kebab House, namely the sale of kebabs, burgers, pizzas, fried chicken, scampi, chips and onion rings. Mr Ermis told us that, at that stage, he had a partner in the business called Cumali Coskun. Mr Ermis said that he and Mr Coskun shared the costs of the business such as decorating the premises, equipment and rent, equally. The business did not make
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enough money to support both partners and so, in October 2005, Mr Ermis paid Mr Coskun approximately £3,000 or £4,000 (Mr Ermis was not sure of the exact amount), being what Mr Coskun had put into the business, and Mr Ermis continued trading as a sole trader. Mr Ermis's self assessment form for income tax submitted to HMRC 5 stated that he had begun trading on 1 January 2005.

18. In the early hours of Sunday 1 March 2009, two HMRC officers, Mr Graham Lybert and Mr John Duxbury, made an unannounced visit to the premises of Star Kebab House at 41 Winwick Street, Warrington. The business was open and an employee was on the premises. Mr Ermis was in the flat above the shop and came 10 down to speak to the HMRC officers. Mr Ermis told the officers that he was registered for VAT but did not have his VAT registration number to hand. He said that he had registered for VAT some 16 or 17 months previously. Mr Ermis stated that he had had 41 Winwick Street for a couple of years since 2006 and that he had previously owned Central Kebab House on the same road. Mr Ermis said that there 15 were normally three people, himself and two staff, working in the shop but there were only two that night. He said his average weekly takings were between £1,500 and £1,700. The takings were £300 or £350 on Friday and Saturday and £200 for the other nights of the week. He stated that the takings had dropped recently because of the credit crunch. Mr Ermis said that he took the details of the takings each night 20 from the electronic till by taking a "Z reading". A Z reading of the till at 2:05 am on 1 March gave a value of £228.70 with total sales to date of £135,420.54. A cash up at 2:10 am produced £235 in notes plus some coins that were not counted. The officers left the premises after the cashing up and asked Mr Ermis to provide them with his VAT registration number.
- 25 19. Mr Ermis did not dispute the HMRC officers' record of the visit on 1 March 2009 or seek to deny any of the answers that he gave during that visit. In evidence before us, Mr Ermis sought to explain some of his answers that he now accepted were not correct.
20. Mr Ermis accepted that he was not registered for VAT at the time of the visit. 30 Mr Ermis said that, at the time of the visit in March 2009, he thought that he was registered for VAT which is why he told the officers that he was registered. He stated that he had told his accountant, Abdullah Dervish of A Dervish & Co Limited in Birmingham, to register him for VAT in 2006 but Mr Dervish had told him that his takings were under the VAT registration limit. Mr Ermis sent his business records 35 showing sales and purchases to Mr Dervish by post. Mr Ermis said that he knew that he should have been registered for VAT at some stage but Mr Dervish had not registered him for VAT. Mr Ermis said that he knew that even if his takings were at the lower end of his estimate, say £1,500 per week, he should have been registered for VAT. Mr Ermis said that he was not trying to avoid paying VAT. It was just a mistake between him and his accountant. Mr Ermis said that they should have 40 communicated more to get the VAT registration right. In reply to questions from the Tribunal, Mr Ermis said that he repeatedly asked Mr Dervish to register him but he did not do so. Mr Ermis said that he could not recall what Mr Dervish said when repeatedly asked to register him. Mr Ermis said that he increased his prices a couple

of times during the period but he did not know if he increased his prices to include VAT.

21. We do not accept Mr Ermis's explanation of why he told the HMRC officers that he was registered for VAT and had a VAT registration number when he did not.
- 5 His explanation was confused and lacked credibility. If Mr Ermis repeatedly asked Mr Dervish to register him for VAT then that shows that Mr Ermis knew that he was liable to be registered and was not so registered. In those circumstances, there can be no reason why Mr Ermis should tell the HMRC officers that he was registered and had a VAT registration number when, on his own evidence, he must have known that to be untrue. If his accountant failed to register him then Mr Ermis should have changed his accountant or registered for VAT himself. He did not do so: Mr Ermis carried on trading without accounting for VAT. We did not have any evidence from Mr Dervish and there is nothing in the correspondence between Mr Dervish and HMRC to suggest that he was to blame for Mr Ermis not being registered for VAT.
- 10 We find that Mr Ermis knew that he should have registered for VAT but we do not accept that he asked Mr Dervish to register him. We find that Mr Ermis knew that he was not registered for VAT and that he deliberately lied to the officers when he said he was registered for VAT. From that deliberate lie, we conclude that Mr Ermis knew that he was not accounting for VAT on his sales, as he should have done.
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- 20 22. Mr Ermis also told the officers that he had had 41 Winwick Street for a couple of years since 2006 whereas, in fact, he had begun trading at the end of 2004 or beginning of 2005. Mr Ermis said that the reason why he said 2006 was that he had not been at 41 Winwick Street at the beginning as the business was run by his partner, Mr Coskun. Mr Ermis said that he took over the running of the business from 2006.
- 25 We do not accept this explanation, which had not been put forward until the hearing. We heard no evidence from Mr Coskun and there is no mention of the existence of him or a partnership in the correspondence between Mr Dervish and HMRC. Even if there was a partnership, we do not accept that Mr Ermis would not have been at the premises from the beginning of trading for at least some of the time. He told us that he and his partner had decorated the premises themselves and it seems inconceivable that he would not have worked at the shop, especially when it was busy, as he did in March 2009. Further, we consider that, even if his explanation is true (which we do not accept), Mr Ermis's reply to the officers was misleading. He should have told the officers that he had 41 Winwick Street since late 2004 or early 2005 although the business was a partnership in the first year or so. We find that Mr Ermis lied when he told the officers on 1 March 2009 that he had had the premises for a couple of years since 2006. We find that he did so in an attempt to reduce the period that HMRC would investigate and that he sought to do that because he knew that he had not been accounting for VAT when he should have been.
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- 35
- 40 23. We record that HMRC made an enquiry by telephone of Warrington Borough Council about the premises. HMRC stated that the Council informed them that Mr Ermis had started to pay business rates in relation to 41 Winwick Street from 20 September 2003. This was denied by Mr Ermis who maintained that he did not start trading from the premises until late 2004 or early 2005. Warrington Council did not provide any evidence about the business rates and nothing else suggested that Mr

- Ermis was trading from 41 Winwick Street in 2003. Ms Watterson asked to find that the Council had made a mistake and the business rates paid in September 2003 must have related to Mr Ermis's former premises at 30 Winwick Street. In our view, the evidence is insufficient to enable us to make any finding about the situation in
- 5 September 2003. In the absence of any evidence, we cannot assess the reliability of information which HMRC say they obtained from Warrington Borough Council and specifically whether it related to 30 or 41 Winwick Street. For the purposes of this appeal, we assume that Mr Ermis was not trading from 41 Winwick Street in September 2003.
- 10 24. As was recorded in the HMRC officers' manuscript note of the visit, Mr Ermis told the officers that there was only one car with "Star Kebabs" written on it with bright stickers, which was used for deliveries. The typed up version of the written note stated that the officers had seen two cars with "Star Kebabs" written on them with bright stickers near the shop. We did not have witness statements from the officers and they were not present to be questioned about the cars. In response to questions from Mr Haley, Mr Ermis said that he only had one car with Star Kebabs on it, a silver Volkswagen Polo. In the absence of any evidence from HMRC about a second car, we accept Mr Ermis's evidence that he only had one car. We note, however, that whether he had one car or two has no bearing on the issues in this appeal.
- 15 25. Following the visit on 1 March 2009, HMRC entered into correspondence with Mr Ermis's accountant, Mr Dervish. Mr Dervish suggested different dates from which Mr Ermis should have been registered for VAT. Initially, Mr Dervish suggested that Mr Ermis should be registered from a current date i.e. December 2009.
- 20 25 Following further correspondence, Mr Dervish suggested that Mr Ermis should be registered from 1 January 2009. In a letter dated 1 February 2010, Mr Dervish produced some calculations, based on purchase records that showed that Mr Ermis' turnover was well below the registration limit throughout the period from 27 December 2004 to December 2007. In a letter dated 10 February 2010, Mr Lybert responded to Mr Dervish's letter and set out his own calculations. Mr Lybert pointed out that a number of purchase invoices appeared to be missing for 2005 and 2006 as there were no purchase invoices for things that Mr Ermis sold during the period such as pizza boxes, chicken burgers, scampi, chips, onion rings or drinks. Further, some of the purchase invoices showed an account balance but these were not always consecutive and some invoices only showed the second page of the invoice. Mr Lybert also stated that Mr Dervish's calculations included purchases of kebab meat for only part of each year. On the basis of his own calculations, Mr Lybert concluded that Mr Ermis had exceeded the registration limit in July 2005 and thus became liable to register for VAT with effect from 1 September 2005.
- 30 35 26. Mr Dervish wrote to Mr Lybert on 25 February 2010 enclosing a form VAT 1 application to register, dated 24 February and signed by Mr Ermis, that showed an effective date of registration of 1 November 2008. Mr Lybert did not accept that date and registered Mr Ermis with effect from 1 September 2005. Mr Dervish asked HMRC to review the decision to register Mr Ermis with effect from 1 September 2005. The review confirmed the decision by letter dated 20 August 2010. Mr Ermis

did not appeal that decision. On 20 September 2010, Mr Ermis submitted a VAT return for the period 1 September 2005 to 31 March 2010. The return showed a liability to VAT of £38,132 which was significantly below the amount estimated by Mr Lybert.

- 5 27. The case was referred to Mr White to investigate whether Mr Ermis had sought
to evade VAT dishonestly and, if so, what action should be taken. Mr White and a
colleague had a meeting with Mr Ermis and Mr Dervish on 27 July 2011. The notes
of the meeting record Mr Ermis as saying that Star Kebab House started trading in
September or October 2005. That statement was inconsistent with his evidence
10 before us, which was that he had begun trading at the end of 2004, or beginning of
2005. Mr Ermis told Mr White that, on 1 March 2009, he had told the officers that he
was registered for VAT because he thought that he was as he was already talking to
Mr Dervish about registering at the time. The meeting notes do not record that he had
repeatedly asked Mr Dervish to register him and there is no suggestion that he had
15 been told by Mr Dervish that he was registered. We consider that Mr Ermis was not
telling the truth in the meeting and that he knew, at the time of the officers' visit, that
he was not registered for VAT and did not have a VAT registration number. Mr
Dervish said that Mr Ermis did not accept the registration date of 1 September 2005
but had not appealed against it because of the costs. Mr Dervish also acknowledged
20 that there were gaps in the purchase records but said there were no gaps in the records
of sales.
28. On 29 July 2011, Mr White sent a typed copy of the notes of the meeting to Mr
Ermis and Mr Dervish with a request that they make any amendments, sign and return
the notes. No response was received.
- 25 29. On 31 October 2011, Mr White notified Mr Ermis that he intended to issue an
assessment for additional VAT due for the period 1 September 2005 to 31 March
2010 not declared on the VAT return and asking for any comments. The further VAT
was based on Mr Lybert's calculations. No response was received. On 16 December,
HMRC issued an assessment for £28,368 VAT. The assessment was not appealed.
- 30 30. On 6 February 2012, HMRC issued a civil evasion penalty assessment to Mr
Ermis. The maximum penalty under section 60(1) VATA is an amount equal to the
VAT sought to be evaded. Mr White based the penalty on the aggregate of the VAT
declared on the return in September 2010 and the VAT assessed in December 2012,
giving a total of £66,500. Mr White reduced the penalty by 40%, being 20% to reflect
35 the disclosure by Mr Ermis in accepting that he should have been registered, although
the date was disputed initially, and 20% for his co-operation in attending meetings
and providing some records. Mr Dervish challenged the penalty and asked for a
review in a letter dated 16 February. The review confirmed the penalty in a letter
dated 30 April 2012. Mr Ermis appealed against the penalty by a notice of appeal,
40 dated 28 May 2012, submitted by a different firm of accountants.

Submissions

31. Mr Haley submitted that the actions of Mr Ermis showed dishonest behaviour in that he falsely claimed to be already registered for VAT when he was not. Mr Haley said that Mr Ermis had been registered for VAT before and, therefore, knew about VAT and must have known that he was not registered. Mr Haley also relied on the fact that Mr Ermis had falsely stated that Star Kebab House started trading in 2006 whereas his self-assessment form stated that trading began on 1 January 2005. At the hearing, Mr Ermis said that he had started trading from the premises in late 2004 or early 2005. Mr Haley submitted that Mr Ermis had given the wrong date for the commencement of trading to limit the period under investigation. Mr Haley also contended that Mr Ermis's business records were not accurate and that Mr Ermis had deliberately suppressed the purchases to mask suppression of sales. HMRC's position was that Mr Ermis deliberately and dishonestly failed to register so that he did not have to account for VAT. The amount of the penalty was based on the VAT due for the longer initial accounting period from 1 September 2005 to 31 March 2010 calculated by HMRC to be £66,500. HMRC had applied a 40% reduction to reflect Mr Ermis's disclosure and co-operation which gave a penalty of £39,900.

32. Ms Watterson submitted that carelessness or negligence were not enough to create liability to a penalty for dishonest evasion of VAT. The burden of showing dishonesty was on HMRC and they had failed to discharge it. Mr Ermis had denied any dishonesty or intention to evade VAT. He also denied dishonestly suppressing purchases and failing to declare sales. Ms Watterson said that Mr Ermis was not a sophisticated businessman and English was not his first language. Ms Watterson acknowledged that Mr Ermis was not always on top of his books and records but that was not enough to establish dishonesty. His position was that he had failed to appreciate that his turnover had exceeded the relevant threshold or the date at which it first did so. Mr Ermis told the officers in 2009 that his weekly takings were £1,500 or £1,700, which was enough to make him liable to register. The fact that he frankly disclosed the level of his turnover to the officers showed that he did not understand that he was liable to register for VAT at that time and that he was not dishonest. The accountant, Mr Dervish, put forward the different registration dates and that was not evidence of any dishonesty on the part of Mr Ermis.

33. Ms Watterson further submitted that if the Tribunal were to find that Mr Ermis had dishonestly sought to evade VAT then the penalty should be further mitigated on the grounds that Mr Ermis took advice from his accountant and provided his records to HMRC.

Discussion

34. There is no dispute that Mr Ermis should have been registered for VAT from 1 September 2005. Although that date was never explicitly accepted by Mr Ermis or his accountant, neither the date of registration nor the amount of tax due as a result was the subject of any appeal or any argument before us. There is therefore no doubt that Mr Ermis failed to register for VAT with effect from 1 September 2005 until his accountant submitted a form VAT 1 application to register on 25 February 2010. During that time, Mr Ermis did not account for VAT on his supplies of take away hot

food, as he was required to do. Mr Ermis did not submit a VAT return for the period 1 September 2005 to 31 March 2010 until 20 September 2010. That return understated the correct amount of VAT due and required an assessment for additional VAT. The total amount of VAT for the period 1 September 2005 to 31 March 2010 that Mr Ermis had previously failed to account for was £66,500.

35. Did Mr Ermis fail to register and account for VAT for the purpose of evading VAT? In 2009, Mr Ermis's own rough estimate of his weekly takings, which was consistent with the takings for the evening of the HMRC visit, showed that he was substantially over the VAT registration limit. Mr Ermis had been registered for VAT before when he traded as Central Kebab House and would have known, if not exactly, roughly what the registration limit was in 2009 (£60,000). In our view, Mr Ermis must have realised that an annual turnover of between £78,000 and £88,400 was significantly in excess of the registration threshold. As a result of having been registered before, Mr Ermis knew that a VAT registered business like his must complete quarterly VAT returns and account to HMRC for VAT charged to its customers. Mr Ermis also knew, however, that he was not signing VAT returns or paying any amounts of VAT to HMRC when he was trading as Star Kebab House. We find that, as he had previously been registered for VAT, Mr Ermis must have known that, by not being registered, he was not accounting to HMRC for VAT at 17.5% or 15% on his sales during the period. There was no suggestion that Mr Ermis kept any amount aside so that he could pay the VAT that he would owe once he was registered. We conclude that Mr Ermis never intended to account for the VAT due on his sales. Accordingly, we find that Mr Ermis failed to register and account for VAT for the purpose of evading VAT.

36. We also conclude that Mr Ermis acted dishonestly when he failed to register and account for VAT. It is obviously dishonest deliberately to withhold tax that is properly due to HMRC. In our view, it is clear that Mr Ermis knew that he should have been registered but, despite knowing that, he did nothing about it. Further, we find that Mr Ermis knew that what he was doing was dishonest as was shown by his attempts to hide the true position from HMRC by lying. We find that Mr Ermis lied to the HMRC officers at the visit when he said he was registered for VAT and had a VAT registration number. We do not accept that he asked Mr Dervish to register him either repeatedly or at all. Mr Ermis also lied when he told the officers that he had had 41 Winwick Street for a couple of years since 2006 when he had been there just over four years, since late 2004 or early 2005. We consider that these lies show that Mr Ermis knew that what he was doing was wrong and demonstrate dishonesty.

37. For completeness, we do not regard the fact that the business records provided to HMRC were incomplete as necessarily showing dishonesty. The poor state of the business records is equally consistent with carelessness and, without more, does not establish dishonesty. Equally, the fact that Mr Dervish tried to establish an effective date of registration earlier than 1 September 2005 in correspondence with HMRC is not evidence of dishonesty on the part of Mr Ermis.

38. In our view, the mitigating factors urged on us by Ms Watterson had already been taken into account by Mr White. In the circumstances of this case, we can see

no reason to increase the, in our view already generous, reduction applied to the maximum penalty available under section 60(1).

39. For the reasons set out above, we have found that Mr Ermis failed to register and account for VAT when he knew that he was required to do so and that he did so dishonestly for the purpose of evading VAT. Accordingly, Mr Ermis was liable to a penalty under Section 60(1) VATA. We have decided that, in all the circumstances of this case, the penalty of £39,900, having been reduced by HMRC from the maximum available by 40%, should not be further reduced or increased.

Decision

10 40. Our decision is that Mr Ermis's appeal is dismissed and the civil evasion penalty is confirmed in the amount of £39,900.

Right to apply for permission to appeal

41. 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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**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 14 April 2014