



TC03551

Appeal number: TC/2012/07811

VALUE ADDED TAX – assessment – whether understatement of sales – penalty – Schedule 24 Finance Act 2007 – whether deliberate and concealed – quantum of VAT assessment and penalty assessment – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

APEX STORES LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR RICHARD CROSLAND**

Sitting in public in Manchester on 5 February 2014

Dr Mohammed Asif of M Asif & Co Accountants for the Appellant

Mr Bernard Haley of HM Revenue & Customs for the Respondents

DECISION

Background

5 1. The appellant carries on business running a convenience store and off licence from premises at 178-182 Langworthy Road, Salford. In this appeal it challenges:

(1) An assessment to VAT dated 18 December 2012 in the sum of £14,103.00 relating to its first VAT period from 1 June 2011 to 30 November 2011 (period 11/11).

10 (2) A penalty in the sum of £13,045.27 for deliberately understating the amount of VAT due in that VAT period and concealing the understatement.

2. The appellant essentially contends that there has been no understatement of VAT so that the assessment and the penalty should be set aside.

15 3. The business was originally carried on by a company called Sideflight Ltd. The director of Sideflight who conducted the business was Mr Khalid Jamil. The premises themselves were owned by Mrs Farhat Jamil, Mr Jamil's wife, who was the director of the appellant. On 30 May 2011 Sideflight transferred the business to the appellant. There are contentious issues arising in relation to that transfer which we consider below.

20 4. The assessment to VAT was made pursuant to section 73 Value Added Tax Act 1994.

5. The penalty, if applicable, arises under *Schedule 24 Finance Act 2007*. The following paragraph references are to Schedule 24.

25 6. Paragraph 1(1)(a) provides that a penalty is payable where the taxpayer gives HMRC a VAT return and two conditions are satisfied. The first condition for present purposes is that the document contains an inaccuracy which amounts to the understatement of a liability to tax. The second condition is that the inaccuracy was careless or deliberate.

30 7. Paragraph 3(1) distinguishes inaccuracies which are "deliberate but not concealed" and those which are "deliberate and concealed". An inaccuracy is deliberate and concealed if it was deliberate on the taxpayer's part and the taxpayer makes arrangements to conceal it, for example by submitting false evidence in support of an inaccurate figure.

35 8. Paragraph 4 sets the penalty for deliberate but not concealed action at 70% of the potential lost revenue ("PLR"). For deliberate and concealed action the penalty is set at 100% of the PLR.

9. Paragraph 5 defines the PLR as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy.

10. Paragraphs 9 and 10 permit reductions in penalties where a person discloses an inaccuracy. Disclosure in this context is defined as:

“(a) *telling HMRC about it,*

(b) *giving HMRC reasonable help in quantifying the inaccuracy..., and*

5 (c) *allowing HMRC access to records for the purpose of ensuring that the inaccuracy ... is fully corrected.”*

11. Paragraph 9 also distinguishes an “unprompted” disclosure from a “prompted” disclosure. A disclosure is unprompted if made at a time when the person making it
10 has no reason to believe that HMRC had discovered or were about to discover the inaccuracy. Otherwise a disclosure is prompted.

12. Paragraph 10 sets out the reductions which HMRC shall apply to a penalty. The reduction which HMRC must apply will depend on whether the disclosure was prompted or unprompted. It must also reflect the “*quality*” of the disclosure.
15 Paragraph 9 defines the quality of a disclosure as including “*timing, nature and extent*”. In the case of a deliberate inaccuracy with unprompted disclosure the minimum penalty is 50% of the PLR

13. Paragraph 11 permits HMRC to reduce a penalty generally “*if they think it right because of special circumstances*”.

20 14. In this appeal it is for the respondents to establish that there was a deliberate inaccuracy in the return so as to justify the penalty assessed. It is then for the appellant to satisfy us that the amount of the penalty assessment is excessive for any reason. See *Khan v Commissioners for Customs & Excise [2006] EWCA Civ 89* in relation to the civil evasion penalties which preceded Schedule 24.

25 15. The issues which we must decide on this appeal are therefore as follows:

(1) Did the appellant understate its sales for VAT purposes in the period assessed or any part of that period?

(2) If so, did it do so deliberately and seek to conceal the resulting understatement of VAT?

30 (3) Are the assessments to VAT and/or the penalty excessive?

16. The respondents opened the appeal and adduced evidence from Mrs Carol Batley and Mr Anthony Walsh, both Higher Officers of HM Revenue & Customs. Mrs Batley is the officer who investigated the appellant’s business and who made the VAT assessment and the penalty assessment. Mr Walsh is a specialist in the
35 interrogation of electronic tills who assisted Mrs Batley in her investigation. Both witnesses produced witness statements and were cross-examined.

17. The appellant relied on evidence from Mr Jamil, but called no evidence from Mrs Jamil.

Findings of Fact

18. Based on the evidence we make the following findings of fact on the balance of probabilities.

19. When the appellant first registered for VAT it provided to the respondents 5 copies of 3 “Z readings” from an electronic till. Subject to any errors in operating the till, such as over-rings, a Z reading ought to show the takings since the last Z reading. The 3 Z readings were numbered 0169, 0170 and 0171. It is clear that 0171 was taken on 3 June 2011. The dates on the other readings are not clear but we find that they were taken on 1 and 2 June 2011 respectively. Hence the Z readings covered the first 10 3 days of trading by the appellant. The readings were as follows:

	Date	Takings £	Average Spend £
0169	1 June 2011	1,939.86	3.51
0170	2 June 2011	2,219.44	3.53
0171	3 June 2011	2,501.45	3.55

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20. At the time of registration the appellant also sent a document to the respondents described as a “Transfer Certificate”. This was a stock valuation carried out on instructions from Sideflight Ltd. It was carried out by Ashby’s National Stocktakers and gave a “Cost Value” for stock at the premises on 30 May 2011 of £37,905.30 20 excluding VAT. It was signed by Mr Jamil on behalf of the vendor (Sideflight) and Mrs Jamil on behalf of the purchaser (the appellant) and was expressed to be final and binding.

21. We did not have a copy of the Appellant’s application for registration.

22. On 5 January 2012 the appellant submitted its VAT return for its first period of 25 trading, period 11/11. The return showed the following details:

	£
Sales (excluding VAT)	244,556
Purchases (excluding VAT)	289,259
Net VAT repayment claimed	7,209

23. The return was selected for verification because the appellant was claiming a VAT repayment. Mrs Batley arranged to visit the appellant’s accountants, Ghani & 30 Co. On 25 January 2012 she met with Mr Ghani. He completed the VAT return from

information provided by Mrs Jamil. As far as sales were concerned, she provided him with a small notebook (“the Notebook”) from which he took figures for the daily sales. It is clear that Mr Ghani had little knowledge of the day to day running of the business. For example he was not aware that the business operated any till.

5 24. Mrs Batley identified that the appellant was using a retail scheme (Apportionment Scheme 1) to calculate the output tax declared on the return. This scheme requires a trader to keep a full record of daily gross takings including all payments as they are received. In fact the only record of takings retained by Mrs Jamil was the Notebook which purported to show the daily total sales rather than individual
10 sales.

25. We had a copy of the Notebook in evidence covering the period 1 June 2011 to 30 November 2011. The shop was open 7 days a week and takings figures were recorded for each day. The following figures appeared in the Notebook for the period 1-3 June 2011 which are the days covered by the Z readings referred to above:

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Date	Takings
	£
1 June 2011	1,249.12
2 June 2011	1,409.47
3 June 2011	1,622.11

26. Mrs Batley arranged to visit the premises. She spoke to Mrs Jamil by telephone and arranged a visit for 27 January 2012. At that visit Mrs Jamil said that there was one electronic till in use, but that no till rolls or printed Z readings had been used or
20 taken since trading began. Mrs Jamil said that she attended the premises every morning to collect the takings from the previous day. She also obtained a Z reading, presumably from the till display, and reconciled this to the cash in the till. She wrote the total daily sales down in the Notebook.

27. We did not hear any evidence from Mrs Jamil to this effect. Dr Asif told us that
25 “no respectable woman would like to come to such a meeting [ie hearing]”. We do not accept that there was any good reason for Mrs Jamil not to give evidence. She was the director of the appellant and was running the business at the material times. Whilst Mrs Jamil explained to Mrs Batley at the meeting on 27 January 2011 how she recorded daily sales, we cannot accept that explanation for the following reasons:

30 (1) At the meeting Mrs Batley observed an employee inserting a new till roll into the till. It was only then that Mrs Jamil claimed she had been using a till roll for the last 2 days after the accountant had told her to do so. There was no corroborating evidence from the accountant.

35 (2) The purchase records for the period ending 30 November 2011 included an invoice for thermal till rolls.

(3) Printed Z readings were available from 1-3 June 2011 and had been produced to the respondents in support of the application for registration.

5 (4) Mr Walsh's evidence, which we accept, is that it was not possible to do a Z reading on the particular till being used without printing it off. If there was no till roll in the machine, trying to obtain a Z reading would result in an error message. Further, Z readings had been taken on a daily basis since at least December 2010.

10 28. Following the meeting on 27 January 2012 Mrs Batley arranged for an unannounced visit to take place on 3 February 2012 at which she attended the premises together with Mr Walsh. Dr Asif contended that this visit had been unfair, and that the respondents had no authority from Mrs Jamil to interrogate the till. We reject that claim. Mrs Jamil was not at the premises at the time of the visit, but we are satisfied that Mrs Batley spoke to Mrs Jamil by telephone from the premises and obtained her agreement to the till interrogation. We set out below Mr Walsh's
15 findings based on his interrogation of the till.

20 29. A further visit was arranged with Mrs Jamil to take place on 14 March 2012. However Mrs Jamil did not attend. Instead Dr Asif was present. In the circumstances the meeting did not proceed, although Dr Asif did claim that the VAT repayment in the 11/11 return arose because of an increase in stock during the period of between £50-70,000.

25 30. The only suggested justification for a repayment return in period 11/11 was a significant increase in stock. Dr Asif produced a stock valuation dated 27 July 2012 apparently from a firm called "National Stocktakers" and purporting to show stock at cost, net of VAT amounting to £65,030. The circumstances in which this valuation was obtained were not explained, nor was there any evidence from the person who carried out the valuation. Dr Asif said the valuation was relevant because Mrs Jamil had increased the stock to its optimal level by November 2011 and thereafter it had remained relatively constant.

30 31. There was no evidence to support Dr Asif's assertions. Without any evidence as to the provenance of the later stock valuation or the level of stock in November 2011 we cannot accept that it supports the appellant's case. Nor was there any evidence in the form of purchase invoices to suggest any great build up of stock.

35 32. At the meeting on 27 January 2012 Mrs Jamil told Mrs Batley that she had funded the purchase of stock from Sideflight with a loan of £15,000 from her sister with the balance from her own resources. However Dr Asif's case, as put to Mrs Batley, was that there was no transfer of stock to Mrs Jamil. Mrs Jamil did not give evidence, but we did have evidence from Mr Jamil which bears on the issue of whether there was a transfer of stock.

40 33. Mr Jamil said that he had a disagreement with his wife about the stock transfer. We accept that Mr Jamil's relationship with his wife was strained. However his evidence in relation to the stock transfer was very confused. What he did say is that he and his wife agreed to have a stock valuation. Mrs Jamil needed the stock on hand to

take over the business. Mr Jamil needed payment for the stock so he could pay his suppliers.

5 34. Following the transfer Mr Jamil said that there was an issue about the payment, in particular whether VAT was due on the stock valuation. Mrs Jamil told him she could get stock cheaper from a cash and carry. He said that he continued to manage the shop for Mrs Jamil for 2 or 3 months after the transfer. Because of the dispute about payment he ended up selling the stock to other traders. At one point in his evidence he said that Mrs Jamil paid him nothing for the stock. Later in his evidence he claimed that he did receive about £8,000 from Mrs Jamil for the zero rated stock
10 such as frozen foods, dairy, bread and milk.

15 35. We do not accept Mr Jamil's evidence. His evidence was confused and inconsistent. It was also inconsistent with what Mrs Jamil told Mrs Batley about payment for the stock transfer. Mr Jamil also said in evidence that he had only very occasionally taken Z readings when Sideflight owned the business. Sideflight used the same till as the appellant, and we accept Mr Walsh's evidence that daily Z readings had been taken from at least December 2010.

36. In the light of the evidence we are satisfied that the appellant did take over the stock held by Sideflight on 30 May 2011. We do not accept that there was any significant increase in stock in the period from 1 June 2011 to 30 November 2011.

20 37. Mr Jamil did say, and in this respect we have no reason to doubt his evidence, that when he ran the business the weekly takings would fluctuate widely. In particular, during the football season takings would be higher than in the summer months. On weeks when Manchester United played away, takings would be lower than when they played at home.

25 38. We regard the takings disclosed by the Notebook as significant. They are strikingly consistent. For example the weekly takings in August 2011 were as follows:

Week Ending	Notebook Takings £
7 August 2011	10,847.07
15 August 2011	10,922.66
22 August 2011	10,875.44
29 August 2011	10,913.66

30 39. Other weeks show very similar takings and in the period of 6 months covered by the notebook, the recorded takings are in the range £9,929 to £11,056. In the week commencing 14 November 2011 the takings are recorded as £12,952.36. Inexplicably however this purports to relate to 8 days of takings.

40. When Mr Walsh interrogated the till on 3 February 2012 he was able to extract Z readings 414 and 415 which covered 1 February 2012 and 2 February 2012 respectively. These showed the following details:

	414	415
Date	1 Feb 2012	2 Feb 2012
Takings	£2,179.43	£2,037.69
Average Spend	£3.49	£3.29

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41. We accept Mr Walsh's evidence that analysis of the individual transactions on those days gives no indication of uncorrected over-rings. Further the average spend per customer is broadly consistent with the 3 Z readings from June 2011. We also accept Mr Walsh's evidence that the average daily takings over the period from 13 December 2010 to 3 February 2012 was £2,091.

42. Mrs Batley estimated the average daily gross takings to be £2,108. She obtained this by using an average of Z readings 414 and 415. In period 11/11 this gives gross takings of £385,764. Using Apportionment Scheme 1 gives gross standard rated sales of £322,807, net standard rated sales of £269,006 and output tax due on those sales of £53,801. The output tax declared was £39,697 meaning that the appellant failed to declare output tax of £14,103.

43. Dr Asif challenged Mrs Batley's estimate of net standard rated sales of £269,006. He relied on a calculation which suggested that if the net standard rated sales were at that level then the appellant would have an unrealistic mark up of 52.24%. He says a more reasonable calculation using the declared takings gives a mark up of 12.33%.

44. We do not accept Dr Asif's calculation. Firstly it relies on an assumption that the appellant did not take over the stock belonging to Sideflight. We have found that it did. Secondly it assumes that closing stock as at 30 November 2011 was the same as the stock valuation produced as at 27 July 2012, which was some £18,000 higher than the stock taken over. We do not accept that the later stock valuation is any evidence of the stock on hand at 30 November 2011.

45. In the circumstances we do not consider that Dr Asif's mark up exercise casts any doubt on the estimate of sales made by Mrs Batley. If the stock level at 30 November 2011 remained the same as the stock taken over, and we have not seen any evidence to suggest a significant increase, the mark up based on sales estimated by Mrs Batley would be 15.6%. That is broadly in line with what Dr Asif suggested would be a reasonable mark up.

46. We are satisfied that Mrs Batley made a reasonable estimate of the daily takings of the business and there is no reason based on the evidence we have heard to reduce that estimate.

47. By way of summary we are satisfied that:

5 (1) The 3 Z readings on 1-3 June 2011 were the true takings of the business on those 3 days. There was no legitimate explanation for Mrs Jamil to record lower takings in the Notebook.

(2) Mrs Jamil was being untruthful when she told Mrs Batley that she did not obtain prints of her daily Z readings and that till rolls had not been used until 25
10 January 2012.

(3) The appellant took over the stock held by Sideflight Ltd as at 30 May 2011. There was no increase in stock levels in period 11/11 and therefore no justification for a repayment return.

(4) The takings recorded in the Notebook were strikingly consistent such that
15 it is unlikely they represent the true takings of the business.

(5) Mrs Batley made a reasonable estimate of the true sales of the business when making the assessment.

48. In the light of all the evidence we are satisfied that Mrs Jamil has failed to
20 declare the true takings for VAT purposes. She has done so deliberately with a view to evading VAT.

The Penalty Assessment

49. For the reasons given above we are satisfied that Mrs Jamil deliberately understated the output tax due in the appellant's 11/11 return. The PLR was £14,103.

50. We also consider that Mrs Jamil made arrangements to conceal the
25 understatement of output tax by producing the inaccurate Notebook to support the declared figures. She must also have disposed of the true Z reading prints which she took on a daily basis.

51. Where the behaviour giving rise to a penalty involves deliberate and concealed
30 action the maximum penalty is 100% of the potential lost revenue. The minimum penalty following a reduction for disclosure is 50% in the case of a prompted disclosure and 30% in the case of an unprompted disclosure.

52. In the present circumstances we are satisfied that any disclosure was prompted.
The appellant did not tell the respondents about the inaccuracy, nor did it give
35 reasonable help in quantifying the inaccuracy. It did allow the respondents access to records to ensure that the inaccuracy was fully corrected.

53. Having regard to the nature, timing and extent of the access to records we are satisfied that Mrs Batley's reduction of 15% of the difference between the maximum and minimum penalty is an appropriate reduction. That leads to a reduction from the

