



**TC04335**

**Appeal number: TC/2012/06580**

*VAT – Penalty – Prompted disclosure of over claimed input tax - Whether error “deliberate and concealed” or “careless” – Careless – Whether appropriate reduction for quality of disclosure – No – Appeal allowed – Penalty reduced accordingly*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SERVBET LTD**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JOHN BROOKS  
                         MRS BEVERLEY TANNER**

**Sitting in public at the Royal Courts of Justice, London, 9 and 10 February 2015**

**Sunil Khanna assisted by Sachin Khanna, both directors of Servbet Limited, for  
the Appellant**

**Jennifer Thelan, counsel, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

5 1. Servbet Limited (“Servbet”) appeals against a penalty of £14,773 imposed by HM Revenue and Customs (“HMRC”) under schedule 24 of the Finance Act 2007 for an error in its 10/11 VAT return in which input tax had been claimed in relation to an invoice in the sum of £118,188 (including VAT of £19,698) for work that was never undertaken.

10 2. Although it is accepted that the disclosure of this error was prompted and that a penalty is payable, HMRC contend that this should be calculated on the basis that the error was deliberate and concealed. However, Servbet says it was made carelessly and this should be reflected in the size of the penalty. The reduction for the quality of the disclosure is also disputed. Servbet contends that HMRC have not given it sufficient credit for “helping” HMRC in quantifying the inaccuracy or under-assessment and  
15 volunteering information relevant to the disclosure.

3. HMRC were represented by Miss Jennifer Thelan of counsel and Servbet by its director Mr Sunil Khanna who was assisted by his son Mr Sachin Khanna, also a director of Servbet.

### *Law*

20 4. In accordance with s 97 of the Finance Act 2007 provisions imposing penalties on taxpayers who make errors in certain documents, including VAT Returns, are contained in schedule 24 of that Act. All subsequent references to paragraphs, unless otherwise stated, are to the paragraphs of that schedule.

5. Paragraph 1 provides:

- 25 (1) A penalty is payable by a person (P) where–
- (a) P gives HMRC a document of a kind listed in the Table below [which includes a VAT Return] and
  - (b) Conditions 1 and 2 are satisfied.
- 30 (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to–
- (a) an understatement of a liability to tax,
  - (b) a false or inflated statement of a loss, or
  - (c) a false or inflated claim to repayment of tax.
- 35 (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P’s part.

6. Paragraph 3 provides:

- (1) for the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is–

(a) “careless” if the inaccuracy is due to failure by P to take reasonable care,

(b) “deliberate but not concealed” if the inaccuracy is deliberate on P’s part and P does not make arrangements to conceal it, and

5 (c) “deliberate and concealed” if the inaccuracy is deliberate on P’s part and P makes arrangements to conceal it (for example, by submitting false evidence in support of inaccurate figures.

10 (2) An inaccuracy in a document given by P to HMRC, which was neither careless or deliberate on P’s part when the document was given, is to be treated as careless if P–

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

7. The amount of a penalty, payable under paragraph 1, is set out in paragraph 4. Insofar as it applies to the present case under paragraph 4(2) provides that the penalty  
15 for careless action is 30% of the potential lost revenue; for deliberate but not concealed action, 70% of the potential lost revenue; and for deliberate and concealed action 100% of the potential lost revenue. The “potential lost revenue” is defined by paragraphs 5 – 8 but for present purposes is, as set out in paragraph 5(1):

20 ... the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

8. Paragraph 9 provides:

(1) A person discloses an inaccuracy, a supply of information or withholding of information, or a failure to disclose an under-assessment by–

25 (a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

30 (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure–

35 (a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and

(b) otherwise is “prompted”.

(3) In relation to disclosure “quality” includes timing, nature and extent.

40 9. Under paragraph 10(1) HMRC “must” reduce the standard percentage of a person who would otherwise be liable to a penalty as shown in column 1 of the table below, to one that reflects the quality of the disclosure.

10. However, paragraph 10(2) precludes a reduction in the standard percentage below the minimum shown for it.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%

5 11. On an appeal against a decision that a penalty is payable the Tribunal may, under paragraph 17(1), affirm or cancel HMRC’s decision. However if, as in the present case, the appeal is against the amount of a penalty paragraph 17(2) allows the Tribunal to substitute HMRC’s decision for another decision provided that it was within HMRC’s power to make the substituted decision.

10 12. It is well established that in penalty cases, such as the present (where the penalty is criminal for European Convention on Human Rights purposes), the burden of proof that the determination of the penalty was correct is on HMRC (see *King v Waldon* [2001] STC 822).

*Evidence*

15 13. We heard oral evidence from Mr Des English, an officer with HMRC’s Specialist Investigation Operational Team who was the allocated officer for Servbet. We also heard from Mr Sheik Ryath Sabiludddin, Mr Sachin Khanna and Mr Sunil Khanna on behalf of Servbet. All three were cross-examined by Miss Thelan.

20 14. In addition we were provided with a bundle and supplementary of documents which included procedural documents such as the Notice of Appeal, Statement of Case etc, Witness Statements which, in addition to the witnesses who gave oral evidence, included a statement from Mr Jagmohan Malhotra of Parrish Court Developments Limited (“Parrish”) and correspondence between the parties.

*Facts*

15. Servbet originally traded as a property management company and now manages a single commercial property at Gosforth Business Park in Newcastle upon Tyne. Its main trade, during the time with which this appeal is concerned, was in silver granules.

16. It has two offices, one in London and the other in Newcastle. The overall operation and basic bookkeeping of the company is carried out at the London office and is the responsibility of Mr Sachin Khanna and Mr Sabiluddin. Mr Sachin Khanna, sends information and paperwork to his father, Mr Sunil Khanna who is based at the office in Newcastle, from where he, Mr Sunil Khanna, completes and submits the company's VAT returns to HMRC.

17. Although Mr Sunil Khanna is responsible for Sachin Limited, a property company, Mr Sachin Khanna is solely responsible of the Servbet's commercial property as confirmed by a letter from Simon Naylor of Naylor's Chartered Surveyors which states that he has known Mr Sachin Khanna since 2005 when "he" purchased the commercial property. The letter continues:

All my communications regarding lettings, marketing and lease issues, since the purchase of the above stated property, have been with Mr Sachin Khanna. I have acted as sole agent and have let the property on 3 occasions whilst working for various firms.

18. Following an attempt by Servbet to verify the VAT number of a potential supplier as part of its due diligence procedures HMRC officers visited Servbet's London office on 27 August 2011. Servbet was informed during that visit that two of its previous suppliers of silver granules were VAT defaulters.

19. On 2 December 2011 Mr Sunil Khanna contacted the Business Payment Support Service of HMRC to request time to pay the VAT due as stated on Servbet's 10/11 VAT return. This was because of a large transaction that had taken place. However, agreement was not reached and no time to pay arrangement was made.

20. On 13 December 2011 HMRC officer, Mr English telephoned Mr Sunil Khanna to arrange a VAT inspection meeting. Although a date was fixed for the meeting on 29 December 2011 Mr Sunil Khanna telephoned HMRC and left a message for Mr English explaining that Servbet now traded from London, not Newcastle.

21. In response to a telephone call from Mr English on 4 January 2012, Mr Sunil Khanna contacted Mr English, by telephone on 5 January 2012, to request that the meeting take place at Servbet's London office. In a subsequent telephone conversation later that day, Mr Sunil Khanna again requested the meeting take place in London. He explained that his son, Mr Sachin Khanna, ran the business on a day-to-day basis and that all he, Mr Sunil Khanna, had done was complete the VAT returns for Servbet. However, Mr English advised that as the Newcastle office was where Servbet was registered for VAT purposes and Mr Sunil Khanna was the director who had completed the VAT returns the meeting should take place in Newcastle. It was therefore arranged for 12 January 2012.

22. On 12 January 2012 HMRC Officers Des English and Mark Chisman attended the Newcastle office of Servbet for the VAT inspection visit where they met with Mr Sunil Khanna. Although Mr Sunil Khanna said that he thought that he would only be required to hand over documents and records, which he did, he was also asked  
5 questions about Servbet's business. He was unable to answer any about the silver trading side of the business and telephoned the London office to speak to his son, Mr Sachin Khanna, but was told by Mr Sabiluddin that Mr Sachin Khanna was not available. However, Mr Sabiluddin was able to speak with Mr English over several telephone calls in relation to the silver granule trade and was able to provide Mr  
10 English with answers to his questions.

23. On reconciling the records provided to them with the VAT returns the officers came across two invoices relating to the commercial property.

24. The first invoice was issued by Servbet, on 15 August 2011, to Macaw Engineering in the sum of £205,200 (including VAT) for "the dilapidation and  
15 surrender of the lease" at the commercial property. Payment for this invoice was sent to Sachins Limited and paid into its bank account.

25. The second invoice (the "Parrish Invoice") was issued on 22 September 2011 to Servbet by Parrish in the sum of £118,188 including VAT of £19,698 which had been claimed as input tax in Servbet's 10/11 VAT return. This invoice had been sent by  
20 Parrish, a Care Home development company run by Mr Malhotra, to Mr Sunil Khanna's home address in Newcastle rather than the business address of Servbet. Mr Sunil Khanna knew Mr Malhotra as he had received a substantial loan from Mrs Malhotra's mother in 2009 which was due for repayment in 2012.

26. The Parrish Invoice (with emphasis as stated on it) stated as follows:

25 **Work carried out as follows at the agreed [net] price of £98,490**  
Supply and fit New carpets  
Repaired Air conditioning, central heating system and electrical faults  
Repaired leaking roof and Replaced Guttering  
Lift Service and repair

30 27. When asked about the two invoices Mr Sunil Khanna did not revert to the London office, as he had with regard questions about the silver granule trade, but answered Mr English's questions. He explained that this was because he knew his son was not available and that Mr Sabiluddin would not be able to answer questions about the commercial property. Although neither Mr English's nor Mr Chisman's  
35 handwritten notes of the visit state that they were told by Mr Sunil Khanna that the Parrish Invoice had been paid by Servbet, Mr English was adamant that this was his recollection and that is why he had recorded that the Parrish Invoice had been paid in the undated visit report. However, Mr Sunil Khanna was equally adamant that he would not have told Mr English that the Parrish Invoice had been paid and said that he  
40 could not remember having being asked if it had been.

28. However, Mr Sunil Khanna did accept that he had told Mr English that Parrish had carried out the work stated on their invoice as he had presumed the work had been undertaken by Parrish because its description on the Parrish Invoice was written in the past tense.

5 29. Although the Parrish Invoice appears, in both form and content, to be an invoice Mr Sachin Khanna explained, in an email sent by him to Mr English on 14 February 2012 in response to a letter dated 19 January 2012 from Mr English, that it was, in fact, a quotation for work to be carried out at the commercial property following the  
10 surrender of the lease which should have been sent to the London office and not to Mr Sunil Khanna in Newcastle. Mr Sachin Khanna said that he had requested the quotation from Mr Malhotra, whose business had been recommended by a cousin, although he had not consulted his father before contacting Parrish despite knowing of Mr Sunil Khanna's business relationship with Mr Malhotra.

15 30. In his witness statement Mr Malhotra confirms that the Parrish invoice was issued "due to a clerical error on [the] part of my staff", something he also told Mr English and Mr Chisman when they visited Parrish on 8 March 2012. Mr Malhotra said that he had personally dictated the invoice to one of the staff who written "work carried out" instead of "work **to be** carried out".

20 31. Following further correspondence between the parties, Servbet was notified by a letter from HMRC, dated of 2 April 2012, that an assessment of tax in the sum of £19,698 would be issued to correct the input tax disallowed which had been claimed in relation to the Parrish invoice. This amount has now been paid by Servbet.

25 32. The letter also warned that Servbet may also be liable to a penalty because of the inaccuracy in the 10/11 VAT return and enclosed a "Penalty Explanation Schedule 1". This set out the three stage process of how HMRC calculate a penalty under schedule 24 to the Finance Act 2007.

30 33. The first stage is to determine the penalty range which will depend on HMRC's view of the behaviour which led to the inaccuracy (eg was it careless or deliberate) and whether the disclosure was prompted or unprompted. The second stage concerns the calculation of the reduction for the quality of the disclosure and the third stage the calculation of the penalty percentage. This requires a calculation of the difference between the maximum and minimum penalty percentages that could apply, for that figure to be multiplied by the total reduction in stage two which is then subtracted (in  
35 stage three) from the maximum penalty percentage to arrive at the penalty percentage to be applied.

40 34. In the Schedule sent to Servbet it was explained that HMRC considered the inaccuracy to be "deliberate and concealed" and its disclosure "prompted". Therefore, the penalty range was 50% to 100%. Servbet was given a reduction for the quality of its disclosure (ie the help given to HMRC to calculate the inaccuracy and quality of Servbet's assistance in accessing the relevant records) of 50%. The difference between the minimum (50%) and maximum (100%) penalty percentages was 50% which, when multiplied by the total reduction (50%), equalled 25%. When this was

subtracted from the maximum total percentage (100%) the penalty percentage to be applied was 75%. Therefore, although the full sum of the penalty was £19,698 the penalty would be reduced to 75% of that amount, ie £14,773.

5 35. Mr Sunil Khanna wrote to Mr English on 6 April 2012 requesting reconsideration of the decision to impose a penalty. On 19 April 2012 Mr English replied that after consideration of the 6 April 2012 letter with his line manager he was:

10 ... obliged to notify you that the penalty charge will stand as per the reasons given in the Penalty Explanation Schedule 1 issued on 2 April 2012.

15 While I can accept that invoices can be processed in error, in our meeting of 12 January 2012 you stated that the repair work had been carried out on the business unit and that payment for the work had been made and therefore maintained you had a right to deduct input tax in respect of the invoice.

20 As a Director of the company and the person responsible for the completion of the VAT returns it would not be reasonable to believe that you would not know that the work had not been carried out, that payment had not been made and therefore I cannot agree that it was a genuine mistake.

The penalty notice is therefore enclosed.

36. The decision to issue the penalty was upheld following a review and Servbet was notified of this by a letter from HMRC dated 24 May 2012.

37. On 22 June 2012 Servbet appealed to the Tribunal.

#### 25 *Discussion and Conclusion*

38. For HMRC, Miss Thelan submits that the penalty was properly calculated as “deliberate and concealed.” She referred us to the following guidance applicable to penalties under schedule 24 to the Finance Act 2007 from HMRC’s Compliance Handbook Manual CH1160:

30 A deliberate and concealed inaccuracy is the most serious level of evasion. It occurs where a document containing a deliberate inaccuracy is given to HMRC and active steps have been taken to hide the inaccuracy either before or after the document has been sent to us.

35 As well as deliberately recording an inaccuracy the person has to take active steps to conceal the inaccuracy.

Examples of acts of concealment in the Manual include the “creating false invoices to support the inaccuracies in the return.”

40 39. Miss Thelan submits that Servbet “falls squarely” within this category, a VAT return with a deliberate inaccuracy had been given to HMRC which was concealed by the production of a false invoice. She argues that Mr Sunil Khanna misrepresented the



true situation by producing the Parrish Invoice and continued to rely on it during the meeting with the HMRC officers, Mr English and Mr Chisman, on 12 January 2012 as he did not raise any doubt that the money was owed as a result of the Parrish Invoice, the work had been done and payment made.

5 40. Mr Sunil Khanna contends that as he was not responsible for the day-to-day management of Servbet he did not, and would not have, said that the Parrish Invoice had been paid at the 12 January 2012 meeting.

41. Having heard and seen Mr Sunil Khanna and given that neither of the officers in their notes, written at the meeting, refer to the Parrish Invoice being paid – something  
10 only mentioned in the subsequent undated visit report written by Mr English – we prefer Mr Sunil Khanna’s recollection of what was said and find that he did not confirm payment of the Parrish Invoice at the 12 January 2012 meeting.

42. We also accept that, despite being a director, Mr Sunil Khanna had limited  
15 knowledge of the day-to-day operation of Servbet which was essentially the responsibility of Mr Sachin Khanna. Although Miss Thelan contends that as Servbet is a family business information would be readily and easily shared between the directors we do not consider this necessarily follows, especially where, as in the present case one director is in London and the other in Newcastle.

43. It is clear from the evidence that despite its appearance the Parrish Invoice is not  
20 an invoice at all. It is said to be a quotation for work to be carried out as opposed to work that had been undertaken. However, the explanation for this, that it was the result of a clerical error by Parrish, is in our view plainly not credible. However, there is no direct evidence to suggest that Mr Sunil Khanna (or Mr Sachin Khanna) played any part in its creation. As such we do not consider the inaccuracy in Servbet’s 10/11  
25 VAT return to have been “concealed” by Mr Sunil Khanna or Servbet.

44. Turning to whether the inaccuracy in the VAT return was “deliberate”, although we accept that the Parrish Invoice is not an invoice or, as Miss Thelan submits a “false invoice”, we do not consider that it has been established that Mr Sunil Khanna knew this to be the case either when he included it in Servbet’s 10/11 VAT return or  
30 at the meeting in January 2012. However, we do agree with Miss Thelan that the Parrish Invoice is significant, both in terms of quantum and in that it relates to property not silver trading. Also, we consider the fact it was sent to Mr Sunil Khanna’s home address by Parrish, and not provided to him by Mr Sachin Khanna, should have struck him as such.

35 45. In our view Mr Sunil Khanna should have made further enquiries on receiving the Parrish Invoice, especially with Mr Sachin Khanna, before including it in Servbet’s 10/11 VAT return as he was clearly aware of the company’s financial circumstances given that he had contacted HMRC on 2 December 2011 to request time to pay the amount due as a result of Servbet’s 10/11 VAT return. His failure to  
40 do so does not, in our judgment, make the inaccuracy in the return arising as a result of the reliance on the Parrish Invoice, deliberate. However, we consider that the

inaccuracy in the 10/11 VAT return would not have arisen had Mr Sunil Khanna taken reasonable care, such as making further enquiries.

5 46. Therefore, having regard to all the circumstances of the case, we find the inclusion of the Parrish Invoice in Servbet's 10/11 VAT return to have been careless rather than deliberate and concealed.

47. We therefore, in accordance with paragraph 17 (of schedule 24 to the Finance Act 2007), substitute HMRC's decision that the appropriate penalty should be calculated on the basis that the inaccuracy was deliberate and concealed with our decision that it was careless.

10 48. Under paragraph 4(2) the maximum penalty that can be imposed is 30% of the potential lost revenue. In this case the potential lost revenue is £19,698 and therefore the maximum penalty that can be imposed is £5,909. However, this penalty may be reduced as a result of the quality of the disclosure of the inaccuracy.

15 49. The guidance contained in HMRC's Compliance Handbook Manual at CH82430 states:

To calculate the reduction for disclosure you need to consider the three elements of disclosure,

- telling us about it,
- giving us reasonable help,
- 20 • allowing us access to records

**As a guide you may weight the elements of disclosure as follows.**

Element of disclosure	Percentage
Telling	30%
Helping	40%
25 Giving Access	30%
Total	100%

50. In the present case HMRC has allowed Servbet 10% for "Telling", 10% for "Helping" and the maximum 30% for "Giving Access". However, Mr Sunil Khanna contends that it should be given full credit or 40% for "Helping".

30 51. Under the HMRC guidance (at CH82450) "Helping" includes:

- (1) Giving reasonable help in quantifying the inaccuracy;
- (2) Positive assistance as opposed to passive acceptance or obstruction;
- (3) Actively engaging in the work to accurately quantify the inaccuracies; and
- (4) Volunteering any information relevant to the disclosure.

35 The guidance continues:

The timing is relevant to the period over which the help is given. As well as there not being any avoidable delays there should be an active approach, providing information as early as possible.

5 The nature covers whether the help is useful and saves you time and effort in quantifying the inaccuracy. For the person to just appear helpful but not actually producing anything of use is not what is required. It includes help in bringing the compliance checks to a speedy and accurate conclusion.

10 The extent of the help covers the whole period of the compliance check from start to finish and **all aspects** of the compliance check relating to that inaccuracy, as and when required. If help is only received for part of the time or in certain aspects you would not give the full reduction.

15 52. Miss Thelan submits that Servbet is not entitled to any further reduction than the 50% already given as it did not adopt an active approach and delayed its response to queries raised by HMRC eg despite seeking information in his letter of 19 January 2012 regarding the payment to Parrish Mr English did not receive an answer until 14 February 2012 when Mr Sachin Khanna explained that the Parrish Invoice was not actually an invoice but a quotation.

20 53. Mr Sunil Khanna also relies on HMRC's guidance, in particular in relation to determining the quality of disclosure penalties for VAT and Excise wrongdoing at CH94900. This is in similar terms to the guidance, at CH82431 which states:

25 There will be cases where the circumstances are such that little in the way of telling, helping and access is needed to establish the reasons for the person giving an inaccurate document and the amount of any additional tax due.

**You should allow the full reduction for those elements of the disclosure that are not required.**

He submits that this applies to the present case and a full reduction for "helping" should be given.

30 54. Having considered the circumstances we agree with Mr Sunil Khanna that there was not any significant delay by Servbet in explaining why an inaccurate return had been made and the amount of any additional VAT due was self-evident from the Parrish Invoice itself. As such we consider that Servbet should be given the full credit of 40% for "helping" and the reduction for the quality of the disclosure should be  
35 increased to 80% (10% for "Telling", 40% for "Helping" and 30% for "Giving Access").

40 55. Using the basis of calculation contained in HMRC's Penalty Explanation Schedule 1 (see paragraphs 33 and 34, above) it is first necessary to establish the penalty range. Given we have found the inaccuracy in this case to be careless and it is accepted that the discovery was prompted the penalty range is from 15% to 30% of the potential lost revenue

56. We have found that the total reduction for the quality of disclosure should be 80%. Therefore, in order to calculate the penalty percentage we take the difference between the minimum (15%) and maximum (30%) penalty percentages ie 15% and multiply this by 80% (the total reduction for disclosure) which equals 12%. This is deducted from the maximum penalty percentage of 30%. Deducting this from the maximum, 30% so that Servbet the penalty percentage to be applied is 18% leaving a penalty of £3,545 (£19,698 x 18%).

57. Therefore, for the above reasons, we allow the appeal and confirm the penalty imposed on Servbet in the sum of £3,545

10 *Right to apply for Permission to Appeal*

58. 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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**JOHN BROOKS  
TRIBUNAL JUDGE**

**RELEASE DATE: 19 March 2015**

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