[2016] UKFTT 0113 (TC)

TC04900

Appeal number: TC/2015/03394

Value Added Tax – Penalty for failure to register – whether "reasonable excuse" – No - whether further mitigation appropriate – No – Sections 49, 67, 70 and 71 VATA 1994 – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERTO PIA **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MEMBER: JOHN B ADRAIN, FCA, M Leg Sci

Sitting in public at Eagle Building, 215 Bothwell Street, Glasgow on Monday 1 February 2016

Appellant – appearing in person

Respondents – Mrs E McIntyre, Officer of HMRC

DECISION

Introduction

1. This is an appeal against the imposition of a penalty for the appellant's failure to register for VAT over an extended period from 6 April 2009, when he took over a business as a going concern, until 21 January 2013. The business is a food takeaway, called "Rock n Roll". Originally a penalty of £10,900 was imposed on the basis of the estimated turnover during the relevant period, and that at a rate of 15%. On further consideration this was reduced to £2,773.91 to take account essentially of not all supplies having been standard-rated, and then mitigated by 25% to the present figure of £2,080.

2. Mr Pia's (the appellant) explanation was that he had instructed and relied on his accountant, Mr McFadyen, to effect the registration on his behalf. Essentially this argument was presented as a *reasonable excuse* for the failure.

The Law

3. We were referred to the relevant provisions of the Value Added Tax Act 1994, in particular the basic charging provisions contained in Sections 3 and 4, Section 49 anent transfers of going concerns, the penalty provisions contained in Section 67, mitigation of penalties provisions in Section 70, and the interpretation of *reasonable excuse* in Section 71. Additionally reference was made to the decisions in *The Clean Car Company Limited* (LON/90/1381X), *Neal v C&E* [1988] STC 131, the conjoined appeals in *Salevon Limited and Harris* [1989] STC 907 and *R M Joinery & Double Glazing* (MAN/88/533).

The Evidence

4. We explained to the appellant, who appeared on his own behalf, that the burden of proof rested on him. However, Mrs McIntyre, HMRC's Presenting Officer, agreed to introduce the appeal, which had the advantage of setting out HMRC's case before the appellant had to address us.

5. Initially, Mrs McIntyre reviewed the correspondence produced at tab 3 of the Bundle. In January 2013 HMRC had written to the appellant enquiring whether he was registered for VAT, whether he should be, and what the level of his trading was. (pages 1-6). Mr Pia had phoned in reply (p 7) explaining that he had instructed his accountant to register his business for VAT; that he had been trading for over three years; and that he had set aside funds to make payment. Mr McFadyen, the appellant's accountant, contacted HMRC. He submitted an "undated" mandate from his client. HMRC then advised Mr Pia that all his business books and records should be produced. HMRC determined that Mr Pia should have been registered from 6 April 2009 and imposed a penalty of £10,900.14 (p 19). By letter dated 27 August 2013 (p 54-55) HMRC advised Mr Pia that they had registered him for VAT with effect from 6 April 2009 and that a 15% penalty was due in view of the lengthy delay. A civil penalty of £10,900 was imposed. Reference was made to

Mr Pia's typewritten replies, received in October 2013 and later in December 2014. He complained there of his accountant's failures.

6. The calculation of the penalty was revised. By letter dated 13 March 2015 (p 70-71) Mr Pia was advised of an assessment to VAT of £22,666 for the period of the default. A belated notification penalty at 15% of £2,773.91 resulted. Mitigation of 25% reduced this to £2,080.44. This was statutorily reviewed and upheld, as narrated in HMRC's letter of 29 April 2015 (p 74-77). The Review rejected the argument as to *reasonable excuse* because of the appellant's accountant's failures under reference to the specific exclusion set out in Section 71(1)(b) VATA.

7. Mrs McIntyre noted that by letter received on 14 January 2015 (p 78) Mr Pia acknowledged again that he was aware of the obligation on him to register the business for VAT and submitted his Notice of Appeal. She confirmed that the tax assessed of £22,666 had been paid.

8. Mr Pia then gave evidence. Candidly he admitted that he had known from the outset that he should be registered for VAT. He had seen three years' accounts before purchasing the business. The annual turnover was in the region of £180,000. He had given these accounts to Mr McFadyen when he instructed him to attend to all tax matters including VAT, PAYE, self-assessment, and the preparation of wage-slips. While Mr Pia's first contact with HMRC about VAT matters was in January 2013, his attention had been drawn to its implications earlier, about two or three months after he took over the business, by other parties such as trade contacts. Also, his father, who had been in business himself, had reminded him of VAT's implications. Unfortunately Mr Pia had dealt with his accountant by "word of mouth" and had no written record of their dealings. (We note, however, p 8-10 of tab 3). As he was conscious of the liability to pay VAT, he had made appropriate bank deposits to meet this.

9. Mr Pia insisted that he had no reason to disbelieve his accountant's assurances that all his tax matters were in order. While he was aware of having paid PAYE tax liabilities and personal tax, he was conscious that he had not made any payments in respect of VAT. He had become stressed and was on anti-depressants.

10. In response to the Tribunal the appellant advised that he understood that Mr McFadyen had worked at the Cumbernauld offices of HMRC. He (the appellant) accepted that he was all along aware of the liability to account for VAT.

11. In a brief cross-examination Mr Pia conceded that he should have contacted HMRC after receiving their letter about VAT, and confirmed that he had made savings specifically to meet this liability. He explained that he had been uncertain about what he should do.

Submissions

12. We heard Mrs McIntyre's submission on behalf of HMRC first, and then heard from Mr Pia in reply.

13. Mrs McIntyre noted the duty on a trader to register for VAT if his turnover exceeds the threshold (Section 3 VATA). There was a charge to VAT on supplies made (Section 4). Mr Pia had taken over the business as a going concern. It had previously been registered for VAT and its annual turnover was in the region of £180,000, well in excess of the threshold level. At the relevant date the threshold was £67,000 on a "rolling year" basis. Accordingly liability to register arose at the outset in April 2009 (Section 49). Over 18 months had elapsed before this was done and, accordingly, a penalty of 15% applied (Section 67(4)).

14. Mrs McIntyre noted that Section 70 permitted mitigation of any penalty. Here, 25% had been allowed. Section 71 was relevant. The availability of a *reasonable excuse* argument could avoid a penalty. *Reasonable excuse* was not defined as such, but there were specific exclusions, for instance the fault of a third party (Section 71(1)(b)), which bore to be relevant in the present case and, Mrs McIntyre continued, precluded any defence as to a *reasonable excuse*. This, she argued, denoted some contingency which was unexpected and unplanned. Such a contingency was not a factor in the present case.

15. Mrs McIntyre then referred us to four authorities. Firstly, she referred us to *The Clean Car Co Ltd*. There *reasonable excuse* was described as involving an objective test. In the present case was it reasonable for a taxpayer with Mr Pia's experience and knowledge to delay for about four years in registration? He admitted in correspondence that he was aware of the VAT liability and had anticipated this by setting savings aside. Mrs McIntyre argued that given his awareness of a liability to account for VAT that Mr Pia should surely have contacted HMRC earlier.

16. She then referred to the decision in *Neal*. There a distinction was drawn between what knowledge of general VAT principles may be imputed to the taxpayer. A distinction was drawn between the fundamental aspects and more esoteric points. There the Court had concluded that ignorance of fundamental legal principles of VAT was not an excuse. The need to register, in Mrs McIntyre's view, was such a basic aspect.

17. Next, Mrs McIntyre referred us to the decision in *Harris & Anor* (conjoined with *Salevon Ltd*), the circumstances of which, she considered, were very similar to those of Mr Pia in the present appeal. Reliance there had been placed by the taxpayers on their accountant. They had been assured that matters of registration and liability had been attended to. However, the statutory exclusion as to reliance on a third party excluded the defence of *reasonable excuse* however unfair that might seem.

18. Finally, Mrs McIntyre referred to *RM Joinery & Double Glazing*. There again it was held that failures by the taxpayers' accountant did not excuse a delay in registration. The partners in that taxpayer firm knew that they should register for VAT, had relied on their accountants to do this, but had delayed in confirming the effecting of registration. A *reasonable excuse* was not present.

19. In conclusion Mrs McIntyre submitted that about four years had elapsed before the registration was made and in the circumstances Mr Pia did not have a *reasonable excuse*. In any event mitigation of 25% had been allowed, which she considered was appropriate. She invited us to uphold the penalty as reduced and dismiss the appeal.

20. In a brief reply to the Tribunal Mr Pia emphasised that he was not an experienced businessman. He had not appreciated that he could be penalised for failure to register for VAT. He considered that that was distinct from a failure to pay VAT which had been assessed. He insisted that it was his accountant who was at fault and who should bear all liability. He submitted that he was entitled to rely on his accountant and trust him. Accordingly the appeal should be allowed.

Decision

21. The material facts here are not in dispute. The appellant took over the business as a going concern. It had been registered for VAT and its annual turnover was about £180,000. The appellant recognised that he was under a duty to register and had anticipated VAT liabilities by putting savings aside to meet this. He was aware of not having paid VAT, yet did appreciate that he had paid his other taxes.

22. Crucially, the appellant argues that he relied on Mr McFadyen, his accountant, and accepted his assurances that matters were in order. Does this amount to a *reasonable excuse* in terms of Section 71? In our view it does not. Reliance on a third party is specifically excluded in sub-section (1)(b). Had some unforeseeable event, such as injury, prevented Mr McFadyen's performance of his instructions, that might have been sufficient, but nothing exceptional appears to have occurred here. Also, the default is over an extended period. Mr Pia has candidly admitted his awareness of having to account for VAT and his being reminded of this by his father. In these circumstances we do not consider that a *reasonable excuse* or other defence to the imposition of a penalty is available.

23. It seems that Mr Pia was fully cooperative with HMRC once prompted by them. The VAT due has been paid and, it seems, a savings provision had been made for this. Mitigation of 25% has been granted, and we consider that this eminently reasonable. We appreciate that Mr Pia was not properly supported by his accountant but in the circumstances he does not have a remedy for this in the context of his VAT liability.

24. Accordingly we uphold the penalty of £2,080 and dismiss the appeal.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.

KENNETH MURE
TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2016