[2016] UKFTT 0369 (TC)

TC05123

Appeal number: TC/2014/04974

VAT – appeal against a penalty for deliberate inaccuracy – para 19 schedule 24 of the Finance Act 2007 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ANTHONY CLYNES **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER PHILIP JOLLY

Sitting in public at Manchester on 23 June 2015

The Appellant representing himself

Mr S Charles, as instructed by the General Counsel and Solicitor to HM Revenue and Customs, as Counsel for the Respondents ("HMRC")

DECISION

1. The appellant appealed against a decision of HMRC to assess the appellant to a penalty for £67,436.36 under para 19 of schedule 24 of the Finance Act 2007 ("**schedule 24**"). HMRC sought to impose the penalty on the basis that 247 Security Services (UK) Ltd (the "**Company**") had under declared VAT as a result of a deliberate inaccuracy which was attributable to the appellant as a director of the Company.

2. At the hearing HMRC noted that, whilst in their view the percentage of the penalty was correctly calculated, there had been an arithmetical error. We accept that there had been an error and the penalty in dispute is therefore £65,660.39.

Facts and evidence

3. We have sets out our findings of fact based on the bundle of documents presented to the tribunal and the evidence given at the hearing by the appellant and Miss Kitchen, an officer of HMRC. Miss Kitchen works as a VAT Investigator and is currently a member of the Specialist Investigations team based at Salford.

Company - history

4. The appellant was the sole shareholder of the Company from the date of its incorporation on 21 June August 2010 and was a director of the Company from 10 August 2010. The appellant's brothers, Mr Mark Clynes and Mr David Clynes, were appointed as directors of the Company on 1 February 2012 and 20 September 2013 respectively. The Company carried on a security business.

5. The Company was set up following the failure of a previous security business in which the appellant was involved as a director of the corporate owner, Nightwatch Limited. This company had gone into liquidation with substantial debts including VAT, PAYE and corporation tax due to HMRC. The appellant said that Nightwatch Limited was liquidated on the advice of solicitors due to an insurance claim. He was advised there was only a 50% chance of winning the claim. He asserted that otherwise the business had been operating quite successfully. The Company had taken over the business of Nightwatch Limited. We comment on this evidence in the discussion.

VAT registration application

6. The Company submitted an application for VAT registration on 3 September 2010. The registration was approved by HMRC on 28 October 2010 with effect from 1 August 2010. In the VAT registration application the appellant stated that the Company had an estimated turnover of £80,000 in the next 12 months. The application form was filled in and signed by the appellant.

7. On 10 January 2011 the Company submitted an online agent authorisation form to HMRC authorising Financial Accountancy Services ("**FAC**") to act on its behalf. FAC is an accountancy business run by the appellant as sole proprietor. The appellant

has an accounting qualification as a Member of the Association of Accounting Technicians.

FRS application

8. In an application dated 7 February 2011 (and received by HMRC on 10 February 2011) the Company applied to be registered under the flat rate VAT scheme (the "**FRS**") with effect from 1 August 2010. The application was hand written and was signed by the appellant.

9. The FRS application form includes the following:

(1) A statement at the top: "Use this form if you wish to apply to join the Flat Rate Scheme. For more information on the Flat Rate Scheme please refer to Notice 733: Flat Rate Scheme for small businesses which is available on our website".

(2) A box asking for details of the main business activity and stating "Use one of the trade sectors from the table accessed in section 4.3 of Notice 733 Flat Rate Scheme for small businesses." The appellant inserted "security".

(3) Beneath this is a box asking for the flat rate percentage that will be used for the trade sector. The appellant inserted 10.5% indicating this was applicable to 4 January 2011 and 12% indicating this was from then onwards.

(4) A statement that a business may apply to be registered from an earlier date and asking for any reasons for such request. The appellant asked for the effective date to be 1 August 2010 and stated this was because the Company had been waiting to receive the VAT registration and then work commitments had delayed the progress of the application.

(5) A declaration that "The information given on this form is true and complete. I am eligible for the Flat Rate Scheme. I will notify HMRC of any changes in circumstances which affect my eligibility for the scheme". The declaration was signed by the appellant.

10. On 8 February 2011 the appellant called HMRC to discuss the FRS and he was advised to read VAT Notice 733 including section 5 on how to apply to be registered under the FRS, section 9 regarding the cash based turnover method and section 7.5 regarding completing VAT returns when using the FRS.

11. On 15 February 2011 HMRC wrote to the Company confirming it was authorised to use the FRS with effect from 1 August 2010. The letter included a statement: "Remember to notify us at the above address if your business changes so that it falls within a different flat rate sector or you are no longer eligible for the flat rate scheme". The letter also referred the Company to VAT Notice 733 for information on the FRS.

12. VAT Notice 733 (as in place at the relevant time) contains information on the conditions for a business to be eligible to use the FRS which states the following at 3.1 and 3.5:

"**3.1 Who can join?**

The Flat Rate Scheme is for small businesses. You can apply to use the scheme if there are reasonable grounds for believing that your taxable turnover (excluding VAT) in the next year will be £150,000 or less…..

3.5 What if my turnover rises once I have joined the scheme?

You may stay in the scheme provided your total income (including VAT) for the year just gone has not risen above £230,000. Make this check on each anniversary of your business joining the Flat Rate Scheme. You must leave the scheme if your turnover increases so that there are grounds for believing that the total value of your income will rise above £230,000 in the next 30 days alone."

VAT returns and VAT assessments

13. The Company's turnover in fact exceeded £150,000 in the VAT accounting period ending on 31 December 2010 and exceeded £500,000 in the first 12 months of the Company's trading (see 15 and 16). The Company was not, therefore, eligible to be registered for the FRS with effect from 1 August 2010 when the application was made by the appellant on 7 February 2011. The Company continued to be ineligible for the FRS but accounted for VAT on the basis that it was within the scheme in the VAT periods from 12/10 to 06/13.

14. In addition the Company failed to account for any VAT in the period 09/11 and also failed to declare the full amount of cash invoiced by the business on its supplies as collected by a factoring agent appointed to collect monies on its behalf (as further explained below).

15. The appellant submitted VAT returns on behalf of the Company on this incorrect basis as follows:

(1) For the 12/10 period the return was submitted after the due date of 7 February 2011 on 15 July 2011 stating a turnover of £152,040.

(2) For the 03/11 period the return was submitted before the due date on 5 May 2011 with a stated turnover of £108,283.

(3) For the 06/11 period the return was submitted after the due date of 7 August 2011 on 8 August 2011 stating a turnover of £101,812

(4) For the period 09/11 no return was submitted.

(5) For the period 12/11 the return was submitted before the due date on 27 January 2012 stating a turnover of £98,092.

(6) The returns for the periods 03/12, 06/12, 09/12, 12/12, 03/13 and 06/13 show turnover of £121,702, £73,845, £67,597, £87,209, £55,735 and £77,368 respectively.

(7) No returns were submitted for the periods 09/13, 12/13 and 03/14.

16. On 21 January 2014, after a period of investigation by HMRC (see 19 to 30), Miss Kitchen issued assessments for under declared VAT for periods 12/10 to 09/13 in the sum of £101,406. As Miss Kitchen was not provided with records and information she had requested from the Company, she prepared the assessments on the basis of her best judgement as follows:

(1) The declared "outputs" were up lifted by 4% to take into account the factoring percentage charge not included in the VAT returns.

(2) An allowance was made for "inputs" of 5% based upon the normal inputs expected of a small office in the trade sector having no trade vehicles and using shared office space.

(3) The revised "outputs" and "inputs" were multiplied by the current rate of VAT. Tax loss amounts were calculated taking into account the amounts already shown on the VAT returns.

(4) The missing VAT for the period ending 09/11 was calculated based on the assessments for the periods ending 06/11 and 12/11 by taking an average of the total (adjusted) VAT due for those periods.

(5) An assessment was issued for the period ending 09/13 as no returns had been issued as well as additional assessments based upon tax loss figures for the period ending 06/13.

17. On 6 February 2014 Miss Kitchen sent a letter to the Company setting out the details of the penalty HMRC intended to charge of £67,436.36. On 21 March 2014 Miss Kitchen issued the Company with the penalty assessment. On 15 May 2014 Miss Kitchen issued the appellant with a notice of liability to pay the full amount of the penalty under para 19 of schedule 24 on the basis it was attributable to him as a director of the Company.

HMRC visits of 27 June 2011 and 18 July 2011

18. The assessments were made and penalty notices were issued after a period of investigation by HMRC.

19. On 27 June 2011 the Company was visited by two officers of HMRC on an unannounced visit to its premises at Bank House Studios, Warwick St, Prestwich, Manchester, M25 3HN. The note prepared by HMRC states that the reason for the visit was "Outstanding VAT and VAT debt. Missing 12/10 VAT return and to quantify current tax year".

20. The note of the meeting prepared by HMRC records that the officers spoke to the appellant about the above matters at some length the main points recorded in the note being as follows.

(1) The officers asked the appellant how long the Company had been trading from the Bank House Studios premises and why HMRC had not been informed of the change from the previous address at Unit 12, Boston Court, Salford,

Manchester. The appellant said that the Company had been trading from these premises since February or March that year and that he thought HMRC had been informed. The appellant gave the reason for moving that he had had tried to buy other previous premises but had been unable to. The note records that "this does not make a lot of sense as the current property is rented from a "Mrs Bowers". Rent is £525 per month".

(2) The officers noted that the Company was using a factoring arrangement and that the expected turnover for the year was much higher than the estimate of £80,000 used in the VAT registration application:

> "The Company is currently using Bibby's as factoring agent. They receive 80% drawdown. The expected turnover in the current year £500k. This is considerably higher than the £80k on the VAT 1. Although AC thought he had put £800k on the VAT 1".

21. Following a further visit from these officers on 18 July 2011 HMRC's Debt Management Office took control of the debt collection which resulted in a County Court claim against the appellant on 11 October 2013 for debts totalling £93,120.87.

HMRC letter of 19 September 2011 removing the Company from the FRS

22. On 19 September 2011 HMRC sent a letter to the Company notifying it that it could not use the FRS due to it having turnover in excess of the permitted limits. The letter was sent to the Company at Unit 12, Boston House. The appellant gave evidence that the Company did not receive this as it had by then moved premises to the Bank House Studios site. That the change in address had taken place before 19 September 2011 is evident from the fact that HMRC officers visited the appellant at the new Bank House Studios premises on 27 June 2011.

Miss Kitchen's review and enquiries

23. On 15 October 2013 Miss Kitchen undertook a review of the Company's VAT affairs. She had a number of concerns which lead her to investigate further. Checks on HMRC's systems showed no input tax recovery being claimed from the first period of 12/10 onwards as the Company had been using the FRS from that time. However, the VAT returns showed that the FRS turnover limit had been exceeded some time before HMRC had notified the Company it was no longer eligible to use the FRS. On review of the Company's corporation tax returns for the periods from 1 October 2010 to 30 June 2011 and 1 July 2011 to 30 June 2012, Miss Kitchen found that a higher turnover was shown than had been used in the VAT returns for those periods.

24. On 15 October 2013 Miss Kitchen wrote to the Company setting out her findings and asking for further information including confirmation that the VAT return submitted for the period 12/11 was for a period of 6 months. She asked for any comments by 22 November 2013 and noted that otherwise she would proceed to make assessments on the Company. She noted that if an assessment was made penalties and interest may be due. The Company did not respond to this letter.

Meeting with appellant on 12 December 2013

25. On 28 November 2013 Miss Kitchen spoke to Mr Mark Clynes on the phone and arranged a meeting with him and the appellant on 12 December 2013 at the Bank House Studios premises. Miss Kitchen attended the premises at that time on that date with her colleague, Mrs Margaret Pearson. Only the appellant was present on behalf of the Company.

26. Miss Kitchen gave the following account of the meeting, as supported by written notes of the meeting prepared at the time. Only matters relevant to this appeal are noted:

(1) The appellant confirmed that he was the sole proprietor of FAC. He explained that the letter "MAAT" at the bottom of FAC's letters are an accounting qualification as a Member of the Association of Accounting Technicians and also that he holds a Master of Arts in Business and Finance. He confirmed that through FAC he does work for clients other than the Company.

(2) The appellant confirmed he had received HMRC's letter of 13 October 2013 and Miss Kitchen in any case handed over another copy of this. Miss Kitchen also showed the appellant a copy of the FRS application and asked why the application was not submitted at the same time as the VAT registration application. The appellant said that he did not know about the FRS when he had sent in the VAT registration. He said he had later come across this on the internet and had since registered a number of his clients under the scheme. The note states “Has other clients also RTI and FRS” and earlier as regards the FRS “unaware of limits only percentages. JK said should have been aware before reg other clients”.

(3) Miss Kitchen pointed out that the Company's turnover for the period 12/10 of £152,040 was in excess of the FRS registration threshold of £150,000. She noted that the appellant as a qualified accountant must have been aware of this limit and that he had signed the form which required a declaration that the Company was eligible.

(4) She also pointed out that a letter from HMRC dated 19 September 2011 stated that the Company was no longer eligible for the FRS as the value of its supplies in the last 12 months had exceeded the maximum FRS limit of £230,000. The appellant said he had not received that letter. He suggested he had removed premises around that time and the letter had been sent to the old address and not forwarded on. He could not remember the exact date of the move and whether he had informed HMRC of the change of address.

(5) Miss Kitchen informed the appellant that it was the Company's responsibility as stated on the FRS application form to monitor its turnover and inform HMRC if the threshold had been reached. She said that as the appellant had submitted the forms he must have been aware the threshold had been reached. The appellant denied being aware of the threshold. Miss Kitchen said that as he was holding himself out as an accountant it was reasonable for

HMRC to assume that he should have known. She said that if the appellant had read up about FRS, as he said he had done and as he was advised to do by HMRC on 8 February 2011, before submitting the application and subsequently enrolling other clients in the scheme he should have known of the thresholds. The appellant did not comment.

(6) Miss Kitchen asked the appellant whether the VAT return for the period ending 12/11 was for 6 or 3 months. She noted that as the Company had not informed HMRC of a change of address it had been listed as a missing trader which prevented VAT returns being issued. The appellant said he did not have the information to know if the return was for 3 or 6 months. Miss Kitchen said the output figures used indicated they were for three months (looking by analogy at other periods) and this suggested under declared VAT for that period.

(7) The appellant said he used his income and expenditure from his bank statements to compute his VAT figures as he was using the cash accounting scheme. Miss Kitchen asked what figures were used for outputs as all invoices were factored through Bibby Factoring. The appellant said he used monies the Company had drawn down from Bibby. Mrs Kitchen explained that this was not correct. The appellant should use the monies actually collected by Bibby. Miss Kitchen asked who was responsible for invoices which were not collected. The appellant said the Company but could not provide any written document confirming this.

(8) Miss Kitchen asked for copies of all invoices for the period 06/11 to 12/11, VAT accounts and documents used to fill in the VAT returns for all periods from 12/10 to 06/13, receipts for the 12/11 period, a list of employees including their NIC numbers, a list of contracts, bank statements for the last 3 months, the invoice factoring agreement and details of vehicles, other assets and debts of the Company. The appellant agreed to provide as much information as he could by 19 December 2013 and further information including the PAYE information by the week starting 6 January 2014.

(9) Miss Kitchen provided the appellant with copies of Factsheet FS2 covering information notices and further copies of FS9 Human Rights and FS7 for penalties for inaccuracies in returns. The appellant confirmed he had read this when previously sent and he would cooperate fully. Miss Kitchen advised that a penalty would be due.

27. On 7 January 2014 Miss Kitchen spoke to the appellant on the phone regarding the requested information. The appellant said he had instructed Begbies Traynor to deal with the liquidation of the Company due to the debts owed to HMRC. He said he had been advised to deal with the last two VAT returns "properly". Miss Kitchen asked what the appellant meant by "properly" and he replied that they would be completed using invoices rather than cash or FRS. He also said the inputs of the business would be very small as the main expense was the wages bill. Miss Kitchen said she required the previously requested information by Friday 10 January and that she would collect the documents at 13.30pm on that date from the Company's offices.

28. Miss Kitchen gave evidence that she attended the Company's offices with her colleague, Mrs Pearson, at 13.30 pm on 10 January 2014 and there was no response. Miss Kitchen rang the doorbell and phoned the appellant on his mobile number. The appellant did not provide the requested VAT information at any time and that is why Miss Kitchen had to make a best estimate assessment of the additional VAT due. Miss Kitchen confirmed that, had she received any information from the appellant supporting the VAT position declared in the VAT returns, she would have taken it into account in the VAT assessment.

29. Following this Miss Kitchen proceeded to issue the VAT assessment and penalty notices as set out above.

30. Miss Kitchen also noted that she attended a meeting of creditors at Begbies Traynor in Manchester on 28 January 2014 at which the appellant was present. He told her then that Mr Mark Clynes had become the sole director of another company Allsecure 247 Ltd. This company was to commence trading at the previous premises of the Company and had bought the goodwill and staff of the Company.

Appellant's evidence

31. The appellant accepts that he filled in the VAT registration and FRS applications and that he dealt with the submission of the Company's VAT returns in the relevant periods. He also accepts that the Company was not eligible to use the FRS and that it had incorrectly included only amounts drawn down from the factoring agent in its VAT returns rather than the full amount collected by the agent. He asserts, however, that he just made mistakes which were not intentional and he has fully co-operated with HMRC once the errors were pointed out to him.

32. The appellant was questioned as to why he had used the figure of £80,000 in the VAT registration application as the estimate of the Company's turnover for the first 12 months of trading. It was noted that the VAT returns for the Company submitted by the appellant showed turnover in the first 12 months of over £450,000. As HMRC has subsequently assessed the Company to an additional £101,332 of VAT, in fact the turnover in the first 12 months of trading was in excess of £550,000. It was also pointed out that Nightwatch Limited, whose business the Company had effectively taken over, had a substantial annual turnover of over £80,000 before it ceased trading.

33. The appellant said that he had stated the expected turnover as £80,000 as, when filling in VAT registration applications, he always put an amount just over the threshold on the form to ensure registration was obtained. He accepted that the estimated figure is important but he said that it is difficult to know what the future holds when the form is filled in. As regards Nightwatch Limited, the appellant said he had hoped to retain its clients but there was no guarantee that the Company would retain all of the clients at the time when he made the VAT registration application. The appellant accepted that he was aware when he made the VAT registration application that the turnover was likely to be more than £80,000 but he said he had not realised that the figure used on the form could affect other matters such as the FRS.

34. The appellant was also asked why he had said to HMRC officers during their visit on 27 June 2011 that he thought he had used a figure of £800,000 for the estimated turnover. The appellant asserted he had not said this; he would not have said this as he always used £80,000 or thereabouts as he had explained. We accept that the officers' account of what the appellant said at this meeting, as shown in the written notes of the meeting, is likely to be correct (see the discussion).

35. The appellant disputes some aspects of Miss Kitchen's record of her meeting with him on 13 December 2013.

36. The appellant states that he has only a Batchelor degree and not a Masters degree, as Miss Kitchen had recorded. We accept his evidence in this respect. We can see there could be scope for error in the record especially as the appellant's accounting qualification refers to the term "master". The reference to a Masters degree could simply be a mistake.

37. The appellant said that, whilst the FRS had come up in the course of his activities in his FAC business, he had really only had one restaurant business interested in it. In that case the client had brought up the FRS but it was clear that the FRS was not beneficial to the restaurant business due to the potential level of input tax recovery of the business. The appellant looked at the applicable flat rate percentage under the FRS for this client but had not investigated the FRS requirements further. He did not recall saying to Miss Kitchen that he had registered a number of clients for the FRS. Most of the appellant's other clients were restaurant businesses or sub-contractors for whom the FRS would not be suitable. He does have clients who use the real time system for PAYE purposes and he said that perhaps that is why the confusion had arisen. We accept Miss Kitchen's evidence that the appellant referred to a number of clients he had advised on the FRS as it is supported by her written contemporaneous note (see 26(2)). We have commented further on the appellant's evidence in this respect in the discussion.

38. The appellant said that he genuinely did not know of the threshold requirements for the FRS and he had not considered them at any time. He said that he may have not have been on top of the VAT position as he should have been – because it was his own business he had paid less attention than he would for a client of his FAC business. He generally dealt with his and the Company's tax affairs last (after those of the clients of his FAC business). He had assumed that the Company qualified for the FRS because it was a small company for Companies House purposes. He said he is not very good with technology and would not trawl through a document such as VAT Notice 33. He had probably just googled the FRS which had thrown up the information on the relevant percentages of VAT to use under the FRS but not the threshold amounts for eligibility. We have commented on this in the discussion.

39. As noted above, the appellant also gave evidence that the Company did not receive the letter from HMRC of 19 September 2011 notifying the Company that it was no longer eligible to use the FRS. We accept his evidence that the move in premises occurred before 19 September 2011. It is clear that this was the case as the officers of HMRC visited the Company at its new Bank House premises in June 2011.

We also accept that it was therefore unlikely that the Company received the letter of 19 September 2011 and that the appellant saw this for the first time when produced by Miss Kitchen at the meeting of 13 December 2013.

40. The appellant stated that he could not remember if HMRC was specifically informed of the change of address as regards VAT but he could not see why that would have been necessary as a number of HMRC officers had visited him at the Company's new offices. On the basis of Miss Kitchen's evidence we accept that HMRC was not notified of the change of address for VAT purposes.

41. The appellant asserted that Miss Kitchen had introduced herself as a bailiff at the meeting. He stated that she said she did not want to wind up the Company and she made no mention of the FRS. Miss Kitchen clarified that she had previously worked as a bailiff but this was some years before and she had not announced herself as such on this visit. We accept her evidence on this.

42. It was put to the appellant that he must have known that the FRS would not apply on an on-going basis. He said that at the time he had a lot of problems and he was not thinking in the long term. The appellant was struggling to cope with work matters during the three years in question due mostly to difficult family circumstances and illness. He wife was not speaking to him at that time and he had to take care of their three children including dropping them off at school 4 days a week and picking them up one night a week. A family dispute in the business meant there had to be disciplinary meetings for four members of staff taking up time. Overall in this period the appellant came into work to do what had to be done as a matter of strict necessity. We comment on this in the discussion.

43. The appellant said that he had written up the books in their correct format as HMRC had requested but on 10 January 2014, the day scheduled for Miss Kitchen to pick up the information, she did not turn up and she did not telephone. The appellant believes Miss Kitchen obtained what she wanted from the liquidators of the Company.

44. As regards the visit of 10 January 2014, we accept Miss Kitchen's evidence that she and her colleague attended the Company's premises as she described. The appellant was clearly aware of the date and time of the visit and did not attend or answer when HMRC called. There is no evidence that the appellant has provided the requested information. There was a great deal of initial confusion at the hearing as the appellant believed the information had been provided, via the liquidators of the Company. It seems the appellant is involved in other enquiries with HMRC which contributed to the confusion. However, it became clear from Miss Kitchen's evidence that the information she requested to support the VAT returns was not provided at any time. Whether other information required by HMRC for other purposes was provided is not relevant.

45. As regards the new company, Allsecure 247 Ltd, the appellant said that in fact this company was initially set up by a member of staff who had overheard conversations regarding the Company's difficulties. The staff member had then

approached the appellant and his brother when he was unable to get a bank account opened for the new company. The appellant's brother had then stepped in and took control of the new company with the motivation being to protect the staff of the Company.

Calculation of penalty

46. As noted on 6 February 2014 Miss Kitchen sent a letter to the Company setting out the details of the penalty HMRC intended to charge of £67,436.36. The letter explained that HMRC considered the Company's behaviour as regards the under declared VAT was deliberate.

> "Director Mr Anthony Clynes is an accountant with other clients. At the meeting on 12 December 2013 he stated that he has registered other clients for the FRS. Mr Clynes said he had read the FRS notices 733 along with notice 731 cash accounting. He stated he was not aware of the turnover limits yet signed the application for the FRS declaring he was eligible and would notify HMRC of circumstances that would affect eligibility. The application was received on 07/02/11 after the first period return end date of 31/12/2010. I put it to Mr Clynes that the turnover had already been exceeded when the application had been signed. Mr Clynes did not comment. HMRC issued a removal notice on 19/09/11 which Mr Clynes stated he did not receive due to moving premises."

47. The letter states that for the purposes of calculating the penalty HMRC regarded the Company as having made a prompted disclosure because the appellant did not tell HMRC about the inaccuracy before he had reason to believe HMRC had discovered it or were about to discover it. Therefore the penalty was in the range of 35% to 70% of the potential lost VAT revenue. HMRC gave reductions in the penalty as follows:

(1) 10% for "telling" on the basis that the appellant admitted at the meeting on 12 December 2013 that the VAT returns submitted were inaccurate stating he was unaware of the FRS monetary limits.

(2) 5% for "helping" as the appellant attended the meeting of 12 December 2013 and answered all questions asked by HMRC but failed to produce the business records requested to enable quantification of the inaccuracy.

(3) 0% for "giving" as there was no response to reasonable requests for information made on 15 October 2013 and HMRC were denied access to records on 12 December 2013 on the grounds that Mr Clynes could not use his computer. Further time was given to 6 January 2014 but there was no response. HMRC visited as agreed on 10 January 2014 but could not gain access to the premises.

(4) This gave a total reduction of 15% which applying the formula set out in the legislation gives a total penalty of 64.75% of the under declared VAT assessed by HMRC.

(5) HMRC noted that they did not consider there are any special circumstances which would lead to any further reduction and did not consider that suspension was appropriate.

48. The appellant disputed that he had refused to give HMRC access to his VAT records on 12 December 2013 (see 47(3)) on the grounds that he could not use his computer. There had been an issue regarding the computer and the use of the real time information system but this was not related to the VAT records. There is no evidence in the record of the meeting of 12 December 2013 that HMRC were obstructed or refused access to any available records and we accept the appellant's evidence in this respect. The appellant also disputed that he had failed to provide all requested VAT records and information. As set out above, we accept Miss Kitchen's clear evidence that this was not provided. The appellant appeared to be confused as other information may have been passed on to HMRC but not the requested information relevant to the VAT position of the Company.

49. Miss Kitchen gave evidence that when deciding to attribute the penalty to the appellant she had considered a number of factors essentially as set out in HMRC's submissions.

Appeal

50. The appellant wrote to HMRC on 4 June 2014 appealing against the penalty as follows:

> "It is my belief that both parties are at fault for the oversight regarding the percentage scheme.
>
> Having applied for the percentage scheme and been accepted and completed the quarterly returns, having had visits from you and other VAT officers and the matter never raised until our final meeting at which point it was realised that the Company could not possibly pay the debts that would arise by back dating the vat returns from incorporation, the decision to liquidate was made.
>
> Please note that the first sight of the letter stating we should not be using the percentage scheme was during our final meeting which had been posted to a previous address and I feel that had we not complied with this, why it had never been raised prior to the final meeting.
>
> I apologise for any errors on my part however can confirm that it was a genuine error and not one of deception, as you are aware I was not receiving monies form the business the vast majority of the time and had the welfare of the staff at heart and therefore it is evident that there was no personal gain".

51. HMRC treated the above letter as a request for a review by an officer not previously involved in the case. HMRC upheld the penalty on review informing the appellant of this in a letter of 1 August 2014. In this letter HMRC upheld Miss

Kitchen's view that the under declared VAT resulted from the Company's deliberate action and that the appellant's actions caused the Company's deliberate inaccuracy. In their view 100% of the penalty should be allocated to the appellant as he was the director of the Company throughout the period, he managed the accounts and caused the deliberate inaccuracy.

52. HMRC noted in their letter of 1 August 2014 that Mr David Clynes and Mr Mark Clynes were also directors of the Company but that HMRC did not consider any part of the penalty was attributable to them. Mr David Clynes was appointed on 28 September 2013 which was after the period of inaccuracy. Mr Mark Clynes was appointed as director on 2 February 2012 to deal with security. Miss Kitchen confirmed in her witness statement that she had taken these factors into account when deciding to attribute the penalty solely to the appellant.

Law

FRS

53. The FRS is provided for under regulations 55-55V, 57A and 69A of the Value Added Tax Regulations 1995.

54. At the relevant time, under regulation 55L a taxable person is eligible to be authorised to account for VAT in accordance with the FRS at any time if there are reasonable grounds for believing that the value of taxable supplies to be made by him in the period of one year then beginning will not exceed £150,000.

55. At the relevant time, under regulation 55M a flat-rate trader ceases to be eligible to be authorised to account for VAT in accordance with the scheme where at any anniversary of his start date the total value of his income in the period of one year then ending is more than £230,000 or there are reasonable grounds to believe that the total value of his income in the period of 30 days then beginning will exceed £230,000.

56. VAT Notice 733 sets out the £150,000 turnover limit in paras 2.5 and 3 and gives full information on the operation of the FRS (see 12).

Penalty provisions of schedule 24

57. The penalty provisions of schedule 24 work as follows (all references below and in 58 to paragraphs are to paragraphs of schedule 24):

> (1) A penalty is payable by a person (P) who gives HMRC a VAT return and (a) the return contains an inaccuracy which amounts to or leads to an understatement of a liability to tax and (b) the inaccuracy was careless within the meaning of para 3 or deliberate on P's part (para 1).
>
> (2) The level of the penalty depends on whether the inaccuracy was careless or deliberate and, if deliberate, if it was concealed or not. Whether an accuracy is concealed or not depends on whether or not P makes arrangements to conceal

it (for example by submitting false evidence in support of an inaccurate figure) (para 3).

(3) Where applicable the maximum penalty is 30% of the potential lost revenue for careless action, 70% of the potential lost revenue for deliberate but not concealed action and 100% of the potential lost revenue for deliberate and concealed action (para 4).

(4) The potential lost revenue in respect of an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment (para 5).

(5) There is a reduction in the penalty where a person discloses an inaccuracy by (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the inaccuracy or (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. The level of reduction depends in part on whether the disclosure is "unprompted" or "prompted". The disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered it or are about to discover the inaccuracy and otherwise is prompted (para 9).

(6) Where a person has made a disclosure HMRC must reduce the percentage of penalty which would otherwise apply to a percentage that reflects the quality of the disclosure provided that it cannot be reduced below the specified minimum. Where the penalty is deliberate the minimum is specified as 20% where the disclosure is unprompted and 35% where it is prompted (para 10).

(7) HMRC may also reduce a penalty if they think it right because of "special circumstances" (under para 11).

(8) HMRC may suspend all or part of a careless inaccuracy penalty (under para 14).

(9) Where a penalty due under the above provisions is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer. An officer for this purpose includes a director (para 19).

58. Where a person is assessed to a penalty under para 19 he may appeal against HMRC's decision that a penalty is payable and/or against the amount of the penalty (para 15). On an appeal to the tribunal against the penalty the tribunal may affirm or cancel HMRC's decision. On an appeal as regards the amount of the penalty the tribunal may affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had power to make.

HMRC's submissions

59. HMRC have, to the requisite standard, proof that in the VAT periods 12/10 to 09/13 the appellant acted on behalf of the Company deliberately in that he:

(1) incorrectly registered the Company for the FRS and misused that scheme,

(2) failed to submit VAT returns for the Company, and

(3) failed to account for VAT on the full amount of supplies by leaving out of account sums retained by the factoring agent

with the result that the Company did not pay the correct amount of VAT due from supplies made in that period in the sum of £101,406.

60. The Company has not challenged the VAT assessment for under declared VAT of £101,406 for the relevant periods. It is to be taken as a fact, therefore, that the Company under declared its VAT liability in the relevant periods. The VAT returns for these periods therefore contained inaccuracies which resulted from deliberate action of the Company acting through the appellant.

61. Under para 19 of schedule 24 the penalty is attributable to the appellant as:

(1) He was the sole director at the time when the VAT registration and FRS applications were submitted who was solely responsible for the financial affairs of the Company and its tax and VAT accounting.

(2) It is clear from the evidence that the appellant did in fact deal with the VAT registration and FRS application and the on-going VAT affairs of the Company and submitted the returns with the relevant inaccuracies.

62. The relevant facts evidencing that the Company, acting through the appellant, acted deliberately are:

(1) The appellant is a qualified accountant of whom a higher degree of knowledge and competence can be expected as regards dealing with VAT matters including the FRS. As a MAAT qualified accountant the appellant is subject to code of professional ethics and principles of honesty and integrity.

(2) As a qualified accountant the appellant operated an accounting business, FAC, and had clients other than the Company.

(3) The appellant signed the declaration on the FRS application which states that the information is true and complete and that the Company is eligible for FRS. The declaration also states that the signatory will notify HMRC of any change in circumstances which affect eligibility for the scheme.

(4) The threshold for the FRS had been reached before the FRS application was submitted so that the Company was ineligible to use the FRS from the outset.

(5) Miss Kitchen has given evidence that the appellant said at a meeting with her that he had enrolled clients of FAC on the FRS and there is evidence in her contemporaneous note of the meeting which supports this. Mr Clynes has given evidence that he only had one customer who was interested in the FRS and that did not go ahead. However, whether the appellant had one or several clients who were potential users of the FRS is irrelevant. As a qualified accountant he could be expected to take steps to ensure he understood the requirements of the FRS. He cannot use as an excuse that he paid less attention to his own business than he would to a wholly independent client of FAC.

(6) The figure of a predicted turnover of £80,000 shown in the VAT registration form was wildly inaccurate. HMRC's records show that the appellant stated in the meeting of 27 June 2011 that he thought he had put £800,000 per annum on the VAT registration application as the expected turnover of the business. The appellant claims that he did not say that as he always used a figure of £80,000 as that was sufficient for registration. It is highly unlikely that an HMRC officer would make an incorrect reference of this kind. However, even on the appellant's version of events, he was still not making any attempt to give an accurate estimate of the turnover of the business which is contrary to his obligations as a director of the Company filling in the return and his professional obligations as an accountant.

(7) The appellant says that he assumed that because the Company was classed as a small business for Companies House purposes this was sufficient to qualify the business for the FRS. However, the appellant telephoned HMRC on 8 March 2011 and was informed by HMRC of the guidance in Notice 733 and was referred to parts of that guidance of particular relevance. Given this, his role as a director and his accounting qualification, it is highly unlikely that he was not aware of the FRS requirements. The appellant, as a qualified professional accountant cannot rely on naivety and ignorance in this case.

(8) The appellant did not submit Company records as requested by HMRC such as bank statements, invoices and contracts.

(9) The appellant has been involved as director in a previous business, Nightwatch Limited, which went into liquidation owing substantial amounts to creditors including HMRC. The Company is, in HMRC's view, a "phoenix company" which, as the appellant has confirmed, essentially took over the business of Nightwatch Limited. When the Company became insolvent, its business was transferred to another company owned by the appellant's brother. There is a clear pattern here of the appellant running or being involved in businesses without proper regard to its VAT and tax obligations.

63. On the basis of the above, HMRC submit that the appellant knew of the eligibility requirements for the FRS and its operation. Having that knowledge the appellant applied for the Company's use of the FRS knowing that it was not eligible and then misused the FRS knowing the Company had exceeded the threshold in order to file incorrect VAT returns.

64. HMRC also submit that at the relevant times the appellant knew VAT returns should be filed for all periods and on time but failed to do so and also knew that all of the Company's taxable supplies should be accounted for.

65. The penalty is correctly calculated as 64.75% of the potential lost revenue under schedule 24. HMRC considers that they have given sufficient reductions in the penalty as set out above. As regards the reduction for "giving", HMRC noted that the appellant asserts he had prepared the requested information but that HMRC did not arrive at the scheduled time to collect it. Miss Kitchen's evidence is that she and her colleague did arrive at the scheduled time as set out above. In any event the appellant could have sent the information at any time subsequently and he has not done so.

Appellant's submission

66. The appellant does not dispute that he made errors in the VAT accounting for the Company. However, whilst he may have been careless his actions were not deliberate. The appellant was not aware of the requirements of the FRS as regard eligibility and otherwise he had simply made mistakes as set out above in his evidence. In this regard, the appellant disputed HMRC's evidence as to what he had said on previous occasions as also set out in his evidence.

67. From what the appellant had read on the FRS his understanding was that it would benefit the Company but that was wrong. Once this and the other errors had been brought to his attention by HMRC he had cooperated fully with HMRC.

68. The appellant cannot understand why it has taken HMRC so long to bring the error to the appellant's attention. As noted, the letter about removal from the FRS of 19 September 2011 was sent to the wrong address and was never received. The appellant cannot remember if he informed HMRC of the change of address. However, in any event HMRC should have informed the appellant of the error with the FRS on one of their visits to the Company's premises. HMRC were accepting the Company's VAT returns on the basis that the FRS applied and there was no need for the appellant to assume they were not being filed correctly.

69. In addition the appellant was struggling to cope with work matters during the three years in question as set out above. Overall in this period the appellant came into work to do what had to be done.

70. The appellant disputes that adverse inferences can be drawn from his involvement in Nightwatch Limited and that his brother's company had in effect taken over the business of the Company when it failed. He asserts that there were valid reasons and motivations for winding up the relevant companies and the transfer of the business as set out above.

71. On Miss Kitchen's first visit to the Company's premises she introduced herself as a bailiff. She said she did not want to wind up the Company and she made no mention of the FRS.

72. On the amount of the penalty and the reductions given, the appellant considered that these were not sufficient as he thought he had cooperated fully once he was made aware of his errors:

(1) He asserts that he did prepare the requested VAT information for Miss Kitchen but she did not turn up to collect it.

(2) He believes that Miss Kitchen received the requested information from the liquidators of the Company.

(3) He had not denied HMRC access to his computer records as they had said in their letter setting out how the penalty was calculated.

73. For the reasons set out above, we do not accept the appellant's assertions in 72(1) and (2) but we do accept the position stated in 72(3).

Discussion

74. The issue is whether HMRC has correctly assessed the appellant to a penalty under para 19 of schedule 24 and, if so, whether the amount of the penalty is correct.

75. As set out above, under para 19, HMRC can issue a notice to an officer of a company, including a director, stating that the officer is liable for the specified portion of a penalty which (a) is payable by that company for a deliberate inaccuracy and (b) is attributable to the officer. In this case HMRC have notified the appellant that he is liable to 100% of the penalty assessed on the Company.

Was there a deliberate inaccuracy by the Company?

76. The first question, therefore, is whether the penalty is payable by the Company for a deliberate inaccuracy. Under para 1 of schedule 24 a deliberate inaccuracy penalty is due from the Company if (a) a VAT return submitted by the Company in the relevant period contains an inaccuracy which amounts to or leads to an understatement of a liability to VAT and (b) the inaccuracy was deliberate on the Company's part.

Was there an inaccuracy resulting in an understatement of VAT?

77. It is clear that the Company submitted incorrect and incomplete VAT returns in the period from 12/10 to 09/13 on the basis that (a) the Company had incorrectly accounted for VAT in the returns submitted using the FRS when it was not in fact eligible to do so (b) the Company had not submitted a VAT return for the three month period ending on 09/11 and (c) the Company had not correctly included all taxable receipts in the VAT returns by excluding amounts retained by the factoring agent. These errors lead to an overall under declaration of VAT in the periods of £101,496 as assessed by HMRC on a "best estimate" basis.

Were these inaccuracies deliberate on the Company's part?

78. The penalty regime in schedule 24 was introduced by the Finance Act 2007 essentially to provide a more uniform penalty system across a range of taxes. The concepts used in schedule 24 including those of "carelessness" and "deliberate" actions replaced those of misdeclaration, dishonest conduct and reasonable excuse which had applied for VAT and fraudulent and negligent conduct for direct taxes.

79. We note we were referred by HMRC to two tribunal cases which considered the meaning of dishonesty for the purposes of the previous dishonest evasion penalty which was in s 61 of the Value Added Tax Act 1994 (now repealed). The approach to take to the interpretation of "dishonesty" for these purposes is well established in the cases.

80. There is some suggestion in materials published at the time that the penalty provisions were revised in 2007, that the use of the new terms was not intended to make any material change to the tests which applied previously. In the explanatory notes published with the draft legislation in 2007, it was stated that the new terms of deliberate and careless behaviour were to "provide a uniform language for behaviours, using more accessible language across the taxes covered." However, our view is that, even if it is permissible to look to such materials for guidance as to the intent of Parliament in interpreting legislation, the statements in the materials are not sufficient to conclude that the new terms are simply interchangeable with the previous ones. Parliament has chosen to use different words and it is those words which must be interpreted. The starting point must be that the term "deliberate inaccuracy" has to be interpreted according to the usual principles of statutory interpretation. In our view, therefore, cases on the meaning of "dishonesty" are not of material assistance in interpreting the provisions of schedule 24 as regards "deliberate" conduct.

81. On that basis we must seek to interpret the relevant provisions in schedule 24 according to their natural meaning looking at the context of their use in the overall scheme of schedule 24. We take the dictionary definition of the term "deliberate" as a starting point which states (in the Oxford English dictionary) that deliberate (as regards action) means:

> "Well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done of set purpose; studied; not hasty or rash."

82. On its normal meaning, therefore, the use of the term indicates that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way.

83. In a sense, in the context we are concerned with, simply filling in a VAT return with particular information can be held to be a deliberate act (in the sense of being undertaken with intent or a set purpose of filling in the form) whether or not the person knew or had any consciousness as regards the accuracy of the information. Our view is that such an interpretation cannot be correct on a purposive interpretation looking at the natural wording and the scheme and context of the overall provisions. The term is used in the context of an "inaccuracy" which was "deliberate" on the relevant person's part. The fact that the deliberate conduct is tied to the inaccuracy, indicates that for this penalty to apply the person must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy. In the case of a Company we take the relevant awareness or knowledge to be that of the relevant officers, such as the appellant acting as director, acting on its behalf.

84. The alternative interpretation would set the bar for a deliberate penalty at a lower level than that for a careless penalty. There is a careless penalty only where the inaccuracy arises as a result of the failure by the person to take reasonable care. That penalty is set at a maximum of 30% of the potential lost revenue. A deliberate penalty is set at a maximum of 70% or 100% of the potential lost revenue depending on whether the person has made arrangements to conceal the inaccuracy or not. The

potential doubling or tripling of the penalty for such deliberate inaccuracies indicates that a deliberate penalty is intended to apply only where there is more a serious failing by the taxpayer than a failure to take reasonable care.

85. In our view, therefore, there would clearly be a deliberate inaccuracy on the part of the Company as regards the relevant VAT returns, to the extent that the appellant, as the officer acting on its behalf in this respect, actually knew that the FRS did not apply, that the return for 12/11 failed to account for the 3 month period ending on 09/11 and that amounts retained by the factoring agent should be included in the returns.

86. However, we consider that the term "deliberate inaccuracy on a person's part" can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy.

Evidence and conclusions

87. The appellant has an accounting qualification and runs his own accounting business. The appellant was wholly responsible for dealing with the Company's VAT affairs through his accounting business and as a director of the Company. He accepts that he dealt with the VAT registration and FRS applications and the Company's VAT returns. We do not know a great deal about the FAC business but the appellant refers to having a number of clients. The extent to which the appellant had advised on the FRS in the course of that business is disputed as set out below.

88. The appellant had experience of acting as director of a similar business, having acted as a director of Nightwatch Limited, which went into liquidation owing substantial amount of VAT and other tax to HMRC. Following the collapse of the Company, the appellant's brother became involved in a new company which has taken over the Company's business. The extent of the appellant's own involvement in this business is not clear. HMRC submit there is a pattern here of the appellant failing to pay due regard to VAT and other tax matters of the businesses he is involved in which contributes to the conclusion that there was a deliberate inaccuracy in this case. The appellant says that there should be no such inference. He says that there were valid reasons for the liquidation of Nightwatch Limited and when the Company failed the motivation to continue the business in a new company was a concern to continue the business and to keep the staff employed.

89. Clearly the appellant has substantial experience of acting as a director in this type of business and he has not done so successfully. We can see that the repeat failure of two businesses in which the appellant was involved, Nightwatch Limited

and the Company, leaving substantial amounts of VAT and other taxes owing to HMRC, indicates in a general way that the appellant may have operated the businesses with inadequate regard to tax obligations. Otherwise there is not sufficient detail available of how the relevant businesses were/are run to inform in any meaningful way our current assessment as to whether there has been a deliberate inaccuracy as regards the VAT matters in question here.

90. We have found that the Company was not eligible to use the FRS at any time. The Company's turnover was already over the threshold of £150,000 when the appellant submitted the FRS application on behalf of the Company. The appellant states he was simply not aware of the FRS limit.

91. In the VAT registration application the appellant estimated a figure of only £80,000 as the expected turnover of the Company in its first 12 months of trading which proved to be wholly inaccurate. In fact the turnover in that period was in excess of £500,000 (or £400,000 on the appellant's own figures).

92. The appellant claims he always uses £80,000 on VAT registration applications on the basis it is sufficient to ensure registration (being slightly over the threshold). When questioned the appellant accepted that he knew when he filled in the VAT application that it was likely that the £80,000 estimate was not accurate but said that it was not possible to judge exactly what would happen in future and he had not thought including this underestimate would affect anything else such as the FRS. He provided no satisfactory explanation as to why he had not looked to the turnover of Nightwatch Limited, whose business the Company had in effect taken over, as the basis for the estimate.

93. HMRC's notes record that when questioned about the estimated figure by HMRC officers in their visit of 27 June 2011, the appellant said that he thought he had put £800,000 as the estimated turnover. The appellant says he would not have said that as he always just uses £80,000 as explained. It seems to us that the written note, prepared by the HMRC officers at the time, is likely to be correct. That the appellant has given conflicting accounts as to why he included £80,000 as the estimated turnover weakens the credibility of his evidence.

94. In any event, on the appellant's own account it is entirely clear that he knew the figure of £80,000 was not likely to be accurate and he made no attempt to work out an accurate estimate on any reasonable basis. He simply ignored the turnover level of the previous business and included what he regarded as sufficient to obtain the registration.

95. As regards the appellant's actual knowledge of the requirements of the FRS, the appellant says that he had just one independent client of his FAC business who he advised regarding the FRS. He asserts the registration for that client did not go ahead as it was clear that the FRS was not beneficial to the client due to the expected input tax position.

96. HMRC have put forward evidence, backed up by a contemporaneous note, that the appellant said to Miss Kitchen at his meeting with her on 13 December 2013 that he had used the FRS for a number of clients. We accept Miss Kitchen's evidence as supported by her contemporaneous note. However, this does not take us much further in assessing what the appellant knew about the FRS, in the absence of any further information on the precise nature of the appellant's accounting business and involvement with advising on the FRS. Again, however, this discrepancy in the appellant's account of his involvement with the FRS weakens the credibility of his evidence.

97. The appellant says that he simply did not read VAT Notice 733 on the FRS and probably just googled for information on the FRS which gave him information on the percentages of VAT applicable under the FRS but not the eligibility requirements. He says he assumed that the Company was eligible because it was a small company for Companies House purposes. He admits he did not pay full attention. He says that as it was his own business he was less diligent in dealing with the VAT affairs than he would be for a paying customer of his FAC business.

98. Looking at all the available facts and evidence, we find the appellant's assertions that he did not know about the eligibility requirements of the FRS implausible.

(1) The appellant is a person with an accounting qualification who runs his own accounting business who clearly has experience of dealing with VAT matters both as regards his own business and for clients of the accounting business. It is highly unlikely that such a person would not be aware that there are likely to be conditions to be met for a special accounting scheme, such as the FRS, to be used.

(2) Moreover the existence of such conditions was drawn to the appellant's attention in that he filled in and signed the FRS application form which contained a declaration that the applicant satisfies eligibility requirements and that the applicant will give HMRC notice of changes in circumstances, the appellant phoned HMRC for information and was referred to VAT Notice 733, the letter approving the application also referred to VAT Notice 733 and expressly stated that changes in circumstances affecting eligibility had to be notified to HMRC. VAT Notice 733 contains clear information on the eligibility conditions such that even a brief look at the index would show their existence. The eligibility conditions are in section 3 near the beginning of the Notice.

(3) On his own evidence, the appellant had some knowledge of the FRS. He investigated the FRS for the Company and one other client to the extent that he was aware of the different percentages for use by different businesses (and he picked the appropriate percentage for the Company), he was aware of the requirements for the business to be "small" and that it was not suitable for businesses in an input tax recovery position.

(4) It seems unlikely that the appellant could have found this quite detailed information on the FRS whilst failing to notice the eligibility requirements as

regards the £150,000 and £230,000 requirement. The explanation offered by the appellant is that did a google search that threw up the percentages information. If that were the case, the google search would in all likelihood throw up VAT Notice 733 which the appellant would at least have had to scroll through to find the relevant section.

(5) The appellant also says he thought that the requirement for the business to be small was satisfied where the business was categorised as small for Companies House purposes. That the appellant, as a person with accounting qualifications and VAT experience, would simply assume that a set of rules applying for a wholly different purpose determined the eligibility position for the FRS is implausible.

99. Overall, looking at all of the above circumstances, we consider that it is more likely than not that the appellant knew from the outset that the threshold for the use of the scheme was £150,000 and that the turnover of the business was in excess of that amount such that the Company was not eligible to use the FRS. On that basis the Company, acting through the appellant, deliberately completed the VAT returns incorrectly as regards the FRS.

100. In any event, we consider that, in these particular circumstances, there was nevertheless a deliberate inaccuracy on the part of the Company even if the appellant did not actually know of the FRS eligibility requirements. Our view is that on all the evidence set out above it is clear that at the very least the appellant cannot have failed to have been aware there were eligibility requirements as highlighted to him on the FRS application and in the letter approving the application from HMRC. We also consider that given he was alerted to VAT Notice 733 on a number of occasions, he must have known that he could check those requirements simply by consulting that document. As noted, the assertion that he assumed the requirement was simply for the Company to be "small" and that was satisfied by it being categorised as such for Companies House purposes is not credible.

101. The appellant admits there were failings in the way he dealt with the VAT affairs of the Company. He says he knows he should have taken more care but as it was his own business he did not pay as much attention as he would if acting for an independent client. The appellant interprets these failings as meaning that he was careless in the sense of failing to take reasonable care and the resulting inaccuracy was not therefore intentional. Our view, however, is that, in such circumstances, even if the appellant did not actually know what the eligibility criteria were, the appellant's failure to check the eligibility conditions to apply does not result in merely a careless inaccuracy but in a deliberate one.

102. In such circumstances, we would regard the failure to check the available information, to which the appellant was clearly alerted, as a conscious and intentional choice by the appellant to close his mind to finding out what those requirements were (if indeed he did not know). An inaccuracy brought about by a person blindly adopting a method of VAT accounting, which he knows contains conditions for eligibility, by simply choosing not to consult available information which has been

brought to his attention, is in our view no less deliberate than an inaccuracy brought about with full knowledge of the position.

103. We note that the appellant asserts that HMRC should have informed him of the incorrect use of the FRS at an earlier stage and that the Company did not receive the letter of 19 September 2011 notifying it that it was not eligible. We accept that, as the appellant had clearly moved premises prior to that date, the letter was sent to the wrong address and so may not have been received. However, it is clear that the onus is on the business to inform HMRC of eligibility for the FRS and changes in circumstances. That the Company did not receive the notification from HMRC does not absolve it of its own responsibility to account for VAT under the FRS only if it is eligible to do so.

104. We also note the appellant's submissions that he had difficult personal and work circumstances at the period in question such that he was dealing with the Company's affairs by doing only what he regarded as strictly necessary. We do not accept that the appellant had sufficient time and presence of mind to investigate the FRS sufficiently to ascertain the applicable percentages and to make an application but not to check the eligibility requirements. Our view remains that on the available evidence the appellant at the very least made a conscious choice not to look at the eligibility conditions.

Missing VAT return and excluded amount retained by factoring agent

105. As regards the other failings by the Company, we regard it as more likely than not that the appellant was aware that the VAT return for 12/11 only contained information for 3 months and not 6 months and that the full amount of taxable receipts of the business should be included in the returns rather than just sums drawn down from the factoring agent. We conclude this taking into account that:

(1) The appellant is a person with an accounting qualification who runs his own accounting business who has experience of dealing with VAT matters both as regards his own business and for clients of the accounting business. On his own evidence the appellant had managed to find out information on the FRS and the suitability of it for one of his clients which demonstrates that he has an understanding of how VAT operates.

(2) The requirement to submit quarterly VAT returns is an essential feature of the VAT accounting system with which the appellant, given his experience and responsibility for VAT matters, is clearly familiar.

(3) That the 12/11 return did not cover a 6 month period is obvious even on a cursory consideration of the position given the levels of VAT paid in previous quarterly periods which indicates there was not simply a mistake.

(4) The appellant did not at any time, once the lack of return for the 3 month period became apparent, offer any viable explanation or provide the missing information.

(5) That the Company's VAT accounting position was unaffected by the factoring arrangement, such that the Company should account for VAT on the full amount of receipts from supplies made, is not a matter of complex analysis. A person in the appellant's position could be expected to know the correct position or at the very least to check that he was acting correctly in not accounting for VAT on the full amount. There is no evidence that the appellant took any steps in that regard.

Is the penalty attributable to the appellant?

106. We consider that 100% of the penalty is correctly attributable to the appellant. The appellant was the sole director of the Company at the time with sole responsibility for its VAT affairs who in fact dealt with its VAT affairs and provided the incorrect information on its behalf as set out in full above.

Amount of penalty

107. As regards the amount of the penalty, we consider that it has been correctly calculated on the basis that the Company made a prompted disclosure.

108. We do not consider that any further reduction in the penalty is appropriate for (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the inaccuracy or (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. As regards (c) we note that HMRC incorrectly referred in their letter of 6 February 2014 to the appellant refusing access to computer records as a reason for not giving any further reduction. However, in our view there are nevertheless no reasons to give a reduction in the penalty on this ground. It is clear that the appellant did not provide the requested VAT information in response to HMRC's requests for information and neither he nor any representative of the Company was available on the scheduled day and time when Miss Kitchen and her colleague arrived at the premises to collect the information. The appellant has provided no plausible reason as to why he was not available at the arranged time.

109. We also cannot see from any submission made or evidence before us that there are any special circumstances which would justify a reduction in the penalty.

Conclusion

110. In all the circumstances and for all the reasons given above we affirm the penalty and the amount of the penalty. The appeal is dismissed.

111. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 1 JUNE 2016