



TC05187

Appeal number: TC/2014/03854

VAT – penalties – s60 VATA 1994 – s61 VATA 1994 – dishonesty – whether actions of the company were attributable to the dishonesty of a director? – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COLIN WALLER

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MRS GAY WEBB**

Sitting in public at Leeds on 5 October 2015

Mr C Bradley, Counsel for the Appellant

Mr J Nicholson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty under s61 of the Value Added Tax Act (VATA) 1994 in the sum of £100,496.

5 Background

2. The appellant, Mr Waller, was a director of Bottleworks (Normanton) Limited ('BNL'). BNL was incorporated in June 2010 and registered for VAT. BNL failed to submit VAT returns for the periods 09/10-09/11 and, as a result, HMRC issued estimated assessments to BNL for each of those periods. BNL paid these estimated
10 assessments and, following investigation by HMRC, submitted the VAT returns for the periods 09/10 to 06/11 on 30 November 2011 and for the period 09/11 on 15 March 2012. The VAT returns submitted shows that BNL's VAT liability for the relevant periods exceeded the amount estimated in the assessments by £574,268.

3. HMRC raised a penalty assessment on BNL under s60 VATA 1994 for
15 £200,993, allowing a 65% reduction from the underassessment for cooperation. In May 2012, BNL went into administration. On 19 July 2012 HMRC raised a penalty assessment under s61 VATA 1994 on Mr Waller for £100,496.

Evidence

Mr Waller's evidence

20 4. Mr Waller provided a detailed witness statement and provided oral evidence.

Background

5. Mr Waller described his background as being technical: he was an engineer in the the glass industry, with a City & Guilds Certificate in mechanical engineering. Mr Waller's expertise was primarily on the shop floor; with experience he gained some
25 managerial responsibilities relating to production.

6. Mr Waller became a shareholder in, and the managing director of, BNL's predecessor, Bottleworks Limited (BL), at the request of an asset funder who sought Mr Waller's experience in the glass industry, particularly his knowledge of the relevant machinery, equipment and people involved. As Mr Waller's experience was
30 limited to production matters and, later, a sales role, the support aspects of BL, including finance, were dealt with by an associated company.

7. BL continued to grow and, in March 2010, engaged a consultant, Mr Battison, to obtain regional grant funding as the company was suffering from cash flow problems. The cash flow issues were not resolved and Mr Battison's consultancy was
35 extended to cover advice on the insolvency of BL.

8. BL went into administration on 1 July 2010; its assets were acquired by BNL on 14 July 2010 by agreement with the administrators and the asset funder who had established BL. Mr Waller was appointed managing director of BNL and had a similar shareholding in BNL to that in BL. In early 2011 Mr Battison was appointed
5 as Finance Director of BNL, with full responsibility for the accounts department including dealing with HMRC. Mr Waller's evidence was that Mr Battison had continued to be involved with BNL as a consultant prior to his appointment as Finance Director and had been involved with financial matters of BNL, including VAT returns, prior to that appointment.

10 9. Given the difficulties that had arisen in BL, Mr Waller instituted weekly management meetings at BNL to ensure that there was some form of reporting system in place where the individuals with responsibility for different areas of the business would report on their areas; his evidence was that this was a casual reporting system and the reports from each of the individuals were taken at face value, given that they
15 were people regarded as experts in their area. Mr Waller's evidence is that, at each of these meetings, Mr Battison had reported that there were no particular issues requiring the attention of Mr Waller and that Mr Waller had therefore believed that there were no issue regarding HMRC and tax compliance.

HMRC meeting on 15 November 2011

20 10. Mr Waller confirmed that his first contact with HMRC in this matter had been an email on 6 October 2011, sent to him and Mr Rennison, another director in the business, advising that HMRC wanted to visit in order to examine VAT records. The email did not state that HMRC had any particular concerns with BNL.

25 11. The email was replied to by Mr Battison, rather than Mr Waller. Mr Battison arranged for HMRC to visit the premises, as requested. The first that Mr Waller knew of this, he said, was on the date of the visit when Mr Battison advised that two HMRC officers had arrived for a meeting; he was told by Mr Battison that the officers had had a tour of the factory and had already met with Mr Battison. The meeting took place with Mr Waller, Mr Battison and two HMRC officers present.

30 12. The meeting discussed the fact that BNL had not filed any VAT returns, and had paid assessments below the actual liability of the company. Mr Waller confirmed that this was the first time that he had learned that VAT returns were not being filed. He did not understand what was going on and, accordingly, took very little part in the meeting. However, Mr Waller was clear that he had objected to the HMRC officer
35 stating that he had acted dishonestly and, when he was advised that this was a standard term used in these circumstances, continued to object and refuted that he had acted dishonestly.

Mr Birdi's evidence

13. Mr Birdi provided a detailed witness statement and provided oral evidence.

14. Mr Birdi confirmed that he was the HMRC officer dealing with the matter and that the case had been referred to him as a result of the missing VAT returns; he was working on the relevant evasion team at the time. He confirmed that, as he was unable to make contact by telephone, he had emailed the directors whose email addresses were on the company website. Following that email, he was contacted by Mr Battison, and arrange the meeting with Mr Battison. Mr Birdi confirmed that, following the initial email, all correspondence had been with Mr Battison and, following the meetings on 15 November 2011, correspondence continued to be dealt with by Mr Battison.

15. When visiting the BNL premises on 15 November 2011, he met first with Mr Battison and questioned him on the missing VAT returns and the financing of the company. Mr Battison had confirmed that the balance of the VAT unpaid had been used to finance the company. Mr Birdi confirmed that Mr Battison appeared to have significant responsibility for the running of BNL's finances.

16. Mr Birdi confirmed that the following meeting with Mr Battison and Mr Waller was a PN160 meeting, intended to deal with the prospect of penalties under s60 VATA 1994. Mr Birdi confirmed that in that meeting Mr Waller appeared quiet than Pattison, and confirmed that he had objected to the use of the word 'dishonest'.

17. Mr Birdi further confirmed that questions were principally responded to by Mr Battison in the meeting; his witness statement notes only one occasion on which Mr Waller spoke, which was to dispute the use of the word 'dishonest'. Mr Birdi also confirmed that he had not asked Mr Waller what his involvement was in BNL's financial management, nor what involvement he had in managing tax compliance at BNL. He had also not asked whether Mr Waller was already aware that BNL had been accepting underassessments, nor when or whether Mr Waller had become aware that the company was failing to pay the correct amount of VAT.

18. Mr Birdi further accepted that at a subsequent meeting between Mr Battison and Mr Rennison, he had asked about Mr Rennison's involvement with the company's financial management and compliance management, and whether Mr Rennison was aware that the company was failing to pay over the correct amount of VAT. Mr Birdi accepted that he should have asked these questions of Mr Waller but had not explicitly done so.

19. Mr Birdi had stated in his witness statement that Mr Waller had a clear understanding of the company and the actions taken to use the underpaid VAT to for working capital; in oral evidence Mr Birdi agreed that he had not explicitly asked Mr Waller whether this was the case but had assumed it from the fact that Mr Waller did not indicate that he was unaware that it was happening.

20. Mr Birdi confirmed that references in his witness statement to Mr Waller's appearing to be involved in and aware of the VAT failures were inferred from the fact that Mr Waller was the managing director of the company and that he did not have any direct evidence that Mr Waller was involved or aware of the company's failure to file VAT returns and to accept underassessments of VAT.

21. In his witness statement, Mr Birdi noted that Mr Derbyshire, the other HMRC officer attending the meeting on 15 November 2011, had asked if Mr Waller and Mr Battison accepted that they had not acted honestly in failing to render their VAT returns. Mr Birdi recorded both as saying “yes”, and that Mr Waller then stated that he was not happy with the word “dishonest”. Mr Birdi confirmed that he then explained the use of the word ‘dishonest’ as meaning that the company had obtained a benefit through its actions with regard to VAT. Mr Birdi confirmed that Mr Waller was not then again asked, following the explanation, whether he agreed with the use of the word ‘dishonest’.

22. In his witness statement, Mr Birdi had stated that Mr Waller “fully admitted” that he had failed to declare the VAT liability of BNL due to dishonest conduct. In oral evidence, Mr Birdi agreed that “fully admitted” was “putting it a bit strongly”.

23. Mr Birdi further agreed, when reviewing the section of his witness statement setting out the evidence on which he had based his assessment that Mr Waller was personally dishonest, that the points set out in that section were not relevant to Mr Waller personally, or were not relevant to the VAT failures for which the penalty had been raised.

Findings of fact

24. In considering the evidence, we find as facts the following:

25. Although Mr Waller was the managing director of BNL, his expertise is technical and he relied on the expertise of others in the management of the company overall.

26. Mr Waller was not involved in the financial management of the company or the VAT compliance of the company.

27. Mr Waller was not aware of the failure to comply with VAT requirements until the meeting with HMRC on 15 November 2011.

Relevant law

28. s60 VATA 1994 provides (so far as is relevant to this appeal) that:

- “(1) In any case where--
 - (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
 - (b) for the purpose of evading VAT, a person does any act or omits to take any action, and
- his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable ... to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.”

29. s61 VATA 1994 provides that:

“(1) Where it appears to the Commissioners--

5 (a) that a body corporate is liable to a penalty under section 60, and

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a
10 "named officer"),

the Commissioners may serve a notice under this section on the body corporate and on the named officer.

15 (2) A notice under this section shall state--

(a) the amount of the penalty referred to in subsection (1)(a) above ("the basic penalty"), and

(b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be
20 the whole) of the basic penalty as is specified in the notice.

(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section
25 76.

(4) Where a notice is served under this section--

30 (a) the amount which, under section 76, may be assessed as the amount due by way of penalty from the body corporate shall be only so much (if any) of the basic penalty as is not assessed on and notified to a named officer by virtue of subsection (3) above; and

(b) the body corporate shall be treated as discharged from liability for so much of the basic penalty as is so assessed and notified.
35

(5) No appeal shall lie against a notice under this section as such but--

40 (a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the

amount of the basic penalty as if it were specified in the assessment;
and

5 (b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

10 (6) In this section a "managing officer", in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director; and where the affairs of a body corporate are managed by its members, this section shall apply in relation to the conduct of a
15 member in connection with his functions of management as if he were a director of the body corporate."

Dishonesty

30. The test for dishonesty in the criminal law was set out by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053:

20 "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest...If it was dishonest by those standards then the jury must consider whether the defendant himself must have
25 realised that was he was doing was by those standards dishonest."

31. This is a two-step approach: the action must be dishonest "according to the ordinary standards of reasonable and honest people," and if it is, then "the defendant himself must have realised that was he was doing was by those standards dishonest." The first step is objective, the second, subjective.

30 32. The authorities for the test of dishonesty have recently been summarised in *Krubally N'Diaye v RCC* [2015] UKFTT 0380, confirming the test in Ghosh as being primarily objective: firstly, was the behaviour of the appellant dishonest according to normally accepted standards of behaviour? Secondly, what did the appellant actually know at the time, not what a reasonable person in his position would have known or
35 appreciated.

33. It is agreed between the parties that the standard of proof is on balance of probabilities, and it is also agreed between the parties that an allegation of dishonesty requires particularly compelling evidence to find that the allegation is proven.

Discussion

40 34. There are three issues to consider: firstly, whether s61 VATA 1994 applies, to determine whether the penalty was correctly issued; secondly, if the penalty was

correctly issued, is the conduct of the company attributable to dishonesty on the part of Mr Waller; thirdly, if the first and second issues are made out, whether the assessment issued to Mr Waller was correct as to its amount.

Issue 1 – is s61 applicable?

5 35. It is not disputed that the company failed to submit its VAT returns. It is also not disputed that the company failed to notify HMRC that the estimated assessments were understatements of the company’s VAT liability.

36. There were, therefore, two offences committed by the company; firstly, a failure to submit VAT returns and then, secondly, a failure to notify HMRC of an
10 understatement in an assessment.

37. The first offence is within s60 VATA 1994, as it does not relate to an error or inaccuracy in a document nor a failure to notify HMRC of an understatement in an assessment. The second offence is within FA 2007, Sch 24 rather than s60 VATA 1994. We note that HMRC’s position is that they will not issue a penalty under Sch
15 24 where a penalty has been issued under s60 in respect of the same tax.

38. Reviewing the penalty letter issued to the company, we note that the penalty was issued under s60(1) VATA 1994 in respect of the failure to submit returns, rather than in respect of the acceptance of understatement. This was confirmed in the penalty letter issued to Mr Waller, notifying him of a penalty assessment under s61
20 VATA 1994.

39. Accordingly, we consider that the penalty under s61 VATA 1994 was validly issued, as the a penalty for failure to submit VAT returns and so within the scope of s60 VATA 1994.

Issue 2 – is the company’s conduct attributable to CW?

25 40. Having established that the penalty was correctly issued, the next question consider is whether the conduct of the company in failing to submit VAT returns and accept underassessments was, in whole or in part, attributable to dishonesty on the part of Mr Waller. It is not disputed that Mr Waller was a named officer of the company.

30 41. It is accepted by both parties that the burden of proof lies with HMRC to show that Mr Waller was dishonest and that the burden of proof is to be established on the balance of probabilities, although, as there is an allegation of dishonesty, the nature, weight and quality of the evidence to prove such allegation must be increased (see, for example, *Ghandi Tandoori Restaurant* (1989) VATTR 39).

35 42. As noted above, the test for dishonesty as set out most recently in *N’Diaye*, is firstly whether the behaviour of Mr Waller was dishonest according to the ordinary standards of reasonable and honest people, and, secondly, whether Mr Waller actually realised and knew at the time that what he was doing was by those standards

dishonest, not whether a reasonable person in Mr Waller's position would have so realised and known.

43. HMRC's submission is that Mr Waller was dishonest because the company concealed the VAT liability of the company by failing to submit VAT returns in order to fund the business by evading payment of VAT and that Mr Waller was aware of this failure.

44. HMRC submitted that Mr Waller had admitted dishonesty in the meeting with HMRC on 15 November 2011. Mr Waller's evidence is that he strongly refuted at this meeting that he had acted dishonestly and did not agree that he had acted dishonestly. This evidence was not challenged by HMRC in cross-examination. Mr Birdi confirmed in his oral evidence that Mr Waller had objected to the use of the word "dishonest". Mr Birdi further confirmed that the phrase "Colin Waller fully admitted that [the failure to file was] due to dishonest conduct" at paragraph 49 of his witness statement was "putting it a bit strongly".

45. HMRC submitted that they "do not accept that [Mr Waller] was ignorant of the steps taken by the company's financial director" and that it was "very unlikely" that the financial director would not have told Mr Waller that the VAT returns had not been filed. They further submit that it is "not feasible that a man in his position was ignorant of what was happening with regard to the VAT returns". However, Mr Birdi also agreed that the matters set out as evidence of Mr Waller's dishonesty in his witness statements were not relevant to establishing Mr Waller's dishonesty.

46. Mr Waller's evidence is that he was not aware until the meeting with HMRC on 15 November 2011 that the company's VAT returns were not being submitted. We consider that Mr Waller was a truthful witness and we accept his evidence that his role in the company was principally as a technical expert and that he was not involved with the financial matters of the business and that he relied upon the financial director to deal with financial matters, including whether to sign the note of the meeting on 15 November 2011.

47. HMRC's submissions are primarily based on what they consider to be the role and actions of a hypothetical director, rather than the actions of Mr Waller himself. HMRC have not provided any substantive evidence that Mr Waller knew that the company's VAT returns were not being submitted. HMRC did not, in their meeting on 15 November 2011, ask Mr Waller whether he was involved with or aware of the VAT defaults and, in cross-examination, did not challenge Mr Waller's evidence that he did not know of the failure to provide the VAT returns until his meeting with HMRC on 15 November 2011.

48. The apparent admission of dishonesty in the meeting note of 15 November 2011 is refuted by Mr Waller; that refutation was not challenged by HMRC in cross-examination and Mr Birdi has accepted that Mr Waller could not be said to have "fully admitted" dishonest conduct.

49. We find therefore that HMRC have failed to discharge their burden of proof, on the balance of probabilities, that Mr Waller was aware at the relevant time of the company's failure to submit VAT returns and accept underassessments; we further find that HMRC have failed to discharge their burden of proof that the conduct of the company in failing to submit returns and accepting underassessments is attributable to any dishonesty on Mr Waller's part.

Issue 3 - if 1 / 2 not applicable, was the amount assessed on Mr Waller correct?

50. We are not required to consider this issue, as we have found that there was no dishonesty on the part of Mr Waller, and so it is not considered further.

10 **Conclusion**

51. In conclusion, we find that the penalty under s61 VATA 1994 was validly issued but that the conduct of the company in failing to submit returns and accept underassessment is not attributable to any dishonesty on Mr Waller's part.

52. Mr Waller's appeal is therefore upheld.

15 53. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **ANNE FAIRPO**
TRIBUNAL JUDGE

RELEASE DATE: 20 JUNE 2016