[2016] UKFTT 0666 (TC)

TC05392

Appeal number: TC/2013/03216

VAT – failure to register – whether appellant carried on business in partnership as well as a sole trader, so affecting date liable to be registered- penalty under s 67 VATA- whether reasonable excuse- extent of mitigation under 70 VATA

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEAN JASON BUTLER **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
REBECCA NEWNS

Sitting in public at Fox Court, 30 Brooke Street, London, EC1N 7RS on 8 September 2016

The Appellant in person

Bruce Robinson, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against HMRC's decision to register the appellant for VAT with effect from 1 June 2008, and against a penalty under s 67 Value Added Tax Act 1994 ("VATA") in respect of failure to notify liability to register.

2. The matters in dispute are the period in respect of which the appellant was liable to be registered, and whether the penalty is either not payable on the basis that the appellant had a reasonable excuse or should be mitigated. The first of these questions turns on whether the appellant was in partnership with his wife in respect of one aspect of his business activities.

3. We have concluded that we should dismiss the appeal against the decision to register but should allow the appeal against the penalty by mitigating it to nil.

Legal background

4. Under paragraph 1(1) of Schedule 1 VATA a person becomes liable to be registered for VAT if at the end of any month the value of his taxable supplies in the preceding 12 months exceeds a specified amount. For the period between 1 April 2008 and 1 April 2009 this amount was £67,000. Paragraph 5 of Schedule 1 imposes an obligation on the person liable to be registered to notify HMRC within 30 days, and on HMRC to register him with effect from the end of the month following the month in which he becomes liable to be registered.

5. Section 67 VATA, which was the penalty provision in force for the relevant period, provided so far as relevant:

> "(1) In any case where-
>
> (a) a person fails to comply with any of paragraphs 5…of Schedule 1 …
>
> he shall be liable, subject to subsections (8) and (9) below, to a penalty equal to the specified percentage of the relevant VAT or, if it is greater or the circumstances are such that there is no relevant VAT, to a penalty of £50.
>
> …
>
> (3) In subsection (1) above "relevant VAT" means…-
>
> (a) in relation to a person's failure to comply with paragraph 5 … of Schedule 1, the VAT (if any) for which he is liable for the period beginning on the date with effect from which he is, in accordance with that paragraph, required to be registered and ending on the date on which the Commissioners received notification of, or otherwise became fully aware of, his liability to be registered; …
>
> (4) For the purposes of subsection (1) above the specified percentage is-

(a) 5 per cent. where the relevant VAT is given by subsection (3)(a) … above and the period referred to in that paragraph does not exceed 9 months …;

(b) 10 per cent where that VAT is given by subsection (3)(a) … above and the period so referred to exceeds 9 months but does not exceed 18 months …; and

(c) 15 per cent.in any other case.

…

(8) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for his conduct.

…"

6. Section 70 VATA provides so far as relevant:

"(1) Where a person is liable to a penalty under section … 67 …, the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

(3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are-

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith."

7. Both parties proceeded on the basis that the effect of s 45 VATA is that, if the appellant was carrying on a business in partnership with his wife, the partnership should be treated as a separate entity for VAT purposes, and that in assessing the date when the appellant was liable to be registered on his own account the turnover from the partnership business should be excluded.

8. Section 1(1) of the Partnership Act 1890 provides that partnership is "the relation which subsists between persons carrying on a business in common with a view of profit". Section 2 sets out certain rules for determining the existence of a partnership, including provision that receipt of a share of profits is prima facie evidence of partnership, but does not of itself make the recipient a partner.

Factual background

9. The appellant is a decorator and carpenter. At the relevant time the appellant carried on three types of activity, those of a professional decorator, carpenter and project management. The appellant now maintains that the project management business was carried on in partnership with his wife, Mrs Margaret Butler.

10. In April 2011 HMRC contacted the appellant to ask for information about his business activities, with a view to considering whether he should have been registered for VAT. Following a formal information notice and the provision by the appellant of monthly turnover figures relating to 2008-09, HMRC used those figures plus annual turnover figures derived from the appellant's self assessment returns for 2006-07 and 2007-08 to determine whether and if so when the appellant had exceeded the VAT threshold. The calculations indicated that the threshold had first been exceeded in April 2008. This led to the appellant being compulsorily registered on 15 February 2012 with an effective date of registration of 1 June 2008 and, in the continued absence of actual turnover figures, a penalty being imposed in April 2012 of £10,750.

11. Following further correspondence actual turnover figures were supplied for periods after 5 April 2008. This resulted in a revised penalty amount of £3,247 being notified in April 2013 following a statutory review, including mitigation of 25%. The appellant appealed to the Tribunal in the same month.

12. The basis of calculation of the penalties was as follows. HMRC considered that the period when it became fully aware of the appellant's liability to be registered was 15 May 2011, and therefore determined the "relevant VAT" to be the VAT for the period between 1 June 2008 and 15 May 2011. This VAT was initially estimated at £71,672 and the penalty was assessed as 15% of that under s 67(4) VATA. Based on actual turnover figures the VAT for the same period was £28,866.08. A 15% penalty was therefore £4,329.91, which HMRC mitigated by 25% to £3,247.

13. In May 2014, having received some legal advice, the appellant filed revised grounds of appeal and witness statements for himself and his wife. These included a new argument that, in respect of the project management business, the appellant was in partnership with his wife. HMRC accept that if the appellant had carried on part of his business activities in partnership with his wife then that would have an effect on the date that he was liable to be registered for VAT. This would alter both the VAT due and the penalty calculation. However, they dispute that a partnership existed.

14. It is also worth noting that, whilst there was a VAT assessment in this case, there is no appeal against it. The reason for this is that although the appellant has supplied detailed calculations he has not filed VAT returns for the periods in question. In the absence of returns no appeal is possible against the assessment- see s 83(1)(p) VATA. An appeal does however lie under s 83(1)(a) against the decision to register, and against the penalty under s 83(1)(q).

Evidence

15. Two witnesses appeared at the appellant's request, Mr Ultan Tierney and Mrs Jenny Cropper. Mr Tierney also provided a short witness statement. Mr Tierner is currently employed by HMRC and Mrs Cropper is retired from HMRC. Both worked at relevant times for local enquiry offices used by the appellant. Mrs Cropper was unable to recall the appellant. Mr Tierney recognised him at the hearing, but neither were able to recall meeting with the appellant or the content of their discussions. We accept the evidence of both witnesses so far as they were able to assist.

16. The appellant appeared in person and answered questions from HMRC and from the tribunal. We have no doubt that the appellant was an honest witness, and we accept his evidence subject to some qualifications which are dealt with below. The bundles also included revised grounds of appeal and witness statements prepared with professional assistance in 2014 for both the appellant and his wife. Unfortunately, Mrs Butler did not attend the hearing and so, whilst HMRC raised no objection to the inclusion of her witness statement in the evidence, HMRC had no opportunity to cross examine her and we were unable to ask her questions. It appears that the appellant did not appreciate that Mrs Butler should have attended and thought that HMRC would request her presence if they wished to question her. In Mrs Butler's absence we have considered her witness statement but have treated it with some caution bearing in mind that HMRC had no opportunity to cross examine her. We also note however that her witness statement was consistent with the appellant's.

17. Documentary evidence included the witness statements referred to above, correspondence, some internal HMRC call records and meeting notes, and evidence of the existence of a company set up by Mrs Butler.

18. It became apparent during the hearing that the version of the main bundle the appellant had at the hearing was incomplete. It appeared that the version he had was put together by HMRC before the appellant produced amended grounds of appeal in 2014. It was unclear whether the appellant had just brought the wrong bundle or had never been sent the latest version by HMRC (he did have copies of other supplementary bundles that were clearly produced more recently). The only material document referred to at the hearing that was missing and that the appellant would not have seen already was the notes of the meetings with Mrs Cropper referred to at [29] below. These were very short and we ensured that the appellant had as much time as ne needed to read them before we proceeded to discuss them. After reviewing these notes the appellant initially thought that he had seen other notes that specifically covered a discussion about VAT, but at the end of the hearing he confirmed that he did not wish to pursue that further and that the point he wanted to demonstrate (which related to the need to divide his results between his three activities) had been addressed and accepted by HMRC.

Findings of fact

19. As already mentioned the appellant is a professional decorator and carpenter. He describes himself as good with his hands and good with people, but finds reading and writing, and concentrating on paperwork for anything more than about 20

minutes, difficult. He has also had significant mental health issues that led to hospital treatment in 2002. Although his overall mental health has clearly improved since that time he can still suffer from significant anxiety, and it was apparent to us that he can find it difficult to deal with stressful circumstances or periods. The appellant explained that when he had a bout of anxiety he was unable to plan properly and just dealt with whatever was in front of him at the time and appeared to be most pressing. This was amply demonstrated for us by the fact that the appellant turned up very late for the hearing, having clearly not planned his journey adequately. It is also consistent with the evidence we saw of his dealings with HMRC, including failure to deal with correspondence and delays in filing tax returns at the time of the last recession.

20. It was clear that the appellant wanted his tax affairs to be dealt with properly. He always made sure that he kept his receipts, and he produced invoices using a book with carbon copies, so he had the necessary information. Although he was not able to produce records for periods prior to April 2008 during the enquiry, this was because by the time they were requested that was after the period for which records were required to be retained.

21. In other respects the appellant was clear that business was not run in a sophisticated manner at the relevant time. Although receipts were kept they were not categorised, there was no business insurance until around 2010 or 2011, and no employees. The appellant also did not have a separate business bank account. Instead Mr Butler's personal account was used for business purposes, and invoices were written under the name "D Butler". He would usually be paid by cheque. He would draw all available cash from his account and give it to his wife, who ran the family finances. Mrs Butler had a separate bank account.

22. Although the appellant could not afford to employ an accountant he recognised he needed help, and so he initially made use of the Inland Revenue's local enquiry office in Ealing to assist him to fill in his self assessment returns. The computerised records we saw showed a number of contacts from 2005 onwards, one of which was a record of a contact between the appellant and Mr Tierney in 2005 in respect of his 2001-02 return. However, records were only kept in that form from 2005 and earlier manuscript records would have been destroyed. We accept the appellant's evidence that he met with Mr Tierney on several occasions to obtain assistance with his returns, until Mr Tierney no longer became available following a reorganisation in 2007. It was not disputed by HMRC that the appellant had explained his mental health issues to Mr Tierney and HMRC accepted that they owed a duty of care. There was also no suggestion that the subject of VAT had come up in any discussion with Mr Tierney. The appellant asked for him to be called as a witness to support his case that he wanted to get his tax affairs right and so asked for help, and that he had explained his health issues. We did not understand these points to be disputed by HMRC

23. Unlike the appellant, who had no formal educational qualifications, his Polish born wife had academic qualifications (including a Masters in Law in Poland) and was an efficient administrator. They had a son in 2006 but by 2007 she was looking to take on some work. The appellant was frequently asked by clients to help them out in ways that went beyond his decorating and carpentry skills, for example in relation to a

new bathroom or kitchen that required other skills such as tiling or electrical work. Previously he had not been able to help them but, with his wife and at her suggestion, he was able to do so. The work involved planning and/or overseeing and supervising the projects. The appellant would first speak to clients about the projects. Mrs Butler was able to use her Polish language and administrative skills to identify suitable traders and provide their services on a sub-contracted basis, at a margin. She would prepare quotations. She would also come on site if that was needed for language reasons (where the tradesman had insufficient English skills for the appellant to deal with him effectively), and on other occasions where required, for example to drop something off. She also spoke to clients in relation to sub-contractors she was arranging and dealt with other matters such as paying in cheques. The appellant's witness statement said that in practice Mrs Butler did about three quarters of the work in the project management business.

24. The appellant commented that Mrs Butler had done pretty much what the (Polish) PA he now employs does for him now. He had stopped working with his wife when their child demanded more of her time and she became too frustrated with his working methods and lack of planning.

25. Both the appellant's and Mrs Butler's witness statement refer to the formation of a company, Cofta Enterprises Limited, which was intended to be used by Mrs Butler for the project management business. Mrs Butler arranged for its formation and was the company secretary, but in the event the company was not used because they did not have the time to organise it.

26. There was no dispute about the turnover figures for the project management business (and the other businesses) for periods after 5 April 2008. There is no evidence we can accept about turnover figures for the individual activities before that, which are also potentially relevant. The appellant's 2014 witness statement suggested that the removal of the partnership numbers would result in a reduction in the "2008 turnover figures" of something in the order of £50,000. If intended as a reference to the year to 5 April 2008 we think this must have been a mistake: the appellant confirmed that figures were not available for the project management activities for that year and the aggregate turnover for that year for self assessment purposes was only £62,966.

27. The financial crisis and recession that followed it proved to be an anxious time for the appellant, and his tax affairs were not up to date. In 2010 he was prompted by a phone call from HMRC to bring his self assessment up to date by filing his 2008-09 return. By this stage he had moved house and his nearest HMRC office was in Kingston, where Mrs Cropper was based. Unlike his visits to the Ealing office which were on a no appointment basis, Mrs Cropper explained that the Kingston office provided half hour appointments to certain customers who needed help with their self assessment returns.

28. The appellant believes that he met with Mrs Cropper on three occasions, although HMRC only has records of two. An appeal letter from the appellant dated 10 May 2012 in facts refers to four visits, with the appellant meeting a different person

first and then having three meetings with Mrs Cropper. According to the letter nothing substantive occurred at the initial meeting with the other person since the appellant needed to come back with proof of identification and address.

29. There are brief notes of two meetings Mrs Cropper had with the appellant on 29 April and 6 May 2010. These notes were taken contemporaneously by Mrs Cropper and both sets record that they were read through with the customer. The first set notes that the appellant had insisted on a face to face appointment, that the appellant had three separate businesses and that because each had a turnover in excess of £30,000 an analysis of expenses was needed. The appellant had produced an unanalysed monthly total but needed to recalculate them, and requested a further appointment once he had done that. The notes also record that the appellant was issued with a "bookmark" with a number for the contact centre for assistance on any future issues or to "follow up on anything dealt with today", and that the appellant was also referred to HMRC's website. The second set of notes record that the appellant was assisted to complete three self employed sheets pages (SES1), and that he signed the return and left it with Mrs Cropper for submission. There was a similar comment about the bookmark, contact centre and website.

30. Although Mrs Cropper had no individual recollection of the appellant she was helpful in explaining the notes and what her job involved. She explained that advisers at enquiry centres like herself were very junior employees. Their remit was self assessment and child tax credit for those without professional help who needed support. For anything outside this level of training customers would be pointed elsewhere via the bookmark (literally a bookmark with enquiry centre details on it) and otherwise as indicated in the notes of the meetings. It was standard practice to provide the bookmarks. The centre also had a dedicated phone that customers could use to call the enquiry centre. Advisers like Mrs Cropper had no training in VAT and it was not part of their brief- it was "beyond my pay grade". Any enquiries about VAT would be addressed by referring the customer to the enquiry centre phone number.

31. Mrs Cropper explained, and we accept, that if she had been told that there were separate businesses she would have expected separate SES1 sheets to be completed. She thought the reference to £30,000 was explained by the fact that there was a turnover figure below which it was possible to produce three line accounts which aggregated expenses into a single figure, whereas for turnover in excess of that an analysis was needed. She could not recall the correct figure for that year but we accept the explanation. She also explained that when customers turned up with unanalysed receipts they would be sent away to complete an analysis before any further help could be provided, as clearly happened in this case.

32. The bundle included extracts from the appellant's self assessment returns for 2007-08 and 2008-09. These clearly indicate that the business was not divided into the three categories for 2007-08 but was divided for 2008-09 between "managing projects", "carpentry services" and "city decorators".

33. The appellant's recollection of the meetings with Mrs Cropper at the hearing was to some extent consistent with the notes. He was anxious to ask for help because he wanted to get his return right. He had taken bags of receipts to the first meeting but was told that because the turnover of each exceeded £30,000 he needed to go away, divide the expenses between the three businesses and analyse them into categories. It took him a week away from his normal work to do this. When he met Mrs Cropper again with his analysis she showed him what to fill in where on the pages of the (hard copy) return, and he signed it and left it with her for submission.

34. However, the appellant was sure that he had asked Mrs Cropper about whether he needed to be registered for VAT. His recollection at the hearing was that she had told him that he did not need to be because he had three separate businesses below the VAT threshold, and that HMRC would tell him if there was a problem or if they needed anything else from him. His witness statement was somewhat different, saying that Mrs Cropper said that he needed to divide his figures because otherwise they would be added together and that he would need to register for VAT: the division was her plan to avoid VAT, and the appellant was certain that it was VAT that she was talking about.

35. The appellant did not recollect any bookmark but suggested that the fact the notes recorded her giving him one showed that he had asked for additional help. The appellant also suggested that if he was going beyond the VAT registration limit then Mrs Cropper should not have proceeded to help him with his self assessment return in the way that she did.

36. Mrs Cropper denied that she would have given any assurance on VAT. It was standard practice to hand out bookmarks. She would have required the separation between the three businesses for self assessment reasons. She could not think why she would have advised that the appellant did not need to be VAT registered. The notes were silent on it but record that they were read to the customer, suggesting that VAT was indeed not covered since he appeared not to have queried the notes.

37. The appeal letter dated 10 May 2012 (referred to at [28] above) describes three meetings with Mrs Cropper in 2010 some detail, albeit without giving dates. The letter was clearly written materially closer to the events in question than the date of the hearing (albeit still around two years afterwards), is more detailed than Mrs Cropper's notes and extends to a third meeting. It is clearly an important document to take into account.

38. The letter sets out in some detail what the appellant believed to have happened. It said that at the first meeting the appellant explained that he was a trader with three forms of income, and described what Mrs Cropper asked him to do to get the necessary information (including bank statements) and organise his figures into a spreadsheet. At the next appointment Mrs Cropper further explained what was needed by printing out a spreadsheet document. At this meeting she referred to the need to break down the outgoings into categories because the turnover was over £30,000, and that to file correctly all the hard copy information had to be transferred to a different spreadsheet for each of the three forms of income, for (the letter said) the past two

years. This took the appellant a week's work. At the third meeting he produced the spreadsheets and he filled in the returns for (again according to the letter) 2007-08 and 2008-09, Mrs Cropper checked them, confirmed they were correctly filled out and said he could leave them there for filing. Mrs Cropper mentioned about attending a seminar to better understand tax matters. The letter went on to say:

> "I asked her if I needed to be VAT registered and she said it was perfectly legitimate to be a sole trader with three forms of income & if the revenue was not happy with this they would in fact contact me."

This statement is essentially consistent with the appellant's oral evidence.

39. We accept that there were three meetings and consider that the second and third meetings were the ones for which HMRC held notes. We do not accept however that the meetings can have encompassed the year 2007-08 as well as 2008-09 since no division of activities is available or reflected in the 2007-08 return. It is much more likely that it covered the 2009-10 return, since that tax year had just ended.

40. We have considered the meeting notes, letter and oral evidence carefully, taking account of the fact that Mrs Cropper had no actual recollection of the meetings beyond what she could see from her contemporaneous notes, and taking account of the fact that what was said at the meeting would have been of much greater significance to the appellant than to Mrs Cropper, so that his recollection might be expected to be clearer both in 2012 and now. We found Mrs Cropper to be a convincing witness who was clear about her job description and the limits of her training. We are not persuaded that she would have felt that she was in a position to offer any assurances about VAT, which was clearly not within her remit to do. We also note that the appellant showed some confusion at the hearing between income tax self assessment and VAT.

41. Overall we think that the most likely explanation is that there was a misunderstanding. We accept that the appellant asked Mrs Cropper about his VAT position at the final meeting on 6 May 2010. We also accept that, as a result of the meeting, the appellant was left with the impression that by following what he was advised to do for income tax purposes that would also deal with his VAT position, or at least that the onus was on HMRC rather than him to tell him if he needed to register for VAT. We are also satisfied however that any comment Mrs Cropper actually made would not have been intended to amount to an assurance in respect of VAT. We also think that any comment she did make would have been subject to the standard approach of referring customers to other help and guidance through the phone number on the bookmark and the website.

42. There are two further points we should cover which we think are relevant. First, in September 2012 the appellant and his family were subject to a very distressing incident where, apparently without warning, collectors appeared at his home to collect the estimated penalty, causing significant upset to his wife and child, and subsequently to the appellant when he found out about it and subsequently spoke to the collector by phone. It appears from the correspondence that this was attributable to HMRC error: the appellant's appeal letter sent in May 2012 had been overlooked

and/or not treated as an appeal or request for review. Collection was subsequently suspended but not before considerable anxiety was caused. It also appears that at the time HMRC held no record of the appellant's health problems, although they do not now dispute that Mr Tierney had been informed of them years earlier.

43. Secondly, we should record that the appellant's affairs are now in much better order. He employs a full time PA who handles all his administration, and has professional accounting support.

Submissions

44. Based on what was said at the hearing and in the appellant's revised grounds of appeal, we understood the appellant's submissions to be as follows:

(1) He carried on the project management business in partnership with his wife. It was a joint business and she was doing more than just helping him out. She was not an employee and there was no deduction for wages. He was in fact the junior partner and she was the key player.

(2) He had always tried to get his tax affairs right by asking for help, which he had done regularly at the Ealing and then Kingston local enquiry offices. He had explained his health issues. He had specifically asked Mrs Cropper in 2010 whether he needed to register for VAT and was assured that it was not needed.

(3) HMRC owed the appellant a duty of care which they breached. It was incumbent on them to respond to the regular requests for guidance that he made in a way that took account of his condition. The advice should have been clear and accurate and delivered in a way that would not mislead the appellant, taking account of his characteristics. He should have been advised unequivocally that he was approaching the VAT registration threshold. He would have heeded the advice if he had been given it. He would have registered for VAT and would not have suffered the losses he incurred from not adding VAT to his invoices or from the penalty. He would also have been able to apply to deregister for periods when he fell below the relevant threshold, so reducing the aggregate VAT due.

45. HMRC submitted as follows:

(1) The onus was on the appellant to notify liability to register. None of HMRC's records of contacts between the appellant and HMRC over the relevant period, including Mrs Cropper's notes of the meetings in 2010, made any mention of VAT. VAT registration was only addressed from April 2011 when enquiries started. In any event any question of whether or not HMRC gave negligent advice is not within this Tribunal's jurisdiction.

(2) On the available evidence the appellant was not in partnership and the three sources of turnover were correctly aggregated.

(3) The appellant's health issues and undisputed duty of care were relevant to the degree of mitigation. 25% was appropriate.

Discussion

Duty of care

46. As an initial point we should make it clear that this Tribunal has no jurisdiction to relieve the appellant from an obligation to pay VAT on the basis that HMRC had a duty of care to the appellant that it breached, and we make no findings on those questions. If authority is needed for this then we would refer to *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC). The sole question within our jurisdiction in respect of the VAT is whether a partnership existed, affecting the date of registration. Any question relating to duty of care would be relevant, if at all, only to the penalty.

Partnership

47. It is clear that the burden of proof is on the appellant to establish, on a balance of probability, that a partnership existed. There is no dispute that the business was carried on with a view of profit. The question is whether the appellant and his wife were actually carrying on business in common (that is, jointly or together) or whether Mrs Butler was providing assistance to the appellant rather than being in business with him. It is clear that this is a question of fact and turns on the substance of the relationship. The fact that it was not labelled as a partnership is not relevant, nor is it determinative that there was no evidence of a partnership agreement or (bearing in mind the joint family finances) an understanding about how profits would be divided.

48. We have concluded, on balance, that the appellant has not done quite enough to persuade us that a partnership existed. The appellant's most telling comment was that his wife had done much the same job as his current PA did: in other words she was helping him out. It is true that she was helping him with an aspect of his business that he would not otherwise be able to take on, but in essence we think that it was still treated by both of them as his business in which she was assisting.

49. We have also taken account of the following factors which we think provide support for the conclusion:

(1) The project management opportunities clearly arose from work the appellant did as a carpenter and decorator. He had the client contacts and our perception from his evidence was that clients primarily discussed their projects with him. Effectively he was extending his activities.

(2) The appellant's wife's primary role, again from the appellant's description at the hearing, appears to have been to identify and engage sub-contractors and handle paperwork. The appellant had the primary role of dealing with sub-contractors and actually managing the project on site, except to the extent that there was a language problem.

(3) Apart from the witness statements and the appellant's oral evidence there was no evidence that indicated that the business was being carried on jointly (or indeed showing any involvement by Mrs Butler in the business). We were told by the appellant that invoices were issued under the name "D Butler", with no

distinction being drawn between different activities. The same sole bank account was used.

(4) The appellant made no mention of the involvement of his wife in his meetings with Mrs Cropper in 2010 or otherwise to HMRC before he received advice during the enquiry about the existence of a partnership. The appellant clearly could not be expected to appreciate what the legal definition of a partnership was. However, bearing in mind his continued emphasis at the hearing on the fact that he always asked for help with his tax affairs, we would expect that if he really was carrying on business with his wife, and indeed with him as the junior partner, he would have made some mention of that to Mrs Cropper rather than simply assume that income he was generating jointly with her should all go on his tax return. Instead he had drawn no distinction between the three activities until Mrs Cropper told him that he needed to for self assessment purposes, and no distinction between project management on the one hand and decorating/carpentry on the other.

(5) Even if the appellant did not appreciate that he might need to consider the project management activities separately, it would be surprising if his wife did not. If she was generating income by running a business with her husband (and indeed doing most of the work), then as someone with a legal qualification and who was as capable as the appellant indicated her to be she might have been expected to consider her own tax position and to recognise that, rather than all of the income being included in her husband's income tax return, some of it might be hers and might need to be reported by her accordingly.

(6) Although Mrs Butler did set up a company, and that indicates that she at one stage had plans to develop her own business using the skills she clearly had, there was nothing to indicate that she had actually done that. Whilst it is of some relevance we do not think that it is of significant weight. The most likely explanation is that the work she had done helping her husband convinced her that she was capable of making her own business out of it, rather than that she was already carrying on her own business in partnership with her husband and wanted to incorporate it.

50. We should emphasise that none of these factors are by any means conclusive, and that the question whether a partnership exists in a case such as this is by no means straightforward. We accept that, for example, Mr Butler's sole account would have been convenient to use given his other activities, and that the appellant and his wife would have had no practical need to consider how to divide profits if a partnership existed given the joint family finances.

51. We have also paid careful regard to the evidence in the witness statements that Mrs Butler did the majority of the work in the project management business. A clear impression is given, in particular in Mrs Butler's witness statement, that the project management activities were a joint enterprise and that Mrs Butler's activities went beyond those described at the hearing, encompassing drawing up plans in discussion with clients, applying for permissions and generally pulling ideas together, using her creativity and knowledge as well as office skills. These are in principle material indicators that Mrs Butler was running the business jointly with the appellant (if

anything with the appellant as the junior partner) rather than helping him out. However, we did not get the same impression from the appellant's description at the hearing, which we felt was more consistent with the business being the appellant's, assisted by his wife. The other factors referred to above are also relevant.

52. The appellant's amended grounds of appeal referred to *George Christodoulou v HMRC* [2013] UKFTT 425 (TC), where a somewhat similar question arose as to whether Mr Christodoulou was running a restaurant in partnership with his wife in circumstances where Mr Christodoulou also ran a hairdressing salon as sole proprietor. In that case the question similarly affected liability to register for VAT, there was also no evidence of an oral or written partnership agreement, Mr and Mrs Christodoulou had not initially told HMRC of the wife's involvement and the bank account was in Mr Christodoulou's sole name. However, the restaurant and liquor licences were held by both spouses and (no doubt in conformity with that) the restaurant had a sign that referred to both of their names. There were also minutes of a Harrow Council meeting which referred to them as joint owners. The Tribunal accepted that Mrs Christodoulou worked at least as hard as he did and received no wages, suggesting that they considered themselves as running the business jointly.

53. Whilst there a number of similarities with the *Christodoulou* case there are important differences, namely the existence of some clear contemporaneous evidence, in the form of the licences and minutes of meetings, that the business was run jointly. We also think that it is of some relevance that the restaurant business was obviously a separate business from the salon and one in which Mrs Christodoulou had been involved from the start, rather than being (as in this case) an extension of existing business activities.

Penalty

54. We are not satisfied that the appellant has demonstrated that he had a reasonable excuse for failing to register for VAT in 2008. Even if the appellant had received assurances about his VAT position from Mrs Cropper as he maintained, those assurances would have been provided in 2010 and cannot form the basis of a claim that the appellant had a reasonable excuse in 2008. For periods up to the effective date of registration in June 2008 the appellant's case can only rest on a general assertion that he sought help from local enquiry offices and they should have warned him that he was approaching the VAT registration threshold. We do not think that this is enough. As illustrated by *Neal v Customs and Excise Commissioners* [1988] STC 131, ignorance of basic VAT rules cannot amount to a reasonable excuse. The appellant had a responsibility to check whether he should register for VAT and did not do so at any time before he became liable to register. Although it is necessary to take into account the attributes of the taxpayer in question in deciding that there was a reasonable excuse (see Judge Medd's comments in *The Clean Car Company v Customs and Excise Commissioners* [1991] VATTR 234), we do not think that this assists the appellant here. He was able to conduct his own business and to ask for help from HMRC for his income tax affairs on a number of occasions. He did not seek any help in relation to VAT prior to 2010.

55. We have however concluded that, in all the circumstances of the case, we should mitigate the penalty under s 70 VATA by 100% rather than 25%, such that no penalty is due and the appeal against the penalty is effectively allowed. The 25% mitigation allowed by HMRC appeared to reflect only the appellant's full disclosure rather than other issues. There is no restriction on the other factors we may take into account, beyond those set out at s 70(4) VATA (insufficiency of funds, no loss of VAT and good faith). The factors we have taken into account in reaching our conclusion are principally the appellant's mental health issues and HMRC's acknowledged duty of care, the appellant's evident desire to ensure that his tax affairs were compliant, his apparent misapprehension (albeit not an objectively reasonable one) that by contacting HMRC about self assessment he was addressing all his tax issues and that he did not have to worry about VAT, HMRC's apparent errors in 2012 that led to attempted collection, and his assurances to us that he now employs both a PA to handle his paperwork and an accountant who ensures that his tax affairs are fully in order. We also note that the VAT the appellant is obliged to pay for the relevant period cannot now be charged by him to customers, and that it might have included VAT that would not have arisen if the appellant had been registered and had applied to deregister when he could. It is clear that the appellant's experience is such that he is very keen to avoid any repetition. In the circumstances it is just to mitigate the penalty in full.

Decision

56. The appeal against HMRC's decision to register the appellant for VAT with effect from 1 June 2008 is dismissed on the basis that the appellant has not demonstrated that the project management activities were carried on in partnership.

57. The penalty charged under s 67 VATA is mitigated by 100% such that no penalty is due. The appeal against the penalty is therefore allowed.

58. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SARAH FALK

TRIBUNAL JUDGE
RELEASE DATE: 30 SEPTEMBER 2016