[2016] UKFTT 0732 (TC)

TC05461

Appeal number: TC/2015/06860

VAT - failure to register - assessment and penalties in default of returns by taxpayer partnership which had traded above VAT registration threshold - retrospective registration - VATA 1994 Schedule 1 paragraphs 1 and 3 - Finance Act 2008 Schedule 41 - penalties for late registration - whether reliance on advice of financial adviser a reasonable excuse - no - whether assessment exceeded best judgement calculation - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

I & S WARD ROOFING AND CLADDING **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER MARYVONNE HANDS

Sitting in public at Tribunal Appeals Service, Lincoln County Court on 5 July 2016

Mr. Maurice Cowling FCA for the Appellant

Mr. David Wilson, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Ivan Ward and Shawn Ward trading as I & S Ward Roofing and Cladding ("the Appellants") against an assessment for under-declared VAT following a decision by the Respondents ("HMRC") that the Appellants' partnership should have been registered for VAT for the period 1 October 2013 (the effective date of registration ["EDR"]) to 1 April 2015, during which it had traded above the VAT registration threshold.

2. In addition to backdating the EDR, HMRC also identified four liable no longer liable ("LNLL") periods, between 1 February 2008 and 31 May 2013. HMRC has assessed these periods of VAT liability. These assessments were issued on 28 October 2015 under s 73(1) VAT Act 1994 and are also appealed by the Appellants.

3. In addition to the assessments HMRC also raised Belated Notification Penalties under s 67(1) VAT Act 1994 and failure to notify penalties under Schedule 41 Finance Act 2008 in the total sum of £2,752.10 for the late registration.

4. The assessments and penalties are as follows:

Schedule of assessments and penalties issued by HMRC:

Liability period	**VAT assessed**	**Belated Notification Penalty**	**Failure to Notify Penalty**	**TOTAL**
1/2/08-31/10/09	£11,291.17	£1,693.68	N/A	£12,984.85
1/1/10-28/2/11	£ 7,056.10	£1,058.42	N/A	£ 8,114.52
1/11/11-30/11/12	£ 8,166.39	N/A	£ 1,633.27	£ 9,799.66
1/4/13-31/5/13	£ 1,776.31	N/A	£ 355.26	£ 2,131.57
TOTAL	£28,289.97	-	£1,988.53	£33,030.60

5. HMRC contends that the assessments do not carry a right of appeal under s 83 VAT Act 1994, returns not having been delivered for the relevant periods of default.

6. The Appellants do not dispute that they failed to notify their liability to be registered for VAT at the proper time, and that the relevant default periods are as

stated by HMRC. Nor do the Appellants dispute the assessments or their liability for penalties.

7. The Appellants are simply requesting leniency with regard to the assessments and penalties on the grounds that they were badly advised by their accountants and a lack of advice from HMRC.

Factual Background

8. The Appellants traded as industrial roofing and cladding contractors from premises in Spalding, Lincolnshire, initially with others as a consortium of self-employed individuals, but since 2007 as a partnership.

9. On 15 January 2015, HMRC contacted the Appellants to discuss whether or not the business should be registered for VAT purposes. A questionnaire was sent with the letter, which the Appellant duly completed and returned to HMRC in February 2015.

10. From the submitted questionnaire and figures, HMRC calculated that the Appellants' business should have been registered for VAT from 1 February 2008. The partnership's turnover remained over the de-registration threshold until March 2011, except for the month of November 2009. HMRC treated this period as a LLNL period and assessed for the unpaid tax. As this period was prior to April 2010, when a new penalty regime was introduced, a belated notification penalty for that period was issued under s 67 of the VAT Act.

11. HMRC further advised that the partnership's turnover exceeded the VAT registration threshold in November 2011. The date of registration for this period would have been 1 January 2012. The partnership remained over the VAT de-registration threshold until November 2012. The unpaid tax was assessed and treated as another period of LNLL. A penalty for Failure to Notify under Schedule 41 of the Finance Act was issued for this period.

12. The partnership's turnover again exceeded the VAT registration threshold in February 2013. The date of registration for this period would have been 1 April 2013. The partnership remained over the VAT de-registration threshold until 31 May 2013. The unpaid tax was assessed and treated as another period of LNLL. A penalty for Failure to Notify under Schedule 41 of the Finance Act was issued for this period.

13. The partnership had also exceeded and remained above the VAT registration threshold from October 2013, the date of registration being 1 December 2013. Because this would be a current registration the Appellants were required to apply for a VAT number and register for VAT by completing a VAT1. Once submitted HMRC would process a penalty based upon the liability stated on the return.

14. Mr. Maurice Cowling, the Appellants' accountant, wrote to HMRC on 16 March 2015 asking that instead of processing a compulsory VAT registration from 1 December 2013, HMRC permit the Appellants to register voluntarily under the VAT Flat Rate Scheme from 1 April 2015. He argued that the Appellants partnership's

labour was its only taxable supply. Historically the Appellants accounts had been prepared by their previous advisors on the basis that their turnover included materials purchased on behalf of customers which should have been separately identified and excluded from turnover. This meant that they would now have to pay more assessed VAT to HMRC than they should.

15. An eligible business which is registered for VAT may opt to join the Flat Rate Scheme for small businesses. This scheme enables a small business to calculate its VAT liability as a flat rate percentage of total turnover and so avoids the need to keep detailed records of input tax and output tax. The Flat Rate Scheme operates as follows:

i. Output tax is charged to customers at the normal rate for the supply. Similarly, input tax is paid to suppliers at the normal rate. However the output tax charged to customers is not paid over to HMRC and (in general) input tax cannot be recovered.

ii. In each tax period, a flat rate percentage is applied to the VAT inclusive turnover for the period. The result of this calculation is the amount of VAT payable to HMRC for the period.

iii. The applicable flat rate percentage ranges from 2% to 13.5% depending on the trade sector in which the business operates.

16. On 20 March 2015 HMRC agreed to the Appellants registering under the Flat Rate Scheme, but said that the earlier periods of LNLL would still have to be considered and either a flat rate scheme percentage applied or VAT calculated in the normal manner.

17. The Appellants were registered under the Flat Rate Scheme with effect from 1 April 2015 at a flat rate percentage of 9.5%. It was agreed that the same rate would be applicable to the earlier LNLL periods.

18. Contemporaneously the Appellants business was registered from 1 April 2015 and assigned VAT number 209 8146 01. The earlier LNLL periods (1 February 2008 - 31 May 2013) were assigned VAT number 019 2660 26.

19. HMRC issued a decision letter on 3 June 2015, stating that the EDR of the business should have been 1 December 2013 for the current registration. A second decision letter was issued on 5 June 2015 notifying the Appellant that there had also been periods of LNLL VAT periods between 1 February 2008 and 31 May 2013.

20. The Agent wrote to HMRC at the end of June 2015 to request a review of both of HMRC's decisions.

21. The statutory review conclusion letter was sent to the Appellants on 15 October 2015. The Review Officer had identified several errors with the calculation of the decision. The Review Officer notified the Appellants that the findings would be

passed back to the Decision Maker to amend. The Review Officer informed the Appellants that any new decision would carry fresh rights of review and appeal.

22. An amended decision letter was issued by HMRC on 21 October 2015. HMRC amended the EDR of the current registration to 1 October 2013. HMRC also recalculated the LNLL periods between 1 February 2008 and 31 May 2013. The Decision Maker also recalculated the assessments charged covering the LNLL periods. The revised figures are shown in paragraph 4 above.

23. On 28 October 2015 HMRC issued the Appellants with a civil belated notification penalty under s 67 VAT Act 1994. The penalty related to the first two LNLL periods: 1 February 2008 - 31 October 2009 and 1 January 2010 - 28 February 2011.

24. On 31 December 2015 HMRC issued the Appellants with a failure to notify penalty under Schedule 41 Finance Act 2008. The penalty related to the second two LNLL periods: 1 November 2011 - 30 November 2012 and 1 December 2012 to 31 May 2013.

25. The Appellants lodged an appeal with the Tribunals Service in a Notice of Appeal dated 29 November 2015.

Evidence

26. The combined bundle of documents included copy partnership annual accounts for the years 2007 - 2015; the Appellants completed form HET1, a generic questionnaire which provided details of the Appellants business including rolling monthly income for the years 2007 - 2015; a chronological summary of the Appellants turnover and expenses; a witness statement by Mr. Ivan Ward; copy relevant correspondence; copy relevant legislation and case law authority.

Relevant legislation

27. The law relevant to the appeal is contained in:

VATA 1994

'Taxable supplies'

Section 4(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

Sch 1, Para 1(1) sets out when an unregistered person making taxable supplies becomes liable to be registered:

> 1(1) Subject to sub paragraph (3) to (7) below, a person who makes a taxable supplies but is not registered under this Act becomes liable to be registered under this schedule
>
> a) at the end of any month, if the value if his taxable supplies in the period of one year then ending has exceeded (relevant VAT threshold); or

b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of thirty days then beginning will exceed (relevant VAT threshold)

Sch 1, Para 1(3) - sets out the rules regarding exception from registration.

A person does not become liable to be registered by virtue of sub-paragraph (1) (a) or (2)(a) above if the Commissioners are satisfied that the value of his taxable supplies in the period of one year beginning at the time at which, apart from this subparagraph, he would become liable to be registered will not exceed £(threshold)

Sch 1, Para 5, - sets out the rules regarding notification of liability and registration.

Sch 1, Para 6(2), - permits the Commissioners to register with effect from the period when liability arises.

Section 67 –

Failure to notify and unauthorised issue of invoices

(1) In any case where -

(a) a person fails to comply with any of paragraphs 5, 6 ,7 and 14(2) and (3) of Schedule 1 with paragraph 3 of Schedule 2 with paragraph 3 or 8(2) of Schedule 3 or paragraph 3, 4 or 7(2) or (3) of Schedule 3A, or

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 (subject to subsections (5) and (6) below) -

(a) in relation to a person's failure to comply with paragraph 5 6 or 7 of Schedule 1, paragraph 3 of Schedule 2 paragraph 3 of Schedule 3 or paragraph 3 or 4 of Schedule 3A, 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; and

(c) in relation to a person's failure to comply with a requirement of regulations under paragraph 2(4) of Schedule 11, the VAT on the acquisition to which the failure relates; and

(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) or (b) above and the period referred to in that paragraph does not exceed 9 months or where the relevant VAT is given by subsection (3)(c) above and the failure in question did not continue for more than 3 months;

(b) 10 per cent where that VAT is given by subsection (3)(a) or (b) above and the period so referred to exceeds 9 months but does not exceed 18 months or where that VAT is given by subsection (3)(c) and the failure in question continued for more than 3 months but did not continue for more than 6 months; and

(c) 15 per cent in any other case.

Section 68(8) provides that a failure to register under s 67(1) shall not give rise to a penalty if the Tribunal is satisfied that there is a reasonable excuse for the failure to register.

70 Mitigation of penalties under sections 60, 63, 64 and 67.

(1) Where a person is liable to a penalty under section 60, 63, 64, 67 or 69A, 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.

71 Construction of sections 59 to 70.

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct -

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

Section 83 - sets out matters that carry a right of appeal.

[(1)] [21]Subject to [sections 83G and 84], an appeal shall lie to [the Tribunal] with respect to any of the following matters -

[...]

(p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act 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.

Paragraph 12 to Schedule 41 Finance Act 2008 states:

(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by -

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure -
(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

Paragraph 14 Schedule 41 Finance Act 2008 states:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub paragraph (1) "special circumstances" does not include -

(a) ability to pay, or
(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub paragraph (1) the reference to reducing a penalty includes a reference to -

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 20 Schedule 41 Finance Act 2008 - Reasonable excuse

(1) Liability to a penalty under any of paragraph 1,2,3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfied HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased. P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

The Appellants' case

28. The Appellants' grounds of appeal as set out in their Notice of Appeal are:

> "We do not dispute the legality of HMRC's right to charge I & S Ward, as registering for VAT is a requirement of tax law. However we do beg for leniency for a number of reasons:
>
> The punishment is far too severe.
>
> i. The Wards have already suffered heavily for the non-registry.
>
> ii. HMRC has benefitted through non-registry.
>
> iii. The Wards are labourers who took bad advice.
>
> iv. There would be no case had the Wards been allowed to operate as two individuals as they wished.
>
> v. A reprimand should have been sufficient provided that VAT registration were made effective from 1/4/2015."

29. At the hearing, Mr. Ivan Ward explained that up until 2007 he, his two sons and his brother Shawn Ward worked together, but were employed and paid as individuals by D. A. Green and Sons, based in Whaplode near Spalding, which erected constructional steelworks and provided roofing and cladding. They provided labour only, their employer purchasing and providing all materials required in respect of any of the projects on which they worked.

30. In April 2007 D. A. Green & Sons said that the company would have to treat and pay them as one self-employed unit. They were advised by their accountants, Fenland Financial Services Ltd, to form a partnership, and following a meeting with HMRC in May 2007 applied for the partnership to be registered in the Construction Industry Scheme as 'I and S Ward Roofing and Cladding'.

31. Mr. Ward said that because they operated as they had done previously and did not supply any materials, they erroneously thought that they did not have to register for VAT.

32. In 2010, D. A. Green & Sons went into administration. By then Mr. Ward's two sons had left the business. He and his brother Shawn continued to find and undertake work in the roofing and cladding industry on a self-employed partnership basis. However they had to buy their own materials.

33. Mr. Ward said that he and his brother were not businessmen and perhaps foolishly did not identify and charge out materials separately to customers, but treated the cost of materials as part of their own overheads. This had the effect of artificially increasing their turnover and unbeknown to them they had been trading significantly in excess of the VAT registration threshold.

34. Mr. Ward said that in 2013 and 2014 they seemed to be paying too much income tax and sought the advice of Fenland Financial Services Limited. In particular they enquired whether they needed to register for VAT. Mr. Ward said he was not happy with the advice he received. The partnership had also received a penalty from HMRC as a result of delays in their accounts being prepared and late payment of their tax.

35. They therefore decided to change accountants and appointed their present accountant Mr. Cowling, who in late 2014, after completing their 2013 accounts, alerted them to the fact that they had been trading above the VAT threshold. It was very shortly after this that the partnership received the letter from HMRC checking whether the business should have been registered for VAT.

36. Mr. Ward said that they had "probably been fools to themselves" and lost a substantial amount of income. Having incurred input VAT on the cost of materials, instead of passing on the VAT to customers, they absorbed the input vat within their own profits along with the output VAT not charged on their labour costs.

37. Mr. Ward said that it was not until 2010 when D. A. Green & Sons went into administration that they had to start purchasing their own materials. He recalled going to the Spalding tax office in 2011 but he could not recall what precisely had caused him to call in the tax office, but he remembers that no-one at the tax office mentioned VAT or the need for the partnership to register for VAT.

38. Mr. Cowling said that the course of action taken by the Appellants in 2007 was based entirely on discussions with HMRC during their meeting in 2007 at the Spalding tax office. Ivan and Shawn Ward had never previously operated as a business partnership, but agreed to do so as a compromise to assist D. A. Green & Sons and HMRC in the operation of the CIS income tax system. He asked why it had taken HMRC seven years before raising enquiries about the Appellants' turnover. They had received up-to-date annual accounts regularly from the beginning.

39. Mr. Cowling said that at the meeting in Spalding the HMRC officer should have made known to the Wards the benefits that were available to them if they registered for VAT, whether they did so as two individuals or as a partnership. As a matter of normal procedure, if any professional accountant had been approached in 2007 to deal with the Wards accounts they would have made sure that, as a new business, they became VAT registered because of the benefits available to them from the recovery of input VAT. It would be ludicrous to believe that the Wards would not have registered for VAT if they had been correctly advised at the meeting. In his view, Ivan and Shawn Ward had been let down badly by both their previous advisors, Fenland Financial Services, and HMRC.

40. HMRC had also failed to point out the benefits available to the Wards through the VAT flat rate scheme. It would have been a simple matter for the HMRC officer to have registered the Appellants for VAT at the same time that he was setting up their partnership Unique Taxpayer Reference.

41. Mr. Cowling said that he had prepared a schedule showing the split of the Appellants' receipts between their VAT registered customers and their consumer customers for the year commencing 1 December 2013 together with a schedule of invoices bearing input VAT for the same year. The purpose of the schedule was to show, by reference to a sample financial year, how much the Appellants had lost in income as a result of not registering for VAT under the Flat Rate Scheme.

I & S Ward Cost of Non-registration for VAT under the Flat Rate Scheme

1 December 2013 – 30 November 2014

	Total	Goods	VAT
Receipts from VAT registered customers	£108,579.60	£90,483.00	£18,096.60
Receipts from consumer customers	£3,660.00	£3,050.00	£610.00
TOTAL	£112,239.60	£93,533.00	£18,706.60
Purchase invoices bearing VAT	£19,067.19	£15,893.27	£3,173.92
Due to HM Revenue & Customs using Input VAT invoices			£15,532.68
Due to HM Revenue & Customs using 9.5% Flat Rate Scheme			£10,662.76

42. Mr. Cowling said that his figures showed that, had the Wards registered for VAT at the time when they were required to become a self-employed partnership, then in the year beginning 1 December 2013, they would have collected £18,096.60 (20% of £90,483.00) VAT from their VAT registered customers and £610.00 from their consumer customers, assuming that those receipts were VAT inclusive. By using the Flat Rate Scheme, out of the total output VAT received of £18,706.60, the sum of £10,662.76 would have been paid to HMRC, leaving the Wards with £8,043.84 which they forfeited through their ignorance of VAT regulations.

43. He said that on the other hand, if they had registered for VAT in the normal way, there would have been £18,706.60 output vat, and £18,096.60 input tax, leaving a net sum of £610.00 payable to HMRC, representing the VAT paid by consumer customers.

44. Through ignorance, but also because of bad advice from their previous advisors and a lack of advice from HMRC, throughout the whole of the Appellants trading history up to 31 March 2015 they had surrendered to HMRC their right to reclaim input VAT on payments. It had cost them £60,415.82.

45. He submitted that for the above reasons the assessments and penalties should be cancelled.

HMRC's case

46. Mr. Wilson, for HMRC, said that there is no right of appeal against the assessments - s 83(1)(p)(i) VATA 1994. Whilst the assessments were raised under s 73(1) VATA 1994, the Appellants had not made returns covering the periods in question. Therefore the conditions of 83(1)(p)(i) have not been met.

47. He said that the information and figures supplied by the Appellants showed that the VAT registration threshold of £64,000 was first breached on 31 December 2007. Therefore the EDR has been correctly calculated as 1 February 2008. HMRC further submit that the LNLL periods between 1 February 2008 and 31 May 2013 had been calculated correctly and were not in dispute.

48. HMRC asserts that the information and figures supplied by the Appellants show that the VAT registration threshold of £79,000 was breached again on 1 October 2013. Therefore, the start date of the current registration period has also been correctly calculated as 1 October 2013; not 1 April 2015 as contended by the Appellants and became liable to be registered as of 1 February 2008. The Appellants should have notified HMRC that the VAT threshold had been breached on 31st December 2007. HMRC did not become aware however of the liability to register until early in 2015. As this is over 18 months, HMRC contend that the Appellants are liable to a penalty of 15% of the relevant VAT.

Belated Notification Penalties (Section 67 VAT Act 1994):

49. Prior to April 2010, penalties for belated notification were determined under s 67 VAT Act 1994 - Belated Notification Penalties. HMRC contend that the first two periods of liability, between 1 February 2008 and 28 February 2011, fall within this Section of the VAT Act.

50. Section 67(8) VATA gives HMRC and the Tribunal the power to consider not issuing a penalty if the Appellant has a "reasonable excuse" for the belated notification. Section 71 VAT Act however specifically excludes reliance upon a third party from being acceptable as a reasonable excuse. HMRC contends that in this appeal the Appellants do not have a reasonable excuse for the belated notification.

51. With regard to s 70 VATA (mitigation), HMRC submits that no facts have been presented to show mitigation of the belated notification penalties.

Failure to Notify Penalties (Schedule 41 Finance Act 2008):

52. The failure to notify the second two LNLL periods fall within Schedule 41 Finance Act 2008. These are the periods between 1 November 2011 and 31 May 2013.

53. Section 1 of Schedule 41 FA 2008 states that a person is liable to a penalty where they have failed to comply with specific obligations. Included within the list of specific obligations are the obligations under paragraphs 3 and 8(2) of Schedule 3 to VATA 1994 (obligations to notify liability to register).

54. Paragraph 6(1) and (2) of Schedule 41 set out the standard penalty percentages that should be charged. These are: Deliberate and concealed - 100%. Deliberate but not concealed - 70%. Any other case - 30%. HMRC contends that in this case the Appellants' failure was non-deliberate and the standard penalty percentage is therefore 30%.

55. Paragraph 12 of Schedule 41 gives HMRC the power to reduce the standard penalty based on the Appellant: telling, helping and giving information to HMRC, in relation to the failure to notify. HMRC submits that in this appeal the Appellants have been given the maximum reduction for their disclosure.

56. Paragraph 13 of Schedule 41 goes on to give the penalty maximum and minimum ranges for the type of disclosure. HMRC asserts that for a prompted disclosure, as in this case, where HMRC becomes aware of the failure over 12 months after the time when the VAT first becomes unpaid, the minimum and maximum penalty range is between 20% and 30%. Having given full reduction for disclosure and telling, helping and giving, HMRC contends that the penalty has therefore been correctly assessed at 20% of the unpaid VAT.

57. Paragraph 14 of Schedule 41 gives HMRC scope to reduce the penalty by way of special reduction. However, having considered all of the facts in this case, HMRC submits that there are no special circumstances.

58. In relation to the decision to backdate the EDR and to assess further liable periods, the onus of proof is with Appellants to demonstrate that they were not liable to register for VAT during those periods.

59. In relation to the penalties assessed by HMRC, the onus of proof is with HMRC to demonstrate that the penalties were calculated and issued correctly.

60. The standard of proof is the ordinary civil standard, of the balance of probability.

61. On the facts, the EDR of the current VAT registration has been rightly determined as 1 October 2013 and the Belated Notification Penalties and the Failure to Notify penalties were calculated and issued correctly.

Decision

62. The Tribunal finds that HMRC's decision that the Appellants' business should be registered from 1 October 2013 is correct. For the entirety of the assessed period following that date, the Appellants traded above the VAT registration threshold.

63. HMRC have also correctly identified four liable no longer liable periods, between 1 February 2008 and 31 May 2013.

64. We concur with HMRC that there is no right of appeal against the assessments - s 83(1)(p)(i) VAT Act 1994. The Appellants have not made returns covering the periods in question, therefore the conditions of 83(1)(p)(i) have not been met. The remedy, for the Appellants to challenge the assessment figures, would be to submit a VAT return covering these periods.

65. With regard to the Belated Notification Penalties and the Failure to Notify penalties, the issue is whether the Appellants have shown a reasonable excuse for their late registration. Ignorance of the law and reliance upon another for advice is not a reasonable excuse.

66. The Appellants clearly received poor advice from those advising them in the period between 2007 and 2015 and it is also questionable why the issue of VAT registration was not raised at the Appellants' meeting with HMRC in 2007, when they became a partnership and they were asked to register in the Construction Industry Scheme. It must have also been apparent that the Appellants were trading significantly above the VAT registration threshold.

67. Nonetheless, it cannot be said that the Appellants "took reasonable care to avoid the failure" to register for VAT. Having considered in 2010 whether they should be registered for VAT, and having raised the point with their then accountants, by not following that up, they were not taking reasonable care. Even if the Appellants had a reasonable excuse for their failure to register at that time, the excuse cannot be regarded as having continued and was not remedied without unreasonable delay after it ceased.

68. The appeal is accordingly dismissed.

69. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 31 OCTOBER 2016