[2017] UKFTT 0815 (TC)

TC06210

Appeal number: TC/2016/06216

***VAT** – Penalty for failure to notify liability to be registered – sch 41 FA 2008 - eBay trader*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Ms PARMINDER KAUR **Appellant**

-and-

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

TRIBUNAL: **Judge Peter Kempster**
Mr Simon Bird

Sitting in public at Centre City Tower, Birmingham on 6 November 2017

The Appellant did not attend and was not represented

Mrs Esther Hickey (HMRC Solicitors Office and Legal Services) for the Respondents

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DECISION

1. The Appellant ("Ms Kaur") appeals against a penalty for failure to notify liability to register for VAT (sch 41 Finance Act 2008 refers) issued by the Respondents ("HMRC") in the amount (reduced after formal internal review) of £6,908.24.

2. Ms Kaur did not appear and was not represented. Prior to commencement of the hearing the Tribunal's clerk telephoned Ms Kaur using three telephone numbers given by Ms Kaur in correspondence; two mobile numbers were unobtainable; a landline number was answered but the Tribunal's clerk was told that Ms Kaur was not present. The Tribunal was satisfied that reasonable steps had been taken to notify Ms Kaur of the hearing (there was on file a letter dated 20 September 2017) and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33.

3. At the hearing HMRC produced as a witness Mr Dave Andrews, who was the case officer. Mr Andrews had made a witness statement dated 27 July 2017 and answered questions from the Tribunal.

Facts

4. In February 2015 HMRC commenced an investigation into Ms Kaur's tax affairs, and requested information for the period from April 2010 to February 2015. In a letter dated 4 March 2015 Ms Kaur stated, "I have not been self-employed in any year." In a letter dated 8 May 2015 Ms Kaur stated, "I do not have a PayPal account." On 25 June 2015 HMRC stated to Ms Kaur that they had reason to believe she had been conducting a trade involving sales through eBay and operation of a PayPal account. In a letter dated 3 October 2015 Ms Kaur stated, "… I had made no profit no money from the venture. I did not know or was aware that I had to keep any paperwork or accounts, as I did not, so I do not know what my liability will be as I made nothing from it."

5. HMRC's investigation included the following:

(1) HMRC ascertained that Ms Kaur had been selling significant volumes of goods on eBay in the period June 2010 to July 2011.

(2) HMRC requested full details of the PayPal account transactions, including issuing a formal information notice (sch 36 Finance Act 2008 refers). Ms Kaur stated that she was not able to provide or access these.

(3) HMRC analysed a sample of 3,983 feedback postings on Ms Kaur's eBay account ("123QueenTrading") (each posting stated the value of the transaction) to estimate the turnover of the business. Ms Kaur objected to the sampling methodology, so HMRC calculated the sales stated on all 20,574 feedback postings. The turnover in the relevant period was approximately £278,000, with sales in Sterling, Euros, US Dollars and Australian Dollars.

(4) HMRC concluded that Ms Kaur was liable to be registered for VAT from no later than 1 December 2010, and that she ceased trading on 17 July 2011. She was informed of this by letter dated 7 January 2016, and that the VAT liability would be assessed at £27,632.98. By further letter dated 13 January 2016 HMRC stated their intention to charge a "failure to notify" penalty of £14,507.31. The penalty was assessed on 22 February 2016. Ms Kaur objected to the penalty (letter undated but received by HMRC around 22 March 2016) and stated, "I believe the penalty should be closer to 25% not what level you have judged it to be."

(5) By a formal review decision dated 30 September 2016 HMRC upheld the VAT assessment at £27,632 but reduced the penalty on the basis that the failure to notify was not deliberate.

Respondents' case

6. Mrs Hickey submitted as follows for the Respondents.

7. The only matter under appeal was the sch 41 failure-to-notify penalty. The VAT assessment was not appealable because Ms Kaur had not filed a VAT return: s 83(1)(p) VAT Act 1994. This situation had been explained to Ms Kaur. Mrs Hickey had checked again HMRC's records on the working day before the hearing and no VAT return had been filed.

8. The starting point for the penalty calculation was the potential lost revenue (para 6 sch 41) and thus, although the VAT assessment was not under appeal, HMRC's best estimate of the VAT undeclared should be explained. HMRC had calculated the sales value of all 20,574 eBay transactions for which customers had left feedback. That was favourable to Ms Kaur in that it ignored the sales for which customers had not left feedback. The eBay account was opened on 5 June 2010 and the last feedback was received on 17 July 2011. The VAT threshold was exceeded in October 2010; Ms Kaur should have registered for VAT within 30 days of the end of that month; thus she was liable to be registered from 1 December 2010. The assessment covered the period 1 December 2010 to 17 July 2011. The VAT undeclared was £27,632.98.

9. Ms Kaur had been given several opportunities to provide accounts and documents. She had failed to comply with sch 36 information notices served on her; penalties for non-compliance had been levied but subsequently cancelled. HMRC did not accept that she could not obtain her PayPal records. No information had been provided to HMRC by Ms Kaur. In particular, Ms Kaur had been given the opportunity to supply details of goods purchased by her business and any VAT incurred thereon; in the absence of any such information HMRC were unable to allow any credit for input VAT. Ms Kaur had raised several objections to the detail of HMRC's calculations but, in HMRC's opinion, those could only be relevant to the income tax implications of the undeclared sales, not the VAT aspects.

10. HMRC had originally levied the sch 41 penalty on the basis that the failure to notify was deliberate (but not concealed). The review officer had directed that view should be changed to the failure being non-deliberate, and so the calculation position was now as follows:

(1) The failure was not deliberate.

(2) The failure involved domestic (not offshore) matters.

(3) Disclosure of the failure was prompted. When first prompted by HMRC, Ms Kaur had denied being in self-employment.

(4) HMRC became aware of the failure more than twelve months after the time when the VAT first became unpaid by reason of the failure (para 13 sch 41 and *Taste of Thai v HMRC* [2013] UKFTT 318 (TC)). The latest time by which the VAT became unpaid was May 2011 (using a first VAT quarterly return for 03/11); HMRC became aware of the failure only in 2015.

(5) Thus the starting point for the penalty was 30% (para 6 sch 41), with a minimum penalty of 20% (para 13 sch 41). On the "discretionary" element of the penalty HMRC had allowed mitigation of 50%:

(a) Telling HMRC – 10% out of a maximum of 30% - Ms Kaur had originally denied trading.

(b) Helping HMRC – 30% out of a maximum of 40% - Ms Kaur had responded to letters.

(c) Giving access to HMRC – 10% out of a maximum of 30% - Ms Kaur had failed to comply with sch 36 information notices.

Thus the discretionary element of the penalty was reduced to 5% and the total penalty to 25%. The review letter had mistakenly stated the penalty was 27.5% but the revised assessed penalty of £6,908.24 was correctly calculated at 25%.

(6) HMRC considered there was no reasonable excuse for the failure (para 20 sch 41).

(7) HMRC considered there were no special circumstances on the facts of this case (para 14 sch 41).

Consideration and Conclusions

The matter under appeal

11. For clarity, the only matter before the Tribunal is the sch 41 FA 2008 failure-to-notify penalty of £6,908.24.

12. There is no right of appeal against the VAT assessment (£27,632) which HMRC have raised under s 73(1) VATA 1994: "Where a person has failed to make

any returns required under this Act … [HMRC] may assess the amount of VAT due from him to the best of their judgment and notify it to him." If Ms Kaur wishes to challenge that assessment then she must first file a VAT return and, if the contents of her return are not accepted by HMRC, then she will have a right of appeal (subject to time limits) against the assessment: s 83(1)(p) VATA 1994 (emphasis added), "… an appeal shall lie to the tribunal with respect to … an assessment under section 73(1) … in respect of a period *for which the appellant has made a return* under this Act …".

The calculation of the "potential lost revenue"

13. The starting point for a sch 41 penalty is that there must be "potential lost revenue" which, for a failure to register for VAT, is provided by para 7(6) & (7) sch 41 to be:

> "(6) … the amount of the value added tax (if any) for which [Ms Kaur] is … liable for the relevant period …
>
> (7) "The relevant period" is … the period beginning on the date with effect from which [Ms Kaur] is required in accordance with that provision to be registered and ending on the date on which HMRC received notification of, or otherwise became fully aware of, [Ms Kaur's] liability to be registered."

14. That amount will be, as stated in s 73(1) VATA 1994, "the amount of VAT due from [Ms Kaur] to the best of [HMRC's] judgment".

15. In relation to HMRC's best judgment, the position was explained by Woolf J in *Van Boeckel v C&E* [1981] STC 290 (at 296):

> "In fact, quite clearly on the material which was before the tribunal, the commissioners [ie HMRC] had made substantial investigations in this case. As I have indicated, unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations then they have got to take into account the material disclosed by those investigations. Obviously, as a matter of good administrative practice, it is desirable that the commissioners should make all reasonable investigations before making an assessment. If they do that it will avoid, in many cases, the necessity of appeals to the tribunal. However to try and say that in a particular case a particular form of investigation should have been carried out, is a contention which, in my view, as a matter of law, … is difficult to establish."

16. Having carefully considered the evidence in this case, we are satisfied that HMRC did make all reasonable investigations before issuing the s 73(1) assessment; also, that HMRC took into account the material disclosed by those investigations. HMRC took the eBay transactions where customers had left feedback on Ms Kaur and aggregated the values for those sales. That was a significant exercise involving over 20,000 transactions, and the resulting spreadsheet was so large that by Directions issued on 19 July 2017 Judge Poole directed that the file could be evidenced

electronically rather than in paper form. By contrast, Ms Kaur has throughout failed to provide any documents, maintaining that she kept no records of a business with annual turnover in excess of a quarter of a million pounds and over 20,000 separate sales. We agree with the point made by Mrs Hickey for HMRC, that the VAT calculation is likely to be favourable to Ms Kaur in that it assumes every customer left feedback – so any other sales have not been included.

17. In her grounds of appeal and in correspondence Ms Kaur had raised a number of objections to HMRC's calculations. These relate to matters such as postal charges, average transaction values, and other items but we find that those matters are irrelevant to the calculation of the estimated business turnover of Ms Kaur in the relevant period. One relevant point is that Ms Kaur claims to have incurred VAT on goods purchased from her suppliers, which she asserts should be deductible as input VAT in calculating the potential lost revenue. While that is a reasonable assertion, it requires evidence (see, for example, s 24 VATA 1994 and reg 14 VAT Regulations 1995 (SI 1995/2518)). Ms Kaur has repeatedly declined to produce any accounting information that could even start to justify her claim. Accordingly, we agree with HMRC that no account can be taken of the business purchases in calculating the potential lost revenue.

18. We find:

(1) The VAT calculation was performed to HMRC's best judgment.

(2) Ms Kaur was liable to register for VAT no later than 1 December 2010.

The calculation of the penalty

19. HMRC's basis of calculation is set out at [10] above. We agree, for the reasons cited by HMRC, that:

(1) The failure involved domestic (not offshore) matters.

(2) Disclosure of the failure was prompted.

(3) HMRC became aware of the failure more than twelve months after the time when the VAT first became unpaid by reason of the failure.

(4) There was no reasonable excuse (within para 20 sch 41) for the failure.

(5) There were no special circumstances (within para 14 sch 41).

20. HMRC's review officer considered that the failure was not deliberate. While that conclusion is open to us to substitute (see para 19 sch 41), we do not propose to disturb HMRC's conclusion.

21. HMRC allowed mitigation of 50% of the 10% "discretionary" element of the penalty between the minimum penalty of 20% and the standard penalty of 30%. We consider that is generous, especially given Ms Kaur's failure to comply with sch 36

information notices, but although (again) that conclusion is open to us to substitute, we do not propose to disturb HMRC's conclusion. Accordingly, we confirm the penalty at 25% of the potential lost revenue. The reference in the review letter to a final penalty of 27.5% erroneously takes the standard penalty as 35% (rather than 30%) – see the penultimate page of that letter – but the intention is clear and the revised assessed penalty of £6,908.24 was correctly calculated at 25%.

Conclusion

22. The penalty calculation of £6,908.24 should stand as assessed.

Decision

23. The appeal is DISMISSED.

24. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 09 NOVEMBER 2017