[2019] UKFTT 0273 (TC)

# TC07112

**Appeal number: TC/2018/01437**

***VALUE ADDED TAX - Appellant a director of limited company - Company "liable but no longer liable" (LNLL) to be registered for VAT - Personal Liability Notice issued to the Appellant - The Appellant accepted that his conduct was careless - Was the failure to register for VAT deliberate? - Yes - Was this attributable to the Appellant? - Yes - Appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**STANLEY JOHN CHMIEL** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**
**MISS SUSAN STOTT FCA CTA**

**Sitting in public at Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 27 March 2019, with further written submissions from the Respondents (none being received from the Appellant) dated 8 April 2019**

**No appearance by or on behalf of the Appellant**

**Michelle Beveridge, and Gareth Hilton, Officers of HMRC, for the Respondents**

## DECISION

1. This is our decision in relation to the Appellant's appeal against a Personal Liability Notice ('PLN') in the sum of £4,250.05 issued to him on 14 November 2017. The PLN was issued to Mr Chmiel on the footing that he was a director of Kudos Building and Electrical Services Ltd ('the Company') which should have been registered for VAT from 1 March 2012 to 31 July 2013 but which was not.

2. On 14 November 2017, HMRC issued a Penalty Notice against the Company under Paragraph 1 of Schedule 41 of the *Finance Act 2008*.

3. At the same time, HMRC issued the Personal Liability Notice which is the subject matter of this appeal against Mr Chmiel on the basis that the penalty was payable by the Company "for a deliberate act or failure which was attributable to an officer of the Company". The PLN sought 100% of the Company's penalty from Mr Chmiel, pursuant to Schedule 41 Paragraph 22(1).

4. We have decided to dismiss the appeal, for the reasons which we set out more fully below.

5. However, before we come to our findings of fact, our identification of relevant law, and our application of the law to those facts, we must first deal with some important procedural matters.

6. There was no attendance by or on behalf of the Appellant at the hearing. There was nothing on the Tribunal's file indicating in clear terms that Mr Chmiel was not proposing to come to the hearing. At the Tribunal's direction, the Tribunal's clerk twice phoned the landline number given by the Appellant on his Notice of Appeal between 10 and 10.10am. Neither call was answered, and neither went to voicemail, so no message could be left.

7. Pursuant to Rule 33 of the Tribunal's Rules, the Tribunal was satisfied that the Appellant had been given notice of the hearing. The Notice of Hearing was sent to Mr Chmiel by email on 19 December 2018. The email address used was the address given by him on his Notice of Appeal.

8. The Tribunal was also satisfied that it was in the interests of justice to proceed. It had already taken over a year from the receipt of the Notice of Appeal (9 February 2018) to the hearing. The Respondents, as directed, had prepared for the hearing (including the preparation of the hearing bundle, sent to Mr Chmiel on 7 September 2018, and a Skeleton Argument, sent to him on 13 March 2019) and had attended, together with a witness, Officer Judith Richards. The Notice of Hearing gave the Appellant a clear warning that, if he did not attend, the Tribunal could decide the matter in his absence. The Tribunal did not see that an adjournment would serve any obviously useful purpose, bearing in mind that Mr Chmiel had not actively engaged with his appeal for several months.

9. Insofar as the Notice of Appeal was made out of time, we have taken account of Mr Chmiel's explanation and reasons, set out in Box 16 of his Notice of Appeal. HMRC does not oppose any extension of time, and we extend the time for appealing accordingly.

10. On 21 February 2019, HMRC applied to amend its Statement of Case (originally dated 11 May 2018). An amended Statement of Case (dated 21 February 2019) was provided, as well as short grounds for the Application, identifying the changes and explaining the reasons for the changes. That application was sent by the Tribunal to Mr Chmiel by email on 4 March 2019, asking for his representations within 14 days. No response was received.

11. Whilst it would perhaps have been better for the amendments to have been made sooner, the Tribunal is nonetheless satisfied (especially in the absence of any contrary submissions) that HMRC's application to amend its Statement of Case is fair and just (within the proper meaning and effect of Rule 2: the overriding objective) and should be allowed, pursuant to Rule 5(3)(c) (the Tribunal's case management powers). The amendments to the Statement of Case are relatively modest. They correct and clarify certain matters of fact which are already known to the Appellant, and one matter of law (namely, an incorrect reference).

12. The Grounds of Appeal, in summary (taken from the Notice of Appeal and Mr Chmiel's letter of 11 December 2017), are as follows:

(1) This was not a deliberate failure to notify, but was pure error and negligence on Mr Chmiel's part;

(2) The Company ceased to trade in March 2016;

(3) The Appellant understands that he should have registered the Company for VAT, but this was not a deliberate attempt to defraud in any way;

(4) The Company did not know that it was liable to register for VAT, and the Company's external accountant was to blame for this position, having failed to tell the Company to register for VAT;

(5) It was wrong for HMRC to pursue the Company in 2016 in relation to matters which had taken place years earlier;

(6) The Appellant is not in any financial position to make payment or even offer a payment plan.

13. HMRC's case was supported by a witness statement from Officer Judith Richards. On the basis of the documents and materials before us in the hearing bundle, as well as one further document handed up to us during the hearing (being a Notice of Penalty Assessment addressed the Company, dated 6 March 2017) and the evidence of Officer Richards, we make the following findings of fact.

14. The Appellant was a director of the Company, which was a private limited company registered in England and Wales.

15. On 9 July 2016, Officer Judith Richards, a Compliance Officer, wrote to the Appellant in relation to its declared turnover on its Corporation Tax returns being in excess of the relevant VAT threshold.

16. For the accounting period 01/05/2011 to 30/04/2012, the Company's declared turnover was £98,653, against a relevant VAT threshold of £73,000. The declared annual turnover therefore exceeded the VAT threshold by £25,653 or 35%.

17. For the accounting period 01/05/2012 to 30/04/2013, the Company's declared turnover was £129,653, against a relevant VAT threshold of £77,000. The declared annual turnover therefore exceeded the VAT threshold by £52,653 or 68%.

18. Officer Richards conducted a rolling turnover analysis, basing the monthly income on 1/12th of the annual turnover.

19. On the basis of that analysis, the Company exceeded the VAT registration threshold (then, £73,000) in January 2012, with a rolling turnover of £79,021, and thereby became liable to register for VAT on 1 March 2012 (an Effective Date of Registration, or EDR, of 1 March 2012).

20. That liability continued until the Company's monthly rolling turnover fell below the VAT De-Registration threshold (then, £79,000) in August 2013 (£78,319), before exceeding it again for one month (September 2013 = £80,289) and then falling below it again in October 2013 (£55,041).

21. HMRC did not receive a response to its letter of 9 July 2016. Officer Richards followed up by phone on 8 August 2016 and spoke to Mrs Chmiel who said that she kept the books, was aware of HMRC's letter, but had not responded since she had not wanted to incur postage costs. She said that she would make the Company's books available and invited HMRC to visit.

22. That visit took place on 22 August 2016. Mrs Chmiel explained that the Company had been set up to 'protect' their home. She also mentioned that Mr Chmiel had - at some earlier time, perhaps in the mid to late 1990s - been the director of another VAT-registered company.

23. There was some concern that the Company had received some building supplies which were in fact intended for domestic use by Mr and Mrs Chmiel. That concern was subsequently allayed, and HMRC accepted that those supplies were made for the use of the Company in the course of its business.

24. HMRC calculated the Potential Lost Revenue ('PLR'), being the net VAT liability, as £12,143. That sum was notified by an assessment on 28 November 2016.

25. On 6 March 2017, HMRC issued a Notice of Penalty Assessment against the Company, in the sum of £4,250.05, being 35% of the PLR. HMRC did not, at that time, issue a PLN against Mr Chmiel. That Notice of Penalty Assessment was not appealed by the Company.

26. On 10 October 2017, HMRC issued a Penalty Explanation letter in relation to its intention to penalise Mr Chmiel for the Company's default, treating the behaviour as deliberate and not concealed, but prompted, giving a penalty range of 35-70%, and applying maximum discounts for 'telling' (30%), 'helping' (40%) and 'giving' (40%) giving a final penalty of 35% of the Potential Lost Revenue from 1 March 2012 to 31 July 2013 (£12,143) x 35% = £4,250.05.

27. On 14 November 2017, HMRC issued an Amended Notice of Penalty Assessment against the Company, in the sum of £4,250.05. The only relevant

amendment was the date. That Amended Notice of Penalty Assessment was not appealed by the Company.

28. On that same date, HMRC also issued a PLN for £4,250.05 against Mr Chmiel. That PLN is the subject of this present Appeal.

**Discussion**

29. The Amended Statement of Case, referred to above, drew attention to the fact that HMRC (i) had issued a Notice of Penalty Assessment against the Company in March 2017, but had not issued any PLN at that time against Mr Chmiel; and (ii) in November 2017, withdrew the March 2017 Notice of Penalty Assessment, and issued the Company with an Amended Notice together with the PLN which is the subject of this Appeal. What happened in November 2017 was described, perhaps delphically, in the application of 20 February 2019 as having been done 'for administrative reasons'.

30. Having heard Officer Richards give evidence, we are satisfied that there was nothing untoward in this sequence of events, and nothing which affected the validity of the November 2017 notices. She explained, and we accept, that she did not want to issue a PLN before issuing a Penalty Notice to the Company: if the Company had paid in response to the March 2017 notice, then there would not have been any basis to issue the PLN against Mr Chmiel. When it became obvious that the Company was not going to pay, it was decided to issue a PLN against Mr Chmiel, but it was considered administratively better not to issue a PLN in November 2017 against a Penalty Notice issued six months earlier, but instead to withdraw the March 2017 Penalty Notice and re-issue it. We accept that these actions were done rationally, in good faith, and did not break any relevant time limits.

31. In order to assure ourselves as to the latter, following the hearing, we ordered the parties to each provide "short written submissions as to the effect, if any, of Finance Act 2008 Schedule 41 Paragraph 16(4) on the Personal Liability Notice issued in November 2017. Such submissions to be copied to the other party."

32. The Respondents provided short written submissions dated 8 April 2019. There was no response from the Appellant.

33. The Personal Liability Notice issued to the Appellant on 14 November 2017 was in time.

34. An assessment of tax for £12,143, being unpaid by reason of the failure to notify, was formally notified on 28 November 2016: see Paragraph 3 of HMRC's Statement of Case.

35. We agree with HMRC that this is not a case under Schedule 41 Paragraph 16(4)(b) (which deals with the time limit where there has not been any assessment) but under Paragraph 16(4)(a) which provided that the penalty assessment had to be made "before the end of the period of 12 months beginning with (a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed."

36. Since the assessment to the tax related to a period for which no return had been submitted, then the assessment did not carry a right of appeal in accordance with section 83(1)(p) of the *Value Added Tax Act 1994*.

37. In consequence, because there was no appeal period, then, in order to satisfy Paragraph 16(4)(a), any penalty had to be issued within 12 months of the date of the assessment to tax: namely, by 27 November 2017.

38. This Penalty Notice was issued on 14 November 2017, and was therefore within the statutory time limit.

39. Since this is a penalty appeal, and so HMRC bears the burden of establishing that Mr Chmiel's conduct was deliberate. However, because this is a civil case, the standard of proof which HMRC must meet is the balance of probabilities (i.e., more likely than not).

40. We are satisfied that the Company's failure to register for VAT was deliberate, but not concealed. For these purposes, we consider 'deliberate' to mean conduct answering to the usual dictionary definition of *'well weighed or considered; carefully thought out; formed, carried out etc with careful consideration and full intention; done of set purpose; studied; not hasty or rash*', which, on at least one occasion, the Tribunal has ruled means that a person "*must to some extent have acted consciously, with full intention or set purpose or in a considered way",* including where a person "*consciously or intentionally chose not to find out the correct position, in particular where the circumstances are such they the person knew that he should do so*": see *Clynes v HMRC* [2016] UKFTT 369 (TCC) at Paras. [82] and [86].

41. We accept Officer Richards' evidence that, when she visited on 22 August 2016, the Company was keeping meticulous records of its income and outgoings, and was sending these to the accountant each and every month. This was not recorded in the written note made at the time, but we accept her evidence in this regard as truthful. We accept her evidence that the Company was, at the time, aware of its level of turnover, through this process of record-keeping and review. We simply do not accept that the Company and Mr Chmiel, as a director of it, were not aware of the turnover, or the liability to register for VAT.

42. The excess of turnover above the registration threshold was neither trivial, nor fleeting. The situation went on, month after month, for well over a year. The amount by which the registration threshold was exceeded was significant. The rolling turnover figures went as high as £135,483 (against a registration threshold of £77,000) in October 2012, and the rolling turnover figures were more than £20,000 in excess of the threshold for 15 consecutive months - from March 2012 (£103,852) to May 2013 (£100,252). We are satisfied that Mr Chmiel knew this to be the case, at the time.

43. The fact that Mr Chmiel had been involved with a VAT registered business over 10 years earlier is a factor to which we have given less weight. On its own, it perhaps would not have been determinative, but it adds to the impression that Mr Chmiel knew how to run a VAT-registered business, and knew how to keep proper books, and it weakens his argument that he was not aware that the business should have been registered for VAT.

44. We are satisfied that the Company's deliberate failure was attributable to Mr Chmiel, who - as a director - was an officer of the Company throughout.

45. We are satisfied that there was no reasonable excuse for the failure to register for VAT.

46. We reject Mr Chmiel's case that the failure to register for VAT was really the fault of the Company's (external) accountant, who is alleged to have failed to advise the Company and/or Mr Chmiel of the liability to register for VAT. There is no evidence to support that assertion. We are not persuaded that the failure to register for VAT was a result of the Company and/or Mr Chmiel 'relying on any person to do anything', and taking reasonable care to avoid that third party's act or failure: Paragraph 20(2)(b) of Schedule 41.

47. Paragraph 20(2)(a) of Schedule 41 of the Finance Act 2008 does not allow us to treat any 'insufficiency of funds' as a reasonable excuse, 'unless attributable to events outside [the taxpayer's] control'. There is simply no evidence of that in this case.

48. There is no relevant time bar which stood in the way of HMRC - whether in March 2017 or November 2017 - from penalising the Company or Mr Chmiel for events which had taken place as lately as July 2013.

49. We are also satisfied that there is no basis upon which we could properly interfere with the deductions already applied for 'telling', 'helping', and 'giving': being, in each event, the maximum deduction allowable.

**Decision**

50. The Appeal is dismissed. The Personal Liability Notice is upheld in full.

51. The Appellant has the right to apply to the Tribunal to set this decision, or any part of it, aside and to remake it, pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 28 days after this decision is sent to the Appellant.

52. 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.

**DR CHRISTOPHER MCNALL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 25 APRIL 2019**