FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2019/01917
TC/2019/05515

VAT – penalties imposed under ss60 and 61 VATA 1994 – dishonest conduct by the director – no – appeals allowed

Heard on: 14 September 2022 and
1 February2023

Judgment date: 9 March 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR IAN SHEARER

Between

UNIVERSAL FLOORING (CONTRACTORS) LIMITED (1)

MARK MACKLEY (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Rebecca Sheldon of counsel instructed by CronerTaxwise

For the Respondents: Esther Hickey litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is a VAT case which concerns a penalty notice issued by the respondents (or "**HMRC**") on 20 March 2018 to the first appellant, Universal Flooring (Contractors) Limited ("**the company**") under section 60 of the Value Added Tax Act 1994 ("**VAT Act 1994**") ("**section 60**"); and a penalty liability notice issued on the same date to the second appellant, Mark Mackley ("**the director**") under section 61 of the VAT Act 1994 ("**section 61**"). Both the company and the director have appealed against those notices. The penalty is in an amount of £90,753.

2. The appellants' liability under such notices depends, in essence, on whether VAT has been evaded by the company and the director has behaved dishonestly. If he has, then that dishonesty is attributed to the company under section 60, and also entitles HMRC to impose liability for the penalty on the director under section 61.

3. In this case, the company failed to submit VAT returns between 2010 and 2016 as a result of which HMRC issued centrally estimated assessments on a quarterly basis. The company paid the majority of these but it turned out that they significantly understated the actual VAT due (by £371,739). It is HMRC's case that this is the VAT which the company has evaded and that the director knew that if the company filed VAT returns, it would have a significantly greater liability for VAT than if the company accepted the centrally estimated assessments. And so he accepted and paid these. The company deliberately failed to submit VAT returns for that period as he knew that it would have resulted in this much greater liability to VAT for the company.

4. The issue which we have to determine, therefore, is whether the director has behaved dishonestly. For the reasons given below we have decided that he has not, and we have therefore allowed these appeals.

THE LAW

5. Section 60 relevantly states as follows:

> (1) In any case where—
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability), he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct. …
>
> (7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.

6. Section 61 states as follows:

> (1) Where it appears to the Commissioners—

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

(b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"), the Commissioners may serve a notice under this section on the body corporate and on the named officer.

CASE LAW

7. The parties agree that the test for dishonesty is as set out in *Byers v HMRC* [2019] UKFTT 310:

The test for dishonesty

141. The fact in issue in this appeal is whether the evasion of BSL's VAT was attributable to Mr Byers' dishonesty as a director. It is a fact that the Tribunal has to find, by applying the test for dishonesty as formulated in case law.

142. The test for dishonesty apposite to civil proceedings was distinguished from the two-stage test in *Ghosh* applicable in criminal proceedings until the Supreme Court decision in *Ivey v Genting*, which makes it clear that *Ghosh* is no longer good law, even for criminal proceedings. Following *Ivey v Genting*, the test for dishonesty to be applied in both criminal and civil proceedings is Lord Nicholls' test in *Royal Brunei v Tan*, as clarified by Lord Hoffmann in *Barlow Clowes*.

143. Lord Nicholls' test was applied in determining 'dishonesty' in the context of a penalty under s 60 VATA by Judge Pelling QC (sitting as a High Court Judge) in *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported):

> 'In my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is *knowledge of the transaction sufficient to render his participation dishonest* according to normally acceptable standards of honest conduct. *In essence the test is objective* – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were'. (emphasis added)

144. That the civil test of dishonesty is essentially objective is confirmed by Lord Hoffmann in *Barlow Clowes*, where it is stated at [10]:

> 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards'.

145. While the test for dishonesty is primarily objective, Lord Nicholls has remarked on the subjective element that remains relevant to the test as follows:

> 'Honesty, indeed, does have a strong subjective element in that it is a description of a

type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart, dishonesty, are mostly concerned with advertent conduct, not inadvertent conduct'.

146. In respect of how this 'subjective element' is to be taken into account by the court, Lord Nicholls' guidance is:

> 'Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.'

147. A s 61 penalty is predicated on a s 60 penalty being imposable on the body corporate in the first place. Section 60(1) of VATA provides:

> '(1) (a) for the purpose of evading VAT, a person does any act or omit to take any action, and
>
> (b) his conduct involves dishonesty …'

148. It is clear from the statutory wording under sub-s 60(1)(a) that the conduct involving dishonesty is not restricted to the commission of an action, but includes an *omission* to act. The statutory wording in this regard accords with case law authority on the meaning of dishonesty, as Lord Nicholls in *Royal Brunei* stated at p106:

> 'Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless'.

THE FACTS

8. We were provided with a comprehensive bundle of documents. Officer Paula Lockwood ("**Officer Lockwood**") provided a witness statement and gave oral evidence on behalf of HMRC. The director provided a witness statement and gave oral evidence on his own behalf and on behalf of the company. From this evidence we make the following findings:

(1) During the relevant time (2009-2016) the company was registered for VAT. The director had "taken over" the company some time before that. His initial career was in banking. He started working in a bank in 1979 and left in 1987. His role had been as a cashier as an entry-level school leaver. He then worked as a cashier. He did not finish his banking exams. He learned little about tax whilst in the bank. Prior to joining the company he had undertaken other roles in the construction industry, including as a sales director in another flooring company.

(2) The business of the company was installing and maintaining resin floors in factories in the automotive industry. During the period in question the director was working extremely hard, 70 to 80 hours a week and doing significant mileage (about 40,000) a year. It had always been a successful business and by 2015 it was established and had some very good clients. The director's evidence was that this was attributable to him working extremely hard and having built up a reliable workforce. Clients trusted them to deliver jobs on time.

(3) Notwithstanding that, the director felt that running the business was his responsibility

and did not delegate matters to others.

(4) On 23 March 2012 and 23 May 2012 HMRC wrote to the director stating that HMRC records showed a surplus credit of £36,070 with no corresponding debit identified and that VAT returns for the periods 02/10 to 11/11 were outstanding. That letter went on to indicate that the company was mandated to submit online returns. A further letter dated 25 October 2013 from HMRC to the company indicates that at that stage, HMRC's records showed a surplus credit of £23,536.70, and that HMRC did not appear to have received a VAT liability declaration for the periods 02/10 to 08/13 inclusive. It also states that the company was mandated to submit online returns. A further letter of 7 April 2015 from HMRC to the company updated the position, stating that there was still a surplus credit of £36,000.70, and that there had been no returns between 02/10 and 02/15.

(5) In 2016, Officer Lockwood was asked by a colleague to review the company's VAT position. Following an examination of HMRC's systems, Officer Lockwood established that the last VAT return which the company had filed was for the period ending November 2009. Computer-generated central assessments had been raised and paid for each subsequent VAT quarter and, in December 2016, the company's VAT account was in credit by £36,000.70.

(6) The director's evidence was that he paid these central assessments by cheque. He blitzed paperwork in short bursts (as he was rarely in the office). He spent little time considering the VAT position.

(7) Following the manual submission in February 2017 of five VAT returns up to the period ending February 2011 by the company's former accountants, Officer Lockwood identified that VAT was a risk since these returns demonstrated that more VAT was due than had been centrally assessed in those periods. Accordingly, she arranged to visit the company. That meeting appears to have been scheduled initially for May 2017.

(8) On 1 June 2017 the accountants and the director sent a disclosure email to Officer Lockwood which included a letter from the director explaining that £306,585.08 of VAT was due and offering to pay this is at rate of £60,000 per annum for five years. It also included commercial information designed to demonstrate that the company's current and future trading position was positive.

(9) On 5 June 2017, Officer Lockwood attended the company's premises and met with the director and the company's accountants. The director confirmed that between 2010 and 2016 he had not given VAT the attention it deserved and that he should have been aware of, and dealt with, the VAT situation. This is because he had spent most of his time on sales and day-to-day business. He had employed his accountants to review the VAT position which they had now done. He had now made full disclosure and wanted to regularise the situation. Officer Lockwood's notes of meeting record that the director knew precisely how much money was owed to the company and its ongoing cash position. They also record that the office organisation was excellent with details of 20 ongoing jobs laid out on the desk and spare car key fobs on the wall. On the same day, the accountants sent Officer Lockwood copies of the accounts for the three years ending 31 March 2016.

(10) Following that meeting, Officer Lockwood gathered further material and discussed the penalty position with colleagues, sought guidance from a specialist and an experienced officer, and then wrote to the accountants on 27 September 2017 about the possible penalty position and asking for a meeting. In a telephone call with the accountants on 10 October 2017 she explained that she was considering issuing penalties under section 60 and section 61. A

meeting to discuss this was arranged for 10 November 2017.

(11) The company went into a creditors voluntary arrangement on 25 September 2017 ("**the CVA**"). The accountants referred to this in their reply of 5 October 2017 to Officer Lockwood's email of 27 September 2017.

(12) HMRC's notes of the meeting which was held on 10 November 2017 record, amongst other things, that; the director said that he was very particular about things and that he was a very particular person; he was paid through PAYE and did not receive dividends; in connection with VAT, he was not doing things right but was not even thinking about it; he knew that the business was paying VAT; he did not consciously consider the accounts which showed an increasing liability to HMRC; he was gobsmacked when he understood the level of VAT which was owed; the VAT had been used as working capital; he denied consciously avoiding paying VAT, but accepted that he was possibly incompetent or clumsy; his behaviour was not deliberate; a mistake had been made and he was trying to rectify it.

(13) Those notes go on to record that Officer Lockwood considered the director's behaviour to be dishonest since: he had failed to submit VAT returns from period 02/10 to period 11/16 until HMRC's intervention; the director understood the VAT process, had collected VAT from his customers, but had not declared it to HMRC; he should have been aware of the VAT liability shown through the company's financial accounts; the level of VAT due to HMRC was substantially higher than the central assessments which had been paid; and the director was remunerated whilst the HMRC debt increased, thus leading Officer Lockwood to believe that the director had gained personally from the evasion.

(14) On 20 March 2018, Officer Lockwood sent the company a civil evasion penalty notice charging a penalty of £90,753 under section 60. The penalty was computed at 30% of the potential tax loss for each period reduced by the surcharges which had already been applied. She also issued an additional letter advising the company that under section 61 the penalty was being apportioned to the director, and she sent a civil evasion penalty notice of assessment letter to him.

(15) Following correspondence between Officer Lockwood and the appellants' agent, Croner Taxwise, the appellants requested a statutory review (on 31 January 2019) to which HMRC responded on 15 March 2019 by way of a review conclusion letter which upheld the penalties. On 27 March 2019 the appellants appealed to the tribunal.

The financial statements

(16) The notes to the financial statements for the company for the year ended 2014 show that £196,618 was owed as "other taxes and social security costs". This increased to £246,068 in 2015 and to £309,670 in 2016. The director's evidence was that he had not discussed these amounts with the accountants and he had not realised that these figures reflected such a substantial debt to HMRC. He realised that now but had not noticed it before. He would not have known how to interpret the figures, and the accountants had not specifically mentioned it. He and his accountants were like "ships passing in the night". Even though he had signed the accounts he did not understand much of the financial information which was included in them. All he was interested in was whether the company had made any money in that year. He was asking us to believe that he hadn't looked at the accounts and had mistakenly failed to declare about 50% of the VAT that was actually owed. He accepted that this had been careless but it had not been deliberate.

HMRC ledger

(17) HMRC's ledger of payments by the company, and assessments for both tax and for penalties allegedly owed by the company, shows that from 1997 to January 2012, there was a slightly chaotic system of assessments and payments. It is very difficult to match an assessment on one hand with a payment on the other. There simply appear to be assessments, and then payments made without any correlation with those assessments. As at 13 January 2012, the company appeared to owe HMRC the sum of £12,645.40. On 17 January 2012, the company paid a further £6,718.01; on 18 January 2012, it paid £10,190.14; on 19 January 2012, it paid £17,377.24; and on 6 February 2012, it paid a further sum of £14,360.71. This resulted in the company being in credit to the tune of £36,000.70.

(18) Thereafter the payment of the assessments matches the central assessments themselves. So, for example, an assessment for the period 08/12 was raised on 12 October 2012 in an amount of £11,344 which was then matched by a specific payment of that amount on 26 October 2012. That same matching of assessments and payments continues until 27 October 2016 (for the period 08/16).

BURDEN OF PROOF

9. Under Section 60(7) the burden of proving evasion and dishonesty lies upon HMRC who must also prove that the penalty notice and penalty liability notice are valid in time notices. In both cases the standard of proof is the civil standard, namely the balance of probabilities.

SUBMISSIONS

10. In summary, Miss Hickey submitted as follows:

(1) Given his background in banking and his experience in business, the director would have, and indeed accepted that he had, knowledge of the VAT system and of the responsibility to file returns and make payments on time.

(2) There had clearly been VAT issues in the past where VAT had not been paid on time, and the director was therefore fully aware of the system, and the company's VAT obligations.

(3) He failed to submit VAT returns from period 02/10 to period 11/16 until HMRC's intervention.

(4) He made payments in satisfaction of the central assessments and therefore must have actively considered them.

(5) At the meeting on 10 November 2017 the director admitted that he had received the VAT from his customers but had left it in the company as working capital.

(6) The accounts, which were based on the figures from the Sage software sent by the company to its accountants, clearly showed an increasing liability to tax during the years in question. It is inconceivable that this was not drawn to the director's attention by the accountants, and given that the director signed off the accounts, he must be taken to have recognised that this debt was increasing. Yet he did nothing about it.

(7) The level of VAT due is about 51% more than the VAT paid under the central assessments. This equates to additional net sales of about £1.85 million and gross sales of approximately £2.23 million. This amounts to approximately one half of the company's

turnover. So, the director is asking us to believe that he had not noticed that the VAT which he was declaring was based on one half of the turnover of the company.

(8) The director was hands on. He undertook all of the invoicing and there were very few sales invoices per month. He would therefore know exactly what the company's turnover was and therefore what its liability to VAT was.

(9) His office was extremely organised and this reflects the director's evidence that he was a dinosaur and did not delegate. This does not sit well with his assertion that he did not know of his turnover and of his quarterly VAT liability.

(10) Paying on the lower amount set out in the central assessments assisted the company in that the underpaid VAT could be used as working capital in the business.

(11) The sheer scale of the under declaration can only be explained by the director knowing what the real liability was yet taking a conscious decision not to pay it. This is dishonest behaviour.

(12) The director's behaviour is similar to that in the case of *Walker v HMRC* [2013] UKFTT 375 ("***Walker***"). In *Walker* it was found that those appellants adopted a deliberate strategy of paying only central assessments visited on a company which understated that company's true liability, and paid other creditors in preference to settling VAT liabilities. This was found to have been dishonest. The case of *Kendrick* [2014] UKFTT 0767 ("***Kendrick***") can be distinguished. In that case, unlike the case of the director in this appeal, Mr Kendrick's failure to submit his VAT returns was due to several external factors, for example a foot-and-mouth outbreak and his recent divorce, which do not apply in the case of these appellants.

(13) The penalty assessment has been correctly calculated and served, as has the penalty liability notice. Both have been served within the relevant statutory time limits.

11. In summary Miss Sheldon submitted as follows:

(1) The crux of this case lies with the principles set out at [148] of *Byers*. It is clear that the director did not actually know that the central assessments understated the actual VAT liability of the company. It is also the case that the director did not "close his eyes and ears or deliberately not ask questions lest he learn something he would rather not know…".

(2) The only issue is whether the director was dishonest. The burden of proving this is clearly on HMRC. It is a serious allegation and cogent and compelling evidence is required.

(3) In this case there is absolutely no doubt that the director has been extremely careless if not reckless towards his, and the company's, VAT responsibilities. But he has not been dishonest. He did not actually know, nor did he turn a "blind eye" to the fact that the central assessments understated the actual VAT liability.

(4) The director was responsible for virtually everything which went on in the company. He worked 70 to 80 hours a week and did not delegate. His approach to paperwork was to blitz it and he spent little time considering VAT. This is evidenced by the somewhat chaotic approach to VAT which existed prior to the issuance of the central assessments. It is also demonstrated by the fact that the company was, at one stage, owed over £36,000 by HMRC, yet the company never sought a repayment. This demonstrates a lack of awareness of the company's VAT position, as well as negativing the assertion that the company needed the VAT as working

capital. If the company needed working capital and had known that it had £36,000 tied up with HMRC, it is likely it would have sought a repayment.

(5) The director's evidence was that the company did not need the VAT which it had obtained from its customers, as working capital.

(6) The first time that he realised that there was an error in the VAT paid was when his accountants had undertaken their analysis, and he was "gobsmacked" when he found out about the level of VAT which was owed. He immediately offered to pay the outstanding amount, by instalments. This is not the behaviour of a dishonest man. HMRC appear to accept this as they have given him maximum discount for cooperation.

(7) He never really looked at the accounts. He did not engage fully with his accountants. All he was interested in was whether the company was making money. Even if he had seen the entries in the accounts which showed that the company's liability for tax was increasing over the years, it wouldn't have made much sense to him. They were simply numbers on a page.

(8) The director's position in this appeal is similar to the position in *Kendrick*. In that case a failure to notice the difference between central assessments and the actual VAT liability was stated not to be a satisfactory way to carry on business affairs. But provided that failure to notice was not intentional, it is not dishonest behaviour. Furthermore, there is no deliberate strategy not to pay as was the case in *Walker*.

(9) There was no personal benefit to the director, something which is now accepted by HMRC.

DISCUSSION

12. We have no hesitation in finding that the director was solely responsible for the VAT affairs of the company, and that he was fully aware of the VAT system and the company's obligation to pay the right amount of VAT at the correct time. Indeed this is not seriously challenged by the appellants.

13. Furthermore, as is also accepted by the appellants, we have no hesitation in finding that the director's approach towards the VAT regime and the company's obligation to pay VAT has been careless and indeed probably reckless.

14. But as a matter of law, that is not sufficient to enable HMRC to discharge their burden of proving that the company acted dishonestly to evade VAT and that that dishonesty is attributable to the dishonesty of the director.

15. The legal test is set out in the extract from Byers at [7] above. HMRC must show that the director had sufficient knowledge of the transaction "to render his participation dishonest according to normally acceptable standards of misconduct. In essence the test is objective…" In this case HMRC contend that the knowledge of the transaction is essentially that the director knew that the central assessments understated the real amount of VAT owed by the company for the periods during which it had not submitted returns (02/10 to 11/16). And in light of this knowledge he paid those central assessments when he should have been submitting VAT returns and paying the true amount of VAT. This was a deliberate strategy not to pay the true amount of VAT.

16. Furthermore, conduct involving dishonesty is not restricted to the commission of an

action but includes an omission to act. The assertion in this case is that the director omitted to submit the VAT returns, rather than pay the central assessments, again on the basis that he knew that those assessments understated the real amount of VAT owed by the company.

17. And so, according to HMRC, he acted dishonestly since he deliberately closed his eyes and ears and deliberately did not question the quantum of the central assessments since had he done so, he would have discovered that they understated the true amount of VAT due.

18. In essence, the competing positions are these:

(1) HMRC say that the director paid sufficient attention to the company's VAT affairs to enable him to pay the central assessments. He was fully aware of the sales/turnover of the company therefore must have known that the central assessments understated the actual VAT liability by about 50%. Furthermore, this additional liability was clearly set out in the accounts which the director signed.

(2) The appellants say that the director was not aware of the real VAT liability as he was a workaholic and only blitzed VAT when he had to. This is demonstrated by his chaotic approach to VAT prior to the issue of central assessments. These were then paid simply because they were put in front of him. He saw no reason to question them. He did not understand the accounts and the fact that they showed an increasing liability to VAT over the years.

19. In our view the director has not behaved dishonestly. HMRC have failed to establish that the director either knew that the central assessments understated the true VAT liability of the company and, in this knowledge, paid them rather than submitting VAT returns and paying the true VAT liability; or that he deliberately did not question the quantum of those central assessments since if he had done so, he would have discovered that they understated the true VAT liability. We say this for the following reasons:

(1) We found the director to be a truthful witness. He appeared to be somewhat harassed, but that is unsurprising given the nature of the claims being made against him, and the fact that he has spent his entire business life building up this business. It is clear that he has poured his heart and soul into it. We wholly accept that during the period in question he was a workaholic, focusing almost exclusively on building up and maintaining a successful business, and that he delegated little. Whilst this means that he was responsible for most things, including the company's VAT obligations, it meant that he had little time to focus on non-business activities, and we accept that this included paying detailed attention to the company's VAT position. We find it plausible that he paid such little attention to it and that he undertook a "blitz" approach towards VAT prior to the issue of the central assessments. Whilst this might not be satisfactory as far as the appellants' responsibilities towards the VAT system is concerned, we find it is understandable in the context of the director's approach towards his business commitments.

(2) Although unusual and indeed reprehensible, we also find it plausible on the facts that we have found, that the director paid little attention to the figures in the accounts. He did not strike us as a man who pays particular attention to fine numerical detail. Whilst he clearly had a detailed handle on the business side of the company's activities, as evidenced by the meticulously organised office which Officer Lockwood observed in her visit to the company's premises, that is very different from having a mind which can necessarily see all the detailed implications from a set of accounts. We accept the director's evidence that he simply signed the accounts without reviewing them in detail, and the fact that those accounts showed that there was an increasing liability to tax over the years in question, was not drawn specifically

to his attention by his accountants. Without that he did not consider them nor understand their implications.

(3) The somewhat chaotic nature of the VAT returns and payments prior to the issue of the central assessments demonstrates that the company and the director, were dealing with VAT on an unsatisfactory basis. But once the central assessments were raised, these were paid. We accept that this demonstrates an awareness of the VAT situation, as submitted by HMRC. But given the position that the director was in, we find it entirely believable that he simply paid what had been sent to him by HMRC, in those central assessments, and that he thought therefore that his VAT position was "sorted" on a quarterly basis.

(4) Whilst we wholly accept that the VAT liability is a massive 50% larger than the amounts centrally assessed, and this effectively reflects a 50% understatement of turnover which would have been readily apparent had the director analysed the sales invoices, we find that he simply did not do so. He had neither the time, nor we suspect the expertise. Although fully aware of how VAT worked, the director, as a matter of fact, did not undertake a reconciliation exercise between the central assessments on the one hand and the sales invoices on the other. And we seriously question whether or not he would have had the numerical expertise to do so even though this appears to be a comparatively straightforward exercise. But even so, we do not believe that in failing to do so, he did so deliberately or dishonestly. His failure to do so does not reflect a deliberate strategy that had he done so he would have discovered the true VAT liability. He simply paid the VAT "in front of him" and in so doing did not deliberately close his mind to the company's VAT obligations. Indeed, as far as he was concerned, it had discharged them.

(5) The director's lack of grasp of the ongoing VAT position of the company is demonstrated by the overpayment to HMRC, at some stage prior to the period in question, of £36,000.70. If, as is suggested by HMRC, the VAT paid by customers was deliberately not paid over to HMRC since the company needed it as working capital, it seems odd to us that the company did not seek a repayment of that overpaid £36,000.70 as soon as it became aware of it. The fact that it did not suggests that the company and the director either had no ongoing awareness of the company's VAT position or it had no need of that money as working capital.

(6) This case is very different from the position in *Walker* where the court found that the appellants in that case had: Come to deliberate decisions not to submit returns unless pressed by HMRC; paid the central assessments knowing that they understated the true amount of VAT due and decided only to pay the correct amount once threatened with legal action; made a conscious decision to pay other creditors in preference to settling the relevant company's VAT liabilities. In other words, those appellants had adopted a dishonestly cynical attitude towards the VAT regime and had consciously decided to pay less VAT than they knew was due for the reasons set out above.

(7) In these appeals, the director's behaviour was careless and reckless, but was not dishonest. We have found that he did not actually know that the central assessments understated the true amount of VAT; there was no deliberate strategy to underpay HMRC in order to pay other creditors and to maintain the company's working capital position; there was no deliberate unquestioning of the central assessments in the fear that they might disclose an underpayment which would result in the additional liabilities having to be paid on an ongoing basis.

DECISION

20. We allow these appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

21. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
Release date: 9 MARCH 2023