Value Added Tax – withdrawal of cash basis – taxpayer continued to use cash basis based on belief that this had been accepted – penalties for a deliberately inaccurate return – personal liability notice on director – whether or not deliberate behaviour – held not – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02718V

BETWEEN

MICHAEL ROBINSON **Appellant**

-and-

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

TRIBUNAL: JUDGE PHILIP GILLETT
NORAH CLARKE

The hearing took place on 17 November 2020. With the consent of the parties, the form of the hearing was a video hearing with all parties attending by video on the Tribunal Video Platform. A face to face hearing was not held because this was not considered appropriate in view of the pandemic.

We were referred to documents and authorities in an electronic bundle consisting of 365 pages, together with skeleton arguments from both parties, also in electronic form.

Rebecca Sheldon, counsel, instructed directly, for the Appellant

Christopher Thompson-Jones, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against a Personal Liability Notice issued to the Appellant, Mr Robinson, under paragraph 19 of Schedule 24 to the Finance Act 2007, on 1 December 2018, in the amount of £31,933.30 for the VAT accounting periods 11/15 to 08/17, on the grounds that he had continued to submit VAT returns on the cash accounting basis after HMRC had withdrawn permission to use that basis.

THE FACTS

2. We received witness statements and oral evidence from Mr Robinson and Officer James Ellis of HMRC. We found both to be credible and reliable witnesses although Officer Ellis did have some, understandable, difficulty recalling precise details about events which had happened some time ago. On the basis of this evidence and the documents provided we find the following as matters of fact.

3. Mr Robinson was a director of PMR Limited ("PMR"), Castle Developments (Wales) Limited ("CDW") and Court Estates & Developments Limited ("CED"). Initially there were other directors of CDW but by the time of the events under consideration Mr Robinson was the sole director of all three companies.

4. Mr Robinson owned 51% of the shares in PMR and 33.3% of the shares in CDW, although he also owned a priority share in CDW, which gave him effective control of the company. He also owned a controlling interest in the shares in CED.

5. PMR was incorporated in May 1995 and commenced trading, providing the professional services of Mr Robinson. It used the cash accounting basis for VAT as it was within the threshold for the cash basis and expected to remain so.

6. In July 2007, PMR was engaged to carry out the project management of a development site in Whitland, Carmarthenshire, which consisted of 26 residential properties, whilst CDW was used to purchase and develop the site. CDW was a joint venture with a local building company, B&S Builders Ltd.

7. The value of the development was approximately £7,000,000 and therefore CDW registered for VAT and was required to account for VAT under the normal invoice accounting method.

8. As a result of the financial crisis in 2008, the lending institutions for the development, Anglo Irish Bank PLC and Oriana Estates, recalled the loans which led to the suspension of work on the development site from 2009.

9. CED was then formed to obtain the necessary finance to repay the lending institutions and continue with the development. It was formed as a separate company in order to keep the refinancing remote from the original borrower. Again, as the value of the development was in excess of the cash accounting threshold, CED operated the invoice accounting method for VAT.

10. The three companies traded with each other with PMR providing Mr Robinson's project management services to CDW and CED. PMR continued to use the cash accounting method and CDW and CED used the normal invoice accounting method, with CDW and CED reclaiming input VAT from HMRC. However CDW and CED did not have sufficient cash resources to pay PMR for Mr Robinson's services, although they continued to reclaim the input VAT on the invoices from PMR. PMR did not therefore account for any output VAT because it was not receiving any cash from CDW and CED.

11. On 4 April 2014, HMRC commenced an enquiry into PMR's VAT position and concluded that there was a disparity between the output VAT declared by PMR and the input VAT reclaimed by CDW and CED.

12. On 30 May 2014, HMRC Officer Ellis wrote to PMR stating that PMR should cease to account for VAT via the cash accounting scheme as of the VAT accounting period 05/14, which had commenced on 1 March 2014. This notice was therefore retrospective in effect.

13. On 18 October 2014, PMR replied to HMRC stating that they would agree to revert to this method but would need to be given reasonable notice because of the difficult financing position of the development. Officer Ellis was aware of the need to refinance the development.

14. However, on 2 December 2014, the decision of 30 May 2014 to withdraw the cash accounting basis and the associated VAT assessments were withdrawn because HMRC realised that the cash accounting scheme could not be withdrawn retrospectively.

15. PMR was then, on 27 February 2015, given another notice by Officer Ellis to cease using the cash accounting scheme, with effect from the period 05/15 onwards, in accordance with Regulation 64(1)(d) SI 1995/2518.

16. Also on 27 February 2015, Officer Ellis wrote to PMR via Mr Robinson asking whether "a positive outcome had been reached with regard to the re-financing arrangements."

17. On 4 March 2015, HMRC wrote to PMR reminding the company that 02/15 would be the last period on the cash accounting basis before the invoice basis would be used. Mr Robinson however continued to use the cash accounting basis for the submission of the VAT returns for PMR.

18. On 8 September 2015, Mr Robinson wrote to Officer Ellis, stating that the refinancing was continuing to progress with completion of the IVA proposal "now within sight."

19. On 22 October 2015, HMRC issued a VAT assessment for the period 05/15 in the sum of £223,083 and for the period 08/15 in the sum of £17,342. In the letter accompanying this assessment, the following was stated under the "summary" section:

> "In recognising that the refinancing agreement to repurchase the residential development site in Whitland is key to this enquiry, this VAT assessment has been delayed for a quarter, allowing you as a director of PMR to concentrate time and efforts in dealing with legal matters that have protracted the securing of this agreement.".

20. The accompanying letter goes on to state that interest will not be charged as a result of the delay as the assessment was "simply about addressing the unfair tax advantage that has been gained by 3 associated businesses employing two different methods of accounting for VAT," and that a penalty would be due as PMR deliberately did not adhere to HMRC's direction to withdraw from the cash accounting scheme.

21. On 1 December 2015, a penalty assessment of £84,148.75 was issued.

22. On 11 December 2015, Mr Robinson wrote to Officer Ellis setting out that progress was continuing with regards to the IVA proposal, and to contact him **if any further information was required before giving authorisation for the input VAT claimed by CDW and CED to be repaid**. A similar e-mail was sent by Mr Robinson to Officer Ellis on 12 January 2016. Another e-mail in similar terms was sent by Mr Robinson to Officer Ellis on 9 March 2016 and, again, another similar e-mail was sent by Mr Robinson to Officer Ellis on 6 April 2016.

23. On 8 June 2016, Mr Robinson wrote to Officer Ellis, stating that "whilst PMR is not yet able to submit [to] using the full invoice accrual basis, VAT received in respect of income

received from Caste and Court during the period is shown as output tax. Following our recent telephone con[versation] I will call again to update you."

24. On 1 August 2016, Officer Ellis responded to Mr Robinson to confirm that the repayment claims for CDW and CED had been authorised.

25. The input VAT for CED and CDW was not however repaid for May 2017 or August 2017.

26. On 18 October 2016, PMR wrote to HMRC to request a review of HMRC's decision to instruct PMR to cease the cash accounting scheme. On 28 November 2016, HMRC carried out a statutory review, having accepted the late review request, but upheld the original decision.

27. On 11 January 2017 PMR lodged an appeal with the Tribunal, although this has not been pursued because HMRC effectively transferred the penalty to Mr Robinson by issuing a personal liability notice.

28. On 9 November 2017, HMRC issued VAT assessments on PMR for periods 11/15 to 02/17 inclusive in the sum of £81,868. On 19 December 2017, HMRC issued a VAT assessment on PMR for the period 05/17 in the sum of £7717.01 and for the period 08/17 in the sum of £833.16.

29. On 19 April 2018, HMRC issued an "officer's liability to pay a company penalty" notice, ie, a personal liability notice, in the amount of £31,933.30 and, on 20 April 2018, a Notice of Penalty assessment was issued in the same amount.

30. On 28 April 2018, Mr Robinson wrote to HMRC stating that the 19 April 2018 notice had been sent to an incorrect name. It had been sent to Paul Michael Robinson, rather than Michael Robinson.

31. On 9 May 2018, Mr Robinson wrote to HMRC disputing that a penalty was due on the basis that there had been tacit approval for PMR to continue using the cash accounting scheme because:

(1) HMRC had been kept "fully informed regarding the Company's strategy and procedures to secure alternative funding sources", and

(2) The repayments for CDW and CED had been authorised.

32. He therefore argued that his behaviour in continuing to submit VAT returns on the cash basis did not amount to a deliberate inaccuracy.

33. Mr Robinson also requested a statutory review of the decision to issue the personal liability notice but, on 4 July 2018, a letter was issued stating the outcome of the statutory review, which was that the penalty assessment dated 20 April 2018 should be upheld.

34. Also on 4 July 2018, the decision of 19 April 2018 decision was cancelled because the incorrect name had been used.

35. On 13 July 2018, HMRC issued a revised penalty assessment against PMR in the amount of £31,933.30 and, on 16 July 2018, HMRC withdrew penalty assessment NPPS-641121 (the 20 April 2018 assessment).

36. On 9 August 2018, a new personal liability notice was issued in the amount of £31,933.30.

37. On 3 August 2018, Mr Robinson wrote to HMRC, via email, setting out that he disagreed with the imposition of the penalty and reiterated the grounds set out in his earlier letter of 9 May 2019. He also wrote to HMRC objecting to the personal liability notice on 20 August 2018, again referring to his email of 3 August 2018.

38. On 16 November 2018, the personal liability notice issued on 9 August 2018 was withdrawn, because Mr Robinson was not identified personally on it.

39. A liquidator was appointed for PMR on 4 October 2018 and, on 1 December 2018, HMRC issued a personal liability notice to Mr Robinson in the sum of £31,933.30 for the periods 11/15 to 08/17, on the basis that the business was "likely to become insolvent."

40. On 19 December 2018, Mr Robinson requested a review of the personal liability notice issued on 1 December 2018, but, on 29 March 2019, following the review, this personal liability notice was upheld.

41. On 24 April 2019, Mr Robinson wrote to HMRC setting out that he believed that Officer Ellis had approved the continuing the use of cash accounting in giving authorisations for the repayment of the input VAT claimed by CED and CDW in respect of invoices from PMR.

42. On 13 June 2019, HMRC wrote to Mr Robinson setting out their view that there was no tacit approval from Officer Ellis to continue using the cash accounting scheme.

The Law

43. Paragraph 1 Sch 24 FA 2007 sets out that a penalty is payable when a document (which for VAT includes a return under para 1(4)) shows an understatement of a liability to tax. The inaccuracy must also be careless or deliberate.

44. Paragraph 3(1) Sch 24 FA 2007 then sets out the following regarding the definition of "deliberate but not concealed":

> "(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
>
> …
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it…"

45. Paragraph 19 Sch 24 FA 2007 permits the transfer of a penalty issued to a company to an officer of that company in certain circumstances, and provides as follows:

> "(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.
>
> (2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.
>
> (3) In the application of sub-paragraph (1) to a body corporate… "officer" means—
>
> (a) a director …"

DISCUSSION

46. In this case there were initially two grounds of appeal:

> (1) HMRC were wrong to issue the notice withdrawing the cash accounting basis, and
>
> (2) The company's behaviour was not deliberate because Mr Robinson believed that there was a tacit agreement with Officer Ellis that he could continue to use the cash accounting basis while undertaking the refinancing.

47. Mr Robinson is no longer arguing that HMRC were wrong to issue the notice withdrawing the cash basis and we need not therefore consider that further.

48. The sole point at issue therefore is whether or not the company's, ie, Mr Robinson's, behaviour in continuing to submit VAT returns using the cash accounting basis amounted to a deliberate inaccuracy.

49. Both Mr Thompson-Jones and Ms Sheldon referred us to the case of *Auxilium Project Management Ltd v HMRC [2016] TC 05024* ("Auxilium"), and in particular the words of Judge Greenbank at [63]:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

50. Both parties agreed that this sets out that the test is a subjective one, which requires a consideration of the taxpayer's knowledge and intention, to establish whether a taxpayer has knowingly provided HMRC with a document that contains an error with the intention that HMRC should rely on it as an accurate document.

51. In this situation the burden of proof lies with HMRC to demonstrate that a penalty is due. This was agreed by both parties.

52. The question for us therefore is whether or not HMRC were able to demonstrate, on the balance of probabilities, that Mr Robinson did not genuinely believe that he had been given tacit approval to continue to use the cash accounting method.

53. Mr Thompson-Jones argued strongly that HMRC had sent seven letters to Mr Robinson stating that the case accounting basis was to be withdrawn, albeit that the first two letters had to be withdrawn because they purported to withdraw the cash basis retrospectively. Mr Thompson-Jones therefore argued that even if Mr Robinson did believe that he could continue to use the cash accounting basis, this was an unreasonable belief.

54. When considering the question of whether or not a taxpayer has a genuine belief for the purposes of demonstrating that he has a reasonable excuse for not doing something, it is well established that a tribunal must also determine whether or not that belief is reasonably held. However, Mr Thompson-Jones did not refer us to any authority on the subject of penalties for a deliberate inaccuracy which required that the taxpayer must have a good reason for holding the belief which caused him to act as he did. It does not matter therefore whether or not it was reasonable for Mr Robinson to believe that there was a tacit agreement with Officer Ellis. We only need to determine if he genuinely did hold that belief.

55. Mr Robinson's witness statement and oral evidence were quite clear and consistent that he believed that he was being allowed to continue to use the cash accounting basis until a satisfactory refinancing had been achieved. This was challenged firmly by Mr Thompson-Jones but Mr Robinson consistently maintained that he believed this was so.

56. As I have said, it is not necessary for us to find that Mr Robinson's belief was reasonably held, but we note that HMRC issues invalid notices to cease cash accounting on more than one occasion during this period, and were also required to cancel and reissue some penalty notices.

57. In addition Officer Ellis did authorise the repayments of input VAT to be made to CDW and CED, which Mr Robinson took as a clear sign that Officer Ellis was content with the continued use of the cash basis. In fact, as Officer Ellis explained to us, because PMR, CDW and CED were separate companies he was unable to offset the VAT refunds against the output VAT which he was about to assess on PMR without Mr Robinson's express permission, which,

he stated, was not forthcoming. It was clear however that Mr Robinson took a very different message from the authorisation of those repayments.

58. Officer Ellis could not remember whether or not he had explained to Mr Robinson his thinking behind the authorisation of the repayments, even though the status of those repayments had been the subject of repeated emails from Mr Robinson to Officer Ellis. We think it likely that he did not explain the position to Mr Robinson, but it is also likely that, even if he did, Mr Robinson would not have fully understood the implications. Mr Robinson is an educated professional person, but he is not a tax specialist and might not have understood all the subtleties of the reasoning behind Officer Ellis's decision to authorise the repayments.

59. We can also understand how Mr Robinson might have become confused as to the precise status of the withdrawal notices and penalties, given that a number had to be withdrawn and reissued. It probably did not present the most organised picture of HMRC's internal workings.

60. It may be difficult for a tax specialist to understand how Mr Robinson could have effectively ignored seven letters stating that the cash basis was being withdrawn, but he stated that he believed that he was being given a reasonable transition period to move onto the invoice basis, which is what he had asked for at the very outset of discussions with HMRC. In the context of the somewhat confused letters and notices from HMRC, it becomes easier to understand how a non-tax specialist could come to that conclusion.

61. Nevertheless, as I have said above, we are not required to ask if Mr Robinson had a good reason to believe that he was being allowed to continue using the cash basis. The only question we need to ask is whether or not he genuinely believed that to be the case. It is, as Judge Greenbank said in *Auxilium*, "a question of the knowledge and intention of the particular taxpayer at the time."

62. It is a subjective test and, addressing that question alone we have come to the conclusion, on the balance of probabilities, that Mr Robinson did genuinely believe that he had been given effective permission to continue using the cash accounting method for a transitional period.

63. HMRC have therefore failed to demonstrate that Mr Robinson's action amounted to a deliberate inaccuracy. This means that no penalty for a deliberate inaccuracy is due and therefore the personal liability notice on Mr Robinson falls away.

64. For the reasons set out above therefore we have decided that this appeal should be ALLOWED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

Release date: 24 November 2020