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

**Appeal number: TC/2018/06568**

**BETWEEN**

**IOAN POPA** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE PHILIP GILLETT**
**MICHAEL BELL**

**Sitting in public at Taylor House, London on 11 March 2020**

**Liban Ahmed, of CTM Tax Litigation Ltd, for the Appellant**

**Ann Sinclair, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

1. This was an appeal against a personal liability notice ("PLN") issued in accordance with para 19(1) Sch 24 Finance Act 2007 on 19 February 2018.

2. HMRC issued the PLN on the basis that Mr Popa was liable to pay 100% of a penalty issued to P&D Fixing Solutions Ltd ("the Company"), of which Mr Popa was the sole director, for a deliberate inaccuracy which was attributable to Mr Popa as an officer of the Company.

3. The original amount of the PLN was £260,635.76, but this was recalculated following the submission of additional information, and reduced to £226,685.00.

### THE FACTS

4. We received a witness statement and oral evidence from Mr Popa, Ms Inga Zavadska, an accounts assistant at Abell Morliss International ("Abell Morliss"), the Company's accountants, and Robert Barnard, an Officer of HMRC. We found all to be credible and reliable witnesses.

5. We find the following as matters of fact.

### Procedural Issues

6. The company was incorporated on 19 April 2005 and traded as a glazing installer. Mr Popa was appointed a director on 1 May 2005 and was the sole director from 31 July 2005.

7. The Company was selected for a visit to check on its VAT returns and, on 8 November 2016, HMRC visited the offices of the Company's accountants.

8. HMRC identified that the deposits to its bank account exceeded the amounts declared as turnover on its VAT returns. These differences amounted to £2,779,034 for the periods from 01/13 to 10/16. Mr Popa explained that the main reason for the difference was that, owing to a computer input error, many supplies which should have been treated as zero-rated were treated as exempt and therefore omitted from the return, but Mr Popa was unable to provide satisfactory evidence of this at the time, and the HMRC officer noted that some zero-rated supplies had been included in the VAT return. HMRC appear to have largely discounted this explanation.

9. The Company provided HMRC with additional information to support the zero-rating of some of the Company's supplies, but HMRC found much of this to be insufficient to support zero-rating and, following further correspondence, HMRC issued VAT assessments in the sum of £462,961 for the periods 04/13 to 04/16, on the basis that the Company had not declared the correct amount of VAT in its returns.

10. On 24 May 2017, HMRC wrote to the Company and advised that HMRC's view was that the behaviour that gave rise to the inaccuracies was deliberate and that the director of the Company had knowingly failed to declare output tax on its VAT returns despite issuing sales invoices.

11. The Company was wound up in the High Court on 18 September 2017 and the Official Receiver was appointed as liquidator of the Company.

12. On 12 January 2018 HMRC issued a penalty explanation and schedule to the Company in contemplation of penalties under Sch 24 FA 2007 for the periods 04/13 to 04/16 and 10/16 and, also on 12 January, issued a notice of penalty assessment to the Company, via the Official Receiver, in the amount of £260,635.76.

13. On 19 February 2018 HMRC issued a PLN to Mr Popa in the amount of £260,635.76, advising that they had issued a penalty notice to the Company for a deliberate inaccuracy and, even though it was charged to the Company, Mr Popa was liable to pay 100% of it because of his actions.

14. An internal HMRC review was requested but the review officer upheld the original decision by letter dated 20 September 2018, but with a recommendation that the officer should examine the additional evidence which had been provided by then. Following a review of this additional evidence the assessment was reduced by £60,626, with a consequential reduction in the penalty amount.

15. Neither the VAT assessment nor the penalty assessment on the Company were appealed because the Official Receiver took no action in this regard.

### Preparation of VAT Returns

16. Mr Popa explained that the building industry is somewhat chaotic and clear paperwork is not always forthcoming, certainly not on a timely basis. We accept this portrayal of the industry.

17. P&D had a small number of long term contracts, the most significant of which were with Deepdale Solutions Ltd ("Deepdale"). Some of these contracts were for new build, and therefore zero-rated, and some were for refurbishments, and were therefore standard-rated.

18. P&D was paid for this work in instalments. When a project had been completed to a specified stage, Deepdale would send a certificate to that effect to P&D. Mr Popa would then

raise an invoice on behalf of P&D for the amount specified in the certificate and Deepdale would then settle the invoice, although not always at the amount billed or the amount on the certificate.

19. Because of the inadequacy and vagueness of the paperwork supplied by Deepdale, it was often very difficult for Mr Popa to tell which payments related to zero-rated supplies and which related to standard-rated supplies. He was therefore required to chase Deepdale for more information and, based on the somewhat unsatisfactory information provided by Deepdale, he put together his best estimate of which invoices should be zero-rated and which should be standard-rated. He believed that he did a very good job in this regard, in spite of the difficulties which he encountered.

20. He then supplied all his invoices to his accountants, Abell Morliss, for them to prepare the VAT and other returns on behalf of the Company. At the hearing HMRC did not argue that Mr Popa failed to provide Abell Morliss with **all** sales invoices, although Officer Barnard may have been of that opinion.

21. Unfortunately, Abell Morliss had problems with the input of some of the documents into its computer systems. Specifically the accounting software used automatically populated the invoice input fields with information used for previous invoices and, at an early stage, one of Ms Zavadska's colleagues had categorised invoices with no VAT as being exempt, meaning that the figures were not carried through to the VAT returns. Unless subsequent operators picked this up during the input process, it was very easy for many, but not all, of the zero-rated invoices to be processed as exempt, which meant that they were not carried forward to the totals on the VAT returns.

22. This problem was picked up by Ms Zavadska when she joined the firm in November 2016. She therefore spoke to the software suppliers who advised her how to correct this default mode, but by then many of the zero-rated invoices of P&D had been treated as exempt and processed accordingly.

23. This explanation of the computer problems was given by Ms Zavadska in her evidence and was not challenged by HMRC at the hearing. We therefore accept it as factually correct.

24. This problem had been explained to HMRC at the time of the visit in November 2016, but was largely ignored by HMRC because some of the zero-rated invoices had been treated properly, which they therefore regarded as an indication that the explanation was not correct.

25. There was also a problem in that when HMRC asked for the underlying evidence to show that work was properly zero-rated, this was thin on the ground, partially due to the failure of Deepdale to provide adequate documentary evidence and partially due to the fact that Mr Popa's personal computer, on which many of the early invoices and information had been stored, had failed, and the information was no longer available.

26. Once the returns had been prepared Abell Morliss submitted them to HMRC online. The returns were occasionally sent to Mr Popa for his approval but this did not happen often owing to the normal time pressures for submission of a VAT return.

27. For his part, Mr Popa remembered seeing some returns before they were submitted but he trusted his accountants to be doing the right thing and would not have been in a position to assess whether they were correct or not.

**The Law**

28. The law as far as is relevant to this appeal is contained in paras 15, 17 and 19 Sch 24 FA 2007, as set out below.

29. Para 15 provides the mechanism for an appeal to be made:

> "15. (1) A person may appeal against a decision of HMRC that a penalty is payable by the person.
>
> (2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.
>
> (3) …"

30. Para 17 then provides, again as far as is relevant:

> "17. (1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 15(2) the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11—
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.
>
> (4) …"

31. Para 19 then provides:

> 19. (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 other than a limited liability partnership "officer" means—
>
> (a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)),
>
> (aa) a manager, and
>
> (b) a secretary.
>
> (3A) In the application of sub-paragraph (1) to a limited liability partnership, "officer" means a member.
>
> (4) In the application of sub-paragraph (1) in any other case "officer" means—
>
> (a) a director,
>
> (b) a manager,
>
> (c) a secretary, and

(d) any other person managing or purporting to manage any of the company's affairs.

(5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)—

(a) paragraph 11 applies to the specified portion as to a penalty,

(b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,

(c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,

(d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),

(e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and

(f) paragraph 21 applies as if the officer were liable to a penalty.

(6) In this paragraph "company" means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association."

**Discussion**

32. The VAT assessments and penalty assessments on the Company were not appealed and this tribunal therefore has no power to reopen those assessments.

33. The only issues before this tribunal therefore are:

(1) Whether or not there was a deliberate inaccuracy which was attributable to Mr Popa, and, if so,

(2) Is the proportion of the liability for which Mr Popa has been assessed (100%) a decision with which we should interfere?

34. It was acknowledged by HMRC that the burden of proof in establishing whether or not there was a deliberate inaccuracy which was attributable to Mr Popa rested firmly on HMRC.

35. According to the penalty explanation sent to the Company on 12 January 2018, the penalty was assessed on the Company on the basis that the inaccuracy was deliberate because:

"You knew the returns were incorrect when they were submitted as bank deposits exceeded gross VAT declarations by £2,777,801 for the period 01/02/13 to 31/10/2016."

36. No further explanation was offered on the penalty explanation form as to why HMRC believed that Mr Popa/the Company "knew" the returns were incorrect but at the hearing HMRC argued that Mr Popa should have seen the returns before they were submitted and should have noticed that the returns did not reflect the full turnover of the Company.

37. We have found as a matter of fact that the returns were not as a rule sent to Mr Popa before they were submitted, even though this would have been the correct practice. In addition, even when Mr Popa did see the returns he would not have known whether his zero-rated supplies should have been included on the returns, and he trusted Abell Morliss to have prepared the returns correctly from the information which he had supplied.

38. Therefore, the assumption on HMRC's part that Mr Popa knew that the returns were incorrect was based on very limited evidence and amounted to little more than an assertion based on the HMRC Officer's assessment of the situation.

39. As we have found above, as matters of fact:

(1) Mr Popa did his best to identify which of his supplies should be treated as zero-rated and which as standard-rated from the limited information which was provided to him by Deepdale. He may not have been able to produce sufficient evidence to support this allocation to the satisfaction of HMRC, again because of the vagueness of the information provided by Deepdale, but he did his best, and actually believes he did a good job.

(2) Mr Popa provided all his sales invoices to his accountants, Abell Morliss, for them to process and prepare the Company's VAT returns.

(3) He did not see most returns before they were submitted to HMRC and he was not in any case in a position to realise that the returns were incorrect because they did not include most of his zero-rated supplies.

(4) The difference between the bank statements/turnover and the VAT returns as submitted arose from a computer input error.

40. Based on these facts, we decided that, on the balance of probabilities, HMRC had failed to discharge the burden of proof on them to show that the inaccuracies in the Company's VAT returns were deliberate inaccuracies attributable to Mr Popa.

**DECISION**

41. For the above reasons therefore we decided that Mr Popa's appeal should be ALLOWED.

42. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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: 18 MARCH 2020**