Appeal number: TC/2015/07275

VALUE ADDED TAX – civil evasion penalty for failure to make returns and pay VAT due - whether omissions by appellant to make returns and pay on time made for the purpose of evading VAT and involving dishonesty – no – whether, if yes, penalty should have been reduced by amount of default surcharges – yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PLANT FORCE (LEEDS) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
ANN CHRISTIAN

Sitting in public at City Exchange Leeds on 20 and 21 February 2017

Jeremy Barnett, instructed by Wine & Co (Chartered Accountants), for the Appellant

Tom Rainsbury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This was an appeal by Plant Force (Leeds) Ltd ("the appellant" or, in §§3 to 27 where there may be ambiguity, "PFL") against a decision of the Respondents ("HMRC") that it was liable to a penalty for dishonestly evading Value Added Tax ("VAT"). The amount of the penalty that HMRC say was due, after making reductions in accordance with their policy in relation to this type of penalty, was £89,001.

2. We chose our words carefully in the previous paragraph for the reasons given in the next section of this decision.

Application to appeal out of time and to consolidate appeals

3. The penalty for dishonest evasion of VAT is set out in section 60 Value Added Tax Act 1994 ("VATA"). That section relevantly provides:

> "(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.
>
> (3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person's conduct shall be construed—
>
> (a) in relation to VAT itself … as a reference to … the amount … by which output tax was falsely understated;
>
> …
>
> (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."

4. Section 76 VATA says:

> "(1) Where any person is liable—
>
> …
>
> (b) to a penalty under section[ ] 60 …
>
> the Commissioners may … assess the amount due by way of penalty … and notify it to him accordingly; …"

5. As to appeals, section 83 VATA provides:

"(1) Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters—

(n) any liability to a penalty … by virtue of …. section[60];

(o) a decision of the Commissioners under section 61 (in accordance with section 61(5));

…

(q) the amount of any penalty … specified in an assessment under section 76;"

6. When on 22 September 2015 HMRC notified PFL of their decision that it was liable to a penalty under s 60 VATA it also notified it, in the same document ("the company letter"), of their decision that s 61 VATA applied. Section 61 says:

"(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.

(2) A notice under this section shall state—

(a) the amount of the penalty referred to in subsection (1)(a) above ("the basic penalty"), and

(b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

(4) Where a notice is served under this section—

(a) the amount which, under section 76, may be assessed as the amount due by way of penalty from the body corporate shall be only so much (if any) of the basic penalty as is not assessed on and notified to a named officer by virtue of subsection (3) above; and

(b) the body corporate shall be treated as discharged from liability for so much of the basic penalty as is so assessed and notified.

(5) No appeal shall lie against a notice under this section as such but—

(a) where a body corporate is assessed as mentioned in subsection (4)(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against

> the amount of the basic penalty as if it were specified in the assessment; and
>
> (b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him."

7. The notice under s 61 to the company included in the company letter informed it that the "basic penalty" referred to in ss (2)(a) was £89,001 and that HMRC proposed to recover 100% of that penalty from Mr Adrian Michael Atkins ("Mr Atkins") who was the sole director and shareholder of the PFL.

8. The company letter comprising the notification of liability to the penalty and the s 61 notice also notified it, in accordance with s 61(4)(a) that the amount of the penalty assessed on PFL was £0.

9. On the same day as the company letter was issued, a letter was sent by HMRC to Mr Atkins constituting both a notice under s 61(1) notifying him (and thus making him a "named officer") that in, accordance with s 61(2), HMRC proposed to recover from him the whole of the penalty to which the company was liable and an assessment on him in the amount of £89,001.

10. On 16 October 2015 Wine & Co, Chartered Accountants acting for PFL and Mr Atkins, wrote to Mrs Marshall, the officer of Revenue and Customs conducting the investigation. The letter was headed "Plantforce (Leeds) Ltd and Mr AM Atkins". It said:

> "We appeal against the penalty on the grounds that it is excessive and unjustified".

11. After setting out grounds for their and their clients' reasons for saying that, the letter concluded (in bold capitals):

> "We would ask for a review by a person not previously involved in the matter"

12. Mrs Marshall replied by email, apparently unsure whether a review was being requested, to which Wine & Co replied that it was. The decisions of Mrs Marshall were then reviewed by a Mrs L M Cooper, who in a letter of 3 December 2015 said:

> "I conclude therefore that the civil penalty imposed in the sum of £89,001, being 60% of the VAT evaded is upheld."

13. On 22 December 2015 a notice of appeal was sent by Wine & Co to the Tribunal.

14. On 8 April 2016 the Tribunal emailed a letter to HMRC to ask who the appellant was. The letter said that the appellant was currently noted as PFL but that

following a review of HMRC's statement of case and their papers it appeared that the appeal concerned a penalty raised against Mr Atkins. Wine & Co were shown as copy recipients of the letter.

15. HMRC replied by email on 15 April 2016, copying Wine & Co in. The email said:

> (1) The appeal had been brought by PFL, a separate person from Mr Atkins.
>
> (2) PFL is entitled to appeal against liability to a penalty issued under s 60(1) VATA.
>
> (3) Mr Atkins has not appealed and only he was entitled to appeal against the decision to attribute the penalty amount to him.
>
> (4) The relevant statutory provisions are at s 61(5) VATA.
>
> (5) Mr Atkins is out of time to put in a notice of appeal and would need to make an application for permission under s 83G(6) VATA.
>
> (6) If the Tribunal considers that Mr Atkins is the appellant, then PFL would need to apply out of time to challenge the penalty.

16. On 5 December 2016 Wine & Co made an appeal to the Tribunal on behalf of Mr Atkins (as the named appellant) seeking to appeal under s 83(1)(o) VATA against the imposition of the penalty of £89,001 on him by virtue of s 61 VATA.

17. On being asked by the Tribunal whether HMRC had any objections to the appeal being made late (it was nearly a year out of time) they replied that they did.

18. On 12 February 2017 PFL's skeleton argument, settled by Mr Barnett, was filed and included an application for permission from the Tribunal to accept the appeal by Mr Atkins out of time and, if successful, to consolidate Mr Atkins' appeal with the company's.

19. When Mr Barnett began to make his application at the hearing we asked him what Mr Atkins hoped to achieve by appealing personally. We drew attention to the terms of s 61(5) VATA which provides in paragraph (a) that where a s 61 notice is served, as it was in this case, the company may not appeal against the notice as such, but it:

> "may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment"

The "basic penalty" in this case is £89,001. It seemed to us that what PFL had done was indeed to appeal against the fact of liability and the basic amount of the penalty.

20. Section 61(5) VATA provides no appeal against the notice as such may be made, whether by the body corporate primarily liable or the "named officer" who also receives a s 61 notice, in this case Mr Atkins. But paragraph (b) gives the named officer the right to:

> "… appeal against the Commissioners' decision that the conduct of the [appellant] is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him."

21. It was agreed by PFL and Mr Atkins that he was the sole controlling mind of PFL and that if PFL was dishonest then it was entirely Mr Atkins' actions (or omissions) that could have made it dishonest. It was also agreed by PFL and Mr Atkins that if PFL had dishonestly evaded VAT it must follow that the only person to whom liability under s 61 could be transferred was Mr Atkins and that there was no one else to whom any part of the liability could be attributed.

22. We said that it seemed to us that the appeal rights in paragraph (b) were necessary only in a case where persons other than one who was the single controlling mind of a body corporate were notified of a share (not the whole) of liability under s 61. If PFL succeeded in its appeal under s 61(5)(a) it would inevitably follow that neither PFL nor Mr Atkins would be liable to pay a penalty. What then we asked was the point of the appeal by Mr Atkins?

23. Mr Barnett suggested that if the appeal against liability failed then Mr Atkins would prefer it for a number of reasons if the liability to pay £89,001 was PFL's and not his personal liability. But following a short recess for discussion with Mr Atkins and Mr Wine, Mr Barnett informed us he was no longer pursuing the late appeal and consolidation application.

24. We would normally leave it there, but there are some aspects of what happened in this case that we should comment on. The excuse put forward by Mr Barnett for the late appeal by Mr Atkins was, it seems, that Mr Wine, when making the original appeal to the Tribunal in 2015, was insufficiently knowledgeable, not being a lawyer, of the niceties of s 61. We have some sympathy for the view that the relationship between s 61 and ss 60, 76 and 83 VATA is not at all clear (contrast the much clearer provisions of paragraph 19 Schedule 24 FA 2007 which replaced s 61 for the most part).

25. But we do not think that does justice to Wine & Co's letter of 16 October 2015 and subsequent correspondence. Their letter was headed with both PFL's and Mr Atkins' name, as were HMRC's replies.

26. The letter from Mrs Cooper, the reviewing officer, was addressed personally to Mr Atkins, and refers throughout to "you" clearly referring to Mr Atkins personally as it says at one point to "the company and you as its sole director".

27. HMRC's statement of case, drafted by HMRC's Solicitor's Office, also reveals a little confusion, and it is also noteworthy that when the Tribunal queried the identity of the appellant they were firmly rebuffed by HMRC who do not appear to have considered the terms of Mr Wine's original letter or HMRC's replies. But HMRC added, somewhat mysteriously, that the Tribunal might still think that Mr Atkins was the appellant.

28. We do not need to discuss what, in the light of the confusion we have described, our decision would have been if the late appeal and application had not been withdrawn.

The appeal

29. The appeal with which this decision is now concerned is the appeal by the appellant under s 61(5)(a) VATA 1994 against the decision of HMRC that it is liable to a penalty and against the amount of that penalty.

30. The parties were essentially agreed that the appeal stands or falls by reference to the answer to a simple question: were the acts and omissions of Mr Atkins that resulted in the company not paying the VAT that was overdue for nine successive quarters dishonest or not.

The facts

31. The primary facts in this case were not in dispute. The account which follows and which constitutes findings of fact is taken mostly from the exhibits to the witness statement of Christine Marshall, the officer of HMRC who conducted the investigation into the appellant's failures to file returns and to pay VAT.

32. Some documents referred to were exhibited in Mr Atkins' witness statement and a further email chain was produced at the start of the hearing. Mr Rainsbury did not object to this being adduced at that late stage. We describe these documents at the end of this section.

33. We add for clarity that in this section we are simply finding as fact that which was stated in correspondence and other documents or is recorded as being said at meetings or in phone calls. We are not at this stage making any findings about the truth of any statements.

34. The appellant was registered for VAT from 3 August 2004, with quarterly accounting periods ending in January, April, July and October. Its business is the transport by lorry of items of heavy plant.

35. Starting with the quarter 10/06 the appellant began to slip behind with its VAT returns and other tax debts and in 2008 HMRC threatened winding up for unpaid VAT and PAYE of over £69,000.

36. The appellant failed to make any VAT returns for the quarters 04/11 to 04/13 (nine consecutive quarters). During that period HMRC issued "central assessments" (these are assessments automatically produced by the HMRC computers when a return is not made) and surcharge notices around the middle of the month two after the last month of the relevant quarter. The central assessments are based on previous returns and in the case of the appellant were in small amounts. The appellant did not at any time inform HMRC that the central assessments were too low.

37. On 25 August 2011 HMRC received a phone call from Nikki Patterson, an employee of the appellant. The note of the call said "E Services Signing Up procedures, advised caller accordingly".

38. On 14 November 2012 "Carolyn", described as a bookkeeper for the appellant called HMRC. The question she asked is recorded as "trying to log in online to bring acc[ount] up to date" and the answer is "gen[eral] adv[ice] given". [In this and following paragraphs of the decision matters in [ ] are the Tribunal's assumptions as to the abbreviated word, or are the Tribunal's clarificatory comments]

39. On 19 November 2012 "Stephen", described as from the appellant's agents enquired by phone about signing up for E services.

40. On 22 November 2012 "Carolyn" again phoned HMRC. The notes say "64-8 on file" [64-8 is the form that taxpayers use to notify the authorisation of an agent to receive correspondence on their behalf.] The notes also say "advised on returns outstanding. WET address given". [We do not know, and were not told, what WET stands for]

41. On 27 July 2013 Mrs Gillian Adair, a Compliance Officer in HMRC, wrote to the appellant informing it that it had come to her attention that returns for 04/11 to 04/13 inclusive were outstanding.

42. On 9 August 2013 HMRC received an email from Blacksheep Bookkeeping. This stated that their client, the appellant, had received a letter dated 22 July 2013 which had been referred to them. The email said that Blacksheep would be sending in the missing VAT returns but wished to have a three week extension to allow time to check the records and speak with the previous accountant.

43. On 20 August 2013 Mrs Adair phoned Blacksheep turning down the request for an extension. Blacksheep said they accepted that and would continue to get the records up to date.

44. On 9 October 2013 Mrs Marshall, who worked in Local Compliance as a Fraud Investigator, had taken over the case from Mrs Adair and decided to open a COP9 enquiry. She wrote an opening letter to Mr Atkins "c/o" the appellant at the appellant's business address. [A COP9 enquiry is one into suspected fraud in which the taxpayer is invited to make a disclosure of irregularities and in return for their cooperation in the enquiry they are given an immunity from prosecution, save in respect of extraneous matters, such as a false statement of disclosure].

45. On 12 December 2013 Wine & Co informed Mrs Marshall that they had been appointed to act for Mr Atkins. They enclosed the authorisation to act for Mr Atkins (64-8), declined the formal COP9 offer but agreed to cooperate with HMRC fully. Mr Atkins denied any irregularities in the VAT affairs of the appellant.

46. On 11 February 2014 a meeting was held at Wine & Co's offices in Leeds. Those present were Mr Atkins, Mr Wine and Mr Scott of Wine & Co, and Mrs

Marshall and Mr Hancox of HMRC. The Notes of the meeting compiled by Mrs Marshall from her and Mr Hancox's notes show, among other things, that:

(1) When Mr Atkins was told that tax fraud includes deliberately failing to disclose a liability to tax or duty ie not submitting returns and asked if he had anything to disclose at this point, Mr Wine responded by saying that his firm had been approached by Mr Atkins as he was not happy with the way Armstrong Watson ("AW"), his previous accountants were dealing with his personal affairs and those of the appellant. Wine & Co had written to AW but had received no reply.

(2) Mr Atkins said he went to see Wine & Co because he was incurring penalties and things were not getting done. He had got Blacksheep to do the records twice a week.

(3) Mr Atkins said that AW had acted for him for about 4 years. He was not sure what they had done so he was not sure what returns he had failed to submit. He didn't know the amounts or periods involved nor what records or evidence was available to quantify the amounts.

(4) Mr Atkins had received a County Court summons from AW regarding unpaid fees.

(5) He had thought that AW were submitting the VAT returns and that he was making payments to cover the VAT. He had had no idea of the returns that were outstanding.

(6) When Mrs Marshall showed Mr Atkins a typical central assessment and surcharge notice that was sent to the appellant's address so that, she said, the appellant would have received it, Mr Atkins said that when he received a letter about tax or VAT he (or another member of staff) would put it in a pile with other documents for AW's attention.

(7) When informed about Nikki Patterson's enquiry about VAT returns, Mr Atkins said that she did not have the ability to do the returns; this was AW's job. Blacksheep would be doing the returns from then on.

(8) Mrs Marshall reiterated that "deliberately not submitting VAT returns is fraud". Mr Atkins' response was that that may be so, but "he didn't commit fraud he just got behind."

(9) Mrs Marshall also asked if there was ever a deliberate decision made not to submit the returns because they could not afford to pay. Mr Atkins denied that was the case.

(10) Mr Wine mentioned that the accounts of the appellant for the year ended in 2012 had been completed by AW. These showed an amount of £86k owed as VAT.

(11) Mr Atkins said he had no objection to Mrs Marshall asking for the accounting working papers, but AW might object as there were outstanding fees.

(12) Mr Atkins informed Mrs Marshall that he had paid £12,000 in VAT "last week" and that he would make a payment of £50,000 "today"

47. Mrs Marshall also asked Mr Atkins a series of questions about the appellant's business and its records. In the course of this questioning he said:

(1) The appellant is currently owed £400,000 and they give 60-90 days credit. £50,000 had been lost due to insolvencies.

(2) Mr Atkins repeated that he had not set out not to declare the VAT and he thought AW were submitting the returns.

(3) When the issue of central assessments and surcharges was raised again, Mr Atkins said that he would have forwarded notices about VAT returns to AW who would he thought have got back to the bookkeeper to pay the VAT.

48. There is no indication in the papers that Mr Atkins or Mr Wine accepted that the notes were a fair representation of what was said at the meeting, but neither is there any record of any disagreement.

49. On 20 April 2014 Mrs Marshall sent notices of VAT assessments to the appellant for the quarters 04/10 to 07/12 totalling £77,415.

50. On 5 June 2014 a meeting was held at the appellant's offices in Leeds. Those present were Mr Atkins, Ms Carolyne Roe of Blacksheep, Mr Wine of Wine & Co and Mrs Marshall and Mr Bland of HMRC. The Notes of the meeting compiled by Mrs Marshall from her and Mr Bland's notes show, among other things, that:

(1) The appellant was suffering from cash flow problem and had outstanding debtors of £500,000 of which only £300,000 was thought to be collectable. Mr Atkins added that the business had never recovered from the previous enforcement action taken by HMRC including a petition to wind the appellant up.

(2) Mrs Marshall explained that the VAT assessments were based on the figures of VAT outstanding shown in the accounts prepared by AW and were net of the central assessments.

(3) Mrs Roe's (Blacksheep) role was explained. She had started with the appellant in November 2012 and worked 1-2 days a week. The previous bookkeeper had left in August or September 2012. Blacksheep were recommend by AW.

51. In a letter dated 15 October 2014 from Mrs Marshall to the appellant she stated that all VAT returns for the appellant had been submitted.

52. An internal note dated 21 September 2015 made by Mrs Marshall sets out her reasons for imposing a dishonest evasion penalty on the appellant. The note does not address the issue of dishonesty, but concludes that Mr Atkins' behaviour in not submitting returns was "deliberate".

53. In a letter dated 22 September 2015 Mrs Marshall wrote to the appellant saying that by that letter she was imposing a penalty under s 60 VATA for dishonest evasion of VAT. The VAT evaded was £148,344 but she was prepared to abate the penalty by 40% for disclosure and co-operation making the total £89,001. She also stated that because HMRC considered the penalty was due wholly or partly because of the behaviour of Mr Atkins HMRC intended to recover 100% of the penalty from him under s 61 VATA. The amount payable by the company was £0 which "should be paid by 22 October 2015".

54. In a letter dated 21 September 2015 Mrs Marshall wrote to Mr Atkins at his home address with a copy of a letter dated 22 September 2015 addressed to him at the appellant's address. This was in most respects identical to the letter sent to the appellant but it informed him of the penalty to which the appellant had become liable, the abatement and that he would, by virtue of s 61 VATA, be required to pay the penalty of £89,001 by 22 October 2015.

55. On 15 October 2015 Wine & Co appealed against the penalty (see §13). The grounds of appeal were that AW were instructed by the company to deal with the VAT returns of the appellant and Mr Atkins believed that all matters were being dealt with correctly. AW did the accounts for the relevant years and Wine & Co commented "one wonders why they did not bring these matters of outstanding VAT returns before the director".

56. Wine & Co's letter also referred to AW's action against the appellant for outstanding fees and enclosed a copy of the appellant's defence and counterclaim (Form N9B) lodged with the County Court on 5 March 2014. The form sets out the appellant's defence:

> "The service provided by the claimant, [AW] is fully disputed due to the following reasons:
>
> a. Work was not completed to a good standard.
>
> b. Corporation tax returns, PAYE and VAT returns were not submitted to the relevant HMRC departments. There is currently an HMRC investigation due to in part to these returns, VAT and PAYE not being provided to the HMRC, this responsibility was with [AW].
>
> c. The financial advice provided by the accountants was insufficient."

57. Wine & Co quoted AW's solicitors' reply of 18 June 2014 which stated:

> "Our client has taken a commercial decision not to pursue further to avoid unnecessary and further legal costs".

A copy of the front page of the "Notice of Discontinuance" was also provided. Wine & Co added that the reply and Notice clearly show that AW accepted the blame in the matter of not sending in VAT returns.

58. Wine & Co's letter also referred to the petitions that in 2010 and 2011 were presented by HMRC to wind up the appellant. A copy of the 2011 petition was attached. Wine & Co said that the earlier petition led to the company's bank account

being frozen. This in turn led to serious problems within the company, and although the account was eventually reopened the cash problem "snowballed". They added that Mr Atkins could have let the company go under but he fought in every way to keep the company alive.

59. Wine & Co also said that the accounts for the year ended 31 July 2012 were approved by Mr Atkins on 14 June 2013 and these accounts showed VAT outstanding of £86,693, with a liability for the previous year, and that these accounts prepared by AW show there was no intention to deny a liability. The full amount of VAT for the relevant periods had been paid.

60. In his witness statement Mr Atkins exhibited some further documents not included in the HMRC bundle or as exhibits to Mrs Marshall's witness statement.

61. A letter of 6 February 2017 from Mrs Marshall to the appellant said that she had found that the VAT assessments for four of the periods covered by the investigation were incorrect and that the assessments totalling £22,534 would be cancelled. The letter said that the withdrawal of the assessments had no effect on the matters before the Tribunal.

62. An email from Carolyne Roe of Blacksheep dated 23 September 2012 is addressed to Andrew Byram of AW. This related to the trial balance at 31 July 2012 The email is a response to Andrew Byram's email of 18 September which attached the "opening balance adjustments for the appellant". Carolyne Roe's reply asks for, among other things, "any VAT reconciliation undertaken".

63. A letter from Mr Atkins to HMRC's "DMB Campaign" [DMB stand for Debt Management and Banking] dated 10 November 2014 says that he is working with Mr Wine to establish the VAT liability that is outstanding to HMRC. He adds that he had experienced problems with the HMRC Gateway and has sent two letters requesting details regarding his last VAT submission and a copy of the VAT certificate so he can submit the VAT returns online. This letter was copied to Mrs Marshall.

64. The documents produced by the appellant at the hearing showed a short email exchange. On 19 October 2012 Steven Esgate of AW emailed Carolyne Roe of Blacksheep asking if she could update him on the position with wages and stating that the bank is reconciled and that further changes will be made through year end adjustments when the accounts were finished. This email was copied to "Mick Atkins" and Andrew Byram of AW.

65. On 21 October Carolyne replied to Steven Esgate also copying Mick Atkins. She attached the latest backup and asked him to contact her if he required further information.

Mrs Marshall's evidence

66. Mrs Marshall's witness statement with its voluminous exhibits, many of which we have described in the "Facts" section, stood as her evidence in chief, subject to a few questions from Mr Rainsbury. She was asked what further contact HMRC had

after Nikki Patterson's call in November 2012. She said that none had been made until after the 04/13 quarter, the final missing return

67. In cross-examination by Mr Barnett she agreed that Mr Atkins had kept to the agreement he made and had paid all the outstanding VAT once he was made aware of the figures.

68. She accepted that she had not contacted AW to verify what Mr Atkins had told her about their role and responsibility. She could not recall why not.

69. She was taken to the accounts produced by AW and asked to agree that they must have dealt with the VAT. She could not confirm that, and she had never asked them.

70. She was also asked if it was correct that Mrs Roe of Blacksheep was dealing with the VAT once she came on the scene and if it was correct that the appellant was not ignoring its responsibilities by then. She replied that they were not talking to HMRC.

71. We accept Mrs Marshall's oral evidence on these matters as that of an honest and credible witness.

Mr Atkins' evidence

72. Mr Atkins produced a witness statement which stood as his evidence in chief, save for his being asked by Mr Barnett "Did you at any time decide you were not going to pay the VAT?" to which he replied "No".

73. The witness statement in a "Background" section explained that Mr Atkins accepted that there was an outstanding amount of VAT which had now been quantified and paid.

74. He stated that the appellant's VAT problems started when he had to focus on the running of the company after the departure of the transport manager and the book keeper in April 2011. He engaged AW to oversee the bookkeeping of the company and he expected them to sort out the records.

75. In 2011 a petition to wind up the appellant was presented by HMRC. The company's bank account was frozen and he had to deal with the serious problems caused to the trade.

76. When it became apparent to him that AW were not doing what they should he engaged Blacksheep to take over their role and bring the outstanding VAT returns up to date.

77. In response to Mrs Marshall's witness statement he denied dishonesty and expanded on his previous account of the "background" by adding that as well as the bank account being frozen he was denied credit facilities and he introduced £100,000 into the company that he raised by mortgage on a personal property.

78. He referred to Mrs Marshall's acknowledgment in her statement that AW had quantified the VAT, and he said that his bookkeepers and an AW employee called Steven had contacted HMRC asking for advice.

79. In cross-examination by Mr Rainsbury:

(1) He admitted he understood how VAT works and that between the 04/11 and 04/13 quarters no returns were made.

(2) He agreed only one attempt to contact HMRC had been made in that period

(3) He maintained that in the post-petition period he had no access to funds and did not know what VAT was due.

(4) He did not know of the VAT defaults, as there was lots going on at the time. He expected AW to deal with these.

80. He explained further about the bookkeeping situation. Although Nikki Patterson was not a signatory on the bank account she had full online access. She was the one who collated information and gave it to AW. People were coming from AW on a week by week basis. They had though begun "bullying him" for payment of their fees, which led eventually to their claim against the appellant which they abandoned.

81. He was asked if he had read the surcharge notices. He said initially no, but he did later. But he would send them to AW for actioning.

82. Asked why he did not contact HMRC in this period he said he was "fighting fires". He denied being aware that VAT was not being paid until told by Ms Marshall.

83. He was asked about his statement to Mrs Marshall that "he just got behind"? Wasn't that a different reason from his statement now? He replied that he got behind because of AW and he didn't know what was going on. He denied turning a blind eye.

84. In re-examination he was asked about his relationship with AW and whether they would have helped him in the investigation or this appeal. He scorned the idea.

85. He also stated that it was the bank's idea to get him to engage AW after the difficulties with the petition and the freezing of the accounts.

86. He reiterated that he was always going to pay, but got behind.

87. We found Mr Atkins to be a straightforward and credible witness. He did not try to say that he had not been careless or negligent in the way the appellant had dealt with its VAT responsibilities. He struck us as someone who was much more at ease dealing with the operational side of his business and that he had devoted all his time and attention (and a lot of money) in the period to ensuring that his business stayed afloat. He had been asked about a document signed by him and dated 13 February

2017 which appeared to be a draft for a witness statement, and agreed that a statement made by him may have been incorrect.

88. His evidence was not otherwise successfully challenged in cross-examination. And we think it noteworthy that Mr Atkins agreed with Mr Rainsbury that the appellant had contacted HMRC only once in the period of default (§79(2)). He could have made the point that there were at least three contacts with HMRC in that period by those working on behalf, ie Blacksheep and AW.

The law

89. We have already referred to and set out the relevant parts of s 60 VATA at §3, but repeat here subsection (1) which is the only substantive provision of law in this case:

> "(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."

90. We had noticed before the hearing that in their statement of case HMRC had said at [39] that it was:

> "the Appellant's failure to make returns and/or disclose that the Central Assessments issued by the Respondents understated the amount of VAT which the Appellant was likely to pay led to an underpayment of VAT in the sum of £148,344. The Respondents submit that it is clear beyond doubt that the Appellant's failure to render returns and/or correct the Central Assessments constituted acts of omission …"

91. At [48] the statement of case said:

> "… the evidence is clear that from at least November 2012 [Mr Atkins] had been fully aware that the appellant was failing to submit returns and to correct the Central Assessments."

92. We pointed out to Mr Rainsbury that section 60 VATA had been repealed by paragraph 29(d) Schedule 24 FA 2007, but that there had been statutory instruments making certain savings. The Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 (SI 2008/568) at article 2 provided that Schedule 24 would come into force on 1 April 2008 and at article 4 said:

> "Notwithstanding paragraph 29(d) (consequential amendments), sections 60 and 61 of the Value Added Tax Act 1994 (VAT evasion) shall continue to have effect with respect to conduct involving dishonesty which does not relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC."

93. Further the Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 (SI 2009/571) which came into force on 1 April 2009 at article 7 said:

> "Notwithstanding paragraph 29(d) of Schedule 24 (consequential amendments), sections 60 and 61 of the Value Added Tax Act 1994 (VAT evasion) shall continue to have effect with respect to conduct involving dishonesty which does not relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC."

94. Quite why it was necessary to provide for the saving twice from two separate dates we do not know, but what is clear to us is that the reference in the articles of the orders to "a failure to notify HMRC of an under-assessment by HMRC" is something which is clearly the same as "failure to ... disclose that the Central Assessments issued by the Respondents understated the amount of VAT which the Appellant was likely to pay" (see §90) and so was not conduct to which s 60 could apply after 2008.

95. Mr Rainsbury agreed that HMRC's case had to rely only on the failure to make the VAT returns.

96. As to case law Mr Rainsbury in his skeleton referred to *R v Dealy* [1995] STC 217 on the question of the meaning of evasion of VAT, and as to dishonesty *R v Ghosh* [1982] 1 QB 1053, *Barlow Clowes International Ltd & Anor v Eurotrust International Ltd & Ors* (Isle of Man) [2005] UKPC 37 ("*Barlow Clowes*"), *Abou-Rahmah & Anor v Al-Haji Abdul Kadir Abacha & Ors* [2006] EWCA Civ 492 *("Abou-Rahmah"), Gandhi Tandoori v Commissioners of Customs & Excise* (1989) VAT Decisions 3303 ("*Gandhi*") and *Thomson v Commissioners of Customs & Excise* [2001] VAT Decision 17489 ("*Thomson*").

97. Mr Barnett agreed these were relevant decisions. In his opening he said that it had appeared to him at first that he and Mr Rainsbury might have had a difference of interpretation over the test to be applied in this case but he said that they now appeared to be at one. But he did hand in a decision which he thought of use, *Lawrance v General Medical Council* [2015] EWHC 586 (Admin) ("*Lawrance*").

HMRC's submissions

98. Mr Rainsbury accepted that the burden of proof was on HMRC to show that on the balance of probabilities that there was evasion of VAT and that it involved dishonesty.

99. On the case law he said that evasion was described in *Dealy* as dodging or getting out of a liability and HMRC accepted that doing acts or omitting to take an action "for the purposes of" evading requires knowledge.

100. "Dishonestly" means in this context "not honest, trustworthy or sincere". He denied it was equivalent to fraud, despite what had been said by HMRC. Dishonesty was predominantly an objective matter.

101. Although the test was the balance of probabilities, he accepted that where dishonesty was pleaded a high degree of probability was required and cogent evidence must be produced (*Abou-Rahmah*). Dishonesty can be inferred though (*Gandhi*) and recklessness can be evidence of dishonesty (*Thomson*).

102. If the Tribunal held that the penalty had been rightly imposed, then the burden of showing the quantum was wrong fell to the appellant.

103. Applying that case law and the wording of s 60 VATA to the evidence in this case, the evasion was the omission to make the returns and pay the VAT due. He asked the Tribunal to reject the appellant's position that AW were solely responsible for VAT: there is no evidence to support this apart from Mr Atkins' assertions. The appellant could have produced evidence from AW on this issue but had not.

104. It was difficult to reconcile the supposed AW role with the evidence. That showed that first Nikki Patterson and then Carolyne Roe was the bookkeeper and that AW was there to provide support to them. It was not AW but Nikki Patterson who phoned HMRC.

105. Even if AW were responsible for VAT compliance, the appellant knew that it had received surcharge notices which were opened by the company. Mr Atkins was responsible for paying VAT and he must have known it was not being paid and he approved the company accounts showing VAT liabilities in creditors.

106. A compelling inference of dishonesty can be inferred from the evidence that:

(1) The appellant was aware of its VAT obligations

(2) There had been significant past problems in not paying VAT

(3) There was a sustained period of 11 quarters with VAT not being paid and returns not being filed.

(4) Despite its knowledge of the situation the appellant did not inform HMRC.

107. The appellant's defaults were concealed and this lack of openness amounted to a lack of honesty.

108. If the Tribunal rejects the appellant's explanation of what happened then they were untruthful and so dishonest.

109. As to the percentage it is HMRC's submission that the abatement was appropriate though it is not clear whether this is now disputed.

110. As to whether there was double jeopardy given that Mrs Marshall had agreed that the appellant had paid surcharges under s 59 VATA which would likely amount to 15% of the VAT due, Mr Rainsbury argued that they were aimed at different conduct and said that no reduction in the penalty should be made on account of the surcharges.

The appellant's submissions

111. Mr Barnett said that HMRC had made little or no mention of the question of "purpose" of evading VAT. From his evidence it was clear that Mr Atkins did not decide not to put the forms in: he said he didn't know that they weren't being submitted or that the right tax was not being paid.

112. The Tribunal has to be satisfied that the purpose of the appellant's omissions was evasion, but Mr Atkins' evidence was that he was always going to pay when he got the figures.

113. HMRC were right to say that they must show a compelling case on the evidence. But the evidence showed:

(1) There was an offer to pay when the appellant knew what it had to pay, and that offer was fully complied with as Mrs Marshall accepted. Late payment penalties were certainly due and the appellant did not deny this, but that was not evasion.

(2) AW were the ones who prepared the VAT figures. They could not have plucked the figures in the accounts from the air – it wasn't a round sum provision. They must have calculated it from figures they had prepared. The emails from Steven were further evidence that AW were preparing the VAT figures.

(3) Mr Atkins' approval of the accounts showing a VAT liability was not evidence of dishonesty or an evasion purpose. His evidence was that he had just signed them without further consideration, and his signature is no proof of knowledge of the items or their significance.

(4) The fact that the appellant paid the precise amount of the VAT said to be due once he knew of it was a powerful indicator of honesty. There may have been incompetence or even recklessness but that was not dishonesty.

114. If HMRC alleged Mr Atkins was untruthful they must show evidence, but there isn't any. They made no attempt to show Mr Atkins had lied.

115. As to dishonesty Mr Barnett agreed that it was essentially an objective test. Mr Atkins was not setting his own standards of honesty – he was not saying it was OK not to file and pay. The issue is whether what Mr Atkins did was dishonest by the ordinary standards of society, but there is also in the civil cases a further question: did Mr Atkins, in his particular circumstances, know that what he was doing was dishonest by those standards.

116. There is no direct evidence of Mr Atkins' dishonesty. But he accepted that dishonesty can be inferred. He had produced *Lawrance* for the position that any inference must be the more likely inference. To infer that Mr Atkins was in his own mind dishonest is an inference too far.

117. It was not appropriate for HMRC to say that Mr Atkins could have got AW to give evidence. He had no power of discovery. He had suggested to HMRC that they

were in a much better position than Mr Atkins with his history of dealings with AW given the powers of HMRC to obtain information and evidence from AW as to what they had done, but they refused.

118. As to quantum he said that the surcharges did amount to double jeopardy and that there should be a bigger abatement on that account.

Discussion

119. We need spend little time on the case law, as there was little if any disagreement. The parties agreed that the burden of proving that the appellant was liable to the penalty was on HMRC, and indeed s 60(7) VATA says as much. They are of course right.

120. They are also right to say that the burden of proof is on the appellant to show that the quantum of the penalty was incorrect, for whatever reason.

121. As to the standard of proof there was no disagreement that the standard is the balance of probabilities, and again they are correct. That where HMRC makes an allegation of fraud or dishonesty or the like, cogent evidence is required before the burden can be said to have been discharged was also agreed.

122. We found the case of *Lawrance* helpful on this point. At [35] Collins J says:

> "The legal assessor should in my view have directed the panel that they should only find dishonesty established if they were satisfied that there was cogent evidence of dishonesty. The civil standard applies, but where dishonesty or particularly a serious offence is alleged the decision makers must be aware of the need for such cogent evidence."

123. As to what amounts to evasion of VAT, the only case we were referred to was *Dealy*. That case was a decision of the Court of Criminal Appeal ("the CCA") (McCowan LJ, Schiemann and Dyson JJ) hearing Mr Dealy's appeal against conviction for an offence now to be found in s 72(1) VATA which says that:

> "If any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by him or any other person, .."

they are liable to a penalty or to a term of imprisonment.

124. The CCA did not itself define evasion. It cited the direction to the jury of the trial judge:

> "Well, what does "evasion" mean? Evasion is an English word that means to get out of something. If you evade something, you get out of its way, you dodge it, and that, of course, is what this case is about. Was Mr. Dealy trying to dodge paying the VAT that his company, the limited company, Yorkshire Clothing Company Limited, owed to the Customs and Excise?
>
> …

> However, the point is that there comes a time when the person who is concerned to send in the firm's VAT Return, or his own if he is an individual, and the cheque for the amount owing, knows that the time has finally come when he must pay by the 31st of the month, or soon afterwards, anyway, and, if that person then deliberately does not send in the VAT Return and the money, at the time when he takes the decision, quite deliberately, not to send in the return, because he does not want to pay, he is, in law, evading the tax."

125. The CCA noted that in the trial the judge had been, reluctantly, following another decision of the CCA, *R v Fairclough* (unreported). After citing from Fairclough, the CCA said:

> "Returning to the case of *Fairclough*, as we have seen, the direction in that case was approved by the Court of Appeal (Criminal Division). There was nothing there about the need of an intention to make permanent default. The way it was being put by the judge to the jury was 'if the person knows that the time has come [but] deliberately does not send them in, in order not to pay the tax because he does not want to, then from that moment onwards he is in law evading the tax.' We cannot see that the judge in the present case in his direction was saying anything different. As we have already indicated, we believe that we are bound by *Fairclough*. We are indeed perfectly happy to acknowledge it. Why ever should the Crown have to prove a permanent intention to deprive? The legislature are perfectly capable of putting those words in a statute if they want to. To imply the words would only add to the difficulties of the prosecution in proving their case. They would constantly have to meet suggestions that there was an intention to pay in the end, just as there was here, even though we are bound to say that the case for the prosecution was overwhelming. Why should such words be implied? The word 'evasion', does not, to our mind, imply any sense of permanence."

126. What we take from *Dealy*, by which we are bound, is that it is not necessary to show an intention to permanently deprive HMRC of the VAT that is due to them for there to be evasion of VAT. But we also take from it that there has to be a deliberate intention not to pay, a matter we address below in relation to the question of dishonesty.

127. *Dealy* is of course a criminal case and the statute imposing the criminal liability is not worded in precisely the same way as s 60(1) VATA which charges a civil penalty. But we do not think that this can mean that "evasion" in s 72(1) has a different meaning from that in s 60(1). Section 72(1) refers to "knowingly concerned in … fraudulent evasion" while s 60(1) penalises a person who dishonestly omits to do something for the purposes of evasion. *Pace* Mr Rainsbury, but we do not think there is any relevant difference between fraud and dishonesty in this context. We therefore agree with HMRC that there is "civil" evasion if tax is dodged or got out of, but not necessarily permanently.

128. As to the test for dishonesty in VATA, no case that related to dishonest evasion of VAT or any other tax or duty was cited to us. The binding decisions that were

cited to us end chronologically with *Abou-Rahmah* where it is the judgment of Arden LJ which is usually referred to as summing up the development of the case law. At [65] she says:

> "65. The subsequent decision of the House of Lords in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 was widely interpreted as requiring both an objective and subjective test to be applied to the question of standard. In the case of the subjective test, that would mean that the defendant would not be guilty of dishonesty unless he was conscious that the transaction fell below normally acceptable standards of conduct. The Privy Council in the *Barlow Clowes* case has now clarified that this is a wrong interpretation of the *Twinsectra* decision. It is not a requirement of the standard of dishonesty that the defendant should be conscious of his wrongdoing. *Snell's Equity* now refers to this as the "better view" (31st ed, para. 28 - 46 as updated).
>
> 66. On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has "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" (page 389 and see generally pp 389 to 391). …"

129. *Abou-Rahmah*, like *Barlow Clowes* and the cases of *Twinsectra a*nd *Royal Brunei* referred to in the passages cited above are all cases about dishonest assistance in breaching trust. The contrast that is being drawn in *Abou-Rahmah* is between civil cases of that sort and criminal cases such as *R v Ghosh*, where the two step test still applies. But *Lawrance* shows that there is a class of civil case where *R v Ghosh* still gives the correct test of dishonesty, and that is in proceedings before professional regulatory bodies such as the GMC (in *Lawrance's* case). The rationale for this is stated in *Bryant v Law Society* [2009] 1 WLR 163 at [154]:

> "154. In any event there are strong reasons for adopting such a test in the disciplinary context and for declining to follow in that context the approach in *Barlow Clowes*. As we have observed earlier, the test corresponds closely to that laid down in the criminal context by *R v Ghosh*; and in our view it is more appropriate that the test for dishonesty in the context of solicitors' disciplinary proceedings should be aligned with the criminal test than with the test for determining civil liability for assisting in a breach of a trust. It is true, as Mr Williams submitted, that disciplinary proceedings are not themselves criminal in character and that they may involve issues of dishonesty that could not give rise to any criminal liability (e.g. lying to a client as to whether a step had been taken on his behalf). But the tribunal's finding of dishonesty against a solicitor is likely to have extremely serious consequences for him both professionally (it will normally lead to an order striking him off) and personally. It is just as appropriate to require a finding that the defendant had a subjectively dishonest state of mind in this context as the court in *R v Ghosh* considered it to be in the criminal context. Indeed, the majority of their Lordships

> in *Twinsectra* appeared at that time to consider that the gravity of a finding of dishonesty should lead to the same approach even in the context of civil liability as an accessory to a breach of trust. The fact that their Lordships in *Barlow Clowes* have now taken a different view of the matter in that context does not provide a good reason for moving to the *Barlow Clowes* approach in the disciplinary context."

130. This decision has been criticised and doubted since, in particular in *Kirschner v General Dental Council* [2015] EWHC 1277 (Admin) where Mostyn J says of the passage just cited from *Bryant*:

> "In para 154 of *Bryant* Richards LJ and Aiken J refer to the extremely serious consequences for the defendant both professionally and personally if a finding of dishonesty is made by a disciplinary tribunal. It would likely lead to him being struck off. This spectre was another reason for retaining the more demanding *Twinsectra/Ghosh* test. But as I have already explained (and as Lord Hutton specifically accepted in *Twinsectra* at para 35) any finding of dishonesty is likely to be calamitous for a defendant, and particularly so if he or she is a professional. If policy reasons are relevant (and I doubt that they are) a much more important argument in favour of the same test is that it negates the risk of inconsistent verdicts on identical facts. At present the scope for confusion is immense. A defendant can face the prospect of being found dishonest in one civil court but not in another, depending on the nature of the proceedings."

131. But it is still followed. We have already remarked on the fact that *Dealy* concerned a criminal offence which bears a very strong resemblance to the charge to a penalty in s 60 VATA. Here, unlike in disciplinary proceedings where in *Bryant* it was pointed out that "that disciplinary proceedings are not themselves criminal in character and that they may involve issues of dishonesty that could not give rise to any criminal liability" but even so the test to be used in such proceedings is the *Ghosh* test, it cannot be said that the issues of dishonesty in s 60 VATA cannot give rise to a criminal offence, because s 60 itself admits that it can. Section 60(1)(b) penalises a person where:

> "his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability)"

132. So it would appear from this that the *Ghosh* test should also be the test for s 60 VATA. But there is also authority, which was not cited, of the Upper Tribunal (Tax & Chancery Chamber) in *Peter Arakiel Brookes v HMRC* [2016] UKUT 214 (TCC) ("*Brookes*"). There Newey J says in relation to s 60(1) VATA:

> "The FTT referred to the test of dishonesty adopted in *Ghosh* as essentially the same as that favoured in *Barlow Clowes*. That, as it seems to me, was a misconception: the two approaches differ significantly (see e.g. the discussions in *Bryant v Law Society* [2007] EWHC 3043 (Admin), [2009] 1 WLR 163, at paragraphs 130-157, and *Kirschner v General Dental Council* [2015] EWHC 1377 (Admin), at paragraphs 9- 20). Further, I was told by Miss Jennifer Thelen, who appeared for them, that HMRC's position is that, in the context of

> section 61 of the VATA, it is the *Barlow Clowes* test that is applicable. Since, however, the test that the FTT used (i.e. that derived from *Ghosh*) was more favourable to him, Mr Brookes can have no complaint on this score."

133. We do not read that however as deciding that the *Ghosh* test is not the correct one for s 60 VATA. But we are aware that in relation to the very similarly worded civil evasion penalties in s 8 Finance Act ("FA") 1994 (Excise Duties) and s 25 FA 2003 (Customs Duties and Import VAT) this Tribunal has generally adopted the *Barlow Clowes* test as described in *Abou-Rahmah*. See for example *Bintu Binette Krubally N'diaye v HMRC* [2015] UKFTT 380 (TC) (Judge Ann Redston and Mrs Gill Hunter).

134. Where does this leave us? Mr Rainsbury in his skeleton refers to the test as being predominantly objective and asks us to apply *Barlow Clowes* and *Abou-Rahmah*, and this is of course is what the Upper Tribunal in *Brookes* was told is HMRC policy.

135. Mr Barnett refers to the test as being primarily objective and says that this is a civil application of *Ghosh*. We find this more difficult to interpret. The non-objective element of the *Ghosh* test is the so called "Robin Hood" defence, that even though ordinary, decent, right-thinking etc people would find the accused's conduct dishonest, the accused's moral compass pointed him in a different direction and he would not consider himself dishonest. The non-objective element of the *Barlow Clowes* test is, as we understand it, that set out by Arden LJ in *Abou-Rahmah*, that dishonesty is:

> "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"

This seems to go to knowledge not to a different code of morals.

136. We have decided to apply the *Barlow Clowes* test. This is because it was conceded by the appellant that Mr Atkins did not have his own standards of honesty.

137. Mr Atkins' state of mind is important, not only in relation to whether his conduct was dishonest, which requires his conduct to have been deliberate, not careless, but also when the question of his purpose is considered. The omissions to file the returns and, more significantly, to pay the tax at the right time must, to bring him within the ambit of s 60 VATA, have been for the purpose of evading tax: it is not sufficient that they have that result.

138. Applying all the considerations we have discussed to the facts we have found from the evidence in the case, and especially Mr Atkins' evidence, we have reached the clear conclusion that HMRC have not discharged the burden on them to show that the appellant, through Mr Atkins, dishonestly omitted to pay for the purpose of evading VAT.

139. We have reached that conclusion for the following reasons.

140. We accept Mr Atkins' evidence that he relied on AW to deal with VAT compliance in all the periods concerned. His evidence is corroborated by the legal action taken in defence of AW's claim for fees and the discontinuance of that action by AW, by the calculation of the VAT due in the accounts which was clearly a detailed calculation, not a guess, and by the emails from AW employees to the appellant.

141. We also think it is telling that Mr Atkins suggested to Mrs Marshall that she approach AW, using her powers if necessary. It is clear to us, and we so find, that AW at that time certainly would not have gone out of their way to assist Mr Atkins, and it is unlikely that they would have done other than reveal the full truth about the extent of their work for the appellant had Mrs Marshall sought that information.

142. Mr Atkins did not seek to suggest that he did not know how VAT worked or what the appellant's obligations were, nor did he deny that would have received the surcharge notices and central assessments.

143. We also accept Mr Atkins' evidence that although he signed the 2012 accounts as director he did not know the significance of the entry or the figures for VAT in creditors.

144. The evidence of what Nikki Paterson, AW and Carolyne did to contact HMRC during the period of default did not suggest that appellant was trying to evade tax.

145. The evidence shows that once alerted to the scale of the outstanding VAT Mr Atkins took all appropriate steps to pay up what the appellant owed.

146. Our findings and our acceptance of Mr Atkins' evidence on these matters, which was not controverted or shown to be incorrect by HMRC, led us to the conclusion that it is more likely than not that the appellant, acting through Mr Atkins, did not know that its omissions amounted to tax evasion and did not fail to make (correct) returns or pay the VAT that those returns would have shown for the purpose of evading VAT.

147. We add that, considering the *Barlow Clowes* meaning of dishonesty, we would hold that ordinary members of the public, or travellers on the Headingley omnibus, would view evasion of VAT through the submission of inaccurate returns suppressing turnover or manufacturing false invoices as dishonest. We are somewhat less clear that failing to pay VAT on time would be so regarded but accept that it would, and it clearly has been by Tribunals and Courts in other cases. But because we find that Mr Atkins did not know that what he was omitting to do led to tax evasion and did not omit to do anything for the purpose of evading tax, he was not dishonestly doing those things.

148. Mr Barnett admitted the appellant's conduct was negligent and we think Mr Atkins agreed. We do not think either would seriously quibble with the term "grossly negligent". But for s 60 to apply that is not enough.

149. HMRC's case essentially relied on inferences for its "cogent evidence" of dishonesty. They asked us to draw the inference of dishonesty from the evidence that the appellant was aware of its VAT obligations; there had been significant past problems in not paying VAT; there was a sustained period of 11 quarters with VAT not being paid and returns not being filed and despite its knowledge of the situation the appellant did not inform HMRC.

150. Of those matters the first three are admitted (though the relevance of the second is doubtful). As to the last while there was indeed little contact by the appellant with HMRC in the whole period of default, we have accepted that Mr Atkins relied on AW. We decline to draw the inference from these facts that it is more likely than not that the appellant was dishonest.

151. HMRC also asks us to draw an inference of dishonesty from a lack of openness in that the appellant's defaults were concealed. We do not understand in what way the omissions to pay tax were concealed. HMRC would know soon after the due date for filing and paying that nothing had been filed or paid. If there was any lack of openness it might be in the failure to admit that the central assessments were wholly inadequate, assuming that the appellant knew of the extent of the inadequacy, but that is not something that s 60 penalises (at least in the periods concerned).

152. We agree with HMRC that if we reject the appellant's account of what happened it follows that they lied and were probably dishonest. But we accept Mr Atkins' evidence and hence the appellant's account of what happened.

153. We turn now to the quantum. After Mrs Marshall had given her evidence the Tribunal asked her to clarify the position about default surcharges under s 59 VATA which she had referred to. She explained that default surcharges had been imposed in relation to the amounts of the central assessments and that when the returns had been submitted in 2014 the amounts were recalculated and assessed. She accepted that it was likely, given the previous defaults she had described, that most if not all of the surcharges would have been at the rate of 15% of the late paid tax.

154. Mrs Marshall said that she had not taken the surcharges into account in arriving at the abatement of the s 60 VATA penalty. We asked the reason for that which was supplied by Mr Rainsbury after discussion with HMRC. We were told that because HMRC consider that the actions or omissions being penalised by the surcharge are not the same as those penalised by the s 60 penalty there is no "double jeopardy".

155. The appellant urged us to decide that the surcharges should be deducted from the abated penalty.

156. Because of our decision on liability the question of quantum is no longer one for our decision. We will however set out our views, in case we are found to have gone wrong on liability and because the matter may arise in other cases.

157. We note firstly that paragraph 12(2) Schedule 24 FA 2007, which is the Schedule that now contains the penalties for non disclosure of inadequate assessments and errors in documents and which repealed s 60 VAT so far as it penalised those acts

or omissions, contains a specific reduction of penalties for "any surcharge for late payment of tax". This is the clearest possible indication that Parliament thought that ss 59 and 60 VATA were dealing with the same "behaviour". Since Schedule 24 FA 2007 (and Schedule 40 FA 2008 which relevantly amended it) were part of the outcome of a major public consultation on the compliance powers of HMRC it does not break any conventions to suggest that paragraph 24(2) reflects the views of HMRC.

158. There is also another consideration. It is a principle of EU law and of the European Convention on Human Rights ("ECHR") that:

> "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

(Article 50 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) ("CFR")) and

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

(Article 4 of Protocol 7 ("A4P7") of the ECHR).

159. It seesm to us incontrovertible that both s 60 penalties and s 59 default surcharges are "criminal" matters for the purposes of the ECHR (see eg *Wood v HMRC* [2016] UKUT 346 (TCC). A decision of the Court of Justice of the European Union ("CJEU"), *Orsi & Baldetti* [2017] EUECJ C-217/15 (05 April 2017) confirms that the CFR is to be interpreted in the same way as the ECHR. *Orsi & Baldetti* is about surcharges imposed by the Italian tax authorities for late payment of taxes and a penalty imposed following conviction for tax evasion in relation to the same omissions. The CJEU referred to art 50 CFR and A4P7 ECHR as expressions of a wider principle *ne bis in idem*, or that a person is not to be punished twice for the same cause, or in terms used in Schedule 24 FA 2007, no double jeopardy.

160. In our view s 60 should be interpreted so as to give effect to this principle. Rather than attempt to remould the section, we would give effect to the principle by exercising the power we have in s 84(6) VATA to vary the amount of a penalty to reduce it to an amount which we consider to be appropriate. We would have reduced the penalty imposed by HMRC by the amount of all default surcharges imposed under s 59 VATA for the relevant periods.

Decision

161. The assessment of the penalty charged under s 60 VATA is cancelled.

162. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2017