[2016] UKUT 0214 (TCC)

Appeal number: FTC/130/2013

VAT – section 61 of the Value Added Tax Act 1994 – whether conduct giving rise to a penalty was "attributable to the dishonesty" of the appellant

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

PETER ARAKIEL BROOKES

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public in London on 6 April 2016

The Appellant appeared in person

Miss Jennifer Thelen, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. During the period relevant to this case, a company could be liable to a penalty pursuant to section 60 of the Value Added Tax Act 1994 ("the VATA") if it dishonestly obtained, or sought to obtain, a VAT credit to which it was not entitled. Under section 61 of the VATA, such a penalty could be recovered from a director of the company if the conduct giving rise to the penalty was, "in whole or in part, attributable to the dishonesty" of the director. In the present case, HM Revenue and Customs ("HMRC") notified the appellant, Mr Peter Brookes, that they proposed to recover from him sums totalling £43,753 under section 61 of the VATA. Mr Brookes challenged this before the First-tier Tribunal ("the FTT"), but in a decision released on 24 June 2013 ("the Decision") the FTT (Judge Kevin Poole and Mr Will Silsby) ruled in favour of HMRC. Mr Brookes now appeals against the Decision, permission to appeal having been granted by Judge Roger Berner.

2. The key question on the appeal is whether the FTT was justified in deciding that Mr Brookes was dishonest.

Basic facts

3. In November 2003, Mr Brookes set up a company called Villagepark Homes Limited ("VPH") to undertake a property development in Highley, Shropshire. Mr Brookes was the company's only director.

4. The main contractor for the project was initially Focus Strip Limited ("Focus"). The key people in that company were a Mr Chris Griffiths, who acted as site manager, and a Mr Bill Young, who had a "backroom" role. It seems that the two did not get on.

5. During 2005, Focus was replaced as main contractor by Design & Construction (West Midlands) Limited ("Design"), a company associated with Mr Griffiths.

6. In late 2007, Miss Clare Farrington, an officer of HMRC, discovered during a VAT visit that VPH did not have the necessary records to support the repayment claims it had made for a number of periods. She asked Mr Brookes for an explanation, listing the invoices that seemed to be missing.

7. The FTT said this about what happened next:

> "17. We accept the evidence of [Mr Brookes] that he asked CG [i.e. Mr Griffiths] to obtain 'copies' of the missing invoices from [Focus] and [Design] (though we do not accept that any original invoices had been delivered by [Focus] or [Design] to VPH, so we consider these 'copies' to have been documents which [Mr Brookes] was in fact seeking to obtain for the first time). We accept CG's evidence that he contacted Bill Young and, after several attempts and some time, he obtained from him a set of documents that purported to be copies of the invoices in question. Apart from one apparently missing invoice (whose absence may be explained by the fact that two invoices carrying VAT

of £1,489.63 had been included in HMRC's schedule, one from [Focus] and one from [Design], but only one 'copy' invoice in that amount was provided), the documents provided appeared to satisfy HMRC's list exactly. CG passed the documents to [Mr Brookes], who looked at them, on his own evidence considered them to be 'useless', but then passed them on to his advisers without comment for onward transmission to HMRC.

18. This was done, under cover of a letter dated 29 February 2008, in which the advisers said 'I also enclose copies of the missing purchase invoices that Peter Brookes has obtained.'"

8. The "copy invoices" supplied to HMRC were, the FTT observed (in paragraph 19 of the Decision), "very poor fabrications" bearing "no resemblance to the bona fide invoices issued by [Focus] and [Design]" and "not even attempt[ing] to fulfil the basic requirements for VAT invoices".

9. The FTT considered that VPH had paid Focus and Design the sums reflected in the "copy" invoices but that the payments ought not to have had any VAT element. It explained in paragraph 24 of the Decision:

> "We find that there were no original invoices provided by [Focus] or [Design] to VPH and the only basis upon which VPH claimed input VAT was by allocating what it considered to be the appropriate fraction of its gross payments as being payment of input VAT. It is quite clear that VPH made the relevant payments (we accept that the development was being financed by a bank which required certificates of work done by a professional surveyor before releasing stage payments to VPH which allowed it to make its payments). However it is equally clear that those payments made by VPH would not properly have included any element of input VAT. In the absence of even incorrect invoices showing VAT purportedly charged by [Focus] or [Design], VPH should not have claimed input VAT."

10. The FTT's conclusions on the crucial issue of dishonesty are to be found in the following paragraphs of the Decision:

> "36. So was [Mr Brookes'] behaviour dishonest? In our view, it was. He effectively argued that his actions should be characterised as naïve incompetence rather than dishonesty, but we are not convinced by this.
>
> 37. By reference to ordinary standards of reasonable and honest people, we consider that his behaviour in passing the fabricated 'copy' invoices to HMRC in spite of his own belief that they were 'useless', presumably in the hope that they would satisfy HMRC, was dishonest. He could have refrained from sending the 'copy' invoices to HMRC altogether, or he could have asked his advisers to submit them with a full explanation of the circumstances and of his own belief that they were 'useless'. He did neither. He just arranged for them to be submitted.

38. Similarly, we consider that the Appellant must have realised that what he was doing, in submitting those documents, was dishonest."

The test of dishonesty

11. The FTT referred in the Decision to two cases in which the meaning of "dishonesty" has been considered. The earlier of them, *R v Ghosh* [1982] QB 1053, concerned charges brought under the Theft Act 1968. In the course of its judgment, the Court of Appeal concluded (at 1064) that, when considering whether a defendant acted dishonestly for the purposes of the Theft Act, a jury "must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest" and, if it was, "must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest". In the other case, *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, the question was whether an individual had dishonestly assisted in the misappropriation of investors' funds. The Privy Council took the view (at paragraph 10) that, "[i]f by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards" and said that there was no requirement for a defendant to "have had reflections about what normally acceptable standards [of honest conduct] were" (paragraph 15).

12. The FTT considered *Ghosh* to be the more helpful of the cases and so (as it explained in paragraph 33 of the Decision) approached matters on the following basis:

> "We are therefore concerned to establish first whether what the Appellant did was, according to the ordinary standards of reasonable and honest people, dishonest. If we decided that it was, then we are required to consider whether the Appellant must have realised that what he was doing was, by those standards, dishonest."

13. 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.

The ground of appeal

14. Judge Berner granted permission to appeal on the basis that certain features gave rise to an arguable question whether the application by the FTT of the test of dishonesty to the facts amounted to an error of law. He described the relevant features in these terms:

(a) "As the FTT explained, at [40], its finding of dishonesty extended only to the submission of the fabricated invoices; it was not found that Mr Brookes had fabricated, or been responsible for the fabrication, of the invoices. The requisite knowledge of Mr Brookes was, on the other hand, confined to the finding that he considered the copy invoices to have been 'useless'. There is in my view a question whether such a finding, absent a finding of knowledge that the invoices were fabricated, is sufficient to give rise to a finding of dishonesty"; and

(b) "The FTT made no reference in its decision to the burden of proof, which in a case of dishonesty lies on HMRC. There is a question whether the FTT adopted the correct approach to the evidence when it said, at [36], that it was 'not convinced' by Mr Brookes' argument that his actions represented naïve incompetence, rather than dishonesty, and its presumption, in [37], that in submitting the invoices Mr Brookes had hoped to satisfy HMRC that the invoices, albeit 'useless', supported the input tax claim".

15. Focusing on the first of Judge Berner's points, it can be seen from the Decision that the FTT found, among other things, that:

(a) The payments to Focus and Design that were ultimately reflected in the invoices forwarded to HMRC by Mr Brookes' advisers in 2008 did not include any VAT;

(b) VPH was not supplied with any invoices in respect of the payments at the time;

(c) The invoices that Mr Brookes obtained from Mr Griffiths following the 2007 VAT visit bore no relation to "bona fide" invoices of Focus and Design;

(d) Mr Brookes himself saw the invoices provided by Mr Griffiths as "useless"; and

(e) Mr Brookes passed the invoices on to his advisers "without comment" in the expectation that they would be forwarded to HMRC.

16. On the other hand, the FTT did not state (in terms, at least) that Mr Brookes realised that no invoices had been rendered before the "copy" invoices were prepared, that Focus and Design had not charged VPH VAT or that the payments to Focus and Design had had no VAT element. Nor did it elaborate on what it considered Mr Brookes to have meant when he described the invoices as "useless".

17. In the course of his submissions to me, Mr Brookes spoke of the "copy" invoices being "useless" because it was obvious that they were nothing like the invoices that Focus and Design should have produced. He said, however, that, as far as he was concerned, Focus and Design had rendered "original" invoices earlier and that, since he had been asked for copies of the invoices, he passed on the "copies" that Mr Griffiths gave him. He observed that there was time pressure.

18. In a similar vein, Mr Brookes said the following in his witness statement for the hearing before the FTT:

> "I advised [Miss Farrington] that I would obtain [copies of the missing invoices]. After many weeks of asking for copies from [Design] and [Focus] the only copies that I was provided with were completely different from the original invoices provided. As these were the only invoices that I had been provided with I had no alternative but to submit these to Miss Farrington via a VAT consultant who was helping me to sort through matters VATCON Ltd ….
>
> I have not acted dishonestly in any of my dealings with the VAT office and indeed I co-operated all the way through the enquiry. I did not know that I could not claim VAT back on new build properties …."

19. I gather that Mr Brookes gave oral evidence before the FTT (see e.g. paragraph 3 of the Decision), but I do not know how far he was challenged on the passages from his witness statement quoted in the previous paragraph. The papers I have do not include any record of the oral evidence and the Decision does not contain any real discussion of any oral evidence on these matters.

20. In the circumstances, it seems to me that, as matters stand, I cannot be satisfied that the FTT's conclusions on dishonesty were justifiable. While the FTT referred to Mr Brookes passing "fabricated" "copy" invoices to HMRC, it is not clear from the Decision whether the FTT considered Mr Brookes to have known that the "copy" invoices did not reflect reality. On the basis of the FTT's limited findings of fact and Mr Brookes' witness statement, I cannot discount the possibility that Mr Brookes genuinely believed the "copy" invoices to be (poor) substitutes for invoices that had been rendered by Focus and Design when the relevant payments to them were made and which included VAT. Were that the case, I find it hard to see how Mr Brookes could properly be held to have been dishonest. It is far from apparent to me that, for example, Mr Brookes would have reckoned in such circumstances that reasonable and honest people would have considered it dishonest of him to pass on to his advisers the "copy" invoices which he had obtained at HMRC's request. Supposing, however, that the FTT took the view that Mr Brookes would have so reckoned, it was, I think, incumbent on it to explain its reasoning in more detail than is to be found in the Decision. That is especially so since "a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established" (see *In re D (Secretary of State for Northern Ireland intervening)* [2008] UKHL 33, [2008] 1 WLR 1499, at paragraph 28, per Lord Carswell). As Lord Nicholls explained in *In Re H and Others (Minors)* [1996] AC 563 (at 586), "[f]raud is usually less likely than negligence" and "the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability".

21. Miss Thelen stressed that appeals from expert tribunals are to be approached "with an appropriate degree of caution" and that such tribunals are "the judges of the facts" (see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678, at paragraph 30, per Baroness Hale). She further made the point, by reference to Jacob LJ's judgment in *Procter & Gamble UK v Revenue and Customs*

Commissioners [2009] EWCA Civ 407, [2009] STC 1990, that "specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence" (see the quotation in paragraph 10 from *Rockwater v Technip* [2004] EWCA (Civ) 381, [2005] IP & T 304).

22. As, however, Jacob LJ noted in the *Procter & Gamble* case (at paragraph 19), a tribunal's decision must be such as to "enable the appellate court to understand why the Judge reached his decision" (*English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, at paragraph 19, per Lord Phillips MR) and "contain … a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts" (*Meek v City of Birmingham District Council* [1987] IRLR 250, at paragraph 8, per Bingham LJ). In the present case, the Decision is not to my mind full or explicit enough to allow me to assess reliably how the FTT arrived at its decision on the question of dishonesty or quite what factual conclusions led it to that decision. It can perhaps also be observed that the FTT's specialist expertise is likely to be of less significance when it is determining whether someone such as Mr Brookes was dishonest than in more technical areas.

23. All in all, it seems to me that I should allow Mr Brookes' appeal. I am, however, in no position to arrive for myself at any conclusion on the dishonesty issue. Apart from anything else, I have, as I have indicated, next to no knowledge of the oral evidence that the FTT heard. That being so, the right course must, I think, be to remit the matter to the FTT. If Judge Poole and Mr Silsby are available, I can see no reason why they should not deal with the case. In that event, it will be for them to consider whether they can dispose of it satisfactorily without a full re-hearing, on the basis of the evidence that was before them when they made the Decision. A full re-hearing will certainly be required, however, if Judge Poole and/or Mr Silsby are unavailable, so that the matter has to be handled by a differently-constituted FTT.

Mr Justice Newey

RELEASE DATE: 6 May 2016