

MISDECLARATION PENALTY - Reasonable excuse - Mitigation - Clerical error - Figure for sales omitted significant amount - Whether reasonable excuse that Commissioners were slow in responding to Appellant's letter - No - Whether mitigation - No - Appeal dismissed

LONDON TRIBUNAL CENTRE

**POWERSCREEN EQUIPMENT LTD - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents**

Tribunal: STEPHEN OLIVER QC (Chairman)

CAROLINE de ALBUQUERQUE

Sitting in public in London on 4 December 2002

No appearance for the Appellant

Jonathan Holl, Senior Officer, HM Customs and Excise, for the Respondents

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DECISION

1. Powerscreen Equipment Ltd ("Powerscreen") appeal against a notice of assessment of misdeclaration penalty of November 2001. The total amount liable to a penalty is £52,043 and the period to which it relates is 12/99. The total penalty amount for that period is £7,806.

2. The penalty notice was issued following the notification of a tax assessment on 29 October 2001. The assessment has, to use the words of the penalty notice, "caused a breach of the objective tests for misdeclaration penalty under section 53, VAT Act 1994." There is, we understand, no dispute about the quantum of the penalty.

3. The appeal was listed for hearing today. The hearing notice was sent out on 3 October 2002. A copy of the hearing notice is included in the tribunal file. No one was present to represent Powerscreen. A telephone call was made to Powerscreen to enquire why. The answer came back that no hearing notice had been received by them. We decided to press on with the appeal. We did so with the provisions of rule 26 of the Tribunals Rules in mind. These provide that the tribunal is entitled to go ahead and hear an appeal in the absence of one of the parties. The absent party does, however, have the right, which must be exercised within 14

days of receiving the decision, to apply to the tribunal to have the decision set aside "on such terms as it thinks just". Powerscreen is therefore at liberty to make such an application. It must be noted in this connection that if Powerscreen wants to make the application, it must do so through a representative present before the tribunal.

4. The Commissioners, through Jonathan Holl opened the appeal, and called two witnesses.

5. The first of those witnesses was Mr H A Stones, a Customs officer at the Staines Business Centre. He explained that he had visited Powerscreen on 17 October 2001. There he had met Mrs Darine Donnelly. The visit was by appointment. The purpose was to examine the records. The visit took about 3½ hours. Mr Stones examined the VAT summaries and the sales and purchases day books. He also looked at the annual accounts for the year 1999 which were available to him at that time. He checked the VAT summaries and the basis on which they had been provided. He noticed that, for the period 12/99, there were several pages in the sales day book. The entirety of the first page had been omitted from the summary of sales. The consequence was that £51,921.67 had been omitted from the figure of sales for that period in the return. Mr Stones said that he looked at all the records from 12/99 until 6/01. He noticed minor errors throughout. For the period 12/00 he noted that page 8 of the purchases day book contained a deletion of an amount of £2,689, as the result of an apparent duplication. The page total had been adjusted but the VAT summary contained both entries.

6. Mr Stones said that he had asked Mrs Donnelly if any adjustment had been made to compensate for the large error in 12/99. She said that no adjustment had been made. According to Mr Stones, Mrs Donnelly had no relevant explanation as to how the error had been made. It appeared, however, that another member of staff had made the entries in the sales day book. Mrs Donnelly, however, had the responsibility of checking and signing the VAT returns.

7. Another point noticed by Mr Stones was that the 12/99 period was a two month period, while all the others were three month periods. Even so, he noted, the entry for sales for that 12/99 period was low as compared with others. Overall the return required a repayment of £18,323. From the information that he had about Powerscreen, Mr Stones could remember no other repayment claims. Mr Stones then checked the accounts for the year 1999. The total figure for sales supported his deduction that there had been an underdeclaration. He stated that his impression was that a reasonable check through the sales books and a comparison between those and the VAT figures should have thrown up the discrepancy. He could see no special reasons for allowing mitigation. Nor could he see that there was any reasonable excuse for the error.

8. The next witness for the Commissioners was a Mr C P Keston. He was the regional business support manager at the Staines Business Centre from 1993 until now. In June 2002 the Powerscreen misdeclaration was brought to his attention. He was asked to reconsider the penalty with particular reference to the fact that the Commissioners had taken seven months to deal with the letter of appeal. That letter, he noted, had been addressed to Southend VCU but that had merely delayed matters by a week. He went on to investigate why it had taken so long to action. He noted that the Customs officer had dealt with the letter on time and that the letter had been sent on to various people who had no involvement in

it. It reached the correct review officer in December 2001. He printed out his review decision but nothing was done with it for some months.

9. Mr Keston explained that he then looked at the misdeclaration penalty. He can see no reasonable excuse. This was a clerical error pure and simple. He explored the possibility of granting a 25% mitigation. He knew, from a letter sent from Powerscreen, that subsequently a Sage accounting system had been installed. He could not see that this called for any mitigation because the change to the Sage system had in no way accounted for the original error. He also bore in mind the terms of a letter written by Mrs Donnelly on 21 November 2001. This contained the following passage:

"I write in reference to the above referenced penalty which has been calculated as £7,086. I would respectfully request a review of this penalty. The underpayment arose as a result of a booking error. While preparing the VAT return for the quarter in question I noticed that one large invoice had been incorrectly posted. I amended the entry to reflect the correct invoiced details and left it with my assistant to amend the end of quarter summary. As she is always very meticulous about balancing accounts I presumed that it had been done when I completed the VAT return some days later. Obviously, on inspection, it had not been done."

Mr Keston noticed a discrepancy between the explanation given by Mr Stones to the effect that an entire page of the sales day book had been left out as compared with Mrs Donnelly's statement that only "one large invoice had been incorrectly posted". Either way, he noted, Mrs Donnelly had spotted a mistake; she had nonetheless gone ahead and signed the repayment return without that mistake being corrected.

10. Mr Keston wrote to Powerscreen on 26 June 2002. He stated that following a detailed review of the circumstances of the case he had concluded that a lack of care had resulted in the error which had led to the penalty. He said that he had been unable to find any reasonable excuse which would result in the withdrawal of the penalty. He went on to say that he had considered the issue of mitigation and the "degree of reasonableness" that existed in the circumstances. Bearing in mind the size of the error in relation to the total output tax due on the return in question, he said in his letter, he found it difficult to accept as reasonable that Mrs Donnelly had not been aware that the sum had not been paid to the Customs before the officer discovered it on his visit some considerable time later. In view of the sum involved, he said, he considered that it would have been reasonable to expect Mrs Donnelly to have checked that the sum had indeed been included in the return notwithstanding the otherwise meticulous character of her assistant, particularly as Mrs Donnelly had discovered it.

11. Mr Keston went on to recognize that there had been an error on the part of the Commissioners in not responding earlier to Powerscreen's letter of November 2001. He could not see that this error had any relevance to the question of reasonable excuse or mitigation as regards Powerscreen's error in its returns for the 12/99 period.

12. We have considered the question of whether the penalty can be displaced on grounds of reasonable excuse by reason of section 63 of VAT Act 1994. We have also considered whether, in the circumstances, we should grant mitigation under the terms of section 70.

13. We cannot reach a firm finding as to whether the error resulted from the omission of an entire page of the sales day book for that period (as Mr Stones said) or whether it resulted from the omission of "one large invoice" as Mrs Donnelly claims in her letter of 21 November 2001. That does not seem to us to be a determinative feature of the case. It appears that Mrs Donnelly became aware of the error before the return was sent to the Customs. It was not corrected by her assistant. She nonetheless signed the return as a repayment return. It should have been apparent to her from the fact that she was signing a repayment return that something was unusual in the figure of the sales. What is more, the exercise that took place in producing the annual accounts for the 1999 period should have thrown up the disparity between the figure of the sales as recorded in the annual accounts and the figures found in the VAT returns.

14. The error was quite simple. It was a clerical error. There was nothing deliberate about it. Nonetheless, we think, it should have been picked up at the time when the 12/99 return was signed and submitted. We can see no grounds for the reasonable excuse defence. There is no evidence of any illness or other distractions on the staff responsible for producing the materials that went into the 12/99 return. Nothing that has been said in the course of correspondence indicates any other reasonable excuse. For that reason we conclude that the penalty was properly assessed.

15. So far as mitigation is concerned, we recognize that there may well have been a failure on the part of the Customs to administer Powerscreen's affairs properly and efficiently. Nonetheless that feature has no impact on the error that was made in compiling and submitting the 12/99 return. Nor does it in any way account for Powerscreen's failure to draw the error to the attention of the Commissioners at the later stage when the 1999 accounts were being prepared and produced. We recognize, of course, that Powerscreen and its staff were acting in good faith at all times. But section 70(4)(c) directs that that particular matter is not to be taken into account by the Tribunal when considering the appeal. We are therefore left with no grounds for mitigating the penalty.

16. For all those reasons we dismiss the appeal.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

LON/02/700