



TC06844

Appeal number: TC/2016/02191

*VAT – input tax credit disallowed – whether invoices invalid – penalties –
whether correctly calculated –*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SACUTIA HEALTHCARE LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MS RAYNA DEAN**

Sitting in public in Nottingham on 30 April 2018

**Mr Woodward, accountant for the appellant
Miss Dosanjh, presenting officer for HMRC**

DECISION

Introduction

- 5 1. This is an appeal against a decision by the respondents (“HMRC”) to raise an assessment against the appellant for the VAT periods 09/13 to 06/15 under s73 Value Added Tax Act (VATA) 1994. The total amount of the assessment is £57, 839.12; this appeal is limited to the assessment in relation to invoices from a single supplier, amounting to £16,771.84 of the assessment. The remainder of the assessment, relating
10 to the refusal of zero-rating and invoices not addressed to the appellant, is not disputed.
2. The assessment appealed is calculated as follows:
- (1) 03/14 – invoice #256 (factoring) – VAT due £1,400.00
 - (2) 06/14 – invoice dated 2 June – VAT due £2,833.83
 - (3) 12/14 – invoice #2998 – VAT due £1,416.66
 - 15 (4) 12/14 – invoice #3013 – VAT due £1,200.00
 - (5) 12/14 – invoice #1820 – VAT due £1,000.00
 - (6) 12/14 – invoice #1863 – VAT due £600.00
 - (7) 06/15 – invoice #2166 – VAT due £2,688.00
 - (8) 06/15 – invoice #2164 – VAT due £5,633.35
- 20 3. The appellant also appeals the related penalty raised under paragraph 19(1) Schedule 24 Finance Act 2007 for deliberate and deliberate and concealed behaviours leading to inaccuracies for the periods 09/13 to 06/15. The penalty has been charged to the appellant and the person liable to pay the penalty is Ronald Barnes who HMRC believe was the acting director and personally gained or attempted to gain from the
25 inaccuracy. Mr Barnes has not appealed in his own right.
4. The penalty is calculated as follows:
- (1) 09/13 – deliberate and concealed behaviour – £1,237.50
 - (2) 12/13 – deliberate behaviour – £1,710.62
 - (3) 03/14 – deliberate behaviour – £1,253.38
 - 30 (4) 06/14 – deliberate behaviour – £12,530.38
 - (5) 09/14 – deliberate behaviour – £1,423.31
 - (6) 12/14 – deliberate behaviour – £2,344.00
 - (7) 03/15 – deliberate behaviour – £221.37
 - (8) 06/15 – deliberate behaviour – £3,349.37

Background

5. The appellant (“Sacutia”) registered voluntarily for VAT from 2 November 2009. It was a supplier of healthcare products. The products were designed by Sacutia and manufactured and packaged by third parties. The sole director was Tara Barnes although Ronald Barnes, her father, undertook most of the work in the business on a day to day basis, taking orders and designing the products and packaging.

6. Following VAT visits at Sacutia’s accountants on 25 September 2014 and 4 August 2015, the assessment detailed in the Introduction above was issued on 19 August 2015. A personal liability penalty notice was issued to Mr Barnes on 3 September 2015 and a penalty explanation letter was issued to Sacutia on 14 September 2015. A further penalty explanation letter was issued to Sacutia on 18 January 2016. A notice of penalty assessment was issued on 22 February 2016 to Sacutia and, on 26 February 2016, an “officer’s liability to pay a company penalty” notification was issued to both Sacutia and Mr Barnes.

7. The matter was appealed to the tribunal on 15 April 2016.

Appellant’s submissions

8. Sacutia accepted that the burden of proof was on them to demonstrate that the assessment was not correctly raised and on HMRC to demonstrate that the penalties were correctly issued.

Assessment

9. Sacutia noted as follows:

(1) The amount of the assessment appealed related to a refusal to allow input VAT on a number of invoices from a single supplier, Sigma Soap Enterprises Ltd (“Sigma”).

(2) HMRC took the view that the invoices from Sigma did not meet the statutory requirements to be VAT invoices as they did not contain the supplier’s VAT number. When this was identified by HMRC, Sacutia’s accountants advised that this was an error by Sigma and obtained replacement invoices with Sigma’s VAT number included.

(3) HMRC continued to consider that these invoices were not valid as they contained what HMRC described as “discrepancies”. Sacutia’s accountants provided further details from Sigma, noting that a different format had been used for invoices which were factored, compared to invoices which had not been factored. Sigma also confirmed that all VAT had been accounted for to HMRC in relation to these invoices.

(4) HMRC still did not accept the invoices, stating that they had been unable to verify the transactions.

10. Sacutia set out some detail as to how the business operated, in order to explain the arrangements:

- 1 (1) When a customer requested products, a deposit was generally taken which was based on the unit price;
- 5 (2) The physical elements of the product were purchased by Sacutia and delivered to the processor/manufacturer – in the case of these invoices, that was Sigma;
- 10 (3) Sacutia paid a deposit to Sigma prior to production in order to assist Sigma’s cashflow so that they could produce the goods. Sigma’s director at the relevant time (Ian Harrison) confirmed that, when a deposit was paid, he manually created an invoice that was not posted to either the factoring company or to their accounts in order to provide Sacutia with evidence that the deposit had been paid. This was done to allow Sacutia to reclaim the VAT paid on the deposit.
- 15 (4) When manually creating the invoice for the deposit, duplicate invoice numbers were sometimes used as the documents were not created using the normal process but were created by copying and amending existing documents. Sacutia submitted that this was not something over which they had any control.
- 20 (5) The manually created invoice was intended to evidence the deposit paid. As it was created in advance, that invoice could not accurately state the quantities of product that would be produced as this may vary in the manufacturing and packaging process. As such, a “revolving deal” process was used with overproduction and underpayments being adjusted for on future orders. For example, the materials for a purchase of 500 bottles may fill 560 bottles. In that case, the extra 60 bottles would be held for Sacutia by Sigma pending a subsequent order for the same product.
- 25 (6) It was therefore not possible to link a specific payment from a customer to a specific purchase by Sacutia although, over time, the payments and purchases would balance.
- 30 (7) Once the goods had been produced and dispatched, an invoice was created on Sigma’s accounting system. These invoices were not released to Sacutia because the manual invoice had already been issued. No statements were produced as payment had already been received.

11. Sacutia had provided HMRC with substantial information to confirm the purchases, including:

- 35 (1) Documents which met the requirements to be VAT invoices;
- (2) Sigma had confirmed that the documents were genuine;
- (3) Sigma had confirmed that the VAT on the relevant transactions had been accounted for to HMRC;
- (4) Evidence of payment and posting of the transactions to the purchase ledger had been provided;
- 40 (5) Evidence of the supplies themselves, in the form of delivery notes, purchase orders and supplier’s purchase documentation had been provided.

12. It was, therefore, submitted that sufficient evidence had been made available to demonstrate that the input tax was properly allowable. In addition, it was submitted that if there were any errors in the VAT invoices that this was a matter which HMRC should have taken up with Sigma rather than Sacutia.

5 *Penalties*

13. Although most of the errors in relation to which penalties have been assessed were not in dispute, Sacutia submitted that the errors did not arise from deliberate behaviour either on its own part, or on the part of Mr Barnes.

14. With regard to the meaning of “deliberate”, Sacutia submitted that the decision in *Auxilium Project Management Ltd* [2016] TC05024 was helpful where, at §63, it stated:

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

20 15. It was submitted that neither Sacutia nor Mr Barnes took any conscious decision to submit inaccurate VAT returns to HMRC. It was accepted that neither may have taken every conceivable step to confirm the accuracy of the documents but this was not the same as knowingly providing inaccurate information. On the contrary, it was submitted that Mr Barnes for Sacutia took reasonable care in providing information to
25 Sacutia’s accountants, together with any additional information which they requested.

16. Mr Barnes confirmed that he was not involved with any bookkeeping or the preparation of the VAT account and returns, having always entrusted this to external accountants. He provided the accountants with what he believed to be the relevant documents (bank statements, invoices and similar) and responded to any queries which
30 they had. He then paid any liability that was advised by the accountants. Sacutia had appointed a long-established firm of Chartered Certified Accountants to undertake this work.

17. Mr Barnes stated that he had no reason to believe that any errors would be made by the accountants, who he expected to have far more knowledge of VAT than he did.
35 He also did not have any bookkeeping records or function and so did not have any mechanism by which to confirm the information provided by the accountants. Accordingly, he did not consider it necessary to check the VAT returns before they were submitted on Sacutia’s behalf. He had described himself as “not a detail man” and engaged others to deal with details.

18. It was submitted that Mr Barnes had acted reasonably and responsibly in engaging a professional firm to prepare Sacutia's VAT returns given his lack of experience and knowledge in this area.

5 19. The most substantial error, over half the assessment amount, related to failure to account for output tax on customer deposits received by Sacutia. It was not disputed that these deposits created a tax point under the provisions of s6(4) VATA 1994.

10 20. Sacutia explained that their accountants had admitted liability for these errors to HMRC: for example, in one letter dated 1 December 2014, they confirmed that a junior member of staff misinterpreted a conversation with Mr Barnes and so recorded deposits received as not including VAT on the accounting system. The accountants had accepted liability for this and had agreed to pay the proportion of the penalties relating to this error. Sacutia explained that Mr Barnes was unaware of the obligation to issue VAT invoices in respect of deposits and to account for VAT in respect of those.

15 21. Sacutia submitted that the failure to account for output tax on deposits could not be regarded as a deliberate error by either Sacutia or Mr Barnes. Although Mr Barnes was not aware of his obligations with regard to the issue of VAT invoices on receiving deposits, this was not a deliberate action. The error arose despite Mr Barnes, and therefore Sacutia, taking reasonable care in appointing professional advisers to deal with the VAT matters for the business and providing them with all relevant information.

20 22. The second category of errors in relation to which penalties were imposed were input tax claims disallowed on the basis of invalid invoices. These errors were not disputed by Sacutia, but it is submitted that they were not deliberate errors. The errors were described as being attributable to the accountants, who had compiled the accounting records from source documents which included the documents from which
25 this input tax was composed. These documents included pro-forma documents which resulted in duplicated items for which input tax was claimed as well as some invoices in the names of other businesses associated with Mr Barnes and his family.

23. It was submitted that there was no deliberate error by either Sacutia or Mr Barnes involved in the provision of these documents to the accountants.

30 24. The third category of errors for which penalties were assessed were assessments to output tax on lack of export evidence. Although the assessments were not challenged, Sacutia disputes that the behaviour leading to the assessment was deliberate and concealed.

35 25. The issue arose because the relevant goods were not exported by Sacutia directly. Instead, the removal of the goods from the UK was undertaken by the customer. Sacutia did not have access to the original export evidence, although it had provided a photocopied bill of lading which had been stamped as "certified true copies" by the shipping companies. The customer had completed the export documentation with "Cleanliness Ltd" as the shipper, although the sales invoices clearly showed that Sacutia
40 was the vendor.

26. Cleanliness Ltd was a company of Mr Barnes through which he also traded at the relevant time although he has since ceased to do so. The wrong name was given as the shipper in error by the customer, who had also dealt with Cleanliness Ltd. Other customers have made the same mistake; as Mr Barnes did not focus on details (as set out above), he would not have noticed this but would simply have put the papers into a box to provide to the accountants. Where the suppliers had reissued documents in the correct name, HMRC had accepted those reissued documents as valid.

27. It was submitted that the errors were made by Sacutia's customer, not Sacutia, and HMRC had not explained how they have reached the conclusion that the error resulted from deliberate behaviour on the part of either Sacutia or Mr Barnes, nor what was concealed by Mr Barnes.

28. Finally, penalties were assessed on the disputed input tax on the basis of deliberate behaviour.

29. Sacutia submitted that, as set out above, they did not agree that the input tax was not recoverable. They further submitted that, if they were incorrect, there was strong and sufficient evidence that the supplies did take place and that the failure was in not holding the prescribed evidence to support the deduction.

30. It was submitted that there was, therefore, no deliberate behaviour on the part of either Sacutia or Mr Barnes. The error was, at worst, careless and was therefore capable of being suspended.

31. It was submitted that although Mr Barnes had not appealed the penalty imposed on him personally, this was an omission and should not be taken to mean that he did not dispute the penalty. The issue, in any case, fell away if the errors leading to the penalty were not considered to be deliberate.

25 **HMRC's submissions**

Assessment

32. HMRC submitted that Sacutia had not demonstrated that they held valid VAT invoices and so were not entitled to reclaim input tax for the periods 03/14 to 06/15 on supplies received from Sigma.

33. Although Sacutia had provided copies of purchase orders and delivery notes, HMRC submitted that Regulation 14 of the Value Added Tax Regulations 1995 (SI 1995/2518) ("VAT Regulations") had not been met and the extra information could not be used as evidence to support the claim for input tax.

34. HMRC further submitted that the VAT invoices produced by Sigma from their accounts system showed considerable discrepancies when compared to the invoices on which Sacutia based their input tax claim. HMRC submitted that the invoices supplied by Sigma did not correlate with the invoices submitted to HMRC by Sacutia to evidence the supplies; some of the invoices produced by Sigma with the same reference number are invoices for goods supplied to completely unrelated companies.

35. s25(2) VATA 1994 requires that a person claiming a deduction of input tax must hold the document required by Regulation 29(1) of the VAT Regulations 1995, which is defined in this case by Regulation 29(2) and Regulations 13 and 14 as a VAT invoice. The documents produced by Sigma did not meet the requirements of Regulation 14,
5 which sets out a number of particulars that must be included in a VAT invoice. HMRC submitted that the documents produced by Sigma did not include many of these particulars and so could not be regarded as anything more than pro-forma invoices and could not be used as evidence to support the claim for input tax.

36. It was submitted, therefore, that Sacutia had not shown that the assessment was
10 incorrect or that they were entitled to a deduction of input tax.

Penalty in relation to refusal to zero-rate exported goods

37. HMRC submitted that no evidence was provided by Sacutia to show that any export took place as the shipping information on Sacutia's records only showed a shipment to the international rail terminal at Doncaster and HMRC could not find any
15 evidence of Sacutia making or being involved in export sales. The documents provided by Sacutia were photocopies and not the original documents and had the name of a different company on them.

38. HMRC submitted that the behaviour which led to the inaccuracy was deliberate and concealed because Sacutia failed to keep acceptable evidence to support the
20 treatment of the goods as exported in order to zero-rate the supply for VAT purposes. There was no evidence that Sacutia had made any exports as HMRC's Customs, International Trade and Excise department confirmed that there was no formal record of Sacutia making or being involved in export sales. Sacutia had failed to keep original documents, which a reasonable person could be expected to do in order to support their
25 claim.

39. The discount given for this inaccuracy was calculated as follows:

- (1) Telling: Sacutia had not admitted that any error occurred but had provided some information when the inaccuracy was identified, so a discount of 10% was given;
- 30 (2) Helping: limited assistance had been given in the compliance check, so a discount of 20% was given;
- (3) Giving: Sacutia had not given full access to documents and a Schedule 36 Finance Act 2008 notice had to be issued to obtain export evidence and so a reduction of 5% was given.

35 *Other penalties*

40. HMRC submitted that they believed that Mr Barnes was the "controlling mind" of Sacutia and, as acting director, personally gained or attempted to gain from the inaccuracy. HMRC noted that Mr Barnes had not appealed the penalty attributed to him personally and submitted that he would need to appeal that penalty separately if he
40 considered that he was not liable to pay it.

41. HMRC submitted that the disclosure of each of the errors was prompted as Sacutia did not tell HMRC about the inaccuracies before they were discovered.

42. HMRC also submitted that the behaviour that lead to the errors was deliberate for a number of reasons:

5 (1) Sacutia had failed to provide their accountant with all of the information required to complete an accurate VAT return and, when explanations were sought by the accountants, had not provided a full explanation of the business income and expenditure. In particular, copies of sales invoices had not been provided to the accountants, who had had to rely on identifying payments from the business
10 bank statements.

(2) Mr Barnes had been in business before and had previous experience of VAT registration. He had previously been given instructions by HMRC on how to record exports and the requirement to obtain proper evidence for purchases.

15 (3) A reasonable person with Mr Barnes' previous knowledge and experience must have known that the returns were incorrect. The size of some of the errors was substantial, such as the £26,128 of VAT on undeclared sales with a net value of £130,640 in the VAT period ending June 2014.

20 (4) Mr Barnes' failure to take reasonable steps to ensure that the returns were correct, having been advised in the past on how to ensure that similar errors did not occur, indicated to HMRC on the balance of probabilities that he must have known that the VAT returns were incorrect at the time of submission or shortly afterwards. As Mr Barnes had not attended any of the meetings with HMRC during the course of the enquiry, the decision had to be made on the balance of probabilities.

25 43. The penalties were discounted to reflect assistance given by Sacutia's accountants during the enquiry. However, the full discount could not be given as Sacutia had not actively participated. For these deliberate errors, the discount given was as follows:

30 (1) Telling: Neither Mr Barnes nor any other person for Sacutia attended meetings with HMRC. The reduction given for "telling" was therefore limited to 25%.

(2) Helping: Sacutia did not actively participate in the compliance check and so the reduction was limited to 35%.

(3) Giving: Sacutia did not actively provide information. The reduction was therefore limited to 25%.

35 44. HMRC submitted that the penalties had been properly and correctly imposed and should be upheld.

Discussion

40 45. We note that the penalty arising from personal liability notice issued to Mr Barnes was not part of this appeal and that this was explained as an omission. Although this explanation was made, no submissions were made that this Tribunal should

nevertheless treat it as having been appealed. As that penalty has not been appealed by Mr Barnes, nor was it submitted that it should be treated as having been appealed, this Tribunal has no jurisdiction to consider that penalty and so we have not further considered the personal liability notice or the related penalty issued to Mr Barnes.

5 *Assessment as to incorrectly claimed input tax*

46. Regulation 29(2)(a) of the VAT Regulations 1995 states (as relevant) that

“at the time of claiming deduction of input tax ... a person shall, if the claim is in respect of:

10 (a) A supply from another taxable person, hold the document which is required to be provided under regulation 13

...

15 Provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.”

47. Sacutia did not submit that the Commissioners had directed that they could provide any other evidence of the charge to VAT. Accordingly, in order to claim a deduction of input tax, they were required to hold the document which was required to be provided under Regulation 13.

20 48. Regulation 13 sets out the obligation on a registered person to provide a VAT invoice to (inter alia) a taxable person to whom a taxable supply is made in the United Kingdom. Regulation 14 sets out the required contents of a VAT invoice, including the requirements to provide a “sequential number based on one or more series which uniquely identifies the document” and “the quantity of the goods” supplied.

25 49. The combined effect of Regulations 13, 14 and 29 in this context is, therefore, that a taxable person must hold a VAT invoice for the supply which meets the requirements of the legislation, provided by the supplier, in order to claim a deduction of input tax in relation to that supply. It was agreed that the burden of proof is on the taxable person to show that they were entitled to claim the deduction.

30 50. Sacutia stated that the documents which Sacutia relied upon to claim the relevant input tax were documents manually created by Ian Harrison of Sigma when payment was received. Once the order was completed by Sigma an invoice would be created on Sigma’s accounting system. These second invoices were not sent to Sacutia and were different to the documents manually produced by Ian Harrison due to changes that had
35 occurred in the manufacturing process: in particular, the quantity of goods would usually be different as it was not possible to accurately forecast how many packages could be produced from the ingredients supplied. The number on the manually produced document was also different to the number on the invoice produced by the accounting system as Mr Harrison would use a previous document to create the manual

document and would leave the number in place. In some cases, he used the same number more than once when he re-used a document.

51. We find that the documents produced by Mr Harrison were not VAT invoices as they did not meet the requirements of Regulation 14. In particular, they did not have a unique identifying number and did not state the quantity of goods supplied.

52. We note that Sacutia submit that they have provided other evidence of the supplies and of payments made for the supplies, but the legislation is clear that what is required in this case for a deduction of input tax is a VAT invoice and not “other evidence”. We find that Sacutia have not met the statutory requirements to be able to deduct the relevant input tax and the assessment is upheld.

53. We note that Sacutia submitted that, if the documents were not sufficient to amount to being VAT invoices, HMRC should have pursued Sigma for producing incorrect documents instead of Sacutia for relying on those documents. That submission is, in effect, challenging a decision by HMRC in the exercise of its general powers which a matter for judicial review and so it is well-established that this Tribunal does not have power to consider such submission. However, we would note that this is in any case not an either/or situation: the legislation is clear that the obligations arise on both the supplier to produce a VAT invoice that complies with Regulation 14 in relation to a supply *and* on the purchaser to hold a VAT invoice that complies with Regulation 14 in order to claim an input tax deduction in relation to that supply. That is, there is an obligation on a purchaser to confirm that they have proper evidence in order to claim a deduction; they cannot simply rely on the supplier’s obligation to produce the proper document.

Penalties

54. It is well established that in penalty cases, such as the present, the burden of proof that the determination of the penalty was correct is on HMRC (see *King v Waldon* [2001] STC 822).

55. “*Deliberate*” *behaviour penalties*: HMRC submitted that the behaviour must be regarded as deliberate because Sacutia had failed to provide their accountant with all of the information required to complete an accurate VAT return and, when explanations were sought by the accountants, had not provided a full explanation of the business income and expenditure.

56. Sacutia submitted that the behaviour should be regarded as, at worst, careless rather than deliberate as there was no intention to make any deliberate inaccuracies.

57. We considered that Mr Barnes, on his own evidence, did not take care as he stated that he was not a “detail man” and left everything to the accountants. Although it was submitted that he had taken care by engaging a professional firm we do not consider that a taxpayer can abdicate all responsibility simply by choosing to engage a firm of accountants.

58. Indeed, we consider that Mr Barnes' evidence was that he did not actually take any care at all beyond engaging accountants – for example, he admitted that he would not notice that an invoice sent to Sacutia was addressed to the wrong business; we find from his evidence that he did not check documents before putting them in a box to send them to his accountants.

59. His approach to VAT compliance therefore was to send whatever information was in the box to his accountants. This information was unchecked and was incomplete as the accountants then had to seek further information from Mr Barnes in order to try to identify transactions. Mr Barnes also did not check the returns when provided and simply paid whatever he was told to pay in relation to VAT.

60. We have considered the meaning of “deliberate inaccuracy” in *Auxillium*, as submitted by Sacutia. We agree that some measure of knowledge is required for an inaccuracy to be made deliberately, but we consider that a taxpayer has the required “knowledge” for an inaccuracy to be deliberate where the taxpayer knows that they should take steps to check accuracy before information is submitted or relied upon and does not do so.

61. Mr Barnes had been in business for many years before becoming involved with Sacutia; it was not disputed he had previously been advised by HMRC in relation to other businesses of the need to keep proper records and evidence of expenditure and exports and that he knew it was necessary to provide accurate returns to HMRC. We find that Mr Barnes did not check or confirm that Sacutia had such proper records or evidence although he knew that Sacutia was required to do so, nor did he check VAT returns on behalf of Sacutia.

62. We note Sacutia's submissions that the errors should be considered to be at best to have been the result of careless behaviour. We consider that, in order for an action to be careless, a taxpayer must have a reasonable belief that the information they are providing is accurate.

63. However, we consider that a taxpayer cannot be regarded as simply careless where they take no steps to ensure accuracy or check the accuracy or completeness of information as that taxpayer cannot have a reasonable belief that the information provided is accurate. Engaging an accountant does not automatically ensure accuracy, and so such engagement cannot on its own amount to taking adequate steps to ensure accuracy, particularly where the taxpayer does not ensure that the accountant is provided with accurate information and does not check the information that is then produced by the accountant. Penalties cannot be escaped simply because a taxpayer (or the person acting on their behalf, in the case of a company) is not a “detail person”.

64. We therefore find that Sacutia, through Mr Barnes, acted deliberately in providing HMRC with documents that contained errors and that Sacutia intended that HMRC should rely on those inaccurate documents. We find no reason to disturb HMRC's calculation of the discount. We find, therefore, that these penalties in relation to deliberate behaviour were properly and correctly imposed.

65. *“Deliberate and concealed” penalty in relating to zero-rating of supplies:* The penalty was charged on the basis that the inaccuracy was deliberate and concealed. We note that HMRC’s Compliance Handbook Manual states at CH81160 that:

5 A deliberate and concealed inaccuracy is the most serious level of evasion. It occurs where a document containing a deliberate inaccuracy is given to HMRC and active steps have been taken to hide the inaccuracy either before or after the document has been sent to us.

10 As well as deliberately recording an inaccuracy, the person has to take active steps to cover their tracks by making arrangements to conceal the inaccuracy.

66. Examples of acts of concealment in the Manual include the “creating false invoices to support the inaccuracies in the return.”

15 67. HMRC submitted that Sacutia had failed to charge VAT on the supply, had failed to keep adequate evidence of export, and that there was no record of Sacutia as an exporter within HMRC’s records. In addition, Mr Barnes had previously been advised in relation to another business of the need to keep proper export evidence.

68. Having reviewed the evidence we consider that HMRC have not adequately explained why they considered that the inaccuracy was “concealed” in accordance with their guidance.

20 69. We note that the copies of bills of lading (only one of which is actually certified as a true copy, despite Sacutia’s submissions) show the shipper to be a different company, but HMRC have not specifically stated either in submissions, their statement of case, or in correspondence that Sacutia provided these in an attempt to hide that the goods were not exported, or otherwise “made arrangements to conceal the inaccuracy”.

25 No submissions were made by HMRC that the information on the copy export documents provided did not otherwise match the supplies which were stated to have been made.

30 70. Given the seriousness which HMRC accords to concealed inaccuracy in their guidance, we consider that HMRC must make it clear why they have treated an inaccuracy as concealed in order to impose a penalty. This is both to be able to show that HMRC have met the burden of proof on such penalties and also in order that the relevant taxpayer understands the case against them.

35 71. We consider that as HMRC have not explained how they consider the inaccuracy to have been “concealed” they have not discharged the burden of proof upon them to show that the penalty was correctly charged.

72. On an appeal against the amount of a penalty, paragraph 17(2) of Schedule 24 Finance Act 2007 allows the Tribunal to substitute HMRC’s decision for another decision provided that it was within HMRC’s power to make the substituted decision.

40 73. We have considered Sacutia’s explanation, that the incorrect company name was used by the customer when the customer organised the shipping. That customer had

also dealt with another company owned by Mr Barnes, and that Mr Barnes had not noticed the incorrect name when he received the copy paperwork. We note that it was not denied that Mr Barnes had previously been informed of the need to keep proper records in order to evidence exports and zero-rate the relevant supplies.

5 74. Sacutia noted (although they did not appeal the refusal to allow the relevant
supply to be zero-rated) that HMRC had accepted other documents addressed to
Cleanliness Ltd and then reissued to Sacutia as valid. The documents indicated as
evidence of this consisted of one invoice, against which a credit note had been raised
and a replacement invoice issued with the same date as the original invoice. Only the
10 correctly addressed invoice is marked as paid, so this was clearly not an invoice issued
to satisfy HMRC's enquiries. we consider therefore that HMRC's acceptance of this
subsequent properly addressed invoice could not be interpreted as meaning that HMRC
is required to accept documents addressed to Cleanliness Ltd as being adequate
evidence of an export by Sacutia.

15 75. We find that Mr Barnes knew that Sacutia was required to have proper evidence
of export in order to be able to zero-rate supplies of goods which were exported. The
failure to obtain such evidence in those circumstances amounts, for the same reasons
described earlier, to deliberate behaviour in that Mr Barnes' evidence was that he made
no attempt to check whether the documentation which he received was correct and so
20 failed to take an action which he knew to be necessary to ensure that Sacutia had the
correct information.

76. On balance, we find that there were no "arrangements to conceal the inaccuracy"
and so we find that the inaccuracy was deliberate but not concealed.

25 77. Accordingly, the penalty range is 35% to 70% of the potential lost revenue. We
do not disagree with HMRC's assessment that the appropriate reduction is 35%. The
potential lost revenue was not disputed to be £1,500. We find, therefore, that the penalty
should be calculated as follows:

- (1) Difference between minimum and maximum penalty: 35%
- (2) Multiplied by the appropriate reduction of 35%
- 30 (3) Equals a percentage reduction of 12.25%
- (4) The maximum penalty is 70%
- (5) Less the percentage reduction of 12.25%
- (6) Equals a penalty percentage of 57.75%

78. Applied to the potential lost revenue, we find that the penalty is £866.25.

35 **Decision**

79. The amount of the assessment appealed against, £16,771.84, is upheld.

80. The deliberate behaviour penalties are upheld in full.

81. The penalty for deliberate and concealed behaviour is not upheld and a penalty for deliberate behaviour in the sum of £866.25 is imposed instead.

82. 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

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RELEASE DATE: 29 NOVEMBER 2018