[2019] UKFTT 352 (TC)

TC07180

VAT – assessment to reclaim overpaid input tax – extended 20 year time limit for deliberate behaviour under VATA s 77 – the Court of Appeal's judgment in* Tooth *considered and applied – penalty for deliberate and concealed inaccuracies – meaning of "deliberate" in Sch 24 in the light of* Tooth *– meaning distinguished – meaning of "concealed" – assessment and penalty upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/07283

BETWEEN

ANTHONY LEACH **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MR JOHN ROBINSON

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 18 April 2019

The Appellant did not attend and was not represented

Mr Carl Hearsum, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction and summary

1. This was Mr Leach's appeal against an assessment to recover overpaid VAT of £49,857 for the period 05/11 to 11/14 ("the relevant period") plus a penalty of £47,364.15 on the basis that his behaviour had been "deliberate and concealed". Mr Leach did not attend the hearing. For the reasons set out in the main body of this decision, the Tribunal decided to continue with the hearing despite his non-attendance.

2. Mr Leach had made claims to recover input tax, but had destroyed all relevant documents. When Mr Wishman, an HMRC Officer, visited his premises, Mr Leach could produce no supporting evidence for his input tax claims. After Mr Wishman's visit, Mr Leach's input tax claims dropped very significantly.

3. Mr Wishman used those later periods as the best evidence on which to base his assessments, and the Tribunal found that he had exercised best judgement in doing so.

4. For part of the period covered by the assessment, Mr Wishman relied on the extended time limit in Value Added Taxes Act 1994 ("VATA"), s 77, on the basis that the loss of tax had been "brought about deliberately" by Mr Leach. The Tribunal considered the meaning of "deliberate" in the light of the Court of Appeal's recent judgment in *HMRC v Tooth* [2019] EWCA Civ 826 ("*Tooth*"). Although that decision was not binding on us, we found that the same analysis applied because of the very similar wording of the relevant statutory provisions. We also found that Mr Leach had submitted the returns intending that HMRC should rely on them as being correct, when he knew they were incorrect, and this behaviour was "deliberate", even were we to be wrong in finding that the Court of Appeal's analysis in *Tooth* was also applicable to VATA s 77.

5. The penalty was issued under Finance Act 2007, Schedule 24 ("Sch 24") on the basis that Mr Leach's behaviour was "deliberate and concealed". We found that the *Tooth* analysis of "deliberate" did not apply to the Sch 24 penalty provisions, but that Mr Leach had acted deliberately because he had submitted the returns intending that HMRC should rely on them as being correct, when he knew they were incorrect. We agreed with HMRC's understanding of the term "concealed" and we also agreed that 5% was the correct reduction for disclosure.

6. We therefore upheld both the assessment and the penalty in full.

Mr Leach's failure to attend

The postponement applications

7. Mr Leach's failure to attend the hearing was preceded by three postponement applications.

8. On 13 April 2018, Mr Leach confirmed that he would be available for a hearing after 24 July 2018, but would be overseas before that date. On 21 June 2018, the appeal was listed to take place on 2 August 2018. That listing direction, and the two later listing directions referred to below, were sent with a covering note from the Tribunal which included the following paragraphs:

> "Postponement applications must be communicated to the Tribunal at the first possible opportunity. They should be in writing and explain the reason for requesting the postponement. If the reason is medical a doctor's certificate should if possible be produced.

> All postponement applications will be considered by a Judge. The Judge will not normally agree to a postponement unless the reasons in the application are compelling, even if the other party consents."

9. On 23 July 2018, Mr Leach emailed the Tribunal to say that he had been admitted to hospital with a mini-stroke on 14 July 2018, and although he was now home, had been advised to rest and to avoid stress. He asked that the hearing be postponed. HMRC did not object, but noted the lack of supporting medical evidence, and the fact that Mr Leach had not given any indication as to when he would be able to attend a hearing.

10. On 25 July 2018, the Tribunal wrote to the parties saying that the hearing was postponed and asking that they provide, within 14 days, their dates to avoid for a relisted hearing. On 31 July 2018, HMRC provided their dates but Mr Leach did not respond. On 20 August 2018, the hearing was relisted for 27 November 2018.

11. On 17 November 2018, Mr Leach emailed the Tribunal saying "please accept this as a request to adjourn under advice from my doctor owing to ill health"; a hospital letter about a cancelled appointment was attached. In his email, Mr Leach said he had been advised to avoid stress and was suffering from high blood pressure, and added (text as original):

> "I will be appointing a representative shortly to attend to my affairs as I have documents that have come to light that need to be submitted to the court and third party, of which I have not done as yet due to ill health."

12. HMRC responded to this second postponement application by saying that:

(1) Mr Leach had "either missed, cancelled or sought to move all prearranged meetings" during their enquiries into his VAT reclaims;

(2) he had again not given any indication as to when he might be able to attend the hearing; and

(3) the hospital letter did not provide any relevant evidence to support his claim that he was unable to attend.

13. Although HMRC did not object on this occasion, they warned that they would object if a future postponement request was not accompanied by medical evidence.

14. On 24 November 2018, the Tribunal postponed the hearing and directed the parties to provide, within 14 days, their dates to avoid for a relisted hearing to take place between 1 January 2019 and 30 April 2019. The Tribunal letter also said:

> "if the appellant considers he will not be able to attend a hearing in that period, he should provide a medical certificate addressing his ability to attend a hearing and information should be provided on when the appellant is likely to be able to attend a hearing. The judge notes that the hearing cannot be postponed indefinitely."

15. On 3 December 2018, HMRC provided their dates to avoid; Mr Leach again did not respond.

16. On 17 December 2018, the hearing was relisted for a third time, to take place on 18 April 2019. On 11 April 2019, HMRC contacted the Tribunal to say that their witness would be unable to attend, but they wanted the hearing to continue in any event. Later the same day, Mr Leach also emailed the Tribunal, saying:

> "I am waiting for the doctors letter to submit to the tribunal to seek adjournment due to ill health. I will not be in attendance at the hearing.
>
> With no witness and myself in attendance, I request an adjournment with notification from my doctor for a date in due course for me to be well enough to attend to put my case forward."

17. On 15 April 2019, HMRC reiterated that they wanted the hearing to go ahead. On 17 April 2019, I refused Mr Leach's postponement application, having taken into account the following matters:

(1) the hearing had been postponed on two previous occasions because of Mr Leach's ill health;

(2) Mr Leach had not given any indication as to when he was likely to be well enough to attend a hearing;

(3) on 17 November 2018, Mr Leach had informed the Tribunal that he "will be appointing a representative shortly", but had not done so; and

(4) the position of other tribunal users was also relevant; their cases were likely to be delayed because the Tribunal's time and resources were taken up with the repeated listing and postponement of Mr Leach's appeal.

18. On the same day, Mr Leach responded to my refusal of his application, saying that he had been unable to appoint a representative because of ill-health, and requesting a further three month postponement to allow him more time to do so.

19. I refused that second application by return, for the same reasons, and also because Mr Leach had promised to appoint a representative four months previously, so had already had plenty of time to carry out that task.

Mr Leach's non-attendance

20. The hearing was scheduled to begin at 10.30am, but Mr Leach was not present. The Tribunal waited for 15 minutes in case he had been delayed, but he did not attend, either within the first 15 minutes, or at all.

21. Mr Hearsum submitted that it was in the interests of justice to continue in Mr Leach's absence, for the reasons already put forward in HMRC's previous correspondence about the postponement applications.

The relevant legal considerations

22. Rules 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 reads:

> **"Hearings in a party's absence**
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

23. It was clear that Mr Leach had been notified of the hearing. We considered whether it was in the interests of justice to proceed. Rule 2(2) says:

"Dealing with a case fairly and justly includes--

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues."

24. The relevant factors here are (a), (c) and (e).

(1) In relation to (a), the case before the Tribunal concerned a claim for overpaid VAT and a related penalty. Although the penalty was for deliberate and concealed behaviour, the facts which led HMRC to that conclusion were not in dispute. HMRC had sent Mr Hearsum to the hearing, and if the appeal was not heard, his time and the related costs would be wasted. It was also relevant that HMRC had prepared for this case on two previous occasions.

(2) In relation to (c), Mr Leach's absence meant that he would not be able to explain orally why he believed he should succeed. However, we had his grounds of appeal which set out his reasons.

(3) In relation to (e), postponing the appeal would inevitably cause delay. This appeal concerned VAT periods 05/11 to 11/14, so between five and eight years previously. Another delay would further lengthen the gap between the dates on which the events occurred, and the eventual hearing of the appeal. We decided we were able properly to consider the issues, because we had a Document Bundle of over 200 pages containing the correspondence between the parties; Mr Leach's Notice of Appeal to the Tribunal; details of the penalties; copies of bank statements; Mr Leach's VAT returns for the relevant period and other documents; and a Bundle of authorities containing extracts from the legislation and various relevant court and tribunal judgments.

25. We also considered the following other factors, some of which had also been relevant to my refusal of the postponement applications:

(1) Mr Leach had never provided medical evidence of his state of health; the only document he had provided was a hospital letter cancelling an appointment;

(2) although he now said he would appoint a representative within the next three months, he had made the same promise four months previously, and he had not in fact appointed a representative;

(3) this was his third postponement request;

(4) both parties are entitled to have the case dealt with fairly and justly, so we must consider the effect of a postponement decision on HMRC as well as on Mr Leach, see *Transport for London v O'Cathall* [2013] EWCA Civ 21 at [42]. HMRC wanted the case resolved, as was clear from their correspondence and Mr Hearsum's submissions;

(5) a further postponement would not only cause delay to HMRC and Mr Leach, but also to other Tribunal users. As Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

26. We also took into account Mr Leach's failures to comply with Tribunal letters or directions:

(1) he had three times been informed that, if he wanted to postpone the hearing, he should make an application at least 14 days before the hearing date, but had never complied with that direction. Although there may have been a "compelling reason" for the late postponement application on the first occasion, this was not the position for the two later applications;

(2) he had failed to respond to either of the Tribunal's earlier directions to provide dates to avoid for the last two listed hearings;

(3) on 24 November 2018 the Tribunal had directed that, if Mr Leach was unable to attend a further relisted hearing "he should provide a medical certificate addressing his ability to attend a hearing", but he had not complied with that direction.

27. We did not overlook the fact that on 17 November 2018 Mr Leach had referred to having "documents that have come to light that need to be submitted to the court". However, we decided that it was in the interests of justice to proceed on the basis of the documents already before the Tribunal, because:

(1) Mr Leach had supplied no further documents during the period of nearly five months since that email;

(2) he had provided no detail as to the type or nature of these documents, or their contents;

(3) on 11 December 2017, the Tribunal issued directions for the progress of his appeal. These directions included that the parties "send or deliver to the other party and the Tribunal a list of documents which that party intends to rely on or produced in connection with the appeal". The document list was be sent to the other party, and filed with the Tribunal, on or before 12 January 2018. Mr Leach did not comply with that direction;

(4) this enquiry began on 3 February 2015, over four years previously. Until this email of November 2018, Mr Leach had consistently denied having any relevant documents; and

(5) his grounds of appeal made no reference to the existence of other documents.

28. Taking all relevant matters into account, we were satisfied that it was in the interests of justice to proceed in Mr Leach's absence on the basis of the documents within HMRC's Bundle.

Late appeal

29. HMRC's statutory review letter was issued on 27 September 2016. The Tribunal received Mr Leach's notice of appeal on 8 December 2016, around five weeks late, so over twice as long at the 30 day period allowed by statute.

30. Mr Leach's reason for delay was that he had also applied for ADR and had become confused as to how this fitted with the requirement to appeal to the Tribunal. HMRC accepted that this was a good reason for the delay, and the Tribunal agreed. His application to make his appeal to the Tribunal after the statutory time limit was allowed.

The legislation relating to the assessment

31. VATA ss 24, 25(2) and 26 provide that input tax may be credited on the supply to a person of goods or services used for the purposes of any business carried on by him, or to be carried on by him.

32. Regulation 29(2) of the VAT Regulations 1995 ("the VAT Regs") requires that a person must hold an invoice or other evidence to support the input tax included on his VAT return. VATA Sch 11 para 6(3) read with Reg 31(1) requires the trader to retain those invoices or other supporting evidence for six years.

33. VATA s 73(2) reads:

> "In any case where, for any prescribed accounting period, there has been paid or credited to any person
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

34. VATA s 73(6)(b) provides that the assessment must be made "one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge".

35. VATA s 77(1) provides that an assessment under s 73 shall not be made more than four years after the end of the prescribed accounting period. However, VATA s 77(4) states that the assessment can be made within 20 years of the end of the relevant accounting period where any of the cases listed in s 77(4A) apply, being:

> "(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),
>
> (b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT,
>
> (c) a case involving a loss of VAT attributable to a failure by P to comply with a notification obligation, and
>
> (d) a case involving a loss of VAT attributable to a scheme in respect of which P has failed to comply with an obligation under paragraph 6 of Schedule 11A."

36. Section 77(4B) reads:

> "In subsection (4A) the references to a loss of tax brought about deliberately by [the person]…include a loss that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by that person."

The case law in relation to the assessment

37. In *Van Boeckel v C&E Commrs* [1981] STC 290 at p 292 Woolf J said that HMRC must make a value judgment on the material before them "honestly and bona fide", and added that:

> "It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which

> could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment."

38. In *Rahman (t/a Khayam Restaurant) v C&E Commrs* [1998] STC 826, Carnwarth J (as he then was) said at p 835:

> "the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment had been reached 'dishonestly or vindictively or capriciously'; or is 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). Short of such finding, there is no justification for setting aside the assessment."

39. We consider the recent case of *Tooth* at §88ff below.

The legislation and case law in relation to the penalty

40. Sch 24, para 1 states that a penalty is payable if a person gives HMRC a VAT return which "contains an inaccuracy which amounts to, or leads to…a false or inflated claim to repayment of tax", and that inaccuracy was careless or deliberate. In this appeal HMRC did not seek to argue, in the alternative, that Mr Leach's behaviour was careless, so there is no need further to consider the provisions relating to careless behaviour.

41. Para 3 states that a person's behaviour is "deliberate and concealed" if:

> "the inaccuracy is deliberate on [the person's] part and [the person] makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

42. Para 4(2) provides that the penalty for deliberate and concealed action is 100% of the potential lost revenue. Para 5(1) defines "potential lost revenue" as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

43. Paras 9 and 10 provide for the penalty to be reduced for telling HMRC about it, giving HMRC reasonable help in quantifying the inaccuracy, and allowing HMRC access to records for the purpose of ensuring that the under-assessment is fully corrected. The maximum reduction for "deliberate and concealed" behaviour is 50% of the penalty; in other words, the statute does not permit the penalty to be reduced below 50% of the "potential lost revenue".

44. Para 11 allows HMRC to reduce the penalty for "special circumstances". These are undefined. In the recent Upper Tribunal ("UT") case of *Barry Edwards v HMRC* [2019] UKUT 131 (Nujee J and Judge Herrington) ("*Edwards*"), the UT warned against putting any "judicial gloss" on the words "special circumstances" – in other words, trying to define the term. They also approved the following statement made by Judge Vos in *Advanced Scaffolding v HMRC* [2018] UKFTT 0744 (TC) at [102]:

> "It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be 'special'. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or,

> where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

45. Para 14 allows HMRC to suspend a penalty, but not where it has been imposed for deliberate behaviour.

46. Para 15 allows a person to appeal a penalty to the Tribunal; the Tribunal then has the power to affirm HMRC's decision, cancel the decision, or substitute another decision which HMRC had the power to make. However, if HMRC had decided that there were no special circumstances, the Tribunal can only consider that issue if they decide HMRC's decision in relation to special circumstances was flawed in a judicial review sense. In *Collis v HMRC* [2011] UKFTT 588 at [36], the Tribunal (Judge Berner and Mr Adams) explained what was meant by "judicial review":

> "Judicial review may be pursued in relation to decisions of public bodies on a number of grounds. Included amongst these are the grounds of illegality and fairness. In the context of a decision of HMRC as to whether a reduction in a penalty should be made on account of special circumstances, the general test will be whether the decision is so demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL)."

The evidence

47. As already noted, the Tribunal had a Document Bundle of over 200 pages containing the correspondence between the parties; Mr Leach's Notice of Appeal to the Tribunal; details of the penalties; copies of bank statements; Mr Leach's VAT returns for the relevant periods and other documents. In addition, we had a witness statement from Mr Wishman and the handwritten notes of his visit to Mr Leach, together with his typed up summary of the position.

48. On the basis of that evidence we make the findings of fact set out in this decision. Most of these findings are in the next following section. We make further findings at §76, §77 and §80.

The facts

The VAT registered business

49. Mr Leach had registered a number of businesses over the years:

(1) on 2 December 2003, he registered a company called TL Travel Limited to undertake the business of minibus and coach hire;

(2) on 15 July 2005, he registered a company called Kent Coaches Ltd; this company was deregistered with effect from 15 March 2006;

(3) on 20 October 2005, he registered as a sole trader, taking over the business of TL Travel as a going concern; and

(4) on 30 July 2007, he registered a company called Kent Minibus Hire Ltd; this company was dissolved on 10 August 2010.

50. Thus, the only VAT registered business in operation during the relevant period, was Mr Leach's sole trader business.

The VAT reclaims and Mr Wishman's visit

51. In periods 05/11 through to 11/14 Mr Leach reclaimed VAT of £60,707. He made a reclaim in each quarter.

52. On 3 February 2015, Mr Wishman and another HMRC officer visited Mr Leach; Mr Leach's accountant, Mr Crittenden, was also present. Mr Wishman asked Mr Leach for the documents to support his VAT reclaims. Mr Leach said that he did not keep any supporting records; instead, after completing each quarter's VAT return, he routinely destroyed all related documents. He denied knowing that he was supposed to keep his records for six years.

Mr Leach's failures to reconstitute the relevant records

53. Mr Wishman asked Mr Leach to reconstitute the relevant records using his business bank statements and any other relevant documents. On 12 February 2015, Mr Crittenden informed HMRC that he was no longer acting for Mr Leach.

54. On 17 February 2015, Mr Wishman wrote to Mr Leach, saying that he was expecting the reconstituted business records by the end of that month. On 24 February 2015, Mr Anil Aggarwal, a chartered accountant and chartered tax adviser, contacted HMRC with authorisation to act on behalf of Mr Leach, and agreed an extended deadline of 16 March 2015 for the delivery of the reconstructed records.

55. On 26 March 2015, Mr Wishman emailed Mr Aggarwal, saying that nothing had been received. Mr Aggarwal responded the same day, saying "I am sorry, but we are also waiting for him to come in. He has cancelled several meetings".

56. On 31 March 2015, Mr Wishman emailed Mr Aggarwal, saying he would have to issue an information notice. Mr Aggarwal responded, saying that Mr Leach had just come in, and he would email the relevant material to Mr Wishman later.

57. On 9 April 2015, Mr Wishman again emailed Mr Aggarwal, saying he had received nothing, and asking him to respond "soonest". Mr Aggarwal replied by return, saying "despite his promises, nothing has come in".

58. On 14 April 2015, Mr Wishman issued Mr Leach with an Information Notice under FA 2008, Sch 36, para 1 ("a Sch 36 Notice" or a "Notice"). The Notice required that Mr Leach provide the required information by 14 May 2015. On 11 May 2015, Mr Leach replied, saying "I can only produce bank statements as other paperwork has been lost/destroyed". He said that his most recent accountant had "got all the information I have, but can not piece together the information you require, as I am informed".

59. On 9 June 2015, Mr Wishman asked Mr Leach to meet him within the next two weeks, and to bring the bank statements to that meeting. Mr Leach agreed to meet on 7 July, but subsequently changed this to 14 July; he cancelled that meeting two days before it was due to take place. Mr Wishman sent Mr Leach two emails suggesting they meet on 21 July; Mr Leach suggested three other dates. He then sent Mr Wishman a package containing bank statements.

The bank statements

60. Mr Wishman received the bank statements on 4 August 2015. They were from three different bank accounts. Mr Leach had not annotated the statements or provided any reconciliation between them and the VAT returns. The statements also included numerous entries entitled "transfers", which Mr Wishman assumed indicated the existence of other bank

statements which had not been provided. We agree with Mr Wishman and find as a fact that Mr Leach had one or more other bank accounts, for which statements had not been supplied.

61. Mr Wishman was unable to carry out any meaningful comparison of payments made through these bank accounts to the VAT returns for the corresponding time periods. He wrote to Mr Leach again on 17 September 2015 asking for *all* the bank statements, and on 6 October 2015, Mr Leach emailed to say that he had already complied with that request. Mr Wishman tried again to set up a meeting, and one was arranged on 24 November 2015. This was cancelled with one day's notice on the basis that Mr Leach had been admitted to hospital.

62. On 1 December 2015, Mr Wishman returned the bank statements to Mr Leach, asking him to use them to reconstruct his VAT returns, and to revert within two weeks. On 7 December 2015, Mr Leach confirmed receipt of the statements.

The basis of the assessments

63. Since February 2015, when HMRC had visited Mr Leach, the business had continued to submit VAT returns, but retained the evidence to support the input tax on those returns. The change to the input VAT included on the returns is shown below, using (a) the three years 2012, 2013 and 2014 and (b) 2015, the year for which records were preserved:

	2/12-11/12	2/13-11/13	2/14-11/14	2/15-11/15
Q1	14,833	27,110	25,986	3,376
Q2	19,928	22,936	32,313	4,248
Q3	18,338	25,500	36,299	4,799
Q4	24,610	25,645	36,345	3,321
Total	**77,709**	**101,191**	**130,943**	**15,744**

64. The input VAT claimed for the year when Mr Leach was retaining his supporting records was therefore 20% of the figure for 2012, 16% of that for 2013, and 12% of that for 2014. Or, to put it another way, the VAT input tax claimed in 2014 was over eight times more than that in 2015.

65. Unsurprisingly, given the significant change to the input tax, Mr Leach's VAT reclaims also dropped sharply: his average VAT recoverable for periods 2/15 to 11/15 was £775.

66. Taking into account the steep drop in the input VAT claimed and the resulting change to the repayment claims, Mr Wishman decided that Mr Leach had overclaimed VAT in the past. In all but one of periods 05/11 through to 11/14 the amount reclaimed was more than £775; the exception was period 11/11 when Mr Leach had reclaimed only £634.

67. In the absence of any other reliable evidence, Mr Wishman used the 2015 returns as the basis for calculating the amount of input tax which should have been claimed in the earlier periods; he treated any reclaims for more than £775 as incorrect. For example, Mr Leach reclaimed VAT of £2,967 for the quarter ended 02/12. Mr Wishman reduced this to £775, so that £2,192 was recoverable from Mr Leach. Applying that approach to each of the earlier periods other than 11/11, Mr Wishman calculated that the total overclaim was £49,857.

68. On 12 January 2016, Mr Wishman issued Mr Leach a pre-assessment letter setting out the VAT he estimated was due on the basis of the methodology explained above. On 29 January 2016, Mr Leach replied, saying:

> "I am afraid I really do not understand the contents of these figures so therefore cannot agree at this present time on your findings. While some receipts and payments are shown on bank statements supplied, there are lots of missing documents that I can not produce as were lost in my business premises movement. So I believe the figure based on my statements alone would be incorrect."

69. On 17 February 2016, Mr Wishman issued the assessment which is under appeal, on the same basis as set out above. On 26 March 2016, Mr Leach asked Mr Wishman to "review these notices as they are extremely high".

The penalty assessments

70. On 10 May 2016, Mr Wishman sent Mr Leach a penalty warning letter, explaining that he intended to issue a penalty of £47,364.15 on the basis that:

(1) the behaviour was "deliberate and concealed" because:

(a) Mr Leach had a duty to keep records, but had destroyed them.

(b) he had retained only his bank statements, but it was not possible to reconstruct his VAT reclaims in reliance on those statements; and

(c) the "scale of destruction indicates behaviour beyond careless and falls within the deliberate category". Mr Wishman did not explain why the behaviour was also categorised as "concealed".

(2) The behaviour was prompted because Mr Leach did not tell HMRC about it until the meeting with Mr Wishman on 3 February 2015.

(3) Mr Leach did not tell HMRC anything about the inaccuracy and provided "minimal help" by providing bank statements, for which Mr Wishman allowed a 5% reduction under each of the "helping" and "giving" categories, so a total of 10%. The maximum penalty reduction for deliberate and concealed behaviour was 50%; Mr Wishman applied the 10% to the 50%, resulting in a 5% reduction.

(4) Mr Wishman considered whether there were any special circumstances, and found that there were none.

71. On 13 June 2016, the penalty under appeal was issued on the basis set out above. On the same day, Mr Leach wrote to HMRC saying he thought the assessment was wrong, and asking for it to be looked at again. He added that he was "being penalised for having paperwork go missing during a premises movement."

The HMRC review conclusion, and the appeal

72. On 27 September 2016, HMRC issued a review decision, upholding the assessments and the penalties. The review officer noted that HMRC's Compliance Manual at CH81160 states that "concealment" includes deliberately destroying books and records so that they are not available, and that was the position here. Mr Leach then appealed to the Tribunal.

The parties' submissions

Mr Hearsum's submissions on behalf of HMRC

73. Mr Hearsum submitted that:

(1) the "evidence of facts, sufficient…to justify the making of the assessment" did not come to Mr Wishman's knowledge until after he had received and considered the bank

statements on 4 August 2015; the assessment was made on 17 February 2016, so within one year;

(2) Mr Leach had not complied with his legal obligations, because he had destroyed all relevant documentary evidence, other than the bank statements;

(3) as a result there was no direct evidence of the figures on his VAT returns other than the bank statements;

(4) neither HMRC nor Mr Leach were able to use those statements to provide a basis to support the VAT claimed, see in particular Mr Leach's letter of 29 January 2016;

(5) Mr Wishman made the assessments to his best judgement, based on the subsequent VAT returns;

(6) Mr Leach's behaviour was deliberate for the reasons set out by Mr Wishman;

(7) as a result, the 20 year time limit applied. Since Mr Wishman's decision was issued on 17 February 2016, this was relevant only to periods 05/11 and 08/11;

(8) Mr Leach made arrangements to conceal the inaccuracy by destroying the related records; that destruction served to "hide the true amount of VAT" to which he was entitled. The penalties were therefore correctly issued on a "deliberate and concealed" basis;

(9) the level of mitigation reflects Mr Leach's poor level of co-operation with the enquiry; and

(10) there were no special circumstances.

Mr Leach's submissions

74. Mr Leach's grounds of appeal stated that:

(1) he "did provide all the evidence needed" and "gave all evidence I had when requested";

(2) the "amount requested is very large";

(3) Mr Wishman gave no "valid reasons" for the assessment, which was not based on "substantial evidence" and had not been made to Mr Wishman's best judgement. He also said that he had been "advised by HMRC advice line that this figure was based on local businesses in [his] area" and this was not acceptable;

(4) he had now stopped trading "due to the decline in business", and added: "hence the reason the VAT returns amounts declined this was explained at the interview at my office";

(5) his behaviour was not "deliberate or concealed"; and

(6) in relation to the penalty reduction, he had "made appointments and was very accommodating in providing all necessary paperwork".

The assessment: discussion and decision

Mr Leach's records

75. Mr Leach's evidence about the destruction of his records changed over time. We have already found as facts that:

(1) during the visit on 3 February 2015, Mr Leach said he "routinely destroyed" all the supporting documents for his VAT returns, and told Mr Wishman that he did not know he had to retain them;

(2) on 11 May 2015, he wrote to Mr Wishman saying "I can only produce bank statements as other paperwork has been lost/destroyed"; and

(3) on 29 January 2016, having received the pre-assessment letter, he wrote to Mr Wishman saying "there are lots of missing documents that I can not produce as were lost in my business premises movement". Similarly, when Mr Leach asked for a statutory review on 13 June 2016, he said he was "being penalised for having paperwork go missing during a premises movement".

76. As can be seen from those facts, the first time that Mr Leach mentioned losing documents during a "business premises movement" was almost a year after he had told Mr Wishman that he routinely destroyed all the documentation which related to his VAT return. In the course of that year, Mr Wishman had repeatedly made contact with Mr Leach, either directly or via his accountant, and at no point did Mr Leach say that the loss of records was a one-off incident caused by a premises move. Moreover, Mr Leach has not said when this move occurred, what was lost, why it was lost, and why it was not possible to recover any of the relevant records. We find Mr Leach's earlier evidence to be more reliable, and find as a fact that he destroyed all business records which supported his VAT returns soon after each VAT return had been completed, and they were not lost in a "business premises movement".

77. In his grounds of appeal Mr Leach made two materially different statements about the information provided to Mr Wishman: he said (emphases added) that he "did provide all the evidence <u>needed</u>" and also that he "gave <u>all evidence I had</u> when requested". Based on our existing findings of fact, we further find that:

(1) Mr Leach belatedly gave HMRC the evidence he had retained, namely the bank statements;

(2) that was not "all the evidence needed" to check the VAT reclaims; and

(3) he did not provide the bank statements "when requested" but on 4 August 2015, almost six months after the meeting with HMRC, and almost three months after he promised to send them to Mr Wishman.

Was there VAT which "ought not to have been paid" to Mr Leach

78. The assessment was raised because Mr Wishman decided Mr Leach had been paid "an amount which ought not to have been so paid…or which would not have been so paid or credited had the facts been known", see VATA s 73(2) at §33. His decision was based on the sudden and steep change to Mr Leach's VAT returns after the HMRC visit. Mr Leach's grounds of appeal challenged this: he said he had now stopped trading (emphasis added)

> "due to the decline in business. <u>Hence the reason the VAT returns amounts declined</u> this was explained at the interview at my office".

79. We do not accept this submission, for the following reasons:

(1) the sudden and steep drop in reclaims <u>followed</u> the meeting at Mr Leach's office, so he clearly had not "explained this at the interview";

(2) Mr Leach provided no evidence to support his statement that there was a decline in his business during the year after Mr Wishman's visit;

(3) Mr Leach made no reference to this alleged drop in business at any point during his correspondence with Mr Wishman; and

(4) it is not credible that Mr Wishman's visit was immediately followed by a drop in business which was so significant that the input VAT claimed in 2014 was over eight times more than that in 2015.

80. We therefore find that, as a direct result of Mr Wishman's visit, Mr Leach reduced his input VAT claims to those he could support with evidence, and that in previous periods he overclaimed VAT. The overclaimed amounts were repaid to him, but "ought not to have been paid".

Amount of assessment to best judgement?

81. Mr Leach said he was told by HMRC's helpline that the assessments were based on local businesses in his area. We do not need to decide whether or not Mr Leach had a conversation with the helpline, or if so what was said, because it is absolutely plain from the evidence that Mr Wishman did not base his assessment on local businesses, but on the average amount reclaimed in Mr Leach's later VAT returns. This is clear from the careful calculations and explanations attached to Mr Wishman's pre-assessment letter.

82. Mr Leach also said that Mr Wishman had "given no reasons for the assessment" and that it was "not based on evidence". Those statements are also incorrect, as is clear from Mr Wishman's pre-assessment letter.

83. We find that the assessment was made according to Mr Wishman's best judgement. It was not reached "dishonestly or vindictively or capriciously"; neither was it a "spurious estimate or guess in which all elements of judgment are missing", and it was not "wholly unreasonable", see *Rahman* cited earlier. On the contrary, Mr Wishman used the only reliable material available to him, averaged over a year, and applied that figure to past periods.

Proportionality

84. Mr Leach also challenged the amount of the assessment, saying it was too high. It was based on a reasonable estimate of the proper amount of VAT reclaimable, and we find that it was entirely proportionate.

Within one year of evidence of facts

85. Mr Leach did not seek to argue that the requirements of VATA s 73(6)(b) had not been met, and we agree. For the reasons given by Mr Hearsum, we find that the assessment was made within the one year period required by that subsection.

Time limits

86. The normal time limit is four years, with an extension to 20 years if the behaviour is deliberate. HMRC relied on that time limit to make the assessments for periods 02/11 and 05/11. Mr Leach submitted that his behaviour had not been "deliberate".

87. We consider the meaning of the word "deliberate" in the next following part of our decision, as it is relevant not only to the extended time limit for the assessment, but also to the quantum of the penalty.

The meaning of "deliberate"

88. The meaning of "deliberate" is not defined in either VATA s 77 or in the penalty provisions contained in Sch 24. In *Tooth* the Court of Appeal considered the similar wording within the Taxes Management Act 1970 ("TMA"). Their findings are not binding on us because (a) they relate to a different statutory provision, and (b) they are *obiter*, even in the context of the TMA We nevertheless we thought it right to consider the Court's analysis, given the similarity of the wording used in the TMA with that in VATA s 77 and in Sch 24, as we explain further below.

The dicta *of the Court of Appeal in* Tooth

89. Mr Tooth had utilised the partnership box on his self-assessment ("SA") tax return to include an employment-related loss, and explained the reasons in the "white space" of his return. By the time the case reached the Court of Appeal, it was common ground that Mr Tooth had not intended to bring about a loss of tax.

90. HMRC raised a "discovery" assessment under TMA s 29, on the basis that the loss of tax had been "brought about…deliberately". HMRC also relied on the extended time limit of 20 years in TMA s 36(1A)(a); that too applies where the loss of tax was "brought about…deliberately".

91. Mr Tooth's case was that (a) there was no discovery, because it was "stale" and (b) if he was wrong in this, then the loss of tax was not "brought about…deliberately". The Court found for Mr Tooth on the first issue, but went on to consider the meaning of "deliberate". As already noted above, their findings on that second point are therefore *obiter*.

92. Floyd LJ, giving the leading judgment, said at [86] that it is clear from the wording of ss 29 and 36 that they both "require HMRC to prove that the taxpayer intended to bring about a particular fiscal result". However, he also considered TMA s 118(2), which says:

> "In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

93. He held that this deeming provision "means that HMRC can establish the relevant intention by showing that there was a deliberate inaccuracy in a document…and that the loss of tax followed 'as a result of' that inaccuracy", and went on to find that:

(1) there was no "inaccuracy" in Mr Tooth's tax return, because the return had to be considered as a whole, see [80]; but

(2) if he were wrong on the first point, he would have found that "the incorrect insertion of the employment losses in the boxes reserved for partnership losses was…a deliberate inaccuracy", see [94]; and

(3) the "loss of tax" would have occurred as a result of that inaccuracy because "the resultant calculations performed by the software will force the losses into the calculation of the tax due".

94. Males LJ disagreed with Floyd LJ on the first point, holding that there was an inaccuracy in the return because the document should not be considered as a whole. He agreed with Floyd LJ on the second and third points, finding that there was a "deliberate" inaccuracy in a document where, as in Mr Tooth's case, the wrong box had knowingly been utilised on the tax return, see [110]-[111], and that a "loss of tax" was brought about by the inaccuracy, because

as Mr Tooth's SA return "was not addressed solely to human readers…the entry did as a matter of fact cause his self-assessment to be insufficient", see [113]-[115].

95. Patten LJ stated that he agreed with Males LJ. However, he went on to say that "the taxpayer's argument that the document when read as a whole did not mislead is adequately accommodated as part of the wider issue as to whether the inaccuracy in the document brought about an insufficiency of assessment". It was, however, unclear to us how that statement was consistent with the position of Males LJ that deliberately using the wrong box caused the insufficiency because the return was read by a computer which would calculate the tax by reading the entries in the boxes. However, our uncertainty as to his meaning does not change our summary of the position taken by the Court, which is that:

(1) a majority (Males and Patten LJJ) found that a purely mechanical error, made intentionally, in part of a document was a "deliberate" inaccuracy, even if the document was not misleading when read as a whole; and

(2) at least a majority (Floyd and Males LJJ, but possibly also Patten LJ) found that an error in a return therefore "causes" the return to be insufficient if it is to be processed by computer, even if the error has been explained elsewhere on the return.

Whether the dicta *in* Tooth *apply to the meaning of "deliberate" in VATA s 77*

96. We thus considered whether the conclusions in *Tooth* also apply to the extended time limits in VATA s 77(4B), so that HMRC does not have to prove that the taxpayer intended to mislead in order for there to be a 20 year time limit. As set out earlier in this decision, but repeated here for ease of reference, that subsection reads:

> "In subsection (4A) the references to a loss of tax brought about deliberately by P or another person include a loss that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by that person."

97. In considering that issue, we took into account the following:

(1) TMA s 118(2), the provision relied on in *Tooth,* uses almost identical wording to that in VATA s 77(4B), namely:

> "In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

(2) the near identical wording as between the two provisions leads to the conclusion that the same analysis would apply, even though:

(a) there is no principle of statutory construction under which the meaning of a word in one Act is imported into another, unless there is a specific cross-reference, so findings about the TMA are not binding in relation to VATA; and

(b) TMA s 118(2), opens by saying that the "deeming provision" it contains applies "in this Act", so expressly limiting the deeming to TMA provisions;

(3) one of the factors considered by the Court in *Tooth* was that SA returns are read by computers. Since April 2012, VAT returns have to be filed electronically, see Reg 25A, and paper returns are scanned on receipt, so the position is the same for VAT returns as for SA returns; and

(4) when construing the meaning of deliberate in TMA ss 29 and 36, Floyd J took into account that (a) a discovery assessment can be made where there is insufficient information on the SA return, and (b) the 20 year time does not only apply to deliberate behaviour, but where a person has failed to notify liability. He said at [88] that that those contiguous statutory provisions do not "depend on proving any blameworthy conduct by the taxpayer". Similarly, the extended time limits in VATA s 77(4B) do not only apply where the behaviour is "deliberate", but also where the loss of VAT is attributable to a person's failure to comply with a notification obligation, see s 77(4A)(c) set out at §35.

98. We therefore find that the Court of Appeal's analysis in *Tooth* applies to VATA s 77(4B), so that the time limit is extended where a person knows that the return he is submitting contains an error, even when there is no intention to mislead.

The meaning of "deliberate" in Sch 24

99. Section 1 of Sch 24 begins:

> "(1) A penalty is payable by a person (P) where--
>
> (a) P gives HMRC a document of a kind listed in the Table below [which includes a VAT return], and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to–
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless within the meaning of paragraph 3, or deliberate on P's part."

100. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC), the Tribunal (Judge Greenbank and Mr Bell) considered the Sch 24 penalty provisions, and said at [63] that "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". The same approach has been taken in many other Tribunal judgments.

101. However, we thought it right to consider whether the position had changed following *Tooth*, so that a person can be charged with a penalty for deliberate behaviour as the result of a purely mechanical error, and HMRC does not have to prove that the taxpayer intended to mislead. We took into account the first three points set out at §97 above. We also considered the following:

(1) Unlike TMA ss 29 and 36, and VATA s 77(4A), there are no "contiguous statutory provisions which also extended the time limit [which] do not depend on proving any blameworthy conduct by the taxpayer".

(2) Tax penalties, unlike provisions extending time, are criminal for the purposes of Article 6 of the European Convention on Human Rights ("ECHR"), see *Euro Wines (C&C) Ltd v HMRC* [2012] UKUT 0359 (TCC) (Birss J and Judge Berner) at [29] and *General Transport v HMRC* [2019] UKUT 4 (Judges Richards and Brannan) at [81]-[88].

(3) But that is not decisive in itself, because a penalty provision can be a "criminal charge" for ECHR purposes, and yet apply to a purely regulatory breach, namely one which is "not dependent on any proof of fault", see *General Transport* at [95(2)], where

the UT found that was the position for non-deliberate penalties charged by FA 2008, Sch 41.

(4) However, those non-deliberate penalties are subject to a "reasonable excuse" defence, see Sch 41 para 20[1]. In contrast, Sch 24 contains no reasonable excuse defence. In our view, had Parliament intended that penalties should be charged under Sch 24 for purely mechanical errors where there was no intention to mislead, a similar "reasonable excuse" defence would have been necessary to avoid injustice.

(5) The Notes on Clauses are also relevant. In *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, Lord Steyn said at [5]:

> "Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have."

(6) The Notes for Sch 24 refer repeatedly to the level of penalty being based on "behaviours", with the most serious penalties being reserved for "deliberate and concealed behaviours". The Notes say that the concepts set out in the Schedule provide "a uniform language for behaviours", and that "where a person has taken reasonable care in completing their return…no penalty will arise". In our judgment, this behaviour-based approach shows that the meaning of "deliberate" cannot extend to purely mechanical errors, where there is no intention to mislead.

102. We therefore find that that the FTT was correct in *Auxilium* to decide that "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". Thus, "deliberate" does not have the wide meaning in Sch 24 which the Court of Appeal has found to be the position for the purposes of the TMA, and which we consider is also the case for VATA s 77(4A).

Decision on the assessment

103. Having decided what is meant by "deliberate" for the purposes of VATA s 77(4A), we return to considering Mr Leach's position in relation to the assessment. We uphold the assessment:

(1) in relation to the periods other than 05/11 and 08/11, for the reasons set out at §75 to §85 above;

(2) in relation to periods 05/11 and 08/11, for the additional reason that the extended time limits applied, because:

(a) although *Tooth* is not binding on us, nevertheless the reasoning is based on statutory provisions which are very similar to those in issue here. By analogy, we find that it is only necessary for HMRC to show that Mr Leach knew he was not using the correct numbers; it is not necessary to show that he intended HMRC to rely on those incorrect numbers. Mr Leach destroyed the underlying records after completing each return, and we make the reasonable inference that he therefore

[1] There is, of course, also a "reasonable excuse" defence in TMA s 118(2), but whether that can be used to prevent the operation of ss 29 and 36 where, as in *Tooth,* the taxpayer explained what he was doing and did not intend to mislead, was not considered by the Court of Appeal, and we decided that it was inappropriate for us to explore that issue which is not directly relevant to the points we need to decide.

knew that the numbers he was inserting on those returns were not supported by those records; and

(b) even were we to be wrong in drawing the analogy between the Court of Appeal's analysis in *Tooth* and VATA s 77, we have found as facts that Mr Leach not only destroyed all relevant supporting records, but had also made significant overclaims of VAT, so that immediately following Mr Wishman's visit, Mr Leach's input tax suddenly dropped to only 12% of that for the previous year. We therefore find that Mr Leach knowingly included numbers on his VAT returns, with the intention that HMRC would refund VAT which he knew was not due.

Discussion on the penalty

Was Mr Leach's behaviour "deliberate"

104. We have found that the *Tooth* analysis of "deliberate" does not apply to that word as used in Sch 24. However, we repeat our findings in the previous subparagraph: Mr Leach knowingly included numbers on his VAT returns, with the intention that HMRC would refund VAT which he knew was not due. He thus acted deliberately, as that term was defined in *Auxilium.*

Was his behaviour "concealed"

105. The meaning of "concealed" is also not defined in Sch 24. The Oxford English Dictionary ("OED") states that "conceal" as an intransitive verb means:

> "To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from...others; to refrain from disclosing or divulging."

106. We noted that Mr Leach immediately told Mr Wishman that he had destroyed all the records: this was not something HMRC discovered subsequently, so he did not "refrain from disclosing or divulging" what he had done.

107. However, "conceal" has a slightly different meaning when it is used transitively (ie so that the verb has an object); it is then defined as:

> "To hide (a person or thing); to put or keep out of sight or notice. Also: to prevent from being visible."

108. The statutory context here is Sch 24, para 3, which says:

> "an inaccuracy in a document is…'deliberate and concealed' if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it."

109. An inaccuracy is therefore "concealed" if the person makes arrangements to conceal "it", ie the inaccuracy, so this is a transitive usage. The question is therefore whether Mr Leach prevented the inaccuracy from being visible?

110. In our judgment the answer is yes: by destroying the related records, he hid the inaccuracy and prevented it from being visible to HMRC. Mr Wishman was prevented from seeing the underlying records, and because of that concealment, he could not work out the *actual* inaccuracy. Instead, he reasonably used his best judgement and relied on other information – the later returns – to make the assessments.

111. We have therefore come to the same conclusion as that t in HMRC's Compliance Manual at CH81160, relied on by the Review Officer, namely that "concealment" includes deliberately destroying books and records so that they are not available.

Reductions

112. As set out at §43 above, a penalty must be reduced for "disclosure", which is subdivided into telling HMRC about the inaccuracy, giving HMRC reasonable help in quantifying the inaccuracy, and allowing HMRC access to records for the purpose of ensuring that the under-assessment is fully corrected.

113. Mr Hearsum asked us to find that Mr Wishman's 5% abatement was correct. Mr Leach submitted that he had not been given due credit because he had "made appointments and [been] very accommodating in providing all necessary paperwork".

114. As is clear from our findings of fact, Mr Leach repeatedly failed to send documents to his adviser, Mr Aggarwal. It took the issuance of a Sch 36 Notice for Mr Leach to promise to send the bank statements; these were not only incomplete, but had not been analysed or linked to the VAT returns. Mr Leach subsequently agreed numerous appointments with Mr Wishman, none of which he attended, and most of which he sought to change at the last minute. We agree with Mr Wishman that 5% is the correct reduction.

Special circumstances and proportionality

115. Mr Leach's grounds of appeal state that the penalty amount is too high. In legal terms, this is a submission that it is "disproportionate". In *Edwards* the UT held that the proportionally of a penalty for late filing of a return could fall within the "special circumstances" provision in FA 2009, Sch 55, and we find that the same must also be true of Sch 24 penalties in issue here.

116. However, the Tribunal can only consider special circumstances if HMRC's decision on that issue was "flawed" in a judicial review sense. In *Edwards* the UT first considered whether the penalty was disproportionate, and having decided it was not, went on to hold at [87] that HMRC's decision as regards special circumstances was not flawed.

117. Mr Edward's representative had submitted that the size of the penalty was disproportionate, and therefore a breach of the right to peaceful enjoyment of possessions contained in Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). In considering that issue, the UT considered the case law, and then said at [82] that in determining whether a penalty infringes a taxpayer's A1P1 rights:

> "…it is necessary to determine the aim of the penalty regime, and whether the aim is a legitimate aim in the public interest. It is then necessary to determine whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, ascertained by establishing whether there is a fair balance struck between the public interest and the requirements of the protection of individual's fundamental rights."

118. We adopt the same approach in considering the penalty charged on Mr Leach under Sch 24, and find that:

(1) the aim of the Sch 24 penalty regime is to discourage taxpayers from submitting incorrect documents to HMRC, and that is a legitimate aim in the public interest.

(2) Sch 24 carefully distinguishes[2] between:

[2] Further distinctions were introduced in years after the period in issue here, such as whether the inaccuracy involves a domestic or an offshore matter, but they are not relevant to this decision.

(a) disclosures which are "prompted" by HMRC, and those where the taxpayer comes forward without prompting;

(b) whether the behaviour is careless or deliberate; and

(c) whether the behaviour is deliberate but not concealed, or deliberate and concealed; and

(3) there is additionally power to suspend penalties for carelessness, and to take into account "special circumstances".

119. We therefore find that there is a reasonable relationship of proportionality between the legitimate aim and the design of the penalty regime: it establishes a fair balance between (a) the public interest in ensuring that only the correct amounts of VAT are refunded to traders, and (b) the financial burden borne by a person who fails to comply with the statutory requirement. In short, we can find nothing disproportionate about the design and structure of the regime.

120. In *HMRC v Total Technology* [2012] UKUT 418 (TCC) at [73], the UT said that it was "possible to envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate". We considered whether the same caveat might apply to Sch 24, but considered that it did not, because the specific "special circumstance" provision itself allows for such occasional situations to be considered; in contrast, there was no equivalent provision in the default surcharge regime considered in *Total.* Even if we were to be wrong in that analysis, we would have found that this was not one of those occasional situations referred to in *Total*, but instead a case where the penalty imposed as a result of the architecture of the scheme was entirely proportionate.

121. We therefore find that HMRC's failure to consider whether the penalty was disproportionate did not cause their decision on special circumstances to be flawed in a judicial review sense. Mr Leach has not put forward any other factors which might have constituted special circumstances and we also have not identified any other possible basis for us to interfere with HMRC's conclusion on that issue.

Decision

122. For the reasons set out above, Mr Leach's appeal is dismissed and the penalty is upheld.

Right to apply for permission to appeal

123. This document contains full findings of fact and reasons for the decision. If Mr Leach is dissatisfied with this decision, he 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 him. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 03 JUNE 2019