[2020] UKFTT 0052 (TC)

TC07548

Appeal number: TC/2019/01616

VAT - penalty for careless inaccuracies - not careless – special circumstances - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UDLAW LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR ANDREW PERRIN

Sitting in public at Weston Super Mare on 6 January 2020

Mrs Bonnie Gleeson, Director of the Appellant for the Appellant

Mrs Rosemary James, Officer of HM Revenue and Customs, for the Respondents

DECISION

BACKGROUND

1. This is a penalty case which relates to the submission by the appellant of inaccurate VAT returns (the "**returns**") for the periods 1 January 2014 to 30 June 2017 inclusive. The returns understated the appellant's output tax liability by £24,933.

2. HMRC have assessed the appellant to a penalty (the "**penalty**") under Schedule 24 Finance Act 2007 ("**Schedule 24**") which amounted, in the first instance, to £3,985.54. This was subsequently reduced on review to £3,846.19. The penalty was assessed on the basis that the inaccuracies in the returns were a result of the appellant failing to take reasonable care.

3. There is no dispute that the aforesaid output tax is payable by the appellant which has paid it and did so with considerable and commendable alacrity once its liability to that output tax had been assessed.

4. The only issue under appeal is the penalty. The appellant accepts that the returns were inaccurate, but has provided a coherent explanation as to why that was the case.

5. In light of this, and for the reasons given later in this decision, we have decided that the appellant did take reasonable care in completing the returns. And we also consider that HMRC's decision that there are no special circumstances in this case to be a flawed decision. And so we allow the appeal.

EVIDENCE AND FACTS

6. The evidence comprised documentary evidence in the form of a bundle prepared by HMRC, and oral evidence, given by Mrs Bonnie Gleeson ("**Mrs Gleeson**") at the hearing. She gave her evidence clearly and concisely and we found her to be a reliable and truthful witness. Her evidence was not seriously challenged by Mrs James. From this evidence we make the following findings of fact:

(1) The appellant made supplies of holiday lettings of mobile homes at a holiday park in Cornwall. It was VAT registered and was the representative member of a VAT group.

(2) The individuals of the appellant who were responsible for these holiday lettings were Mrs Gleeson's father, Mr Charles Gigg ("**Mr Gigg**"); and one of Mrs Gleeson's brothers and his wife. The latter lived on site in Cornwall and were responsible for the day-to-day running of the business which included arranging bookings of the mobile homes.

(3) Mrs Gleeson and her mother and her other brother knew little about the day-to-day running of the mobile homes which was described by Mrs Gleeson as very much her father's baby. Mrs Gleeson was, however, a reasonably experienced bookkeeper and it was she who actually submitted the VAT returns for the

appellant once they had been prepared by her father's bookkeeper and signed off by her father.

(4) The appellant's office at which the financial operations took place was located at her father's house in Bristol. Her brother and sister in law would send details of the lettings together with supplier invoices to her father in Bristol who would then deal with the necessary payments and tax filings.

(5) Mr Gigg was assisted in these financial operations. Firstly, by a friend of his who undertook the role of bookkeeper. This gentleman came to Mr Gigg's house once a week and would go through all the paperwork which related to the VAT returns and which had been sent from Cornwall. He also went through the supplier invoices and undertook bank reconciliations. He then prepared the VAT returns, gave them to Mr Gigg for approval and they were then given to Mrs Gleeson for electronic submission to HMRC.

(6) The appellant also retained accountants to assist in its financial operations and to compile its annual accounts. The original accountants were MWM accountants, and the two partners there had a long established relationship with the appellant and with Mr Gigg. One element of their responsibility was to reconcile the money received from the supplies of holiday lets as shown by the sales invoices and reflected in the VAT returns with the annual accounts and the money credited to the appellant's bank account.

(7) During the period in question, MWM accountants amalgamated with another firm of accountants, the Sully partnership which then amalgamated with Haines Watts. In evidence before us, Mrs Gleeson said that the two partners which had originally acted for the appellant did not transfer to either of these successors to their business. And it was her surmise, at the hearing, and indeed in her grounds of appeal, that during these transition periods, the accountants stopped checking the sales invoices against the company's bank statements. Her evidence was that her father had been in very poor health in the last couple of years of his life with his prostate cancer and had relied heavily on his accountants and bookkeeper to handle those duties. But this seems at slight odds with the information that she gave to HMRC in an email dated 11 December 2017 in which, having explained the aforesaid amalgamations, she went on to explain that ".…….the same accountant, Gareth Roberts, has done our accounts throughout all of these transition periods and should have known the procedure."

(8) It was Mrs Gleeson's evidence, which was largely unchallenged, that Sully and subsequently Haines Watts have not undertaken the reconciliation exercise between the annual accounts and the VAT returns, and it was that which has resulted in the underdeclaration of VAT.

(9) This underdeclaration arose as a result of a 20% retention by the appellant which was paid in part as commission to an agency who assisted in the letting of the holiday homes, and in part to Dennyview Investments Ltd, a company in the

same VAT group as the appellant, for expenses incurred in relation to the lettings. These expenses were VAT exempt.

(10) Mrs Gleeson became a director of the appellant on 18 August 2016. Her father died on 12 April 2017 having been very ill with prostate cancer for a number of years before that. Her mother died in 2015. Her brother who was involved in the holiday lettings in Cornwall died approximately 10 years ago and since then his wife had dealt with all the lettings. Mrs Gleeson has a second brother who in May 2016 had a stroke from which, thankfully, he has and is making a good recovery.

(11) Following the death of Mr Gigg, the holiday park was sold (in May 2017) and a VAT return was submitted for the period ended June 2017 which claimed a repayment of £13,542.50.

(12) This return was selected for verification. As part of that verification a visit took place in October 2017 between Officer Drew and Mrs Gleeson. At that visit Officer Drew identified a number of issues including concerns about the discrepancy between the annual accounts and the VAT returns. Following correspondence between the appellant and HMRC, Haines Watts sent an email to HMRC on 6 December 2017 which included a summary of differences in reported turnover for the years ended 30 September 2014 to 30 September 2016.

(13) A further meeting took place on 25 January 2018 between Officer Drew, Mrs Gleeson and Haines Watts. Confirmation of what was discussed at that meeting is contained in an email dated 25 January 2018 sent by Officer Drew to Mrs Gleeson. In that email Officer Drew indicates that he is considering penalties for under declaration of VAT and is "minded to set the penalty at Failure to Take Reasonable Care……. It would appear that at no point did Mr Gigg ask his accountant to check the accuracy of the tax returns and having carried out the annual audit records your accountant also failed to recognise that the sales in the annual accounts greatly exceeded those in the VAT returns".

(14) He also said that "in the matter of a Special Reduction of Penalty I would expect that your scope for this is limited. You mentioned that at a previous inspection of records, in 2007, the matter of underdeclared output tax was not addressed by the officer. HMRC (and for as long as I can remember, HM Customs & Excise) has consistently maintained that a VAT inspection is not a full audit and the tax adjustment raised following that inspection appears to focus entirely on Input Tax – VAT on costs".

(15) The reference to an inspection in 2007 is reflected in the evidence given by Mrs Gleeson at the hearing; namely that the appellant had a VAT inspection in 2007, which, having taken place so long ago, means there are no records of that visit. However, it was her evidence, and this is consistent with the extract from the email mentioned above, that the arrangement of deducting the 20% from the VATable turnover was in place at that time, yet HMRC did not, at that visit, or thereafter, indicate that that arrangement was incorrect. Mrs Gleeson also said

that the bookkeeper employed by her father was an ex HMRC officer who had told her father that there was nothing wrong in retaining 20% of the income to pay expenses of the holiday park.

(16) On 19 February 2018 HMRC issued a notice of assessment for the periods 03/14 to 09/16 which increased the VAT due to HMRC for these periods by an extra £24,933.00.

(17) On 26 March 2018 HMRC issued a penalty explanation letter explaining that they intended to charge a penalty of 15% of the potential lost revenue for the aforesaid VAT periods.

(18) The penalty explanation letter explained that in HMRC's view, the penalty was a result of careless behaviour by the appellant. It should not have deducted 20% charges from the amount declared for VAT. The company had been registered for a number of years and the director was familiar with VAT. The records had been audited by both former and current accountants and the differences between the VAT account and the annual accounts sales were not noticed. The penalty explanation letter was followed up, on 16 May 2018, by a penalty assessment.

(19) Following a request for a review of the penalty, on 18 February 2019 HMRC issued a review conclusion letter to the appellant. On review, HMRC realised that VAT assessments for the periods 12/16 and 03/17 had not been issued. As a result, the errors in these returns have not been corrected and there was therefore no potential lost revenue for these two periods. Because of this the penalty assessments relating to these two periods were cancelled hence the reason that the penalty was varied to £3,846.19.

(20) Following this review, on 16 March 2019 the appellant appealed against the penalty to the tribunal.

THE LEGISLATION

Schedule 24 Finance Act 2007

7. The provisions of Schedule 24 that are relevant in this case are as follows:

(1) The respondents may assess a taxpayer for a penalty if a tax return contains a careless inaccuracy (paragraphs 1 and 13).

(2) An inaccuracy is careless if it is due to failure by the taxpayer to take reasonable care (paragraph 3(1)).

(3) The penalty for a careless error is capped at 30% of the potential lost revenue (paragraph 4).

(4) This can be mitigated to zero if a taxpayer makes unprompted disclosure or to 15% for prompted disclosure (paragraphs 9 and 10).

(5) The respondents may reduce the penalty for special circumstances (paragraph 11) and may also suspend the penalty (paragraph 14).

(6) A taxpayer may appeal against a penalty assessment (paragraph 15).

(7) A taxpayer is liable to a penalty even if the return is submitted by an agent (paragraph 18(1)).

(8) But it is not so liable if he can show that the inaccuracy arises because of an act or omission of his agent and it took reasonable care to avoid that inaccuracy (paragraph 18(3)).

(9) On any appeal under paragraph 15 the tribunal may affirm the respondents' decision or substitute for the respondents' decision another decision that the respondents had the power to make (paragraph 17(2));

(10) If, pursuant to paragraph 17(2), the tribunal substitutes its decision for the decision previously made by the respondents, the tribunal may rely on paragraph 11 to the same extent as the respondents or to a different extent, but only if the tribunal thinks that the respondents' decision in respect of the application of paragraph 11 was "flawed" (paragraph 17(3)); and

(11) The word "flawed" in the context of, inter alia, paragraph 17(3) means "flawed when considered in the light of the principles applicable in proceedings for judicial review" (paragraph 17(6)). What this means is that the respondents' decision cannot be said to be "flawed" merely because the tribunal, were it to consider the question de novo, would disagree with the respondents' decision. Instead, the respondents' decision can be said to be "flawed" only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the tribunal needs to consider whether, in reaching their conclusion, the respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account or if the respondents have reached a decision that no reasonable person could have reached upon consideration of the relevant matters.

CASE LAW

Reasonable care

8. In the First-tier Tribunal case of *Mr J R Hanson v HMRC* [2012] UKFTT 314, Judge Cannan set out what he considered the test for carelessness (or failing to take reasonable care.). We set it out below.

> "19. In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under section 29 Taxes Management Act 1970. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer. 20 The test was described by Judge Berner in Anderson (deceased) v Revenue and Customs Commissioners [2009] UKFTT 206 at [22], cited with

approval by the Upper Tribunal in Colin Moore v Revenue and Customs Commissioners [2011] UKUT 239 (TCC):

> "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, 25 would have done."

20. I am satisfied that the effect of paragraph 18 is to remove the liability of a taxpayer to a penalty where:

> (1) a return is completed and lodged by an agent, and (2) an inaccuracy in the return is the result of something done or omitted by the agent, but (3) the taxpayer took reasonable care to avoid that inaccuracy.

21. What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent. In my view, if a taxpayer reasonably relies on a reputable accountant for advice in relation to the content of his tax return then he will not be liable to a penalty under Schedule 24.

22. I am fortified in these conclusions in relation to paragraph 18 by the content of the HMRC Compliance Handbook at CH84540 which states in relation to paragraph 18 as follows:

> "A person cannot simply appoint an agent and deny responsibility for their tax affairs. The person still has a duty to take reasonable care, within their ability and competence, to make sure that what they are signing for is correct. The person has to show that they took reasonable care, within their ability and competence, to avoid default by their agent. This will include
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> > • making sure that they give the agent all relevant information with which to work ... 1
> >
> > • implementing the professional advice received, and not neglecting some vital step
> >
> > • checking the agent's work to the extent that the person is able to do so. For example, an ordinary person cannot be expected to challenge specialist professional advice on a complex legal point. But they ought to be able to recognise the complete absence of a major transaction.
>
> A person saying and meaning 'I leave it all to my agent' is hardly taking care, let alone reasonable care, over their obligations or the work of their agent.

> The person has an obligation to choose an adviser who is trained and competent for the task in hand ...
>
> The benchmark is a person who goes to an apparently competent professional adviser
>
> • gives the adviser a full and accurate set of facts
>
> • checks the adviser's work or advice to the best of their ability and competence and
>
> • adopts it.
>
> The person will then have taken reasonable care to avoid inaccuracy on the part of themselves and their agent."

> 23. At one extreme is an error of omission, for example failing to declare a source of income. In those circumstances it seems to me that a taxpayer will almost always be expected to identify the error. At the other extreme an error might involve wrongly construing a complex piece of legislation. In those circumstances the possibility of a penalty may still arise because of the carelessness of the agent, but the taxpayer's liability to a penalty might well be excluded on the basis that he took reasonable care but did not identify the error.
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> 24. I agree with the general thrust of the guidance given in the HMRC Compliance Handbook. In particular that a taxpayer cannot simply leave everything to his agent. A taxpayer must certainly satisfy himself that the agent has not made any obvious error. That might involve the taxpayer seeking to understand the basis upon which an entry on his return has been made by the agent. However in matters that would not be straightforward to a reasonable taxpayer and where advice from an agent has been sought which is ostensibly within the agent's area of competence, the taxpayer is entitled to rely upon that advice. At the heart of this issue is the extent to which a taxpayer is required to satisfy himself that the advice he has received from a professional adviser is correct. The answer to that will depend on the particular circumstances of the case."

9. Although Judge Cannan's view is not binding on us, we agree with it and adopt it as the test which is to be applied in this case.

Special circumstances

10. The issue of special circumstances has been most recently, and definitively, considered by the Upper Tribunal in the case of *Barry Edwards v HMRC* [2019] UKUT 131. Although that case concerned late filing penalties, rather than penalties for submitting an inaccurate return, the legislation is to all intents and purposes, identical. And so the principles set out in that case are as relevant to a penalty under Schedule 24 as they are to a late filing penalty. The relevant extract is set out below:

67. "We therefore turn to the question as to whether the amount of the penalty imposed in this case for failure to file self-assessment returns on time in circumstances where no tax is payable is a relevant circumstance that HMRC should have taken into account when considering whether there were special circumstances 15 in this particular case which justified a reduction in the penalty.

68. There are many appeals in the FTT where the question as to whether there are special circumstances justifying a reduction in the amount of a penalty has been considered. Accordingly, from time to time the FTT has made general observations about what might constitute special circumstances. In many of those decisions, reference is made to *Crabtree v Hinchcliffe (Inspector of Taxes)* [1972] AC 707 where Viscount Dilhorne (in a rather different context to that with which we are concerned) suggested at page 739E that:

> "For circumstances to be special [they] must be exceptional, abnormal or unusual..."

69. In *Warren v HMRC* [2012] UKFTT 57, the FTT put a gloss on the meaning of "special". It said at [54] that:

> "The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

70. In *Welland v HMRC* [2017] UKFTT 0870 the FTT likewise did not confine the meaning to circumstances which did not affect many taxpayers. After referring to the passage in *Warren* cited above, the FTT said at [125]:

> "What was said in *Warren* seems right, if very general. … In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions."

71. By contrast, in *Collis v HMRC* [2011] UKFTT 588 the FTT said at [40] that:

> "to be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves."

72. In our view, as the FTT said in *Advanced Scaffolding (*Bristol*) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of "special circumstances" as follows:

> "the respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".

73. The FTT then said this at [101] and [102]:

> "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
>
> 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."

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration."

11. In the First tier Tribunal decision in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 095, Judge Redston undertook a comprehensive analysis of the issues concerning special circumstances, and of particular relevance to this case, considered firstly the time at which special circumstances may be considered by HMRC, and secondly, having concluded that that they may be considered up to and including the end of the hearing, the role of the presenting officer in considering special circumstances. *Bluu Solutions*, like *Edwards* was a case that related to late filing penalties. But, as in *Edwards*, the same principles are, in our view, directly applicable to penalties for submitting an inaccurate return. The relevant extracts from that decision are set out below:

> "121. We prefer an alternative reading of para 15(3), which we find wholly consistent with the broad discretion given by para 9. We read "HMRC's decision" in the 40 sentence "HMRC's decision in respect of the application of paragraph 9 was flawed" as meaning HMRC's decision about the application of para 9 and not HMRC's decision as to the amount of the penalty. In other words,

we think that the statute envisages two decisions, one "as to the amount of penalty payable by P" and a second decision "in respect of the application of para 9."

122. Reading para 15(3) in this way allows HMRC to exercise the para 9 discretion at any time before the tribunal makes its decision. This is in accordance with the 5 discretion granted by Parliament under para 9, allowing HMRC to "reduce a penalty" including staying a penalty, without limit as to time, and agreeing a compromise in relation to proceedings for a penalty. HMRC can therefore consider special circumstances at the time of the statutory review, when drafting the statement of case, or during the tribunal proceedings……

151. What is the position where, as here, it is HMRC's presenting officer who has made the special circumstances decision? We know from our own experience that presenting officers can and do make concessions during the hearing: for instance, to reduce the amount under appeal or even to withdraw assessments entirely. Presenting officers are not only advocates, but representatives who have authority to make compromises and settlements on HMRC's behalf. We see no reason why a presenting officer should be unable to exercise the discretion contained in para 9. Indeed, that she should be able to do so is entirely consistent with the reference in para 9(3)(b) to the special circumstances discretion including "agreeing a compromise in relation to proceedings for a penalty."

152. We therefore find that Mrs Levy was exercising the discretion given to HMRC under para 9, and that there was no failure by HMRC to consider the exercise of that discretion.

153. Where it is the presenting officer who makes the decision, she must give her reasons orally to the tribunal, as Mrs Levy has done. Our task is therefore to consider whether her decision was "flawed" according to the principles of judicial review……."

12. In *Bluu Solutions*, Judge Redston also considered whether a decision by HMRC as to whether there were special circumstances can be flawed if HMRC decide that there were no such circumstances but failed to give reasons as to why that was.

"147. In White v HMRC [2012] UKFTT 364 (TC) (Judge Brannan and Mr Williams) ("White") the review officer had considered special circumstances. However, the tribunal said that this "ex post facto consideration" of special circumstances did not prevent the original penalty assessment from being flawed, see [66] of that judgment. As already explained, we disagree. In our analysis, a decision on whether or not there are special circumstances is separate from the penalty decision and can be made at any stage up to the conclusion of the tribunal hearing.

148. However, the tribunal in White went on to say at [67] that if they were wrong in this, the decision was flawed because of an absence of reasons. The decision continues:

> "[68] It is true that the common law, 'at present', does not recognise a general duty to give reasons for administrative decisions (R v Home Secretary ex p. Doody [1994] 1 AC 531 per Lord Mustill at page 564). However, in many cases if a public body, such as HMRC, fails to give reasons for its decision it will be found to have acted unlawfully. As 40 explained in 'Administrative Law' (10th edition) Wade & Forsyth, there is no closed list of circumstances in which fairness will require reasons to be given.
>
> [69] In this case, [the relevant statutory provision] envisages this Tribunal having to decide whether HMRC's decision is flawed, in the judicial review sense of that term. A failure to give reasons for a decision makes this task almost impossible. It would not then be possible to determine whether the decision-maker applied the correct 5 legal test, whether he took account of all relevant factors or whether he took account of irrelevant factors. In short, a failure to give reasons makes it almost impossible for the Tribunal to determine the issue of Wednesbury unreasonableness. Parliament must have envisaged that an officer of HMRC deciding whether to exercise the discretion in 10 paragraph 11 would give reasons for the decision."

149. We respectfully agree that a decision of HMRC in relation to special circumstances requires reasons: otherwise the tribunal cannot know whether the decision was flawed, and so cannot fulfil its obligations under para 15(3)(b).

150. The reasons do not need to be lengthy. Lord Brown's summary of the correct 15 approach in South Bucks DC v Porter [2004] 1 WLR 1953 at [36] is accepted as authoritative and includes the following guidance:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inferences will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration…""

PROOF

13. The burden of establishing that the appellant is prima facie liable for the penalty which has been properly notified and assessed lies with HMRC.

14. The burden of establishing that it should not be liable for the penalty because, for example, it has taken reasonable care, or that the decision by HMRC that special circumstances do not apply in this case is flawed, lies with the appellant.

15. In each case the standard of proof is the balance of probabilities.

DISCUSSION AND CONCLUSION

16. HMRC have given a variety of reasons as to why they consider the appellant to have been careless in submitting the returns. Officer Drew was minded to impose a carelessness penalty on the basis that at no point did Mr Gigg ask his accountant to check the accuracy of the tax returns and having carried out the annual audit of records that accountant also failed to recognise that the sales in the Annual Accounts greatly exceeded those in the VAT returns. The reasons given in the penalty explanation letter are set out at [6(18)] above. Before us Mrs James accepted that the penalty did not arise a result of deliberate behaviour but it was careless because the error had occurred consistently for a number of years. The amount of VAT underpaid was more than £25,000, and this level of under declaration, when compared to the turnover from the appellant's annual accounts should have been easily identifiable.

17. Mrs Gleeson explained to us why, in her view, the returns were incorrect. Firstly her father's protracted illness and subsequent death in April 2017. This was a very difficult time for her father and, in her view, he took his eye off the ball. He was also preoccupied, prior to his death, with the sale of the holiday park which he found difficult to accept. Secondly her mother's death in 2015. Thirdly the failure by the accountants not to undertake the appropriate reconciliations due, in her view, to the change of accountants mentioned earlier in this decision. Finally, HMRC had known about the 20% retention in 2007 and had done nothing about it either at or following the 2007 visit. It is also clear from the paperwork that on 2 October 2017 she told HMRC about her father's death in April 2017. And in December 2017 she told HMRC about the 2007 visit. Mrs Gleeson also emphasised that any mistakes had not been made deliberately but feels that having paid the VAT following the assessments, she is being unfairly penalised.

Reasonable care?

18. We deal first with the assertion, by HMRC, that the appellant failed to take reasonable care. We have set out the relevant case law in some detail earlier in this decision. It is clear that in determining whether a taxpayer has taken reasonable care, one tests this by considering the behaviour of a reasonable taxpayer (an objective test) in the position of the particular taxpayer bringing the appeal. We need to consider all the circumstances in which a taxpayer finds itself. Furthermore, a taxpayer will still have taken reasonable care if an accuracy in a return is a result of a failure by an agent if the taxpayer has taken reasonable care to avoid that inaccuracy. Again, what is reasonable care depends on all the circumstances.

19. The circumstances in which the appellant found itself between 1 January 2014 and 30 June 2017 has been established by the evidence given in the documents and

orally by Mrs Gleeson. The VAT returns were prepared by the appellants bookkeeper, presented to Mr Gigg who signed off on them, and they were then given to Mrs Gleeson for electronic submission to HMRC. Responsibility, however, for reconciling, at the end of each year, the cash position, i.e. the VAT position, with the accounting position was delegated, by the appellant, to its accountants. It does not seem that the accountants at any stage questioned whether the 20% should have been deducted from turnover for VAT purposes. We have to say that we find this pretty extraordinary, especially in light of the simplicity of the exercise of reconciling the cash and accounting position. It seems surprising to us that the accountants never questioned the difference between the two figures. The fact that this is a simple exercise is a two edged sword for the appellant. It is open for HMRC to say that because of its simplicity, it is something that could readily have been carried out by the appellant and it was not something which it could simply devolve to its accountants and then forget about. And we have some sympathy with this view in normal circumstances.

20. But the appellant circumstances are not normal. Mr Gigg was suffering from prostate cancer for most if not all of the period under appeal. His eyesight was failing. His wife died in 2015. His surviving son had a stroke in 2016. The apple of his commercial eye, the holiday park, was loss-making and was to be sold.

21. It seems to us that in the circumstances it is wholly acceptable for Mr Gigg to have relied heavily upon his accountants to ensure that the appellant's financial position as reported to HMRC was correct.

22. In her email to Officer Drew of 11 December 2017, Mrs Gleeson (having reviewed and explained to HMRC the relationship between the activities carried out in Cornwall, and the financial operations in Bristol, and the activities of the accountants and taking up the bank income and reconciling it with the sales invoices) went on to explain that the accountants had always been aware of the 20% retention and "I suppose I am feeling a little let down by the service that we have been receiving"

23. We can understand why she said this. We, too, think that she has been let down by the accountants. At a time when the appellant needed an enhanced degree of care shown to it because of the issues surrounding Mr Giggs health, they appear to have received exactly the opposite. No reconciliation; no consideration of whether the 20% retention was been correctly reported; no appropriate advice.

24. Mrs Gleeson surmises that this is because of the merger first between MWM and Sully, and then between Sully and Haines Watts. And we suspect she is right. Whether she is correct in her oral evidence that neither of the partners of MWM survived the mergers, or whether, as she says in her email of 11 December 2017, the same accountant, Gareth Roberts, was responsible for the appellants accounts throughout all of the transition periods, does not affect the position. Indeed if the same accountant had done the accounts throughout the transition periods, we cannot see any reasons why the reconciliations that had been done before the period under appeal were not done during the period under appeal. The appellant had an entirely legitimate expectation that its accountants would do what was necessary to ensure that it correctly reported its financial position to HMRC. It was not possible, during the period in question, for Mr

Gigg to undertake any meaningful checks on whether the accountants were doing their job properly. He was ill and under considerable emotional strain.

25. It is our view, therefore, that the inaccuracies in the returns arose as a result of failures by the appellant's accountants, and it was reasonable for the appellant to rely on the accountants to ensure that the financial information reported to HMRC was correct. It is our decision that the appellant did take reasonable care and for this reason allow the appeal.

Special circumstances

26. Although we allow the appeal on the basis that the appellant took reasonable care, we have also considered whether there are special circumstances which would also affect the penalty. We remind ourselves that HMRC may reduce a penalty if they think it right because of special circumstances. And we can only impugn any decision by HMRC in relation to special circumstances, and substitute our own decision for that of HMRC, if we think that HMRC's decision in respect of special circumstances was flawed.

27. It is also worth saying that even if we think it was flawed but also consider that it was inevitable that HMRC would have come to the same conclusion had it not been flawed, we cannot impugn HMRC's decision.

28. HMRC have considered special circumstances on three occasions. The first of these was in the email dated 25 January 2018 from Officer Drew to Mrs Gleeson. In that email he indicated that he expected the appellant's scope for a special reduction was limited and did so on the basis that the 2007 VAT inspection was not a full audit. At that time he was aware of Mr Giggs death, but does not refer to it in his email. We think this is something that could comprise special circumstances within the meaning of that term set out at [10] above i.e.:

> "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."

29. In failing to take this into account, we consider that Officer Drew has come to an unreasonable decision in relation to special circumstances.

30. The second occasion where HMRC have considered special circumstances is in the penalty explanation schedule which was sent to the appellants by HMRC on 26 March 2018.

31. In that schedule HMRC say that based on information that they had "we do not consider there are any special circumstances which would lead us to further reduce the penalty".

32. They do not say what they have considered when coming to this conclusion, and give no reasons for coming to it. This renders the decision an unreasonable one.

33. Finally, and this is the reason for the extensive extract from the case of *Bluu Solutions* set out earlier in this decision, Mrs James considered special circumstances at the hearing itself. We put to Mrs James that it was open to her right up until the end of proceedings for her, on behalf of HMRC, to consider special circumstances. This was a very fast ball, and, we suspect, put Mrs James in a somewhat difficult position. She was in a different position from that of the presenting officer in *Bluu Solutions*, since in that case the presenting officer was also the assessing officer. Mrs James was not the assessing officer in this case. But she is agent for HMRC and able to consider, and conclude, on HMRC's behalf, whether special circumstances might apply. The importance of this, of course, is that we can only consider the reasonableness of HMRC's decision whether to apply special circumstances in light of the information that was available to the decision maker. And it is not clear to us that the facts which Mrs Gleeson gave to us in evidence, and in particular her mother's death in 2015, her father's illness and failing health in the period in question, and her brothers stroke in 2016, were things that were known to the two earlier decision makers.

34. When we asked Mrs James in light of the information that had materialised during the evidence, whether she considered that this information could and did provide special circumstances, she responded that she did not consider that any of them were exceptional and thus there were no special circumstances even in light of this new information.

35. It is our view that, unsurprisingly given the suddenness with which we sprung the question on her, Mrs James applied the wrong test. She considered whether the information comprised special circumstances in the light of whether there were exceptional circumstances. As we have said, set out above, this is now not the correct test to apply.

36. And so it is our view that on three occasions HMRC have come to flawed decisions concerning special circumstances. We do not think that if HMRC had considered all the factors that were before them on each occasion that they came to a conclusion about special circumstances, they would inevitably have come to the same conclusion. In the case of Mrs James, we do not think that she would inevitably have come to the same conclusion had she applied the correct test.

37. Accordingly, had we not allowed this appeal on the basis that the appellant had taken reasonable care in completing its returns, we would have reduced the penalty to zero on the basis that there were special circumstances.

DECISION

38. For the foregoing reasons we allow this appeal.

APPEAL RIGHTS

39. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 27 JANUARY 2020