TC07800

VAT – assessments – 20 year time limit – whether or not deliberate behaviour – yes – whether or not the assessments were made to best judgment – yes – whether or not the assessments were correct – yes – whether or not the penalties were properly imposed – yes – whether or not there were any special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05360

BETWEEN

MIRZA SHAHARYAR BAIG **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MISS SUSAN STOTT

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds on 15 August 2019.

The Appellant appeared without representation.

Mrs Stephanie Skipper, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

A summary decision was issued to the parties on 15 January 2020. A request for a full decision was subsequently received from the Appellant. This is our full decision in this appeal.

DECISION

INTRODUCTION

1. This is an appeal against VAT assessments for the periods 12/00 to 09/16 in the sum of £259,845 and penalties in the sum of £82,198.20. In essence, it is HMRC's case that Mr Baig deliberately overclaimed input tax deductions on his VAT returns, that the assessments were raised to best judgment, and that Mr Baig is liable to a penalty. Mr Baig disputes this in all respects.

BACKGROUND

2. There was broad agreement as to the factual background in this matter, which we summarise as follows.

3. Mr Baig carries on business in the import and sale of dresswear and equestrian wear. He operates from his home.

4. In general, Mr Baig purchased goods from India and, more recently, Argentina. The goods would be delivered to his home by couriers arranged by his suppliers. Mr Baig would pay the suppliers by Western Union transfers although his understanding was that this method could not be used now and so transfers would be through a bank.

5. Mr Baig then sold the goods to market traders and others who would come to his door to collect the goods. The customers would pay in cash and Mr Baig would not provide an invoice or a receipt. Typically, Mr Baig's sale prices would be 20% higher than his purchase prices.

6. Mr Baig was first registered for VAT from 2 May 2000. He was selected for a pre-credibility check in respect of his 09/16 return by a letter dated 28 October 2016. This resulted in a visit on 19 January 2017 by an HMRC Officer, Ms Jane Kettlewell. We have been provided with a visit report and Mr Baig has not suggested that it is in any way inaccurate. In particular, the report provides as follows in respect of Mr Baig's explanation as to how he filled in his VAT returns:

> "Mr Baig said when a sale is made he records it on an A4 sheet of paper for each VAT quarter. No invoice or receipt given to his customers. General overhead costs are also listed on an A4 sheet of paper and stapled to the sales sheet plus another sheet where he has calculated his VAT.
>
> P09/16 return – checked overheads listing which showed totals £16267.40 and VAT £1199.97 – these did not match the figures in boxes 4 and 7. On the VAT workings sheet Mr Baig had written down a figure of £67301.90 as being the total net inputs – he said this included the figure for goods bought. He had then deducted a figure of £5345.80 which was described as net purchases which did not have VAT, and then multiplied the difference of £61956.10 by 20% to arrive at the box 4 figure of £12391.22. I explained to Mr Baig that this was not the correct way to calculate IT due and told him the correct way i.e. listing out as he had done for his overheads and having the evidence of VAT paid. He is assuming he has paid import VAT on the goods figure but he was only able to provide me with one C79 certificate for import VAT totalling £200.54. Mr Baig did not seem to be au fait with the imports procedure. His Indian suppliers used various couriers. Mr Baig said he ordered the goods from India, they arrived by courier at his front door and he simply paid the supplier whenever they sent him a statement. He said he ordered goods around 2 or 3 times a week. It was unclear who was making the customs declarations and paying the import VAT. He copies some documents for me to take back to the office."

7. Further information was sought in the course of correspondence between Ms Kettlewell and Mr Baig. In particular, we have considered letters and emails (and their attachments) dated 30 January 2017, 13 February 2017, 23 February 2017, 12 June 2017, 21 July 2017 and 16 August 2017.

8. Ms Kettlewell reached the view that there were inaccuracies in Mr Baig's VAT returns stretching back to 09/00. She calculated that, with the exception of 12/15 to 09/16, the input tax to be allowed was £953 per quarter save for where nil returns had been entered. The input tax allowed for 12/15 was £753, for 03/16 was £1,232, for 06/16 was £882 and for 09/16 was £745. When comparing these sums to the returns, this resulted in (on HMRC's case) overclaimed input tax of £265,194.

9. Ms Kettlewell also reached the view that the inaccuracies were due to deliberate behaviour. This was the basis for treating the time limit for the assessments as 20 years and was also the basis for the imposition of penalties.

10. Following various adjustments, this resulted in Ms Kettlewell making the following assessments totalling £259,845 plus interest, together with penalties in the total sum of £82,198.20:

(1) An assessment dated 15 September 2017 for the periods 12/00 to 06/16 in the sum of £253,548.

(2) An assessment dated 4 October 2017 for the period 09/16 in the sum of £6,297.

(3) A penalty assessment dated 13 November 2017 for the periods 12/00 to 06/16 in the sum of £78,122.10.

(4) A penalty assessment dated 13 November 2017 for the period 09/16 in the sum of £4,076.10.

11. Mr Baig sought a review of the assessments and penalties by an email dated 11 May 2018. His position was that the assessments could not be correct as he had not received this amount of money. He also maintained that his actions were not deliberate and instead resulted from his lack of understanding of VAT.

12. By a letter dated 11 July 2018, HMRC reviewed the decision and upheld it.

13. Mr Baig appealed against the decisions by a notice dated 6 August 2018. HMRC accepted that the appeal could proceed notwithstanding that it was out of time and, insofar as is necessary, we grant permission to do so.

14. In summary, the grounds for appeal are that HMRC ignored Mr Baig's VAT working papers and documents and the assessment was incorrect.

ISSUES

15. The following issues arise for determination:

(1) Whether or not the assessments were made to best judgment.

(2) Whether or not the assessments were correct.

(3) Whether or not Mr Baig's conduct was deliberate for the purposes of the time limit for the assessments.

(4) Whether or not the penalties were properly imposed.

(5) Whether or not there are special circumstances in respect of the penalties.

16. In considering these issues, we bear in mind that the burden of proof in respect of the assessments is upon Mr Baig, the burden of proof in establishing that the penalties are due is

upon HMRC and the burden of proof in establishing any reasonable excuse or special circumstances is upon Mr Baig. We also bear in mind that the standard of proof in each of these respects is that of the balance of probabilities.

THE EVIDENCE

17. We heard evidence from Mr Rob Walshaw on behalf of HMRC and from Mr Baig.

18. Mr Walshaw was neither the decision making officer (who, as set out above, was Ms Ketttlewell) nor the review officer (who was Mr Samuel Johnstone). As such, Mr Walshaw could only provide a commentary on the documentation. Mr Baig cross-examined Mr Walshaw briefly. Mr Walshaw was asked whether or not Mr Baig had co-operated with the enquiry, to which Mr Walshaw said that he had, that there was no problem with his co-operation and that a full reduction for co-operation had been given. Mr Baig also asked Mr Walshaw if it was correct that Mr Baig had offered to show Ms Kettlewell the stock and that she had said no but that she would come back. Mr Walshaw said that he was in no position to disagree with that.

19. Mr Baig provided a brief witness statement which focussed upon the visit by Ms Kettlewell on 19 January 2017. He said that Ms Kettlewell asked for documents which he provided and that he answered all her questions. He said that Ms Kettlewell asked him to send her all his VAT papers since September 2000 which he then did. He expressed his belief that Ms Kettlewell had made up her mind to penalise him as much as possible as soon as she entered his premises for the visit.

20. Mr Baig also gave oral evidence. He said that he was a man of honourable character and showed us a newspaper report praising his charitable conduct; a stables offering riding lessons to vulnerable or handicapped children had been burgled and so Mr Baig provided them with free riding equipment. Mr Baig said that Ms Kettlewell had ignored his answers to her questions. He accepted that there were some inaccuracies and that the proper amount payable was not more than £20,000. He said that his conduct was not deliberate and that he did not have a full knowledge of VAT law. In the course of cross-examination, Mr Baig said that he went on a course about VAT in 2000 at York racecourse and another in 2004 or 2005. He also said that his business was making a profit.

BEST JUDGMENT

21. The relevant parts of section 73 of the Value Added Tax Act 1994 ("VATA 1994") provide as follows:

> "73. Failure to make returns etc.
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
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> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person -
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> (a) as being a repayment or refund of VAT, or
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> (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.
>
> …"

22. Regulation 29 of the Value Added Tax Regulations 1995 provides for the documentation required (subject to the exercise of discretion to accept alternative evidence) as follows:

> "29. Claims for input tax
>
> (1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of
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> (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;
>
> (b) a supply under section 8(1) of the Act, hold the relative invoice from the supplier;
>
> (c) an importation of goods, hold a document authenticated or issued by the proper officer, showing the claimant as importer, consignee or owner and showing the amount of VAT charged on the goods;
>
> …
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a), (b), (c), (d), (e) or (f) above, such other documentary evidence of the charge to VAT as the Commissioners may direct."

23. In *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, Woolf J defined best judgment as follows at 292:

> "What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

24. In *Rahman v Customs & Excise Commissioners (No 2)* [2002] EWCA Civ 1881, Chadwick LJ stated as follows at [45]:

> "It is in cases where the amount of tax found by the tribunal to be properly due is substantially different from the amount assessed by the commissioners that the tribunal may think it appropriate to investigate why there is that difference; and to seek an explanation. That investigation may - but, often (as in the present case) will not - lead to the conclusion that the commissioners did not exercise best judgment in making their assessment. The tribunal may take the view, in such cases, that the proper course is to discharge the assessment. But even in cases of that nature, as it seems to me, the tribunal could choose to give a direction specifying the correct amount - with the consequence that the assessment would have effect pursuant to section 84(5) of the 1994 Act. It could not be criticised for doing so. The underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax."

25. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015, Carnwath LJ stated as follows at [38]:

> "In the light of the above discussion, I would make four points by way of guidance to the Tribunal when faced with "best of their judgment" arguments in future cases:
>
> i) The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners exercise of judgment at the time of the assessment.
>
> ii) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment" grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.
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> iii) In particular the Tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The Tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.
>
> iv) There may be a few cases where a "best of their judgment" challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing."

26. Mrs Skipper also referred us to *Bennett & Mansell (trading as Enerco) v HMRC* [2002] Lexis Citation 539 (a decision of the First-tier Tribunal and so which only has illustrative effect), which states as follows at [14] in relation to HMRC's discretion to accept alternative evidence of input tax and:

> "[14] While the Commissioners have a discretion in such circumstances, it is clear from the appeal of *Kohanzad v Commissioners of Customs and Excise* (1994) STC 967 that they also have discretion to refuse the taxpayer's claim to any input tax credit. The burden for showing that the Commissioners wrongly exercised their discretion must be on an appellant. While the Tribunal has a supervisory jurisdiction over the exercise of the Commissioners' discretion, or in the present case, their refusal to exercise it, the burden of proof must lie on an appellant. In the present case not only has no evidence been produced on behalf of the Appellants, but in spite of the Commissioners' repeated request for evidence, none has been produced. In such circumstances the Tribunal has no ground for considering that the Commissioners have wrongly exercised their discretion to refuse to allow a claim for input tax when there is neither the primary evidence of the original invoice, nor any secondary evidence to support it. The Commissioners have a duty to control the revenue, and indeed to do so in the exercise of the obligations created by the value added tax regime."

27. In *Scandico Ltd v GMRC* [2018] STC 0153, the Upper Tribunal held that the FTT should not adopt a two-stage approach of deciding first whether or not there was a taxable supply and then whether or not HMRC acted in reasonably in not accepting alternative evidence. Instead, the proper approach is for the Tribunal to consider the decision before it. The Upper Tribunal stated as follows at [43]:

> "In appeals of this kind, the First-tier Tribunal should address only the decision which is before it, namely HMRC's decision that, in the absence of the VAT receipts, they were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer as to whether there had been a taxable supply. The test that the First-tier Tribunal applies in reviewing that decision is the test set out in *Kohanzad*."

28. Mrs Skipper submitted that the assessments were made to best judgment because HMRC made an honest and genuine attempt to make a reasoned assessment of the VAT payable on the basis of the information provided to them.

29. Mr Baig submitted that he had given all his papers to HMRC and that he could not be liable for so much money because he had not received as much as that. He said that HMRC had verified his 06/02 return and allowed his claim of £1,784.40. He also said that he had offered to show Ms Kettlewell his stock to verify his claim, that she said that she would come back to do so, but that she never returned.

30. We find that the assessments were made to best judgment. This is for the following reasons.

31. Ms Kettlewell's methodology for the assessment was as follows:

(1) Input tax was claimed for 03/16 in the sum of £12,361.17. However, Mr Baig's list of purchases resulted in VAT of only £1,968.67, resulting in a difference of £10,392.50. Mr Baig was invited to provide further evidence justifying this difference, but he did not do so. After removing items which were not business expenses, this resulted in a reduction of the input tax allowed to £745.

(2) Input tax was claimed for 06/16 in the sum of £11,168. However, Mr Baig's list of purchases resulted in VAT of only £1,213.93, resulting in a difference of £9,954.07. Mr Baig was invited to provide further evidence justifying this difference, but he did not do so. After removing items which were not business expenses, this resulted in a reduction of the input tax allowed to £882.

(3) Input tax was claimed for 09/16 in the sum of £12,391.22. However, Mr Baig's list of purchases resulted in VAT of only £1,199.97, resulting in a difference of £11,191.25. Mr Baig was invited to provide further evidence justifying this difference. The input tax allowed was recalculated as £1,232.

(4) The average of the input tax allowed by HMRC for 03/16, 06/16 and 09/16 was £953.

(5) Ms Kettlewell considered that all previous returns (other than nil returns) were incorrect and so adjusted all input tax claims to £953.

(6) Ms Kettlewell did not prejudge the matter and had not made up her mind upon entering Mr Baig's premises at the time of the visit. This is shown by the fact that she repeatedly asked Mr Baig for evidence of his purchases after the visit.

32. We note that in reaching these figures Ms Kettlewell did not take into account any VAT on the goods which Mr Baig was purchasing for resale. At first sight, this might be seen as ignoring an important feature. However, we are satisfied that Ms Kettlewell was entitled (and correct) to approach the calculations in this way for the following reasons.

(1) The purchase invoices are in rupees. There is no evidence as to what conversion rates Mr Baig applied.

(2) The purchase invoices are not addressed to Mr Baig.

(3) There are no purchase invoices relating to any period prior to 10 September 2015.

(4) There is no evidence that Mr Baig paid import VAT. Mr Baig's evidence is that he simply paid whatever the supplier requested. However, this does not assist in the calculation.

(5) With the exception of VAT period 12/15 no import C79 certificates have been provided.

(6) Mr Baig has not provided any calculations for VAT for such goods.

(7) The level of business suggested by the value of the purchase invoices is inconsistent with the low turnover figures for Mr Baig's self-assessment returns. For the year ended 5 April 2013, Mr Baig's turnover was £11,000 and the expenses allowable were £2,800. For the year ended 5 April 2014, Mr Baig's turnover was £10,500 and the expenses allowable were £2,600. For the year ended 5 April 2015, Mr Baig's turnover was £12,100 and the expenses allowable for tax were £3,200. For the year ended 5 April 2016, Mr Baig's turnover was £14,000 and the expenses allowable for tax were £5,500.

(8) Ms Kettlewell was unable to establish the accurate output tax for the returns.

33. We find that Ms Kettlewell's calculations of the VAT for 03/16, 06/16 and 09/16 cannot be said to be inaccurate. This is because Mr Baig has not provided any evidence to establish that the figures for these periods should be any different and, if so, what the figure should be. Indeed, Ms Kettlewell appears to have given Mr Baig the benefit of the doubt by allowing the expenses listed by Mr Baig without requiring invoices or any further information about them.

34. We also find that Ms Kettlewell was entitled (and correct) to apply this average to all previous returns other than nil returns (we deal separately below with the operation of the time limits for assessment). This is for the following reasons:

(1) Mr Baig's VAT returns establish that his expenses exceeded his sales in the period 09/00 to 09/16 by £1,087,710. The total inputs were £1,775,871 whereas the total outputs were £688,161.

(2) Mr Baig informed Ms Kettlewell (and still maintains) that his business was not loss-making.

(3) As set out above, Mr Baig's apparent turnover is not reflected in his self-assessment tax returns.

(4) Mr Baig has not provided any evidence to substantiate his returns. For the avoidance of doubt, we note that his bundle of documents for the appeal predominantly contains correspondence with HMRC and documents already available to HMRC. The supporting documentation relied upon by Mr Baig comprise the purchase invoices of goods from India, manuscript listings of other expenses, ledgers and VAT returns. With the exception of the purchase invoices from India, these documents are prepared by or on behalf of Mr Baig. In any event Mr Baig has failed to provide any alternative calculation to support his argument.

35. Crucially, in the course of his evidence, Mr Baig frankly accepted that the returns were wrong but has not provided any detail at all as to what they should be other than to assert that the amount overclaimed was approximately £20,000. He gave no explanation for this figure and so we reject it.

36. Mr Baig criticised HMRC for failing to consider the level of stock, which he said was between £35,000 and £40,000. However, we do not accept that this would have substantiated

the input tax claimed; it would simply establish that he was holding stock, which was not in dispute in any event.

37. Mr Baig states that HMRC queried and then allowed his 06/02 return. However, we were not giving any evidence as to the circumstances of this. In any event, this does not validate the inaccuracies in Mr Baig's other returns.

38. Insofar as Mr Baig's arguments in relation to best judgment can also be treated as a claim that HMRC has wrongly failed to exercise its discretion to accept alternative evidence of input tax, Mr Baig faces the central difficulty that he did not provide any such alternative evidence. Indeed, even in the context of the appeal hearing itself, he did not provide any evidence of the input tax and did not even calculate it beyond a broad assertion that the assessment should be no more than £20,000.

39. Given the absence of such alternative evidence, it is not even clear that HMRC reached the stage of refusing to exercise its discretion. However, to take Mr Baig's case at its very highest, even if HMRC is to be treated as not having considered its discretion to accept alternative evidence, we find that this does not disturb the assessment as it is inevitable that a consideration of such discretion would result in it being refused. Again, this is because of the complete absence of any such alternative evidence.

Whether or not the assessments were correct

40. For the same reasons that the assessments were to best judgment, we find that they were correct. Crucially, the burden of proof is upon Mr Baig to establish what the correct assessment should be. As set out above, his only assertion is that it should be no more than £20,000. However, he has not provided any detail, calculations or evidence for this.

Time limits

41. The relevant parts of section 77 of VATA 1994 provide for time limits in the following terms:

> "77. Assessments: time limits and supplementary assessments
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> (1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made
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> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or
>
> (b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty.
>
> …
>
> (4) in any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).
>
> (4A) Those cases are –
>
> (a) a case involving a loss of VAT bought 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, 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 or an obligation under paragraph 17(2) or 18(2) of Schedule 17 to FA 2017.

(4B) In subsection (4A) the reference to a loss of tax brought about deliberately by P or another person includes 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."

42. In *Tooth v Revenue and Customs Commissioners* [2019] EWCA Civ 826 ("*Tooth*"), the Court of Appeal dealt with the meaning of "deliberate" in the different context of discovery assessments under section 29 of the Taxes Management Act 1970 and held that the time limit is extended where a person knows that the return being submitted contains an error rather than there being any requirement of an intention to mislead. Floyd LJ stated as follows at [91] to [94]:

"[91] The FTT appears to have considered whether the inaccuracy was deliberate solely by reference to s 29(4), asking itself at [57] whether the taxpayer had deliberately brought about the insufficiency of the assessment. I agree with Ms McCarthy that this was an error of law. The FTT should have asked whether the inaccuracy was deliberate, and then, separately, whether this resulted in fact in the insufficiency of the assessment.

[92] The UT held at [46] that s 118(7) did not:

'remove from s 29(4) the requirement that "the situation mentioned [in s29(1) TMA] was brought about" by a deliberate inaccuracy in a document given to HMRC …'

[93] That is correct, in the sense that s 118(7) still requires factual causation of the 'situation', although it is important to keep in mind that it is not necessary to show that the taxpayer intended to bring about the situation (or in s 36(1A)(a) the loss of tax). The UT's reasoning as to why there was no deliberate inaccuracy is in [66]:

'The mere insertion of a figure into a document that is inaccurate may be a deliberate act, but it is not, necessarily, a deliberate inaccuracy. In this case, we do not consider that the inaccuracies alleged by HMRC can be said to be deliberate, because Mr Tooth took steps to draw the (putative) inaccuracies to the attention of HMRC.'

[94] I approach this second sub-issue on the assumption (contrary to my conclusion on the first sub-issue) that there is an inaccuracy in the document. If there is no inaccuracy then there is no deliberate inaccuracy either. If there is an inaccuracy, however, that must be because it is incorrect to construe the tax return as a whole, and correct to focus on the individual inaccuracy on the partnership pages of the return. The incorrect insertion of the employment losses in the boxes reserved for partnership losses was, viewed in this way, a deliberate inaccuracy. Whilst it is no longer suggested that Mr Tooth and his advisers were, by this means, deliberately seeking a reduction in his liability to tax, the inaccuracy was, on any view, deliberate. I agree with HMRC that Mr Tooth cannot escape from this conclusion by the suggestion, accepted by the UT, that he was forced to enter his employment losses in this way. There were other means by which he could communicate his loss claim to HMRC without including inaccuracies in his return, if that is what they were."

43. In *Leach v Revenue and Customs Commissioners* [2019] UKFTT 352 (TC) ("*Leach*"), the First-tier Tribunal (Judge Redston and Mr Robinson) held that the definition of "deliberate" in *Tooth* was also applicable to section 77(4)(B) of VATA 1994. The Tribunal found as follows at [96] to [98]:

> "*Whether the dicta in Tooth apply to the meaning of 'deliberate' in VATA section 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:
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> '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:
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> (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 limit does not only apply to deliberate behaviour, but where a person has failed to notify liability. He said at [88] 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 para [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."

44. We are conscious that *Leach* was a First-tier Tribunal decision and so is not binding on us. However, we agree with the analysis in *Leach* and adopt the reasoning at [96] to [98]. For the purposes of section 77(4B) of VATA 1994, therefore, it is only necessary for HMRC to show that Mr Baig knew he was not using the correct numbers rather than showing that he intended to mislead HMRC.

45. We find that the inaccuracy was deliberate for these purposes and that Mr Baig knew he was not using the correct numbers. Although not necessary for the purposes of the time limit, we also find that Mr Baig intended to mislead HMRC. We make these findings for the following reasons.

46. First, Mr Baig said that he did not understand VAT law. However, in the course of his oral evidence Mr Baig said that he went on a course about VAT in 2000 at York racecourse and another in 2004 or 2005. The inaccuracies arose out of basic VAT law rather than any technicalities or complexities. Mr Baig confirmed his understanding of basic VAT law in the visit and in his letter dated 12 June 2017. As such, we do not find his evidence credible that he did not know that he was putting incorrect figures on his return. In turn, we find that he was intentionally misleading HMRC because he was including claims that he knew that he was not entitled to.

47. Secondly, Mr Baig's lists of expenses do not match the inputs on his returns. Mr Baig has not provided any basis for these inputs. This is reinforced by the fact that the inputs and outputs are not consistent with the self-assessment returns which are available. In the absence of any explanation for this from Mr Baig, we are driven to the conclusion that he had no such basis for making these input tax claims at the time.

48. Thirdly, according to the returns, Mr Baig's expenditure vastly exceeded his sales. Mr Baig knew that this was not the case as his own evidence was that his business was making a profit. Mr Baig was aware that he was receiving repayments for each of his returns. We do not find it credible that he thought that he was entitled to these repayments in circumstances in which he knew that his business was making a profit. Although Mr Baig sought to explain this by reference to holding stock, he gave no evidence or detail of this and did not even say what amount of stock was held at the time of the returns. Given that we have found that he knew that he was not entitled to these repayments, it follows that we find that he was misleading HMRC in claiming them.

49. It follows that we dismiss the appeal against the assessments.

Whether or not the penalties were properly imposed

50. Schedule 24 of the Finance Act 2007 deals with penalties for errors. The relevant sections are as follows:

> "1(1) A penalty is payable by a person (P) where
>
> (a) P gives HMRC a document of a kind listed in the Table below; 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.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

…

3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P –

(a) discovered the inaccuracy at some time later, and

(b) did not take reasonable steps to inform HMRC.

…

4(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is –

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

…

5(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

…

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

…

17(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11 –

(a) to same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed."

51. We note that the broader meaning of "deliberate" in *Tooth* is not applicable to a penalty. We adopt what was said in *Leach* in this regard at [100] to [102]:

"[100] In *Auxilium Project Management Ltd v Revenue and Customs Comrs* [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 para [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 art 6 of the European Convention on Human Rights ('ECHR'), see *Revenue and Customs Comrs v UK Storage Company (SW) Ltd* [2012] UKUT 359 (TCC), [2013] STC 361 (Birss J and Judge Berner) at [29] and *General Transport SpA v Revenue and Customs Comrs* [2019] UKUT 4 (TCC) (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 SpA v Revenue and Customs Comrs* [2019] UKUT 4 (TCC) 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 *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956 Lord Steyn said at [5]:

'In so far 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)."

52. Mrs Skipper also referred us to the First-tier Tribunal cases of *Clynes v HMRC* [2016] UKFTT 369 (TC) (to the effect that an inaccuracy may be deliberate where it is found that a person consciously or intentionally chose not to find out the correct position, particularly where the circumstances are such that the person knew that he should do so) and *Miah v HMRC* [2016] UKFTT 644 (TC) (to the effect that an action was deliberate if it had been "thought about").

53. It follows from these authorities that, for the purposes of penalties as distinct from the time limits, a deliberate inaccuracy occurs for the purposes of Schedule 24 when a taxpayer knowingly provides HMRC with a document that contains an error with an intention that HMRC rely upon it as an accurate document. Further, an inaccuracy can in some circumstances be held to be deliberate where it is found that the person consciously or intentionally chooses not to find out the correct position, in particular, where the person clearly knew that he should have taken steps to ascertain the position.

54. Mrs Skipper argued that the evidence showed that Mr Baig had acted deliberately. Mr Baig argued that he did not act deliberately and that he did not understand VAT law.

55. We find that Mr Baig did act deliberately for the purposes of the penalties. We have in mind that, as set out above, the test for deliberate conduct is stricter for penalties than for the time limits for assessment. We repeat our findings at paragraphs 45 to 48 in this regard and, for the same reasons, find that the stricter test is fulfilled.

56. We find that the disclosure was prompted because it was only given in the course of and after the visit.

57. Mr Baig was given the maximum available reduction for disclosure and co-operation.

58. In the circumstances, we find that the penalties were properly imposed.

Special circumstances

59. Mr Baig has not argued that there are any special circumstances. However, for completeness we note that Mr Baig refers to his lack of financial income and assets and also his ill health and difficult personal circumstances. However, there is no evidence (or even any assertion) that these caused the inaccuracies. As such, they cannot constitute special circumstances in the present case.

DISPOSITION

60. It follows that we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

RICHARD CHAPMAN QC

TRIBUNAL JUDGE

RELEASE DATE: 4 AUGUST 2020