[2021] UKFTT 0447 (TC)

(TC) 08331

Inaccuracy penalty – whether HMRC proved that any inaccuracy due to Appellant's deliberate or careless behaviour – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00668

BETWEEN

PORTVIEW FIT-OUT LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM

The hearing took place on 6 May 2021 and 21 June 2021. With the consent of the parties, the form of the hearing was video with the parties attending through the Tribunal video platform. A face to face hearing was not held because of the ongoing Covid 19 pandemic and social distancing guidance.

On the application of HMRC, the hearing was held in private.

Ximena Montes Manzano, Counsel, instructed by PwC LLP for the Appellant

Glynis Millward, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. On 28 March 2018, HMRC issued the Appellant with a penalty in the sum of £666,563.12 pursuant to Paragraph 1 of Schedule 24 to the Finance Act 2007 ("FA 2007") because HMRC formed the view that there were inaccuracies in the Appellant's P35 return for the 2010/11 year, and that those inaccuracies were the result of deliberate behaviour on the part of the Appellant. Before me, HMRC also advanced an alternative case alleging that the inaccuracies were the result of carelessness on the part of the Appellant.

BACKGROUND

2. The background to this appeal is the Appellant's participation in an employee benefit trust tax arrangement that was recommended to it by Clavis Tax Solutions Limited ("Clavis").

3. The following was apparent from the documents I was provided with and/or was not in dispute:

4. The Appellant was introduced to Clavis by a financial advisor who had previously advised the Appellant in relation to a variety of matters. Between 2008-2010, the Appellant sought to utilise the Clavis proposed arrangement on five separate occasions (referred to as "tranches" by HMRC).

5. In brief, the principal steps in the arrangement were follows:

(1) The Appellant set aside a sum of money intended to reward the four key employees (the directors).

(2) The Appellant engaged Herald Employment and Recruitment Services Limited t/a Herald Resource ("HERS"), a Jersey based human resources company, to review the performance of the key individuals and to make a recommendation as to how to allocate between those individuals the sums set aside.

(3) The findings of the review formed the basis of recommendations made by HERS in a remuneration report. The recommendations would invariably include that the individuals be rewarded by the company settling into an employee benefit trust an amount equal to that which the review had found would reward and incentivise them.

(4) HERS sent to the Appellant an invoice for an amount that included the sum it had recommended be made available to the employees, and its own fees.

(5) The Appellant paid the invoice amount to HERS , which then settled that amount (minus its fees) into the Portview Fit-Out Limited Settlement established in Jersey.

(6) A share of the total amount settled was then allocated by the trustees of the Portview Fit-Out Limited Settlement to four sub-trusts established in favour of each of the four individuals.

(7) The Appellant claimed a corporation tax deduction for the payment it had made to HERS.

6. Ultimately, HMRC formed the view that the arrangements did not achieve the tax result sought by the Appellant and raised determinations in respect of the PAYE and NIC that they considered due.

7. On 31 March 2017, the Appellant and HMRC entered into a settlement agreement covering all PAYE, NIC, corporation tax, and inheritance tax liabilities arising from the Appellant's use of the arrangement.

8. Paragraph 1 of the agreement stated:

> "[It is agreed] [t]he income tax payable pursuant to the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("the PAYE Tax"), the National Insurance Contributions ("NICs") set out in Appendix A ("the Unpaid Liabilities") are unpaid wholly or in part because of [the Appellant's] failure to meet all its obligations. On the basis that no proceedings are taken against [the Appellant] for the Unpaid Liabilities or the interest on them and in consideration of the mutual obligations contained in this Agreement, [the Appellant] agrees to pay £5,185,298 ("the Settlement Amount") in full and final settlement of the Unpaid Liabilities and Inheritance Tax On Account ("the IHT On Account")."

9. Paragraph 26 of the agreement stated:

> "It is understood and agreed by the Parties that this Agreement does not include any penalties arising from [the Appellant's] failure referred to in [paragraph] 1 above and that nothing in this Agreement limits the Commissioners' powers to raise penalty assessments for that failure and recover the amount due under those penalty assessments."

10. HMRC subsequently considered whether to issue to the Appellant inaccuracy penalties. In relation to tranches 1-4, HMRC formed the view that no penalty was payable by the Appellant because there was a "mistake despite taking reasonable care". In relation to tranche 5, however, HMRC formed the view:

> "that the Appellant did not adhere to the prescribed scheme steps…in summary, the Appellant pre-determined the outcome of the report and set out the amounts they wished to receive…further counsel's opinion, or independent advice, was not obtained in relation to the effectiveness or otherwise that this alteration from the prescribed scheme steps would have on PAYE liability".

11. The Appellant disputes it is liable to a penalty.

EVIDENCE

12. Richard Hall, an officer of HMRC, provided a witness statement and gave evidence before me. As well as setting out the dates of various correspondence and procedural steps in the investigation/appeal, his evidence was as follows:

(1) He was allocated this case from October 2016.

(2) Under the arrangement (or "scheme") marketed by Clavis, "there were a number of steps to be followed…the main such step being that an independent review of the business should be carried out to decide the way in which the employees should be rewarded and incentivised."

(3) On 17 November 2009, HMRC had opened an enquiry into the Appellant's corporation tax return for the period ending 30 November 2007. This was before the dates of tranches 3, 4 and 5.

(4) On 6 August 2010, HMRC wrote to the Appellant stating that the Appellant was a known user of the Clavis arrangement and that HMRC were exploring potential challenges to the arrangement with regards to the validity of the corporation tax deduction claimed for payments for services, and whether or not PAYE and NICs should have been applied to payments received by beneficiary employees of the company usually by way of interest free loans from an Employee Benefit Trust.

(5) “A settlement agreement was reached between the parties which reflects the position that PAYE and NICs were due when the payments were made to the trusts. The P35s submitted by the Appellant for the tax years 2008/09, 2009/10 and 2010/11 were inaccurate as they did not contain the full amount of remuneration paid to the directors.”

(6) In relation to tranches 1-4:

(a) Prior to the Appellant’s first use of the arrangements, the Appellant “met with an independent tax advisor who considered the arrangements”.

(b) In June 2008, the Appellant was sent an extract of counsel’s advice by email which stated: “For the proposal to work it is vital that HERS does not act as agent for the company. Payment must be made unconditionally to HERS for the functions it is to perform and HERS must have complete freedom to then perform those services as it sees fit within the confines of the report. These decisions must be taken – and be seen to be taken – by HERS.”

(c) “The documented steps appear to have been followed and meetings with Herald were held prior to the completion of the HR reports. There was no evidence available to the Respondents to suggest the Appellant deviated from the advice received or failed to execute the steps presented. There was no evidence to suggest the outcome of the HR report was preordained or the directors dictated the amounts of remuneration they wanted to receive. As no evidence was available which would suggest the proper steps for the scheme were not undertaken, and they had sought further independent advice, I consider the first four tranches to be a Mistake Despite Taking Reasonable care and no penalty assessment was raised for the tax years 2008/09 and 2009/10.”

(7) In relation to tranche 5:

(a) Emails obtained by HMRC evidenced that “the Appellant deviated from the scheme steps and predetermined the outcome of the report and the Appellant set the amount of remuneration they wished to receive.”

(b) “The paperwork produced for the final tranche does not reflect the actual series of events which took place [as shown by the emails]. The HR report…is not said to have been produced until 1 November 2010, however by this point the amounts of remuneration had already been decided by the Appellant as contained in the emails of 26 and 27 October 2010.”

(c) “The Appellant, in directing [HERS] through Clavis [as to] the amount by which the directors were remunerated, were aware that an independent review of the Appellant did not take place.”

(d) “The Appellant simply determined the amount by which the directors wished to be remunerated through the Scheme for this fifth tranche…the documents show it was the Appellant and not [HERS] that determined how much was to be paid but the transactions were still presented as if the Appellant had followed the correct steps…this is why the Respondent considers that the fifth tranche should be distinguished from tranches one to four when considering the behaviour that led to the tax loss.”

(e) In cross examination, he accepted that:

(i) there were 4 “headline” steps that needed to be followed for the Clavis arrangement to be properly implemented:

(A) There needed to be a contract between the Appellant and HERS by which the Appellant outsourced its remuneration and benefits arrangements to HERS. Mr Hall accepted this step was satisfied.

(B) Representatives of HERS needed to gain an understanding of the business and the key performers, and undertake an evaluation of the key performers' roles and contributions. Mr Hall accepted that there needed to be some element of "collaboration" between the Appellant and HERS to understand business/roles/contributions.

(C) HERS needed to produce a detailed report setting out the position on rewards and incentives. Mr Hall accepted that such a report was prepared in relation to tranche 5. The report was dated 1 November 2010 and was considered by the Appellant's board on 2 November 2010 (albeit HMRC have only seen a copy of the amended report dated 10 November 2010).

(D) HERS needed to make the ultimate decision in deciding who was to receive an award and the amount of that award. HMRC's position is that this step was not satisfied for tranche 5 because the Appellant told HERS what figures to use and what the split between directors should be. However, Mr Hall accepted that:

(I) HERS was an independent third party.

(II) There is no evidence that HERS was under the direction or control of the Appellant or the Appellant's directors or that HERS was acting as the Appellant's agent.

(III) There is no evidence of any sort of "arrangement" or "agreement" as between the Appellant and HERS that HERS would simply do as directed by the Appellant.

(IV) The allocations referred to in Mr Campbell's emails of 26/27 October 2010 are not exactly the same as the sums ultimately allocated to individual sub-trusts.

(V) The amounts allocated to each director were consistent with the HERS report (assuming the 1 November 2010 report was materially identical to the 10 November 2010 amended report). The allocation to each director was broadly in line with their shareholding.

(ii) there was a valid trust in place and that the tranche 5 monies were paid to the trust and then paid from there to the sub-trusts. The allocations to the sub-trusts were made by the trustees who still had a discretion even though the amounts had been "put forward…by the Appellant."

(iii) HMRC have no evidence to directly contradict Mr Campbell's evidence that in October 2010, he spoke with Clavis/HERS to provide

detailed information about the Appellant's performance and the individual performance of the directors.

13. Simon Campbell provided a witness statement and gave evidence before me. His evidence was as follows:

(1) He is, and was at all material times, a chartered accountant.

(2) At all material times he was the Appellant's Company Secretary and Finance Director.

(3) During the period relevant to this appeal, there were three other directors of the Appellant.

(4) The directors of the Appellant were introduced to Clavis and its planning by John Greene of Greene Financial. Mr Greene had previously provided the Appellant (and the directors) with advice in relation to various financial matters. The relationship between the Appellant/its directors and Mr Greene had existed for some 3-4 years prior to the introduction to Clavis. This was not challenged in cross examination.

(5) After the Clavis arrangement was first introduced by Mr Greene, he (Mr Campbell) spoke with a number of people who were familiar with Clavis including a partner at a firm of accountants whom he understood had also introduced the Clavis arrangement to clients. This gave a sense of credibility and legitimacy to the Clavis arrangement. This was not challenged in cross examination.

(6) There were several meetings between the Appellant and Clavis at which the arrangement was explained. During one of these meetings, the Appellant was shown (and permitted to read at leisure) an opinion from Andrew Thornhill QC which advised that the Clavis arrangement did not fall foul of HMRC's rules and allowed directors/employees to be rewarded in a flexible/tax efficient way. This was not challenged in cross examination.

(7) There was no reason to question the credibility of Clavis or the arrangement, particularly as Clavis had obtained advice from Queen's Counsel. This was not challenged in cross examination.

(8) The Appellant's "day to day compliance accountants" and the Appellant's auditors, Grant Thornton, had full sight of the payments made pursuant to the arrangement and raised no concerns. This was not challenged in cross examination.

(9) In respect of "tranche 5":

(a) He contacted Clavis in October 2010 about again using the arrangement. This was not challenged in cross examination.

(b) Around this time he also spoke with Clavis/HERS about the Appellant's performance, and the individual performance of the directors. His recollection is that a representative came over to Belfast to meet with the company (as had occurred with previous tranches) but he could not identify a diary entry for that meeting so it may have been that this was done over the telephone. This was not challenged in cross examination. The only question put in relation to this was that there was no mention of meetings/discussions in the emails, which Mr Campbell acknowledged.

(c) He specifically discussed with Clavis that, due to cash flow, the full invoice value (remuneration amounts plus fees) could not be paid in one amount. Clavis told him that there could be two payments with the second payment being funded

by a loan back of the first payment. Clavis told him this did not alter the efficacy of the arrangement. This is also something he had discussed with John Greene. This was not challenged in cross examination. He did not ask HMRC about the "loan back" because "he knew what the answer would be" (this reply was not followed up by HMRC but I took it to mean that he formed the view that HMRC would have said that they were looking to challenge the Clavis arrangement – i.e. repeat what HMRC had said in the 6 August 2010 letter).

(d) Clavis subsequently asked him to provide to them (1) the total amount available for distribution and (2) a "split on the basis of current shareholding which from memory had been done on previous occasions." This was not challenged in cross examination.

(e) The information requested by Clavis was provided by email on 26 October 2010. The language used in that email such as "propose a value of £3m including fee" and "split suggested" reflected that these were simply suggestions.

(f) Subsequent emails (on 27 October 2010) between him and Clavis were to address the practicalities of the movement of funds. In particular he was concerned to ensure that each sub-trust bore the appropriate proportion of fees hence he made a suggestion in relation to how the total payment could be split. Some documentation was provided at this stage but this was only to be completed/populated once HERS had reported. The language used in Clavis's response: "the first payment…should definitely not be made until the invoice is received. This will take approximately 4 working days from Herald commencing, which all being well will be tomorrow" reflected that Herald was conducting an evaluation and that the split between the directors needed to await that.

(g) Despite making suggestions as to what he considered to be the appropriate split between the directors, he continued to be of the view that the decision as to how the funds should be allocated was at the discretion of HERS, and then the trustees, although the trustees would take into account the recommendations made by HERS.

(h) The HERS report was received on 1 November 2020 and was approved by the Appellant's' board on 2 November 2010. There was an amendment made to the report on 10 November 2010 – from recollection this was not of any significance. The payments were made on basis of the HERS report as received on 1 November 2010 (on 2 and 9 November 2010).

(i) Prior to the relevant P35 being filed, Grant Thornton conducted an audit and saw the details of tranche 5 including the loan back arrangement. No issues or concerns were raised. This was not challenged in cross examination although he was asked whether Grant Thornton has seen the emails relied on by HMRC to which the answer given was "probably not".

14. Much of Mr Campbell's evidence went unchallenged. Indeed, at the end of cross examination of Mr Campbell, I had to prompt Ms Millward to specifically put to Mr Campbell the alleged tranche 5 implementation shortcomings on which HMRC based its case that tranche 5 should be treated differently to the earlier tranches. Ms Millward then put to Mr Campbell that the Appellant had "pre-determined" what each director was going to receive and so "Herald was not independent". To which Mr Campbell replied:

(1) The figures were not "pre-determined". His emails need to be read in context. He was doing no more than suggesting what the Appellant considered to be an appropriate allocation/split.

(2) Herald was independent and made an independent decision just as it had in previous tranches. The HERS report had a range for remuneration and the allocations ended up being within that range. The allocations ultimately made to the sub-trusts differed to the splits that he had suggested.

15. I was also provided with a bundle of documents which included emails between Mr Campbell and Clavis which HMRC submitted demonstrated that the allocation as between the directors was "pre-ordained".

SUMMARY OF HMRC'S SUBMISSIONS

16. HMRC made the following submissions:

(1) There was an inaccuracy in the P35 submitted by the Appellant for the year ended 5 April 2011 in that it did not accurately state the level of the directors' remuneration. The Appellant accepted as much by way of the settlement agreement and cannot now resile from that concession.

(2) The emails demonstrate that, for tranche 5, the Appellant did not properly implement the Clavis arrangement. Specifically, the level of remuneration for each director was "pre-ordained" and HERS did not make the decision as to level/split as between the directors. As HMRC put it at paragraph 75 of their closing submissions:

> "The independence of HERS was the crucial element of the scheme, which allowed the CT deduction to be claimed and for there to be no deduction of PAYE income tax and Class 1 National Insurance contributions. Once that independence was no longer in existence, as had occurred on the fifth tranche, then the monies paid amounted to remuneration by virtue of the Directors employment with the company and should have been declared on the P35."

In those circumstances:

(a) The Appellant *knew* that the scheme was not being properly implemented and therefore knew that the desired tax benefits would not follow and therefore knew that the P35 was inaccurate.

(b) Alternatively, the Appellant was careless as to the accuracy of the P35 because it failed to take reasonable care to ensure that the arrangement was properly implemented and/or failed to take advice in relation to whether changes to the implementation for tranche 5 would affect the efficacy of the arrangement such as to mean that the desired tax benefits might not follow.

(3) In relation to suspension, there were no appropriate conditions on which suspension could have been made. The behavioural failure was a failure to properly implement an avoidance scheme, the only condition that could address such behaviour would be one that required the Appellant to properly implement such schemes going forward and that would be contrary to HMRC's approach of discouraging involvement in such schemes.

17. HMRC made clear (both in oral opening and oral closing) that there was no allegation of sham made in this appeal.

RELEVANT LAW

18. Paragraph 1 of Schedule 24 FA 2007 provides:

> "(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."

19. Paragraph 3 of Schedule 24 FA 2007 provides:

> "(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is–
>
> 'careless' if the inaccuracy is due to failure by P to take reasonable care,
>
> 'deliberate but not concealed' if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> '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)"

20. Paragraph 4 of Schedule 24 FA 2007 sets out the standard amounts of penalty for the behaviours that are the subject of the Schedule 24 regime. For a "category 1" inaccuracy (which applies in the present case) the penalty payable (subject to any reduction for disclosure) is: for a careless inaccuracy 30% of the potential lost revenue, for a deliberate but not concealed inaccuracy 70% of the potential lost revenue, and for a deliberate and concealed inaccuracy 100% of the potential lost revenue.

21. Paragraph 5 of Schedule 24 FA 2007 provides:

> "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."

22. Paragraphs 9 and 10 of Schedule 24 FA 2007 provide for reductions in the penalty where a person provides disclosure in relation to an inaccuracy.

23. Paragraph 11 of Schedule 24 FA 2007 provides that a penalty can be further reduced in "special circumstances". Paragraph 17 provides that the Tribunal's power to substitute its own decision for that of HMRC may include a reduction on account of special circumstances but this reduction may only differ from that applied by HMRC if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed when considered in the light of the principles applicable in judicial review proceedings.

24. Paragraph 14 of Schedule 24 FA 2007 provides HMRC with a power to suspend all or part of a penalty for a careless inaccuracy, but only if this would help a person to avoid becoming liable to similar such penalties in future.

25. Paragraph 15 of Schedule 24 FA 2007 provides a right of appeal to the Tribunal in relation to the decision to issue a penalty, the amount of the penalty and the decision not to suspend a penalty (or to suspend on conditions).

26. It is for HMRC to prove that the Appellant is liable to a penalty (and the amount of the penalty).

27. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC), the Tribunal held:

> "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.
>
> The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT 575 (TCC) at [37])."

28. I agree with the approach set out in *Auxilium.*

29. HMRC also referred to the decision in *Clynes v HMRC* [2016] UKFTT 369 (TC) where the Tribunal stated:

> "we consider that the term "deliberate inaccuracy on a person's part can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

30. I agree that an inaccuracy may be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position. However, as the Tribunal indicated in *Clynes*, this will be a question of fact and degree that must be determined on a case by case basis. Care must be taken not to blur the line between careless and deliberate conduct.

SUMMARY OF THE APPELLANT'S SUBMISSIONS

31. The Appellant made the following submissions:

(1) There was no inaccuracy in the PAYE return when it was submitted by the Appellant in circumstances where:

(a) The Appellant's tax treatment of the contributions to the EBT was in accordance with prevailing practice and a widely held view that such arrangements would not be subject to income tax and/or class 1 NICs.

(b) The Appellant took advice from reputable and qualified advisers.

(c) The Appellant's reasonable understanding was that the return was correct when it was submitted.

(d) The position adopted was not unreasonable and was based upon a *bona fide* interpretation of tax law.

Further, the Appellant entered into the settlement agreement with HMRC purely for commercial reasons.

(2) In circumstances where HMRC calculated potential lost revenue by reference to the allocations to each sub-trust:

> "there is no causative link between the 'inaccuracy' (allocation of the sub-trusts) and the conduct which HMRC complain about. The sub trust allocations were made by independent trustees…on which [amounts] the company has paid all tax due. It cannot be said that the Company's alleged actions/omissions caused the potential loss of revenue.
>
> In other words, any pre-determination (which is not accepted) of the outcome of the report produced by Herald Resource and allegations that the Company knew that Herald Resource was not acting independent do not make any difference to the tax treatment or PAYE/NIC due and payable. The behaviour complained of simply did not cause potential loss of tax."

(3) There was no deliberate or careless conduct on the part of the Appellant. In particular:

(a) In circumstances where: the Appellant:

(i) took advice in relation to the arrangement; and

(ii) Implemented the scheme materially in accordance with that advice,

and HMRC:

(iii) disavowed any allegation of sham;

(iv) conceded there was no evidence that HERS was other than an independent third party;

(v) conceded there was no evidence that HERS was under the direction or control of the Appellant;

(vi) conceded there was no evidence of an "arrangement" or "agreement" as between the Appellant and HERS that HERS would simply do as directed by the Appellant;

(vii) accepted that there was a valid trust in place; and

(viii) accepted, in relation to tranche 5, that the trustees were independent and had a discretion as to allocation as between the sub-trusts

HMRC are not able to prove that the Appellant *knew* (actual or blind eye knowledge) that HERS was not acting independently and therefore *knew* that the arrangement was not being properly implemented and therefore that the P35 was inaccurate.

(b) In circumstances where the Appellant:

(i) took advice in relation to the arrangement; and

(ii) implemented the scheme materially in accordance with that advice;

HMRC are not able to prove that the Appellant behaved carelessly or that any failure to take reasonable care resulted in the alleged inaccuracy on the P35.

(4) Further and in any event, any careless penalty should have been suspended.

FINDINGS OF FACT

32. The background facts summarised at paragraphs 4-10 above are not in dispute.

33. The emails relied on by HMRC to demonstrate that the remuneration levels/split was "pre-ordained" and that HERS was not acting independently are, in my view, *capable* of supporting that conclusion. However, I do not think that is the only reading of them. Context is important. Evidence of context was given by Mr Campbell.

34. As to Mr Campbell's evidence, I found him in some regards to be somewhat guarded. However, as recorded above, large parts of his evidence were simply not challenged.

35. In all the circumstances, I find as fact:

(1) Prior to participating in the arrangement, the Appellant took professional advice to the affect that the arrangement was lawful and achieved the desired tax result. It was reasonable for the Appellant to rely on that advice. As much was accepted by HMRC.

(2) There were 4 "headline steps" for proper implementation of the Clavis arrangement (see steps summarised at paragraph 12(7)(e) above). As much was accepted by HMRC.

(3) In relation to tranches 1-4, the Appellant properly implemented the arrangement. HMRC did not contend otherwise.

(4) In relation to tranche 5:

(a) Mr Campbell spoke with Clavis about the loan back. Clavis told him this did not alter the efficacy of the arrangement. Prior to the P35 being filed, Mr Greene and Grant Thornton were also aware of the loan back arrangement and did not indicate that it would alter the efficacy of the arrangement. That was Mr Campbell's unchallenged evidence. It was, then, reasonable for the Appellant to proceed on the basis that the loan back would not alter the efficacy of the arrangement.

(b) In relation to the first headline step: this was satisfied. As much was accepted by HMRC.

(c) In relation to the second headline step: this was satisfied. HERS (or Clavis as its representative) obtained information from the Appellant both in relation to previous tranches and, in October 2010, in relation to tranche 5. It was Mr Campbell's unchallenged that in October 2010 he spoke with Clavis/HERS about the Appellant's performance and the performance of the directors.

(d) In relation to the third headline step: this was satisfied. The report was dated 1 November 2010 and was considered by the Appellant's board on 2 November 2010. That was Mr Campbell's evidence and Mr Hall accepted as much.

(e) In relation to the fourth headline step. This was satisfied. HERS did act independently in relation to the allocation/split as set out in the report. I reach this view because:

(i) I am satisfied that the emails of 26 and 27 October 2010 reflect the Appellant's *wishes* as to allocation/split. That was Mr Campbell's

evidence and is consistent with the language used in those emails (and replies).

(ii) HERS was at all material times an independent third party. That was Mr Campbell's evidence and Mr Hall accepted as much.

(iii) HERS was not under the direction or control of the Appellant or the Appellant's directors and HERS was not acting as the Appellant's agent. That was Mr Campbell's evidence and Mr Hall accepted as much.

(iv) There was no "arrangement" or "agreement" as between the Appellant and HERS that HERS would simply do as directed by the Appellant. That was Mr Campbell's evidence and Mr Hall accepted as much.

(v) On 1 November 2010, HERS produced a report setting out its remuneration recommendations.

(vi) The amounts allocated to each director were consistent with the HERS report.

(vii) The allocation to each director was broadly in line with their shareholding. However, that does not in and of itself show that HERS did not independently form a view as to the appropriate allocation/split.

(viii) The allocations referred to in Mr Campbell's emails of 26 and 27 October 2010 are not exactly the same as the sums ultimately allocated to individual sub-trusts, although I attached no material weight to this final point given it was suggested by HMRC that the difference only arose as a result of fee deductions.

(f) There was a valid trust in place and that the tranche 5 monies were paid to the trust and then paid from there to the sub-trusts. The allocations to the sub-trusts were made by the trustees who at all times maintained a discretion in relation to allocation (albeit it was expected they would take into account the HERS report). As much was accepted by HMRC.

DISCUSSION AND DECISION

36. HMRC bear the burden of proof in this appeal.

37. Ms Millward accepted that if, in relation to tranche 5, the 4 headline steps had been complied with then HMRC's case would necessarily fail. For the reasons set out above, I am satisfied that the 4 headline steps were complied with in relation to tranche 5, and there was no "pre-ordination" or lack of independence on the part of HERS.

38. In those circumstances:

(1) Tranche 5 should not have been viewed any differently to tranches 1-4; and

(2) HMRC have not established that deliberate or careless behaviour on the part of the Appellant given that the Appellant implemented the arrangement for tranche 5 in accordance with the headline steps that it had been advised would lead to the desired tax results. Therefore the Appellant did not know that there were any inaccuracies on the P35 nor did it fail to take reasonable care in that regard.

39. Further and in any event, despite advancing a case that the level of remuneration for each director was "pre-ordained" and that the independence "was no longer in existence", HMRC (in submissions and evidence) acknowledged/conceded:

(1) There was no allegation of sham;

(2) HERS was an independent third party;

(3) There is no evidence that HERS was under the direction or control of the Appellant or the Appellant's directors or that HERS was acting as the Appellant's agent; and

(4) There is no evidence of any sort of "arrangement" or "agreement" as between the Appellant and HERS that HERS would simply do as directed by the Appellant (in relation to tranche 5 or otherwise).

In my view, these acknowledgments/concessions were fatal to HMRC's case (albeit the case also failed on the facts).

40. HMRC having failed to make good necessary elements of their case, I allow this appeal.

41. Whilst not necessary for the disposal of this appeal, I deal briefly with the Appellant's other submissions as follows:

(1) No inaccuracy: HMRC's position was that, whatever the prevailing practice in relation to EBT arrangements (in relation to which no detailed submissions were provided by HMRC) and even though professional advice was taken, the Appellant was not implementing the arrangement correctly and therefore the perceived tax benefits could not have attached. But, of course, this requires determination of whether or not the arrangement was implemented correctly – which is an issue I have determined in the Appellant's favour. The Appellant referred me to paragraphs 51-53 of the Upper Tribunal's decision in *Raymond Tooth* where it was held:

> "51. The question therefore arises as to whether an entry in a document that is explicitly based on a bona fide albeit controversial interpretation of tax law, which subsequently proves to be wrong, can amount to an inaccuracy.
>
> 52. An inaccuracy is something that is not accurate. Something is accurate if it conforms with the truth or with a given standard. In our judgment, where a taxpayer adopts a position in his return which, albeit controversial, cannot (at the time of the return) be said to be wrong and takes the trouble to identify the position he has taken (and the fact that it is controversial) in that return cannot be guilty of an inaccuracy when, subsequently, it is established that the position taken by the taxpayer is wrong.
>
> 53. In such a case, it can be said that the Return *becomes* inaccurate. But it cannot, in our judgment, be said that the Return *was*, at the time of its making, inaccurate."

HMRC submitted that, because it had signed the settlement agreement, the Appellant was shut out from arguing that there was no inaccuracy in the P35. I was initially attracted to this submission (having regard to cases such as *Foneshops Ltd v HMRC* [2015] UKFTT 410 (TC)). However, the Appellant has persuaded me that the correct approach is that summarised in *Stuart Gulliver v HMRC* [2017] UKFTT 0222 (TC) citing *Barnett v Brabyn* [1996] STC 716 and *King v Walden* [2001] STC 822, and the Appellant is permitted (despite the settlement agreement) to argue in this penalty appeal that there was no inaccuracy in the P35.

Ultimately, I am not satisfied that HMRC have established that, at the time of the submission of the relevant P35, the position adopted by the Appellant was "wrong" (as opposed to being controversial). I therefore accept the Appellant's submission that HMRC have failed to establish that the P35 contained an inaccuracy.

(2) Causation: I reject the Appellant's submission on this point. The inaccuracy relied on by HMRC was the alleged failure to include in the P35 remuneration that, on HMRC's case, ought to have been included as a result of the arrangement not being properly implemented because of pre-ordination as to allocation/split (i.e. as a result of the Appellant's alleged behaviour). I do not accept that the fact that the trustees ultimately authorised the allocation to the sub-trusts breaks that causative link, especially given that it was acknowledged by the Appellant that the trustees would be expected to "take into account" the recommendation of HERS.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 19 JULY 2021