Neutral Citation: [2024] UKFTT 00510 (TC)

Case Number: TC09198

FIRST-TIER TRIBUNAL
Tax CHAMBER

[By remote video/telephone hearing]

Appeal reference: TC/2023/00270,00278, 00285 & 000287

CAPITAL GAINS TAX- invalid claim for Business Asset Disposal Relief/Entrepreneurs Relief- penalty imposed for carelessness- whether penalty notice was validly issued - yes- whether behaviour was careless-yes-whether decision not to suspend penalties was flawed- no- Schedule 24 Finance Act 2007 - Appeal dismissed.

Heard on: 23 April 2024
Judgment date: 3 June 2024

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
ANN CHRISTIAN

Between

PHILIP COX AND MRS DEBORAH COX

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: **Andrew Gotch CTA, ("counsel for PC, DC and PDC").**

For the Respondents: **Gift Nyoni, Litigator of HM Revenue and Customs' Solicitor's Office, ("counsel for HMRC").**

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely. The remote platform used was the Tribunal video hearing system. The documents which were referred to comprised of a Hearing bundle of 641 pages and the Appellant's skeleton argument.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

3. The Appellants, Philip Cox ("PC") and his wife Debra Cox ("DC ")(and collectively "PDC) appealed against a penalty notice issued by the Respondents ("HMRC") amounting to £16,152.90, for PC, and £16,252.35, for DC, for the tax year 2019-20.

4. More specifically, PDC (1) sought confirmation that their appeal should be treated as having been notified within the "post-review period" as defined in section 49G(5)(a) Taxes Management Act 1970; (2) appealed against the penalties for inaccuracy/failing to take reasonable care when submitting their tax returns in relation to a claim for Entrepreneurs' Relief ("ER", also referred to as Business Asset Disposal Relief, "BADR", following a change of name of the CGT relief); and (3) appealed against the refusal of HMRC to suspend the penalties.

5. Evidence was given by PDC, David Sparrow ("DS") and by Ian Wate ("IW"), an accountant of 10 Chartered Accountants ("10CA"), who acted for PDC and the company David Williams IFA Holdings Ltd ("DWIFA"), who were credible witnesses.

6. PDC, Ian Lowe ("IL") and his wife and Nick Beal ("NB") and his wife (all collectively "the outgoing shareholders") decided in 2018 to dispose of their shareholdings in DWIFA to DS and his wife, Gillian ("GS"), and to Stephen Womack ("SW") and his wife Lucy ("LW") (all collectively "the continuing shareholders", although a new 'vehicle' was set up to acquire the business). The outgoing shareholders were all paid in cash. NB,PC,IL,DS and SW were directors of DWIFA ("the IFA directors").

7. It was agreed informally by the outgoing shareholders that DS and NB would act as the points of contact for them, including liaising with solicitors, and keeping them informed.

8. The firm of solicitors used was EWM Solicitors ("EWM") and the partner involved was Ian Morris ("IM"), assisted by Lisa Stevenson ("LS"), a tax specialist and senior associate of EWM.

EVIDENCE

Chronological events in relation to PDC and HMRC

9. The penalty was calculated as percentage of the Potential Lost Revenue ("PLR") for the year 2019-20 in terms of Schedule 24 FA 2007 being 15% of £107,686.00 giving a total £16,152.90 for PC and £16,252.35 for DC.

10. On 30 April 2019, PC gifted 572 and DC gifted 571 B shares to other shareholders of DWIFA, taking PDC's total percentage ownership of DWIFA to approximately 4.143% each and below 5% each.

11. On 20 May 2019, PDC disposed of their remaining of shares, and subsequently claimed for ER in their 2019/20 tax returns.

12. On 30 July 2021, HMRC issued Notices of Enquiry to PDC under Section 9A Taxes Management Act 1970 to investigate the Capital Gains Tax ("CGT") Reliefs on the 2019/20 tax returns.

13. On 5 November 2021, PDC conceded that the claim made for Business Asset Disposal Relief was invalid and expressed their wish to withdraw the claim for Entrepreneurs' Relief.

14. On 18 February 2022, PDC's agent, IL, provided a copy of the agreement the company held with its legal advisors.

15. On 3 October 2022, HMRC issued closure notices under Section 28A(1B)&(2) Taxes Management Act (TMA) 1970 in the amount of £108,349.70 and £107,686.42 and issued the penalty notices under Schedule 24 FA 2007 ("sch24"), in the amounts of £16,252.35 and £16,152.90, alongside penalty explanation letters.

16. On 5 May 2022, HMRC issued their penalty explanation letter, stating that the qualifying criteria for BADR had not been met, and that PDC were liable to pay the underdeclared tax of £210,00 and a 15% penalty for the behaviour of carelessness.

17. On 17 October 2022, PDC requested an independent review, contesting the behaviour of carelessness and providing a further/revised condition.

18. On 16 December 2022, HMRC issued their review conclusion letter to DC, upholding the decision and the behavioural penalty.

19. On 19 January 2023, PDC lodged an appeal with the First-Tier Tribunal against HMRC's decision to charge the penalty, citing that it was reasonable for PDC to rely on the professional advice provided to his company which had led to the under declaration to tax, and against HMRC's decision not to suspend the penalty charged.

Oral and written evidence

20. A meeting took place on 18 April 2019 with all the IFA directors present and IM and LS. LS went 'round the table' and, in relation to PC, IL and NB, confirmed that the disposal of their entire shareholdings and those of their wives would qualify for ER as they satisfied the ER conditions. In evidence, DS stated that this required confirmation that PC, IL,DS and NB, and their spouses, owned their shares for the relevant period of time, that the shares in the company related to a qualifying company for ER and that they had enough shares.

21. In relation to the latter, DS stated that IM and LS knew, prior to the meeting, of the respective shareholdings of the outgoing shareholders and that all at the meeting were aware of the 5% limit which was necessary in order to claim ER.

22. The ER position of SW and LW was less clear and required specialist advice.

23. At subsequent meetings, the IFA directors discussed how the consideration for the sale should be split in a way that more accurately reflected each individual's contribution to the business. The outcome of this was that it was agreed that PC and IL and their wives would transfer shares to DS and his wife.

24. DS suggested that PC and IL gift these shares as he felt sure it would not lead to any CGT, as the gift would qualify for holdover relief from CGT, and that there would be no

Inheritance Tax ("IHT") issues, as the shares to be gifted were 'business property' and eligible for relief.

25. On 25 April 2019, DS and NB asked IM whether he foresaw any problem with the proposed gifting of the shares and the revised structure of the deal.

26. The transaction and share transfers were completed on 20 May 2019 and claims for holdover relief were subsequently accepted by HMRC.

27. It was the paramount belief of all the IFA directors and the outgoing shareholders that the sale of shares would qualify for ER and consequently at a lower rate of capital gains tax, and this was an important consideration for them.

28. On 29 April 2019 at 1648, EWM issued a Confirmation of Instructions ("CoI") document which named the client as DWIFA, and not the individual outgoing or continuing shareholders. PC stated that notwithstanding this he saw them acting for him as he was bearing the cost along with his colleagues through the company.

29. The CoI set out what services EWM would provide and what services they would not provide. The former included "review of proposed buy out structure and previous buy out clearances and preliminary meeting to advise on buy out structure from a tax perspective; review of proposed revision to buy out structure and further meeting to advise on buy out structure from a tax perspective; follow up note to SW on the Entrepreneur's Relief tax position for himself and LW; and review of Final buy out structure."

30. The latter excluded: "any matter relating to the laws of any jurisdiction other than England and Wales; or evaluating the commercial and/or financial merits of the proposed transaction being undertaken; or the CGT IHT implications of the proposed gift of B shares."

31. PC confirmed that, as a company director for a period of over 10 years, he was aware of the difference between the different legal entities being the company, DWIFA, and himself and his wife as individuals. There were no letters of engagement or CoIs between EWM and PDC. PC was kept informed by DS and NB as to developments with EWM and was not aware, until after the sale had taken place, that the CoI was with the company and not the shareholders.

32. PC did not question the scope of instructions and although he saw the email referring to the suggestion of "sign off for CGT and IHT", he did not believe it was necessary to accept the offer of LS looking into this because DS was confident that holdover relief from CGT would be granted and that there were no IHT issues on the gift of shares.

33. PC stated that he had no concerns about his and his wife's ER entitlement when they transferred their shares to DS and his wife. He stated, 'in our industry we are used to thinking round all aspects of the transaction when we give advice'. Accordingly, he considered EMW, as the solicitors, whom he believed were providing tax advice, should have mentioned any problem with this, if they thought there was one.

34. PC stated that throughout the sale process he kept his wife, DC, fully informed about all meetings and progress in negotiations and that she, too, expected to receive ER on the sale of shares on the same basis as he did.

35. On 11 September 2020, PC emailed IW with the details of what needed to be include in his tax return, including details of the share disposal. IW had been PDC's accountant for many

years and had always reliably and accurately completed their tax returns relying on information that they sent him each year. In the previous twenty years, there had never been any inaccuracies or issues with HMRC in relation to PDC's tax returns.

36. The figure given for the consideration that PDC received for their shares was taken from a spreadsheet prepared by DS when the negotiations about the respective contributions to DWIFA were being made.

37. PC used the wrong spreadsheet which showed a larger figure than the amount actually received detailed in DS's final spreadsheet.

38. PC stated that this was a genuine mistake, and the wrong figure did "not ring any bells" because "we had not received cash into their bank account when the deal was done." The consideration was left on an outstanding loan and PC honestly believed he had supplied the correct figure even though it meant he ended up paying more tax.

39. Following the meeting on Thursday, 18 April 2019, IM wrote by email to NB, with a copy to DS, on 24 April 2019 at 1622, setting out their fee proposals for "work already done and to include both tax structure meetings and the necessary preparation for those meetings and the note that LS will send over shortly specifically referencing Stephen and Lucy's [Womack] ER position".

40. It continued "For the work to be done and to include share purchase agreement, all necessary ancillary documents, pertaining to completion and post completion formalities to include statutory payment, companies house filings and writing up of company books we are proposing to charge a fixed fee of £12,000 and VAT and necessarily incurred third-party disbursements….. Technically the Sellers will require separate advice given the relationship between the parties and the fact that we will approach the drafting of the document in a balanced way you may take the view that separate representation will not be required."

41. On 25 April 2019 at 2129, NB wrote, by email, to IM, with a copy to DS, saying "In light of your advice we have decided to keep our plans as simple as possible as outlined in the slightly revised proposal attached. As you will read the only to change to what we broadly agreed is that some of the shares are going to be gifted immediately to David and Gillian [Sparrow] so that the numbers going into the Newco scenario are all as required. If you could please confirm asap that you can see no reason not to do this assuming the parties are happy with it (including the IHT aspects) we will arrange with our accountants for the necessary stock transfers to be completed and for Companies house updated.". The email instructed EWM to do all the work described.

42. IM replied by email to NB, with a copy to DS, on 29 April 2019, at 1056, saying: "At first glance I do not see anything wrong with the proposal to give some B shares to David and Gillian but as previously discussed I am not an out and out tax expert. If you want proper sign off both on CGT and IHT I would need to refer the proposal to Lisa and there would be a cost implication for the extra work."

43. On 29 April 2019 at 1529, NB wrote, by email, to IM with a copy to DS as follows: – "In the first instance we will speak to our accountants re the share gifting. Hopefully he will be able to reaffirm the position on the proposed CGT. If not and we need Lisa's [LS] input on this point we will let you know."

44. The consequence of the transfer of the shares by PDC to DS and GS resulted in PDC's respective holdings which were only just more than the 5% holding in the company (6.4 % as at 18 April 2019, falling to 4.138 %) and, therefore, below the relevant threshold.

45. PS and DS stated that they considered and assumed that reference by EWM to CGT and IHT related only to the availability of CGT holdover relief and IHT relief on business property assets and not in relation to ER relief from CGT.

46. They considered that it had always been made clear that EWM had an overriding duty to ensure that ER would be secured, and consequently that EWM should have noted that any change in shareholding would affect the ER position, and failing to do so was in breach of EWM's duty of care to PDC.

47. On 15 March 2022, HMRC wrote to 10CA asking if PDC had received legal advice directly or from another party and who paid for legal advice. HMRC also questioned whether the advice was generic rather than specific advice taking account of their personal circumstances.

48. On 25 March 2022, IW of 10CA replied stating that the legal advice on ER was requested by all shareholders in DWIFA and was paid for by DWIFA. IW said "the advice sought was both corporate and shareholder wide tax advice to ensure that our clients, and all other shareholders disposing of their shares via the corporate buyer, qualified for Entrepreneurs Relief. Two named individuals [SW and LW] in the instructions [CoI] where in the nature of "specimen advice".

49. On 5 May 2022, HMRC wrote to PC advising him that prior to 29 April 2019 he held 6.4% of the nominal share value of DWIFA and on 30 April following the transfer he owed 4.138%. The letter advised that for a successful claim for ER, in terms of The Capital Gains Tax Act 1992, section 169S, it was necessary to hold 5% of the share capital and voting rights for 2 years prior to disposal.

50. The letter also referred to the imposition of a penalty under sch24, where a person who gives HMRC an inaccurate return, or other document, if it satisfies condition 1; that the inaccurate document either amounts to or leads to an understatement of a person's liability to tax, or a false or inflated statement of a loss, or a false or inflated claim to repayment of tax; and condition 2, that the inaccuracy was careless or deliberate.

51. HMRC concluded that reasonable care in the completion of the return had not been demonstrated and the penalty was set at the minimum level of 15%.

52. HMRC considered whether the penalty could be suspended under paragraph 14 sch24 but concluded that it was not possible to do this.

53. The letter said: "The knowledge you have gained as a result of this enquiry is what will assist you in determining whether potential future claims to BADR are valid. I am unable to set any specific, measurable, achievable, realistic and time bound (SMART) conditions to help you avoid making these inaccuracies in future and so the penalty will be charged."

54. IW replied, on 25 May 2022, confirming that the claim to BADR failed to meet the qualifying conditions for relief because of the disposal of shares and that the relevant self-assessment returns for PC and DC were inaccurate and led to an understatement of their liability to tax.

55. IW stated that HMRC had accepted that any inaccuracy did not arise from behaviour that was a deliberate attempt to claim a tax relief which was not due. The issue was whether PDC could be regarded as careless as they did not demonstrate the behaviour that a prudent and reasonable person would take and as a result could be shown to be lacking in care.

56. IW stated that PC had worked full-time for DWIFA and held shares for almost 20 years. He was a director of the company and a minority shareholder and part of a very small group of people involved in the company. This meant he had good reason to accept assurances from other shareholders that professional advice had been taken and a claim for BADR would be valid.

57. He continued "It does not mean he understood that the sequence of events which reduced the shareholding below the de minimis 5% would have the consequential effect of eliminating his claim to a valuable tax relief. The relationship of trust and awareness of different levels of shareholding did not extend to appreciation of the technical requirements of BADR".

58. He continued "Mr Cox (and by extension Mrs Cox) were not present at any meetings with the lawyers involved in these transactions in order to have sight of the document headed CoI setting out the precise terms of the instructions. These were only provided to Mr and Mrs Cox in the course of this correspondence… Other documentation may exist that much of the discussion took place at meetings at which neither Mr Cox nor Mrs Cox were present where the focus of the instructions related to other tax aspects of a complex commercial transaction."

59. In relation to HMRC's decision not to suspend the penalty, IW referred to sch24 and stated that the conditions that are set are to reduce the possibility of future "careless" errors. "This is again consistent with HMRC's published view on the role of penalties which seeks to influence behaviour by "encouraging and supporting those who try to meet their obligation and penalised those who do not". Suspension is particularly appropriate where the "failure " (sic) represents an uncharacteristic failure by an otherwise compliant taxpayer.""

60. IW stated that this is precisely the scenario applicable to PDC. "It is surely possible to set a condition which stipulates that they will commit to taking advice on any future transactions on their own behalf rather than relying on advice taken via any third party over an agreed timescale as required by the legislation."

61. On 12 July 2022, HMRC responded stating that as PDC were not present at any of the meetings with lawyers, involved in these transactions, which PDC confirmed at the hearing, and also as the CoI was the sole written advisory document, and that PDC did not even have sight of this document until the course of HMRC's enquiry, HMRC questioned whether PDC had actually received any professional advice, whether generic or not.

62. The letter continued "if your clients are not present in meetings discussing the transaction, or receive any advice in writing from the lawyers, then it would appear to me that the only "advice" received by your client is the aforementioned assurances from other shareholders that a BADR claim would be valid.

63. "I would assume that the other shareholders themselves are not qualified to be providing professional tax advice to your client, considering that at least 2 other main shareholders themselves appear from the CoI to have sought professional advice for themselves. If this is

the case it would seem that no professional advice was received in relation to this transaction".

64. "It appears that your clients have not sought advice from an apparently competent professional adviser, they have instead taken the word of their fellow shareholders, that professional advice relating to another shareholders circumstances would apply to them also… I believe no attempt to check the adviser's worker advice was made regardless of any level of ability based on the confidence in the advice received."

65. In relation to the suspension of the penalty HMRC stated that "it is unlikely that similar careless inaccuracies will arise in future. "Firstly, your clients will gain knowledge from this enquiry that will help them avoid a similar error in future. Additionally, as far as I am aware, neither of your clients currently hold any offices, nor any employments currently. While of course other eligibility criteria also apply, this does not indicate that your clients currently have any capability or intention to dispose of shares that could qualify for be BADR. Currently I have no reason to believe it is likely that your client will ever have further share disposals that may qualify for BADR. Therefore, as it seems unlikely that a similar careless error will occur again, I find it difficult to see how any suspension condition relating this could be measured (as per the SMART criteria)."

66. IW replied to HMRC on 21 August 2022, emphasising that the whole intent and purpose of the transaction was to provide a structure by means of three objectives, one of which was to secure BADR on the capital gains of their shareholdings. IW stated that a meeting took place on 18 April 2019 at which the legal team were expressly instructed to advise on the actions and documentation for the sale of shares in DWIFA which were to be carried out in such a manner that they would qualify for BADR for all shareholders.

67. In relation to the suspension of the penalty IW stated "The legislation imposes a penalty for an inaccuracy in a document which results in an understatement of tax. It is not specific to any particular entry on that document. So, the requirements of the legislation are to look at the document as a whole, i.e., the self-assessment tax returns and consider what action should be taken to avoid errors in future. It is accepted these present difficulties in the case of one off errors (and) to an extent of the facts of this case bear many similarities to the facts in *Eastman v HMRC* [2016] where the tribunal considered that the "acid test" was to ascertain what went wrong originally so as to identify whether the taxpayer in that case could have done something differently, which would have avoided the earlier inaccuracy before going on to direct HMRC to suspend the penalty.".

68. IW stated that PDC's circumstances were not a failure to disclose the disposal of shares as was the case in *Eastman* but that the accuracy reflected a failure "on the part of the lead professional advisers to recognise the impact that the dilution of the Cox's shareholding had on the availability of BADR to advise the Cox's accordingly... Therefore it becomes possible to identify what could have been done differently so that accuracy could be avoided in future."

69. On 14 September 2022, HMRC replied stating: " Additionally, I note that you have stated that you have been advised that EMW were instructed to advise on the sale of shares in such a manner that all shareholders would qualify for BADR relief at the meeting at which PC was present was on 18 April 2019, 11 days before the gift of shares are made. The exchange of emails noted on 25 April 2019 that the gifts of shares are mentioned as the "a change to

what we broadly agreed" which indicated to HMRC that the advice received at the meeting on 18 April was not based on PDC's personal tax circumstances, following the gift of the shares, and that at that time on 18 April 2019, EMW were not aware of the proposed gift of shares.

70. HMRC stated that this suggests "that EMW were not provided with a full and accurate set of facts at the time of this meeting which as per HMRC's guidance does not therefore meet the benchmark for taking reasonable care."

71. "Following this the 'CoI' clearly stated that EMW are not advising on "CGT IHT implications of the proposed gift of shares". This document appears to clearly set out that EWM are not going to be providing professional advice regarding the CGT implication of the gifts".

72. In relation to IW's response in relation to suspension, HMRC said that the previous use by HMRC of "similar" inaccuracy did not refer to the legislation but HMRC guidance on suspension penalties. "The legislation at paragraph 14 sch24 is not specific regarding which careless errors could be avoided in future any suspension conditions." HMRC said " that they cannot see any future careless errors that could be avoided by setting a suspension condition in this case."

73. HMRC said that the proposals that PDC seek individual advisers that will consider only their particular circumstances, in the event that any further advice was required, would not meet the suspension criteria for the following reasons "firstly, a promise to check with an adviser in future is not a measurable condition. The condition does not relate to a definite specific action, but rather an action could be taken if the situation arose. Furthermore, such a situation may not arise within the suspension period and therefore again this would be a suspension condition which does not meet the criteria set out in the legislation as a condition which would not have avoided any future careless errors."

74. HMRC continued that "were this to be the case, adherence to the condition could not be measured. Additionally, seeking appropriate advice when required to meet tax obligations is the responsibility already expected of a reasonable taxpayer, regardless of a suspension condition. It is everyone's own responsibility to get their tax right. In HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice."

75. IW responded on 17 October 2022 stating that there was never a change of plan. "There was one plan, one strategy and what Mr and Mrs Cox regarded as a minor adjustment to their shareholding which has resulted in a hugely expensive increased tax liability. This "change" was merely a mechanism to arrive at the agreed purchase price not a substantive "change" as your letter implies."

76. In relation to suspension, IW stated that "the proposal is that each year, with immediate effect, our client you have a full minuted, in-person meeting with a partner in this firm specifically to review each entry on the return before the return is submitted. Had that happened in this case, the anomaly between the client's circumstances and the advice received would have become apparent, enabling a further review to be undertaken and the inaccuracy obviated".

77. He continued "It is beyond question that an undertaking such a pre-submission review is a condition that will "help [our client] to avoid becoming liable to future penalties"…. "Please note the language of the statute only requires that the likelihood of a further careless error occurring is reduced ("help… to avoid"), reflecting Parliament's wish to change careless behaviour wherever possible that can be done, rather than to simply penalised."

78. On 16 December 2022, HMRC issued review conclusion letters upholding the penalty advising that there were no special circumstances in terms of the legislation or a reasonable excuse in relation to the inaccuracies in the tax returns for the year 2019-20.

79. On 19 January 2023, PDC appealed to the tribunal.

80. DC gave evidence that she had no involvement of any kind in the transaction and relied upon her husband. She had no reason to doubt her husband's ability. She did not attend any of the meetings either with the IFA directors or with EWM. The arrangements that she had with a husband for submitting her tax returns had never led to an error in the past.

LEGISLATION

81. Section 9A Taxes Management Act 1970

82. Section 28A Taxes Management Act 1970

83. Section 50(6) Taxes Management Act 1970

84. Schedule 24 Finance Act 2007

CASES REFERED TO

85. *HMRC v Mrs A M Rowland* [2006] UKSPC SPC00548

86. *HMRC v Khawaja* [2008] EWHC 1687 (Ch)

87. *HMRC v Anthony Fane* [2011] UKFTT 210 (TC)

88. *HMRC v Collis* [2011] UKFTT 588 (TC)

89. *HMRC v Wald* [2011] UKFTT 183 (TC)

90. *HMRC v Hok* [2012] UKUT 363 (TC)

91. *HMRC v Mr J R Hanson* [2012] UKFTT 314 (TC)

92. *HMRC v Philip Boughey* [2012] UKFTT 398 (TC)

93. *HMRC v David Testa* [2013] UKFTT 151 (TC)

94. *HMRC v Elizabeth Mariner* [2013] UKFTT 657 (TC)

95. *HMRC v Paul Ronald Steady* [2016] UKFTT 473 (TC)

96. *HMRC v Carrasco & Carrasco* [2016] UKFTT 731 (TC)

97. *HMRC v Patrick Miller* [2016] UKFTT 0801 (TC)

98. *HMRC v David Alan Webb* [2016] UKFTT 364 (TC)

99. *HMRC v Eric Eastman* [2016] UKFTT 527 (TC)

100. *HMRC v Martland* [2018] UKUT 178 (TCC)

101. *Hicks v HMRC* [2020] UKUT 0012

HMRC'S SUBMISSIONS

Points at issue

102. Whether PDC acted carelessly in submitting erroneous self-assessment returns.

103. Whether HMRC have correctly calculated and applied the penalties resulting from the inaccuracy in PDC's self-assessment tax returns for the tax year 2019-20.

Burden Of Proof

104. Under common law, the onus of proof rests with the person making the assertion and is reinforced by Section 50(6) of the Taxes Management Act 1970 so that the onus is on HMRC to show that the penalty notice was validly issued and to demonstrate that PDC's behaviour was deliberate, or in the alternative careless, in filing inaccurate Self-Assessment returns.

105. The standard of proof is the ordinary civil standard, on the balance of probabilities.

Penalty Notice

106. Paragraph 1 of sch24 states the following:

> "(1) A penalty is payable by a person (P) where –
>
> (a) P gives HMRC a document of the kind listed in the table below, and
>
> (b) conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contained 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 or deliberate on P's part."

107. The table referred to in paragraph 1(1)(a) lists, amongst others, a return under Section 8 of the Taxes Management Act 1970 (personal return).

108. HMRC contend that Condition 1 has been met as Officer Callum McKenzie identified an error in PDC's return when a compliance check was conducted regarding PDC's self-assessment return for the tax year ending 5 April 2020.

109. PDC gifted B shares of DWIFA Holdings 2019 Limited on 30 April 2019, which took their respective ownerships of the company shares below the 5% threshold required to claim Business Asset Disposal Relief (BADR).

110. PDC subsequently claimed BADR in their self-assessment returns for the year 2019/20 resulting in inaccuracies amounting to under-declarations in liabilities to tax.

111. HMRC submit that this satisfies condition 1 of sch24.

112. PDC conceded that the claims for BADR, which led to the under-declarations were not valid and had subsequently paid the additional tax in full.

113. With regards to Condition 2, HMRC submit that the understatements of liabilities to tax was caused as a result of carelessness.

Behaviour

114. HMRC contend that PDC's behaviour was careless as PDC cannot be said to have taken reasonable care in submitting their erroneous tax returns.

115. In the case of *David Collis v Her Majesty's Revenue and Customs* [2011] UKFTT 588, it was held the standard by which reasonable care fell to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question; an objective test. Furthermore, the First-tier Tribunal went on to state at paragraph 30:

> "It is of the essence of the reasonable care test that in normal circumstances this should avoid simple errors of omission, or mere oversights."

116. HMRC contend the inaccuracies in PDC's self-assessment tax returns were not 'simple errors of 'omission' or 'mere oversights.

117. PDC have stated that it is their belief, that it was reasonable to rely on the advice provided to them by a reputable firm of solicitors on an area of tax which PDC were unfamiliar with.

118. HMRC submit that:

> 1. PDC failed to take reasonable care by seeking appropriate advice from a competent professional advisor who had prior possession of all accurate facts under these specific circumstances.
>
> 2. PDC failed to seek professional advice regarding the consequences for the individual of gifting shares.
>
> 3. PDC relied on assurances from fellow shareholders that professional advice had been taken and that their claims for BADR would be valid and that it was unreasonable to rely on an unqualified third party for the purposes of due diligence.
>
> 4. The professional advice acted upon by PDC was provided not to themselves, but to DWIFA, regarding tax and buy out structuring, which HMRC say it was not reasonable to rely on, as this advice as it was applicable on a generic basis, lacked a full set of facts regarding the circumstances of the gifting of the class B shares, and was not to individual shareholders.
>
> 5. PDC had been advised by EWM - the professional advice on which PDC rely – that they would not advise on the Capital Gains Tax and Inheritance Tax implications of the gifting of B class shares, the very issue on which PDC failed to meet the BADR criteria. This was disclosed in the CoI issued to the company on 26 April 2019 by EMW.
>
> 6. PDC were made aware that the advice provided was not from an expert in this area. In correspondence to HMRC on 18 November 2022, PDC's agent provided a summary of the appeal in which he stated "The response received from Ian Morris on 29th April was: "At first glance I don`t see anything wrong with the proposal to gift some B shares to David and Gillian but as previously discussed I`m not an out and out tax expert. If you wanted proper sign off both on CGT and IHT I would

need to refer the proposal to Lisa and there would be a cost implication for the extra work."

7. PDC had been made aware that they ought to seek out further advice from an adviser who had a greater knowledge of the tax implications.

8. This demonstrates that PDC have not behaved as prudent and reasonable taxpayers would in this position and the error does not constitute a simple error of omission or mere oversight. Therefore, the behaviour of PDC was careless in nature by the standard established in the case of *Collis*.

119. In the case of *Wald v Revenue & Customs* [2011] UKFTT 183 (TC) (17 March 2011), Judge Staker stated at [15]:

> "The obligation to file a correct tax return is on the taxpayer, and the taxpayer cannot transfer that obligation. If PDC relies on an accountant to prepare and file a tax return on his behalf, then PDC will be responsible if errors in the tax return are due to negligence by the accountant acting on his behalf (compare *Smith v HMRC* [2010] UKFTT 92 (TC) at [25]-[29] and [107]; *Employee v HMRC* [2008] STC (SCD) 688, SpC 673). If there has been negligence on the part of an accountant, it may be that the taxpayer may have some recourse against the accountant. However, that does not normally affect the liability of the taxpayer to a penalty for filing an incorrect return."

120. The Respondents submit that:

> 1. PDC have provided no tangible proof that they had made any attempts to check their adviser's work or advice to the best of their ability or competence, and owing to the untailored advice acted upon, it would have been reasonable for PDC to check this prior to their application for BADR and submission of their 2019/20 tax returns.
>
> 2. The careless behaviour demonstrated in this matter satisfies condition 2 of sch24 and HMRC submit that both conditions of paragraph 1 of sch24 have been satisfied.

121. This was confirmed in the case of *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012] UKUT 363 at paragraph 36:

> "[Section 100B of the Taxes Management Act 1970] permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further… it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair."

122. The First-tier Tribunal can therefore only discharge a penalty if it has been incorrectly charged. However, HMRC submit this is not the case and the penalties should be upheld.

Mitigation

123. A penalty may be reduced by PDC's quality of disclosure (QOD) under paragraph 9 of sch24 and HMRC may reduce the percentage of a penalty by taking into account how much PDC have co-operated with HMRC during their check or enquiry.

124. Reductions were given for how much PDC had helped HMRC ('Helping'), how much PDC had told HMRC ('Telling') and the access that PDC had provided to HMRC with their records or information ('Giving').

The reductions

125. Officer McKenzie allowed reductions and the explanations as to why these were made as follows:

    1. Telling: 30% out of a possible 30% reduction was allowed.
    2. Helping: 40% out of a possible 40% reduction was allowed.
    3. Giving: 30% out of a possible 30% reduction was allowed.
    4. The penalty therefore was at the minimum rate of 15%.

126. HMRC contend that the deductions allowed through QOD are fair and reasonable considering all circumstances.

127. HMRC must consider whether the disclosure of a taxpayer's inaccuracy is prompted or unprompted and submit that a disclosure is unprompted if at the time the disclosure was made, the person making it had no reason to believe that HMRC would have discovered or are about to discover their failure. Otherwise, it is a prompted disclosure.

128. In PDC's case, HMRC contend that the disclosure was prompted following an enquiry into PDC's tax returns.

129. The minimum penalty percentage chargeable for a careless inaccuracy penalty under paragraph 4 of sch24 is 15% and the maximum percentage chargeable is 30%.

130. Consequently, following the reductions allowed in this case, the penalty chargeable was 15% of the Potential Lost Revenue.

Suspension

131. In *Anthony Fane* v *HMRC* [2011] UKFTT 210 (TC), (Judge Brannan and Sandi O'Neil) ("the Fane Tribunal") found at [52]:

> "As regards the issue of suspension of the penalty, our jurisdiction is confined to that of judicial review. We cannot substitute our opinion for that of HMRC simply because, if we had been in their shoes, we might have come to a different conclusion. We can only overturn HMRC's decision on suspension if we consider it to be 'flawed' in the judicial review sense of that expression."

132. HMRC do not believe that suspension of the penalty is appropriate in PDC's circumstances.

133. HMRC submit that their decision not to offer suspension conditions is justified, as the circumstances under which they submitted their inaccurate returns are highly unlikely to be repeated within the maximum two-year suspension as per paragraph 14(2)(b) sch24.

134. HMRC submit that PDC were offered the ability of acquiring further advice from a professional tax adviser specific to their circumstances prior to their application for BADR, but this advice which was not acted by them prior to submission of their Self-Assessment return.

135. HMRC say that PDC would be unable to fulfil the condition within a two-year period as this particular circumstance was unlikely to re-occur within the timeframe. As per *Webb v HMRC* [2016] UKFTT 364 (TC) at [32]:

> "A condition of suspension, therefore, must contain something more than just a basic requirement that tax returns should be free from careless inaccuracies."

136. HMRC submit that this also highlights that the conditions set out in paragraph 14(6) sch24 would be redundant if the legislation were intended to give a condition to simply provide a return free from careless inaccuracies.

137. In *Webb v HMRC,* the Appellant omitted employment income on his Self-Assessment tax return. Paragraph 15 explained the reasoning behind not permitting him a suspension as:

> "the error arose because of the Appellant's incorrect belief that employment income did not need to be included on his return. He was now aware that such income had to be included and his future responsibility. Therefore, HMRC could not identify any future careless inaccuracies that would result from the same underlying cause."

138. The Respondents submit that the same reasoning in *Webb* can be applied to this matter, in that PDC are now aware that they were not eligible for BADR at the time their Self-Assessment return was submitted and will be aware of this going forward.

139. *Webb* also affirmed that a one-off scenario is not appropriate for suspension conditions, at [32]:

> "suspended penalties will not be appropriate for one off inaccuracies in returns such as a capital gain or a one-off transaction. They are more likely to be appropriate for accounting system of record keeping weaknesses, where the money that may have been spent on the penalty could be used to remedy the defective processes ensuring future returns are accurate".

140. HMRC submit that PDC's circumstances in this case should be considered a one-off transaction, and that PDC already have professional advice to rely upon.

141. HMRC contend that their decisions not to suspend these penalties are not flawed and should not be overturned as they were made in line with the intentions of the legislation at sch24.

142. HMRC say that all the cases cited in relation to suspension including *Fane* are all First-tier Tribunal cases are not binding but merely persuasive on this Tribunal. Those that militant against the decision in *Fane* are 'one-offs' and are not appropriate as they are interpretational differences only.

143. *Fane* refers to at [66] the Explanatory Notes as follows:

> "We are fortified in this view by reference to the Explanatory Notes published together with the Finance Bill 2007 in respect of the provisions which were eventually enacted as Schedule 24 Finance Act 2007. The relevant extract from the Explanatory Notes reads as follows:
>
> " Suspended penalties will not be appropriate for one off inaccuracies in returns such as a capital gain or a one off transaction. They are more likely to be appropriate for accounting system or record keeping weaknesses, where the money

that may have been spent on the penalty could be used to remedy the defective processes ensuring future returns are accurate."”

144. HMRC say that consideration of the Explanatory Notes provides a purposive interpretation of the legislation and say that *Fane* should be followed.

145. In relation to *Philip Boughley,* HMRC say that the tribunal considered this to be a borderline case when considering that the decision not to suspend the penalty was flawed and there was no consideration of the Explanatory Notes on sch24.

146. In *David Testa*, HMRC say that the tribunal fully agreed with *Fane* and referred, to *Fane* at [66],to the Explanatory Notes but having done so there is no discussion of them.

147. The Testa Tribunal stated at [31-33]:

> “ 31. The apparent underlying purpose of the legislation is not simply to allow a taxpayer the opportunity of “a last chance” if he mends his ways (akin to a suspended sentence in the criminal sphere) but only to allow him that last chance if he takes some specific and observable action which is specifically designed to improve his compliance.
>
> 32. Although the legislation does not specify the nature or extent of the required linkage between the earlier default and the action required by the suspensive condition, the use of the word “further” in paragraph 14(3) seems to us to imply that there must be some such linkage.
>
> 33. It therefore seems unlikely that paragraph 14(3) is intended to cover a situation where, for example, a taxpayer carelessly gives inaccurate information in a Construction Industry Scheme return and then seeks to have the penalty suspended on the basis of a promised improvement in his PAYE record keeping processes.”

148. In relation to *Paul Steady,* HMRC refer to [28] as follows:

> “Mr Steady’s case is not on all fours with *Fane*. In *Fane*, the suspension condition being considered was merely that Mr Fane file accurate self-assessment returns in future. In Mr Steady’s case, it is proposed that a detailed schedule of his savings accounts is kept, and that this will help him to ensure that his tax returns are accurate in future. It matters not that a prudent taxpayer might keep such a schedule (although we would question whether a typical prudent taxpayer would keep such a schedule) – indeed it could be argued that the purpose of the suspension conditions is to bring the standard of compliance of the careless taxpayer up to the standard of a prudent taxpayer. We are satisfied (and find) that a requirement to maintain a schedule of the sort described by Mrs Foyle, would be a practical and measurable condition (e.g. improvement to systems) which would help Mr Steady to achieve the statutory objective that his tax returns should be free from errors caused by a failure to exercise reasonable care.”

149. In relation to *Webb,* HMRC refer to [32] as follows:

> “*Anthony Fane* [2011 UKFTT 201 TC 01075] suggested that a Tribunal should look at the issue of suspension and flawed decisions in the judicial sense of the expression, and it is necessary to consider if HMRC, in exercising their discretion, had correctly directed themselves in law.

Judge Brannan goes on to state:

"The important feature of paragraph 14(3) is the link between the condition and the statutory objective: there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties. In other words, if the circumstances of the case are such that a condition would be unlikely to have the desired effect (e.g. because the taxpayer in question has previously breached other conditions or has a record of repeated non compliance) HMRC cannot suspend a penalty. The question therefore is whether a condition of suspension would have the required effect.

On the face of the wording of paragraph 14 (3), there is no restriction in respect of a "one off event". Nonetheless, it is clear from the statutory context that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension (two years).

Paragraph 14(6) provides:

'If, during the period of suspension of all or part of a penalty under paragraph 1, suspended penalty or part becomes payable'.

If the condition of suspension was simply that, for example, the taxpayer must file tax returns for a period of two years free from material careless inaccuracies, paragraph 14(6) 5 would be redundant.

Moreover, it is difficult to see how a taxpayer could satisfy HMRC that the condition of suspension, if it contained no requirement other than a condition not to submit careless inaccuracies in their tax returns had been satisfied as required by paragraph 14(6). This would, effectively, require the taxpayer to prove a negative and will require HMRC to conduct a detailed review of the taxpayer's tax returns.

A condition of suspension, therefore, must contain something more than just a basic requirement that tax returns should be free from careless inaccuracies. This suggests, therefore that the condition of suspension must contain a more practical and measurable condition (e.g. improvement to systems) which would help the taxpayer to achieve the statutory objective. The tax returns should be free from errors caused by a failure to exercise reasonable care.

Bearing these considerations in mind, HMRC's guidance indicating that a one off error would not normally be suitable for a suspended penalty is understandable and, in our view justified.

We are fortified in this view by reference to the Explanatory Notes published together with the Finance Bill 2007 in respect of the provisions which were eventually enacted as Schedule 24 Finance Act 2007. The relevant extract from the explanatory Note reads as follows:

'Suspended penalties will not be appropriate for one off inaccuracies in returns such as a capital gain or a one off transaction. They are more likely to be appropriate for accounting system or record keeping weaknesses, where the money that may have been spent on the penalty could be used to remedy the defective processes ensuring future returns are accurate.'"

150. HMRC say that in *Eastman*, the tribunal identified between systemic errors and human errors confirming that whereas the issue of suspension may be more susceptible for the former than the latter the tribunal said at [49] as follows:

> "If the inaccuracy has been brought about by human error, the proper question to be addressed is whether there is scope for the risk of human error in the future to be minimised. The enquiry should not stop with the identification of a human error; it should start with it."

151. HMRC say this is not the case of a simple error; this is a case of PC being an experienced director who was aware that advice to his company was distinct from advice to himself and was alerted twice to the fact that EWM could not guarantee that advice. PDC should have obtained specific counsel that was geared to their needs. There was, therefore, a wilful neglect towards getting specific advice and there is no scope for suspension to be given because the circumstances will not arise in the next 2 years.

152. PDC had the benefit of professional advice for the last 20 years and the proposal for meetings to be held are, in effect, simply holding meetings in person rather than having 'meetings' by email.

153. HMRC say that sch24 was designed to assist taxpayers who have systemic failures and are unable to "get their act together" It is not a 'get out of gaol/jail free card' and PDC are using it as if it is.

Special Circumstances

154. Paragraph 11 of sch24 allows HMRC to reduce a penalty further "if they think it right because of special circumstances".

155. PDC have not provided details of any special circumstances which would reduce their penalty and HMRC have not identified any, and thus, a special reduction has not been given.

156. HMRC submit that the legislation and guidance has been followed and that the level of penalty charged is appropriate taking into account the circumstances of the case.

Conclusion

157. The Respondents request that in light of the above submissions, the tribunal finds that:

> 1. PDC was careless in submitting their self-assessment returns for the year 2019-20 containing an inaccuracies.
>
> 2.The penalty charged has been appropriately calculated and PDC is liable to pay this penalty which is due under sch24.

PDC'S SUBMISSIONS

Preliminary issue – permission to notify the appeals

158. By s.49G(2) TMA 1970, PDC were both required to notify their appeals to the Tribunal within the *"post-review period"* as defined in s.49G(5)(a) TMA 1970, which in their case meant by 15 January 2023, 30 days from the date of the letter concluding the statutory review.

159. In the event, PDC's penalty appeals were not notified by that date because an application for ADR was in progress; and their suspension appeals were not notified by that date because the appeals were sent to HMRC rather than to the Tribunal. As soon as these errors were

noticed, the appeals were re-sent to the Tribunal on 19 January 2023 and were therefore notified late by 4 days.

160. By s.49G(3), an appeal may be notified after the elapse of the post-review period *"... only if the Tribunal gives permission"*. PDC's appeals adverted to the late notifications and asked for permission to notify the appeals.

161. In asking the Tribunal to give permission, PDC, relying on the principles set down in *William Martland v HMRC* [2018] UKUT (TCC) at [44]-[46], contend that: the delay of four days was neither serious nor significant; the delay was the result of genuine confusion; and that it would be unfair in all the circumstances of the case for them to be unable to pursue their appeal against the penalties that had been imposed.

162. PDC also contend that there is no significant prejudice to HMRC from permitting the notification of the appeals, since HMRC was aware, within the post-review period, that the statutory review decision was not accepted by PDC has already done all the work of preparation for the hearing; but that there would a substantial prejudice to PDC if notification was not permitted. The penalties under appeal are substantial, they have reasonable arguments to present on the merits of their case and, in relation to the suspension appeals, PDC argue that HMRC's decision is flawed in a judicial review sense, so that it is in the interests of justice that their appeal should be heard.

163. No notification has been received that the Tribunal has given permission, but the appeals have been listed for a hearing and treated as 'live'. Out of an abundance of caution, PDC respectfully ask the Tribunal to confirm that permission can be treated as having been given to notify their appeals outside the post-review period.

The penalty appeals

164. The penalties under appeal are imposed by sch24.

> Para.1 says, so far as relevant:
>
> "A penalty is payable by a person (P) where P gives HMRC a document of a kind listed in the Table below [here, a tax return], and Conditions 1 and 2 are satisfied. Condition 1 is that the document contains an inaccuracy which amounts to or leads to an understatement of a liability to tax … . Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3)…".
>
> Para.3 says, so far as relevant:
>
> "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…".
>
> Para.18 says, so far as relevant:
>
> "P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf. … Despite sub-paragraph (1) …, P is not liable to a penalty under paragraph 1 … in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) …"

165. The burden of proof is on HMRC to demonstrate that the inaccuracy in PDC's returns is, on a balance of probabilities, due to a failure to take reasonable care.

166. When considering whether a person has taken reasonable care, a twofold evaluation is required, as described in the decision of the Upper Tribunal (Morgan J and Judge Brannan) in *Hicks v HMRC* [2020] UKUT 0012 (TCC), where the Upper Tribunal says at [120]:

> "Whether acts or omissions are careless involves a factual assessment having regard to all the relevant circumstances of the case. There are many decided cases as to what amounts to carelessness in relation to the completion of a self-assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position…"

167. Thus, the question is not just whether the inaccuracy is due to a failure to take reasonable care by reference to an objective standard: the question is whether PDC, given their own attributes, experience and circumstances, failed to take reasonable care.

168. The evidence is that PC received advice, in person, from a reputable law firm, EMW, that he and DC would be entitled to BADR. DC reasonably relied on the account given to her by her husband PC and reasonably believed that BADR would be available to her. EMW were on notice that ER was required.

169. The evidence is that the availability of BADR was a central requirement of the tax advice sought from EMW on behalf of all outgoing shareholders and this was made clear to EMW. Following the redistribution of a small number of shares, of which EMW was fully aware, EMW did not suggest that entitlement to BADR might be impugned for PDC.

170. When PDC reviewed the returns before they were submitted to HMRC, the returns accorded with PDC's expectations as regards the claim to BADR. In all the circumstances, PC was reasonably entitled to rely on the assurance given to him by EMW that BADR would be available; and the inaccuracy in the returns submitted for PDC was not due to a failure to take reasonable care on their own part.

171. The evidence is that IW, submitting the returns to HMRC as appointed agent for PDC, was told by PC and by DS that the entitlement to BADR had been confirmed by EMW and that he should accept that analysis. IW knew that EMW was fully aware of the redistribution of shares. It was therefore reasonable of IW to accept instructions based on the assurance given by EMW to PC; and the consequent inaccuracy in the returns that he submitted for PDC was not due to a failure to take reasonable care on his part.

172. Following *Elizabeth Mariner v HMRC* [2013] UKFTT 657 (TC), whilst it is usual for the actions of an agent who is a mere functionary to be attributed to the taxpayer for whom the agent is acting, that is not an absolute rule. At para.25, the Tribunal (Judge Geraint Jones QC) said:

> "In our judgement, where an accountant acts as a mere agent, administrator or functionary, he is acting as the taxpayer's agent and his default (whether negligent or not) will usually provide a taxpayer with little opportunity to claim that he is not in default of a particular obligation. However, when a professional person acts in a truly professional advisory capacity, the situation is otherwise and reliance upon properly provided professional advice, absent reason to believe that it is wrong, unreliable or hedged about with substantial caveats, will usually lead to the

conclusion that a taxpayer has not been negligent if she has taken and acted upon that advice".

173. Thus, Judge Jones QC provides a complete answer to the question of whether the inaccuracy in PDC's returns was due to a failure to take reasonable care, *sc.*:

> PDC relied on the advice of EMW which they had no reason to believe was wrong and so did not fail to take reasonable care.
>
> IW was instructed to claim BADR based on the assurance provided to PDC by EMW, which he had no reason to believe was wrong and so he did not fail to take reasonable care.

174. Even if it was held that IW did fail to take reasonable care, that failure cannot be attributed to PDC because, para.18(3) sch24, attribution is prohibited if PDC "took reasonable care to avoid inaccuracy". In this case, PDC took advice from EMW and were satisfied that their returns as submitted reflected that advice, so that they had no reason to believe that their returns were inaccurate.

175. PDC say that they were at no time were they relying on advice from DS.

176. The case of *Mr J R Hanson v HMRC* [2012] UKFTT 314 (TC) considered the operation of Sch.24 para.18 at length. Discussing the range of criteria involved in assessing whether a taxpayer has taken reasonable care to avoid inaccuracy, the Tribunal (Judge Jonathan Cannan) ("the Hanson Tribunal") said at [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".

177. The Tribunal continued at [24]:

> "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".

178. In finding that Mr Hanson had taken reasonable care to avoid inaccuracy, so that his agent's careless failure could not be attributed to him, the Tribunal said at [33]:

> "I have come to the conclusion that the appellant did take reasonable care. He instructed an ostensibly reputable firm of accountants who had acted as his accountants for many years. The matters on which he instructed them were ostensibly within their expertise. He had no reason to doubt their competence or

their advice that relief was available. They were in possession of all relevant facts. In the circumstances of this case the appellant was entitled to rely on CBF's advice without himself consulting the legislation or any guidance offered by HMRC. I suppose that the appellant might have asked Mr Clarke for a technical analysis of why relief was available although Miss Shields did not criticise him for not doing so. In my view in the circumstances of this case that would be a counsel of perfection. Failure to do so does not demonstrate a lack of reasonable care on the part of the appellant".

179. The case of *Carrasco & Carrasco v CHMRC* [2016] UKFTT 731 (TC) makes a similar point. In discussing whether Mr & Mrs Carrasco had taken sufficient care to avoid an attribution of their agent's carelessness to them by way of para.18(3), the Tribunal (Judge Geraint Jones QC and Ms Howell) ("the Carrasco Tribunal") said at [25]:

> "In our judgement when a person seeks appropriate professional advice from somebody who is a professed expert in the applicable discipline, it will almost always be reasonable for the person who has sought out such advice to rely upon that advice provided only that that person has selected a seemingly competent professional adviser, unless there are factors to the knowledge of the recipient of the advice which indicate to him/her that it ought not to be relied upon. In our judgement such factors would have to be reasonably obvious rather than subtle or such as might only be picked up by a fellow professional. It was not argued by the respondents that on the facts of this case the situation falls into that latter category".

180. In the instant case, an ostensibly reputable firm of solicitors had been instructed, the availability of BADR was ostensibly within their expertise and advice on BADR had been provided to PC in person. PDC had no reason to doubt the firm's competence and no obvious reason to doubt that BADR was available. The solicitors were in possession of all the relevant facts but did not indicate that relief was not due. PDC were entitled to rely on their advice and on progress of DS and NB being both outgoing and continuing shareholders. To ask Mr Wake to review the entitlement to BADR again would have been a counsel of perfection and not doing so does not mean that PDC did not take reasonable care to avoid inaccuracy.

181. PDC say the issue of the separate legal persons between DWIFA and PDC relate to a distinction of no significance. The advice was given to the company and specifically to DS and NB merely as a means of channelling and distributing information and advice. The Share Purchase Agreement which was a major component of the work being carried out by EWM was only for the shareholders and not the company. In addition, the advice from EWM was not generic.

The suspension appeals

182. By para.14 sch24, if a penalty is levied under sch.24 para.1 for giving a document to HMRC containing an inaccuracy due to a failure to take reasonable care, HMRC may suspend that penalty. Para.14 says:

> "(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.
>
> (2) A notice must specify—

(a) what part of the penalty is to be suspended,

(b) a period of suspension not exceeding two years, and

(c) conditions of suspension to be complied with by P.

(3)HMRC may suspend all or part of a penalty only if compliance with condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify—

(a) action to be taken, and

(b) a period within which it must be taken.

(5) On the expiry of the period of suspension—

(a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

(b) otherwise, the suspended penalty or part becomes payable.

(6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable".

183. A refusal to suspend a penalty may be appealed under paragraph 15(3) sch24. Paragraph 17(4) sch24 says, so far as relevant:

> "On an appeal under paragraph 15(3) the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed…"

184. However, paragraph 17(6) sch24 says, so far as relevant:

> "In sub-paragraph … (4)(a) 'flawed' means flawed when considered in the light of the principles applicable in proceedings for judicial review."

185. HMRC have a permissive and not a discretionary power and specifically paragraph 14(3) sch24 does not mean avoid another penalty it is to help to avoid carelessness.

186. In essence the provisions relate to behaviour and not the inaccuracy itself and said distinction must be made between the behaviour and the specific inaccuracy which resulted in the penalty.

187. Thus, the starting point is to consider whether HMRC's decision is 'flawed' in that sense, which it would be if it was based on an error of law, irrational or 'Wednesbury' unreasonable, (by reference to the principle derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223 that a decision by a public body is so unreasonable that no reasonable person acting reasonably could have made it).

188. Many cases have considered the meaning and operation of paragraph 14 sch24 and whether refusals to suspend are flawed. In *Anthony Fane v CHMRC* [2011] UKFTT 210 (TC), the Tribunal (Judge Brannan), (" the Fane Tribunal") finding against Mr Fane, observed at [58]:

> "The important feature of paragraph 14(3) is the link between the condition and the statutory objective: there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties."

189. The Tribunal continued at [60]:

> "On the face of the wording of paragraph 14(3) there is no restriction in respect of a "one-off event". Nonetheless, it is clear from the statutory context that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension …."

190. Those observations are correct: merely undertaking not to make mistakes in future is not a condition at all, but a mere aspiration.

191. *David Alan Webb v HMRC* [2016] UKFTT 364 (TC) adopted the reasoning in *Fane,* finding against Mr Webb.

192. *David Collis v HMRC* [2011] UKFTT 588 (TC) was an unusual case insofar as there was no appeal against suspension and thus no decision on that point. However, the Tribunal said that had the point been before it they would have adopted some of the approach in *Fane*, although notably not that part that found that suspension was not available for one-off errors.

193. Both *Fane and Webb* drew heavily on HMRC's internal instructions and other non-statutory material in arriving at their decisions. Subsequent decisions have focussed more closely on purposive construction of the statutory provisions.

194. In *Philip Boughey v CHMRC* [2012] UKFTT 398 (TC) the Tribunal (Judge Geraint Jones QC) (" the Boughey Tribunal") said at [14]:

> "When I look at the letter of 22 June 2011 it is plain beyond doubt that the respondent's decision is flawed. That is because the writer of the letter has proceeded on the basis that he must set a condition "that is specific to the careless inaccuracy". That is not a statutory requirement; nor is it implicit in the statutory regime set out in Schedule 24".

195. The Tribunal continued at [17]:

> "As I find that the decision-making process by the respondent was flawed because it was based upon an error of law, I have to exercise my discretion upon the appellant's request for suspension".

196. In *David Testa v HMRC* [2013] UKFTT 151 (TC), the Tribunal (Judge Kevin Poole and Ms Debell), ("the Testa Tribunal") finding for the taxpayer, talked at 36 of:

> "… the danger of taking too narrow a view of the legislation. It has been drafted deliberately broadly and HMRC should not be placing unwarranted limits on it by reference to general policies which exclude whole classes of case which, in our view, would have been intended to be covered by it".

197. In particular the Testa Tribunal disagreed with HMRC's contention that suspension could not be applied when the original inaccuracy was a one-off error; and of the view expressed in *Fane* at 65 that "a one-off error would not normally be suitable for a suspended penalty is understandable and, in our view, justified", the Tribunal said at [25]:

> "As to paragraph [65] however, we feel that as a general statement it must be treated with care. It was made in the context of the particular condition suggested by the appellant in that case, which amounted (in the Tribunal's view) to little more than "a condition not to submit careless inaccuracies in future tax returns".

198. There was then a series of cases in the second half of 2016 that all found in favour of the taxpayer, and which evolved an interpretation of paragraph 14 sch24 that PDC contend is correct and that it invites the Tribunal to follow.

199. In *Paul Ronald Steady v HMRC* [2016] UKFTT 473 (TC), Mr Steady had entered an incorrect figure for bank interest in his return. HMRC charged a penalty; and although Mr Steady offered as a suspensive condition to maintain a schedule of bank interest received in subsequent years, HMRC refused to suspend it on the grounds that it was a one-off error and that keeping a schedule was no more than a reasonable taxpayer would do.

200. The Tribunal (Judge Aleksander & Mr Stafford) (The Steady Tribunal"), finding for Mr Steady, said at [27]:

> "We find that HMRC's decision to refuse to suspend penalties is flawed, as they have reached a decision that is Wednesbury unreasonable. In essence, HMRC have fundamentally misinterpreted the operation of paragraph 14 of Schedule 24."

201. The Tribunal continued at [28]:

> "Mr Steady's case is not on all fours with Fane. In *Fane*, the suspension condition being considered was merely that Mr Fane file accurate self-assessment returns in future. In Mr Steady's case, it is proposed that a detailed schedule of his savings accounts is kept, and that this will help him to ensure that his tax returns are accurate in future. It matters not that a prudent taxpayer might keep such a schedule (although we would question whether a typical prudent taxpayer would keep such a schedule) – indeed it could be argued that the purpose of the suspension conditions is to bring the standard of compliance of the careless taxpayer up to the standard of a prudent taxpayer. We are satisfied (and find) that a requirement to maintain a schedule of the sort described by Mrs Foyle, would be a practical and measurable condition (e.g. improvement to systems) which would help Mr Steady to achieve the statutory objective that his tax returns should be free from errors caused by a failure to exercise reasonable care."

202. The case of *Eric Eastman v CHMRC* [2016] UKFTT 527 (TC) provides the most comprehensive and succinct account of the meaning and application of Sch.24 para.14. At [33], the Tribunal (Judge Berner & Mr Robinson) ("the Eastman Tribunal") set the scene as follows:

> "It is necessary, in order that HMRC can operate fairly amongst all taxpayers, that guidance is issued to officers tasked with the exercise of a discretion such as that which applies to the question of the suspension of a penalty. But that guidance should go no further than is required to ensure consistency of approach. It should not fetter the discretion of an HMRC officer otherwise than is consistent with the legislative scheme itself. If it does, then any decision which is constrained in that way will be likely to be flawed in the sense provided for by para 17(6)."

203. At [39], the Tribunal observed that:

> "We have to say that this emphasis on the type of the inaccuracy remains vulnerable to the criticism that it unreasonably fetters the discretion of HMRC. All that para 14(3) requires is that the conditions or conditions would help the taxpayer avoid further penalties for careless inaccuracy. There is no necessary link between the type of inaccuracy and the possibility of further penalty".

204. The Tribunal continued at [41]:

> "In the same way that the penalty for careless inaccuracy seeks to deter careless behaviour and penalise it, para 14 recognises that the imposition of conditions may alter behaviour so as to avoid that behaviour being repeated. It is therefore necessary, in exercising a discretion, for the decision-maker to have regard to the underlying behaviour that has given rise to the penalty and to determine whether a condition may be imposed to affect or obviate that same behaviour in the future. That is not something that is confined to the nature of the original inaccuracy, including whether it arose as a consequence of a one-off event that is not expected to be repeated."

205. Turning to the nature of conditions that might be imposed, the Tribunal said at [43]:

> "In considering whether any appropriate conditions may be imposed, the acid test, in our view, is to ask what the taxpayer could reasonably have done differently that would have avoided the original inaccuracy. That, in different words, is a similar approach to that adopted most recently by the tribunal in *Paul Ronald Steady v Revenue and Customs Commissioners* [2016] UKFTT 0473 (TC) where it said, at [28], that it could be argued that the purpose of the suspension conditions is to bring the standard of compliance up to the level of a prudent taxpayer. Having ascertained what could have been done in that respect, the question is whether, educated by that answer, a condition may be imposed which would help avoid future careless inaccuracies. As a penalty would not differentiate between types of inaccuracy, the condition must encompass all risks of future careless inaccuracy that can reasonably be identified".

206. The Tribunal continued at [49]:

> "Although it can readily be appreciated that a systemic failure may be particularly susceptible to conditions aimed at remedying such failure, the legislative scheme is not confined to such failures. If the inaccuracy has been brought about by human error, the proper question to be addressed is whether there is scope for the risk of human error in the future to be minimised. The enquiry should not stop with the identification of a human error; it should start with it".

207. At [50], the Tribunal considered whether the grounds given for rejecting suspension, which, being focused on records, mirror those given by the Reviewing Officer in this case, were flawed. Finding that they were, the Tribunal said:

> "That review was not one that could have been made by a reasonable reviewer; it was unreasonable in its assertion that a penalty suspension condition would have to address an ongoing record-keeping system or something similar, and that because Mr Eastman could simply have taken more care the inaccuracy could not be considered as having resulted from a weakness in process or record-keeping system

that Mr Eastman had in place. That failed to consider the relevant question whether there was anything Mr Eastman could have done that could reasonably be considered would have obviated the error, and whether the imposition of a condition requiring that to be done in the future would help avoid a repetition."

208. The case of *Patrick Miller v HMRC* [2016] UKFTT 0801 (TC) drew on *Eastman*; and having reviewed and approved Judge Berner's analysis the Tribunal (Judge Popplewell) ("the Miller Tribunal") set out his approach to identifying a suitable suspensive condition at 50:

> "For the reasons given above, I think … the correct test is the two-fold test set out [in Eastman]; namely;
>
> Firstly, one must ask what the taxpayer could have reasonably (and proportionately) done differently that would have avoided the original inaccuracy; and
>
> Having decided what could have been done in that respect, whether, educated by that answer, a condition may be imposed which will help avoid future careless inaccuracies."

209. Against that background, PDC invite the Tribunal to find that the reasoning behind HMRC's refusal to suspend was flawed and their decision likewise. The reasons why the Officer refused to suspend the penalty were set out in his letter of 14 September 2022 as follows:

> "I note your point in response to my previous mention of "similar" inaccuracies and would explain that this is not a reference to the legislation but to HMRC guidance on suspension of penalties as per the previously issued factsheet CC/FS10. The legislation at FA 2007 Sch.24 paragraph 14 is not specific regarding which careless errors could be avoided in the future through any suspension conditions as you point out. However, the point remains that I cannot see any future careless error(s) that could be avoided by setting a suspension condition in this case.
>
> As mentioned in my previous correspondence, the legislation states that HMRC may suspend a penalty, only if compliance with a condition of suspension would help a taxpayer to avoid becoming liable to further penalties for careless inaccuracy. Your response suggests a condition relating to your clients seeking individual advisors that will consider only your clients particular circumstances, in the event any further advice is required. This condition would unfortunately not meet the suspension criteria for several reasons.
>
> Firstly, a promise to check with an advisor in future is not a measurable condition. I would refer again to CC/FS10 which sets out that any suspension condition must be specific, measurable, achievable, realistic and timebound. The condition does not relate to a definite specific action, but rather an action that could be taken if the situation arose. Furthermore, such a situation may not arise within the suspension period and therefore again this would be a suspension condition which does not meet the criteria set out in the legislation (as above) as the condition will not have avoided any future careless errors. Also, were this to be the case, adherence to the condition could not be measured. Additionally, seeking appropriate advice where

> required, to meet tax obligations is a responsibility already expected of reasonable taxpayers, regardless of a suspension condition. It's everyone's own responsibility to get their tax right. As mentioned above, in HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice. Therefore, due to the points raised above I can't see how appropriate suspension conditions can be set to avoid a future careless inaccuracy and allow the penalties to be suspended."

210. This reasoning was adopted as the Officer's 'view of the matter' in his letter of 4 November 2022. That was notwithstanding that the Officer had had an opportunity to consider PDC's revised proposal for a condition of suspension submitted in IW's letter of 17 October 2022, which said:

> "We can understand your view that promising to do something contingently in the future may not be a suitable condition for suspension. However, our proposal is that each year, with immediate effect, our client should have a formal minuted, in-person meeting with a partner in this firm specifically to review each entry on the return before the return is submitted. Had that happened in this case, the anomaly between the client's circumstances and the advice received would have become apparent, enabling a further review to be undertaken and the inaccuracy obviated. It is beyond question that undertaking such a pre-submission review is a condition that will "help [our client] to avoid becoming liable to further penalties", as sch.24 para.14(3) FA 2007 requires, not just in relation to complex technical matters but across the board. Please note that the language of the statute only requires that the likelihood of a further careless error occurring is reduced ("help … to avoid"), reflecting Parliament's wish to change careless behaviour wherever possible if that can be done, rather than simply to penalise. The condition we propose does exactly that and therefore fully meets the requirements of the statute (as well as the non-statutory requirements of HMRC's instructions). We note in passing that our experience is that where this condition has been proposed, it has been accepted by HMRC: and our client would be treated inconsistently were you not to allow suspension based on this condition."

211. The Reviewing Officer also refused to suspend the penalty in her review conclusion letter of 16 December 2022 , saying:

> "In order to suspend a penalty for a careless inaccuracy, HMRC must be able to set at least one specific suspension condition that would help a person to avoid becoming liable to a further careless inaccuracy under Paragraph 1. In your case I am unable to identify a careless inaccuracy that will be avoided by setting conditions. There is no underlying weakness in your record keeping etc, and therefore suspension does not appear to fit in your case".

212. PDC contend that neither of these decisions is in accordance with the requirements of paragraph 14 sch24; that they constitute errors of law; and that the decisions thus frustrate the clear intention of Parliament in enacting that provision. Further, neither Officer seems to have considered the revised condition for suspension put forward by PDC in Mr Wake's

letter of 17 October 2022, which they should have done, so they have not taken all relevant matters into account.

213. It follows that the refusal of HMRC to suspend the penalties is flawed in the sense used in paragraph17(6) sch24, since HMRC is obliged to act in accordance with the law taking into account all relevant facts and no reasonable Officer acting reasonably could or should have made that decision.

214. In particular, sch.24 para.14(3), the 'operative clause' of para.14, says:

> "HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy."

215. Sch.24 para.1 penalises taxpayers who give a document to HMRC (here – and in most cases – a tax return) which contains an inaccuracy due to a failure to take reasonable care (a careless inaccuracy). What Parliament is doing in para.14(3) is offering the possibility of escaping a penalty for a careless inaccuracy in return for satisfying a condition that reduces the likelihood of a taxpayer giving a document to HMRC in the future that contains an inaccuracy due to a failure to take reasonable care.

216. In other words, para.14(3) is aimed at changing the behaviour of taxpayers by incentivising them to take more care; and Parliament sees the financial cost of the suspension and possible cancellation of a penalty as a worthwhile opportunity cost for securing better compliance amongst the careless.

217. Importantly, there is nothing either express or implied in para.14(3) that requires a particular class of inaccuracy to be identified before suspension is possible, nor for it to be of the same kind as the inaccuracy giving rise to the penalty – which of course would be impossible because it is in the nature of carelessness that its consequences are unforeseen.

218. On the contrary: the absence of a definite or indefinite article in para.14(3) – in other words "… penalties under paragraph 1 for careless inaccuracy rather than "for the careless inaccuracy" or "for a careless inaccuracy" – makes it unequivocally clear that specificity as to the kind of inaccuracy is not required. Thus, the Officer's view that "… the point remains that I cannot see any future careless error(s) that could be avoided by setting a suspension condition in this case" and the Reviewing Officer's statement that "In your case I am unable to identify a careless inaccuracy that will be avoided by setting conditions" are wholly misconceived and are errors of law. Both Officers are asking the wrong question.

219. Further, there is no requirement for the condition set to eliminate entirely all possibility of careless inaccuracy in the future – which would be impossible because carelessness by its very nature is unrecognised at the time – and once again Parliament recognises that by sensibly providing in para.14(3) that (emphasis provided):

> "a condition of suspension would help P to avoid becoming liable to further penalties."

220. Similarly, Parliament has wisely put no limits on the nature of the condition to be set as long as it will achieve the statutory purpose of helping a taxpayer to avoid becoming liable to further penalties under para.1, any condition is acceptable. HMRC's requirement that conditions should be 'SMART' (specific, measurable, achievable, realistic, time-bound)

before they can be accepted is a gloss on the statute with no basis in the statutory language, imposing a non-statutory hurdle that fetters HMRC's discretion and that often results in suspension being wrongly refused, as it has been in this case.

221. Thus, by the Officer couching his entire rationale for refusing suspension in terms that both expressly and implicitly refer to HMRC's non-statutory published criteria and by the Reviewing Officer saying that "There is no underlying weakness in your record keeping etc, and therefore suspension does not appear to fit in your case", both the Officer and the Reviewing Officer restrict the scope of the statutory enquiry that they should be making and fetter their discretion by using non-statutory and irrelevant criteria to justify their refusing to suspend, amounting to an error of law. Their decisions are therefore flawed in the sense meant by paragraph 17(6) sch24.

Conclusion and decision sought

222. PDC say that the errors in their tax returns arose because there were too many assumptions. There was no issue with their belief that they could not obtain PR. IW assumed that advice from DS on ER was well-founded and did not need to check it. As, however, the entire correspondence was done remotely and not in person the likelihood of an error increased. The process of completing tax returns by email fell down and something happened that needed more interrogation.

223. PDC say that it does not matter that they are not going to be any more share disposals in relation to the condition for suspension and that the proposal put forward will reduce the likelihood of inaccuracies and furthermore the conditions they suggested meet the SMART criteria.

224. PDC submit that:

> PDC did not fail to take reasonable care within the meaning of paragraph 3 sch24 when submitting their tax returns because they reasonably relied on the advice provided by reputable solicitors as regards BADR, which they reasonably believed was correct and had no obvious reason to believe was wrong.
>
> IW did not fail to take reasonable care within the meaning of paragraph 3 sch24 when submitting returns on behalf of PDC because he was instructed by PDC to claim BADR on the basis of the advice provided by reputable solicitors to PDC.
>
> Any failure by IW is not attributable to PDC in any case because PDC took reasonable care to avoid careless inaccuracy within the meaning of paragraph18(3) sch24 by relying on the advice of reputable solicitors which they had no obvious reason to believe was wrong and which they knew was reflected in their tax returns.

225. In the alternative, if there was a failure to take reasonable care by PDC and a penalty is exigible under paragraph 1 sch24, the decision by HMRC not to suspend the penalty under paragraph 14 sch24 is flawed in the sense described in paragraph 17(6) sch24.

226. Decisions sought:

> That Mr Cox and Mrs Cox did not fail to take reasonable care, either themselves or by attribution and the penalties charged on them should be cancelled.
>
> In the alternative:

That the Tribunal should find that HMRC's decision not to suspend the penalties charged on Mr & Mrs Cox is flawed and that the Tribunal should order HMRC to suspend the penalty and as PDC say HMRC have acted unreasonably an application is made for costs.

TRIBUNAL DECISION

Permission to notify the appeals

227. This tribunal ("the tribunal") considered the submissions made by PDC, to which HMRC had no objections, and accordingly confirmed that permission is granted for PDC to notify their appeals outside of the post review period.

The penalty appeals

228. The burden of proof is on HMRC to demonstrate that the inaccuracy in PDC's return is, on the balance of probabilities, due to a failure to take reasonable care.

229. The inaccuracy in the return, which is the subject of the appeal, is a claim made for ER/BADR which failed because a basic condition to obtain relief, principally, the 5% shareholding, was not met. The amount of tax that was subsequently due, based on a corrected amount of disposal proceeds received by PDC, was approximately £215,000.

230. The basic requirements for ER were that a claim must be made in respect of "qualifying business disposals." The relief applies for CGT purposes only. In relation to the disposal by the outgoing shareholders, there was a minimum shareholding requirement.

231. At the meeting, on 18 April 2019, with the IFA directors and IM and LMS of EWM, LS was able to reassure the IFA directors, and indirectly their spouses, that ER would be available as DS stated by her "going round the table". An exception was that further consideration was required in respect of SW and LW. LW's shares were only acquired on 07 July 2017, according to the Register of Members. PC at that stage took professional advice.

232. DS stated that three matters were raised in relation to each IFA director being the length of ownership of the shares, DWIFA's trading status and "shareholdings". In respect of the latter, DS stated that LS had the information of the outgoing and continuing shareholders respective shareholdings prior to the meeting. He also stated that "everyone knew about the 5% holding rule".

233. No written note or board minute of the meeting of 18 April 2019 was submitted to the tribunal.

234. At the meeting of 18 April 2019, PDC's respective shareholdings were slightly in excess of 6% as against the 5% limit, which did not leave a great "margin of error" to be near to or less than the 5% level, which DS stated that everyone knew about, when subsequent discussions were taken to gift shares,

235. PC was a Financial Adviser authorised to give financial advice to the public and had been a company director for a period of 20 years and was 'used to thinking round all aspects of the transaction when giving advice to clients.' All Financial Advisers, who give advice to the public, are required by the financial services regulator to meet threshold conditions and annual training/professional development which involves basic numeracy and knowledge of taxes and the conditions for reliefs of taxes. DC was also a company director.

236. The mechanism for the sale by the outgoing shareholders to the continuing shareholders was relatively complex and involved a new holding company which in turn involved further tax considerations. The basic ER criteria, which was considered by LS at the meeting on 18 April 2019, was not complex and at that date, PDC's shareholdings qualified for ER which was a paramount consideration for them in relation to the sale of their shares.

237. The subsequent meetings, however, reallocated PDC's shareholdings, prior to the sale of shares, based on relative historic contributions to the company. It was only by gifting shares that PDC failed to qualify for ER and that important change in the percentage holding did not 'register' with PDC. As 10CA were instructed to prepare the relevant Stock Transfer Forms, that important change did not 'register' with them either.

238. It seems that once the principle of redistribution was accepted, the major concern was around how to achieve that transfer and with the CGT and IHT consequences of the gifts of shares by PDC to DS and GS.

239. EWM provided their CoI which did not contract with PDC as clients but with their company, DWIFA. The CoI was entitled 'Tax Structuring Advice' being work "to review a proposed buyout structure and previous buyout clearances and a preliminary meeting to advise on buyout structure from a tax perspective; and a review of the proposed revision to buyout structure and further meeting to advise on buyout structure from a tax perspective."

240. The CoI excluded the "CGT IHT implications of the proposed gifts of B shares." PC and DS construed this is only relating to the holdover relief and inheritance tax implications of the gift of B shares. In his email of 29 April 2019 at 1056, IM referred to "proper sign off of both CGT and IHT".

241. The tribunal did not accept that references to 'CGT IHT' or 'CGT and IHT ' related solely to the holdover relief from CGT and IHT relief on the gifts, notwithstanding that EWM were aware of them, as ER is only relevant for CGT and as EWM were on notice that this was an important consideration.

242. The advice under the CoI was not given directly to PC or DC but to DWIFA. The only meeting that PC had with EMW, IM and LS was on 18 April 2019, when it was established that PDC both owned shares in excess of the 5% limit and met the other criteria for ER.

243. Thereafter, PC relied on the information from EWM that was passed on by DS and/or NB. DC's sole source of information/advice was always PC as she had attended no meetings and had no involvement at all with both the transaction and the advice received. No advice was given directly to PDC after 18 April 2019.

244. The need to obtain separate advice was described by IM as a "technicality" in his email of 24 April 2019 at 1622. He left the option with the shareholders' representatives to 'take a view' on the need for separate advice but this was not chosen.

245. PC stated that for convenience, and as a means of paying for the advice, the fact that DWIFA was "the client" was acceptable but the consequence of this was that PDC did not directly obtain specialist advice from a professional adviser, notwithstanding that they believed they had.

246. Furthermore, as NB and DS decided not to accept IM's offer of "sign off" on tax consequences of the subsequent transfer of shares by PDC to DS and GS, PDC were not

receiving specialist professional advice on their specific and changed circumstances and were also relying on DS's advice on the CGT holdover and IHT consequences of their gifts, which was not relevant to ER.

247. Notwithstanding that NB's and DS's circumstances were quite different from his own, PC relied on what they told him, and DC relied on PC's interpretation of that. NB was a majority shareholder who with his wife held well in excess of 5% of the shares and DS and GS were acquiring shareholders not outgoing shareholders.

248. SW's and LW's circumstances were also different and 'not straightforward' so that they needed specialist advice, which was referred to in the CoI. This was unlikely to be suitable as 'specimen advice' that could be followed by all outgoing shareholders.

249. The tribunal enquired whether the CoI was accompanied by EWM's terms of business, or what IM referred to as "the small print". This had only been provided online and at the date of the hearing the website had changed, and the replacement equivalent was no longer relevant. DWIFA had not retained a copy of it for their files, for whatever reason, so that the context, if any, in which the CoI, may have been issued, including any conditions or terms accompanying it, was unknown.

250. When the revised shareholdings were decided, NB emailed IM, on 29 April 2019 at 1529, stating that "in the first instance we will speak to our accountants re. the share gifting. Hopefully he will be able to reaffirm the position on the proposed CGT. If not and we need Lisa's [LS] input on this point we will let you know". No evidence was produced as to whether NB or DS spoke to the accountants nor whether IW or 10CA reaffirmed the proposed position but in any event LS's input was not obtained for PDC after 18 April 2019.

251. The tribunal considered that PDC had not taken reasonable care in submitting their tax returns and found that PDC did not as a matter of fact seek appropriate advice from a competent professional adviser after the meeting on 18 April 2019 when their circumstances had changed.

252. PDC relied on assurances and information from NB and DS. To the extent that they received advice at the meeting on 18 April 2019 in relation to their paramount wish to obtain ER, they did not seek subsequent advice, nor did DWIFA, following the gift of shares which resulted in the failure to meet the 5% holding limit.

253. The Tribunal agree with the submission made by HMRC that the professional advice was provided not to PDC but to DWIFA regarding tax and buyout structuring issues and that it was not reasonable to rely on the 18 April 2019 meeting advice after having gifted some of their shares.

254. The tribunal considered the attributes, experience and circumstances of PDC. PC was a Financial Adviser and both PC and DC were company directors. In conclusion, PDC had not behaved as a prudent and reasonable taxpayers and their errors did not constitute simple errors or omissions or mere oversights.

255. As Judge Staker stated in *Wald v Revenue & Customs*, "the obligation to file the correct tax returns on the taxpayer and the taxpayer cannot transfer that obligation. If the appellant relies on an accountant to prepare a file a tax return on his behalf, then the appellant will be responsible if the errors in the tax return are due to negligence by the account need not

acting on his behalf… However, that does not normally affect the liability of the taxpayer to a penalty for filing an incorrect return."

256. The carelessness was PDC's not taking professional advice after having been told that they qualify for ER and then changing their shareholdings. PDC did not re-examine that advice in the light of the changed events. They completed their tax returns based on previous advice based on different facts.

257. The tribunal did not, therefore, accept that PDC, relying on DS and NB who raised the issue of the changed shareholdings but who then declined to take specialist advice that was offered to them, can be characterised as acting as of a prudent and reasonable taxpayers and that they were careless and failed to take reasonable care when submitting their tax returns.

258. There was no evidence that PDC had made any attempt to check their tax returns prepared by IW. The tribunal considered that both conditions 1 and 2 of paragraph 1 of sch24 had been satisfied and that the penalty notice had been validly issued.

Suspension

259. Paragraph 14 of sch24 states that HMRC may suspend penalties for a careless inaccuracy. In exercising that discretion, however, HMRC must only act within the framework of the legislation and the jurisdiction of the tribunal is to review the exercise of that discretion according to judicial review principles.

260. There is a specific limitation on the exercise of HMRC's discretion. Paragraph 14 (3) provides that the penalty or part of the penalty can be suspended only if compliance with the condition of suspension "would help the person [liable to the penalty] to avoid becoming liable to future penalties… for careless inaccuracy."

261. A range of FTT cases with differing interpretations on the issue of whether or not a decision not to suspend the penalty was flawed were before the tribunal, none of which, both counsel for HMRC and PDC reminded it, were binding upon it but instead persuasive.

262. Counsel for PDC stated that HMRC's decision not to suspend the penalty was flawed in law and made an application for the costs of the hearing as HMRC had acted 'unreasonably'.

263. The tribunal considered the decision of the Fane Tribunal and their interpretation of paragraph 14 sch24 and in particular paragraph 14 (3).

264. The Fane Tribunal considered that HMRC's indication that a one-off error would not normally be suitable for a suspended penalty was understandable and justified and their view was 'fortified' by reference to the Explanatory Notes published together with the Finance Bill 2007 .

265. Counsel for PDC said that the Explanatory Notes were not part of the legislation. Counsel for HMRC stated that a number of tribunals, which had found in favour of the taxpayer had, incorrectly, not considered them.

266. All the cases referred to accepted or did not disagree with the proposition in *Fane* that the condition[s] of suspension must contain more than just a basic requirement that tax returns should be free from careless inaccuracies ("a basic requirement"). There is no specific definition of what constitutes 'a basic requirement' but HMRC said that seeking appropriate advice when required to meet tax obligations is 'already expected of reasonable taxpayers' and indicated that any condition must be practical and measurable .

267. As stated in *Eastman* at [42] "Every case must fall to be considered by reference to its own facts and circumstances" and a tribunal has to consider whether the conditions amount to no more than carrying out the tasks that reasonable and prudent taxpayers should when submitting their tax returns."

268. The facts in *Eastman* were in relation to a failure to disclose a disposal of shares and in this case a claim for CGT relief that was invalid.

269. Following the logic of the *Eastman* decision, a tribunal has to consider to whether *any* conditions which are general and widely drafted for *any* inaccuracy, and which may have possibility to avoid liability for further penalties for careless inaccuracies, must always require HMRC to suspend the penalty, as a result of their 'discretion having been fettered'.

270. If so, HMRC say the provision would become redundant, and it would provide a 'get out of gaol/jail free card'. The tribunal does not believe that this was the intention of Parliament.

271. Schedule 24 deals with 'Penalties for errors', it is not a schedule dealing with suspensive penalties. Paragraph 14 requires to be read with the other provisions of the schedule.

272. The tribunal rejects an interpretation of paragraph 14 that if conditions are general and wide enough, they will always and necessarily avoid suspension of a penalty for further careless inaccuracies if they amount to more than ' a basic requirement'.

273. The tribunal considered that the conditions put forward by PDC are no more than a basic requirement and the decision to preclude suspension was justified and not flawed on those grounds.

SMART Criteria, 'One Off' inaccuracies and 'Future' Penalties/Careless Inaccuracies

274. Even if the tribunal is wrong in categorising the conditions put forward by PDC as no more than a basic requirement, the tribunal considers that the exercise of HMRC's discretion not to suspend PDC's penalties was in any event not flawed according to judicial review principles.

275. PDC say that HMRC, when applying their SMART criteria for considering conditions, is applying a 'gloss on the statute' and that 'Parliament has wisely put no limits on the nature of the conditions to be set as long as it will achieve the statutory purpose of helping a taxpayer to avoid becoming liable to further penalties.'

276. The tribunal refers to *Eastman* at [33]:

> "….it is necessary, in order that HMRC can operate fairly amongst all taxpayers that guidance is issued to officers tasked with the exercise of a discretion such as that which applied to the question of a suspension of a penalty."

277. Without defining exactly how, the Eastman Tribunal then goes on the say that the guidance should go no further than ensure consistency of approach. It should not though 'fetter the discretion' of an HMRC Officer otherwise than is consistent with the legislative scheme itself. If it does it will be flawed.

278. The SMART criteria are there to achieve, as far as possible, a consistency of approach by HMRC officers and the tribunal considers that HMRC have applied these correctly in their reason for failing to suspend PDC's penalty.

279. PDC had for twenty years submitted faultless tax returns and their system of providing their adviser with information and submitting returns had worked well.

280. The conditions to provide for suspension said they would appoint a separate tax adviser dedicated to their circumstances; obtain written advice from such advisers; have annual meetings with a partner of their accountancy firm prior to the submission of tax returns and a formal minuted in-person meeting with a partner [in the accountancy firm] specifically to review each entry on the return before it was submitted.

281. The tribunal did not agree with Counsel for PDC's assertion that the proposal put forward by PDC on 17 October 2022 was not taken into account by HMRC, as in their review conclusion letter of 16 December 2022, HMRC did not refer to the specific proposals but said that "HMRC must be able to set at least one specific suspension condition that would help a person to avoid becoming liable to a further careless inaccuracy under paragraph [1) of paragraph 14 of schedule 24 of the Finance Act 2007", and did not consider that any one of them did.

282. The conditions put forward by PDC related to an event that was not to be repeated or likely to be repeated within the specified period set down by HMRC who would be attempting to prevent something that "cannot happen".

283. In *Eastman* at [37] the Eastman Tribunal said:

> "….the tribunals were making the valid observation that the statutory framework did not preclude suspension where the inaccuracy had arisen in relation to a 'one off' event…but that it would be unreasonable for HMRC to adopt too rigid approach and thereby fetter their discretion."

284. The tribunal did not consider that HMRC had adopted a rigid approach and, therefore, decided that PDC's inaccuracy was a 'one off' event and automatically precluded suspension. HMRC set out their reasons with reference to the SMART criteria The promise to check with an advisor in future was not measurable and did not relate to a specific action. It could not, HMRC, say be measured.

285. In relation to PDC's condition of taking advice, HMRC say that PDC would gain knowledge of this by the fact of their enquiry. In any event, PDC believed they had taken advice, not just from their accountant, but from a specialist professional adviser, in the form of EMW, but that EMW had failed in their duty of care by not recognising that their change of circumstances negated EWM's previous advice that ER was applicable.

286. This is relevant to considering the 'underlying behaviour which caused the inaccuracy' referred to in *Eastman.* PDC did take advice and thought that this was unchanged when their circumstances changed. For decades they had submitted correct tax returns using an established communication method with their accountant. It is not that they simply took no advice from an accountant or a specialist adviser when submitting their returns; they did.

287. The Eastman Tribunal stated at [39] that the emphasis on the type of inaccuracy:

> "…remains vulnerable to the criticism that it unreasonably fetters the discretion of HMRC. All that para 14(3) requires is that the conditions or conditions (sic) would help avoid further penalties for careless inaccuracy. There is no necessary link between the type of inaccuracy and the possibility of further penalty."

288. The tribunal respectfully disagrees.

289. The tribunal considers that in exercising HMRC's discretion there must be some consideration of the causes of the careless inaccuracy which resulted in the penalty, but the exercise of that discretion should not be entirely specific to that and/or adopted with 'a rigid approach'.

290. The tribunal agrees with the Testa Tribunal at [32] that the use of the word 'further' in paragraph 14(3) implies a link between the type of inaccuracy for which the original penalty has been levied and the type of inaccuracy which might give rise to further penalties and with the Fane Tribunal and the Webb Tribunal decisions that a 'one off' error would not normally be suitable for a suspended penalty.

291. The Testa Tribunal fortified its view by stating that a condition to prevent a future penalty as a result of failure to correctly implement the Construction Industry Scheme would not be appropriate for suspension if the conditions related to improving implementation of the PAYE scheme. It, accordingly, made a link based on their interpretation of 'further'.

292. The Miller Tribunal at [53] specifically refers to the fact that the taxpayer was:

> "…likely to complete further self-assessment tax returns. This is not a "one-off" case."

293. The tribunal considers that the penalty arose for PDC because of a one-off event and HMRC were entitled, if not required, to provide guidance to all their Officers to ensure as consistent as possible decisions, which included consideration of the SMART criteria.

294. HMRC were acting reasonably in considering whether the conditions of suspension, or any conditions of suspension, could avoid a taxpayer becoming liable to further penalties for careless inaccuracy within the period of suspension not exceeding 2 years by applying the SMART criteria.

295. The Eastman Tribunal stated that "it does not matter that the disposal of the business premises was a one-off event or that Mr Eastman no longer has business assets. Nor would it necessarily be a bar to a suspension condition, if he had no other chargeable assets, so long as he had a continuing requirement to make self-assessment returns and thus a risk of a penalty for careless inaccuracy."

296. This suggests that anyone required to make future tax returns and who sets out conditions which may amount to the actions of a reasonable and prudent taxpayer, or little more than that, should have a penalty suspended and brings into question the purpose of having a system of penalties, rather than suspensive penalties, for careless inaccuracies.

297. The tribunal considered that it cannot have been Parliament's intention that the construction of paragraph 14, sch24 should be such that it becomes, as HMRC put it, a "get out of gaol/jail free card" and results in negating HMRC's ability to exercise its discretion.

298. The tribunal considered that there has to be some connection between the careless error and the source of the error; and not none at all.

299. IW did so when he identified what could be done differently by reference to the cause of the inaccuracy and suggested the conditions. It is difficult to understand how HMRC could avoid viewing this from a similar perspective.

300. PC was a qualified Financial Adviser who would be cognisant of the transaction elements of income tax and CGT. IW was content with the method of operation of completing PDC's tax returns and, in any event, PDC cannot transfer responsibility from IW as it remains with them.

301. The history over the previous 20 years, prior to the submission of the 2019-20 tax return, was that PDC had accurately and competently completed their tax returns without requiring any of the conditions proposed for suspension of their penalties.

302. The tribunal agreed with HMRC's submission that the proposals to meet with a partner and go through the tax return did little more than transfer what had been carried out electronically to a face-to-face meeting.

303. HMRC said in respect of the proposals, that they could identify "no underlying weakness in your record keeping etc. and therefore suspension does not appear to fit in your case."

304. The error was in relation to a 'one-off' event which was out of the ordinary for the completion of PDC's tax returns.

305. If there was no serious contemplation of further out of the ordinary events, there would be little likelihood of the proposed change of behaviour having any effect on future carelessness.

306. Accordingly, the tribunal considered that the connection referred to in *Fane* between the event and behaviour is relevant and that in the case of PDC was evident.

307. The tribunal considered; that the conditions put forward by PDC amounted to no more than a basic requirement that their tax returns should be free from careless inaccuracies; that that the conditions should be and were reviewed by HMRC who carried out their due diligence in a practical and measurable manner by using the SMART criteria to achieve the statutory objective to consider whether the penalty should be suspended; and that the inaccuracy was a 'one off' error which would not normally be suitable for a suspended penalty, and that is applicable in this case.

308. HMRC's decision process was not flawed and there are no grounds for HMRC's decision not to suspend the penalty to be set aside.

309. The appeal is dismissed and PDC's application for costs is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

310. 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.

WILIAM RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

Release date: 06th JUNE 2024