Neutral Citation: [2024] UKFTT 00717 (TC)

Case Number: TC09257

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal references: TC/2023/08797
TC/2023/08801

CORPORATION TAX and INCOME TAX – section 455 assessments visited on the first appellant – upheld in slightly reduced amounts – appeal dismissed – penalties – upheld – appeal dismissed – discovery assessment visited on second appellant – validated by s114 TMA – appeal dismissed – corresponding penalty assessment – upheld – appeal dismissed

Heard on: 4 July 2024
Judgment date: 1 August 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MRS SONIA GABLE

Between

TSS FIRE LIMITED (1)
MR PAUL PORTER (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Nathaniel Monk of TM Sterling Ltd

For the Respondents: Martin Priestley litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The first appellant (or "**the company**") has been assessed to corporation tax under section 455 Corporation Tax Act 2010 ("**section 455**") for four accounting periods as a result of loans made to the second appellant (or "**Mr Porter**"). The company has also been assessed to penalties for these periods. The section 455 tax is £58,394.82, and the penalties amount to £35,036.89.

2. The second appellant has been assessed to income tax of £38,217.30 for the tax year ended 5 April 2017. This arises from the write-off of £100,324 owed by him to another company controlled by Mr Porter. He has also been assessed to a penalty for £21,401.68, which was reduced on review to £13,375.05.

3. The appellants have appealed against both the tax assessments and the penalty assessments.

4. During the hearing, Mr Monk, representing the appellants, accepted that as the first appellant was unable to provide any financial evidence to challenge HMRC's revised section 455 assessments, he was prepared to agree that they should be upheld and that the first appellant's appeal against those assessments (in the revised amounts) should be dismissed.

5. He also withdrew the technical challenge to the discovery assessment issued to the second appellant (the assessment wrongly stated the additional income tax liability as being £100,324, rather than £38,217.30).

6. The focus, therefore, of the hearing concerned the penalties visited on both appellants, and the law and facts set out below reflect this.

THE LAW

7. The law relating to penalties is set out in the appendix. Words and phrases defined in the appendix bear the same meaning in the body of this decision.

EVIDENCE AND FACTS

8. We were provided with a substantial bundle of documents. Officer Ben Biswell ("**Officer Biswell**") tendered witness statements and gave oral evidence on behalf of HMRC on which he was cross examined by Mr Monk. From this evidence we make relevant findings as follows:

Background

The company

(1) During the periods under appeal the company was owned by Mr Porter and his wife ("**Mrs Porter**"). Mr Porter was the sole director and has at all times exercised full control over the company.

(2) The company was incorporated on 28 May 2012 and commenced trading on 1 September 2012. It took over the trade of another company controlled by Mr Porter, Trojan Safety Systems Ltd ("**Trojan**"), which was subsequently liquidated with outstanding debts to creditors (primarily HMRC), and £100,324 of debt owed by Mr Porter was written-off.

(3) According to a meeting with the first appellant on 17 October 2018, the company's trade was the installation, maintenance and testing of electrical and fire alarm systems. Their only customer was Oakray Ltd ("**Oakray**"), who contracts work to the company. Oakray had large contracts with local authorities.

(4) HMRC commenced compliance activity in relation to the company on 11 February 2014, when they opened a VAT, PAYE and CIS check. This activity culminated in a referral to HMRC's Fraud Investigation Service ("**FIS**"), who offered the first appellant the opportunity to enter the Contractual Disclosure Facility ("**CDF**") on 23 March 2017.

(5) On 2 June 2017, the company's agent submitted a CDF acceptance and outline disclosures for Mr and Mrs Porter to HMRC. The covering letter included the following statements with respect to Mr Porter:

> "We understand why you opted to issue a cop9 in terms of the difficulty in getting to the bottom of what has occurred, a difficulty that we share".
>
> "It is however clear to us that the taxpayer has sanctioned the submission of returns by his accountant recognising that those returns were not accurate. He had failed to provide them with various aspects of relevant information necessary to enable them to accurately complete his return and as such this constitutes fraudulent behaviour".

(6) In Mr Porter's outline disclosure, he stated:

> "In relation to TSS Fire Limited, I drew funds without operating any form of appropriate PAYE or dividend allocation procedure. I benefited by paying insufficient tax".

(7) On 7 September 2018 at the offices of the appellants' agent, a meeting was held between, amongst others, Officer Biswell and Mr Porter. The notes of that meeting are dealt with below.

(8) On 6 December 2018, representatives of the appellants and HMRC met together to discuss the scope of the disclosure reports of Mr and Mrs Porter.

(9) On 21 August 2019, the appellants' representatives shared a "draft" disclosure report for Mr Porter. With respect to the company, this stated:

> "….we are currently working with the accountants, Phillip T Chave & Co. To quantify any potential tax liabilities. These will be presented to HMRC by 26th August 2019".
>
> "We are aware of payments made from Trojan Safety Systems to TSS Fire Ltd before the liquidation of the company. The payments feature in the analysis section of the report".

(10) The Analysis section of the report was blank apart from a heading and the line: "To be attached".

(11) On 13 September 2019, the agent submitted:

> (a) Mr Porter signed a statement of full disclosure for the period 2011 to 2019, adopting the previously shared "draft" disclosure report alongside an Excel spreadsheet containing further analysis, dated 5 September 2019.
>
> (b) Mr Porter's statement of assets as at 5 September 2019.

(c) The agent's analysis of Mr Porter's director's loan account ("**DLA**") with the company for the accounting period ending 31 May 2013 through to 2018, plus income summaries for Mr Porter which fed into their revised tax calculations. The analysis profiled the amounts of Mr Porter's personal expenditure, which was paid by the company and therefore ought to have been debited to his DLA.

(12) On 2 December 2019, HMRC wrote seeking further information from the first appellant, stating that they had not been provided with sufficient information and evidence to test the conclusions of the disclosure report.

(13) On 24 January 2020, Officer Biswell collected paper records from the agent in person. These included bank statements of Mr Porter and the company, Barclaycard statements addressed to "Mr Porter, TSS Fire Ltd", plus the company's invoices. The review of these records was delayed by the closure of HMRC's offices during the pandemic.

(14) On 2 February 2022, HMRC wrote to the agent expressing concerns that Mr Porter's DLA with the company was substantially overdrawn. Officer Biswell set out his calculations for the section 455 charges that resulted from amending the DLA to account for payments between the bank accounts of the company and Mr Porter.

(15) On 27 April 2022, HMRC sent a penalty explanation letter setting out their view of the company's behaviour and culpability to penalties under Schedule 24 Finance Act 2007.

(16) On 13 June 2022, HMRC issued the section 455 assessments to the company.

(17) On 19 October 2022, HMRC issued penalty assessments to the company.

(18) On 28 October 2022, the company appealed against the section 455 assessments.

(19) On 22 November 2022, the company appealed against the penalty assessments.

(20) On 23 February 2023, HMRC offered a review of the decisions which was accepted on 27 March 2023.

(21) On 31 May 2023, HMRC issued a review conclusion letter in relation to both. The review officer noted that the assessments had overlooked personal expenses paid by the first appellant on behalf of Mr Porter that had been identified within the disclosure report. The review officer upheld the percentage of the penalty and proposed applying this to the uplifted potential lost revenue, thereby increasing the penalties.

(22) The company notified its appeal to the Tribunal on 29 June 2023.

Mr Porter

(23) Mr Porter was the director and majority shareholder of Trojan from its incorporation on 19 February 2000 date until the appointment of a voluntary liquidator on 23 April 2013. On 27 October 2016, Trojan was dissolved.

(24) In the outline disclosure report of 2 June 2017, Mr Porter stated that the records of Trojan "… Were not properly kept and correct amount of tax is not paid on drawings and Corporation tax was not paid. Records were falsified".

(25) On 30 May 2018, Mr Porter submitted his 2017 tax return. This declared £60,000 of income from dividends from UK companies and employment income of £8,060 all of which derived from the company.

(26) At a meeting between Mr Porter and HMRC on 7 September 2018, Mr Porter told HMRC that when Trojan went into liquidation his DLA was overdrawn by £110,000. On 21 August 2019 Mr Porter sent HMRC a disclosure report in which he stated that the liquidator had determined that the total director's loan outstanding to Trojan at the date of liquidation was £115,324. He had repaid £15,000, and the balance of £100,324 was written off.

(27) On 13 June 2022 Officer Biswell completed an internal form to direct a support team that an assessment should be raised in respect of Mr Porter's 2017 return, increasing the dividend figure in that return by £100,324.

(28) On 15 June 2022, HMRC issued a notice of assessment to Mr Porter assessing him to additional income tax of £100,324.

(29) On 19 October 2022, HMRC issued a penalty assessment for £21,401.68.

(30) On 22 November 2022, Mr Porter appealed against the penalty.

(31) A review was offered to Mr Porter which he accepted. On 31 May 2023, HMRC issued their review conclusion letter. The review officer concluded that the penalty should be varied to £13,376.05, representing 35% of the potential lost revenue of £38,217.30.

(32) Mr Porter notified his appeal to the tribunal on 29 June 2023.

The meeting notes

(33) In the notes of the meeting which took place on 7 September 2018, Mr Porter indicated that he did not agree with some of the statements set out in his outline disclosure, namely the statements: "Records were falsified" and "in relation to TSS Fire Ltd, I drew funds without operating any form of appropriate PAYE or dividend allocation procedure. I benefited by paying insufficient tax".

Officer Biswell's evidence

(34) Officer Biswell was not satisfied that the disclosure report was of a proper standard, and he had no confidence in its accuracy. It contained no calculation of any section 455 liability for the company nor any calculation of the penalties for inaccuracies in the returns of the company. He considered that Mr Porter had reneged on a previous commitment under the CDF to make good the loss of tax which he had estimated, in his outline disclosure, as being £250,000 as a result of deliberate behaviour.

(35) Accordingly, he requested (and was given) further records. He carried out a full analysis of the company's turnover position from the bank account statements and compared this with the turnover shown in both the corporation tax and the VAT returns. He then undertook an analysis of the payments into Mr Porter's bank account and from the company's bank accounts. He concluded that the company had underpaid corporation tax under section 455 on Mr Porter's DLA in an amount of £63,953.80 over a six-year period.

(36) As regards the company penalty, it was his view too that Mr Porter had consistently and over a period of many years used money drawn from his companies to fund his lifestyle. The size of the withdrawals and the amount declared through salary and dividends meant that Mr Porter must have been aware that he was drawing amounts that had not been correctly taxed. Section 455 tax had been accounted for in the company accounts for two of the six years under investigation and it was therefore inconceivable that Mr Porter was not aware of the rules regarding taxation of loans made to participators. Furthermore, Mr Porter admitted in his outline disclosure that he had deliberately taken money out of his companies for personal gain which had not been taxed.

(37) He allowed mitigation against a deliberate penalty. A reduction of 5% for telling, 5% for helping, and a full reduction of 30% for giving access. For prompted deliberate disclosure the minimum penalty is 35% of the Potential Lost Revenue ("**PLR**"). However, where the disclosure is made more than three years after the inaccuracies first occurred, the maximum reduction is restricted. It cannot be less than 45% of the PLR.

(38) The penalty range is therefore between 70% and 45% (so 25%). A 40% reduction for telling, helping, and giving access reduces this to 10%. He therefore assessed the company to a penalty based on 60% of the PLR.

(39) As regards Mr Porter, it was his view that the behaviour which led to the inaccuracy was deliberate but not concealed. Mr Porter had said, in his outline disclosure report that drawings from Trojan had not been correctly accounted for and tax had not been paid. Mr Porter knew that at the time that Trojan was liquidated, he had only paid £15,000 towards a true liability of £115,324. He was in no doubt that at the time of the dissolution, Mr Porter was aware that he owed Trojan money which had been written off. In his view, Mr Porter had deliberately chosen not to declare that write-off in his tax return for the year ending 5 April 2017 in the full knowledge that he had benefited personally from that write-off and that it had not been taxed.

(40) He confirmed that he had considered special reduction but thought there were no circumstances which warranted such reduction.

The discovery assessment

(41) An internal HMRC document authored by Officer Biswell, was produced to us. This evidence shows that on 13 June 2022 (the date on which HMRC submit was the date on which Officer Biswell made the discovery that there was an insufficiency in Mr Porter's 2017 tax return) Officer Biswell delegated the responsibility for raising the discovery assessment itself to another officer. In that request he stated "Please raise an assessment for Income Tax Self-Assessment. The details are as follows [details of Mr Porter and his UTR]". It went on to state: "An assessment should be raised for the year 5 April 2017. The dividends figure needs to be uplifted from 60,000 to 160,324 (an increase of 100,324)".

(42) We were also provided with a document evidencing the identity of the officer to whom that task had been delegated.

(43) However, the notice of assessment dated 15 June 2022 identifies the amount charged by the assessment as being £100,324.

The penalty explanation and review conclusion letters

(44) In his letter to the appellants' agent dated 27 April 2022, Officer Biswell set out his reasons, and calculation, of the penalties in respect of both the company and Mr Porter. As regards the company, that letter sets out, essentially, the matters detailed in his oral and witness statement evidence at [8 (36)-(368] above.

(45) As regards Mr Porter, it sets out his calculation which was based on prompted disclosure. He gave the same discounts of 5% for telling, 5% for helping, and 30% for giving access, as he had given to the company. He calculated the penalty percentage at 56% which resulted in a penalty of £21,401.69.

(46) In the review conclusion letter dated 31 May 2023, the review officer agreed with the appellants' agent's assertion that the reductions for this penalty were insufficient. The insufficiency had been discovered in Mr Porter's own tax return which was disclosed at an early stage and the penalty reduction should be allowed in full. The review officer thus reduced the penalty percentage to 35%, resulting in a penalty of £13,376.05.

DISCUSSION

9. It is for HMRC to establish, on the balance of probabilities, that they have issued best judgment assessments for corporation tax and income tax on, respectively, the company and Mr Porter, and that these have been made in time and properly served on the respective appellants. If they can establish this, then the burden of showing that those assessments overcharge the respective appellants switches to the appellants.

10. The same is true of the penalty assessments. It is for HMRC to establish that the appellants have demonstrated deliberate behaviour which has resulted in the inaccuracies in their returns. It is then for the appellants to show that they have been given insufficient credit for telling, helping and giving access.

11. It is also for the appellants to show that there may be special circumstances which warrant a reduction in the penalties.

The company

Corporation tax assessments

12. Notwithstanding that Mr Monk mounted no serious challenge to the validity of the corporation tax assessments, we still need to find that they were valid in time assessments which were properly served on the company.

13. We find that they were. We accept Officer Biswell's evidence, set out above, concerning the omissions from the disclosure report of any reference to a section 455 liability on the second appellant's overdrawn DLA. The company has not disputed that that DLA was indeed overdrawn, nor the amounts which have been asserted by HMRC as having been overdrawn. Whilst there have been amendments to the original assessment figures, those have arisen as a result of the accounting date of the company not marrying up with the relevant income tax years. For that reason, a subsequent adjustment (downwards) has been made to the corporation tax assessments originally issued.

14. The revised corporation tax assessments assessed the company to corporation tax under section 455 as follows. Accounting period ending 31/05/2013: £33,977.75. Accounting period

ending 31/05/2014: £15,518.25. Accounting period ending 31/05/2016: £8,898.82. The aggregate is £58,394.82.

15. The company provided no evidence that these revised assessments overcharged it. And given his difficulty in taking instructions, Mr Monk accepted that he could not submit that those assessments overcharged the company. So we uphold these assessments in the foregoing amounts and dismiss the company's appeal against them.

Penalty assessment

16. The penalty assessment was issued to the company on 19 October 2022 in an amount of £40,071.18. As a result of the reductions to the corporation tax liability, the parties are agreed that the penalty should be reduced to £35,036.89 (subject to further variation in this decision).

17. The penalty assessment assessed penalties for the three accounting periods mentioned above. They are based on deliberate behaviour. It is HMRC's contention that the corporation tax returns for those accounting periods failed to self-assess any section 455 corporation tax, and that failure is deliberate.

18. For there to be a "deliberate" inaccuracy HMRC have to establish an intention "to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement" (see *Tooth* at [47]).

19. The burden of establishing this deliberate behaviour rests with HMRC.

20. Officer Biswell, who issued the penalty assessment, says that deliberate behaviour is evidenced by a number of things. Firstly, in the outline disclosure report, Mr Porter stated that he had drawn funds without operating any form of appropriate PAYE or dividend allocation procedure and that he benefited by paying insufficient tax. He had signed this outline disclosure. Furthermore, it is clear that in previous years the company had accounted for section 455 tax and it is therefore inconceivable that Mr Porter was not aware of the liability arising under that section on an overdrawn DLA. In his view this demonstrates a deliberate choice by Mr Porter to structure extractions from the company without the company paying the appropriate amount of tax.

21. Mr Monk points out that in the notes of the meeting which took place on 7 September 2018, Mr Porter sought to distance himself from the statements in his disclosure report. At paragraph 22 of those notes, Mr Porter said that he did not agree with some of the statements contained in that report, including the admission that he had drawn funds from the company without operating PAYE or accounting for tax on them as dividends.

22. We place little weight on this as evidence of non-deliberate behaviour. Firstly, it is clear that the outline disclosure report was handwritten and signed by Mr Porter. Secondly, the notes of meeting contain no justification from Mr Porter as to why he did not agree with them.

23. But more importantly, Mr Porter (and by dint of this, the company, as he was the controlling mind) had declared section 455 tax on his overdrawn DLA in previous accounting periods. And we, like Officer Biswell, find it inconceivable that he was not, therefore, fully aware of his reporting obligations in this regard. By failing to account for section 455 tax it is our view that the company intended to mislead HMRC as to the truth of the corporation tax returns filed for the relevant accounting periods.

24. And indeed, this failure was exacerbated by the fact that the final disclosure report contained no mention of any section 455 liability.

25. Finally, we would also observe, as submitted by HMRC, that Mr Monk made no substantive challenge, at the hearing, to deliberate behaviour nor to the fact that the disclosures were prompted.

26. Mr Monk submitted that insufficient credit has been given for telling and helping, nor has sufficient credit been given for the fact that Mrs Porter had been ill, and subsequently died, in February 2021.

27. Officer Biswell gave a reduction of 5% for telling. The maximum reduction for this is 30%. He considered the timing, nature and extent of the telling. The company missed several deadlines to provide the disclosure report to HMRC. It was an inadequate report. The nature and extent of the telling was unsatisfactory, and it was incomplete. There was no acceptance that Mr Porter had received money from the company that was not declared.

28. We agree that the disclosure report was flawed as set out by Officer Biswell. We see no grounds for that upsetting his 5% reduction for telling.

29. We have the same view as regards his 5% reduction for helping. The same criticisms as regards the inaccuracies in disclosure report are relevant under this head. Officer Biswell had to undertake his own analysis of the withdrawals based on the copious information provided by the company. No analysis of the bank statements was undertaken by the company. Mr Porter also sought to distance himself from the admissions he had made in the outline disclosure report, at the meeting of 7 September 2018.

30. As regards giving access, the maximum reduction is 30%. This amount has been allowed by Officer Biswell.

31. We therefore reject the company's submissions that the mitigation is inadequate and uphold the penalties in the revised amount of £35,036.89.

32. Officer Biswell says in his witness statement that he considered whether a special reduction should be made to the penalty. He considered Mrs Porter's ill health and subsequent death and thought that it was not a factor at the time that the company submitted inaccurate returns, and would not have impacted on the behaviour of Mr Porter for the years 2013 to 2016.

33. The following extract from the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 131, sets out the test for special circumstances.

> "73. The FTT then said this at [101] and [102]:
>
> > "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
> >
> > 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special".

> Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

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

34. The definition of special circumstances should not be limited to the exceptional or the unusual. But even adopting this broader definition we, like HMRC, do not think that there are any circumstances which are sufficiently special for the company.

35. We, like HMRC, are wholly sympathetic with what Mr Porter must have gone through during his wife's ill health and subsequent death.

36. But at the risk of sounding harsh, there is no evidence that these issues had any impact on the company's ability to file correct returns during the relevant accounting periods, nor that they had any material impact on the failings in the disclosure report.

37. We therefore dismiss the company's appeal against the penalty assessment (as adjusted).

Mr Porter

Discovery assessment

38. We are satisfied from Officer Biswell's evidence that on 13 June 2022, he made a valid discovery that Mr Porter's tax return for the year ended 5 April 2017 contained an insufficiency of tax arising from the writing off of £100,324 of the loan from Trojan.

39. Unfortunately for HMRC, Officer Biswell's instructions to the officer who was then charged with raising the assessments based on this discovery were not as clear as they might have been, with the result that the assessment itself assessed Mr Porter to tax of £100,324, rather than the tax arising from that write off, namely £38,217.30.

40. In Mr Porter's notice of appeal he challenged the validity of this discovery assessment.

41. Mr Priestley submitted that the assessment was in fact made in the correct amount when Officer Biswell made his discovery and recorded that in the confirmation of request which was sent to the assessing officer and the subsequent error in the notice of assessment does not invalidate that original assessment. Alternatively, the discovery assessment was validly made, and any error made in the subsequent notification would not invalidate it.

42. He submits that any mistake is corrected by dint of section 114 of the Taxes Management Act 1970, and in particular section 114(2)(b); "An assessment or determination shall not be impeached or affected… by reason of any variance between the notice and the assessment determination".

43. We would observe that section 114(2)(a) (iii) might also be relevant. "An assessment or determination shall not be impeached or affected… by reason of a mistake therein as to… the amount of the tax charged".

44. Mr Monk did not mount any serious challenge to the application of section 114. However, it is incumbent on us to determine whether the discovery assessment was valid.

45. We have considered, in the first place, whether the error in the assessment was so fundamental that it cannot be cured by section 114. We think not. Firstly, the error was not in the discovery itself but in the subsequent raising of the assessment. Secondly, this is not a case where the assessment was made for the wrong year. All that is wrong is the number. And it seems to us that this is precisely the sort of circumstance at which section 114 (2) is directed Thirdly, we concentrate on the nature and effect of the defect in the particular circumstances of the case (see *R (on the application of Archer) v HMRC* [2018] STC 38 at [57]). The notice of assessment was issued on 15 June 2022. By that time Mr Porter had received the penalty explanation letter of 27 April 2022 which made it clear that the penalty was being calculated as a percentage of the PLR. This was clearly set out in the letter as being £38,217.30. So, it was absolutely clear to Mr Porter and to those advising him that the amount of tax being assessed was that amount and not the amount of loan written off.

46. In our view section 114 (2) TMA applies to validate any error in the discovery assessment.

47. Mr Porter mounted no challenge to the amount of the validated assessment of £38,270.30 and did not suggest that it overcharged him.

48. We therefore uphold the discovery assessment in that amount and dismiss Mr Porter's appeal against it.

Penalty assessment

49. The position regarding the penalty assessment visited on Mr Porter is very similar to that in respect of the company. It is for HMRC to establish that the inaccuracy in Mr Porter's income tax return was a result of his deliberate behaviour. We find that it was. The reasons given by Officer Biswell for assessing on the basis of deliberate behaviour are largely the same as those which he gave for assessing the company penalty. And we accept these in respect of Mr Porter in the same way that we accepted them in respect of the company. Mr Porter, in our view, took the view that he would not disclose the write off of the balance of the loan and it was clear from the disclosure report that this had not been reported following the dissolution of Trojan. We think it inconceivable that Mr Porter did not realise that by benefiting from the write off of the majority of the loan, there was no tax consequence.

50. Turning now to mitigation and special circumstances. Maximum mitigation of 35% has been given by the reviewing officer. For the reasons given above in respect of the company penalty, we do not believe there are any special circumstances.

51. So, we uphold the penalty in the amount set out in the review conclusion letter of 31 May 2023 (namely £13,376.05) and dismiss Mr Porter's appeal against that.

DECISION

52. For the reasons given above we have upheld the corporation tax assessments made on the company and the discovery assessment made on Mr Porter (albeit as regards the former in slightly reduced amounts and as regards the latter in the sum of £38,270.30).

53. We have also upheld the penalty assessments as adjusted.

54. We therefore dismiss the appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date:

APPENDIX

PENALTIES

1. Pursuant to s 97 of the Finance Act 2007, provisions imposing penalties on taxpayers who make errors in certain documents, are contained in schedule 24 of that Act. All subsequent references to paragraphs, unless otherwise stated, are to the paragraphs of that schedule to the Finance Act 2007.

2. Paragraph 1 provides:

(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below [which includes a VAT Return] and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

3. Paragraph 3 provides:

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

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

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

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

(2) An inaccuracy in a document given by P to HMRC, which was neither careless or deliberate on P's part when the document was given, is to be treated as careless if P—

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

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

4. The amount of a penalty, payable under paragraph 1, is set out in paragraph 4. In so far as it applies to the present case, paragraph 4(2) provides that the penalty for careless action is 30%

of the potential lost revenue; for deliberate but not concealed action, 70% of the potential lost revenue; and for deliberate and concealed action 100% of the potential lost revenue.

5. The "potential lost revenue" is defined in paragraphs 5 – 8 but for present purposes it is only necessary to refer to paragraph 5(1) which provides:

> … the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

6. Paragraph 9 provides:

(1) A person discloses an inaccuracy, a supply of information or withholding of information, or a failure to disclose an under-assessment by—

> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure—

> (a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and
>
> (b) otherwise is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

7. Under paragraph 10(1) HMRC "must" reduce the standard percentage of a person who would otherwise be liable to a penalty. However, the table in paragraph 10(2) sets out the extent of any reduction which must not exceed the minimum penalty which for a prompted deliberate and not concealed error is 35% of the potential lost revenue and for a prompted careless error is 15%.

8. HMRC may also reduce a penalty because of "special circumstances" under paragraph 11 although the ability to pay or the fact that a potential loss from one taxpayer is balanced by a potential payment from another are precluded from being special circumstances by paragraph 11(2).

9. On an appeal against a decision that a penalty is payable the Tribunal may, under paragraph 17(1), affirm or cancel HMRC's decision. However, where the appeal is against the amount of a penalty paragraph 17(2) allows the Tribunal to substitute HMRC's decision for another decision provided that it was within HMRC's power to make the substituted decision.

10. With regard to a reduction of a penalty in relation to special circumstances (pursuant to paragraph 11), under paragraph 17(3), the Tribunal may only substitute its decision for that of HMRC if it "thinks that HMRC's decision in respect of the application of paragraph 11 was flawed." If so, paragraph 17(6) provides that:

> "Flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

11. The Supreme Court considered the meaning of "deliberate" in relation to whether there was a deliberate inaccuracy in a document in *HMRC v Tooth* [2021] 1 WLR 2811 ("***Tooth***") in which it said:

> "42. The question is whether it means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.
>
> 43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase "deliberate inaccuracy". Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy". An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate".

12. Although this was said in relation to a different statutory provision (s 29 of the Taxes Management Act 1970) the Supreme Court recognised, at [33] and [45], the alignment of the language used with that of the schedule 24 penalty provisions. Accordingly, for there to be a "deliberate" inaccuracy HMRC have to establish an intention "to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement" (see *Tooth* at [47]).

NIGEL POPPLEWELL
TRIBUNAL JUDGE

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