Neutral Citation: [2024] UKFTT 00138 (TC)

Case Number: TC09073

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/07662

INCOME TAX –appeal against a penalty for deliberate or in the alternative careless inaccuracies in a tax return under Schedule 24 FA 2007 - late appeal – application for permission to make a late appeal – application granted – appeal against the deliberate penalty considered and allowed – HMRC alternative submission that the inaccuracies were caused by the appellant failing to take reasonable care –Ritchie considered - alternative submission accepted – appeal against failure to take reasonable care dismissed

Heard on: 24 January 2024
Judgment date: 12 February 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
DR CAROLINE SMALL

Between

SCOTT THOMPSON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Mr Jordan Ness litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision deals with two matters. Firstly, whether we should exercise our judicial discretion and permit the appellant to make a late appeal against a penalty ("**the penalty**") issued pursuant to Schedule 24 Finance Act 2007 in respect of inaccuracies in his self-assessment tax return for the tax year ending 5 April 2014. Secondly, if we do allow the appellant's application, whether we should allow his appeal against the penalty or alternatively uphold the penalty on the basis of either the originally assessed deliberate behaviour, or in the alternative, on the basis that the appellant failed to take reasonable care.

2. In this decision, we refer to the appellant's application to make a late appeal as "**the application**", and the appeal against the penalty as the "**penalty appeal**".

3. For reasons given later in this decision, we allow the application and the penalty appeal based on deliberate behaviour but dismiss the appellant's penalty appeal against his failure to take reasonable care.

THE LAW

4. There was no dispute about the relevant law.

The penalty appeal

5. The law relating to the penalty appeal is set out in the appendix to this decision.

Late appeal

6. When deciding whether to give the appellant permission to make a late appeal, the tribunal is exercising judicial discretion, and the principles which should be followed when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), ("***Martland***") in which the Upper Tribunal considered an appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal".

THE EVIDENCE AND FINDINGS OF FACT

7. We were provided with a bundle of documents which, somewhat disappointingly to both ourselves and to Mr Ness, do not include many significant documents relating to the penalty appeal. The appellant gave oral evidence on his own behalf. This was largely unchallenged. From this evidence we make the following findings of fact:

(1) The appellant was an employee, working in the field of IT, until partway through 2013 when he stopped working for Ciber Ltd ("**Ciber**") and went out on his own as an IT consultant. The income which he earned from Ciber in 2013 was correctly reported on his 2014 tax return.

(2) Before becoming self-employed, the appellant took professional advice from an organisation called Big Fat Buddha ("**BFB**") who appeared to specialise in IT contracting. He also engaged the services of a firm of certified accountants which practised in the locality ("**B2B**").

(3) Prior to engaging their services, he set up his own company which he thought he might need to conduct his IT consultancy. In fact, the company was not needed and never traded. It was called Pixel Bridge Ltd.

(4) The way in which the appellant's IT consultancy services were supplied appears to be as follows. An organisation called Catch Resourcing supplied his services to an end user. And invoice that end user on a daily basis, a day in arrears. They would receive the money from the end user, and paid, less their commission, that money across to BFB. BFB would then pay the appellant less its commission, under deduction of PAYE and NICs. It seems too that an entity called Atlas Trustees Ltd ("**Atlas**") were also involved in paying sums in respect of his services to the appellant. At least that is what the appellant thought was going to happen. One reason why he engaged BFB was because he wanted to be paid under deduction of tax and NICs. As things turned out, BFB and Atlas failed to deduct and account for tax and NICs on the payments made to the appellant.

(5) The appellant told B2B of these arrangements and engaged them to compile and submit his 2014 tax return.

(6) As mentioned, that tax return included his employment income from Ciber, but did not include any income from BFB or Atlas.

(7) The tax return includes a white space disclosure stating that "Employment with Pixel Bridge Ltd began on 2013-05-17 Director of "Pixel Bridge Ltd" but no remuneration received, therefore no employment page for this directorship has been completed".

(8) His tax return was sent by B2B to the appellant for checking. This was the first tax return that the appellant had submitted. The reason that he gave for having failed to realise that B2B had not included his BFB or Atlas income was that he wasn't sure what to look for as he had never completed a self-assessment tax return before. He simply signed it, relying on B2B to have ensured that it was correct, and it was then submitted (he couldn't remember whether it had been submitted by the accountants or by himself).

(9) On 19 October 2017, in a letter from HMRC to the appellant, HMRC told the appellant that their records showed he had not sent tax returns for the years ended 5 April 2007-2016, and they required information concerning his income and taxable gains for those periods for which they were out of time for assessing. They also told him that he should submit his tax returns for, amongst others, the tax year to 5 April 2014 as soon as possible.

(10) The appellant's 2014 tax return was submitted to HMRC on 19 January 2018.

(11) HMRC opened an enquiry into the tax return on 23 March 2018.

(12) We were told by Mr Ness that HMRC's conclusions of that enquiry and letters relating to penalties, were sent to the appellant on 6 November 2019. Unfortunately, neither letter was in the bundle.

(13) However, 26 November 2019 the appellant wrote to HMRC, for the attention of Mrs Wilson, stating that he was writing in response to two letters dated 6 November detailing "your findings regarding my 2014 Tax Return and associated penalty explanation……".

(14) In that letter the appellant indicated that he did not intend to contest the additional tax which HMRC considered was due, of £26,508.61, as it was in line with the calculations which he and his new accountant had undertaken following his own investigation.

(15) He went on to say that "I do however contest the penalty explanation, totalling £12,634.04 and break this down as follows, in line with the stages in your process……".

(16) That letter also records that in February 2018 HMRC had issued the appellant with a demand for £109,000 in back tax for previous tax years. It records that this was a "mistake" by HMRC during an investigation in which the appellant fully cooperated with the result being that he owed approximately £28,000 including interest and penalties which was paid off without question by September 2018. The letter records that at that point "I was informed that my account with HMRC was in good order".

(17) On 17 January 2020 HMRC sent a letter to Mr Thompson thanking him for his letter of 26 November 2019 and noting that he did not contest the additional tax due. It also stated that

"with regard to the penalty I note that you disagree that the behaviour which led to the additional tax becoming due was deliberate...".

(18) It then went on to consider why in HMRC's view, the behaviour was deliberate and indicated that because the appellant had provided HMRC with no further evidence to suggest that the behaviour was not deliberate, Mrs Wilson had "today arranged for the penalty to be charged as explained in the letter of 6 November 2019. If you still disagree with this view you have the right to appeal against it and information on how to do so will be included with the penalty determination you will receive under separate cover".

(19) Neither the penalty determination, nor a pro forma version of a penalty determination was included in the bundle. We therefore have no primary evidence that the appellant was notified of the 30-day appeal period by any information sent to him by HMRC.

(20) The appellant's evidence was that because HMRC had taken no further action in relation to the penalty following the correspondence in January 2020, he thought that the matter had been settled without any liability on his part. As far as he was concerned, his letter of 26 November 2019 comprised an appeal against the penalty which had been accepted by HMRC.

(21) He was therefore unpleasantly surprised when a bailiff arrived at his door in 2022 who told him that she had been sent by HMRC in respect of the penalty and advised him that he had a right to appeal against the penalty. The appellant appealed against the penalty on 23 January 2023.

DISCUSSION

8. As regards the application, it is for the appellant to persuade us that we should exercise our discretion in his favour. As regards the penalty appeal, the initial burden of establishing that they have issued a valid in time penalty assessment, and that the appellant's behaviour is either deliberate or careless, rests with them. They must establish those matters on the balance of probabilities.

The application

9. We turn first to the application and approach in light of the three criteria set out in *Martland,* and which are set out in more detail at [6] above.

10. The first issue is whether the appeal is late in the first place and if it is, the length of that delay and whether it is serious and significant. In fact, at this stage we simply need to assess the length of the delay and whether it is serious or significant is a matter which weighs in the balance at the final evaluation stage. *Martland* simply says that if we were to decide that the delay was not serious or significant, there may be no need to go on to consider the other two criteria.

11. Regrettably we have neither the HMRC letters of 6 November 2019, nor the penalty determinations referred to in HMRC's letter of 17 January 2020. It is HMRC's case that the assessment against which the appellant's appeal rights stem was issued on 17 January 2020 and thus the appeal deadline was 16 February 2020. And by appealing in January 2023, the appeal is very late (Mr Ness calculated it at 1072 days late).

12. But HMRC's letters of 6 November 2019 may have themselves comprised decisions against which the appellant had an appeal right, and which he exercised on 26 November 2019, well within the 30 day period.

13. The appellant has not pleaded or taken this point, so we have not considered it further, but it is of course highly relevant when considering the appellant's contention that as far as he was concerned, he had made a valid appeal against the penalty on 26 November 2019, and was thus justified in assuming that the matter had been settled given that he had heard nothing from HMRC until the bailiff arrived in 2022.

14. We find therefore that the appealable decision was set out in the documents sent to the appellant on 17 January 2020, and thus his appeal on 23 January 2023 was, as suggested by Mr Ness, very late.

15. As for the reasons for this tardiness, we have said above that the appellant thought that he had made a valid appeal against the penalty on 26 November 2019. In that letter he accepted his liability to the tax. And thus thought the matter had been settled. It was not until the bailiff arrived in 2022 that he realised that they had not been whereupon he made an appeal.

16. In response to this, Mr Ness submits that the appellant should have provided the further evidence requested by Officer Wilson in her letter of 17 January 2020 and that it should have been clear to the appellant from that letter that he had an appeal right against the formal penalty assessments and should have therefore brought an appeal as suggested in that letter.

17. Whilst we accept that the letter of 17 January 2020 does inform the appellant that he will be receiving a formal penalty determination against which he will have a right of appeal, we have not been provided with that penalty determination, and the letter does not state the time within which the appellant had such a right.

18. Furthermore, we are dealing here with an unrepresented litigant in person who having been sent a letter telling him that he was going to be liable to penalties, responds that "I do however contest the penalty explanation…….". It seems to us that this is a clear statement that he does not accept the penalty, and that had that wording being used in response to the more formal penalty determination, it would have been treated by HMRC as an appeal against the penalty. The objectively reasonable person would have construed those words as non-acceptance that he was liable to the penalty.

19. All that has happened here is that the appeal has been made early. It was made against the contents of a letter dated 6 November 2019 which had been construed by the appellant as an allegation by HMRC that he was liable to a penalty. And he appealed against it within 30 days.

20. We are somewhat surprised, therefore, that HMRC have not accepted this as an appeal not just against the contents of the letter of 6 November 2019 but also against the more formal penalty determination which HMRC claim to have sent the appellant on 17 January 2020. But they have chosen not to do so.

21. As far as we are concerned, however, this is a cogent reason which we can now consider at the third, final evaluation, stage of the *Martland* test.

22. At this stage we need to conduct a balancing exercise assessing the merits of the reasons for the delay, and taking into account its seriousness and significance, with the prejudice which

would be caused by granting or refusing permission. And we remind ourselves that when conducting this balancing exercise, litigation must be conducted efficiently and at proportionate cost, and statutory time limits should be respected.

23. We must take into account all relevant factors, and one of these is any obvious strength or weakness of the appellant's case.

24. The delay in bringing the appeal is clearly serious and significant. However, this is, in our view, outweighed by the wholly justifiable reason submitted by the appellant for the delay, namely that he thought he had made a valid appeal against the penalty in his letter of 26 November 2019, and had no reason to think that HMRC thought any differently given that he heard nothing from HMRC until the bailiff arrived at his door in 2022.

25. It is clear to us that the terms of the letter of 26 November 2019 comprise a valid appeal against the penalty which HMRC appear to have said he was liable in their letters of 6 November 2019. It doesn't surprise us at all that the appellant thought that this comprised an indication that he was liable to a penalty, and whether or not he was told of any appeal rights in the letters of 6 November 2019, his assertion that "I do however contest the penalty explanation" is, in our view, an unequivocal assertion that he disagrees with the penalty and is an effective appeal against it. And this is true against whatever was said in the letter of 6 November 2019 and against whatever was sent to the appellant on 17 January 2020.

26. Clearly litigation must be conducted efficiently and at proportionate cost, but these important principles are far outweighed by the prejudice which would be caused to the appellant by denying his application. And this is exacerbated by the fact that even on a cursory examination of the merits of the penalty appeal, it seems to us that HMRC have got nowhere near establishing deliberate behaviour. And given that we have considered the position in detail, as is necessary to decide the penalty appeal, we are reinforced in that conclusion.

27. We therefore grant the application and now go on to consider the penalty appeal.

The penalty appeal

28. We remind ourselves (and indeed HMRC) that it is for HMRC to establish deliberate or careless behaviour, and it is not for the appellant to establish that he has not behaved deliberately or carelessly.

29. As far as deliberate behaviour is concerned, the test is set out in *Tooth* the relevant extract from which is in the appendix. In essence however 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". It is worth saying too that at [83] of *Tooth* the Supreme Court observed that deliberate behaviour generally describes conduct that amounts to fraud or is akin to fraud.

30. HMRC have asserted, in their statement of case, that the appellant was self-employed between 17 May 2013 and 22 November 2013 and in that period received £5,218 from BFB and a further £46,012 from Atlas. Neither of these sources of income was declared on his tax return. However, they have provided no primary evidence to justify this assertion.

31. The appellant does not deny that he has received income by dint of his "self-employed" activities as an IT consultant which was not declared to HMRC. And whilst he did not accept,

explicitly, that HMRC's numbers are accurate, he has accepted, and paid, a liability to income tax for the tax year in question.

32. The basis of HMRC's submission of dishonest behaviour appears to be that whilst the appellant had told B2B of his income from Ciber (as evidenced by the fact that it was included in his tax return) and that he was a director of Pixel Bridge Ltd (as evidenced by the white space disclosure in that return) he could not have told them of his income from BFB or Atlas, since had he done so, B2B would have included it in his return. In essence, HMRC submit that the appellant failed to tell his accountant about the sources of income, knowing that he had received income from them, and that is deliberate behaviour which resulted in the inaccurate return.

33. In contrast the appellants unchallenged evidence is that he told B2B of all his sources of income including that from BFB and Atlas. He had little understanding of the role of Atlas Trustees, but his evidence was that he thought they had been appointed by BFB as part of the umbrella arrangements. And that he had advised B2B of all of the strands of income. We take this to mean that he had advised B2B of any income derived from Atlas. Furthermore, his unchallenged evidence was that he understood BFB (and we infer, by implication, Atlas) would deduct tax and NICs at source and pay him on a net basis. Indeed, this was one reason that he appointed BFB in the first place as he did not want to be bothered by the hassle of self-employment tax.

34. We accept the appellant's submissions. It is clear that whilst he was highly competent in the field of IT, he was an innocent abroad when it came to business structures and taxation. When he decided to go out on his own, he appointed what he thought was a competent organisation (BFB) to implement the umbrella arrangements which he thought would be the appropriate way of conducting his consultancy. He also appointed what he thought were competent accountants to take care of his tax position. He had thought that he was being paid under deduction of tax.

35. He was entitled to rely on both BFB and B2B to provide the services they had held themselves out as being competent to do. As things turned out, neither delivered what they promised. The former failed to deduct tax at source or ensure that Atlas should do so; the latter failed to declare the sources of income which the appellant had told them about.

36. Although HMRC made no submissions to this effect in the context of deliberate behaviour, we have also considered whether the appellant's failure to check the information set out in the draft tax return sent to him by B2B could be construed as an intention to mislead HMRC. We have considered this in greater detail in the context of failure to take reasonable care below. But the bar for deliberate behaviour is very high (tantamount to fraud) and whilst we consider the appellant to have been careless in failing to properly check the return and correct it so that it included his income from Big Fat Butter and Atlas, we accept his evidence that he had not come across a self-assessment tax return before and wasn't sure what to look out for. In the circumstances we do not consider that he intended to mislead HMRC.

37. There is in our view, therefore, no compelling evidence that the appellant sought to mislead HMRC as regards the sources of income which were not reported in his 2014 tax return. We find that he has not behaved deliberately as regards the inaccuracies in that return.

38. HMRC submit, in the alternative, that the return was submitted carelessly, the appellant having failed to take reasonable care to ensure that the return was accurate. For these purposes it is our view that reasonable care is assessed by reference to the reasonable and prudent

taxpayer in the position of the taxpayer in question, endowed with the personal and professional experience and qualities of that taxpayer. HMRC have always recognised that reasonable care cannot be identified without consideration of a particular person's abilities and circumstances and recognises the wide range of abilities and circumstances of persons completing returns.

39. It is open to us to consider whether the inaccuracies were careless given the provisions of paragraphs 15(2) and 17(2) of Schedule 24 which permits us to substitute for HMRC's decision (i.e. deliberate) another decision which HMRC had power to make (i.e. careless).

40. Following *HMRC v William Ritchie and Hazel Ritchie* [2019] UKUT 0071 we can consider the issue of carelessness if HMRC specifically allege, as an alternative to deliberate behaviour, that the appellant had submitted inaccurate returns as a result of carelessness; and if they do so allege, that the appellant has then been given an opportunity to make submissions and provide evidence that that is not the case.

41. HMRC have clearly pleaded, in their statement of case dated 22 June 2023, that in the alternative to deliberate behaviour, it is their view that the appellant has failed to take reasonable care. The appellant has been on notice that HMRC are arguing careless behaviour in the alternative to deliberate behaviour and has been given ample opportunity to make submissions and provide evidence to the contrary.

42. We remind ourselves that the failure to take reasonable care must be considered in light of the appellant's abilities and circumstances. As we have said above, the appellant had little experience of the tax system and, wholly properly, appointed what he thought was a competent tax adviser to complete his return. His evidence, which we accept, was that he had told those accountants of all of his sources of income. Quite why they were not reported in his return, we do not know. But it seems to us that it is a consequence of some unknown failure by those accountants.

43. Recognising that one does not have the personal skills to complete a return, and putting responsibility for ensuring that an accurate return is sent to HMRC into the hands of a competent professional, is clearly reasonable and responsible behaviour. However, a taxpayer cannot simply wash their hands of responsibility once they have done that. They have a duty to check the work undertaken by that professional to the extent that they have the competence to do so.

44. In this case the appellant accepts that he was sent the tax return before it was submitted to HMRC but failed to notice that the accountants had omitted the income from BFB or Atlas. His evidence was that this was the first tax return that he had had to consider, and he wasn't sure where to look to find the sources of income.

45. We also accept that he thought that payments from BFB and Atlas were paid under deduction of tax and NICs.

46. But it is our view that the objectively prudent and reasonable taxpayer in the appellant's position, with the obvious intelligence possessed by the appellant, who had been asked to check and sign a tax return, would have reviewed, as a minimum, whether the tax return set out all of the sources of his income (irrespective of how naïve that individual might be about the intricacies of the tax system). Even a cursory examination of the appellant's 2014 tax return would have revealed that his employment income from Ciber had been included in it, yet his income from Atlas and BFB had not been. So, it should have put him on notice that income from a source from which tax and national insurance had been deducted (as was his view of

the income from BFB and Atlas) might have needed including on the return. And generated an enquiry of his accountants as to why there was a difference in treatment between Ciber on the one hand and BFB and Atlas on the other. There is no evidence that the appellant did this. Indeed, as he said, he simply signed it and either sent it or allowed it to be sent to HMRC.

47. Sadly, for the appellant, we think that this failure to carry out a review of his tax return to check out whether it included his known sources of income, demonstrates a failure to take reasonable care.

48. Whilst, therefore, we uphold the appellant's appeal against the penalty for deliberate behaviour, we dismiss it against HMRC's alternative submission that the appellant is liable to a penalty for failure to take reasonable care.

49. We were given insufficient information which might enable us to amend the penalty assessment. We therefore make this decision on an "in principle" basis and leave it to HMRC to reassess the appellant to a penalty based on failure to take reasonable care. This clearly allows them to consider the quality of the appellant's disclosure and whether they might exercise their discretion under paragraph 14 of Schedule 24 to suspend all or part of the penalty. The appellant will have appeal rights against any such assessment.

DECISION

50. We allow the application and the appeal against the penalty assessed on the basis of deliberate behaviour. However, we consider that the appellant is liable to a penalty based on his failure to take reasonable care. The amount of that penalty is to be assessed by HMRC as set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. 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: 12th FEBRUARY 2024

APPENDIX

PENALTIES

1. The statutory provisions imposing penalties on taxpayers who make errors in certain documents, including self-assessment income tax returns, are contained in Schedule 24 to the Finance Act 2007. All subsequent references to paragraphs, unless otherwise stated, are to the paragraphs of that schedule.

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 self-assessment tax 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) 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. HMRC may also suspend all or part of a penalty for a careless inaccuracy under paragraph 14(1). To do this they must notify the taxpayer specifying the part of the penalty to be suspended and any suspensive conditions which they require the taxpayer to satisfy. The period of suspension may not exceed two years (paragraph 14 (2)). However, HMRC may only exercise their discretion to suspend all or part of a penalty if compliance with a condition of suspension would help the taxpayer to avoid becoming liable to further penalties for careless inaccuracy (paragraph 14(3)).

10. 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.

11. 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.

12. 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 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".

13. 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]).