[2021] UKFTT 0409 (TC)

TC 08319

VAT – whether assessment made to best judgement – yes – whether behaviour deliberate – yes – assessment and penalty upheld and appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01261

BETWEEN

RNS UTILITIES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MR MICHAEL BELL

The hearing took place on 13 and 14 October 2021 by video. A face to face hearing had not been listed because of the coronavirus pandemic.

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 in order to observe the proceedings. The hearing was therefore held in public.

Dr John Brown of Counsel, instructed by the Appellant, for the Appellant

Mr Andrew Cameron, Litigator of HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. This was the appeal of RNS Utilities Ltd ("the Company") against the following decisions made by Mrs Hillary Carr, an Officer of HM Revenue & Customs ("HMRC"):

(1) an assessment to Value Added Tax ("VAT") of £190,987 for periods 03/14 to 03/17; and

(2) a penalty of £5,405 for period 06/17 on the basis of deliberate behaviour by Mr Neil Segger, the Company's managing director.

2. The Company carries on business as a groundwork contractor in the telecommunications industry. Its supplies are all standard rated, but the Company had filed numerous repayment returns.

3. Mrs Carr carried out a compliance visit, and checked the supporting documents for the 06/17 period. She found that almost 30% were either missing or had been replaced with a different purchase invoice or a delivery note. She asked to see the supporting documents for the previous four years, but was told they had been lost in a flood. Mrs Carr never received those supporting documents, and made a best judgement assessment under Value Added Taxes Act 1994 ("VATA"), s 73, denying the Company a deduction for input tax. That assessment was subsequently reduced by some £15,000 when alternative evidence was provided. The penalty of £5,405 was calculated as 35% of the VAT assessed, under Finance Act 2007, Sch 24 ("Sch 24").

4. We found as facts that the Company's VAT records had not been lost in a flood, and that Mr Segger was responsible for providing the incorrect and incomplete documents for period 06/17. We decided Mrs Carr had made the assessment to her best judgment and that Mr Segger had acted deliberately. We upheld the assessment and the penalty, and refused the Company's appeal.

5. Part 1 of this decision notice sets out the evidence and Part 2 the Tribunal's findings of fact on the basis of that evidence. Part 3 relates to the assessment and Part 4 to the penalty.

PART 1: THE EVIDENCE

The Bundle

6. The Tribunal was provided with three bundles of documents (together, "the Bundle"), which included:

(1) the communications between HMRC and the Company, and between the parties and the Tribunal;

(2) notes of Mrs Carr's visit to the Company's premises and her subsequent notes;

(3) emails between Mr Lee Fawcett of LDF Accountancy Services Ltd, the Company's accountant, and Mrs Carr;

(4) a schedule setting out the Company's VAT return information from 03/14 to 09/19;

(5) various of the Company's bank statements and various invoices and receipts;

(6) various documents relating to transactions between the Company and others; and

(7) a communication between the Company and its insurers.

Dr Brown's criticisms of the Bundle

7. The second bundle contained 345 pages under the heading "green folder records provided by the Appellant on 20.3.19", and 137 pages under the heading "black folder records provided by the Appellant on 5.11.19". The black folder had been presented to HMRC by Mr Segger at the initial listed hearing of the Company's appeal, which was adjourned with directions, see §79. The third bundle included five pages headed "Appellant documents received 3.9.20" and a further 806 pages under the headings "RNS Files provided by Appellant April 2021". In this decision we have called all of these extra documents "the Folders".

8. Dr Brown criticised the ordering of the second and third bundles, describing it as "almost impossible to follow". He also attached some documents to his skeleton argument, on the basis that he did not know if they were already in those bundles. We find his criticisms to be misplaced, because:

(1) the Folders contained the Company's documents, but neither Mr Segger nor his representatives had ordered, indexed or referenced any of the Folders before giving them to HMRC;

(2) Rule 27(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires the parties to exchange *lists* of documents within 42 days of the Statement of Case;

(3) the Tribunal issued directions for lists of documents to be exchanged by 12 April 2019. The Company did not comply with those directions.

(4) on 12 November 2020, HMRC suggested that responsibility for preparing a supplementary Tribunal bundle containing the documents so far provided should pass to the Company, but on 25 November 2020, Mr Segger refused to undertake that task;

(5) HMRC therefore scanned the Folders to produce 1,293 pdf bundle pages, so as to ensure that all the Company's documents were before the Tribunal for the hearing; and

(6) after a short break in the proceedings, Dr Brown confirmed that he had been able to locate all the documents attached to his skeleton in the Folders.

9. In summary, the Folders contained the Company's documents. They consisted of almost 1,300 pages provided late, without indexing and without any obvious order. It was for the Company to ensure they were indexed and referenced appropriately.

The witness evidence

10. The Tribunal received witness statements from Mr Segger and from Mrs Carr, both of whom also gave oral evidence.

Mr Segger's witness evidence

11. Mr Segger provided three witness statements and Dr Brown confirmed that all three were to stand as Mr Segger's evidence-in-chief. The first was dated 10 June 2019 and consisted of six paragraphs. The second was dated 8 January 2019 and contained 47 paragraphs; the third was dated 25 August 2021 and contained 60 paragraphs, some of which were *verbatim* repetitions of passages in the second witness statement.

12. Mr Segger gave oral evidence led by Dr Brown, was cross-examined by Mr Cameron and answered questions from the Tribunal. We found him to be an entirely unreliable witness in relation to the significant issues in this appeal and also more generally. In relation to the significant issues:

(1) At the meeting with Mrs Carr in September 2017, Mr Segger said that the Company's records had been destroyed in a flood in March of the previous year. Mrs Carr pointed out that this could not explain the Company's failure to produce records for the year to March 2017, as those records had come into existence after the flood. Over two years later, in his second witness statement, Mr Segger said the flood had occurred in March 2017. He provided an email which purported to support his change of position, but the date on that email had been changed from 2018 to 2017, see further §50ff.

(2) During the same meeting, Mrs Carr identified that the some of the records for period 06/17 had been "tampered with", and that others were missing. Mr Fawcett, the Company's accountant, emailed Mrs Carr after the visit, saying "Mr N Segger advises that the file has been tampered with by a member of the administrative staff in the office". Mr Fawcett continued to act for the Company until at least 12 July 2018, when he filed its appeals against the penalties. In his second witness statement over two years later, Mr Segger alleged that Mr Fawcett was responsible for tampering with the records. We reject that evidence for the reasons given at §44.

(3) In that second witness statement, Mr Segger also stated that he had been told by Mr Fawcett that the Company's records had been saved onto a hard drive. However, there is no previous reference to a hard drive, or to Mr Segger having been told of its existence: it was not referred to during the meeting with Mrs Carr; in any subsequent correspondence with HMRC; in Mr Segger's first witness statement, or in the grounds of appeal. We rejected the evidence about the hard drive for the reasons given at §67.

13. Mr Segger was also unreliable in relation to more minor points, as can be seen from the following examples:

(1) In relation to Mrs Carr's compliance visit, Mr Segger's first witness statement stated that he had "spent most of the day answering questions to the very best of my knowledge"; in his third witness statement, this changed to a statement that he had "left the meeting after about 4 hours", and under cross-examination Mr Segger accepted that he had only been at the meeting for 1.5 hours.

(2) That first witness statement also states that Mr Segger was "told late afternoon that everything was fine", but he accepted under cross-examination that he had instead been told it was "fine" for him to leave the meeting after 1.5 hours, not that "everything was fine".

(3) Both his second and third witness statement contain numerous legal submissions, including a paragraph stating that the HMRC officers involved had "fettered their discretion". Mr Cameron asked Mr Segger to explain this phrase, but he was unable to do so: he said twice "I don't understand it" and added "what does it mean?". The Tribunal asked him how he had provided his witness statements, to which he replied that he had written them all himself, although he may have had some help from his daughter, who was a plasterer by trade. However, it is plain from the wording of the witness statements that they include material which neither Mr Segger nor his daughter could have provided (such as the statement that HMRC had fettered their discretion). The statements also contain numerous references to case law, which (apart from being inappropriate in a witness statement) were legal submissions Mr Segger and his daughter could not have made. Mr Segger nevertheless denied, from the witness box, the obvious truth that they contained passages he had not written and which he did not understand.

Mrs Carr's witness evidence

14. Mrs Carr provided a witness statement dated 7 May 2019, and two supplementary witness statements, one dated 19 February 2020 and one dated 12 August 2021. Mrs Carr was cross-examined by Dr Brown and answered questions from the Tribunal. We found her to be an entirely honest and credible witness.

The records for period 06/17

15. Mrs Carr had reviewed the records supporting the Company's VAT return for period 06/17, but those records were not included in the Bundle. Dr Brown asked the Tribunal to take the absence of those records into account when making our decision.

16. We have however found as a fact (see §38) that Mrs Carr left those records at Mr Fawcett's premises at the end of her visit. Thus, had the Company wished to provide those records to support its case, it could have done so.

Request for disclosure under the General Data Protection Regulation ("GDPR")

17. Dr Brown's skeleton argument stated that Company had made an application under the GDPR for disclosure of certain information from HMRC relating to Mr Cameron's predecessor, Mr Healey. No disclosure application had been made to the Tribunal. Having taken instructions, Dr Brown said that the point was not being pursued in the context of these proceedings.

PART 2: FINDINGS OF FACT

18. On the basis of the evidence summarised above, including our findings as to the witnesses' credibility, we make the following findings of fact.

The business and the contra-charging

19. The Company carries on business as a groundwork contractor in the telecommunications industry, digging trenches for cables and inserting ductwork. It was registered for VAT with effect from 1 June 2009.

20. Until at least 2015, most of its work was carried out for Carillion, which had provided the Company with a purchase card. When the Company ordered goods on that card, the vendor sent the invoice directly to Carillion for payment, but the goods were supplied and delivered to the Company.

21. There was a dispute between the parties as to how the Company accounted for VAT on these Carillion purchases. On the basis of Mrs Carr's evidence, we find that there were two possible methods:

> (1) The technically correct method was for these supplies to be included as inputs on the Company's VAT return, as the Company was the recipient of the supply, and for the same amounts also to be included as outputs, because they had been on-supplied to the main contractor. Thus, identical figures relating to the purchases would appear on both sides of the VAT return, and so the inputs would match the outputs.
>
> (2) However, some businesses did not include the purchase on *either* side of the VAT return. Although not technically correct, this approach was tolerated by HMRC because the omission of two identical numbers, one from the inputs and one from the outputs, had no effect on the amount of VAT due from the trader. In the hearing, this method was referred to as "the net basis".

22. Whichever method was used, the contractor had already paid for these materials by settling the purchase card, and so would have no more to pay for those supplies. The value of the materials would be included on internal documentation showing work carried out, but a "contra-charge" would be applied of the same amount, because the contractor had already paid for these items.

23. HMRC's position was that the Company used the second of those two methods, so the VAT on the purchases made using the Carillion purchase card was not included on either side of its VAT returns. Had the Company used the first method, the figures on the VAT returns would have been much higher. Mr Cameron pointed out that the Bundle contained a document from Carillion entitled "sub contractors contra charge invoice" with a tax point of 26 June 2017, which related to materials of £686,374 plus VAT of £137,274, making a total of £823,649. The total value of sales in the Company's 06/17 VAT return was £106,336, so it clearly did not include the amounts on the Carillion contra-charge invoice. Mr Cameron also relied on a letter sent to Carillion's liquidators dated 6 June 2019 by Mr Cook FCA on behalf of the Company, which said "in the normally [sic] course of events, my client paid VAT on the net amount paid to him".

24. The Company's position was that it had included on its VAT returns, the VAT on the purchases made with the Carillion card, but Dr Brown was unable to explain why, if that was the position, the Company had not included the related outputs.

25. It was indisputably clear from the evidence that the Company had not included the VAT on the Carillion purchases in its outputs, and we find as a fact that the Company had therefore adopted the second or "net basis", as Mr Cook had said was the case in his letter of 6 June 2019.

26. After Mrs Carr had issued the VAT assessment, Mr Segger contacted Carillion to obtain copies of the invoices for the materials bought using the Carillion purchase card, with the aim of using those invoices to support the Company's argument that the assessment was too high. However, Carillion had entered liquidation in January 2018, and the liquidators refused to provide copies of invoices to the Company, citing data protection law. We agree with Mr Cameron that this made no difference to the Company's position, because the contra-charge purchases were not included in the outputs on the Company's VAT returns and should not have formed any part of the inputs.

The dispute with Carillion

27. The Bundle contains a letter from Carillion's lawyers dated 28 June 2016, which states that the Company was seeking to dispute payments relating to 2014. The Bundle also contains an engagement letter dated 19 August 2016 from a barrister, Mr James Morgan of Trinity Chambers, Newcastle, setting out his instructions to advise the Company on its dispute with Carillion. Mrs Carr's meeting notes say that she was told by Mr Segger that:

> "Carillion is being taken to court as they owe the business approx. £800,000 to £1m. This has been going on since 2014. March 2017 saw a barrister. Hopefully the case will be sort[ed] by the end of 2017."

28. We find as facts on the basis of this evidence that the Company had been in dispute with Carillion since at least 2016 in relation to payments said to be due in 2014, and that Mr Morgan was instructed in August 2016.

Recent VAT returns and period 06/17

29. HMRC's VAT return summaries for the Company show that all supplies were standard rated, and it was not in dispute that this was the normal position for a company carrying out groundwork activities in the telecommunications industry. However, of the twelve VAT periods from 03/14 to 03/17, nine were repayment returns, as was that for period 06/17. Moreover, according to the same returns, the Company had sales of £988,442 and purchases of £1,080,890 and so was making a loss.

30. After the Company submitted its VAT return for period 06/17 showing input VAT of £30,800 and a repayment of £9,000, HMRC blocked the repayment and contacted the Company to say that they would carry out an examination of the records.

Mrs Carr's compliance visit

31. On 7 September 2017, Mrs Carr visited the premises of the Company's accountant, LDF Accountancy Services, and met with Mr Fawcett and Mr Segger. The first part of the meeting was an interview and the second part an examination of the records underlying the Company's return for period 06/17. Mrs Carr's contemporaneous visit notes record that she was told that "accountant checks with Neil prior to submitting VAT return", and Mr Segger confirmed under cross-examination that this was right: he checked that the returns were correct before they were submitted.

32. In his first witness statement, Mr Segger said that during Mrs Carr's compliance visit he had "spent most of the day answering questions to the very best of my knowledge". By the time of his third witness statement this had changed to a statement that he had "left the meeting after about 4 hours". However, in the skeleton argument submitted for the hearing, Dr Brown said that Mr Segger "may only have been present for 1.5 hours". In his oral evidence, Mr Segger agreed that he had only been at the meeting for an hour and a half. This was consistent with Mrs Carr's evidence. We find as a fact that Mr Segger was present at the meeting only for an hour and a half, during the interview, as Mrs Carr had said was the case.

33. Mr Segger's first witness statement also stated that Mrs Carr told him "late afternoon that everything was fine". This too was incorrect, as Mr Segger later accepted under cross-examination. Not only was he no longer present at the meeting in the "late afternoon", he was instead told it was "fine" for him to leave the meeting after the interview, so that only Mr Fawcett was present when Mrs Carr went through the records.

34. After Mr Segger had left, Mrs Carr first checked a random sample of purchase invoices to the detailed purchase listing, and identified that some of the values on those invoices did not match those on the listing. For example, one item was listed as having input VAT of £479.67, whereas the actual invoice showed VAT of £5.25. Mrs Carr then undertook an in-depth check of all of the purchase invoices, and identified that 49 were either missing or had been replaced with a different purchase invoice or even a delivery note. These replacement documents had been annotated by hand to cross-reference them to the listing. These 49 items made up 29.69% of the items on the listing.

35. Mrs Carr discussed her findings with Mr Fawcett, who said he had just received the file from Mr Segger and had had no reason to check it prior to her visit. He also stated that the reference numbers on the replacement documents were not in his handwriting.

36. Dr Brown's skeleton says that Mr Segger "disputes that invoices for VAT period 06/07 had been tampered with as alleged". However, no such denial was included in any of the

correspondence with HMRC after the meeting, and there is nothing to this effect in Mr Segger's first witness statement. His second witness statement, dated over two years after the compliance meeting, also contains no explicit denial of Mrs Carr's evidence, but only a statement that Mr Segger "never got back the 'alleged tampered with documents'": that phrase is repeated *verbatim* in the third witness statement.

37. We prefer Mrs Carr's contemporaneous evidence, and find that she accurately recorded what she found when she reviewed the records for 06/17, namely that there were missing documents and others had been "tampered with". That evidence is also consistent with the correspondence after the meeting (see §40-§42) and was never explicitly denied by Mr Segger. Moreover, the Company's grounds of appeal to the Tribunal stated that Mr Segger "was aware how the records supplied in the return compared to that of the return submitted does not look good", see further §76 below.

38. Mrs Carr's evidence was that she did not remove any of these documents from the premises; there is also no mention of her having done so in her contemporaneous visit notes or in the subsequent correspondence after the meeting. However, as noted above, Mr Segger's second and third witness statement said that the Company "never got back" the records underlying the 06/17 return. However, when this part of Mr Segger's witness statement was challenged in cross-examination, Mr Segger said he "wasn't there at the time and so didn't know" if the documents were taken away or not. We find as a fact, in reliance on Mrs Carr's evidence, that the documents remained on Mr Fawcett's premises at the end of the visit.

39. Mr Fawcett called Mr Segger after the meeting and told him Mrs Carr had found some supporting documents had been tampered with, and that others were missing.

Who was responsible?

40. On 8 September 2017, Mr Fawcett emailed Mrs Carr asking her to confirm that she wanted Mr Segger to provide "missing/replaced receipts and an explanation as to why quarter's submitted records have been tampered with".

41. On 14 September 2017, Mrs Carr confirmed that she wanted an explanation as to why "the records for period 06/17 have been tampered with and the purchase invoices are either missing or have been replaced". On 12 October 2017, Mr Fawcett said that Mr Segger had asked for further time to provide a reply, and Mrs Carr extended the deadline to 20 October 2017.

42. On 18 October 2017, Mr Fawcett emailed Mrs Carr about a number of matters; his email included this passage:

> "in relation to the missing/replaced receipts Mr N Segger advises that the file has been tampered with by a member of the administrative staff in the office and is still trying to get to the bottom of this."

43. Mr Segger's subsequent witness evidence on this issue changed over time:

(1) In his first statement (June 2019) he said that the Company's part-time office worker had "no access" to the files and the only people who had had access were himself and his barrister (in relation to the claim against Carillion).

(2) In his second statement (January 2020) he reiterated that the office worker, Ms Salkeld, had no access to the records; denied having authorised Mr Fawcett to make the

statement set out at §42, and said he thought the writing on the invoices was that of Mr Fawcett.

(3) In his third statement (August 2021) he said that he first became aware of the email sent on 18 October 2017 in the course of these Tribunal proceedings.

44. We find it inherently improbable that Mr Fawcett was responsible for falsifying the Company's records because:

(1) Mrs Carr's contemporaneous evidence was that Mr Fawcett told her that the writing on the documents was not his writing;

(2) Mr Fawcett said he checked the VAT returns with Mr Segger before submission, and Mr Segger confirmed that this was the case;

(3) Mrs Carr checking the records for the 06/17 return, which had already been submitted to HMRC, and thus Mr Segger had previously confirmed that the figures were correct;

(4) Mr Segger was told of the gaps in the records and the tampering on the day these issues were identified by Mrs Carr. Yet Mr Fawcett continued to work for the Company until at least 5 May 2018: on that date he submitted the Company's appeal against the VAT penalties. It is inconceivable that Mr Segger would have continued to use Mr Fawcett as the Company's accountant if he considered Mr Fawcett was responsible for tampering with the records;

(5) it was not until January 2020, over two years after the events in question, that Mr Segger suggested for the first time that Mr Fawcett was responsible; and

(6) there was no financial advantage to Mr Fawcett in falsifying the records.

45. It was common ground that, apart from Mr Fawcett, the only other people with access to the records were Mr Segger, Ms Salkeld (the office worker) and Mr Morgan, the barrister. By the time of the first witness statement, Mr Segger had accepted that Ms Salkeld was not responsible, and neither party suggested that Mr Morgan was involved. There would also be no financial benefit to either Ms Salkeld or Mr Morgan in falsifying the VAT records so as to increase the money paid to the Company by HMRC.

46. The only other person with access to the records was Mr Segger. Mr Cameron asked to find as a fact that Mr Segger was responsible for the tampering and for removing certain documents, on the basis that the only person who benefited was the Company, which was owned by Mr Segger, and also because there was no other credible candidate. We agree. We find as a fact that Mr Segger was responsible for the gaps in the records and for tampering with those records.

47. As noted above, in Mr Segger's second witness statement (January 2020) he denied that he had authorised Mr Fawcett to make the statement set out at §42, and in his third witness statement (August 2021) he said he first became aware of that email in the course of these Tribunal proceedings. We do not accept that evidence for the following reasons:

(1) Mr Fawcett does not simply state that it "was" a member of the administrative staff but specifically attributes that statement to Mr Segger, saying "Mr N Segger advises that" it was the position;

(2) it is entirely improbable that Mr Fawcett sent the email to Mrs Carr without having been authorised to do so by Mr Segger, because (as we have already found) he was not

responsible for falsifying the records, and so had no reason to blame "a member of the administrative staff";

(3) the email says Mr Segger "is still trying to get to the bottom of this". Mr Fawcett (an accountant with his own practice) could not investigate staff working for Mr Segger, so as to "get to the bottom" of the tampering; and

(4) it is not credible that an accountant with his own practice would not only blame a member of a client's administrative staff, but also inform HMRC that the client was carrying out related investigations, if he had not been so advised by the client, here Mr Segger.

48. We find as a fact that Mr Fawcett's email of 18 October 2017 contained the information he had been instructed by Mr Segger to provide to HMRC.

The assessment for period 06/17

49. On 10 November 2017, Mrs Carr issued an assessment for period 06/17 on the basis that the input tax of £15,881.84 was disallowed. As a result, the Company's VAT refund claim of £9,246.86 was reduced to nil and £6,634.48 was owed to HMRC. That assessment has not been appealed.

The earlier years and the alleged flood

50. The records for VAT periods prior to 06/17 were not provided to HMRC. The Company's case was that they had been destroyed in a flood. However, Mr Segger's evidence on this issue was inconsistent and unreliable, as explained below.

Mr Segger's initial position: the flood was in March 2016

51. When Mrs Carr met with Mr Fawcett and Mr Segger, she asked for the VAT records for those earlier periods. Her contemporaneous hand-written note of the interview (at which Mr Segger was present) records:

> "Records in Carlisle office when floods happened in 2016. Records were taken from Carlisle to Darlington and put into a garage. Then disposed of in March 2017 due to garage conversion. Records in Carlisle as Barrister needed to see them. Records normally held with accountant."

52. Mrs Carr's typed up notes of the visit expand the above. She recorded:

> "Accountant informed us prior to the visit that some of the records have been lost in the March 2016 flood in Carlisle. Discussed with Neil Segger (director) who informed us that he had collected the records from the accountants in Stockton and take them to Carlisle as his barrister needed to see the records and had then stored them in his premises in Carlisle after his barrister had seen them and in March 2016 they had been damaged when there was a large flood in Carlisle."

53. Mrs Carr realised that a flood in March 2016 could not explain why there were no records for periods 06/16 to 03/17. On 14 September 2017, she wrote to Mr Fawcett saying:

> "as to the records which were destroyed in the floods in Carlisle can you please explain how the records for periods 06/16 – 03/17 were destroyed when the flood occurred in March 16 as at the time of the flood the records would not exist."

54. Mr Fawcett replied on 20 October 2017, saying:

> "As previously advised by the director, the files in question had been taken from my office to the barrister in relation to the Carillion court case, these were then put in the out shed at the directors registered office with the flood damaged records which were skipped on erection of building works by mistake."

55. Thus, Mr Fawcett did not answer Mrs Carr's question as to how a flood in March 2016 could have affected records which only came into being subsequently.

The change of date and the insurance email

56. Mr Segger did not mention the flood in his first witness statement. In his second, he said he was "at a loss as to why my Accountant told [Mrs Carr]…that the flood occurred in March 2016 when in fact it was March 2017". He also said he had not authorised Mr Fawcett to send the email dated 20 October 2017, and continued:

> "The flood that occurred on 30 March 2017 meant that the entire yard workshop and office were under water. The water rose to a height of over five feet within the office and it opened up a manhole which also brought sewage into the office. A huge amount of small plant was damaged, all office equipment was damaged beyond repair and paperwork on the premises was ruined due to the water damage. I kept the purchase orders in a folder and that folder was covered in sewage due to the flood.
>
> I bagged all of the water/sewage damaged paperwork that I could and took it home and left it in my garage at home. I reported this to my Accountant and I asked him to inform the VAT office. My Accountant told me that did not matter as he 'had already saved them onto a hard drive'. Therefore, acting on his advice, I disposed of the bags a few weeks after putting them in my garage.

57. Mr Segger provided two pieces of related evidence. One was a picture of a flooded office, which, as Mr Cameron said, was undated and unauthenticated. The other was an exchange of emails between Ms Salkeld and Mr Paul Gill of Peacock Insurance. One copy of this email was dated 9 March 2018, and was contained in the documents provided by Mr Segger on 20 March 2019. Ms Salkeld wrote:

> "I have a quick question I'm hoping you can help me with. This morning Neil came into the yard & it was flooded, a manhole behind our premises has flooded into our unit can you confirm if were [sic] covered for this."

58. Mr Gill responded on the same day, saying that the Company was only covered for "public, products and employer liability".

59. The second copy of the email was among the documents provided by Mr Segger in April 2021. The text of the email exchange is identical, including the typographical error and the spacing. The only difference is that the date of the email is now shown as 31 March 2017, and the typeface used for that date is different from that in the rest of the email.

60. Mr Cameron described this second email, and the changes, as "unexplained" and asked the Tribunal to find that there was no reliable evidence that the Company had suffered a flood in March 2017 which destroyed all its records up to that date.

61. We agree with Mr Cameron. The email exchange with Mr Gill cannot be relied upon, as the date has been changed. The picture could be of any place at any time, and given the

unreliability of Mr Segger's other evidence, we place no weight on his assertion that it was a picture of his Carlisle office, or on the evidence about the alleged flood in his second and third witness statements.

62. We also do not accept the following evidence in the second witness statement:

(1) that Mr Fawcett (and not Mr Segger) told Mrs Carr that the flood was in 2016. We instead rely on Mrs Carr's contemporaneous meeting notes, which record that Mr Segger confirmed that date; and

(2) that he did not authorise Mr Fawcett to send the email dated 20 October 2017 as to what had happened to the records, see §54. That is because the content of the email reflects what Mrs Carr recorded Mr Segger as having said, and also because there is no reason why Mr Fawcett would have made these statements unless he had been authorised to do so by his client.

The Tribunal's findings on the flood

63. As set out in the preceding paragraphs, there is no reliable evidence that Company's records were destroyed in a flood in 2017, and we find as a fact that they were not.

64. There is also no reliable evidence on which we could find that the Company's records up to *March 2016* were destroyed in a flood, and we decline to make any such finding. This is because:

(1) there is no reliable independent contemporaneous evidence of the flood;

(2) the picture provided by Mr Segger is unauthenticated;

(3) the original copy of the email exchange with Mr Gill dates from March 2018, well after the meeting with Mrs Carr, and in any event refers only to a flooded manhole, not to the wholesale destruction of the contents of the Company's office, and

(4) the only other evidence is that given by Mr Segger, who we have found to be an entirely unreliable witness.

65. We record for completeness that Dr Brown's skeleton argument said "the records had been destroyed by floods in Carlisle in March 2016 (not 2017 as seems to be HMRC's case)". When Mr Cameron pointed out that Mr Segger's second witness statement stated that the flood was in 2017, Dr Brown said he had confused the dates, and had meant to say "the records had been destroyed by floods in Carlisle in March **2017**". For the avoidance of doubt, we accepted that this was an error by Dr Brown and have placed no weight on it. We have instead come to our findings above because there was no reliable evidence that the records were destroyed in a flood in either year.

Whether the records were stored on a hard drive

66. As noted above, Mr Segger's second witness statement also said he had been told by Mr Fawcett that the Company's records had already been saved onto a hard drive. There is no previous reference to a hard drive, or to Mr Segger having been told that it was the case. Specifically, a hard drive was not mentioned by either Mr Segger or Mr Fawcett during the meeting with Mrs Carr, or in any subsequent correspondence with HMRC, or in Mr Segger's first witness statement. The only evidence as to the alleged hard drive is that in Mr Segger's second witness statement, repeated *verbatim* in his third. Mr Cameron challenged that evidence in cross-examination and invited the Tribunal to find that there was no hard drive.

67. We agree with Mr Cameron, because:

(1) had Mr Fawcett saved the Company's records on a hard drive, there would have been no good reason why he would not have provided them to Mrs Carr at the meeting. Instead, she was told that the records were unavailable because they had been destroyed in a flood;

(2) that statement was repeated in correspondence after the meeting;

(3) in none of the correspondence was there any reference to the records having been stored on a hard drive;

(4) the first time the alleged hard drive was mentioned is in Mr Segger's second witness statement dated 8 January 2020, well over two years after the meeting with Mrs Carr; and

(5) Mr Segger's evidence on other matters has been shown to be entirely unreliable.

68. We find as facts that there was no hard drive, and that Mr Segger was thus never told by Mr Fawcett that a copy of the records had been stored on a hard drive.

The assessment for the earlier periods

69. On 10 November 2017, Mrs Carr issued the Company with a schedule setting out the input tax claimed for the periods 12/13 through to 03/17, together with a covering letter saying that the figures on that schedule would be disallowed "as your business records have been disposed of…unless you can provide any reconstructed records by no later than 11 December 2017".

70. On 24 November 2017, Mrs Carr granted the Company an extension until 11 January 2018. On 1 December 2017, before that deadline had expired, Mr Fawcett told Mrs Carr that Mr Segger was "going back to as many suppliers as possible to retrieve copy invoices". On 13 December 2017, Mr Fawcett emailed again, saying that Mr Segger had:

> "confirmed he had no joy retaining supplier invoices for the period in question but has tried…he wishes you to move forward with the case and make your official assessment so he can appeal through his barrister."

71. Mrs Carr took some time off over Christmas and New Year and returned to work on 2 January 2018; she made the assessment on 5 January 2018 and it was issued on 22 January 2018. It was for periods 03/14 to 03/17 and totalled £206,011. Period 12/13 was not assessed because it was outside the four year time limit. In making the assessment, Mrs Carr took into account the poor quality of the records she had seen in relation to 06/17, and also that the Company had claimed repayments in nine out of the previous twelve periods, despite making all its sales at the standard rate.

72. Mrs Carr told the Company that she would allow any input tax for which supporting evidence was provided. She pointed out that it was the Company's obligation to keep its records for six years and that it should have been able to provide the relevant supporting documents. After she was informed by Mr Fawcett in December 2017 that no documents were available, she made the original assessment. She subsequently considered the Folders provided by Mr Segger and reduced the assessment to £190,987 on the basis of alternative evidence within the Folders.

73. The Tribunal noted that when examining the records for period 06/17, Mrs Carr had found that 29.69% of the claimed inputs had no supporting documentation. The Tribunal asked

Mrs Carr why she had not used the same percentage for the previous periods, in reliance on the presumption of continuity, instead of disallowing *all* the input tax on those earlier VAT returns. Mrs Carr said she had only been given access to one VAT period, and had discovered significant and widespread anomalies. In her judgement, that single period did not provide a reliable basis for assessing any earlier period.

The penalty relating to period 06/17

74. On 23 April 2018, Mrs Carr issued the Company with a penalty for period 06/17 on the basis that the inaccuracies had been "deliberate but not concealed", and disclosure was prompted. The penalty range was thus in the range 35% to 70%. Mrs Carr gave full mitigation, so the penalty was charged at 35% of the VAT assessed, namely £5,558.35. This was later reduced to £5,405 after the provision of alternative evidence.

The penalty for the earlier periods

75. Mrs Carr also issued a penalty of £122,577 for the earlier periods on the same basis. On 3 May 2018 Mr Fawcett asked for a statutory review of both penalties. On 21 June 2018, an HMRC Review Officer, Mrs Sutton, accepted the evidence provided as to the flood and destruction of the records. She decided that the Company's behaviour had been "careless" rather than deliberate and that the penalty should be reduced to £30,901.80 for that reason.

Appeal to the Tribunal, and the suspension of the penalty for the earlier periods

76. On 15 February 2018, Mr Fawcett appealed to the Tribunal on behalf of the Company against the assessment of the earlier periods. The grounds of appeal stated that Mr Segger "was aware how the records supplied in the return compared to that of the return submitted does not look good". No appeal was made against the assessment for period 06/17.

77. On 12 July 2018, Mr Fawcett filed the Company's appeal against both penalties. In relation to the penalty for the earlier years (which had been reduced to £30,901.80 on the basis of careless behaviour), he said that the Company would withdraw its appeal if that penalty were to be suspended by HMRC.

78. On 13 September 2018, the two appeals were consolidated by the Tribunal. At some point before 1 March 2019, the Tribunal was notified that Mr Fawcett was no longer the Company's representative.

79. A hearing of the consolidated appeal took place on 6 November 2019; it was attended by Mr Segger and Mr Cameron. Mr Segger produced the black folder (see §)7 and asked the Tribunal for permission to admit it as late evidence. The Tribunal (Judge Chapman and Mr Stafford) decided it was in the interests of justice to adjourn the hearing, and also granted permission for the black folder documents to be admitted into evidence.

80. On 6 May 2020, HMRC informed the Tribunal that on 14 February 2020 they had suspended the penalty for the earlier periods. On 11 May 2020, Dr Brown notified the Tribunal that the Company was withdrawing its appeal against that penalty. Thus the appeals which remained to be determined by this Tribunal were against the assessment of £190,987 for periods 03/14 to 03/17, and against the penalty of £5,405 for period 06/17 on the basis of deliberate behaviour.

PART 3: THE ASSESSMENT FOR THE EARLIER YEARS

81. This Part sets out the relevant law, followed by the parties' submissions on the assessment, and the Tribunal's conclusion.

The relevant law

82. We begin with the statute and case law relevant to the concept of "best judgement" and then other key VAT provisions.

*Best judgeme*nt

83. VATA s 73(1) reads as follows (emphasis added):

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgement and notify it to him."

84. The correct approach to a "best judgment" assessment was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) (Judge Scott and Ms Gable), in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC) (Judges Herrington and Scott):

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC) (Judge Sir Steven Oliver QC).
>
> 15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):
>
> > 'In such cases…the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary.'
>
> 16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:
>
> > '…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment.'
>
> 17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment."

85. The case of *Van Boekel v HMRC* [1981] STC 390 also provides guidance as to the correct approach. At the High Court, Woolf J (as he then was) said:

> "…the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and *bona fide.* It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

86. In *Tynewydd Labour Working Men's Club and Institute Ltd v HMRC* [1979] STC 570 ("*Tynewydd*"), Forbes J stated that:

> "… any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. There should be no difficulty in the way of the Appellant assuming this burden. The facts and figures are known to him…."

87. Those *dicta* were recently cited with approval by the Upper Tribunal in *Kingsley Douglas v HMRC* [2021] UKUT 0163 (TCC) (Judges Herrington and Scott).

Other VAT legislation and regulations

88. VATA s 26(2) provides that a taxable person can recover any input tax on goods or services which are attributable to its taxable supplies.

89. Reg 29 (1) and (2) of the VAT Regulations 1995 make it a legal requirement to hold satisfactory evidence to support claims for input tax, which may include "such other evidence of the charge to VAT as the Commissioners may direct". HMRC thus have a discretion to accept alternative evidence.

90. Reg 31(1) provides, *inter alia*, that a taxable person shall keep "his business and accounting records", and "copies of all VAT invoices received by him". VATA Sch 11, para 6(3) provides that HMRC "may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing". HMRC have

consistently specified that records must be kept for 6 years unless they agree in writing to a particular business or type of business keeping them for a shorter period.

91. VATA s 77 provides:

> "(1) Subject to the following provisions of this section, an assessment under section 73… shall not be made
>
> (a) more than 4 years after the end of the prescribed accounting period…concerned.
>
> …
>
> (4) In any case falling within subsection (4A), an assessment of a person ('P'), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period…
>
> (4A) Those cases are
>
> (a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf."

The parties' submissions on best judgement, and the Tribunal's view

92. Dr Brown submitted that the assessment had not been made to Mrs Carr's best judgment, because she had not taken into account:

(1) that the original records had been lost in a flood in 2017;

(2) that the Company had tried to recreate the records underlying the input tax claims, but "the vast majority of the Appellant's purchases were undertaken on a Carillion purchase card" and Carillion had refused to provide the relevant documents to the Company;

(3) the copies of contra-charge documentation included in the Folders; and

(4) other (unspecified) documents provided in the Folders, which provided alternative evidence of input tax.

93. We agree with Mr Cameron that all of the above submissions are to be rejected, for the following reasons:

(1) We have found as a fact that there was no loss of records in a flood.

(2) Input tax relating to the Carillion contra-charge purchases could only be included in the Company's VAT returns if the related outputs were also included, and we have found as a fact that this was not the position. In other words, the Company had decided to complete its returns on a net basis.

(3) The contra-charge documents in the Folders could therefore not provide alternative evidence of input tax.

(4) Mrs Carr had carefully reviewed the material in the Folders, despite their disorganised state, and had reduced the assessment where she found reliable evidence of input tax. Neither the Company nor Dr Brown identified any specific examples of "alternative evidence" which Mrs Carr had failed to consider.

94. The Tribunal considered for itself whether Mrs Carr had exercised best judgement by disallowing all the input tax, instead of relying on the 29.69% to extrapolate back for previous periods. However, as explained at §84, our jurisdiction at this first stage is akin to supervisory. We were clear that Mrs Carr had made "a genuine attempt to make a reasoned assessment of the VAT payable", because:

(1) she had reviewed the purchase records provided and found them to be entirely unreliable, and therefore decided she could not base the assessment on an extrapolation of those figures;

(2) she had also taken into account that the Company had claimed repayments in nine out of the previous twelve periods, despite making all its sales at the standard rate;

(3) she gave the Company three months to provide the actual records, during which time none were provided and at the end of which Mr Segger said that none would be provided; and

(4) she fairly considered consider all material placed before her, reducing the assessment when the Company later produced some alternative evidence of purchases.

95. This was not a case which "compels the conclusion that no officer seeking to exercise best judgment could have made it" or one where "the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment". Mrs Carr plainly performed her function honestly and *bona fide.*

96. In relation to the second stage, Forbes J said in *Tynewydd* that the appellant "takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong". We have considered the reasons why Dr Brown has said that this was the position, and have found none of those reasons to be correct.

Other submissions by Dr Brown

97. Dr Brown made three other submissions, set out below.

The calculation sheet

98. Dr Brown relied on a working sheet used by Mrs Carr in which she had written "FRB pre-cred PLR £15,881/1 quarter x 12 quarters = £190,572". Dr Brown submitted that Mrs Carr had therefore used the figure of VAT disallowed for period 06/17 of £15,881.84 as the basis for the assessment, and that such an approach was unreasonable.

99. This submission was not in Dr Brown's skeleton argument and was raised for the first time during the hearing: Mr Cameron therefore had to respond without prior warning. He explained that from his own experience, this type of calculation is used by HMRC Officers to provide an estimate how much *future* VAT may have been saved as the result of the compliance intervention. It was not the basis for the assessment. Mrs Carr, who had remained a participant in the hearing (although her witness evidence had concluded), indicated that she agreed with Mr Cameron's summary as to the purpose of the calculation.

100. We reject Dr Brown's submission. It is clear from other documents in the Bundle that the assessment was made up of the actual input tax claimed by the Company during each of the periods, and was not a multiplier of the VAT disallowed in period 06/17. Thus, although we accept Mr Cameron's explanation as to the purpose of the calculation identified by Dr Brown, we would have come to the same conclusion in any event.

Four year period.

101. The Company's grounds of appeal submitted that it was "unreasonable" for Mrs Carr to issue an assessment going back for four years "based only on this one return". Mr Cameron's response was that this was permitted by the statute; that the assessment had been made to best judgement and it was for the Company to displace the figures. The Tribunal agrees with Mr Cameron for the reasons he gave. We add that, as originally made, the assessment was on the

basis of deliberate behaviour, and the statute allows HMRC to go back 20 years, see VATA s 77(4) and (4A) cited above.

VAT paid to HMRC

102. Dr Brown also made submissions about amounts of VAT which Mr Segger said he had paid over to HMRC. However, the matter before the Tribunal is the Company's appeal against an assessment. It is irrelevant whether or not amounts of VAT have, or have not, been paid to HMRC.

Conclusion on the assessment

103. For the reasons set out above we find that the assessment was made to Mrs Carr's best judgement and there is no basis for any part of it to be reduced. It is therefore upheld and the Company's appeal against it is refused.

PART 4: THE PENALTY

104. As we have already found earlier in this decision notice, on 10 November 2017 Mrs Carr issued the Company with an assessment for period 06/17, disallowing input tax claimed of £15,881.84. On 23 April 2018, she issued the Company with a penalty of £5,558.35, charged at 35% of the assessment, on the basis that the inaccuracies had been deliberate but not concealed, and disclosure was prompted. Mrs Carr later reduced the penalty to £5,405 after the assessment was amended following the provision of alternative evidence.

105. We next set out the relevant statutory provisions, followed by the parties' submissions and our conclusion.

The legislation

106. The penalty was charged under FA 2007, Sch 24, para 1, which reads:

> "(1) A penalty is payable by a person (P) where
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to
>
> (a) an understatement of a liability to tax…
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part."

107. A VAT return is one of the documents listed in the Table below that paragraph.

108. Paragraph 3 is headed "degrees of culpability" and subparagraph (1) provides:

> "For the purposes of a penalty under paragraph 1, an inaccuracy in a document given by P to HMRC is–-
>
> (a) 'careless' if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) 'deliberate but not concealed' if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) 'deliberate and concealed' if the inaccuracy is deliberate [on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

109. Paragraph 4 provides that penalties which are in "category 1", being those with no offshore element, are charged at 30% of the "potential lost revenue" ("PLR") for careless action; 70% of the PLR for deliberate action, and 100% of the PLR where the action is both deliberate and concealed. Paragraph 5 defines the PLR as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

110. Paragraph 10 allows penalties to be reduced to "reflect the quality of the disclosure". A penalty for deliberate behaviour, where disclosure was prompted, can be reduced from 70% to a minimum of 35%.

111. Paragraph 11 allows HMRC to reduce a penalty "if they think it right because of special circumstances". Those circumstances cannot include "ability to pay".

112. Paragraph 13 is headed "Assessment" and includes the following provisions:

> "(3) An assessment of a penalty under paragraph 1 must be made before the end of the period of 12 months beginning with–-
>
> (a) the end of the appeal period for the assessment of tax which corrected the understatement,…
>
> (5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which–-
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn.

113. Paragraph 15 sets out the appeal rights, and paragraph 17(3)(b) and (6) provide that the Tribunal has the jurisdiction to change HMRC's decision on special circumstances "only if it thinks that HMRC's decision was flawed"; the term "flawed" is defined to mean "flawed when considered in the light of the principles applicable in proceedings for judicial review.

The parties' submissions

Whether there was an inaccuracy

114. Dr Brown's skeleton said that Mr Segger "did not submit an inaccurate VAT return for period 06/17". Mr Cameron pointed out that the Company's grounds of appeal had said that Mr Segger was aware that the records supporting the return for that period "does not look good" when compared to the figures in the return, and in terms that was an acceptance that the return was inaccurate. Moreover, that assessment had not been appealed.

115. We agree with Mr Cameron that it is not open to this Tribunal to consider whether or not the 06/17 return was inaccurate, partly for the reason he gives, and also in reliance on *R (PML Accounting) v HMRC* [2018] EWCA Civ 2231("*PML*").

116. In *PML* the Court of Appeal considered a penalty charged in relation to failure to comply with an information notice issued under FA 2008, Sch 36. The Court held that when considering a penalty charged under that Schedule, a tribunal does not have the jurisdiction to consider the validity of the underlying assessment, unless that assessment has itself been appealed, because a Sch 36 penalty assessment can only be made within the 12 months after the end of the "appeal period" for the underlying assessment. The wording of the Sch 36 legislation relied on by that Court is identical to that in FA 2007, Sch 24, para 13 set out above. It follows that when considering the appeal against the penalty, we have no jurisdiction to consider whether the underlying assessment for 06/17 was inaccurate, as that matter was not before us for determination.

Whether the inaccuracy was deliberate

117. Dr Brown's skeleton also said (presumably in the alternative) that Mr Segger did not know the return was inaccurate and thus the penalty could not be charged on the basis that he had acted deliberately.

118. We can deal with this briefly. Mr Segger initially sought to blame "a member of the administrative staff in the office" and then Mr Fawcett. We have already found as a fact that it was Mr Segger who was responsible for tampering with the records and for the missing documents. This was clearly a deliberate act and we agree with Mr Cameron that the penalty has been correctly assessed on that basis.

Prompting, mitigation and special circumstances

119. There was no dispute that disclosure was prompted by Mrs Carr's visit. The maximum mitigation for a deliberate penalty where the disclosure was prompted has already been given, from 70% to 35%.

120. Both Mrs Carr and Mrs Sutton, the Review Officer, considered whether there were any special circumstances, and decided there were not. Dr Brown did not put forward any submission in relation to special circumstances. As is clear from the legislative provisions set out above, the Tribunal only has jurisdiction to change HMRC's decision on special circumstances if we consider HMRC's decision on that issue was "flawed...when considered in the light of the principles applicable in proceedings for judicial review". There was no basis for any such finding in this case.

Conclusion on the penalty

121. For the reasons set out above, we confirm the penalty of £5,405 and refuse the Company's appeal.

OVERALL CONCLUSION AND APPEAL RIGHTS

122. We uphold the assessment of £190,987 for periods 03/14 to 03/17 and we uphold the penalty of £5,405 for period 06/17. The Company's appeal is dismissed.

123. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 15 NOVEMBER 2021