TC02698

Appeal number: TC/2012/02222

VAT – penalty for inaccurate return under schedule 24 Finance Act 2007 – admittedly careless error – whether disclosure was "prompted" or "unprompted" – disclosure made at a time when HMRC had already booked a repayment return verification visit, but would have been made irrespective of that visit – whether Appellant at the relevant time had "no reason to believe" that HMRC were "about to discover" the inaccuracy – held no – disclosure therefore "prompted" within paragraph 9, schedule 24 Finance Act 2007 – whether penalty should be suspended – held no, even if original HMRC decision might arguably have been flawed – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNITED EUROPEAN GASTROENTEROLOGY FEDERATION — **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
SHAMEEM AKHTAR

Sitting in public in Priory Court, Bull Street Birmingham on 20 March 2013

Jane Bailey of Deloitte LLP Chartered Accountants for the Appellant

Pat Checkley, Presenting Officer of HMRC for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty under Schedule 24, Finance Act 2007 ("Schedule 24") imposed for a careless inaccuracy in the Appellant's VAT returns for the periods 06/09, 09/09 and 12/09. The penalty totals £104,973.

2. As a result of what the Appellant (rightly, in our view) concedes to have been a careless error in each case, those returns did not include output VAT totalling £693,897 and wrongly included input VAT totalling £5,925. The total error was therefore £699,822.

3. Schedule 24 lays down penalties for inaccuracies in returns, and provides that the penalties should be reduced if the taxpayer discloses the inaccuracies to HMRC.

4. For careless errors, Schedule 24 lays down a penalty range of 15% - 30% for "prompted" disclosures and a range of 0% - 30% for "unprompted" disclosures. In each case, the percentage is calculated by reference to the "potential lost revenue", i.e. in this case the £699,822 figure mentioned at [2] above.

5. In view of the quality of the Appellant's disclosure, HMRC accepted that it was entitled to the maximum mitigation that was permitted.

6. They regarded the Appellant's disclosure as "prompted". They therefore imposed a penalty at a rate of 15%. Hence the penalty was calculated at £104,973.

7. The Appellant maintained that its disclosure was unprompted and therefore qualified for 100% mitigation, with no 15% minimum penalty.

8. The question of whether the disclosure was prompted or unprompted was therefore the main issue between the parties.

9. If it did not succeed fully on the main issue, then the Appellant also argued that any penalty should be suspended. HMRC argued that in the circumstances of this case, suspension was not available.

10. The Appellant has not argued for any special reduction of the penalty and we therefore do not consider that issue.

The Facts

11. We heard evidence from:

    (1) Ramzan Khan, the HMRC officer who carried out the relevant control visit and imposed the penalty the subject of the appeal, and

    (2) Dr Gernot Schuster, a partner in Deloitte Tax Wirtshaftsprüfungs GmbH in Austria ("Deloitte Austria"), who acted as accountants to the Appellant in Austria.

12. We also received a bundle of documents agreed between the parties. From the evidence before us, we find the following facts.

13. The Appellant is a Swiss-registered non-profit making association with its place of management in Austria. Its status is similar to a charity in the UK. It is a professional organisation combining all the leading European societies concerned with combating digestive disease. As part of its range of activities, it organises a congress each year, generally in a different country. It organised a congress in the UK in November 2009.

14. The Appellant engaged a third party supplier based in Austria, Destination Management & Consulting gesmbh ("DM&C"), to assist it in organising the UK congress. DM&C also assisted in organising the 2008 congress in Vienna. The short contract between the Appellant and DM&C in relation to the UK congress was signed on 24 January 2007.

15. Up to (and including) the 2007 congress, the Appellant had used a different service provider to help in the organisation of the conference, which had invoiced delegates for their congress fees in its own name as principal, rather than in the name of the Appellant. There was no evidence before us that such matters were considered or discussed with DM&C.

16. The contract between the Appellant and DM&C which was signed in January 2007 was extremely sketchy. The description of DM&C's services took the form of a number of bullet points under three headings, covering less than half a page. Its services under the "Finance" heading were listed as:

> "• Contract negotiations with the service providers
>
> • Handling of all relevant financial transactions
>
> • Payment statistics and reports
>
> • Final invoice"

17. In March 2009 the Appellant applied for a UK VAT registration. The application was signed by a Dr Peter Milla, a distinguished Paediatric Gastroenterologist and Treasurer of the Appellant. In it, an effective registration date of 10 March 2009 was requested and the application was for a voluntary registration based on an expected turnover of £7 million.

18. The vast majority of the Appellant's income from the 2009 annual congress (some €6.1 million) was made up of the delegates' fees paid by the 17,500 delegates. In addition, there were fees from exhibitors and commissions from hotels.

19. It appears that DM&C issued invoices to the delegates for their congress fees in the name of the Appellant and on its behalf. We were told this was done without reference to or discussion with the Appellant. A copy of an invoice was included in the evidence before us. It included the Appellant's VAT number, which must

therefore have been supplied to DM&C at some point. In the context of that contact, one would normally expect there to be a discussion about the reason why the VAT number was being requested. However, because the Appellant accepted that it had been careless, it was not necessary for us to consider this aspect further.

20. DM&C did not give the Appellant or its advisors any information about or details of the invoices they were issuing to delegates at the time they were issued. The Appellant and its advisors either assumed that DM&C had invoiced delegates' fees in its own name as principal or gave the matter no thought at all. As a result, no figures in respect of sales or output tax for those fees were included on the Appellant's UK VAT returns for periods 06/09, 09/09 or 12/09. Those returns were prepared and submitted by Deloitte in the UK as the Appellant's agent. The Appellant does not dispute the validity of the invoices issued on its behalf by DM&C.

21. The congress took place in London on 21-25 November 2009.

22. The Appellant received various payments from DM&C, at least some of which were identified as "registration fees" on the bank remittance advices. In particular, it received round sum payments of €1 million each on 16 November 2009 (just before the congress started) and 12 January 2010, followed by payments of €3,829,892.03 on 14 April 2010 and £171,198.34 on 18 May 2010. The November and January payments were identified as "registration fees". There was no evidence before us as to whether the April and May payments were similarly identified.

23. Deloitte UK prepared and submitted the Appellant's 12/09 VAT return on 26 February 2010. That return requested a repayment of just over £150,000. In response to it, HMRC contacted Deloitte UK by telephone on 30 March 2010 to arrange a visit to "discuss your request for a VAT repayment for December 2009". The date initially agreed for the visit was 27 April 2010 at the St Albans office of Deloitte.

24. On 22 April 2010, the date for the visit was re-arranged at the request of Deloitte. This was because of delays in getting the Appellant's records delivered from Austria to the UK. The new agreed date for the visit was 21 May 2010.

25. In the meantime, Deloitte Austria had been compiling the Appellant's financial statements for the calendar year 2009. It was only when doing so that they identified the mistake that had been made. On 10 May 2010 DM&C provided the Appellant with the "Final Statistics" for the 2009 congress, which for the first time fully documented all the income and expenditure in respect of the services carried out by DM&C. When this was passed on to Deloitte Austria, they recognised that something must be wrong and within two days they had established that DM&C had been issuing invoices in the name of the Appellant. They advised the Appellant that Deloitte UK should be contacted to make a disclosure to HMRC and on 19 May 2010 sent an email to the Appellant confirming the telephone discussion to that effect. Following that email, Deloitte Austria were obviously instructed to make that contact themselves, which resulted in a call to Deloitte UK on 20 May 2010, in which Dr Hofer of Deloitte Austria told Tom Nash of Deloitte UK what had been discovered.

26. Thus when Deloitte UK heard from Deloitte Austria about the error that had been identified, it was the day before the agreed visit from HMRC. Tom Nash of Deloitte UK immediately telephoned HMRC to explain that additional information been discovered and that there was a possibility the 12/09 return needed to be amended. It was agreed that the 21 May visit should be deferred in order to enable Deloitte to investigate the position fully. A new visit was arranged for 1 July 2010. We find that during this conversation, only the most general indication was given by Deloitte that something was potentially wrong, and there was no disclosure of either the general nature or extent of the problem.

27. On 28 June 2010 Deloitte sent to HMRC by fax a letter dated 25 June 2010. That letter explained the outline of the mistake that had been discovered and invited HMRC to consider whether it would be appropriate to defer the visit until Deloitte had been able to put together a formal voluntary disclosure. This fax resulted in the further postponement of the visit from 1 July.

28. The visit eventually went ahead on 24 August 2010. There followed a series of further communications, culminating in agreement as to the corrections that were required to the various VAT returns.

29. Eventually, HMRC issued a pre-decision letter dated 5 September 2011 in relation to the penalties it proposed, stating that:

(1) in respect of period 06/09, the omission of the delegates' fees had caused an underdeclaration of output tax of £92,772;

(2) in respect of period 09/09, the same omission had caused an underdeclaration of output tax of £195,110;

(3) in respect of period 12/09, the same omission had caused an underdeclaration of output tax of £406,015. In addition, £5,925 of input tax had been claimed which was disallowable as business entertainment. The total underdeclaration was therefore £411,940;

(4) the total "potential lost revenue" was therefore £92,772 + £195,110 + £411,940 = £699,822;

(5) applying the maximum available mitigation for a prompted disclosure of a careless inaccuracy, a penalty was chargeable at the rate of 15%, i.e. £104,973.30.

30. The Appellant does not dispute the calculation, apart from the applicable penalty rate.

31. Following a pre-decision letter dated 5 September 2011 and a penalty calculation summary dated 7 September 2011 there was further correspondence culminating in a letter dated 5 October 2011 from Officer Khan setting out the basis of his decision and a formal penalty assessment dated 10 October 2011. Following a request for a statutory review dated 3 November 2011, HMRC issued a review decision letter dated 16 December 2011, confirming the original decision. The appeal was then notified to the Tribunal on 13 January 2012.

32. Dr Schuster told us that the same error had occurred in relation to its 2008 congress in Vienna – the first which was managed for it by DM&C. It was only when the error came to light in relation to the 2009 UK congress that the previous year was checked and the same error was found – without having been picked up at the time by Deloitte Austria or on the Swiss audit of the Appellant's financial statements. A voluntary disclosure had been duly made to the Austrian VAT authorities, who had charged a 2% penalty.

33. We find that the Appellant would have disclosed the underdeclarations of output tax (but would not have disclosed the overclaim of input tax) irrespective of whether or not HMRC had made contact with Deloitte to arrange the visit to verify the 12/09 repayment return. Therefore it could be said that in colloquial terms the bulk of the Appellant's disclosure was not prompted by anything done by HMRC, as it would have been made in any event.

34. Mr Khan was questioned about his normal approach to visits such as the one he made to Deloitte in relation to the Appellant. We accept his evidence that, whilst there was no formal checklist laid down by HMRC of matters to be considered, he always included as one of his most basic enquiries (as part of gaining an initial understanding of the business he was visiting) the question of output VAT on the main streams of revenue of the business. He was confident that the same could be said of his colleagues generally.

35. A copy of the manuscript notes he made of the visit on 24 August 2010 was included in the evidence. Those notes included a pre-prepared list of areas to be covered on the visit, and second on the list was "MBA" (main business activity), against which he had noted the streams of income at the meeting. We accept his evidence that he was aware before the meeting of the estimated £7 million turnover figure given in the VAT registration application form and even if he had been informed that DM&C had dealt with the VAT under its own registration, simply accounting to the Appellant for net profit, he would have tested what he was being told. We accept that he would have wanted to see where the UK VAT was being accounted for, if it was not by the Appellant. We also accept that the same could be said of his colleagues generally.

36. We therefore find that HMRC would, even if the visit had gone ahead before Deloitte had indicated there were potential errors in the returns, have made enquiries about the Appellant's output tax liability (especially in the light of the estimated turnover of £7 million indicated in its VAT registration application form) and they would, as a result of such enquiries, eventually have discovered the underdeclarations of output tax. We also find as a fact that Mr Khan did discover the over-reclaim of input tax purely as a result of his enquiries at the meeting.

37. The Appellant ceased its business activities in the UK once the UK congress was completed. At a later date it deregistered for VAT and is only likely to undertake further business activities in the UK requiring VAT registration if it decides to hold another congress here (which is apparently not currently planned).

38. It was suggested by Miss Bailey that, at the time of the disclosure to HMRC (which she submitted was on 20 May 2010), there was no evidence in the UK which could have caused the discovery of the error. We accept that the error was not obvious on the face of the information held in the UK at that time, however:

(1) this does not affect our findings at [36]; and

(2) by 28 June 2010 (the date on which we find that the inaccuracy was, in general terms, disclosed to HMRC), the error was clearly apparent on the face of the material held in the UK which would be available for consideration by HMRC during their visit.

39. We therefore reject Miss Bailey's submission that, on the facts, the Appellant <u>could not</u> have had any reason to believe that HMRC were about to discover the error, whether that submission relates to the state of affairs on 20 May 2010 or 28 June 2010. We address later in this decision whether the Appellant <u>actually</u> had any reason to believe that HMRC were about to discover the error.

The law

40. The penalty in question has been imposed under Schedule 24.

41. We only set out the parts of that Schedule which are relevant to the matters in dispute, namely whether the disclosure made on behalf of the Appellant was "prompted" and whether any penalty should be suspended. It is common ground that the error in the Appellant's VAT returns was careless and therefore that it was liable, before any reduction for disclosure, to a penalty at the rate of 30% of the potential lost revenue.

42. The copy legislation included in the bundle prepared by HMRC was incorrect. Instead of reproducing the legislation as it stood at the material time, they included it as originally enacted. We only discovered the error as a result of our subsequent researches. This is not the first time HMRC have included an incorrect version of legislation in an authorities bundle before the Tribunal and they should take care to ensure the error does not occur again. It is quite conceivable that a Tribunal might reach a decision based on the legislation included in the bundles by HMRC, then be required to review its decision later when the error is drawn to its attention. We would consider exercising our power to award costs against HMRC in such circumstances.

43. Paragraphs 9 and 10 of Schedule 24, headed "Reductions for disclosure", provided at the relevant time (so far as material) as follows:

> "9 (A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy.....
>
> (1) A person discloses an inaccuracy ..... by –
>
> (a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy ..... , and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy ..... 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 .... , and

(b) otherwise, is “prompted”.

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

10 (1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.

....”

44. Accordingly, the crucial question is whether the Appellant’s disclosure to HMRC was made at a time when it had “no reason to believe” that HMRC had discovered or were about to discover the inaccuracy.

45. On the matter of suspension, the relevant law is contained in paragraph 14 of Schedule 24 (and remains unchanged since original enactment):

“14 (1) HMRC may suspend all or part of a penalty for careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify –

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

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

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

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

(4) A condition of suspension may specify –

(a) action to be taken, and

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

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

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

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

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

46. Finally, paragraphs 15 and 17 of Schedule 24 contain (amongst other things) the following provisions concerning appeals (as they have stood since 1 April 2009):

"15 (1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

....

17 (1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may–

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

....

(4) On an appeal under paragraph 15(3) –

(a) the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the tribunal orders HMRC to suspend the penalty –

(i) P may appeal to the tribunal against a provision of the notice of suspension, and

> (ii) the tribunal may order HMRC to amend the notice.
>
> ....
>
> (6) In sub-paragraphs ..... (4)(a).... "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.
>
> (7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph."

47. The parties did not refer us to any authorities to assist us in relation to the question of whether the Appellant's disclosure was prompted or unprompted.

48. In relation to the question of suspension, Mrs Checkley referred us to *Fane v HMRC* [2011] UKFTT 210 (TC), in particular the statement in paragraph [65] that:

> "[b]earing these considerations in mind, HMRC's guidance indicating that a one-off error would not normally be suitable for a suspended penalty is understandable and, in our view, justified."

49. In relation to the same question, we also considered *Testa v HMRC* [2013] UKFTT 151 (TC), where the Tribunal (at [25]) said of the passage from *Fane* quoted above that "as a general statement is must be treated with care." The Tribunal went on to find (at [38]) that HMRC's uncritical adherence to a general policy of "no suspension for one-off events" and their failure to give any proper consideration to the suspension conditions proposed by the appellant rendered HMRC's decision not to suspend the penalty flawed in that case.

Submissions of the parties

Prompted or unprompted

50. Miss Bailey argued that because the disclosure was unprompted, and HMRC had already confirmed that a full 100% mitigation was available within the relevant range, the penalty should be reduced to nil.

51. She submitted the disclosure was unprompted because:

(1) The evidence clearly showed that the disclosure would have been made irrespective of any planned visit by HMRC; and

(2) The facts were such that the Appellant had no reason to believe, at the time it made the disclosure, that HMRC were about to discover the error.

52. She submitted that the wording in paragraph 9(2)(a) of Schedule 24 ("has no reason to believe") meant that the test was a subjective one, looking into the mind of the Appellant (or its controlling individuals); she asserted that the only available evidence as to that state of mind was the uncontested evidence of Dr Schuster to the

effect that the Appellant had no reason to believe, at the relevant time, that HMRC were about to discover the inaccuracy.

53. She argued that HMRC's approach – which she paraphrased as "the disclosure must be prompted simply because a visit had been booked" – could not be right as it would have arbitrary results. It could mean that a large and complex business with regular meetings with a customer relationship manager from HMRC might never be able to claim an unprompted disclosure; or that two identical taxpayers making the same disclosure might get totally different treatment, depending on the pure chance of whether one of them had received a letter booking a routine control visit.

54. Mrs Checkley simply argued that on the facts of this case, it was clearly right to say that once the visit had been booked, the process whereby HMRC would discover the error had begun; therefore the Appellant had reason to believe that HMRC would discover it and so the opportunity to make an unprompted disclosure had passed.

Suspension

55. Miss Bailey submitted that it was clearly incorrect to say, as HMRC had done in their review letter dated 16 December 2011, that suspension was not available because any future UK business activities would be carried out under a new VAT registration, thus making the Appellant a different "person" for the purposes of paragraph 14 of Schedule 24.

56. She further submitted that this was a case in which suitable suspensive conditions could be laid down, binding on the Appellant if it chose to organise a further congress (or indeed carry out any other taxable activity) in the UK. These might include requirements for the Appellant to put in place clear systems to ensure that VAT was adequately covered in contracts with suppliers and its operation was appropriately checked and verified. She argued that HMRC should have checked with the Appellant whether it had any further taxable activities planned in the UK before reaching its decision.

57. Mrs Checkley submitted that as all the indications were that the Appellant had ceased its UK taxable activities for the foreseeable future once the congress had been completed and tidied up, it was entirely reasonable to take the view that there was no suspensive condition that would help the Appellant to avoid becoming liable to further penalties under Schedule 24. She made no attempt to defend the line of argument contained in HMRC's review letter dated 16 December 2011 referred to in Miss Bailey's submission at [55] above.

Discussion and conclusion

Prompted or unprompted?

58. In view of our finding at [38(2)], the question for determination is whether "the person making" the disclosure on 28 June 2010 had "no reason to believe" that HMRC were "about to discover" the inaccuracy.

59. In passing, we would observe that in the circumstances of this case there would be no difference if we considered the same question as at 20 May 2010 (the date when Deloitte indicated to HMRC that the 12/09 return might need amendment); the only thing that changed between the two dates was that Deloitte's and the Appellant's general knowledge of the problem hardened into a much fuller appreciation of its detail. On both dates, they were aware that HMRC had arranged a visit specifically to consider the accuracy of the VAT return for 09/12, which could therefore be expected to bring the Appellant's VAT position generally under the spotlight.

60. We reject Miss Bailey's submission that the "no reason to believe" test is a subjective one. Paragraph 9(2)(a) of Schedule 24 requires the question to be asked: "At the time the disclosure was made, did the person making it have no reason to believe that HMRC had discovered or were about to discover the inaccuracy?" The question is not whether the person actually held that belief, it is whether there was any <u>reason</u> for them to hold that belief. To answer that question, an objective examination of the facts is required, not an enquiry into a subjective state of mind.

61. In making that objective examination, the first question to be asked is which "person" it should relate to. In the present case, it was Deloitte UK who actually made the disclosure, though clearly it was being made on behalf of the Appellant. Which of these two is the "person" with whom we are concerned for the purposes of paragraph 9(2)(a)?

62. Since paragraph 9 is effectively an interpretation provision to explain paragraph 10, and paragraph 10 refers to the situation in which "a person who would otherwise be liable to a .... penalty has made [a prompted/an unprompted] disclosure", it seems clear that the references to "person" in paragraph 9 are intended to refer to the person who may potentially benefit from mitigation of the penalty under paragraph 10. We therefore interpret the reference in paragraph 9(2)(a) to "the person making [the disclosure]" as referring, where a disclosure is made by an agent, to the principal on whose behalf it is made. In the present case, this means that the "person" in question for the purposes of paragraph 9(2)(a) is the Appellant, rather than Deloitte UK. Both parties at the hearing proceeded on the assumption (without addressing the point specifically) that this was correct.

63. So if we are considering what the Appellant had "reason to believe", we must surely do so by reference to the facts known to it at the time. It is clear from Dr Schuster's evidence that (as you would expect) Deloitte Austria's first step when it realised the problem was to contact the Appellant to inform it about it.

64. Thus, at the time when the disclosure was made (whether that was 20 May or 28 June 2010), the Appellant was aware that there was a major problem with its VAT returns, in that they had not included the output VAT charged on its behalf to the delegates. It was also aware that HMRC had arranged a visit to verify the repayment claim in its 12/09 return, and that visit was to take place imminently (and certainly before the repayment would be authorised).

65. In those circumstances, could it be said that the Appellant had “no reason to believe” that HMRC were about to discover the inaccuracy?

66. This is clearly a much higher hurdle for the Appellant than if it had to establish, for example, that there was a reasonable possibility (or even a likelihood) that the inaccuracy would have escaped undetected. It is a hurdle which, in the circumstances, we consider the Appellant cannot clear. Whether or not it knew of the level of enquiry that HMRC would undertake during the course of the visit, it is quite clear to us that it had at least some reason to believe that the inaccuracy would be discovered as a result of it. It must therefore fail the “no reason to believe” test and this is fatal to the appeal. We should emphasise that this is the case, on our interpretation of the statutory test, even though we fully accept the Appellant’s evidence that the disclosure would have been made even if no HMRC visit had been arranged.

67. We see nothing in Miss Bailey’s submissions summarised at [53] above to the effect that this approach has arbitrary results. In the context of a large and complex business, it might be quite possible to demonstrate that some inaccuracy would be extremely unlikely to be picked up during a routine pre-arranged control visit and therefore a disclosure of such an inaccuracy might be unprompted, despite being made after a control visit had been booked. It would be a question of whether there was any “reason to believe” that the inaccuracy would be picked up on that routine visit. And in the case of two identical taxpayers with identical inaccuracies, we do not find it indefensibly arbitrary that they may be differently treated because one of them has received notice of a visit before it makes its disclosure of an inaccuracy that is likely to be picked up on the visit. This is akin to arguing that the speeding motorist who is caught should be let off because other speeding motorists have not been caught.

Suspension

68. We agree with Miss Bailey’s submission at [55] that HMRC’s additional reason in their review decision for rejecting any suggestion of suspension was misconceived. The fact that the Appellant would have to apply for a new VAT registration if it chose to carry out any future taxable activities in the UK does not, in our view, mean that it should therefore be treated as an entirely different person for the purposes of Schedule 24. Mrs Checkley was right, in our view, not to seek to defend the statement to that effect made in HMRC’s review letter dated 16 December 2011.

69. If that had been the sole ground for HMRC’s decision not to suspend the penalty, we would not have hesitated to find the decision “flawed” for the purposes of paragraph 17(4) of Schedule 24. However, in his original letter dated 5 October 2011, Officer Khan stated his reason for refusing suspension as follows:

> “As the trader has ceased to trade and will be deregistering once the enquiry has been concluded, it precludes imposition and compliance with a suspension condition.”

70. In the review letter dated 16 December 2011, in addition to the reasoning we have identified as flawed, HMRC re-iterated the earlier reason:

> "I am afraid there is nothing further of value that I can add to what has already been explained by Officer Khan regarding this matter. As your taxable activities have ceased in the UK and are [sic] deregistering there is no scope in law for suspending the penalties, *even* if this was considered appropriate."

71. Because of the somewhat inconsistent reasoning given in the review letter, it might perhaps be arguable that HMRC's decision is "flawed" overall. We do not consider this issue further because even if it were to be flawed, we note that paragraph 17(4)(a) of Schedule 24 only <u>authorises</u> and does not <u>require</u> us to order a suspension; and in the circumstances of this case (where there is no evidence of the Appellant having carried on any taxable activities in the UK since the 2009 congress, or having any intention to carry on such activities in the foreseeable future) we would not in any event consider this to be a suitable case for suspension.

Conclusion

72. We find that the Appellant's disclosure was prompted within the meaning of paragraph 9(2)(a) of Schedule 24 (see [66] above) and therefore the imposition of a minimum penalty of 15% cannot be impugned.

73. We find that even if (which we doubt) HMRC's decision not to suspend the penalty was "flawed", we do not consider this to be an appropriate case for the penalty to be suspended in any event (see [71] above).

74. The appeal must therefore, with some regret in view of the worthy activities of the Appellant, be dismissed.

75. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 9 May 2013