



TC04589

Appeal number: TC/2014/05698

VALUE ADDED TAX – DIY Builders scheme – s 35 VATA 1994 – claim withdrawn because HMRC evidence requirements could not be met – Penalty under Schedule 24 Finance Act 2007 – whether inaccuracy in document caused by failure to take reasonable care – No, because no inaccuracy – if inaccuracy, no failure to take reasonable case - appeal upheld.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS M M HOWELLS & MR D A HOWELLS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RICHARD THOMAS
JULIAN STAFFORD**

Sitting in public at the Civil Justice Centre, Swansea on 31 July 2015

The Appellants did not appear and were not represented.

Ms Jane Ashworth, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This was an appeal by Mrs and Mr Howells (“the appellants”) against an
5 assessment of a penalty of £3,810.54 imposed under paragraph 1 Schedule 24 Finance
Act 2007. The penalty had been assessed because HM Revenue and Customs
 (“HMRC”) considered that there was an inaccuracy in the appellants’ claim under
 s 35 Value Added Tax Act 1994 (“VATA”) which gives effect to the DIY Builders
 and Converters Scheme (“DIY Scheme”). That claim was withdrawn so there is no
10 appeal against any refusal to refund the VAT concerned.

2. When the appeal came on at 14.00 there was no attendance by the appellants or
 their representatives, LHP Accountants (“LHP”). Our clerk telephoned the Howells
 at the number given on the appeal form but with no reply. He then phoned the
 number given by LHP on that form. He was informed by LHP that they had emailed
15 a letter to the Tribunal on 28 July. LHP were asked by our clerk to forward the email
 and attachment to him at the Court in Swansea. The letter so forwarded stated that the
 appellants would be unable to attend the hearing and asked for the Tribunal to decide
 the matter in their absence. The letter put forward the clients’ case against the penalty
 and drew the Tribunal’s attention to a case which they said was on all fours with
20 theirs. In view of this letter we decided that it was in the interests of justice to
 proceed. The absence of the appellants meant that any issue as to which party should
 start became moot – had there been attendance we would have asked HMRC to start
 as they had the burden of proof.

3. We were told by Ms Ashworth for HMRC that this was only the second case to
25 come to the Tribunal about a penalty charged in relation to a claim under the DIY
 Scheme, and that this was because there had only recently been a policy decision to
 charge penalties in cases like this. The first case, the one referred to in LHP’s letter to
 the Tribunal, was *C J Palau & R C Loughran v HMRC* [2015] UKFTT 38 (TC)
 (“*Palau & Loughran*”) in which the appeal against a penalty had been upheld. Ms
30 Ashworth said that both the HMRC office dealing with the DIY Scheme and
 presenting officers would welcome guidance from the Tribunal about these cases. As
 a result we put to Ms Ashworth a number of points which had occurred to us in
 relation to penalties in connection with this kind of claim, and about Schedule 24 FA
 2007 more generally, and which might have been made had the appellants attended
35 and been represented. This decision is therefore somewhat longer than it might
 otherwise have been and we pay tribute to Ms Ashworth’s skill in dealing with our
 questions which no doubt interrupted her flow. We are also grateful for her producing
 to us her speaking notes.

4. The appellants may not want to read the whole of this lengthy decision, so we
40 say straightaway that we are upholding their appeal and cancelling the penalty.

5. In this decision from here onwards a reference to “the Schedule” or “Schedule
 24” is a reference to Schedule 24 to the Finance Act (“FA”) 2007, and a reference to a
 paragraph by number, without more, is to the paragraph of the Schedule so numbered.

To avoid any confusion, paragraph numbers of this decision are preceded by a pilcrow (“¶”).

Evidence

5 6. We had a single bundle of documents, statutory provisions and HMRC Guidance, but no case law, prepared by HMRC. From the appellants we had the letter sent to the Tribunal on 28 July. HMRC added to the bundle of authorities a report of the *Palau & Loughran* case referred to by the appellants.

The facts

10 7. Paragraphs ¶¶8 to 34 set out in some detail the contents of many of the documents in the bundle. We consider it is important for these to be comprehensively described so that our decision can be seen in its full context. It should be noted that in quotations in this and later sections of the decision, the text is exactly as it appears in our papers. Interpolations in square brackets are the Tribunal’s.

The claim is made

15 8. At some time in June 2013 the appellants submitted a claim form for a refund of VAT under the DIY scheme.

20 9. On 3 July 2013 the Local Compliance National DIY Team in Glasgow wrote to the appellants. The letter informed the appellants that their claim needed to be made on a different form (VAT431C) and that they should “read the notes attached to the enclosed form very carefully, paying particular attention to the fact that if you are converting or renovating a previously residential property, it must not have been lived in for the past 10 years.”

25 10. On 19 July 2013 a Form VAT431C (VAT refunds for DIY Housebuilders Claim form for conversions) was given to HMRC. The form contained the following entries (among others):

Page 1 Section B:

“9 Have you converted a non-residential building? *By conversion we mean converting a non-residential building into a dwelling.*

No Yes

30 10 Have you carried out works to a building that has previously been lived in? No Yes

11 Have you got evidence that the building has been empty for 10 years or more before work started? No Yes

35 13 Has work been done on a completed dwelling purchased from a developer, builder or previous vendor? No Yes

Page 2 Section C:

“20 What was the building before you started your works? Answer: Farmhouse”

Page 9 Section G

“25 Checklist

Make sure you send all documents as requested to help us deal with your claim quickly. If you do not provide us with the correct documents we may reject your claim.

5 Have you enclosed the following documents?

Evidence that the building has been empty for 10 years or more before you started your works No Yes [ie there are no entries]

27 Declaration

10 **If you give incomplete or inaccurate information in this claim, we may charge you a financial penalty or prosecute you.** [emphasis in original]

I declare that:

...

15 All the details and information on this form and any accompanying documents are correct

I have read the attached guidance notes”

The form was signed by Mrs M M Howells, the first claimant, and dated 19 July 2013. (Because Mrs Howells is the first claimant and first signatory to the declaration on the cover page of this decision we have shown the names of the appellants in the order in the claim form, and this was the order in the early correspondence, but not in the penalty assessment). Copies of the planning permission application (with plans) and grant, and of conditional approval under the building regulations, with the conditions attached to that approval, were enclosed with the form (but we noted the relevant “yes or no” boxes in the checklist relating to these documents had not been crossed, and at least from the papers in our bundle it does not appear that a completion certificate or similar evidence had been supplied).

Correspondence on the claim

11. On 1 August 2013 in a letter HMRC noted receipt of the VAT431C. The letter referred to the 10 year rule and asked for:

30 “the following evidence of non occupation

- Electoral roll data
- Council tax data
- Information from utility companies
- Evidence from a local authority’s Empty Property Officer (Evidence from this source alone may be sufficient.) Where an Empty Property Officer is unsure, HM Revenue & Customs may accept a best estimate and call for other supporting evidence.”

40 HMRC also asked for the form to be signed by both claimants. A deadline of one month was set.

12. On 4 September 2013 HMRC issued a reminder stating that unless a reply was received by 16 September the claim would be closed.

13. On 10 September 2013 LHP, acting for the appellant, sent another page 9 of a VAT431C signed by both claimants dated 5 August 2013. They said in response to the request for documents that:

“It is very difficult for our client to provide you with proof of evidence of non- occupation. Our clients lived in a static caravan on the land adjacent to the property, and would therefore have been included in the electoral roll. Utility bills would also have been sent to their address, as they were living in the caravan. We do however, enclose photographs of the property which we trust you will find useful.”

14. On 16 September 2013 HMRC wrote to the appellants, not to LHP, saying that photographic evidence can help to see the overall picture of the state of the property but

“... it cannot be used as 10 year evidence.
Therefore, as per our notes and our letter dated 1st August ... 10 year evidence is still outstanding.”

A two week deadline was given for a response.

15. On 9 October 2013 a reminder was issued and a 15 working day deadline was given with a statement that failure to provide the requested documentation would lead to the claim being closed. The letter then added:

“Your claim will then [ie on closure] be passed to the Penalty Officer for consideration of a penalty under the Penalties for Inaccuracies -Schedule 24, Finance Act 2007. A copy of the penalty factsheet is enclosed for your reference.”

Withdrawal of the claim

16. On 11 October 2013 LHP replied saying:

“Our clients have advised that they are unable to supply further evidence to support the 10 year rule. In the circumstances, please return our clients records to them.”

The compliance check begins

17. On 21 October 2013 the HMRC Penalty Officer, Mr Dalwinder Singh, wrote to the appellants:

“You had submitted a claim on VAT431 form for a VAT refund of **£25,403.64** under VAT ACT Section 35 – DIY Builders and Converters Refund Scheme. The guidance notes with VAT 431 form gave you detailed information as to whether or not you are entitled to submit a VAT refund claim and what documentations you must provide in support of your claim.

The submission of an invalid claim means that you are liable to a penalty under Schedule 24 Finance Act 2007. The purpose of this letter is to establish what steps you have taken to ensure that you were submitting a valid claim.

5 Before we process your request [presumably for a return of the appellant's documents], please provide a full explanation for each of the following".

10 There then followed eight questions. The questions asked are set out below with the answers received in a letter of 28 February 2014 (see ¶26). The letter continued after these questions:

"The extent to which you advise me and provide information is up to you, but the level of help may affect the amount of any penalty. We will not charge a penalty if you took reasonable care to get things right but still made an error.

15 ..

Please reply *by return of post* [Tribunal's emphasis] to the DIY Penalties Review Officer at the address shown above. If I have not heard from you in writing by 23rd November 2013, a decision will be made on the information held and we will then write to you accordingly.

20

The following two factsheets are enclosed:

- CC/FS9 Compliance Checks – Human Rights Act
- CC/FS7a Compliance Checks – penalties for inaccuracies in returns and document

25

When you respond please also confirm in writing that you have received, read and understood the contents of factsheet CC/CF9 'Human Rights Act'. [emphasis in original]

18. Form CC/FS9 contains the following passages:

30 "You have been given this factsheet because we have found something wrong during a compliance check"

and

"We welcome your co-operation with our compliance check and in establishing your correct liabilities."

19. Form CC/FS7a contains the following passage:

35 "We will not charge a penalty for an inaccuracy if you took reasonable care to get things right but your return or document was still wrong. Some of the ways you can show that you took reasonable care include:

- ...
 - checking with a tax adviser or with us if you are not sure about anything."
- 40

20. On 4 December 2013 HMRC noted a lack of response and set a new deadline of 19 December.

The penalty warning letter

21. On 30 January 2014 HMRC sent a letter to the appellants headed “About the penalty we intend to charge”. The letter requested any information not already taken into account by HMRC and shows that the amount of the penalty was £3,810.54 of which none was to be suspended.

22. “Penalty explanation – schedule 1” attached to the letter showed how the penalty was to be calculated and why. This said at the start of the schedule:

10 **“Description of the inaccuracy:** Submitting a claim for renovation and extension to existing dwelling where you have not provided evidence of non-occupation for the past 10 years from when work started in support of your claim.”

15 It then stated “We consider that the behaviour was ‘careless’.” It explained that the behaviour was careless because:

20 “You had submitted a claim on VAT431 form for a VAT refund of under VAT ACT Section 35 – DIY Builders & Converters Refund Scheme. The guidance notes attached with VAT431 form gave you detailed information as to whether or not you are entitled to submit a VAT refund claim and what documentations you must provide in support of your claim.

25 Your accountant in letter of 11/10/2013 states that you are unable to provide further evidence to support of the 10 years rule of non-occupation. On 21/10/2013 and 04/12/13, we wrote to you and your accountant asking for an explanation as to why you had submitted a invalid VAT Refund claim. To date, no response received. The submission of an invalid claim means that you are liable to a penalty under Schedule 24 Finance Act 2007. The submission of an invalid claim means that you are now liable to a penalty”

30 It went on to say that the disclosure was “prompted” because “you did not tell us about the inaccuracy before you had reason to believe we had discovered it.” It added that the maximum penalty was 30% and the minimum 15%. The penalty schedule explained that:

35 (1) a full discount was to be given for “Telling, helping and giving” so that the penalty was 15%, the minimum.

(2) the 15% was to be of the PLR (potential lost revenue). That was said to be £25,403.64 (the amount of VAT claimed as a refund).

(3) the period for the penalty was stated to be 21/10/2013 to 20/10/2014.

40 From here onwards we refer to this letter and the schedule attached as the PWL (penalty warning letter).

23. On 7 February 2014 LHP replied by recorded delivery. They pointed out that they had replied to the letters of 21 October and 4 December 2013 and enclosed copies. They added that their client:

5 “has fully co-operated on every instance and provided all information in a timely manner throughout HMRC’s enquiry. The facts remain as in our clients claim, however it is most unfortunate that we are unable to provide the facts as requested by HMRC and consequently the cost of refurbishing their dilapidated home has already cost our clients £25,403.64 more than anticipated.

10 For the above reasons we hereby appeal against the penalty and propose that the penalty be suspended.”

24. The letter of 18 November 2013 from LHP said:

15 “...our client find it difficult to provide the necessary information to provide non occupation of the farmhouse. The static caravan in which our client’s lived in was situated on the farm yard and therefore they were included in the electoral roll. Utility bills were also issued to the same address.

20 For the above reason our clients are unable to provide definitive additional information, and on this basis our clients made the logical decision not to proceed with the application already submitted...”

25. On 18 February 2014 HMRC told LHP that they could not appeal at this stage, and asked for a reply to the HMRC letter of 21 October 2013.

The 8 questions answered

25. On 28 February 2014 LHP replied giving the responses to the questions in the letter of 21 October 2013. They were (and here we have added the questions in italics before the replies):

1. Why do you now wish to withdraw your VAT refund claim?

30 1. Our clients decided not to proceed as the evidence available was not acceptable to HMRC. There was no possibility of producing the documents requested as they did not exist for the reasons given later.

2. Before completing the VAT431 form, did you read and fully understand the guidance notes that were provided with the VAT431 form plus the associated HMRC public notice 708? If not please advise what you did not fully understand.

35 2. They had read the notes and guidance and decided that they were eligible.

3. If you were uncertain about the eligibility of your claim, were you aware that additional advice was available to you? If so, from whom did you seek advice?

40 3. They felt that the claim was eligible.

4. If you did seek advice, what advice was obtained and did you follow this advice fully and correctly? If not, why not?

4. They saw no reason to seek further advice.
5. *If you sought further advice from HMRC, please provide details of who you spoke to and the date/time of your enquiry.*
5. As for 4
- 5 6. *If you sought advice from someone other than HMRC, how did you check whether the person providing the advice was competent?*
6. As for 4
7. *Please explain why you considered your claim to be eligible under the DIY scheme?*
- 10 7. They complied with all the requirements of the scheme.
8. *Please also give us details of any exceptional circumstances or information that you feel is relevant for consideration.*
8. The exceptional circumstances were that when the house became uninhabitable they had to move to a static caravan. Due to the nature of their business (farming) it was essential that they remained on the farm yard in order to attend to their animals etc. There did not appear to be any need to notify anyone of a change of address. It appears to be inequitable that this error of judgment (i.e. not formally changing the address) should result in the imposition of penalties, in addition of course to the loss of a substantial amount of VAT.”
- 15
- 20

LHP’s letter went on to say:

“There was never any intention of misleading HMRC as all matters were made perfectly clear in the documentation submitted. Our clients remain adamant that this claim was genuine and only failed for the reasons given.

25

We trust that you will agree that this is not a case where penalties should be imposed.”

27. On 5 June 2014 (after a holding reply of 27 March 2014) HMRC stated that if the appellants lived in a static caravan then that would normally have been banded A for council tax, whereas the house was previously banded E. Therefore, the letter says, “my original decision ... is still upheld”. The letter enclosed a Notice of Penalty Assessment and details on how to appeal.

30

The penalty assessment

28. The penalty notice (NPPS2) shows that an assessment was made in the amount of £3,810.54, with none suspended, on Mr D A and Mrs M M Howells. The tax period for which the penalty is assessed was stated as 21 October 2013 to 20 October 2014.

35

29. On 12 June 2014 LHP appealed against the penalty repeating their point that it was a genuine claim, which only failed because the clients were unable to produce the documentation requested. They added that they did not think that the penalty regime was intended to apply to this sort of case as the clients took reasonable care to get things right. They also accepted HMRC’s offer of a review.

40

The review

30. On 17 July 2014 HMRC wrote to give the outcome of the review. The reviewing officer, Mrs Kathryn Jenkins, upheld the correctness of the decision to charge a penalty but decided that the notice of the assessment showed the wrong period. She added “I have asked Officer Singh to withdraw the current penalty and re-issue it against a different tax period.”

The second penalty assessment and second review

31. On 7 August 2014 Mr Singh sent the appellants an amended notice of a penalty assessment, the only difference (apart from the date) being that the tax period was 1 July 2009 to 5 August 2013. The assessment number was the same.

32. On 14 August 2014 LHP stated their disagreement with the amended notice of assessment and repeated their arguments used in their appeal against the first assessment. They added that, had their clients been aware that the claim would be rejected, they could have included a proportion of the VAT incurred in their business VAT returns as it was a farmhouse. They also pointed out that by getting the assessment wrong first time HMRC were guilty of what they were accusing their clients of. They also asked again for a review.

33. On 29 September 2014 the reviewing officer, Mr David Waterhouse, gave his decision upholding the assessment.

34. On 16 October 2014 the accountants appealed to the Tribunal.

Our findings of fact

35. We find as facts all the matters set out in ¶¶8 to 34. But in so finding we stress that, in the case of statements made in forms and documents, we are not at this point making any findings about the correctness of any of them, merely that they were made.

36. The only inferences we can draw from these facts at this point concern the photographs enclosed with LHP’s letter of 10 September 2013. We consider that they simply show that at the time they were taken there appeared to be merely part of the front and back walls of the property upright, and there was a large caravan in the vicinity. There is no indication when the photographs were taken, and they do not prove anything about the claim that the house was not used as a dwelling for 10 years before work began.

The law

37. The legislation for the DIY Scheme is to be found in s 35 Value Added Tax Act 1994 (“VATA”), the Notes to Group 5 of Schedule 8 to that Act and Part 23 of the Value Added Tax Regulations 1995 (SI 1995/2518) (“the VAT Regulations”).

38. Section 35 VATA, so far as relevant, provides:

Refund of VAT to persons constructing certain buildings

(1) Where—

- (a) a person carries out works to which this section applies,
- (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and
- (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,

5

the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.

(1A) The works to which this section applies are—

- ...
- (c) a residential conversion.

10

...

(1D) For the purposes of this section works constitute a residential conversion to the extent that they consist in the conversion of a non-residential building, or a non-residential part of a building, into—

- (a) a building designed as a dwelling or a number of dwellings;

15

...

(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim—

- (a) is made within such time and in such form and manner, and
- (b) contains such information, and
- (c) is accompanied by such documents, whether by way of evidence or otherwise,

20

as may be specified by regulations or by the Commissioners in accordance with regulations.

25

...

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below.

30

(4A) The meaning of “non-residential” given by Note (7A) of Group 5 of Schedule 8 (and not that given by Note (7) of that Group) applies for the purposes of this section but as if—

- (a) references in that Note to item 3 of that Group were references to this section, and
- (b) paragraph (b)(iii) of that Note were omitted.

35

...

39. Group 5 of Schedule 8, so far as relevant and as modified by s 35(7A), says:

Group 5 – Construction of buildings, etc

...

NOTES

...

5 (2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—

...

(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.

10 (7A) For the purposes of [section 35], and for the purposes of these Notes so far as having effect for the purposes of [section 35], a building or part of a building is “non-residential” if—

...

(b) it is designed, or adapted, for such use but—

15 (i) it was constructed more than 10 years before the commencement of the works of conversion, and

20 (ii) no part of it has, in the period of 10 years immediately preceding the commencement of those works, been used as a dwelling ...”

40. Part 23 of the VAT Regulations 1995 says:

“200 Interpretation of Part XXIII

In this Part—

25 “claim” means a claim for refund of VAT made pursuant to section 35 of the Act, and

“claimant” shall be construed accordingly;

“relevant building” means a building in respect of which a claimant makes a claim.

201 Method and time for making claim

30 A claimant shall make his claim in respect of a relevant building by—

(a) furnishing to the Commissioners no later than 3 months after the completion of the building the relevant form for the purposes of the claim containing the full particulars required therein, and

35 (b) at the same time furnishing to them—

(i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,

40 (ii) an invoice showing the registration number of the person supplying the goods, whether or not

such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site,

- 5 (iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,
- 10 (iv) documentary evidence that planning permission for the building had been granted, and
- (v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgement, were likely to have been, incorporated into the building or its site.

15 201A

The relevant form for the purposes of a claim is—

...

- (b) form VAT 431C where the claim relates to works described in section 35(1A)(c) of the Act.”

20 41. The legislation imposing the penalties in this case is in Schedule 24. So far as relevant to the appellant’s claim and the penalty in this case it provides:

SCHEDULE 24

PENALTIES FOR ERRORS

PART 1

25 LIABILITY FOR PENALTY

Error in taxpayer’s document

- 1 (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
- 30 (b) Conditions 1 and 2 are satisfied.
- (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
- (a) an understatement of a liability to tax,
- (b) a false or inflated statement of a loss, or
- 35 (c) a false or inflated claim to repayment of tax.
- (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P’s part.
- (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax

Document

...	...
VAT	Return, statement or declaration in connection with a claim.
Any of the taxes mentioned above	Any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about—
...	...
...	(d) repayments ... to P.
...	...

Degrees of culpability

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

- 5 (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,

...

PART 2

AMOUNT OF PENALTY

Standard amount

4 (1) This paragraph sets out the penalty payable under paragraph 1.

(2) ... the penalty is—

- (a) for careless action, 30% of the potential lost revenue,

15

...

Potential lost revenue: normal rule

5 (1) “The potential lost revenue” in respect of an inaccuracy in a document ... is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy

20

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—

...

- (b) an amount which would have been repayable by HMRC had the inaccuracy ... not been corrected.

25

Reductions for disclosure

9 (A1) Paragraph 10 provides for reductions in penalties under paragraph[.] 1 ... 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
- 5 (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
 - 10 (b) otherwise, is “prompted”.
- (3) In relation to disclosure “quality” includes timing, nature and extent.
- 10 **10** (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a “standard percentage”) has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.
- 15 (2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—
- 20 (a) in the case of a prompted disclosure, in column 2 of the Table, and
 - (b) in the case of an unprompted disclosure, in column 3 of the Table.

<i>Standard %</i>	<i>Minimum % for prompted disclosure</i>	<i>Minimum % for unprompted disclosure</i>
30%	15%	0%
...		

Special reduction

- 25 **11** (1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1
- (2) In sub-paragraph (1) “special circumstances” does not include—
- (a) ability to pay, or
 - 30 (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- 35 (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

...

PART 3
PROCEDURE

Assessment

- 5 **13** (1) Where a person becomes liable for a penalty under paragraph
1 ... HMRC shall—
- (a) assess the penalty,
 - (b) notify the person, and
 - 10 (c) state in the notice a tax period in respect of which the
penalty is assessed
- (2) An assessment—
- (a) shall be treated for procedural purposes in the same
way as an assessment to tax (except in respect of a
matter expressly provided for by this Act),
 - 15 (b) may be enforced as if it were an assessment to tax, and
 - (c) may be combined with an assessment to tax.
- (3) An assessment of a penalty under paragraph 1 ... must be
made before the end of the period of 12 months beginning
with—
- 20 (a) the end of the appeal period for the decision correcting
the inaccuracy, or
 - (b) if there is no assessment to the tax concerned within
paragraph (a), the date on which the inaccuracy is
corrected.
- 25 (5) For the purpose of sub-paragraph[.] (3) ... 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.
- 30 (6) Subject to sub-paragraph[.] (3) ..., a supplementary
assessment may be made in respect of a penalty if an earlier
assessment operated by reference to an underestimate of
potential lost revenue.

Suspension

- 35 **14** (1) HMRC may suspend all or part of a penalty for a careless
inaccuracy under paragraph 1 by notice in writing to P.
- (2) A notice must specify—
- (a) what part of the penalty is to be suspended,
 - (b) a period of suspension not exceeding two years, and
 - 40 (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.

5

(4) A condition of suspension may specify—

- (a) action to be taken, and
- (b) a period within which it must be taken.

...

Appeal

10

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.

15

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

(4) P may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by P.

20

16(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

25

- (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
- (b) in respect of any other matter expressly provided for by this Act.

30

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.

35

(3) If the ... tribunal substitutes its decision for HMRC's, the ... tribunal may rely on paragraph 11—

- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
- (b) to a different extent, but only if the ... tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

40

- (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
 - 5 (b) if the ... tribunal orders HMRC to suspend the penalty—
 - (i) P may appeal against a provision of the notice of suspension, and
 - 10 (ii) the ... tribunal may order HMRC to amend the notice.
- (5) On an appeal under paragraph 15(4) the ... tribunal—
 - (a) may affirm the conditions of suspension, or
 - (b) may vary the conditions of suspension, but only if the ... tribunal thinks that HMRC’s decision in respect of the conditions was flawed.
- 15 (5A) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).
- (6) In sub-paragraphs (3)(b) ... “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.
- 20 (7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph.

...

...

25

PART 5
GENERAL

Interpretation

...

30

22 Paragraphs 23 to 27 apply for the construction of this Schedule.

23 HMRC means Her Majesty’s Revenue and Customs.

...

35

27 An expression used in relation to VAT has the same meaning as in VATA 1994.

40

28 In this Schedule—

- (g) “tax period” means a tax year, accounting period or other period in respect of which tax is charged,
- (h) a reference to giving a document to HMRC includes a reference to communicating information to HMRC in any form and by any method (whether by post, fax, email, telephone or otherwise),

- 5
- (i) a reference to giving a document to HMRC includes a reference to making a statement or declaration in a document,
 - (j) a reference to making a return or doing anything in relation to a return includes a reference to amending a return or doing anything in relation to an amended return, and
 - (k) a reference to action includes a reference to omission.
- ...

10 **Submissions of the appellants**

42. From their grounds as stated in the Notice of Appeal to the Tribunal and elsewhere, we take these to be:

- 15
- (1) The claim was genuine and was only unsuccessful due to a failure to produce supporting evidence which was acceptable to HMRC.
 - (2) The Howells abandoned the house as it was uninhabitable many years ago and never thought they would be required to prove this at a later date.
 - (3) They took reasonable care with the claim and provided all information. There was no intention to mislead.
 - (4) They could have reclaimed a proportion of the VAT in their farming business but are now out of date, and so HMRC will benefit financially.
 - (5) HMRC admit the first penalty assessment was technically deficient. That was also careless but has no consequence for HMRC whereas the appellants have to pay a substantial penalty for their inability to prove non-habitation.

25 They also claimed that there were “exceptional circumstances” in response to HMRC’s request for any such circumstances to be provided. These were that:

30 “when the house became uninhabitable they had to move to a static caravan. Due to the nature of their business (farming) it was essential that they remained on the farm yard in order to attend to their animals etc. There did not appear to be any need to notify anyone of a change of address. It appears to be inequitable that this error of judgment (i.e. not formally changing the address) should result in the imposition of penalties, in addition of course to the loss of a substantial amount of VAT.”

35 They further stated in their letter of 24 June 2014 that they did not think that the penalty regime was intended to apply to “this sort of case” as the clients took reasonable care to get things right.

40 43. In the Notice of Appeal to the Tribunal the outcome which the appellants ask for is that the appeal should be cancelled. That could be read as showing that their appeal is only under paragraph 14(1), against the fact of liability and not against the amount of the penalty.

44. The appellants were asked by HMRC to put forward any special circumstances in their case and they have done so (see ¶42). The Tribunal can however only consider HMRC’s decision about a reduction of the penalty for special circumstances if the appeal is made under paragraph 15(2) (amount of penalty). The Tribunal
5 considers that the appropriate approach in this kind of case is that of the Tribunal (Judge Roger Berner and Mr Harvey Adams) in *David Collis v HMRC* [2011] UKFTT 588 (TC) (“*Collis*”) where the Tribunal said at [25]

10 “Although set out in this way, there will be many cases, in fact it is likely to be common, where a taxpayer subject to a penalty will want to make an appeal under more than one of the heads of appeal available. In many cases taxpayers will be unrepresented, and will not make any distinction, based on para 15, in the nature of the appeal that is made. In such cases, in the interests of fairness and justice the tribunal should
15 be slow to exclude any avenue of appeal available to an appellant purely on the technical nature of the appeal that has been made. Issues of liability and amount will often go hand in hand and should normally be considered in that way by the tribunal. Accordingly, if a tribunal affirms the decision of HMRC that a penalty is payable, it should normally go on to consider the amount of that penalty, including any
20 decision regarding the existence or effect of any special circumstances, and also any decision whether or not to suspend the penalty and any conditions of any such suspension.”

This is the approach we have adopted (including in relation to suspension).

45. As we mention above we have also put to HMRC certain arguments which the
25 appellants might have made had they been present and represented.

Submissions of HMRC

46. HMRC’s primary submission is that the penalty assessment is correct and should be upheld. HMRC agreed that theirs is the burden of proof in a penalty case (to the civil standard, that is on the balance of probabilities). That is indeed a correct
30 statement of the law, both as to burden (see *King v Walden (HM Inspector of Taxes)* 74 TC 45) (“*Walden*”) and to standard (see *HMRC v Khawaja* [2008] EWHC 1867 (Ch)). In a case such as this we consider that HMRC must establish to that standard all the elements of the Schedule, with the exception of their decisions in respect of suspension and special circumstances.

35 47. Ms Ashworth’s approach in this case was to go through the provisions of Schedule 24, seeking to show for each relevant elements that HMRC had met the burden of proof. Rather than set out all her propositions here and then to repeat them in the discussion section, we use that section to consider the elements and their detailed submissions in turn, and covering the appellants’ submissions where relevant.

40 **Discussion**

48. The application of Schedule 24 in this case seems to us to raise a number of issues, each of which we consider below. They are:

- (a) On what “document” (within the meaning in paragraph 1) does HMRC rely to prove its case?
- (b) Was that document given (within the meaning in paragraphs 1 and 28) to HMRC?
- 5 (c) What is the inaccuracy in the document so given on which HMRC rely?
- (d) Did the inaccuracy amount to, or lead to, a false claim to repayment of tax within the meaning of paragraph 1(3)?
- (e) Was the inaccuracy careless within the meaning of paragraph 3?
- 10 (f) Is the amount of the PLR or “potential lost revenue” used by HMRC correct within the meaning of paragraph 5?
- (g) Is the reduction for disclosure in accordance with paragraph 10?
- (h) Was the assessment made in accordance with the requirements of paragraph 13?
- 15 (i) Is the decision on special circumstances flawed in the judicial review sense?
- (j) Is the decision on suspension flawed in the judicial review sense?

What is the “document”?

49. HMRC say that the only document in this case on which they rely is the Form VAT431C signed by Mrs Howells and stamped as received by HMRC on 29 July 2013, and that it is a document listed in the Table in paragraph 1(4) “a return, statement or declaration in connection with a claim.”

50. In the Tribunal’s opinion, the VAT431C is not a “return in connection with a claim”. The term “return” implies that a listing of, for example, income or some other taxable matter is given by the claimant to justify the claim. An example that springs to mind is a form R40 used to reclaim income tax deducted at source where because of personal allowances etc the deduction is greater than the claimant’s liability.

51. Is the VAT431C a “statement”? It contains a number of question and answers at Section B going to the claimant’s eligibility, and asks for details of the property in Section C, also in the form of questions and answers. In sections D, E and F it asks for details of the goods and services for which a refund of VAT is claimed. These (or at least the answers to the questions rather than the questions) seem to be statements, and statements made in connection with a claim.

52. However the Form as a whole is not in our view a “declaration in connection with a claim”. True the VAT431C includes a declaration as to various matters, including the correctness of the information and details on the claim, at item 27 in section G on page 9, but as will be seen HMRC are not relying on the declaration as being inaccurate.

53. A further possibility might be that the document concerned falls into the residual category at the end of the Table. This includes “Any document which is

likely to be relied upon by HMRC to determine, without further inquiry, a question about ... repayments to P.” We do not think that this applies if for no other reason than that most members of this Tribunal would be able to attest to the fact that HMRC take a rigorous approach to checking s 35 VATA claims, and that they are not relied
5 on without further enquiry. In fact we enquired of Ms Ashworth whether the forms are scrutinised by HMRC using “Mark 1 Eyeball” or if any computer-based scanning or risk assessment is carried out. She confirmed that all forms are checked, and that they are checked by a human being.

54. We hold that there is a “document” or rather “documents”, being the statements
10 in the Form VAT431C.

Was the document given to HMRC?

55. There is no doubt that the form VAT431C was posted to, and received in the post by, HMRC. It was therefore given in the extended sense set out in paragraph 28(h) (“by post ...”). Paragraph 28(i) puts it beyond doubt that the since the
15 “document” here means the statements in the VAT431C, they are also “given”.

56. We hold that the “document” was given to HMRC within the meaning in paragraph 1 read with paragraph 28.

What is the inaccuracy on which HMRC rely?

57. The first place to look for the inaccuracy alleged by HMRC to be in the
20 document is in the PWL issued by HMRC on 30 January 2014. This states:

“Description of the inaccuracy: Submitting a claim for renovation and extension to existing dwelling where you have not provided evidence of non-occupation for the past 10 years from when work started in support of your claim.”

25 58. In our view this is not a description of any inaccuracy in a document (the statements). It is a description of the action taken and not be taken (in HMRC’s view) by the appellants. It is a statement which might justify HMRC taking the view that the appellants did not take reasonable care, but that is a completely different matter. HMRC had not at any time sought to resile from or vary that description of the
30 inaccuracy they allege in this case, nor did they seek to substitute another, until the day of the hearing.

59. Ms Ashworth’s submission to us was that the inaccuracy in the document was the answer “Yes” to the question at item 11 in Section B of the form. That says
35 “Have you got evidence that the building has been empty for 10 years or more before works started?” If HMRC can show that on the balance of probabilities that the answer is incorrect, then we would hold that that was an inaccuracy in a document given to HMRC.

60. She was frank enough to admit that she was putting forward a completely different formulation of what the alleged inaccuracy was and thereby admitting that
40 the description in the PWL was not a description of any inaccuracy. The question

then arises: does it matter that HMRC are now at the hearing arguing for a different inaccuracy? There are two reasons in our view why it does.

5 61. First, it may well have misled the appellants. There is nothing in the PWL that refers to the answer in item 11, and the whole course of correspondence seems to proceed on the assumption that what the appellants have done wrong was not to produce the evidence that HMRC said was the only evidence that would satisfy them. See for example the appellants' submission set out in ¶26 and which was their submission to the Tribunal. It is only in the first review letter that there is any mention of item 11, and that is relatively peripheral.

10 62. And in a basic case such as this there is no statement of case or any formal pleadings. Had there been and had HMRC attempted in the hearing to put their case on a different basis from that set out to the appellant, without notice to the appellant, there is a strong likelihood that permission to so change their case on such a fundamental point would have been refused.

15 63. Secondly it throws into serious question whether the assessment was justified. Paragraph 13(1) provides that "Where a person becomes liable for a penalty under paragraph 1 ... HMRC shall [ie must] (a) assess the penalty". As the assessment is mandatory it must surely be only capable of being properly made if HMRC can properly describe, for the appellants' benefit especially, the basis on which they are liable to a penalty, and in the case of paragraph 1 and 3 the basis is that there is an inaccuracy which was careless.

20 64. In our view, and on the basis that we do not permit HMRC to advance its new contention as to the nature of the inaccuracy, we hold that HMRC have not shown that there is an inaccuracy in any document on which they have based their conduct in this case, and especially in their act of assessing a penalty. The appeal must on that basis succeed. But in case we are wrong only to consider the original description of the inaccuracy, we also consider whether the revised formulation of the inaccuracy put forward at the hearing does itself disclose an inaccuracy.

25 65. The question in item 11 asks if the claimants have evidence of 10 years of non-residential occupation. This is clearly aimed at the situation described in s 35(1B) of, and Note (7A)(b)(ii) to Group 5 of Schedule 8 to, VATA. The question in item 11 is, as LHP point out in their letter of 28 July 2015, tantamount to asking the claimant to prove a negative. But the question doesn't say "Can you prove non-occupation for 10 years?" It asks whether the claimant has got "evidence". The question itself does not specify what evidence might need to be available, but it does say at the beginning of section B that the claimant should refer to the guidance notes.

30 66. Those Notes are included in our bundle. They consist of 14 pages. The relevant parts to which Ms Ashworth took us are these:

40 "If the building you are converting has been lived in, you must produce evidence to show that no-one has lived in it for 10 years or more [not of course any 10 year period, but the one ending before the date the works began].

The following are *examples* [our emphasis] of acceptable evidence of non-occupation:

- electoral roll data
- council tax data
- information from utility companies
- evidence from a local authority's Empty Property Officer. (Evidence from this source alone may be sufficient.) Where an Empty Property Officer is unsure HMRC may accept a best estimate and call for other supporting evidence"

5

10 67. We also observe that the guidance notes relating to the checklist at item 25 in Section G of the Form do not mention documents relating to the 10 year test. We further note that the documents mentioned in the guidance notes are restricted to those documents which, in accordance with regulation 201 of the VAT Regulations, it is mandatory to provide if the claim is to be entertained, and that documents relating to
15 the 10 year rule are not included in those regulations.

68. And we further observe that in the eight questions asked of the appellants on 21 October 2013 Mr Singh asked whether the appellants read and fully understood the guidance notes plus the associated public notice 708. Notice 708 is mentioned only once in the guidance notes and then as a place to look for further information on VAT
20 rates. The appellants neither confirmed nor denied that they read Form 708 and it is not in the bundle. As it is a public document available on HMRC's website we have looked at it out of curiosity (though in its most recent version which postdates the claim) to see what it might have told the appellants had they looked at it.

69. The only reference to the DIY Scheme is in part 1.3:

25 "This notice may also be useful if you, as the customer or client of a contractor, subcontractor or developer, wish to satisfy yourself as to the correct liability of the supplies of goods and services being made by them to you.

30 This is especially so in the case of DIY House Builders and Convertors [*sic*] ('self-builders'), who contract VAT registered builders or tradesmen to carry out construction or conversion services and are charged VAT on those services. Some, if not most, of the VAT charged can be recovered by the self-builder through the provisions of the DIY House Builders and Convertors VAT Refund Scheme but only
35 where that VAT that has been correctly charged in the first place.

70. The 10 year rule (but for builders and developers, not the DIY Scheme) is covered at Part 6.3:

"6.3.2 How does the 10 year rule work?"

40 You cannot normally zero-rate work to a property that has previously been lived in. Subject to the conditions at sub-paragraph 6.1.2, the exception to this is where, in the 10 years immediately before you start your work, it has not been lived in and following the work it is

‘designed as a dwelling’ or intended for use solely for a ‘relevant residential purpose’.

If the property starts being ‘used as dwelling’ or for a ‘relevant residential purpose’ whilst your work is being carried out, then any work that takes place after that point is not zero-rated.

6.3.3 How do I know if the building has been unoccupied for 10 years?

You *may* [our emphasis] be required to show that that the building has not been lived in during the 10 years immediately before you start your work. Proof of such can be obtained from Electoral Roll and Council Tax records, utilities companies, Empty Property Officers in local authorities, or any other source that can be considered reliable.

If you hold a letter from an Empty Property Officer certifying that the property has not been lived in for ten years, you do not need any other evidence. If an Empty Property Officer is unsure about when a property was last lived in he should write with his best estimate. We may then call for other supporting evidence.”

71. What the guidance notes (which the appellants say they did read) and Notice 708 (which they do not say whether they read) show relevantly is that the documents which the appellants were asked for and did not in the end produce are *examples* of the kind of evidence that might provide to HMRC’s satisfaction that the 10 year condition is met. They do not rule out the appellant showing other evidence to prove the meeting of that condition. (We cannot help remarking that the absence of entries on the Electoral Roll does not seem to us to be persuasive evidence that no one has lived in a property).

72. There is nothing in the form VAT431C itself, the guidance notes or even Notice 708 to show that when the question in item 11 is asked it must be the case that the claimant has to possess documentary proof of 10 years non-occupation. It turns out that the appellants did not have that proof for the reasons they gave, which were that during the period covered they were living in a large static caravan in the farmyard because the house had become uninhabitable, that they were on the Electoral Roll at the address of the house because that was still their address, and that for the same reasons the electricity bills showed that address. They also maintain that they were unaware of the existence of the Empty Property Officer.

73. HMRC’s reaction to this was to point out, presumably from having made enquiries of the local council, that the property was banded D during this period, but a static caravan would have been banded A. On this point HMRC do not say if farmhouses, occupied or unoccupied, have any special council tax treatment or if Business Rates apply. No other suggestions of what other evidence might have been given by the appellants were made. Nor were the appellants asked outright why they had crossed the “Yes” box in item 11. That is not entirely surprising as the question in item 11 and its answer were at the time of the compliance check no part of HMRC’s formulation of what the inaccuracy was. Nor was it put to them that the Council Tax evidence that HMRC had obtained, and their inability to prove non-

occupation from the electoral roll or from utilities, meant that their answer to the question in item 11 was wrong.

74. We should mention that in connection with that question Ms Ashworth suggested to us that a close scrutiny of the form (in our case a photocopy) showed that the “No” box may have been crossed and then covered by correction fluid or something similar. That did appear to be a possibility, but we had no evidence that it had been done or, if it had been, who had done it. And even had it been shown to have been done by the appellants, we had no evidence to show why they might have done it.

75. We did in fact have some limited evidence that it might have been a simple mistake. The appellant answered “No” to the item 9 question: “Have you converted a non-residential building?” That is a correct answer to the question if taken literally. But the guidance notes make it clear that it is the Note (7A) definition of “non-residential dwelling” that applies, so the appellants should have put “Yes”. It was not however suggested by HMRC that the answer to the item 9 question was incorrect. Whether this was due to their overlooking it or assuming that it was a simple, wholly innocent, mistake that need not be queried we do not know.

76. There are other simple mistakes in the original form. It was not signed by both claimants, and the checklist boxes were not filled in, even where the appellants did have the documents such as planning permissions. But HMRC do not seem to have considered that these mistakes would justify a penalty, but are simply those which just happen, and if need be can be corrected without penalty. It is we think within judicial knowledge that for wholly innocent reasons people make mistakes when filling in complicated forms, and in some cases correct them before sending them in. (In the unfinished semi-autobiographical novel “The Pale King” by the great American novelist David Foster Wallace which is set in the IRS Regional Examination Center in Peoria IL, one character states that a significant percentage of Americans can’t even enter their own name correctly in their tax returns).

77. The appellants’ grounds of appeal and statements in support do not directly engage with the reason for their answer to the item 11 question, for the obvious reason that it was never put to them directly that that was what concerned HMRC. They have asked HMRC to consider a case which they say supports their stance, *Palau & Loughran*. In that case the appellants answered “No” to the question in item 16 in a VAT431NB (new build) form: “Are you intending to live in the property you are claiming for?” In answer to the follow up “If No, provide the address of the new build and explain why you have carried out the work”, the explanation was: “For re-selling purposes”.

78. That answer showed that the appellants were not eligible for a refund. The Tribunal (Judge Hacking and Mr Robinson) said:

“19. Mr Bingham agreed with the tribunal that the answers provided by the Appellants to each of the questions included in the section dealing with eligibility to claim under the Scheme had in fact been correct. It was, however, the position adopted by HMRC, having

referred the matter to its technical department, said Mr Bingham, that the submission of the form, a claim form relating to the Scheme, constituted the inaccuracy of which complaint was made and for which the penalty had been imposed.

5 20. Paragraph 1(1)(c) of Schedule 24 however provides that a penalty is payable where a document of the type described “**contains** an inaccuracy which amounts to or leads to a ...false or inflated claim to repayment of tax” (*emphasis added*)

10 21. Where the document concerned is one which is designed to ascertain or confirm eligibility to make the claim itself and which, because it has been accurately and honestly completed by the claimants must necessarily result in the claim being disallowed, it is difficult, if not impossible, to argue that the requirements for the offence contemplated by paragraph 1(1)(c) are satisfied.

15 22. It is equally difficult to argue that in light of the reply to Question 16 and the statement that it was intended to sell the converted property there could have been any real likelihood of loss to the public purse. The implications of the Appellants’ reply to question 16 had been promptly picked up by HMRC in accordance with the design of the form and the claim had, quite properly, been disallowed.

20 23. It is clear to this tribunal that the form has done nothing more than to serve the purpose for which it was designed. It had on scrutiny by HMRC identified the Appellant’s claim as one which did not meet the conditions of the Scheme.”

25 79. On the basis that HMRC were not impugning the answer to any of the questions in the case of our appellants (which was how they formulated the inaccuracy in the PWL) then this case is clearly on all fours, and we have come to the same conclusion for the same reasons as the tribunal in *Palau & Loughran*, with whose decision we most emphatically concur, and in particular with the following paragraphs:

30 “26. The Respondents’ argument produces the logical absurdity that the Appellants accuracy in the completion of a form designed to check eligibility under the Scheme gives rise to a penalty for inaccuracy.

35 27. In the view of the tribunal this is a misreading of the relevant legislation which quite clearly addresses the issue of inaccurate replies in a form which cause loss to the Revenue and not accurate replies which simply disentitle the claimant to participate in the Scheme.”

40 80. But if it is Ms Ashworth’s contention that we are looking at, then *Palau & Loughran* is not quite so relevant, as HMRC do not accept, as they did in *Palau & Loughran*, that all the questions were correctly answered, and in such a way that the appellants there plainly disentitled themselves from making a valid claim.

45 81. We hold for the reasons we give in ¶¶58 to 80 above that HMRC have not shown on the balance of probabilities that the answer to the question in item 11 was inaccurate. Had it said “Do you have any of the documents that we suggest would prove 10 years non-occupation?” a “Yes” answer would have been inaccurate. So we continue to hold that there was no inaccuracy.

Did the inaccuracy amount to, or lead to, a false claim to repayment?

82. If we are wrong about there being no inaccuracy on either formulation we have to consider whether the inaccuracy, on either basis, is one which “amounts to or leads to a false claim to repayment”. We take this last phrase to describe a repayment to which the claimants are not in law entitled.

83. We can say straightaway that if we regard the formulation in the PWL as an inaccuracy it does not amount to a false claim, because it does not amount to a claim at all. Nor do we see how it would lead to a false claim. It was an “inaccuracy” that would inevitably have led HMRC to refuse the claim had it not been withdrawn, as HMRC had made very plain to the appellants (on 4 September 2013, 16 September 2013 and 9 October 2013).

84. Assuming that it is the answer to the item 11 question that is the inaccuracy as Ms Ashworth maintains, would that have amounted to a false claim, or have led to one? Again it is very difficult to see how. If the answer was inaccurate it was a false claim (ie to have evidence of non-occupation when they did not), but not a false claim to a repayment. Would it have led to a false claim in the sense that it was a necessary ingredient of the claim? That has to be tested on the assumption that everything else in the Form VAT431C that was essential to the claim was correct and in order. For the answer to have led to a false claim in these circumstances would have required HMRC to disregard the fact (that must have followed from the answer) that the appellants could not provide the proof that HMRC required. We know from this case that is precisely what they do not do, whether or not they are right in law to take that approach.

85. We do not think that HMRC can pray in aid their own possible carelessness to support a contention that the appellants’ inaccuracy leads to a successful false claim. And the legislation says “leads to” not “might lead to, if there is a dereliction of duty at HMRC.” *Palau & Loughran* at [22] (see ¶78 above) is equally relevant here.

86. We therefore hold that even if there were an inaccuracy (and we do not think there was) neither of the inaccuracies put forward by HMRC was an inaccuracy where Condition 1 in paragraph 1 was satisfied.

Was the inaccuracy careless?

87. If we are wrong about there being no inaccuracy on either formulation, and wrong in holding that the inaccuracy did not lead to a false claim, we need to consider whether either inaccuracy was careless. HMRC have never argued that it was deliberate.

88. In her submissions to us, Ms Ashworth said that “HMRC considers behaviour is careless if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer to take reasonable care”. The Tribunal agrees with HMRC because that is what paragraph 3(1)(a) also says.

89. She went on to say that “HMRC consider the standard by which this is judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question”.

We agree with that as well, since it repeats the well-known statement of Judge Berner in *Collis* at [29]. We note also that in *Hanson v HMRC* [2012] UKFTT 314 (TC) (“*Hanson*”), Judge Cannan said at [21]:

5 “What is reasonable care in any particular case will depend on all the
circumstances. In my view this will include the nature of the matters
being dealt with in the return, the identity and experience of the agent,
the experience of the taxpayer and the nature of the professional
relationship between the taxpayer and the agent.”

10 90. As Judge Redston pointed out in *Martin v HMRC* [2014] UKFTT 1021 (TC)
 (“*Martin*”), the *Collis* and *Hanson* formulations combine elements of objectivity (“...
a reasonable taxpayer ...”) and subjectivity (“... in any particular case will depend on
the circumstances”). (In *Martin* Judge Redston was actually referring to a statement
made by Judge Berner in *Anderson (deceased) v HMRC* [2009] UKFTT 258 (TC)
which was in very similar terms to his statement in *Collis*.)

15 91. Ms Ashworth says a prudent and reasonable taxpayer would have read the notes
accompanying the claim carefully before submitting it. The appellants said that they
did (reply to question 2 in the letter of 21 November 2013). Ms Ashworth says that
the appellants claimed to have evidence of non-occupation. They did claim that. She
says that the notes to the claim form set out the type of evidence HMRC require. Not
20 exactly – they set out the type of evidence that they would consider proof of non-
occupation, without ruling out any other types of evidence. She then says that they
were unable to provide such evidence (ie the types of document listed in the guidance
notes), which indicated that they had not read the guidance notes as carefully as may
have been expected.

25 92. The appellants say they read the notes. There are, as we have noted, 14 pages of
them. It seems to us unlikely that anyone who did read the notes would not do so
carefully, particularly the part on eligibility. The appellants are farmers. We think it
is within judicial knowledge to say that farmers have to fill in a lot of forms, that
many of them are complicated and that their livelihood may depend to an extent on
30 their getting the forms right. So in these particular circumstances we think that the
appellants would have read the notes carefully and that they would have read the
claim form carefully. If there is an inaccuracy then, on that basis, it would either have
come from the appellants taking the same view of what the guidance notes say as we
do, that they are not exhaustive of the types of evidence of non-occupation that may
35 be provided, or they might, despite taking care, have misunderstood what the notes
are saying. The third possibility, which we stress is not what HMRC (or we) are
alleging, is that they did understand the notes in the way HMRC says they should be
construed but decided to answer the question in the way they did anyway as they
realised that otherwise their claim would fail. Such conduct would of course be
40 deliberate, not careless.

93. It might be argued that if they had realised that they were not sure how to
answer the question in item 11 even after carefully reading the notes, they were
careless in not seeking advice (as they say they did not). The appellants say they

thought they were eligible and saw no reason to take advice. That suggests they did not feel they were unclear about anything.

5 94. We would hold that, if there was an inaccuracy, HMRC have not shown that the appellants did not take reasonable care. They cannot show that the appellants did not read the notes, and they do not allege deliberate conduct. Objectively the conduct is capable of being careless: but it is also explicable by the appellants reading the questions and the Notes in the way we do, or misunderstanding them, which is not careless conduct.

10 95. We note that it was suggested in *Hanson* at [24] that the burden is on the appellant to show that they did take reasonable care, by analogy with the requirement on an appellant to show that they had a reasonable excuse for not complying with a deadline. We do not agree with that. In a scheme such as that in Schedule 55 FA 2009 a default gives rise to a penalty automatically, unless the appellant can show a reasonable excuse. In Schedule 24, the “default” is a careless inaccuracy in a document, and that is what HMRC have to show, just as they would have to if it was
15 alleged to be negligent and of course if they say it was deliberate or fraudulent.

Is the amount of the PLR correct?

20 96. Penalties under the Schedule are calculated as a percentage of potential lost revenue (PLR). If there is no PLR there can be no penalty. PLR is defined in paragraph 5:

- 25
- “(1) “The potential lost revenue” in respect of an inaccuracy in a document ... is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy
 - (2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—
...
(b) an amount which would have been repayable by HMRC had the inaccuracy ... not been corrected.”

By use of selective comminution, that reads in this case:

30 “The potential lost revenue” in respect of an inaccuracy in a document is the amount which would have been repayable by HMRC had the inaccuracy ... not been corrected”

35 97. Again we are assuming that our decision as to whether there was an inaccuracy was wrong and that there was one, and that it led to a false claim to repayment. Looking at the alleged inaccuracy which was used to justify the assessment (submitting a claim ... where you have not provided evidence of non-occupation), it cannot, being a course of conduct, be “corrected” by HMRC in any meaningful sense, whether by HMRC taking some action or by the withdrawal of the claim. So if the alleged inaccuracy is that in the PWL there is no PLR.

40 98. If the inaccuracy is an incorrect answer to the question in item 11, “correcting” that means changing the “Yes” to a “No”. If it becomes a “No”, then HMRC would

have refused the claim, so no amount would have been repayable. It is a relevant inaccuracy only if, despite a correct answer which would indicate that the claim would fail (just as it did in *Palau & Loughran*), it could still be said that the VAT would be repayable. This result suggests either or both of the definitions of PLR being inadequate for this kind of case, or a further indication that the inaccuracies identified here are not inaccuracies within the meaning of the Schedule or not the kind of errors that should lead to penalty.

99. We therefore hold that the PLR is nil for the reasons given above.

Is the reduction for disclosure correct?

100. We agree with HMRC that if there was a disclosure it was “prompted”. Assuming we had agreed that there was a careless inaccuracy, then the starting point is 30% as HMRC have used. If there is a disclosure then HMRC are entitled to reduce the penalty to an amount less than 30%, subject to a minimum of 15%.

101. Our problem here is we find it difficult to see that there has been any disclosure at all here. The appellants have adamantly refused to accept that they have been inaccurate or careless. HMRC would presumably say that the withdrawal of the claim is disclosure, or it might be the statements that they could not provide evidence to HMRC’s requirements. If the withdrawal was the disclosure, where is the element of telling? It is possible to characterise the appellants’ statements that they could not provide the evidence in the form HMRC wanted as a confession of sorts and therefore “telling”, but that was done before the disclosure, if withdrawal is indeed the disclosure. If the disclosure is the statements that they could not provide evidence to HMRC’s requirements, then that could be possibly be characterised as also being the “telling” of it.

102. But even if there was arguably some “telling”, where is the element of “helping and giving” (access)? In the circumstances we are not going to say what reduction (if any) we would have given. But it does prompt us to consider why HMRC felt it was appropriate to give a 100% reduction, or whether the way HMRC gave the reduction shows that they didn’t really follow their own guidance.

Was the assessment made in accordance with paragraph 13?

103. What prompted us to ask this question was the fact the papers showed that HMRC had had difficulty in deciding what the “tax period” was. Paragraph 13(1)(c) says that HMRC shall “state in the notice a tax period in respect of which the penalty is assessed.”

104. The first assessment notice showed a tax period 21 October 2013 to 20 October 2014. 21 October 2013 was the date of the letter in which HMRC informed the appellants that they were liable to a penalty. The period of a year seems arbitrary: it does not relate to any normal VAT periods.

105. The second assessment, which is the one with which we are concerned, showed the period as 1 July 2009 to 5 August 2013. 5 August 2013 is the date on which a page 9 of the Form VAT431C was signed by Mr Howells (as he had not signed the

original claim form, only Mrs Howells). The significance of 1 July 2009 is not clear. It may be the date the works started and so formed the end of the 10 year period. We did entertain the thought that it was somehow related to the commencement provisions for Schedule 24. These are in the Finance Act 2007, Schedule 24
5 (Commencement And Transitional Provisions) Order (SI 2008/568). Article 2(a) shows that, with some irrelevant exceptions, the tax periods to which it applies are those beginning on or after 1 April 2008, so that is unlikely to be the answer.

106. But we noted that that Order, in article 1, says that in the Order “tax period” has the meaning given in paragraph 28(g) of Schedule 24. That paragraph, relevantly,
10 says:

“In this Schedule –

...

(g) “tax period” means a tax year, accounting period or other period in respect of which tax is charged.”

15 107. The “tax” concerned is VAT. That tax is charged by reference to prescribed accounting periods usually of a quarter. But they are specific to registered persons who account for VAT in quarterly returns. A DIY converter will only by coincidence be registered for VAT and have a prescribed accounting period. So it cannot be the case that for such a DIY converter the tax period is based on any VAT rules.

20 108. Article 2 of SI 2008/568 does provide a clue to the answer here. Article 2(e) sets 1 April 2009 as the commencement date “in relation to documents relating to all other claims for repayments of relevant tax made on or after 1 April 2009 which are *not* [our emphasis] related to a tax period”.

25 109. This then seems to be the case with the refund claim under s 35 VATA. There is no tax period within the meaning of paragraph 28(g), because for a DIY converter there is no period in respect of which VAT is charged. Thus in these DIY cases the commencement date for Schedule 24 is 1 April 2009.

30 110. That means that the search for a tax period is futile: there can be none. What does this mean for the requirement in paragraph 13(1)(c)? On its face the requirement is absolute – an assessment must state a tax period. If that is a necessary requirement for a valid assessment then an assessment of a penalty in relation to a section 35 VATA claim cannot be validly made, or rather cannot be validly notified, as the requirement is that the notice of the assessment state a tax period, not that the assessment itself should.

35 111. But a purposive reading would suggest that the requirements of paragraph 13(1)(c) are simply not relevant where there is no tax period. The person assessed can be notified and that is all that is required in that situation.

40 112. On the basis of the old Latin maxim *ut res magis valeat quam pereat* (that it is better that something have effect than be futile) we prefer the second approach, though it does require something like “(if any)” to be read in.

113. Another way of looking at this issue would be to give a purposive (but strained) construction to “tax period” as defined in paragraph 28(g) so that it applies to any period for which a refund is claimed. This interpretation is strained in the sense that a refund of tax (which is the only tax event for a DIY builder or converter) is the opposite of a charge to tax. But if we accept that there is a tax period on this basis, what is the actual period in this case? In this case it is difficult to see how there is any period of more than one day in respect of which the penalty can be assessed. The penalty relates to a false claim. The claim does not relate to any existing tax period for VAT or any other tax. It seems to us if paragraph 28(g) is to apply, then the relevant period is the day on which the impugned document, the claim form, was given to HMRC. The completed whole form was given to HMRC on 29 July 2013 (the date stamped on the form), and the second fully signed page 9 was given it seems on 12 September 2013.

114. We are not troubled by the notion that a tax period may be one day. After all, IHT is one of the taxes covered by Schedule 24, as are SDLT and various excise duties, and those taxes and duties are (generally) about events or transactions which take place on a single day. We think therefore that the correct period is either 12 September or 29 July 2013. But as we have said there is an argument which we prefer that there is no tax period and so none need be stated on the assessment.

115. Does the seeming error, the insertion of any period at all where there is none in law or the wrong period (if it is a single day), invalidate the assessment? If this were an income tax, CGT or corporation tax matter then s 114 Taxes Management Act 1970 (“TMA”) would be in issue (see paragraph 14(2)(a) of the Schedule). On the basis of the decision of the High Court in *Baylis (HM Inspector of Taxes) v Gregory* (62 TC 1 at pp 91 and 92) we think that the assessment would be held to be valid, since although in this case the mistake as to the tax period or to the existence of any tax period was not an accidental slip, as it was in that case, but the result, at least in the second assessment, of some consideration by the reviewing officer, no one has been misled by the error. And although we cannot find any provision in the legislation applying to VAT that corresponds to s 114 TMA it would be absurd to be able to correct a mistake in a Schedule 24 assessment where the tax was income tax and not where it was VAT. We further note the strictures of the Chairman of the VAT and Duties Tribunal (Mr Colin Bishopp, now Judge Bishopp, President of this Tribunal) in *Anthony Corston* (2006) VAT Decision 19991, where he said at [39]:

“It has been made clear by the courts and this tribunal on many occasions that the purpose of an assessment is to recover from a taxpayer the amount of tax which is properly due. The assessment process is not a kind of challenge in which, regardless of the merits, the Commissioners have to comply with rigid but inconsequential matters of form, and run the risk that if they make a mistake, however unimportant and however obvious to the taxpayer, he secures an adventitious escape from his liability.”

116. We therefore hold that, had there been a careless inaccuracy, the penalty assessment would be valid despite the error about the tax period.

Was the assessment made in time?

117. As Ms Ashworth addressed us on the question of whether the assessment was made in time, we consider that here. Failure to assess in time is of rather more moment than getting the tax period wrong when no one is misled. Paragraph 14 says:

- 5 “(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 decision correcting the inaccuracy, or
- 10 (b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.”

HMRC accept that paragraph (a) does not apply. The time limit is thus 12 months from the date on which the inaccuracy is corrected. When was that date (always assuming there was an inaccuracy)?

118. Paragraph 14(3) clearly assumes that an inaccuracy in, for example, an income tax or VAT return is corrected by an assessment charging the amount of tax “lost”. “Correcting the inaccuracy” in a non-assessment case is not an easy concept to grasp. It could perhaps include an amendment to a self-assessment though we are inclined to think that that would be encompassed by paragraph (a). HMRC consider that the withdrawal of the claim amounts to the inaccuracy being corrected. Certainly there is nothing in paragraph 14(3) that prevents a taxpayer’s action from being a correction, as well as some action not amounting to an assessment by HMRC. If the claim is inaccurate, and is withdrawn or not proceeded with, then the potential tax loss will not become an actual one. The same would apply if it were a matter of HMRC refusing the claim. Subject to an appeal against the refusal it has the effect of preventing the potential tax loss becoming an actual one and this is a correction in a fairly loose sense. We therefore agree with HMRC that the relevant date is the withdrawal of the claim. That was on 11 October 2013 and so the second assessment of the penalty is in time as it was issued on 7 August 2014.

Is the decision on special circumstances flawed in the judicial review sense?

30 119. As we have stated in ¶44 above, we are treating the appeal as including an appeal against the amount of the penalty even though that was not specifically stated in the grounds of appeal to HMRC or to the Tribunal. We consider we are all the more justified in doing so by the correspondence that has taken place and which we review shortly.

35 120. We firstly remind ourselves of the extent of our jurisdiction in connection with this issue. Paragraph 11 provides that “[i]f HMRC think it right” they may give a special reduction. It is a discretionary matter: if they do not think it right, they do not need to give a reduction. The exercise of such a discretion is normally amenable to challenge only by way of proceedings for judicial review, and that was the case for the statutory predecessors of paragraph 11 such as s 102 TMA, s 70 VATA and s 40 152(c) Customs and Excise Management Act 1979. (They are predecessors in relation to the matters covered by Schedule 24, though they all, it appears, remain in force for other cases). But paragraph 17(3) gives this Tribunal a power. It says:

“If the ... tribunal substitutes its decision for HMRC’s, the ... tribunal may rely on paragraph 11 ...”

121. The decision of HMRC that is in question is a decision as to the amount of a penalty. One consequence of this limitation is that the Tribunal has no jurisdiction
5 over a decision by HMRC that they do not think it right to stay a penalty (whatever that means – the predecessor sections refer to “staying proceedings for a penalty” which makes sense) or to agree a compromise in relation to proceedings for a penalty.

122. The Tribunal is entitled to come to its own decision as to whether there are special circumstances that would justify a reduction in a penalty beyond the amount
10 of the penalty assessed by HMRC. We assume that our powers are in addition to, and should be exercised after, our power to vary the reduction given by HMRC under paragraph 10 for the quality of disclosure. We are not sure whether our ability to rely on paragraph 11 enables us to cancel a penalty by reducing the penalty to 0%, but since we can reduce a penalty to say £1 or 1 penny, we can effectively cancel a
15 penalty.

123. But our power to reduce a penalty if there are special circumstances that would warrant it is only to be exercised if we “think that HMRC’s decision in respect of the application of paragraph 11 was flawed.” We therefore have to identify HMRC’s decision as to the application of paragraph 11. There may of course be more than one
20 such decision.

124. There has been some difference of opinion in this Tribunal about when the decision has to be made. The decisions were helpfully discussed in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 95 (TC) (“*Bluu*”). In *Bluu*, the Tribunal (Judge Redston and Mr Robinson) noted that in *Agar v HMRC* [2011] UKFTT 773 (TC) (“*Agar*”) the
25 Tribunal (Judge Poole and Ms Tanner) said:

“... the tribunal considered and rejected the appellant’s submission that HMRC had to consider special circumstances before issuing a penalty notice.”

125. Judge Redston agreed with Judge Poole on this, and so do we. She also noted
30 that in *Algarve Granite Ltd v HMRC* [2012] UKFTT 463 (“*Algarve*”) the Tribunal (Judge Brannan and Mr Howard) considered that

“HMRC was required to consider special circumstances before issuing the penalty, and that a failure to do so meant that the penalty decision was flawed.”

35 126. She disagreed with that and we respectfully agree with her for the reasons she gives in *Bluu* at [137].

127. We note that it does not follow from either *Agar* or *Bluu* that a decision about a special reduction taken before the assessment of a penalty is not something that the Tribunal can consider. In this connection we agree with *Bluu* at [121] that the
40 decision to assess a penalty and the decision about HMRC’s application of (in this case) paragraph 11 that is referred to in paragraph 17(3)(b) are different things.

128. In *Bluu* Judge Redston went on to consider, and disagree with, the remarks of the Tribunal in *Donaldson v HMRC* [2013] UKFTT 317 (TC) at [117] (“*Donaldson*”). These remarks were to the effect that it was too late for HMRC to consider and give a decision about special circumstances at the hearing. The Tribunal in *Donaldson* 5 included Judge Thomas, then sitting as a member with Judge Mosedale. Judge Thomas now considers that those remarks were wrong and that Judge Redston is correct in the view that a decision as to special circumstances can be made at the hearing (as it was in *Bluu*).

129. We would add that we see no reason why a decision to reduce (or not to reduce) 10 a penalty by reason of special circumstances could not be taken *after* a tribunal hearing: but it would not then be amenable to the Tribunal’s jurisdiction, only to judicial review proceedings.

130. Next we should set out what we think would make a decision of HMRC under paragraph 11 flawed. In *Barber White v HMRC* [2012] UKFTT 378 (TC) (“*White*”) 15 Judge Brannan considered the meaning of “special circumstances”. He said:

“53. The expression “special circumstances” was considered in the well-known decision of the Court of Appeal in *Clarks of Hove Ltd. v Bakers’ Union* [1978] 1 W.L.R. 1207 (Stephenson, Roskill and Geoffrey Lane LJ). Geoffrey Lane LJ said (at page 1216), in a much-quoted passage: 20

“What, then is meant by “special circumstances”? Here we come to the crux of the case...

In other words, *to be special the event must be something out of the ordinary, something uncommon*; and that is the meaning of the words “special” in the context of this Act.” (Emphasis added) 25

54. With respect, we think it is correct to adopt the same interpretation of the expression “special circumstances” as it appears in paragraph 11, save that the expression should, of course, be interpreted in accordance with its statutory context, i.e. Schedule 24 Finance Act 2007. It was evidently the *Bakers’ Union* decision that those drafting paragraph 11 Schedule 24 had in mind (see the Drafting Notes to the Finance Bill 2007).” 30

131. He pointed out that section 82490 in the relevant manual used by HMRC staff, the Compliance Handbook, was not particularly helpful in that it merely said:

“We will only consider the special reduction of the penalty where exceptional circumstances are identified that cannot be taken into account in arriving at the reduction for disclosure... This means that when you are determining the quality of the disclosure you should only consider those factors that are relevant... You should not be influenced by other factors. 40

Judge Brannan commented:

“60. The reference to “exceptional circumstances” is not, perhaps, the best summary of the test to be applied. It would be better to use the

5 better-known phraseology of Geoffrey Lane LJ (“something out of the ordinary, something uncommon”), which was plainly the concept that those drafting the legislation had in mind. “Exceptional” circumstances may be a passable summary of that concept and is the word used in the less-quoted judgment of Roskill LJ in the *Bakers’ Union* decision – although it can perhaps too easily be given an over-restrictive meaning.”

132. HMRC seem to have taken Judge Brannan’s strictures to heart, because CH82490 now cross refers to CH170600 which says:

10 “Special circumstances are either

- uncommon or exceptional, or
- where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.

15 To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.

Uncommon or exceptional

Special circumstances are something that is not otherwise provided for in the legislation. So, for example, they will not include

20

- matters that amount to a reasonable excuse in the case of failures, or reasonable care in the case of inaccuracies, or
- the usual factors - telling, helping and giving access - which you take into account when you consider reduction of a penalty for quality of disclosure.

25 Special circumstances are uncommon or exceptional circumstances that should be clearly recognisable as such and are completely separate from the other considerations mentioned in the bullets above. See CH170800 examples 1 and 2 for examples of special circumstances that may exist as a result of uncommon or exceptional circumstances.

30 **Application of penalty law produces a result that is contrary to the clear compliance intention of that penalty law**

35 We may reduce penalties for special circumstances where imposing the penalties would be contrary to the clear compliance intention of the penalty law. See CH170800 example 3 for an example of special circumstances that may exist where the application of the penalty law produces a result that is contrary to the clear compliance intention of the penalty law.

40 However, we will not reduce penalties through special reduction where such a reduction would be contrary to the clear compliance intention of the penalty regime. In particular, we will not do so on the basis that the underlying tax liability has been paid.”

133. The first example given was of a trader who mistakenly accounted for a VAT repayment as output VAT, and then corrected the error in his next return. HMRC said he was careless for not using the VAT error correction report process, and imposed

the minimum 15% penalty for a prompted careless error. HMRC agreed to reduce the penalty further it seems on the basis that no tax had been lost or delayed, as it was exceptional for someone to account for a repayment to them as if it was output tax they should account to HMRC for.

5 134. The second example gives no explanation of why HMRC thought there were uncommon or exceptional circumstances.

135. The third example is of the second type of special circumstances (clear compliance intention). It says:

10 “Frank and Darren, a father and son, traded in partnership. Frank retired from the partnership trade. Darren continued to trade afterwards without registering as a sole trader. Darren continued to submit VAT returns to HMRC, but failed to notify the change of VAT entity. He was therefore liable to a tax-geared penalty for late notification.

15 In these precise circumstances, where the right tax was paid at the right time, which the partnership does not want returned, and there is a close association (here the father and son succession relationship), we may reduce the penalty to an appropriate level through special reduction. We would only consider this because there is a close association
20 between the two tax entities.

If the change in tax entity resulted from normal commercial arrangements then such transfer of business circumstances would not be uncommon or exceptional and so would not be special circumstances.”

25 136. We struggle to see quite what HMRC thought was the “clear compliance intention of the penalty regime” which this strict application was contrary to. It seems to have been that the law should not impose tax geared penalties when there is no likelihood of tax not being accounted for because of the close relationship between the partnership and the sole trader who succeeded to the partnership’s trade, and the
30 common participation of Darren in both businesses.

137. This second formulation of special circumstances has been considered by this Tribunal. In *James Hillis v HMRC* [2013] UKFTT 196 (TC) Judge Tildesley referred to this formulation in relation to paragraph 14 Schedule 41 FA 2008 (failure to register for VAT). He said:

35 “24. The Tribunal is satisfied that HMRC’s decision on special circumstances in this Appeal was flawed in that HMRC did not consider whether the penalty met the clear compliance intention of the law having regard to the Appellant’s individual circumstances.”

40 138. Ms Ashworth’s submission is that there are no special circumstances in this case such as would justify HMRC giving a special reduction of the penalty. We now look at what has passed between the parties to identify any decisions about special circumstances, to see if, despite Ms Ashworth’s submission, any of them was flawed in the judicial review sense.

139. The first time anything to do with special circumstances was mentioned was in Mr Singh's letter of 21 October 2013 – the eight questions. Question 8 asked for details of any “exceptional circumstances”. That letter also enclosed factsheet CC/FS7a which on page 2 says:

5 **“Letting us know about any special circumstances**

If there are any special circumstances that you believe the officer dealing with the check should take into consideration when calculating the penalty, you should let us know.”

10 We note that Mr Singh's question 8 uses the gloss on the meaning of “special circumstances” that is used in the Compliance Handbook, even though the factsheet uses the statutory term, but he is clearly making the same point as the factsheet.

140. The PWL of 30 January 2014 also covers special circumstances. It says:

Other reductions or adjustments Where relevant we then [ie after the reduction for disclosure] reduce the penalty for any special circumstances ...	Based on the information we have, we do not consider there are any special circumstances which would lead us to further reduce the penalty.
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141. On 28 February 2014 LHP answered the eight questions, and the answer to the eighth was:

15 “8. The exceptional circumstances were that when the house became uninhabitable they had to move to a static caravan. Due to the nature of their business (farming) it was essential that they remained on the farm yard in order to attend to their animals etc. There did not appear to be any need to notify anyone of a change of address. It appears inequitable that this error of judgment (i.e. not formally changing the address) should result in the imposition of penalties, in addition of course to the loss of a substantial amount of VAT.”

20

142. Without responding to this answer HMRC made the penalty assessment on 5 June 2014. In the review conclusions letter of 17 July 2014 Mrs Jenkins said:

25 “HMRC has the discretion to reduce a penalty due to special circumstances. Officer Singh did not consider that there were any grounds to apply these reductions. HMRC Guidance CH170600 explains when special circumstances might be applied and in general are for ‘uncommon or exceptional circumstances’ or “*where strict application of the penalty law produces a result that is contrary to the clear compliance intention of that law*”.

30

I conclude that, in agreement with Officer Singh, there are no grounds for Special Reductions to the penalty. I have explained earlier that I consider the submission of a claim that cannot be substantiated falls within the intention of the penalty regime.”

35

143. Special circumstances were not considered by Mr Waterhouse, the second reviewing officer, reviewing the second assessment, as he simply adopted Mrs Jenkins' conclusions.

5 144. There are two, or arguably three, decisions made by HMRC in respect of the application of paragraph 11 about a special reduction. In each of them, Mr Singh's, Mrs Jenkins' and Mr Waterhouse's, the decision was that no special reduction was due.

10 145. Mr Singh's decision, included in the penalty schedule in the PWL was said to be "based on the information we have". At that time that information was that included in the VAT431C, the information from LHP including the photographs, about the circumstances in which the appellants had been placed and the reasons they could not supply the evidence in the form required by HMRC. HMRC also it seems had information about the Council Tax bands in operation.

15 146. By the time of Mrs Jenkins' review conclusions letter she would have had the answer to question 8 and further correspondence from LHP. Mr Waterhouse would, in addition to the information Mrs Jenkins had, have had the LHP letter of 14 August appealing against the second assessment and giving reasons.

20 147. In our view Mr Singh's decision was not flawed. He took into account "the information we have". He had asked if there were any exceptional circumstances and did not receive a reply. Is there anything he failed to take into account? Not that we can see. He can we think be criticised to some extent for not giving reasons, ie explaining why the information he had did not disclose any exceptional circumstances, but he was clearly influenced by the lack of a reply to his questions. Judge Brannan noted in *Barber White* at [68] that a failure to give reasons would usually, but not always, render a decision flawed. In these particular circumstances we do not see what more he could have done.

30 148. But in our view Mrs Jenkins' decision is flawed. By the time she made it she would have had the answer to question 8 which explicitly stated that it sought to explain exceptional circumstances. She does not indicate that she considered that answer at all. She sets out the HMRC view of what special circumstances are, including the compliance intention point, but makes no attempt to engage with the answers to question 8 or any other representation of LHP which explain their clients' circumstances and to give reasons for not accepting that they amount to anything exceptional, abnormal or special or that to impose a 15% penalty might be contrary to the intention of Schedule 24. She therefore failed to take into account something she should have taken into account, as well as not giving reasons.

149. As her decision is flawed, so must Mr Waterhouse's be. He gave no independent consideration to the issues, and did not engage with letters from LHP that Mrs Jenkins would not have seen.

40 150. As we have held that two decisions about special circumstances made by reviewing officers are flawed, we are entitled to substitute our own decision. Yet

again we have to say that we are in the rather unreal position of having to assume that our decision that the penalty assessment must be cancelled because there was no careless inaccuracy is wrong.

5 151. We first assume that the careless inaccuracy in question is the one put forward by HMRC in the PWL (submitting a claim where no evidence of non-occupation is provided). If that amounts to a careless inaccuracy we cannot see how the special circumstances identified by LHP would have affected that. They are in effect the reason why (so HMRC say) the claim is inaccurate.

10 152. Next we are going to assume that it is the one put forward by Ms Ashworth, that the careless inaccuracy is an incorrect answer to the item 11 question on the VAT431C. On that hypothesis we would say that to charge a tax geared penalty of 15% does not produce a result that is contrary to the clear compliance intention of the law. The intention of Schedule 24 is to punish careless inaccuracies that would, if not corrected either voluntarily or by HMRC intervention, have led to a loss of tax. 15% is, as we have suggested, generous on a strict interpretation of the law, so the reduction to 15% can be seen as an attempt to produce a result that is not at odds with the compliance intention.

15 153. But we do consider that the situation the appellants found themselves in was unusual, abnormal even, and exceptional. As LHP have said, it is only because they are farmers that they had to live on the site of the uninhabitable house for so long or at all. More than 10 years living in a static caravan otherwise than in a properly equipped mobile home park is also exceptional. But do those special circumstances justify or explain in any way why a false answer was (hypothetically we stress) given? We do not think they do.

20 154. As we have stressed, this point is academic in view of our decision on the question of whether there is a careless inaccuracy that justifies a penalty. But should the case get to the Upper Tribunal, that tribunal has the benefit of our views.

Is the decision on suspension flawed in the judicial review sense?

25 155. We turn then to HMRC's decision on the suspension of penalties in this case. Before we consider Ms Ashworth's submissions on this point it is necessary to look at precisely what decisions HMRC have made on this point and what reasons they have given.

30 156. It is in the PWL that we find the first mention of suspension. The relevant part of the PWL says:

35 **“Information about suspending penalties**

...

40 We cannot suspend any of this penalty. One of claim [*sic*] Suspended penalties are explained in more detail in factsheet CC/FS10 [the title follows] You can get a copy of this factsheet from our website. Go to [URL] or, if you prefer, you can phone us and we will send what you need.”

157. In their letter of 7 February 2014 LHP said among other things:

“For the above reason we hereby appeal against the penalty and propose that the penalty be suspended.”

158. We say at this point that we think that the reference to suspension in LHP’s
5 letter could be interpreted as a reference to postponement of payment of the penalty, but we assume for this purpose that it is a request for suspension of the penalty itself. The response of HMRC to this letter on 18 February was to merely point out that a PWL cannot be appealed against. No reference was made to suspension.

159. The actual assessment made by Mr Singh showed the amount to be suspended
10 as £0.00. In their appeal against the penalty assessment, LHP did not mention suspension.

160. The first review conclusion letter included the wording quoted above from LHP’s letter in response to the PWL, but did not comment on it. In the actual conclusions at section 5.4 the reviewing officer said:

15 “The law makes provision to suspend all or part of a careless penalty. As I have agreed that the penalty behaviour is careless suspension conditions therefore need to be considered.

20 Guidance CH83133 explains that, “You can **only** [the emboldening is in the text of CH83133, but not in the reviewing officer’s letter] suspend a penalty for a careless inaccuracy where you can set at least one specific suspension condition that, if met, **would** [as above] help the person avoid a further penalty for a careless inaccuracy.” It further explains that, “Where the careless inaccuracy that you are penalising in this compliance check will not recur in future returns, the person may
25 propose that specific suspension conditions could help him to avoid a different inaccuracy.”

As it is highly unlikely that you will submit another DIY claim under the DIY Housebuilders scheme in the foreseeable future I conclude that it is not possible to set suspension conditions.

30 I therefore agree with officer Singh that the penalty cannot be suspended.”

There is no further consideration of suspension by HMRC.

161. If it is Mr Singh’s decision in the PWL letter that is the relevant decision, then it is clearly flawed. It makes no attempt to give any reasons. If the relevant decision is
35 the first reviewing officer’s conclusions then she does give reasons. She justifies not suspending the penalty by saying that, in effect, a one-off penalty cannot be suspended. In saying that, we consider that she has taken into account a matter, an incorrect statement in HMRC guidance, that she should not have taken into account. What is more he has not taken into account that the HMRC guidance is not the law
40 and does not reproduce the law (as we shall see Ms Ashworth does not support the guidance). This Tribunal has held that a blanket policy to deny suspension merely because the error is “one-off” is flawed (*Testa v HMRC* [2013] UKFTT 151 (TC) (“*Testa*”) (Judge Poole and Ms Debell). It has also held that the reference to a

“different inaccuracy” is also incorrect. The law merely says that the condition should help in avoiding further careless inaccuracies, not that they should be of the same type. We hold that her decision was also flawed.

5 162. The appeal that is before the Tribunal is an appeal against the second penalty assessment. The grounds of appeal against that assessment do not include that the penalty should be suspended. But as we explained in ¶44 above we consider it right that all possible grounds should be considered, and in any event Ms Ashworth came to the Tribunal to defend the decision not to suspend. (And again this is what we have done in relation to special circumstances).

10 163. In her submissions Ms Ashworth said that HMRC had considered whether to suspend the penalty very carefully. Quite correctly she accepted that the fact that this, and all DIY Scheme claims, are “one-off” does *not* lead to the inevitable conclusion that suspension is not possible, but she added, also in our view correctly, that it can be difficult to set an appropriate condition (a point also accepted by the Tribunal in
15 *Testa*). In saying this we consider that she is admitting that the decision not to suspend for the reasons given by Mrs Jenkins and adopted by Mr Waterhouse was flawed in the judicial review sense. And it follows from what we have said about all the HMRC decisions on suspension that we agree with her.

20 164. She accepted that where a claimant is VAT registered it may be possible to set suspension conditions in respect of future VAT returns. The Tribunal suggested to her that the same could apply to income tax returns especially if the claimant was not VAT registered.

25 165. But Ms Ashworth maintained that in this case it was not legally possible to set a condition in relation to the VAT returns. This was because the VAT registered business is a farming partnership where the partners are not only the appellants but two others (the parents of one of the appellants), and so is a different person for penalty purposes (the firm name is W K & J A Howells & Son as shown in LHP’s letter of 28 July 2015 to the Tribunal). Ms Ashworth put forward no authority for this proposition, and so the views we express below are no more than tentative, and are
30 given in the spirit of HMRC’s request for guidance.

166. To consider the issue carefully we need to repeat part of paragraph 14:

- 35 “(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.
- (2) A notice must specify—
- (a) what part of the penalty is to be suspended,
- (b) a period of suspension not exceeding two years, and
- (c) conditions of suspension to be complied with by P.
- 40 (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.”

P is the person who gives the document in question to HMRC (paragraph 1). In this case P is two persons, Mrs and Mr Howells, or looked at another way there are two P's. The question then is whether inaccuracies by the partnership in relation to its VAT returns would cause the appellants to become liable for penalties as required by paragraph 14(3). Our starting point for our consideration is to note that for VAT purposes a partnership has been held not to be a person, at least for the purposes of registration. In *Customs and Excise Commissioners v Evans and others (trading as The Great Escape Wine Bar)* [1982] STC 342, Glidewell J said (at 348):

10 “The scheme of the [Value Added Tax] Act [1972] in my view, in relation to a partnership, is that it is no more than a group of taxable persons trading jointly and thus under a joint tax liability arising out of their partnership enterprise. The partnership itself, in my view, is not a person within the meaning of the Act.”

15 167. From this, from s 45 VATA and the Partnership Act 1890 our tentative conclusions are that it is the partners who are the persons who are assessed to VAT and that they are jointly and severally liable to pay any tax, and are also jointly and severally responsible for the consequences of any inaccuracies in the VAT return of the partnership.

20 168. In our tentative view it does not matter that the appellants would be jointly liable with the non-appellant partners for any careless inaccuracies made in the partnership return. Paragraph 14(3) should we think be construed as applying to any inaccuracies which would cause P to be liable for a penalty, even if P is not the only person so liable.

25 169. We have noted, but not considered in any detail, paragraph 20 (partnerships). It appears at first glance (and from the references in a commercial publication of tax legislation to HMRC's Compliance Handbook given in relation to the paragraph) that paragraph 20 only concerns income tax.

30 170. But we make no firm decision whether to accept Ms Ashworth's submission that it would not be legally possible to set a condition for suspension that related to helping the appellant avoid careless inaccuracies in relation to the partnership for VAT purposes. But as we put to her, the position in relation to income tax is clearer. Irrespective of the position in relation to a partnership return for income tax purposes, each of the appellants is required to make a return of their own income including their share of the partnership profit (or loss), as to which see s 8(1B) TMA. In relation to those individual returns and to the DIY Scheme claim each of the appellants is a single P. In our (tentative) view there is no legal bar to a condition being set that would help the appellants avoid careless inaccuracies in the future in relation to their own tax compliance documents.

40 171. What then is required to happen if we think the decisions to be flawed? Paragraph 17(4) is the only place where our powers are set out in relation to an appeal against a failure to suspend. We may order HMRC to suspend the penalty if we think the decision not to suspend was flawed. We do think it was flawed, so we could, it follows, had we not upheld the appeal under paragraph 17(1) and (2), have ordered

suspension. But we didn't have to. The paragraph does not give any criteria by reference to which we can make the decision whether to order suspension. In a way our reaction to Ms Ashworth's submission was irrelevant as it was the decisions of Mr Singh and the reviewing officers that are flawed. But where it could be relevant is helping us to decide whether to order suspension.

172. We also note that paragraph 17(4) does not require us to set conditions if we order HMRC to suspend, and we note that we can only confirm or vary conditions for suspension if there is an appeal against conditions that have actually been imposed (paragraph 15(4)). We assume that if we order suspension, HMRC would then have to reconsider its decision. If it decides to suspend, then paragraph 17(4)(b)(i) gives the appellant a right of appeal against any conditions under paragraph 15(4). If it decides again not to suspend, the appellant has a right of appeal against that decision under paragraph 15(3).

173. As we have rejected HMRC's argument that it is not legally possible to set a condition that would fall within paragraph 14(3), had we decided to dismiss the appeal we would have had to consider whether to order suspension of the penalty. There is a difference of view within the Tribunal about whether we ought to have ordered suspension. Given all we say about the hypothetical and tentative nature of much of this section of the decision we therefore state no conclusion about ordering suspension.

174. In any event it would be somewhat pointless to actually order suspension, rather than simply express a view. This is because as a result of our decision the penalty assessment is cancelled. Unless and until our decision is overturned by the Upper Tribunal there is no penalty in being that can be suspended. If the Upper Tribunal were to overturn our decision, it would have the power under paragraph 17(4) to order suspension (as references to "the Tribunal" in paragraph 17 include the Upper Tribunal (sub-paragraph (5A))).

The appellant's submissions

175. We are conscious that much of the discussion has been of the HMRC submissions. The main reason for this is that the appellants' submissions are responses to the way HMRC has formulated its case for imposing a penalty, and Ms Ashworth has abandoned that case. It is for that reason that we shouldered the burden of putting forward to Ms Ashworth a number of points which the appellants' submissions had not addressed. And it is for that reason that we have decided this case by reference to HMRC's original formulation, considering Ms Ashworth's only on the assumption that we are wrong.

176. We have dealt with the appellants' submission on "special circumstances" so we consider the remainder as set out in ¶42 above. The remaining submissions are:

- (1) The claim was genuine and was only unsuccessful due to a failure to produce supporting evidence which was acceptable to HMRC.
- (2) Mr & Mrs Howells abandoned the house as it was uninhabitable many years ago and never thought they would be required to prove this at a later date.

(3) They took reasonable care with the claim and provided all information. There was no intention to mislead.

(4) They could have reclaimed a proportion of the VAT in their farming business but are now out of date, and so HMRC will benefit financially.

5 (5) HMRC admit the first penalty assessment was technically deficient. That was also careless but has no consequence for HMRC whereas the appellants have to pay a substantial penalty for their inability to prove non-habitation.

177. Looking at the first three together they really only relate to HMRC's original formulation. We have no reason to think that the claim was not genuine or that the
10 appellants intended to mislead HMRC. But neither matter affects the question of whether there is a careless inaccuracy, which is matter of objective fact, not requiring any motive to be established. As to the second we have to say that if the appellants wished to make a claim and had read the notes they must have realised that they would have to show some evidence of non-occupation, which in fact they did in the
15 form of statements and photographs.

178. The fourth point is one that concerns us slightly. Section 35(1)(b) VATA requires that the DIY converter be "carrying out ... the works ... otherwise than in the course or furtherance of any business". If the appellants are of the view that they could have claimed a large percentage of the costs in the partnership VAT returns,
20 that might raise questions about whether the requirements of s 35(1)(b) could have been met. On the other hand there is no question on the VAT431C that is aimed at that paragraph of s 35(1), and the form clearly states at item 20 that the building was a "farmhouse", which HMRC have not queried. Ms Ashworth said that this could be taken as a claim that the PLR should be less than £25,403.64.

25 179. The only possibility that there might be something in this is to be found in paragraph 6 which relevant says:

"Potential lost revenue: multiple errors

...

30 (2) In calculating potential lost revenue where P is liable to a penalty under paragraph 1 in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.

(3) In sub-paragraph (2)—

35 "understatement" means an inaccuracy that satisfies Condition 1 of paragraph 1, and

"overstatement" means an inaccuracy that does not satisfy that condition.

...

40 (5) In calculating for the purposes of a penalty under paragraph 1 potential lost revenue in respect of a document given by or on behalf of P no account shall be taken of the fact that a

potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's)."

5 180. For the appellants' point to succeed they would have to show that the failure by the partnership to claim a refund of VAT or to omit the input VAT from its returns was an inaccuracy that would not lead to an understatement of tax within the meaning of Condition 1 (paragraph 1(2)), and so was by definition an "overstatement". That seems to be the case if the partnership's VAT is overpaid as a result of the failure to
10 claim as input tax the VAT paid on the goods and services supplied to the appellants that relate to their DIY Scheme claim.

181. The overstatement would have to be in a document given by P. That brings up the issues of partnership VAT again, but we think that all the partners are treated as giving the VAT return to HMRC. However if the potential over-payment by the
15 partnership is that of "another person" then it would have to be shown that some enactment required as in the parenthetical words in sub-paragraph (5).

182. Given all this we are in no position to decide this matter, which for the reasons we have given above is moot. We did entertain, briefly, the thought that the incorrect answer to the question at item 9 would be an "overstatement" that would balance out
20 any understatement arising from the item 11 answer. It is certainly an inaccuracy, and one that is not one that leads to a false claim, so meets the test in paragraph 6(3). But we imagine that HMRC would say that while it may be an inaccuracy and an overstatement, they only have to take it into account, not accept that it must trump the understatement.

25 183. The fifth submission was made rather more pointedly in LHP's letter of 14 August 2014 where they said:

30 "Finally it appears to us to be completely inequitable that HMRC can issue inaccurate assessments, cancel them and then issue new notices without suffering any penalty or loss. Is this not exactly what our clients are accused of i.e. failing to get it right first time?"

184. The answer is that unfortunately for them one or several wrongs by HMRC do not make a right for the taxpayer, at least not unless the wrongs legally invalidate some action of HMRC's. There is nothing in VAT law (as it applies to penalties) that prevents an assessment being withdrawn and another one being issued as long as the
35 second is in time, which in this case it is. And we have held that the mistake about the tax period is not one which invalidates the assessment.

Final remarks

185. This is a case which should never have got to the Tribunal. It is not as egregious as *Palau & Loughran* or *Tyne Valley Motorhomes v HMRC* [2014] UKFTT
40 969 (TC), but it is close. There are some features of the claim which might have seemed suspicious to HMRC – the withdrawal of the claim for a lot of money for example, the idea that people can live in a static caravan for 10 years or more, or that they do not get the property rebanded for council tax, or that they may have changed

the cross in the box in item 11. Had this been an appeal against the refusal of the claim, then the appellants would have had to produce some explanation for these matters, as the burden would have been on them to prove their case for a refund, and we cannot say what would have happened if that had been the nature of the appeal
5 before us. But this was an appeal against a penalty which, in accordance with Article 6 of the European Convention on Human Rights, is a criminal matter (see eg *Walden*). Although this does not mean that in a VAT appeal HMRC have to prove their case beyond a reasonable doubt, Article 6.2 and 3(a) makes it clear that there is a presumption of innocence and that an appellant is entitled “to be informed promptly,
10 in a language which he understands and in detail, of the nature and cause of the accusation against him”. We think that the formulation of the inaccuracy in the PWL falls short of this standard (except in the matter of promptness).

186. We do not know how much of a risk area the DIY Scheme is. HMRC are perfectly entitled, if they think it is a major risk area, to police it rigorously.
15 Fraudulent and deliberately false claims should be dealt with properly and Schedule 24 imposes heavy penalties for that kind of conduct. But paradoxically it can be easier to show fraud or deliberate conduct than carelessness where to succeed in a claim requires navigating through a complex piece of legislation and a none too simple form and notes. We consider that HMRC should, in the light of this decision
20 and that in *Palau & Loughran*, ask themselves whether their policy in this particular area in relation to careless inaccuracies, and the implementation of it, does accord with the compliance intention of Schedule 24.

Decision

187. The appeal is upheld and the penalty is cancelled.

25 188. 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
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **RICHARD THOMAS**
TRIBUNAL JUDGE

RELEASE DATE: 10 AUGUST 2015