TC02727

Appeal number: TC/2011/01948

VAT – Penalties – Schedule 24 Finance Act 2007 – inaccuracies in VAT return – deliberate inaccuracy – careless inaccuracy – reliance on agent – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

BILAL JAMIA MOSQUE **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR DEREK ROBERTSON

Sitting in public in Manchester on 18 March 2013

Mr Philip Rayner of Portcullis VAT Consultancy appeared for the Appellant

Mr William Brooke of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. The appellant is the Bilal Jamia Mosque, or more correctly the members of the management committee who administer the mosque. The full name under which they are registered for VAT purposes is Bilal Jamia Masjid and Islamic Teaching Centre.

2. In October 2007 the appellant applied to be registered for VAT and was registered with effect from 2 March 2006. The appellant made its first VAT return for the period 2 March 2006 to 30 April 2008 ("the 04/08 Return") on 30 May 2008. The 04/08 Return showed no supplies and claimed an input tax repayment of £36,747.35. The claim related to input tax on the costs of constructing the mosque. Following a period of verification which we describe in more detail below the repayment was refused.

3. On 26 May 2010 the appellant made a return for the period 1 February 2010 to 30 April 2010 ("the 04/10 Return"). That return also showed no supplies and claimed an input tax repayment of £42,214.00. It is not disputed that the input tax claimed in the 04/10 Return included the same input tax which had been refused in the 04/08 Return. Further, the appellant accepts that the 04/10 Return contained an inaccuracy and was correctly reduced by HMRC to nil.

4. An officer considered that the appellant had deliberately made an inaccurate claim for repayment of tax in the 04/10 Return and assessed a penalty pursuant to *Schedule 24 Finance Act 2007*. The penalty was notified to the appellant on 18 February 2011 and is in the sum of £20,684.86. The appellant appeals against that penalty.

5. We set out below the relevant statutory provisions which govern the assessment of penalties for errors in tax returns including VAT returns. We also consider various statutory provisions relevant to the input tax claims. We then set out our relevant findings of fact based on the evidence before us and our decision on the appeal.

Statutory Provisions - Penalties

6. The following references are to the penalty regime in place in May 2010 when the 04/10 Return was made. Save where otherwise noted references are to *Schedule 24 Finance Act 2007*.

7. Paragraph 1(1)(a) provides that a penalty is payable where the taxpayer gives HMRC a VAT return and two conditions are satisfied. The first condition for present purposes is that the document contains an inaccuracy which amounts to an inflated claim to repayment of tax. The second condition is that the inaccuracy was careless or deliberate.

8. Paragraph 3(1)(a) provides that an inaccuracy in a document is "careless" if "*the inaccuracy is due to failure by [the taxpayer] to take reasonable care*". It also distinguishes inaccuracies which are "deliberate but not concealed" and "deliberate and concealed". It is not suggested by HMRC that the inaccuracy in the present case was concealed.

9. Paragraph 4(1)(a) sets the penalty for careless action at 30% of the potential lost revenue ("PLR"). The penalty for deliberate but not concealed action is 70% of the PLR.

10. Paragraph 5 defines the PLR as follows:

> "(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 –*
>
> *(a) …*
>
> *(b) an amount which would have been repayable by HMRC had the inaccuracy … not been corrected.*"

11. There are specific provisions which define PLR in cases of multiple errors in a return where the calculation of PLR depends on the order in which the errors are corrected; where a loss is wrongly recorded; and where an inaccuracy results in an amount of tax being declared later than it should have been.

12. Paragraphs 9 and 10 permit reductions in penalties where a person discloses an inaccuracy. Disclosure in this context is defined as:

> "*(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.*"

13. Schedule 24 also distinguishes an "unprompted" disclosure and a "prompted" disclosure. A disclosure 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. Otherwise a disclosure is prompted.

14. Paragraph 10 sets out the reductions which HMRC shall apply to a penalty which for present purposes will depend on whether any penalty is a 30% penalty for a careless inaccuracy or a 70% penalty for a deliberate but not concealed inaccuracy. The reduction which HMRC must apply will depend on whether the disclosure was prompted or unprompted. It must also reflect the "*quality*" of the disclosure.

Paragraph 9 defines the quality of a disclosure as including "*timing, nature and extent*".

15. Paragraph 11 permits HMRC to reduce a penalty generally "*if they think it right because of special circumstances*". Paragraph 14 permits HMRC to suspend all or part of a penalty for a careless inaccuracy.

16. Paragraph 18 makes provision for the liability of a taxpayer to penalties pursuant to Schedule 24 where agents are acting on behalf of the taxpayer. It provides as follows:

> "*(1) P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.*
>
> …
>
> *(3) Despite sub-paragraphs (1) and (2), P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1)…*"

17. Paragraphs 15 to 17 set out the rights of appeal in respect of penalties and where relevant the refusal of a suspension. The tribunal has jurisdiction to affirm or cancel HMRC's decision that a penalty is payable. It may also affirm HMRC's decision as to the amount of any penalty payable, or substitute another decision which HMRC would have had power to make. The tribunal's jurisdiction to reduce a penalty because of special circumstances or to suspend a penalty in circumstances where HMRC's decision on those matters is challenged is restricted to cases where HMRC's decision is "flawed".

Statutory Provisions - VAT

18. In the present appeal there is no challenge to the underlying decision of HMRC to refuse the repayment claim made in the 04/10 Return. It is necessary however to say something about the statutory provisions which would be relevant to support a claim to repayment of input tax on construction costs. We were not addressed in detail in relation to these provisions and it is fair to say that the VAT treatment of land and buildings is not straightforward. The following is an outline of the position in so far as it is relevant to the issues on this appeal. There are two separate regimes to which we must refer:

(1) Recovery of input tax by VAT registered traders, and

(2) Recovery of input tax by "DIY Builders".

Registered Traders

19. Generally, where a trader is registered for VAT it can reclaim the input tax incurred on the cost of constructing a building to be used for the purposes of its business. However the input tax would be wholly irrecoverable if the business makes only exempt supplies and may be restricted if the business is partially exempt.

20. Where the business to be carried on will involve granting licences to occupy the building under construction then in the ordinary course that would be an exempt supply by virtue of *Group 1 Schedule 9 VATA 1994*. However the business can opt to tax the land for VAT purposes pursuant to *Schedule 10 VATA 1994*. This has the effect of excluding exemption so that supplies of licences to use the building will be standard rated.

21. There are two separate steps involved in opting to tax land. Firstly the trader must exercise the option. Secondly the trader must notify the option to HMRC. The earliest date on which an option to tax can take effect is the date on which it is exercised. Where an option to tax is exercised but not notified to HMRC within 30 days, HMRC has a discretion to accept the notification from the date of the option. Whether or not it does so will depend on the circumstances.

22. In certain circumstances permission from HMRC is required before a trader can opt to tax. In particular where a trader has made exempt supplies from the land in the 10 years prior to the date on which the option to tax is to take effect. In certain circumstances automatic permission is granted where the conditions set out in Notice 742A are satisfied. The requirement for permission is to be distinguished from the discretion which arises where a belated notification is made.

23. Where an option to tax is effective, input tax on the cost of constructing a building would be recoverable or partially recoverable depending on the nature of the supplies to be made by the business from the building.

24. Specific considerations arise in relation to the recovery of input tax by places of worship. Any business activity is usually incidental to the main non-business purpose of providing a place of worship. In the case of cathedrals and churches HMRC has an informal banding system depending on activities taking place in the building. There are four bands, A to D. Band A represents buildings such as St Paul's Cathedral where there are significant admission charges and 90% input tax recovery is permitted. Band D represents churches where there are no admission charges, only a small number of visitors and little taxable income. 25% input tax recovery is permitted.

DIY Builders

25. *Section 35 VATA 1994* makes provision for what is known as "the DIY Builders Scheme". It is a special VAT refund provision which is designed to put DIY builders in a broadly similar position to developers constructing and selling zero rated properties. Under the scheme HMRC must refund VAT charged on the supply of goods used in connection with the construction work subject to certain conditions.

Generally the scheme is used in relation to the construction of dwellings or in relation to buildings to be used solely for a "relevant charitable purpose".

26. HMRC has treated a building as being used solely for a relevant charitable purpose where 90% of the use was for such a purpose. Extra Statutory Concession 3.29 provided that "*the non-qualifying use of a building can be ignored if the entire building will be used solely for a qualifying purpose by 90% or more of the people using the building*".

27. With effect from July 2010 the concession was withdrawn and HMRC replaced it with a practice that effectively used a 95% test. HMRC accept that many places of worship are seen as involving non-business use for these purposes and as being used solely for a relevant charitable purpose.

28. Regulation 201 Value Added Tax Regulations 1995 requires a claim under the DIY Builders Scheme to be made no later than 3 months after the completion of the building. The claim must include evidence of completion, for example a certificate from the local authority.

Findings of Fact

29. During the hearing we heard evidence from Ms Julie Lyddon, the officer of HMRC who carried out verification of the 04/10 Return and who took the decision to assess the penalty. On behalf of the appellant we heard evidence from Mr Mushtaq Ahmad, who is the vice-chairman of the management committee and had responsibility for construction matters. We also heard evidence from Mr Mohammad Safdar who is an accountant acting on behalf the management committee. We had before us documentary evidence provided by both parties. Based on the evidence we make the following findings of fact.

30. In 1988 a group of individuals formed to consider the possibility of building a mosque in Rochdale. At that time there was only a small mosque with capacity for 100 people. Donations were sought and in due course a suitable piece of land was purchased and cleared. Originally a portable cabin was used but by 1998 there were sufficient funds to commence building work. To date some £2½ million has been raised by way of small individual donations. We understand that the mosque is now in the latter stages of completion, although it is already in use and has been for some years. It is estimated that another £½ million of works are required to complete the mosque.

31. The management committee of the mosque comprises 4 people and includes Mr Ahmad who is the vice chairman and in 2010 was the acting chairman, Mr Aftab Khan the treasurer, and Mr Ghalib Hussain the secretary. In Mr Ahmad's words they are "just ordinary people" with no particular business experience. He himself is a driving instructor.

32. The mosque is not only a place of worship but also provides an important resource locally giving the opportunity for children to attend classes and providing a venue for community meetings. It has always been the intention of the committee to

hire part of the building for catering at funerals, marriages and other ceremonies and events. To date no such supplies have been made because the kitchen and the toilet facilities are yet to be finished.

33. Mr Safdar has acted as an accountant to the management committee since January 2007. He has no other connection with the mosque. He practises as an accountant under the name M Safdar & Co Accountants. He has a Batchelor of Commerce degree and includes on his letterhead the letters AICA, although when asked he did not know what those letters stand for. He described them as a "small diploma". In the light of the intended use of the mosque Mr Safdar advised the committee in 2007 that they should become registered for VAT.

34. The application for registration was signed by Mr Ghalid Hussain and lodged with HMRC on or about 24 November 2007. Mr Safdar suggested that the issue of an option to tax arose at this time although we have no other evidence to this effect. It is likely that the issue would have arisen but we cannot make any findings as to what was discussed or how matters were left. In any event the appellant was registered for VAT with effect from 2 March 2006.

35. The 04/08 Return was completed by Mr Safdar and signed by Mr Khan. The claim for repayment in the 04/08 Return included construction costs of building the mosque. The return was selected for verification by HMRC and Mr K Sanders, an officer of HMRC, visited the mosque on 3 July 2008. We were provided with a copy of Mr Sanders handwritten notes of that visit but we were told that nothing turns on those notes. Mr Safdar and Mr Khan, the treasurer of the management committee were present at that meeting. Mr Khan took primary responsibility for VAT matters.

36. Following his visit Mr Sanders wrote a letter addressed to the mosque setting out his concerns that the input tax claimed was irrecoverable because there was no business activity taking place. He referred to the possibility that where some business activity takes place at a religious building, for example the sale of books or where there are admission charges, then some input tax relating to repairs and general maintenance may be recoverable. He asked for confirmation as to what items might be sold from the building when fully open and whether community users would be charged.

37. Mr Safdar replied by letter dated 1 August 2008. He stated that once the building was complete there was a hall which would be available for hire for weddings and other social purposes. Books, magazines and periodicals would also be sold at the mosque.

38. On 12 August 2008 a Mr Mallinson replied in the absence of Mr Sanders. He stated that the matter was clearly complex and had been referred to the HMRC policy team. He also said that "*the concern expressed by my colleague is not whether or not VAT can be recovered but to what extent VAT can be recovered*".

39. On 3 September 2008 Mr Sanders sent a comprehensive letter to Mr Safdar having taken advice from the relevant policy team. He identified "two options" as follows:

> (1) The mosque could remain registered for VAT in which case some input tax recovery would be allowed. The input tax which was incurred during the construction of the mosque would be split between the business and non-business use made of the whole building. Identifying a fair and reasonable split between business and non-business use may not be easy. The primary use of the mosque would be for worship. Education services would probably be exempt from VAT. Sale of books, room hire and catering would probably be taxable. HMRC had an agreement with a body representing churches of the United Kingdom giving a fixed percentage input tax recovery depending on the nature of the church with 4 possible bandings, A-D which he went on to explain. Mr Sanders indicated that in his view the same bandings could be applied to mosques and that the mosque would fall into band D allowing 25% input tax recovery.
>
> (2) Alternatively, the mosque could de-register and would probably be able to claim a refund of VAT pursuant to the DIY Builders Scheme. Buildings which are constructed for a charitable purpose can be zero rated for VAT and once the mosque was fully open extra-statutory concession 3.29 would probably apply. This provides that business use can be ignored if the building will be used solely for a charitable purpose by 90% or more of the people using the building. Mr Sanders referred to the rules set out in Public Notice 719 (Refunds for DIY Builders) and suggested that subject to those rules VAT on the cost of building materials could be recovered. However it would be necessary for the VAT registration of the mosque to be cancelled which would mean that it would not be possible to reclaim input tax on future running costs, nor would VAT be charged on supplies made.

40. On 29 September 2008 Mr Sanders spoke to Mr Safdar and was informed that the mosque intended to remain registered. On the same day Mr Sanders wrote to Mr Safdar referring to the conversation, including reference to what appeared to be an agreement that 65% of input tax would be treated as attributable to business use. Mr Sanders asked Mr Safdar to confirm the position so that the 04/08 Return could be processed.

41. There was no response from Mr Safdar or from the mosque and Mr Sanders wrote on 28 October 2008 requesting written confirmation of the intention to remain registered with input tax recovery on the construction costs and future running costs being restricted to 65%. He stated that the 04/08 Return would not be processed until confirmation was received at which stage 65% of the claim amounting to £23,885 would be made.

42. Mr Ahmad attended several meetings with other members of the management committee and Mr Safdar in connection with the 04/08 Return. He saw some of the correspondence but he had no real understanding of technical matters concerning VAT. Any letters addressed to the mosque concerning VAT would go to Mr Khan. At

some stage, it is not clear when, Mr Safdar told the mosque committee that HMRC would repay 65% of the VAT claimed. Mr Ahmad described this as "good news" but that the mosque committee asked Mr Safdar to try and get 100%. Mr Safdar said that he would try his best. Mr Ahmad's understanding was that the 65% was guaranteed and he was not aware that anything else was needed in order to recover the 65%. As far as Mr Ahmad was concerned the mosque committee had provided all the information necessary to Mr Safdar. They worked closely with Mr Safdar and he gave the impression that he was fully on top of the situation. They relied on Mr Safdar's advice.

43. Mr Safdar's evidence was that when HMRC offered 65% of the claim the management committee was not happy but could not make up their minds as to whether they would forgo the other 35% or pursue the DIY Builders Scheme. Mr Safdar said that he had difficulty getting instructions as to how to proceed with the claim. We deal below with the apparent inconsistency between Mr Ahmad's evidence and that of Mr Safdar.

44. There is no document from which to identify that Mr Sanders told Mr Safdar that the mosque would have to make an option to tax the land before it could reclaim input tax through its VAT return. We have not heard from Mr Sanders, but we infer that he must have told Mr Safdar this was the case, or at least satisfied himself that Mr Safdar was aware that it was necessary to opt to tax.

45. Some time in November 2008 HMRC received notification of an option to tax the mosque, claiming to have been effective from 1 January 2003. Mr Safdar helped in completing the form and it was signed by Mr Ghalib Hussain. The form indicated an expected date for completion of the mosque as 31 December 2011. The HMRC Option to Tax Unit wrote to the mosque on 27 November 2008 identifying that notification of an option to tax must be made within 30 days of the decision to opt to tax. Late notification is only accepted in certain circumstances and HMRC requested evidence to confirm that certain conditions were satisfied.

46. There was no reply from the mosque or from Mr Safdar to the letter dated 27 November 2008. Mr Safdar said that he had not seen this letter at the time and we accept his evidence. Mr Ahmad also had not seen the letter and in any event it was a technical letter and he accepted he would not have understood the contents. It would have been given to Mr Khan on receipt. We find that Mr Khan was aware of all the correspondence in 2008 and 2009.

47. On 18 February 2009 Mr Sanders wrote to Mr Safdar asking for the confirmation he had previously requested in his letter dated 28 October 2008. He also stated that until the matters raised by the Option to Tax Unit in their letter dated 27 November 2008 had been resolved and the option approved none of the input tax claimed in the 04/08 Return would be paid. In the absence of a reply Mr Sanders sent a further letter dated 13 March 2009 stating that unless there was a response within 21 days the claim on the 04/08 Return would be reduced to nil.

48. There was no response. Mr Safdar said that this was because he could not get instructions from the management committee. Again, this appears to be inconsistent with Mr Ahmad who understood that the management committee had provided everything Mr Safdar needed. This apparent conflict of evidence between Mr Ahmad and Mr Safdar only arose during their oral evidence and it was not put as such to either witness during the course of their evidence.

49. It is unfortunate that we did not have any evidence from Mr Khan, who was the treasurer and had responsibility for VAT matters. However, based on the evidence we do have we find that Mr Safdar was dealing principally with Mr Khan, as the treasurer. Mr Khan must have been aware, at least in 2009, that Mr Safdar required further instructions to progress the claim. It seems likely that Mr Ahmad was not aware that Mr Safdar was waiting for instructions from Mr Khan.

50. On 3 April 2009 Mr Sanders wrote to Mr Safdar stating that the repayment claim on the 04/08 Return was rejected. Mr Sanders indicated that if the mosque wished to remain registered then if the information required by the Option to Tax Unit was provided and the option approved a voluntary disclosure could be submitted reclaiming the input tax on construction costs. Alternatively if the mosque wished to de-register to make a claim under the DIY Builders Scheme it should contact HMRC's registration unit. The rights of review and appeal were set out in this letter. Another letter to the same effect was sent to the mosque on 14 April 2009, copied to Mr Safdar.

51. There was then no relevant contact between HMRC and the mosque or Mr Safdar until the mosque submitted its 04/10 Return claiming a repayment of £42,214. The submission of that return led to another verification exercise, this time conducted by Ms Lyddon.

52. Mr Safdar gave evidence as to the circumstances in which the 04/10 Return came to be made. In a witness statement made on 5 January 2012 Mr Safdar stated that the management committee had told him that losing 35% of the claim made in the 04/08 was unacceptable. In April 2010 the building work on the mosque was nearly complete so he advised claiming the input tax on building works again. He thought that if 65% of the input tax was claimed then this might be reduced further. Instead, therefore he advised claiming 100% of the input tax expecting HMRC to review and reduce the claim but in circumstances where he could negotiate with HMRC. He knew that the claim would not be paid without a visit from HMRC.

53. In his oral evidence Mr Safdar stated that at the time of the 04/10 Return the management committee had decided to rely on the option to tax because they did not know when construction of the mosque would be completed. He also said in terms "*I knew there was no way of getting 100%*". This was because there would always be religious use of the building. However he thought HMRC might offer more than 65% because the building was nearer completion. We find it extraordinary in the light of his previous dealings with Mr Sanders that Mr Safdar should advise claiming 100% of the input tax. However we accept Mr Safdar's evidence that this was the advice he gave. We also find that Mr Khan and through him the appellant relied on Mr Safdar's

advice in signing and submitting the 04/10 Return. Mr Safdar's evidence demonstrates his confusion as to the nature of the claim. He had no real understanding as to any basis upon which HMRC might accept a claim greater than 65%.

54. The 04/10 Return was completed by Mr Safdar and signed by Mr Khan. The sum of £42,214 represented input tax incurred in building the mosque over the period December 2003 to December 2009, including the period of the previous claim.

55. It is not clear on the evidence before us whether in May 2010, when the 04/10 Return was submitted, Mr Khan recalled that further instructions were required to justify the claim to 65% of the input tax incurred. The most we can say is that Mr Khan ought to have been aware that Mr Safdar required further instructions. A moment's thought and reference to the correspondence in 2008 and 2009 would have shown that the claim made in the 04/10 Return was not justified until the option to tax was effective and he had no reason to believe that it was effective in 2010.

56. Mr Safdar stated in his witness statement that he did not know whether he was making this claim under the option to tax scheme or any other scheme. He stated that at the time he did not know there was a DIY Builders Scheme. However he also stated that he had no intention of making a deliberately incorrect return. In the end, following the visit of Ms Lyddon, Mr Safdar asked Mr Rayner for help in relation to the verification. He had previously dealt with Mr Rayner in relation to the VAT affairs of other clients. We accept Mr Safdar's evidence, however he certainly ought to have been aware of the DIY Builders Scheme because it was referred to extensively in the correspondence with Mr Sanders. Again, this illustrates Mr Safdar's confusion.

57. Mr Ahmad also gave evidence as to the circumstances in which the 04/10 Return came to be made and as to the verification meeting with Ms Lyddon. It was clear to us, and Mr Ahmad accepted as much in his witness statement, that he was confused as to the nature of the claim being made. Mr Ahmad suggests that Ms Lyddon was confused, but we do not accept that.

58. Mr Ahmad stated that the management committee never had any intention other than to obtain whatever sum it was entitled to. His understanding was that 65% of the claim was guaranteed. When the 04/10 Return was made claiming 100% of the input tax it was simply a request for HMRC to look kindly on the charitable work of the mosque and to pay a bit more than the 65% that had been offered. He considered that the mosque committee had been open and honest with HMRC and was acting on the advice of Mr Safdar. No-one on the management committee would derive any personal benefit from an incorrect return. Indeed he said that the mosque was a building where honesty and truth are the first things to be taught. Mr Safdar added that money collected for a mosque must be "pure and earned by fair means". There must be no question that funds were obtained by cheating or deception.

59. We accept Mr Ahmad's evidence as to his understanding of the 04/10 Return and that the management committee did not intend to obtain more by way of repayment than that to which they were entitled.

60. Ms Lyddon visited the mosque on 13 December 2010. She met with Mr Safdar, Mr Ahmad, Mr Khan and another gentleman. There was a discussion as to whether the mosque would be entitled to reclaim the sums in the 04/10 Return, including a discussion as to matters outstanding from the previous claim. The meeting lasted some 2 hours. Ms Lyddon gave evidence to the effect that what she was told at the meeting was inconsistent with the correspondence in connection with the verification of the 04/08 Return. For example she understood that she was being given a conflicting account as to the dealings between Mr Safdar and Mr Sanders in 2008 and 2009. However, based on the evidence we have heard the most we can be satisfied about is that there was a considerable amount of confusion at this meeting on the part of the members of the mosque committee in attendance and on the part of Mr Safdar. We are not satisfied that they intentionally tried to mislead Ms Lyddon.

61. Mr Safdar suggests in his evidence that Ms Lyddon was unhelpful and puts this down to her lack of understanding. Ms Lyddon acknowledged during the hearing that she was not an expert in the DIY Builders Scheme or in relation to the option to tax. However we do not accept that Ms Lyddon was unhelpful or demonstrated a lack of understanding in the enquiries made during her visit. She was aware of the distinction between a repayment to a registered person who had exercised an option to tax and a refund to an unregistered person through the DIY Builders Scheme. During the course of the visit she was obtaining information with a view to seeking specialist advice from HMRC policy teams. If Mr Safdar gained the impression that Ms Lyddon was being unhelpful we put this down to his own confusion as to the proper basis on which a claim to input tax might be made.

62. Matters were left that Ms Lyddon would check with various other HMRC units before deciding how to progress the claim.

63. Ms Lyddon spoke to Mr Safdar by telephone on 17 December 2010. It was agreed that the repayment claim would be reduced to nil and the mosque would submit a claim under the DIY Builders Scheme once the building works were complete. She also set out the alternative that if the mosque proceeded with the option to tax, the option would only be effective from the date the notification was received in November 2008. Input tax incurred prior to November 2008 could not be reclaimed and input tax incurred after that date would be apportioned.

64. Ms Lyddon discussed the question of penalties with her manager. She considered that when the 04/10 Return was submitted Mr Safdar knew that it was not correct. On this basis she considered that the inaccuracy in the return arose as a result of deliberate behaviour. She then went on to consider the appropriate reduction for disclosure, bearing in mind that the maximum penalty was 70% of the PLR and that this could not be reduced below 35% because the disclosure was prompted. HMRC guidance in relation to penalties suggests the maximum reductions to be given should be as follows:

(1) 30% for telling,

(2) 40% for helping, and

(3) 30% for access to the records.

65. Ms Lyddon gave a reduction of 10% for telling. She did not give the full 30% reduction because she felt she had been misled at the visit on 13 December 2010. She gave a reduction of only 20% for helping because she felt that the mosque committee and Mr Safdar could have been more helpful in quantifying the inaccuracy. She gave the full 30% reduction for access to records. In total these reductions equated to a 21% reduction from the maximum penalty of 70% so that the penalty was 49% of the PLR. The PLR was £42,214 so the penalty imposed was £20,684.

66. Ms Lyddon also considered whether there were special circumstances to justify a special reduction but concluded that there were not. We agree with that aspect of Ms Lyddon's decision and Mr Rayner did not seek to suggest that there were any special circumstances.

67. Mr Ahmad said that the mosque committee was shocked and very disappointed when the penalty was assessed. We can understand that, given that the basis of the penalty is deliberately making an inaccurate return which in most cases would imply some dishonesty on the part of the trader.

Decision

68. It is well established that the burden is on HMRC to satisfy us that a penalty is chargeable, in particular that there is an inaccuracy in the return and that the inaccuracy was either careless or deliberate. If we are so satisfied, there is a burden on the appellant to establish that HMRC have failed to reduce the penalty properly, have unreasonably failed to take into account special circumstances or in the case of a careless penalty have unreasonably failed to suspend the penalty.

69. Mr Brooke accepted that the scope of our jurisdiction on this appeal pursuant to paragraphs 15(1) and (2) Schedule 24 included the possibility we might find that the inaccuracy was careless rather than deliberate and also that we might take a different view as to the quality of the disclosure.

70. Mr Rayner submitted that no penalty was due because there was no PLR. At some point when the building of the mosque is completed the appellant will be entitled to an input tax credit. There was never any danger of a loss of revenue.

71. We do not accept that submission. The appellant may well be entitled in due course to reclaim some of the input tax which it claimed in the 04/10 Return. However it was not entitled to do so in the 04/10 Return. On any view there was an additional amount repayable by HMRC had the inaccuracy not been corrected. That amount is the PLR defined by paragraph 5. Paragraph 8 makes provision for cases involving tax being declared later than it should have been. However there is no provision whereby we can take into account the possibility that the amount claimed would be repayable on a future return or if the appellant were to de-register pursuant to a different statutory provision.

72. The first issue for us to decide is whether the appellant deliberately made an inaccurate return. Mr Rayner submitted that there was no deliberate or dishonest attempt by the appellant to claim a repayment to which it was not entitled.

73. The test in Schedule 24 is not dishonesty unlike the provision in section 60 VATA 1994 which it replaced for VAT purposes. Having said that a taxpayer who deliberately makes an inaccurate return may well be acting dishonestly. Deliberately making an inaccurate return must however involve knowledge on the part of the taxpayer that the return contains an inaccuracy.

74. We are conscious that the 04/10 Return was signed by Mr Khan. It was not suggested that he was acting outside his authority in signing the return. We are principally concerned therefore with the knowledge of Mr Khan. We have no direct evidence as to the knowledge of Mr Khan because, as we have noted, he did not give evidence. As to the management committee generally we have the evidence of Mr Ahmad upon which we have made our findings of fact.

75. We have accepted Mr Safdar's evidence that he fully expected the 04/10 Return to result in a verification visit at which stage he intended to negotiate with HMRC. We have also found that Mr Khan submitted the 04/10 Return relying on Mr Safdar's advice.

76. Mr Rayner suggested when cross-examining Ms Lyddon that the correspondence from Mr Sanders accepted that the mosque would be entitled to a repayment of at least 65% of the input tax at some stage. He referred in particular to Mr Mallinson's letter dated 12 August 2008 which stated that the issue was not whether VAT could be recovered but the extent to which VAT could be recovered.

77. In our view the correspondence as a whole made clear that repayment through a VAT return would require an option to tax to be accepted by HMRC. The appellant had failed to respond to the letter dated 27 November 2008 to give the confirmations required by that letter. In those circumstances there was no certainty that late notification of the option to tax would be accepted, and if it was accepted from what date the option would be effective. Similarly, repayment through the DIY Builders Scheme would be subject to cancellation of the registration and compliance with rules in Public Notice 719.

78. There are material differences between a claim for input tax repayment through a VAT return and a claim under the DIY Builders Scheme. For present purposes the most significant differences are as follows:

(1) A claim through the VAT return can only be made by a registered person. A claim under the DIY Builders Scheme can only be made by a non-registered person.

(2) A claim through the VAT return can only be made in respect of input tax which is attributable to taxable supplies in the course or furtherance of a business. A claim under the DIY Builders Scheme can only be made where there is no more than 5% (in 2008, 10%) business use.

(3) A claim by a registered person must be made in the relevant VAT return in which the input tax was incurred, subject to a voluntary disclosure within 4 years. A claim under the DIY Builders Scheme can only be made in the 3 months following completion of the building.

79. We have found that both Mr Safdar and the mosque committee were confused as to the basis of the claim and we do not consider that they were fully aware of the technical differences described above. However Mr Safdar was aware that the claim could not be made until a choice had been made as to the route the mosque wished to pursue to obtain a repayment. This was more than a mere formality. One route involved only 65% recovery, the other route involved possibly a greater recovery but with cancellation of the registration and no recovery of VAT on future running costs.

80. The appellant never implemented the steps required for either route to repayment. The option to tax was not accepted. Mr Rayner relied on the possibility of automatic permission but if the conditions for that to apply were satisfied then Mr Rayner would no doubt have argued that some part of the claim was wrongly refused. In the light of the appellant's acceptance that the claim was properly refused, no claim for repayment could properly be made through a return. Even if the option to tax was automatic and did not require permission it would only have been effective from the date the option was made.

81. Building at the mosque is not yet complete. Mr Ahmad estimated that another £½ million of works are required to complete the mosque. In the circumstances a claim under the DIY Builders Scheme could not be made.

82. Mr Rayner submitted that Mr Safdar and the appellants ought to have received better advice from HMRC as to how they might fully recover input tax on construction costs. In particular he submitted that there had been conflicting advice from HMRC in the light of which it was not appropriate to impose a penalty.

83. In considering the penalty we are concerned in particular with the position from May 2008 to May 2010 when the 04/10 Return was submitted. We do not accept that the advice from Mr Sanders during this period was in any sense conflicting. He was seeking to alert the appellant and Mr Safdar to the two different methods by which the appellant could obtain a repayment of input tax incurred. We acknowledge that this is not a straightforward area of law. However we consider Mr Sanders outlined the options available to the appellant in a reasonably straightforward way. He also identified the conditions attaching to each route. Matters were fairly left in the hands of Mr Safdar. It has not been suggested by Mr Rayner that there was any other route by which the mosque could recover the input tax incurred.

84. It is not disputed that the 04/10 Return contained an inaccurate claim. In the light of our findings of fact based on Mr Ahmad's evidence we consider that the inaccuracy should be viewed as comprising two elements. Firstly the claim to 35% of the input tax incurred, and secondly the claim for 65%. We consider that each of these elements amounts to a separate inaccuracy for the purposes of Schedule 24. We shall refer to these inaccuracies as "the 35% Claim" and "the 65% Claim" respectively.

85. When Mr Safdar prepared the 04/10 Return he fully expected a visit and hoped, in some way, to convince HMRC to increase the amount of input tax credit from the 65% which had previously been offered. However when he advised Mr Khan to sign the return he was aware that the mosque was not entitled to recover any input tax at all at that stage. Nothing had changed from his discussions in 2008 and 2009. Mr Safdar knew that nothing had changed. His decision to advise the appellant to make a claim to which it was not entitled amounted to advice to submit an inaccurate return. In doing so we consider that Mr Safdar was highly naïve rather than dishonest. Subjectively he did not consider what he was doing to be dishonest because he fully expected a visit from HMRC at which the claim would be discussed and negotiated.

86. Notwithstanding the position of Mr Safdar, Schedule 24 requires the inaccuracy to be deliberate or careless on the part of the appellant rather than its adviser. It is the actions and state of mind of the appellant on which we must focus.

87. The management committee was well aware that the 04/08 claim had been refused and on any view Mr Khan was aware that they were not entitled to claim 100% of the input tax incurred. Mr Safdar's advice was to the effect that the appellant could properly submit an inaccurate return. Any reasonably conscientious taxpayer ought to have realised that a claim to repayment should not be made unless there is reason to justify the claim. The management committee had no reason to consider that the 35% Claim could be justified. We acknowledge that Mr Safdar prepared the return for signature by Mr Khan. However the management committee, in particular Mr Khan who had all the correspondence from 2008 and 2009, must have known that the appellant was not entitled to the 35% Claim.

88. We find therefore that there was a deliberate inaccuracy in relation to the 35% Claim. We stress however that this should not be taken to imply any finding of dishonesty. The circumstances in which the 35% Claim came to be made are highly unusual. In most cases where an individual signs a return knowing it to be inaccurate that individual will be acting dishonestly. However in the present case we accept that Mr Khan and the management committee genuinely believed that it was appropriate to reclaim 100% of the input tax incurred as some sort of negotiating position. That was the advice they had been given by Mr Safdar and they accepted it in good faith.

89. We now consider whether the 65% Claim amounted to a deliberate inaccuracy, a careless inaccuracy or neither. In our view carelessness can be equated with "negligent conduct" in the context of discovery assessments under section 29 Taxes Management Act 1970. Negligent conduct is to be judged by reference to the reasonable taxpayer. The test was described by Judge Berner in *Anderson (deceased) v Revenue and Customs Commissioners [2009] UKFTT 206 at [22]*, cited with approval by the Upper Tribunal in *Colin Moore v Revenue and Customs Commissioners [2011] UKUT 239 (TCC)*:

> "*The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.*"

90. The appellant's case, through Mr Ahmad's evidence, is that the committee was unaware anything else needed to be done to. We have accepted that Mr Ahmad was unaware that anything else was required before the claim could be made. In the light of Mr Safdar's evidence we have found that Mr Khan ought to have been aware that HMRC required further information before any repayment return could be paid however we are unable to say that he was aware in May 2010 that further information was required. In the light of that finding we are not satisfied that Mr Khan deliberately made the inaccurate 65% Claim. We accept that he genuinely believed, on Mr Safdar's advice, that the 65% Claim could be made in the 04/10 Return. In our view making the 65% Claim in those circumstances was clearly careless.

91. When the case was opened before us, we raised the possibility that the appellant might wish to rely on *paragraph 18 Schedule 24*. Mr Rayner did rely on that paragraph during his closing submissions although he did not expand on the basis of his reliance.

92. The next issue which we must address is whether and if so to what extent it is relevant that Mr Khan, when he signed the 04/10 Return, did so on the advice of Mr Safdar. We have not heard any evidence from Mr Khan, which as we have said is unfortunate given that he was the treasurer and had responsibility for VAT matters.

93. It seems to us that liability for a penalty for careless action requires a failure by the taxpayer to take reasonable care. Paragraph 18 reflects the fact that taxpayers will often use agents in the course of their dealings with HMRC. The effect of paragraph 18 is to ensure that even in cases where agents are used the liability of a taxpayer depends on whether the taxpayer took reasonable care

94. We repeat what Judge Cannan has previously said in *Hanson v HMRC [2012] UKFTT 314 (TC)* in the First-tier Tribunal in the context of paragraph 18:

> " *21. 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. In my view, if a taxpayer reasonably relies on a reputable accountant for advice in relation to the content of his tax return then he will not be liable to a penalty under Schedule 24.*"

95. The appellant had available to it, or ought to have had available to it, the correspondence with HMRC in 2008 and 2009. We have founds as a fact that this correspondence made clear that repayment through a VAT return would require an option to tax to be accepted by HMRC. The appellant had failed to respond to the letter dated 27 November 2008 to give the confirmations required by that letter. It failed to respond to subsequent correspondence. In those circumstances there was no certainty that the option to tax would be accepted, and if it was accepted from what date it would be effective. In the light of this correspondence and taking into account

all the circumstances we do not consider that the appellant was entitled to accept Mr Safdar's advice at face value.

96. Mr Safdar's evidence was that the committee was aware that further information and instructions were required before the claim could be justified. In the absence of any evidence from Mr Khan, who had primary responsibility for VAT matters, we have found that he ought to have been aware that further information was required by HMRC to justify the 65% Claim.

97. Based on the evidence we have heard we accept that Mr Khan did not deliberately include the inaccurate 65% Claim in the 04/10 Return. He relied on the advice of Mr Safdar. However we do not accept that the management committee, acting through Mr Khan, took reasonable care to ensure that the 04/10 Return was accurate. The management committee and Mr Khan in particular knew that the previous claim had been refused and they failed to satisfy themselves as to the basis on which the 65% Claim could be made in 2010.

98. Mr Rayner's overarching submission was essentially that the entitlement to repayment was a complicated area as to which the appellant was justifiably confused. The inaccuracy could not be described as either deliberate or careless. Even if it was careless the appellant could rely on paragraph 18(3). For the reasons given above we do not accept those submissions. We consider that the 35% Claim was a deliberate inaccuracy and the 65% Claim was a careless inaccuracy.

99. During the course of his submissions Mr Rayner also pointed to a number of confusing passages in the respondents' statement of case for this appeal. We accept that in some respects the statement of case is confusing but we do not accept that this has affected the ability of the appellant to fully present its case on this appeal.

100. Mr Rayner did not suggest that the HMRC guidance as to what reductions to make by reference to the quality of disclosure was unreasonable. He did in effect challenge the decision of Ms Lyddon in applying that guidance. We agree that the reductions applied to the penalty do not reflect the quality of disclosure given by the appellant. In particular we have not found that the management committee sought to mislead Ms Lyddon during her visit. Nor do we consider that the management committee could have been more helpful in quantifying the inaccuracy given their confusion over the basis of the claim. In those circumstances we see no reason not to give the full reduction of 30% for "telling" and 40% for "helping" in addition to the 30% reduction given by Ms Lyddon for giving access to records.

Generally

101. In the circumstances we allow the appeal in part. We can summarise the effect of our decision as follows:

(1) We affirm that a penalty is payable by the appellant.

(2) We substitute our decision that the 35% Claim was a deliberate inaccuracy and the 65% Claim was a careless inaccuracy. In each case the

penalty imposed should be reduced to the minimum percentage so as to reflect the quality of the appellant's disclosure.

(3) In the case of the 35% Claim the minimum penalty for a prompted disclosure is 35% of the PLR which amounts to £5,171.21

(4) In the case of the 65% Claim the minimum penalty for a prompted disclosure is 15% of the PLR which amounts to £4,115.86.

102. HMRC have not considered whether to suspend any part of the penalty. If it had been wholly deliberate they would have had no power to do so. In the light of our findings it will be necessary for HMRC to consider whether or not to suspend the penalty in relation to the 65% Claim. If the parties are unable to agree whether that penalty should be suspended or the conditions on which it should be suspended then we give permission to either party to apply to restore the appeal for consideration of that matter. Any such application should be made within 90 days from the date on which this decision is released.

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

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 30 May 2013