# TC04237

**Appeal numbers: TC/2014/01943 & TC/2014/06295**

***VALUE ADDED TAX – supply – supplies made more than six months before registration – VAT Regulations 1995 reg 111 – whether supplies were of goods or services – argument that supplies were of an intangible asset – reference to HMRC Business Income Manual – held, under Article 14(1) of VAT Directive, that supplies were of services – appeal on substantive issue dismissed – appeal against penalty – Sch 24 FA 2007 – consideration of factors – held, no advance disclosure – disclosure prompted – no adjustment – as HMRC decision on special circumstances not flawed, no special reduction – penalty confirmed – consolidated appeals dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**SAM SMITH t/a HELIOPS UK** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN CLARK**
**MR JULIAN SIMS FCA, CTA**

**Sitting in public at Aldershot County Court on 13 October 2014**

**The Appellant in person**

**Barry Sellers, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant, to whom we refer in this decision as Captain Smith, appeals against the decision of the Respondents ("HMRC") to disallow a claim to pre-registration input VAT incurred from 9 November 2011 to 3 March 2012 inclusive in relation to helicopter pilot training.

2. Captain Smith has also given Notice of Appeal in respect of a penalty; this was lodged subsequently to the hearing, as we explain later in this decision.

3. We consider first the substantive appeal against the decision to disallow input VAT; if Captain Smith's appeal against that decision succeeds, then the penalty assessment falls away. Thus we leave aside the question of the penalty pending our conclusion on his input tax claim.

### The substantive appeal

*The background facts*

4. The evidence consisted of a bundle of documents, including a witness statement given by the HMRC officer Anna Sellers. No formal oral evidence was given, but where appropriate we have treated statements made by Captain Smith in putting his case as oral evidence.

5. From the evidence we find the following facts.

6. Captain Smith applied in January 2013 for VAT registration. As his turnover was below the VAT registration threshold, this was an application for voluntary registration. The effective date of registration requested was 14 October 2012. His flight school assisted him in preparing the registration form.

7. Following his first return for the period 05/13, HMRC arranged for a VAT visit to review Captain Smith's records in relation to a repayment claim made for that period. The HMRC officer who made the visit was Ravinder Chander. During the visit, Captain Smith raised the subject of the VAT which he had incurred on the helicopter pilot training which he had undertaken in the period from 9 November 2011 to 3 March 2012. He explained to Ms Chander that he had not included this in his claim for that period; the reason was that he was not sure whether the input tax could be claimed, as it related to obtaining a private licence. He stated that as he needed a private licence to train as a commercial pilot, this expense was part of the expenses of the business.

8. Ms Chander told him that a claim would be out of time. He had registered for VAT with effect from October 2012, and the invoices were dated 2011. Under the input tax rules, input tax on services supplied to the taxable person more than six months before the date of registration could not be recovered.

9. Captain Smith was not happy with Ms Chander's statement. He was aware that other people had received their input tax back. According to her note of the telephone conversation, he indicated that he accepted that the input tax could not be claimed back, and therefore no adjustment to his return was required to deal with this claim.

10. Following this visit, Captain Smith discussed the position with the director of the company to which he was contracted to provide helicopter services. The director told him that the last five contractors to his firm had successfully claimed back pre-registration input VAT in similar circumstances.

11. Captain Smith sent an email to Ms Chander on 8 August 2013, referring to this statement by the director, and asking how an appeal against HMRC's decision should be made. As he had omitted his VAT registration number from that message, he re-sent the message to another HMRC officer on 13 August 2013, adding his VAT registration number.

12. On 22 August 2013, Ms Chander telephoned Captain Smith to discuss his email. She explained that as the VAT in respect of his return for the period ending 05/13 had been verified and repaid in full, he could not appeal against the decision. The input tax claim to which he was referring was not on his return but had been discussed at the visit, and it had been explained to him that it was out of time. Captain Smith stated that everyone he knew had received repayments of such input tax, and he had been advised that he too was entitled to repayment.

13. He said to Ms Chander that he would include this input tax in his next return and would try claiming repayment through that return. Ms Chander explained the voluntary disclosure process, but told Captain Smith again that the input tax timing rules would apply. She advised him to consult the HMRC website for information on the matters which they had discussed.

14. On 2 October 2013, Captain Smith submitted his VAT return for the period 08/13. This was a "repayment return".

15. Ms Sellers wrote to him on 29 October 2013, asking Captain Smith to contact her urgently in order to enable the details of his VAT return to be verified.

16. On 3 November 2013, Captain Smith sent an email to Ms Sellers, attaching a series of invoices in support of his claim; these invoices related to the helicopter pilot training undertaken from 9 November 2011 to 3 March 2012. He referred to the advice given by Ms Chander on 22 August, and also to the information which he had received relating to colleagues who had successfully made similar claims.

17. On 6 November 2013, Ms Sellers wrote to Captain Smith; this followed a telephone conversation the previous day. She referred to checks carried out on his return for the period 08/13. As a result of these checks, HMRC believed that there were inaccuracies in this return; as a result, the amount of VAT reclaimed for that period was incorrect. The amount of VAT which he had reclaimed in respect of purchases and other inputs was £4,456.16. HMRC had adjusted this to £2,376.07.

Instead of the net VAT repayable being £3,702.16 as claimed, the adjusted VAT repayable was £1,633.07. The amount of input tax disallowed was £2,069.09.

18. Ms Sellers referred to the possibility of HMRC charging a penalty. HMRC had not yet decided whether to charge Captain Smith a penalty, but would write to him shortly to let him know their decision. She explained what he needed to do if he disagreed with HMRC's decision.

19. Captain Smith replied requesting a review. On 16 December 2013 the HMRC Review Officer, Mr N Greenough, wrote to him with the results of the review. Subject to a minor variation of the quantum, the assessment decision notified by Ms Sellers on 6 November 2013 was upheld. The quantum of VAT disallowed was reduced from £2,069.09 to £2,004, and the net VAT repayable was consequently increased from £1,633.07 to £1,698.07. Mr Greenough gave details of the right to appeal to an independent tribunal.

20. On 24 February 2014, HMRC sent Captain Smith a "Penalty explanation", telling him about the penalty that HMRC intended to charge and how they had calculated it. They indicated that the penalty should not be paid yet; they would write again to let him know how much to pay and when to pay. (The copy of this letter included in the evidence provided for the hearing does not contain the "penalty explanation schedule"; it merely sets out a summary of amounts from that schedule.) The amount of the penalty is £771.54; none of that amount is suspended.

21. Captain Smith replied to Mr Greenough in an undated letter stamped by HMRC as received on 5 March 2014. Captain Smith set out a series of arguments; as these are considered elsewhere in this decision, we do not set them out here.

22. Mr Greenough replied on 19 March 2014. He explained that he could not carry out a second review of the assessment. If Captain Smith wished to dispute the review conclusion, he had to appeal to HM Courts and Tribunals Service ("HMCTS"), as previously indicated in the review letter. Mr Greenough referred to the points in Captain Smith's letter; again, there is no need to refer to the arguments until a later point in our decision.

23. On 9 April 2014, Captain Smith sent an email to HMCTS attaching his Notice of Appeal dated 2 April 2014 against the decision contained in the review letter. He attached a number of documents in support of his appeal. HMCTS informed him that as he had applied for permission to make a late appeal, HMRC might object, or the judge might be unwilling to give permission.

24. That Notice of Appeal made no reference to the question of a penalty; we consider this later, after arriving at our conclusion on the decision by HMRC to disallow the input tax claim.

*The relevant law for the substantive appeal*

25. Regulation 111 of the VAT Regulations 1995 (SI 1995/2518) (the "VAT Regulations") sets out the circumstances in which exceptional claims for VAT relief may be made, including claims for recovery of input tax in respect of goods and services supplied to the taxable person before the date of registration:

> "**111 Exceptional claims for VAT relief**
>
> (1) Subject to paragraphs (2) and (4) below, on a claim made in accordance with paragraph (3) below, the Commissioners may authorise a taxable person to treat as if it were input tax—
>
> (a) VAT on the supply of goods or services to the taxable person before the date with effect from which he was, or was required to be, registered, or paid by him on the importation or acquisition of goods before that date, for the purpose of a business which either was carried on or was to be carried on by him at the time of such supply or payment, and
>
> (b) . . .
>
> (2) No VAT may be treated as if it were input tax under paragraph (1) above—
>
> (a) . . .
>
> (b) subject to paragraph (2A), (2C) and (2D) below, in respect of goods which had been supplied to, or imported or acquired by, the relevant person more than 4 years before the date with effect from which the taxable person was, or was required to be, registered;
>
> (c) . . .
>
> (d) in respect of services which had been supplied to the relevant person more than 6 months before the date with effect from which the taxable person was, or was required to be, registered; or
>
> (e) in respect of capital items of a description falling within regulation 113.
>
> (2A) . . .
>
> (2B) In paragraph (2) above references to the relevant person are references to—
>
> (a) the taxable person; or
>
> (b) . . .
>
> (3) Subject to paragraph (3A) and (3B) below, a claim under paragraph (1) above shall, save as the Commissioners may otherwise allow, be made on the first return the taxable person is required to make and, as the Commissioners may require, be supported by invoices and other evidence.
>
> . . ."

*Captain Smith's arguments on the substantive appeal*

26. In his undated letter to Mr Greenough received by HMRC on 5 March 2014, Captain Smith referred to discussions with his accountant. The accountant had advised him that HMRC's decision would be correct if he were claiming input VAT back in relation to a "service"; however, this was not the case for his "PPL(H) Pilot Training" course. Under HMRC's Manual BIM35660 (Capital/Revenue divide: intangible assets: proprietor's training courses), that course should come under the category of an "Asset".

27. Captain Smith referred to an item on HMRC's website relating to BIM35660, which stated:

> "Where attendance is required to give business proprietors new expertise, knowledge or skills, which they lack, it brings into existence an intangible asset that is of enduring benefit to the business. We take the view that the expenditure is therefore of a capital nature."

28. He stated that from day 1, the HMRC officer (Ms Chander) had been talking about assets and services. It was not until Mr Greenough's review letter dated 16 December 2013 that HMRC had referred to goods and services. Captain Smith referred to BIM 35660; this was definitely not referring to a service.

29. He accepted that the VAT legislation referred to goods and services, but in his and his accountant's opinion, the training course was always an asset. In his letter dated 19 March 2014, Mr Greenough had commented on the reference to BIM35660:

> "You cite what I understand to be HMRC guidance about income tax (BIM35660) and revenue expenditure. The pilot training course may well fall within the definition of an intangible asset under this guidance and be recoverable as capital expenditure for Direct Tax purposes. However the supply of the course to you was the supply of a service and for VAT purposes input tax recovery is restricted to within six months prior to registration. Any Direct Tax rules cannot override the VAT legislation."

Captain Smith and his accountant were in agreement that this was not a VAT ruling, but that it still proved that the provision of the course was not a service. Captain Smith could not find any legislation saying that his training did become a service; he considered that it was the polar opposite to a service. All the information that he had discovered had brought him to the conclusion that it was an intangible asset.

30. In their comments, HMRC had indicated that they had not accepted the pilot training to be an intangible asset; however, Mr Greenough's letter had accepted this.

31. Captain Smith accepted that if the supply were to be treated as a service, the six-month restriction would apply. However, he did not believe that this was the supply of a service. An asset would not fall under the heading of "service". He had seen no legislation that said goods must be physical things.

*Arguments for HMRC on the substantive appeal*

32. Mr Sellers referred to Captain Smith's contention that the training was an intangible asset. HMRC had never agreed with this view. Mr Sellers referred to Article 24(1) of Council Directive 2006/112/EC of 28 November 2006 ("the VAT Directive"), which stated:

> "1. 'Supply of services' shall mean any transaction which does not constitute a supply of goods."

33. In addition, he referred to s 5(2) of the Value Added Tax Act 1994 ("VATA 1994"):

> "**5 Meaning of supply: alteration by Treasury order**
>
> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
>
> (a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

34. He submitted that all of this legislation showed that the training was a service.

35. The BIM chapter referred to by Captain Smith related to direct taxes, ie income tax and corporation tax. It did not apply for VAT purposes. Furthermore, it was only guidance. It could not override the VAT legislation.

36. The position was governed by VATA 1994 and reg 111(2) of the VAT Regulations. Captain Smith had voluntarily registered with effect from 14 October 2012; HMRC had no discretion to vary this date. The invoices showed that the training had been supplied more than six months before that date, so recovery was capped by reg 111(2)(d).

*Discussion and conclusions on the substantive appeal*

37. The dispute between Captain Smith and HMRC turns on the question whether the supplies to Captain Smith of his private pilot training were supplies of services or of goods.

38. Nothing in the UK VAT legislation provides a definition of a "supply of goods". It is therefore necessary to refer to the underlying European law to see what assistance it provides. Mr Sellers referred to Article 24 of the VAT Directive. He did not refer to an earlier Article in the VAT Directive which specifically deals with the subject. This is Article 14.

39. There is no need to set this out in full in this decision. We cite only Article 14(1):

> "1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner."

Captain Smith's case is that the pilot training amounts to an intangible asset. An intangible asset does not fall within the terms of Article 14(1). As a result, the supplies of pilot training cannot be supplies of goods.

40. Captain Smith accepted that if the supplies were to be treated as supplies of services, the effect of reg 111(2) of the VAT Regulations would be to disallow his input tax repayment claim because the supplies were made over six months before the date from which he was voluntarily registered for VAT. As s 5(2)(b) VATA 1994 treats anything which is not a supply of goods but is done for a consideration as a supply of services, the input tax claim must be disallowed.

41. We regard it as unfortunate that in their correspondence with Captain Smith, HMRC confined their attention to domestic UK VAT law, and did not refer to the VAT Directive. We think it likely that if Captain Smith had been told in the course of the correspondence that the position was clarified by Article 14(1) of the VAT Directive, he would not have pursued his claim.

42. He relied on the comments in BIM35660. As Mr Sellers submitted, this relates only to direct tax, ie income tax and corporation tax. We find it surprising that the accountant whom Captain Smith consulted appears, on the face of the matter as described in the correspondence, to have based VAT advice on one of HMRC's Manuals dealing with direct tax. (Whether this was the true position depends, of course, on the question put to that accountant; there is no evidence to show the precise nature of the point raised.) The nature and concepts of VAT are entirely different, and until the amalgamation of the former Inland Revenue and the former Customs and Excise departments from 2005 onwards, VAT and the direct taxes were to a very large extent regarded as separate and were separately administered. It is necessary to bear this in mind in stressing the many distinctions between VAT on the one hand and the direct taxes on the other.

43. As the input tax claim must be disallowed, Captain Smith's appeal on the substantive issue must be dismissed. As a result, it is necessary to deal with the penalty issue, as set out in the following sections of this decision.

**The appeal against the penalty**

44. As already mentioned, Ms Sellers' letter dated 6 November 2013 indicated that HMRC might decide to charge a penalty. Mr Greenough's review letter dated 16 December 2013 made no reference to the question of a penalty, as there was no decision on that subject for him to review.

45. On 24 February 2014, HMRC wrote to Captain Smith to inform him that HMRC intended to charge him a penalty, and how they had calculated it. They indicated that he should not pay the penalty yet; they would write to him again to let him know how much to pay and when to pay. They emphasised that he could not appeal against or request a review of anything to do with the penalty at that time; if

they sent him a penalty assessment notice, he would be able to appeal or ask for a review then. They enclosed a summary of the amounts from the penalty explanation schedule. The amount of the penalty was £771.54, none of which was suspended.

46. In his letter dated 19 March 2014 (sent in response to Captain Smith's undated letter received by HMRC on 5 March 2014) Mr Greenough dealt only with the matters covered by his review letter. After setting out comments on certain of the points raised by Captain Smith, Mr Greenough continued:

> "If you wish to continue to dispute the decision to amend your VAT return, you need to appeal to the Courts and Tribunals Service."

As he was dealing only with the issue raised in relation to the pilot training invoices, he made only limited reference to the other questions which Captain Smith had raised in his letter, which had referred to taking necessary action to have the penalty withdrawn. Mr Greenough simply indicated that Captain Smith could only appeal against the penalty once he had received a formal notification; there would then be rights of review and appeal.

47. HMRC's Statement of Case in respect of the appeal against the decision to refuse the input tax claim was dated 29 May 2014. Paragraphs 37 to 39 of their Statement of Case, under the heading "Deliberate inaccuracy penalty", set out their arguments in support of their case that the penalty had been correctly calculated and issued in accordance with the legislation.

48. Other than the documents referred to in the above paragraphs, no documentation relating to the question of a penalty was included in the papers provided to us for the purposes of the hearing. As the parties were in agreement that they wished the subject of the penalty to be considered at the hearing as part of Captain Smith's appeal, we agreed to do so on condition that appropriate action would be taken by Captain Smith after the hearing to formalise his appeal against the penalty. Captain Smith showed us the Notice of Penalty Assessment dated 3 May 2014; in the absence of a clerk for the hearing, we did not take a copy of that document, and handed it back to him after we had examined it. We did not see the full penalty explanation schedule.

49. Captain Smith explained that there had been subsequent correspondence reducing the net amount due to HMRC in respect of the penalty by £65; his understanding was that his right of appeal against the penalty only arose from that point.

50. No appeal against the penalty was notified to HMRC or to HMCTS before the hearing.

51. After the hearing we established that it would be necessary for Captain Smith to lodge a separate Notice of Appeal with HMCTS. There appears to have been some confusion as to what was required, but the Notice of Appeal was lodged on 14 November 2014.

52. As that document was not accompanied by a copy of the full penalty explanation schedule, we requested a copy. It was provided by the parties to HMCTS on 1 December 2014, and received by us on 2 December 2014. The parties also confirmed that they did not object to the consolidation of the penalty appeal with the original substantive appeal. As a formal matter, we direct that appeals TC/2014/01943 and TC/2014/06295 are consolidated and are to be considered together.

53. As a result, we are now able to deal with Captain Smith's appeal against the penalty.

*Captain Smith's arguments on the penalty*

54. Captain's Smith's primary argument as put in his March 2014 letter to Mr Greenough was that the penalty was incorrect as he was legally entitled to recovery of the input tax on the basis of the arguments previously put to HMRC. We have concluded that he was not entitled to recover that input tax, as his claim was time-barred. His second argument was that he had "committed no crime of wrong doing in submitting this return". His further argument was that the penalty should be withdrawn as it was unjust of HMRC to fine a person who had carried out actions of an informed channel of appeal.

55. At the hearing he argued that it was disgraceful for him to be fined; he had not tried to mislead anyone, and the information from HMRC had been misleading. He also argued that he did not fall within Condition 1 of paragraph 1(2) of Schedule 24 to the Finance Act 2007 ("Sch 24"); this was not a repayment of tax.

56. In relation to Condition 2, he argued that he had not been careless; it was an industry standard for the VAT on such fees to be recoverable. In order to appeal, he had to get a rejection of his claim. He could not understand how he could be liable; he referred to para 3(1)(b) of Sch 24. It was not reasonable to fine someone and then penalise them. Both Condition 1 and Condition 2 had to be satisfied. He failed to see how a fine due to legislation was even reasonable. He was still receiving letters indicating that he had to pay the penalty now, even though he had been told that the matter was on hold.

57. In reply to HMRC's submissions at the hearing, he stated that he was not fully convinced in relation to Condition 1; he had not inflated anything, and had not increased the amounts covered by the invoices. On the question of whether the alleged inaccuracy was deliberate and concealed, he emphasised that the position was different if the trader was told by HMRC what action to take. He would not have submitted the claim if he had known that he would be fined for it.

58. In his grounds of appeal set out in the Notice of Appeal against the penalty, which were prepared with the assistance of external advisers, he argued that the position concerning the VAT treatment in relation to pilots and their training expenses was unclear, and that there was no way of appealing the VAT decision until a submission had been made to HMRC. He contended that Condition 1 had not been fulfilled. He did not provide an inaccuracy to HMRC which had amounted to or led to

an understatement of a liability to tax, nor had he made a false or inflated statement of a loss, nor a false or inflated claim to a repayment of tax. Furthermore, Condition 2 had not been fulfilled in that any inaccuracy was either careless or deliberate. HMRC agreed that there was no careless behaviour. Captain Smith did not deliberately make a careless or inaccurate submission; the submission was made in order to appeal against the VAT position taken by HMRC. The criteria for a penalty under Sch 24 had not been met; the penalty was not due to HMRC.

59. If the Tribunal were to find in favour of HMRC, he asked the Tribunal to consider the equitable position in finding it inequitable to levy a penalty on him in this particular case.

*HMRC's arguments on the penalty*

60. In their Statement of Case for the substantive appeal, HMRC had argued that the penalty was appropriately categorised as "deliberate but not concealed". The officer had stated at the visit that input tax relating to the pilot training fees could not be claimed because it had been incurred more than six months before the date of registration. This had been reiterated in her telephone conversation with Captain Smith on 22 August 2013, before the return was submitted on 2 October 2013. Despite being informed that the input tax on these services could not be recovered, they were knowingly included on the subsequent return, thereby creating a false or inflated claim to repayment of tax as referred to in para 1(2)(b) Sch 24.

61. The actions that had led to the penalty met the two conditions set out at para 1(2) and 1(3) Sch 24, and it had therefore been correctly calculated and issued in accordance with the legislation.

62. At the hearing, Mr Sellers reviewed the factual background by reference to the two conditions in para 1 Sch 24; we consider this in the following section of this decision. He referred to para 9 Sch 24, relating to reductions for disclosure; Captain Smith's disclosure had been within the "prompted" definition, as it had been as a result of the checking of his 08/13 return that the position concerning his claim ad become apparent. Captain Smith had made an active choice to claim VAT that he had been advised was not claimable; this therefore fell with the "deliberate" category under Sch 24.

63. In response to our question whether Captain Smith's telephone conversation with Ms Chander on 22 August 2013 amounted to disclosure to HMRC, Mr Sellers indicated that HMRC's view, and submission, was that it did not.

*Discussion and conclusions on the penalty appeal*

64. It is necessary for us to make further findings of fact. The subject of the input tax in respect of the pilot training invoices was first raised by Captain Smith at his meeting with Ms Chander on 7 August 2013. The details relating to the visit were recorded by her in a "VAT Audit Report" added by her to the records at 09.53 on 22 August 2013. The following is an extract from that report:

> "He had also not claimed VAT on the invoices for his training to become a private helicopter pilot. He did not included [*sic*] thee [*sic*] as he was not sure if he could have this VAT as it related to private licence, but as he needs a private licence to train as a commercial pilot, this was part of the business. However, the invoices were out of time. Trader registered for VAT in 10/12 and the invoices were dated 2011, under the I/T rules – services prior to reg can only be claimed if 6 months old.
>
> Advised trader of this and although he was not happy and that other people had received their i/t back accepted that the i/t could not be claimed and therefore no adjustment was needed to his return."

65. The telephone conversation between Ms Chander and Captain Smith on 22 August 2013 was recorded by her in a note dated "22/08/13 – 09.10". In relation to his wish to appeal in respect of the return [ie his first VAT return] which he had already submitted, he would not be able to appeal in order to deal with the pilot training invoices, as that return had been verified and repaid in full. She continued:

> "The VAT he had referred to in the email was not on the VAT return but was discussed during the visit and explained to him as being out of time.
>
> Mr Smith said everyone he knows has had this VAT back and he has been advised that he is entitled to it too.
>
> Explained the 6 month pre-registration services costs rule and referred trader the VAT notice for input tax claims and timings.
>
> Trader said he would put this VAT on the next return and would try claiming through this return.
>
> Discussed the voluntary disclosure process but again advised that the input tax timing rules would apply.
>
> Referred trader to the HMRC web and advised t read up on items we have discussed."

66. We regard it as a little odd that Ms Chander did not complete the process of recording on file her VAT Audit Report until after she had had the latter conversation with Captain Smith that morning. However, we consider it improbable that the report would not accurately have recorded what had taken place at the visit on 7 August 2013.

67. Captain Smith stated at the hearing that when he and Ms Chander had discussed the question of the training invoices at the meeting, she had not been sure about the position; she did not know the processes to be followed.

68. On the basis of the record in the report, which we acknowledge was not added to HMRC's records until after the telephone conversation on 22 August 2013, we find that Ms Chander did tell Captain Smith in the course of the VAT visit on 7 August 2013 that the input tax which he wished to claim back was time-barred, as the six month restriction applied. (Ms Chander was not strictly accurate when she said "services prior to reg can only be claimed if 6 months old"; she should have said that

input tax in respect of such services could only be claimed if it had been incurred less than six months before registration.)

69. We acknowledge that after discussing the question with "the boss of Phoenix" following the visit, Captain Smith did not accept the view that the input tax could not be recovered. In his email dated 8 August to Ms Chander, which had to be relayed on 13 August because he had omitted his VAT registration number, he referred to five other persons who had claimed back their VAT in circumstances where the interval between training and registration for VAT had been longer than six months.

70. In the telephone conversation on 22 August 2013 in response to that email, Ms Chander made two main points. The first was that Captain Smith could not seek to appeal in respect of his first return so as to enable him to raise the subject of the input tax in the context of that return; it was too late to do so, as the return had been verified and repayment had been made of the amounts claimed in that return. The second was that, despite the points which Captain Smith had mentioned in his email, the six-month restriction applied.

71. We are satisfied that Ms Chander informed Captain Smith of the position before he raised the subject of seeking to claim the input tax in his next return. She also informed him that if he did so, the six-month restriction would still apply.

72. Thus we find that Captain Smith was aware of the position before he made the claim in his return. This was that, despite his view to the contrary, he would be making a claim that HMRC had told him that they did not and would not accept.

73. We accept Captain Smith's evidence that he included the claim in his 08/13 return in order to seek to test HMRC's view on appeal. He saw this as the only way in which he could counteract what he saw as their refusal to make repayment in circumstances which appeared to be the same as those of others who had successfully claimed repayment of input tax in respect of pilot training costs.

74. We turn to the terms of Sch 24. The VAT return for period 08/13 was clearly one of the documents referred to in the Table in para 1 Sch 24. The claim for repayment of input tax was a claim to repayment of tax. In the context of Condition 1, was it "false or inflated"?

75. Captain Smith believed that the input tax was repayable. However, he had been told that as a result of the timing rules, he would not be able to claim repayment.

76. We have found that the timing rules applied so as to prevent him from claiming recovery of the input tax. We construe para 1(2)(b) Sch 24 as laying down an objective test; the question is not what the state of mind of the relevant person was at the time of providing the document to HMRC, but whether the document contains an inaccuracy which leads to a false or inflated claim to repayment of tax.

77. We find that the latter test is met in Captain Smith's case, and therefore Condition 1 is fulfilled. The effect of the return was to claim more input tax than that to which he was entitled.

78. The other condition laid down by para 1(3) Sch 24 is Condition 2, that the inaccuracy was careless or deliberate on his part. We are satisfied that it was not careless; in terms of para 3(1)(a) Sch 24, there is nothing in the evidence to suggest that Captain Smith did not take reasonable care. Was the inaccuracy deliberate? He made an input tax repayment claim in circumstances where he knew that the supplies of pilot training had been invoiced to him more than six months before the date on which he became a registered taxable person. His view that he should in his mind be able to recover the input tax does not affect the objective analysis; he made the claim, and intended to make it. We find that it was deliberate. In terms of the test in para 3(1)(b), it was "deliberate but not concealed"; he had made it clear in his conversations with Ms Chander that he intended to make a claim, and he did so despite the recommendation she made to him to check the HMRC website and ascertain the position for himself.

79. As we have concluded that the two conditions for imposition of a penalty under Sch 24 have been fulfilled, Captain Smith is in principle liable to a penalty. In the Notice of Appeal submitted on his behalf on 13 November 2014, he submitted that no penalty should be due. No specific submission was made as to the amount of the penalty if any proportion of it were to be held to be due; however, the two final paragraphs of his Grounds of Appeal are:

> "The Appellant contends that the criteria for a penalty under the FA 2007 have not been met and that the penalty is not due to HMRC.
>
> Should the Court [ie the Tribunal] find in favour of HMRC, then the Court is asked to consider the equitable position in that it finds it inequitable to levy a penalty on the Appellant in this particular case."

80. In relation to that final paragraph, these Tribunals do not have an equitable jurisdiction in relation to penalties. This was made clear by the Upper Tribunal in *Revenue and Customs Commissioners v Hok* [2012] UKUT 363 (TCC). The Tribunal can only use the powers and discretions given to it by the legislation in question. We consider later whether there is any residual power given to us by Sch 24.

81. Under para 15(1) Sch 24, a person may appeal against a decision by HMRC that a penalty is payable by him. Under para 15(2), he may appeal against a decision by HMRC as to the amount of a penalty payable by him.

82. Although his Grounds of Appeal do not specifically state that he has appealed against HMRC's decision as to the amount of the penalty, we construe the reference in those Grounds of Appeal to the equitable position to be an oblique and indirect reference to the amount of the penalty, given the clear indication in *Hok* that these Tribunals have no equitable jurisdiction in relation to penalties. We therefore examine the basis for the calculation of the penalty.

83. Under para 4 Sch 24, the standard amount of the penalty for deliberate but not concealed action is 70 per cent of the potential lost revenue, ie in Captain Smith's case 70 per cent of the difference between the amount shown in the VAT return and the amount actually due. That standard amount is subject to adjustment for various factors.

84. Para 9 of Sch 24 allows a reduction for disclosure; the extent of the reduction is set out in para 10 of Sch 24. The degree of reduction depends on whether the disclosure is "prompted" or "unprompted". Para 9(2) provides:

> "(2) Disclosure—
>
> (a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and
>
> (b) otherwise, is "prompted".

85. Captain Smith told Ms Chander in the telephone conversation on 7 August 2013 that he proposed to submit his claim for the input tax in his next VAT return. Mr Sellers submitted to us that this did not amount to disclosure. Captain Smith's argument is that he made it clear, before submitting his return, that this was what he intended to do. Did this amount to disclosure?

86. In our view, it did not. Ms Chander made clear HMRC's view that the input tax would not be recoverable, because of the timing restriction. She advised Captain Smith to obtain further information, in particular by consulting the HMRC website. At most, Captain Smith's indication that he was proposing to include the item in his VAT return was an expression of intention; Ms Chander could not have assumed from the conversation that he would claim the input tax, in particular because she was recommending him to investigate the position before he submitted his next VAT return.

87. The course which he took was to submit that next return without further discussion with or notification to HMRC. This meant that HMRC did not have notice that the return actually did contain the input tax claim. It was therefore left for HMRC to check the return in order to ascertain that the amount had been claimed; if they had not checked the return, they would not have become aware of the position. Thus the position was not disclosed to them until after they had checked the return. There was a prompted disclosure after Ms Sellers wrote on 29 October 2013 requesting information in order to verify Captain Smith's VAT return.

88. Under para 10 of Sch 24, where there is a prompted disclosure a 70 per cent penalty may be reduced to no less than 35 per cent, depending on the extent and quality of disclosure. In the present case, HMRC's penalty explanation schedule shows that they allowed a 20 per cent adjustment factor for providing information, 40 per cent for providing assistance, and 30 per cent for giving access to records. The total reduction factor was 90 per cent.

89. We see no reason to adjust that reduction factor. The factor is applied to the difference between the minimum and maximum penalty percentages (ie 35 and 70 per cent in the present case). The difference of 35 per cent is multiplied by the 90 per cent reduction factor, giving a percentage reduction of 31.5 per cent. That percentage reduction is deducted from the maximum potential penalty; the result is a penalty of 38.5 per cent.

90. The amount of the penalty, based on the potential lost revenue of £2,004.00, is £771.54. As required by para 13(1) of Sch 24, the period for which it is charged is stated to be "01/06/2013 to 31/08/2013".

91. HMRC considered whether, under para 11 of Sch 24, a special reduction should be made because of "special circumstances". They did not consider that there were any such circumstances that would lead them to reduce the penalty any further.

92. HMRC did not consider it appropriate to suspend any part of the penalty pursuant to para 14 of Sch 24.

93. Having examined the basis on which HMRC calculated the penalty, we do not differ from their approach in general. However, we think it necessary to look again at the question of "special circumstances". Paras 15 to 17 of Sch 24 deal with appeals against Sch 24 penalties. Para 17 provides:

> "17—
>
> (1) On an appeal under paragraph 15(1) the …1 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.
>
> (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.
>
> . . ."

94. As already indicated, we consider the terms of the last paragraph of Captain Smith's Grounds of Appeal to amount to an appeal under para 15(2) of Sch 24. We have agreed with the calculation of the penalty; the only question is whether there are any "special circumstances" to be taken into account. Para 17(3) of Sch 24 makes clear that if the Tribunal seeks to rely on para 11 to make a "special reduction" differing from any reduction made by HMRC, it can only do so if it considers HMRC's decision in respect of special circumstances to have been flawed.

95. If it had been open to us to do so, we would have been inclined to reduce somewhat the penalty which has been imposed on Captain Smith, in recognition of his openness in making clear to HMRC his wish to have the merits of his input tax claim tested on appeal. However, we see no basis on which to question the decision of HMRC in respect of the application of para 11 of Sch 24; they considered the question of special circumstances, and concluded that no special reduction should be

made. We have found that as a formal matter, Captain Smith's openness did not amount to disclosure and that as a result, his disclosure cannot be regarded as "unprompted" within para 9(2) of Sch 24. We accept that he was not seeking to mislead HMRC, but the result of the way in which the events occurred was that he became liable to a penalty.

96. As there is no basis on which we are able to adjust the penalty, it must be confirmed and Captain Smith's appeal against it must be dismissed.

97. In arriving at that conclusion, we feel it necessary to make various comments. Captain Smith sought to rely, both in correspondence and at the hearing, on the position of other pilots who had apparently been successful in reclaiming input tax in similar circumstances. Leaving aside the difficulty in establishing whether other traders' circumstances are in fact similar in all respects, it is not open to the Tribunal to consider the circumstances of any person apart from the appellant (or appellants) in the appeal before it. There is no general jurisdiction to look at alleged "unfairness" as between taxpayers.

98. In relation to the substantive appeal, we have already referred to the lack of any reference by HMRC in correspondence to the terms of Article 14 of the VAT Directive. We find it surprising that it was not referred to in HMRC's Statement of Case or their Skeleton Argument, nor was it mentioned at the hearing. We had looked at it in advance of the hearing and expected it to be raised in submissions, but this did not happen. We would have expected HMRC to have considered it in advance of the hearing.

99. Reverting to the penalty appeal, we consider it very unfortunate that HMRC's Statement of Case contained anything relating to the penalty. At the point when the Statement of Case was lodged by HMRC, the penalty assessment had not been issued. We suspect that the inclusion of paragraphs relating to the penalty gave Captain Smith the impression, as an unrepresented appellant, that the question of the penalty was being dealt with as part of the proceedings relating to the substantive appeal and that as a result, he did not need to take further steps to appeal against the penalty assessment when he received it.

100. We accept that Mr Greenough made clear in his letter dated 19 March 2014 that there would be no appealable decision in relation to the penalty until Captain Smith received formal notification of the penalty on form NPPS2, but that letter preceded 29 May 2014, the date of HMRC's Statement of Case.

101. We regard it as inappropriate for a Statement of Case to deal with matters not covered by the appeal to which it relates. We hope that HMRC will keep our view in mind in future cases.

**Disposition of the consolidated appeals**

102. Both of Captain Smith's appeals are dismissed.

**Right to apply for permission to appeal**

103. This document contains full findings of fact and reasons for the decision. Any to review 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.

**JOHN CLARK**
**TRIBUNAL JUDGE**

**RELEASE DATE: 19 January 2015**