[2017] UKFTT 542 (TC)

TC05991

Appeal number: TC/2016/02230

VAT – disallowing credit for input tax - section 26A VATA 1994 – whether or not consideration paid within six months of the later of the supply or date for payment – no – penalty – schedule 24 of the Finance Act 2007 – whether the penalty was properly imposed – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAPITAL SMA LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES on 8 May 2017

There was no attendance by or on behalf of the Appellant

Mr Gareth Hilton, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This appeal relates to whether or not Capital SMA Ltd ("Capital") paid the consideration for certain purchases of flooring products in respect of which it claims credit for input tax. By a decision dated 10 May 2016, HMRC found that consideration had not been paid in respect of purchases in the sum of £73,533.05 ("the Disallowed Purchases"), made an assessment in the sum of £11,770 and a penalty assessment (which it then suspended) in the sum of £1,765.50. Capital's appeal is against the assessment and the penalty. However, by virtue of partially successful ADR, Capital has agreed that £6,574.67 of input tax is not deductible as £39,448.05 remains unpaid. The appeal is therefore now against the remaining purchases in the sum of £34,085 ("the Disputed Purchases") and associated input tax in the sum of £5,194.33.

2. There was no attendance at the hearing for or on behalf of Capital. By emails dated 13 April 2017, Mr Shoket Ali, a director of Capital, applied to the Tribunal to postpone the hearing, primarily upon the basis that Capital's representative was unavailable. HMRC objected. The application to postpone was referred to Judge Mosedale, who gave a decision in a letter from the Tribunal also dated 13 April 2017 refusing to postpone the hearing. The letter included the following:

> "Judge Mosedale has said that it is in the interests of justice for parties to have the opportunity, in so far as consistent with justice, to be professionally represented in hearings. However, the choice of representative is the party's, and parties ought to ensure that they appoint persons who are able to represent them. It is not consistent with justice to all parties for the Tribunal to delay hearings for long and unexplained absences by a party's appointed representative.
>
> It now appears that the representative, originally said to be absent for 6 weeks (10 April to 26 May 2017) will be out of the country only for about 2.5 weeks (18 April to 7 May). That absence remains unexplained. Moreover, it is clear that the adviser will be in the UK on 8 May 2017, which is the day of the hearing. He is flying into Manchester the day before at 3pm and the hearing is in Leeds. It is therefore not at all obvious why he could not be present at the hearing. And he could prepare for the hearing in advance. The appellant in any event has the option of appointing a different adviser. So the judge is not satisfied that the appellant's appointed representative could not in practice represent him and in any event it was the appellant's choice to appoint someone who might not be available for an extended period during the hearing window.
>
> Taking into account (a) the earlier delays in this case, (b) the unfairness to HMRC who have prepared for a hearing on 8/5/17 and (c) that the appellant, as explained above, has not justified his application for

> postponement, it is not appropriate for the hearing to be postponed and the application is refused."

3. By an email dated 19 April 2017, Mr Ali stated, *inter alia*, that, "As I have no representation at the meeting, and the meeting is not to be rescheduled, on this basis I will not be attending."

4. HMRC invited me to proceed with the hearing in the absence of Capital pursuant to Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and I decided to do so. It is clear from Mr Ali's correspondence with the Tribunal that he had been notified of the hearing. It was in the interests of justice for the hearing to proceed. I agree with and adopt Judge Mosedale's reasoning for the purposes of HMRC's application to proceed. I also note that Capital did not appeal Judge Mosedales' decision and did not seek to renew any application to postpone.

Findings of Fact

5. It is convenient to set out my findings of fact at the outset.

6. The hearing bundle included a witness statement from the decision making officer, Miss Natalie Felton, which was tendered as evidence in chief. There was no witness evidence on behalf of Capital. I make the following findings of fact upon the basis of Officer Felton's witness statement and the documents relied upon by the parties and contained in the hearing bundle. In doing so, I bear in mind that the burden of proof in respect of the assessment is upon Capital whereas the burden of proof in respect of the penalty is upon HMRC. In both respects, the standard of proof is that of the balance of probabilities.

The background

7. Capital has been VAT registered since 13 May 2014, carrying on business in CCTV installation. In the period 1 February 2015 to 30 April 2015 ("04/15"), Capital apparently made purchases of flooring and was sent invoices in respect of the same ("the Flooring Purchases"). Capital filed its VAT return for 04/15 seeking a repayment, primarily as a result of the Flooring Purchases.

8. I note at this point that the VAT return is not included in the hearing bundle and that there are small discrepancies in various recitals of the figures which are said to have been included on it. HMRC's Statement of Case and Officer Felton's witness statement state that Capital sought a net repayment of £3,761.12 based upon input tax claimed of £17,435.78. However, after the return had been submitted, Capital provided to HMRC (at Officer Felton's request) a schedule setting out the sales and purchases for the 04/15 quarter which provides for a net repayment of £3,781.77 based upon input tax claimed of £17,456.43. On the balance of probabilities, I find that HMRC's figures are correct. This is because Capital has not disputed the figures put forward by HMRC, the schedule was not attached to the return and there are

entries in the schedule which are demonstrably wrong in that they do not match the invoices in the hearing bundle (for instance, the invoice dated 9 April 2015).

9. On 17 August 2015, Officer Felton requested the purchase invoices that were referred to in the schedule. Capital duly provided these. On 30 August 2015, Officer Felton requested bank statements and further invoices. Again, these were duly provided. On 14 September 2015, Officer Felton asked for evidence of the payment of the Flooring Purchases in the sum of £87,742.82.

10. In response, Capital referred to the bank statements, which showed direct payments to suppliers of £14,624.57. £500 had already been allowed and Officer Felton allowed input tax of a further £2,354.12.

11. On 19 October 2015, Miss Felton wrote to Capital to the effect that she intended to disallow input tax in the sum of £11,770 on purported purchases of £73,533.05 for which she had not seen any evidence of payment ("the Disallowed Purchases"). Mr Ali disputed this on behalf of Capital on 16 November 2015 but Officer Felton nevertheless made a decision on 14 December 2015 to disallow input tax in the sum of £11,770. Capital wrote to Officer Felton on 17 December 2015 taking issue with this and arguing that the Disputed Purchases are evidenced by cash payments from withdrawals shown in the bank statements.

12. Officer Felton states that the bank statements show cash withdrawals of £34,085 and that these do not correlate with the unallocated purchase invoices in amounts or timing. I have considered the bank statements and accept Officer Felton's evidence in this regard.

13. On 15 December 2015, Officer Felton sent a notice of assessment to Capital in the sum of £11,770. Capital challenged this in an email dated 31 January 2016. By a letter dated 1 February 2016, Miss Felton refused to change her decision. On 19 February 2016, a penalty assessment was issued in the sum of £1,765.50. On 10 February 2016, Capital requested a review.

14. On 29 March 2016, the review officer, Mrs Heather Gibbs, upheld the decision to assess and to impose a penalty but decided that they should have been issued in respect of the period 10/15 rather than 04/15.

15. Pursuant to the review decision, a new assessment was notified by a letter dated 5 April 2016 in the sum of £11,770. A notice attached to this letter confusingly refers to a very slightly lower figure of £11,769, but it appears that the parties have approached this appeal upon the basis that the assessment was for £11,770. A new penalty assessment was also issued on 8 June 2016 on the same basis as the original penalty assessment and again in the sum of £1,765.50. I have not been provided with the suspension conditions or the basis for imposing them. However, the Statement of Case states that on 8 June 2016 HMRC received a signed declaration from Capital dated 1 June 2016 to the effect that it accepted the penalty suspension conditions (and

as there is no contradiction with any documents or dispute taken by Capital, I find that this is correct as a matter of fact).

16. Capital's Notice of Appeal is dated 20 April 2016. The grounds for appeal state as follows:

> "HMRC's decision is fundamentally flawed.
>
> On one hand they state they are allowing the claim for input tax and then on the other hand they dispute the invoices, claiming that the transaction/invoices are not genuine.
>
> This is simply incorrect, they cannot pick and choose in the sense they consider part of the invoice to be genuine and part of it not. It's either one or the other.
>
> My evidence supplied to HMRC has not been considered fully. I have paid the client through various bank transactions and cash withdrawal transactions, evidence to this effect has been provided.
>
> Since my registration, I have not been given any training or guidance in keeping VAT records, verifying clients/VAT invoices/VAT numbers, yet I'm expected to police and collect VAT on their behalf. I have requested for training and guidance, but this appears to have been sidelined or ignored. How can one be compliant and diligent if there is a complete lack of training?"

17. Although the grounds for appeal make no mention of the penalty, Capital has marked the "Yes" box next to the question "Is the appeal against a penalty or surcharge?" on the Notice of Appeal.

18. The hearing bundle includes an email dated 12 September 2016 which records the outcome of ADR. It includes the following:

> "As promised I confirm the agreement reached with the Customer as follows;-
>
> 1. £39,448.05 remains unpaid on the purchases from "RJ Flooring", "JDMT Flooring" and "JMS Bespoke Furniture" and input tax of £6,574.67 is agreed as not deductible.
>
> The remaining £34085.00 remains in dispute. You will pursue the dispute through the Tribunal Service, however HMRC will consider any further evidence the Customer may produce in the meantime."

19. There is nothing to suggest that Capital disagrees with this.

Whether or not the consideration was paid

20. The key question of fact in this appeal is whether or not Capital paid the consideration for the Disputed Purchases. I find that, on the balance of probabilities, Capital did not pay the consideration for the Disputed Purchases within six months of

the date of supply or, if later, within six months of the date on which the sum became payable. Indeed, I find that the consideration for the Disputed Purchases has not been paid at all. This is for the following reasons.

21. First, Capital has agreed through the ADR procedure that £39,448.05 remains unpaid with the effect that £6,574.67 is agreed as not deductible. These are said to relate to “RJ Flooring”, “JDMT Flooring” and “JMS Bespoke Furniture”. I have not been provided with any evidence or information as to how this is made up or as to whether this includes partial invoices. I find that, on the balance of probabilities, this figure of £39,448.05 has been reached by deducting from the total of the Disallowed Purchases (being £73,533.05) the total amount of cash withdrawals shown on the bank statements and which Capital maintains evidences the purchases (being £34,085). The absence of information as to how this relates to the invoices does not affect my decision as, for the reasons set out below, there is no evidence that *any* of the consideration for the Disallowed Purchases (being the Disputed Purchases of £34,085 and the purchases agreed at ADR not to be deductible in the sum of £39,448.05) has been paid.

22. Secondly, Capital relies upon the bank statements to establish the payment of the Disallowed Purchases. However, the bank statements do not support this at all, whether in the total sum of the Disallowed Purchases or the lower sum of the Disputed Purchases. The payments directly to suppliers are already within the sums which HMRC accepted (and Capital does not assert otherwise). The cash withdrawals are sporadic, are in multiples of £10 ranging from £10 to £4,500, and do not correlate precisely in either amount or date with the invoices for the Disallowed Purchases. Capital has not provided any analysis of the bank statements and has provided no explanation at all as to how it says the withdrawals correlate with the invoices. This failure is particularly stark given that the burden of proof is upon Capital to establish this correlation.

23. Thirdly, there is no evidence from the suppliers that they received any payment in respect of the Disallowed Purchases or, if so, when. For example, no receipts have been provided.

24. Fourthly, Capital relies upon the invoices themselves. However, they do not set out the details of any running accounts and refer to “balance due” rather than the sums paid.

25. Fifthly, five of the invoices require payment on the same date as the invoice and two allow for payment within 30 days of the date of the invoice. There is no evidence to suggest that the supplies were any later than the invoices.

The Issues

26. Capital’s grounds for appeal are set out above. They are largely mirrored by what is said to be an “opening statement”.

27. It is clear from HMRC's evidence that that they are not alleging that the invoices are not genuine but instead that the consideration has not been paid. As such, the allegation that HMRC are not entitled to treat parts of the invoices as genuine and others as not is irrelevant to this appeal.

28. It follows that the issues which arise for determination are as follows:

(1) The legal framework.

(2) Whether or not the assessment is correct.

(3) Whether or not the penalty assessment is correct.

(4) The relevance, if any, of the absence of training.

The Legal Framework

29. The relevant subsections of section 26A of the Value Added Tax Act 1994 provide as follows:

> "26A Disallowance of input tax where consideration not paid.
>
> (1) Where –
>
> (a) a person has become entitled to credit for any input tax, and
>
> (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of 6 months following the relevant date,
>
> he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.
>
> (2) For the purposes of subsection (1) above "the relevant date", in relation to any sum representing consideration for a supply, is –
>
> (a) the date of the supply, or
>
> (b) if later, the date on which the sum became payable."

30. Provision is made for penalties in Schedule 24 of the Finance Act 2007 ("Schedule 24"). The relevant paragraphs of Schedule 24 provide as follows:

> "*Error in taxpayer's document*
>
> 1(1) A penalty is payable by a person (P) where –
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –
>
> (a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

5

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

…

Degrees of culpability

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

10

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

…

Amount of penalty

15

Standard amount

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

(2) … the penalty is –

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

…

20

Potential lost revenue: normal rule

5(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

25

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

…

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

30

...

Reductions for disclosure

9 …

(2) Disclosure –

35

(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”.

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

…

10(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a “standard percentage”) has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it –

(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard%	*Minimum% for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	15%	0%

…

…

Special reduction

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2

(2) In sub-paragraph (1) “special circumstances” does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

…

Appeal

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

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

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

5 (4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.

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

(2) Sub-paragraph (1) does not apply –

(a) so as to require P to pay a penalty before an appeal against the
15 assessment of the penalty is determined or

(b) in respect of any other matter expressly provided for by this Act.

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

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

20 (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 –

25 (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.

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

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

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

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

(ii) the tribunal may order HMRC to amend the notice.

35 (5) On an appeal under paragraph 15(4) the tribunal

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the tribunal thinks that HMRC's decision in respect of the conditions was flawed.

> (5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).
>
> (6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

The Submissions

HMRC

31. Mr Hilton submitted that it was clear that payment had not been made as there was no correlation between the bank statements and the Disputed Payments. He said that this meant that the assessment was correct for the purposes of section 26A(1) of VATA 1994.

32. Mr Hilton also said that the penalty had not been addressed specifically as Capital had not set out any basis for it being incorrect.

33. Finally, Mr Hilton said that the absence of training was not relevant as complaints about HMRC are outside the jurisdiction of the Tribunal. He relied upon *Preece v HMRC* [2012] UKFTT 193 (TC) (Judge Anne Redston) to this effect at [48] and [49].

Capital

34. Capital were not present and did not make any written submissions. I have set out the grounds for appeal in full, considered the document entitled "Opening Statement" in the bundle and considered whether there are any arguments which might have been available to Capital even though they have not been specifically raised.

Discussion

The Assessment

35. There is no basis for the argument that the assessment is incorrect. It was made upon the premise that payment had not been made within six months of the relevant date for the purposes of section 26A(2) of VATA 1994 (being the date of the supply or if later the date on which the sum became payable). For the reasons which I have set out in paragraphs 19 to 25 above, I find as a fact that the whole of the Disallowed Purchases in the sum of £73,533.05 upon which the assessment is based was unpaid within six months of the dates of supply or of the dates upon which the sums became payable (even if the latest period of 30 days from the date of the invoice is taken).

36. The legal effect of this is that Capital is not entitled to credit for input tax in the sum of £11,770 referable to the Disallowed Purchases of £73,533.05. The assessment is therefore correct.

The Penalty

5 37. The burden of proof is upon HMRC to establish that the penalty was properly imposed. As such, it is not enough for HMRC simply to say that Capital has not taken issue with the penalty.

38. I note that the hearing bundle does not include a copy of the original decision to issue a penalty assessment. However, the review decision gives sufficient information
10 about the decision to explain how it was made and is itself a decision to issue a replacement penalty assessment in the same terms. I note that Capital does not take any issue with the review decision's précis of the original decision to issue the penalty.

Potential Lost Revenue

15 39. The starting point is as to whether or not the amount of the potential lost revenue is correct. The penalty uses as its basis the disallowed input tax of £11,770. For the reasons set out in paragraphs 35 and 36 above, I find that the assessment was correct. For the same reasons, I also find that the amount of the potential lost revenue is also correct.

20 *Degree of Culpability*

40. HMRC treated the inaccuracy as careless. HMRC stated as follows in the original decision and adopted it in the review decision:

> "I consider this to be careless behaviour as despite my requests for evidence of payment you have not been able to provide any. The
25 information regarding input tax claims is readily available and you did not seek advice on whether or not the claim was allowable despite payment not being made."

41. I find that HMRC were correct in their analysis. The failure to provide evidence of payment and to continue to maintain that payment had been made, together with
30 my finding that payment was not in fact made, means that Capital's conduct was careless at the very least and constituted a failure to take reasonable care. If Capital had taken reasonable care, it would have informed HMRC that payment had not been made for the Disallowed Purchases within six months of supply or, if later, within six months of the date when the sums were payable. Capital did not do so, whether in the
35 10/15 return or in the course of Officer Felton's investigations or even (other than in respect of the amounts agreed following ADR) in the course of this appeal.

Disclosure

42. HMRC treated the disclosure as prompted. It is difficult to see that they could have done anything else; the disclosure only arose as a result of HMRC's investigations and Officer Felton's request for documents and information from Capital. I find that this was a prompted disclosure.

5 43. The percentage applied to the potential lost revenue was 15%, being the minimum that could be applied for a prompted disclosure. It follows that Capital cannot (and need not) disturb that outcome.

Suspension

44. The penalty was suspended. I have not been told what the conditions of the
10 suspension were. However, these conditions were imposed by agreement and Capital has not sought to reopen or question that agreement. As a result of such agreement, I cannot say that the suspension was flawed in a judicial review sense or at all.

Special circumstances

45. The relevant law as to the reduction of penalties for special circumstances was
15 well summarised as follows by the First-tier Tribunal (Judge Jonathan Cannan and Mrs Gay Webb) in *Solar Power PV Limited v HMRC* [2016] UKFTT 0400 (TC) at [68] and [69]:

> "[68] The Court of Appeal decision in *Clarks of Hove v Bakers' Union* [1978] 1 WLR 1207 at p1216 held that in the context of special
> 20 circumstances, the word 'special' means "something out of the ordinary, something uncommon". In *Crabtree v Hinchcliffe* [1971] 3 All ER 967 Lord Reid stated at p976 that "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal.'" In the same case, Viscount Dilhorne said at p983 that "for
> 25 circumstances to be special they must be exceptional, abnormal or unusual...".
>
> [69] The tribunal has generally accepted these meanings and we propose to do the same. We would add that the special circumstances must in our view also go some way to excusing or mitigating the
> 30 conduct which has given rise to the Penalty, whilst at the same time recognising that there is no general power to mitigate. It appears to us that our jurisdiction involves considering HMRC's decision as to whether there are special circumstances. If there are special circumstances then HMRC has a discretion to reduce a penalty. It is
> 35 only if we consider that HMRC's decision in relation to the application of paragraph 11 Schedule 24 is flawed that we can reduce the Penalty on the basis of special circumstances. The approach was summarised by the F-tT in *Collis v HMRC* [2011] UKFTT 588(TC):
>
> > '[36] ... Judicial review may be pursued in relation to
> > 40 decisions of public bodies on a number of grounds. Included amongst these are the grounds of illegality and fairness. In the

> context of a decision of HMRC as to whether a reduction in a penalty should be made on account of special circumstances, the general test will be whether the decision is so demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL).
>
> [37] ... The tribunal should also consider whether HMRC have erred on a point of law (see *Customs & Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231; *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941). This will also include considering whether any internal HMRC policy on the application of the special circumstances rule is being applied too rigidly so as to amount to a fetter on HMRC's discretion.'"

46. In the present context, the Tribunal's power to substitute its decision for HMRC's to a different extent is limited to where HMRC's decision was flawed when considered in the light of the principles applicable to judicial review (see paragraphs 22(3) and (4) of Schedule 55).

47. There is no evidence that HMRC considered whether or not the penalty should be reduced because of any special circumstances at the time of the decision or since (and, indeed, no submissions were made as to special circumstances at the hearing). This failure to consider whether or not there were any special circumstances makes the decision flawed on judicial review grounds.

48. However, I find that there are no special circumstances in the present case which cause me to make any reduction. The only point raised by Capital is that HMRC did not provide it with any training. However, it is not unusual for HMRC not to provide training. I find that there are no features of this case which make it appropriate to make any reduction for special circumstances.

Outcome on the Penalty:

49. It follows that I affirm HMRC's decision as to the penalty for the purposes of paragraph 17 of Schedule 24.

The Absence of Training

50. Capital's grounds for appeal criticise HMRC for their failure to provide it with any training. It is not clear how Capital maintains that this supports its appeal.

51. In *R & J Birkett v HMRC* [2017] UKUT 89 (TCC) (Nugee J and Judge Ashley Greenbank), the Upper Tribunal considered the circumstances in which the First-tier Tribunal can have regard to questions of public law in the course of exercising its jurisdiction. In essence, public law principles can only be considered by the First-tier

Tribunal where its statutory jurisdiction allows it rather than there being any inherent judicial review jurisdiction. The Upper Tribunal set out the relevant principles at [30]:

> "30. The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

52. I have also considered *Preece v HMRC,* above, and agree with Mr Hilton that (albeit at First-tier Tribunal level and so binding on me) that it reflects the principle

that general complaints about HMRC's handling of taxpayer's affairs are not matters for the First-tier Tribunal. However, I add the rider that this depends upon the nature and proper characterisation of the complaint and its interplay with the principles set out in *R & J Birkett v HMRC,* above.

5 53. In the present case, the proper statutory construction of section 26A of VATA 1994 does not allow for any public law principles to be considered. As regards the penalty, public law principles are only relevant to suspension and special circumstances. However, as set out above, the suspension conditions were agreed and the absence of training is not relevant to special circumstances.

10 54. Even if I am wrong in this and public law is to be taken into account in any other respect, the absence of training which Capital refers to is in respect of keeping VAT records, verifying clients, verifying invoices and verifying VAT numbers. This is irrelevant to the assessment and penalty in the present case, which relate to the non-payment of consideration by Capital rather than any due diligence or record keeping.

15 **Disposition**

55. For the reasons set out above, I dismiss the appeal.

56. 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 20 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.

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RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 05 JULY 2017

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