NCN: [2021] UKFTT 323 (TC)

TC08264

CORPORATION TAX ACT – penalties – deliberate behaviour – potential lost revenue – reductions for disclosure

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00697
TC/2020/01519

BETWEEN

GRANGEWOOD ENTERPRISES LTD
ANTHONY MARSDEN

Appellants

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
IAN SHEARER

The hearing took place on 15 June 2021. With the consent of the parties, the form of the hearing was V (video). A face to face hearing was not held because of the Covid pandemic. The documents to which we were referred are the hearing bundle (538 pages), the authorities bundle and the parties' skeleton arguments.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The hearing was attended by the parties' representatives, the Respondents' witness and observers.

Roger Purkiss, React Business Services, for the Appellants

Miles Matthews, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a penalty assessment ("the Penalty") and personal liability notice to pay 100% of the Penalty (the PLN) issued by the Respondents ("HMRC") on 20 September 2019 and 24 September 2019 to Grangewood Enterprises Ltd (Grangewood) and Anthony Marsden (Mr Marsden) respectively. The Penalty was issued on the basis of a deliberate inaccuracy in Grangewood's company accounts for the accounting period ending 30 September 2016. The Appellants dispute that the inaccuracy was deliberate and the calculation of the Penalty.

FINDINGS OF FACT

We made the following findings of fact from the evidence in the Tribunal's hearing bundle and the witness evidence of Mr Sked for HMRC and Mr Purkiss for the Appellant.

2. Grangewood was incorporated on 22 May 2000. Grangewood's business is the buying and selling of real estate. Mr Marsden is the sole director and shareholder of Grangewood.

3. Grangewood advanced cash to Mr Marsden and Mrs Marsden over several years and this was recorded in the overdrawn director's loan account. The director's loan account was overdrawn by £2,895,295.64 by the end of the accounting period ending (APE) 30 September 2015 and a tax charge of £723,801.75 had been paid.

4. Mr Marsden withdrew a further £379,641 from the company in APE 30 September 2016, bringing the overdrawn balance of the director's loan account to £3,274,936. The increase in the loan account gave rise to the tax charge under section 455 Corporation Tax Act 2010 ("section 455") of £103,472.03.

5. Grangewood's accounts for APE 30 September 2016 showed an intangible asset (the Asset) valued at £4m. The Asset is stated to have been transferred by Mr Marsden to the company on 30 September 2016. The effect of the transfer was to bring the director's loan account into credit. The accounts state that "included in creditors falling due within one year is a balance of £723,666 …owed to the director of the company, A Marsden".

6. The Appellants have not provided a copy of the document that evidences the rights or nature of the Asset. The Appellants' agent, React Business Services, have referred to the Asset as an option to acquire $5m shares in Gable Holdings Inc and a security convertible into shares at a value of $5.2m. References have been made to the Asset being a bearer document, and the Appellants have also referred to the execution of documents of transfer. The Appellants have not provided evidence of the delivery or transfer of the Asset to Grangewood by Mr Marsden.

7. Grangewood's accountants filed the company's accounts for APE 2016 and a corporation tax return for APE 30 September 2016 on 28 September 2017. The return included a claim for relief under section 458 Corporation Tax 2010 ("section 458") on the basis that the director's loan account was in credit as a result of the transfer of the Asset. The relief claim sought repayment of £723,801.75 and relief for the £103,472.03 that Grangewood would have been liable to pay under section 455 in respect of the increase in the director's loan account in APE 30 September 2016 (see paragraph 4 above).

8. On 12 February 2018 Mr Sked of HMRC wrote to Grangewood to notify the company that he had opened a compliance check into the APE 30 September 2016 to consider the loan accounts and other matters on the return. In a letter to React Business Services of the same date, he specified that the check should be treated as a check into the relief request made under section 458.

9. On 16 March 2018 React Business Services acknowledged notice of the formal enquiry and stated that they "now understand the delay in receiving repayment". The letter was from an accountant within React Business Services enclosing some of the information requested but advising HMRC that he was waiting for "the legal documents regarding the bearer bonds from the law firm who handled the execution". On 6 April 2018 the adviser asked for a further extension of time to obtain the documents.

10. Mr Sked's response on 9 April 2018 gave the company until 27 April 2018 to provide the documents and warned that he may have to issue a formal request under schedule 36 Finance Act 2008. Mr Sked commented that no explanation had been provided as to why the company had not retained the necessary documents, and that he presumed that the adviser would have such information and documentation provided for the preparation of the accounts for APE 2016. React Business Services responded by letter dated 26 April 2018 from an accountant within the business stating as follows:

> "This firm did not handle any of the security transfers and only reported the substance of the transaction in the accounts from details provided to us, which resulted in the request for repayment. We have chased the lawyers for the documents requested to support the transaction and are expecting them any day and will forward as soon as received and comprehended."

11. A final extension was allowed for production of the documents by 22 May 2018. As the documents were not provided Mr Sked issued an information notice under schedule 36 on 29 May 2018 requesting a detailed explanation of the nature, acquisition and valuation of the Asset. As the information was not provided by 29 June 2018 HMRC issued a £300 penalty under schedule 36 on 2 July 2018.

12. On 3 August 2018 React Business Services responded to HMRC. The letter included the following statements concerning the Asset that resulted in the reclaim under section 455:

> "This relates to an option agreement on US fractional shares (scrip) convertible to full shares at a value of $5,200,000. The original documents are all lodged with the US Company Gable Holdings Inc. and we have been trying without success to obtain the various proof of value that you require.
>
> Unfortunately, we have been unsuccessful in obtaining these documents and we must now conclude that the report, valuation and transaction cannot be verified and accordingly we must reverse our client's balance sheet entry.
>
> To give clarification as reporting accountants (not auditors), we simply applied the transaction as it was presented to us and made the entries on their face value."

13. On 12 September 2018 Mr Sked wrote to React Business Services to advise that HMRC required amended returns, full accounts and computations for the APE 30 September 2016 and further information on all drawings, loan, capital or other accounts between Grangewood and Mr and Mrs Marsden in order to calculate the tax charge due. The tax position has been agreed and settled. The only matter in dispute is the penalties.

14. Mr Sked wrote to Grangewood on 12 September 2018 to request information to establish the behaviours involved in causing the inaccuracies to determine the penalties that could apply.

15. On 11 October and 28 November 2018 and 20 March 2019 React Business Services responded to HMRC's requests for information on behalf of their client in relation to the penalty. The letter dated 11 October 2018 enclosed amended returns, full accounts and computations for APE 30 September 2016 based on the reversal of the accounting entry for the Asset and the withdrawal of the tax claims. The letter responded to HMRC's question asking why it was considered that the company had acquired an asset with a valuation of £4m with

the statement that the Asset "if genuine, would have put the value of the shares at $5m hence the valuation in the accounts".

16. The letter dated 20 March 2019 followed the issue of a second schedule 36 information notice on 19 February 2019 that was later withdrawn following a review. The letters from React Business Services make a number of points that Mr Purkiss sought to clarify on behalf of the Appellants at the hearing. These are addressed under the heading of Mr Purkiss' evidence below.

17. On 25 July 2019 Mr Sked issued a penalty for the inaccurate return or other documents due to deliberate behaviour. The potential lost revenue (PLR) was calculated in accordance with paragraph 5 schedule 24 Finance Act 2007 to include the amount that would have been repayable had the inaccuracy not been corrected and the amount due in respect of the increase in the loan in 2016/17. Under paragraph 10 Schedule 24, the standard penalty for prompted disclosure is 70% of the PLR, but HMRC must reduce this to a percentage reflecting the quality of the disclosure, but not below a minimum limit of 35% of the PLR. A total reduction of 50% (of the maximum possible reduction) was allowed in calculating the penalty for deliberate inaccuracy with prompted disclosure, largely to reflect the assistance provided in producing revised accounts and returns. This resulted in the penalty being reduced from 70% to 52.5% of PLR.

18. On 20 September 2019 Mr Sked issued a closure notice for the company's tax return for APE 30 September 2016.

19. On 24 September 2019 Mr Sked also issued a personal liability notice to Mr Marsden for 100% of the penalty on the basis that the inaccuracy in the return is attributable to his action and he attempted to gain personally from the inaccuracy. Mr Marsden will not be personally liable if Grangewood pays the £434,318.73 penalty in full.

20. By letter dated 21 October 2019 React Business Services made a formal appeal against the penalty and PLN issued to the Appellants. The Appellants requested an independent review of the penalty decisions. The review conclusion letters were issued on 17 January 2020. The conclusion upheld the penalty assessment of £434,318.73 to Grangewood and the PLN issued to Mr Marsden. The letter also confirmed HMRC's decision that the Appellants had not put forward explanations that could amount to special circumstances that would justify reducing the penalty.

21. On 14 February 2020 the Appellants filed notices of appeal with the Tribunal. On 5 May 2020 the Tribunal directed that the appeals should proceed and be heard together.

Mr Sked's evidence

22. Mr Sked is an HMRC compliance case worker and the decision maker in this case. We found his evidence clear and reliable.

23. Mr Sked opened a compliance check in the APE 30 September 2016 when he opened up the document by which the Appellants made the claim under section 458. His letter dated 12 February 2018 to the Appellants' adviser stated that the check was "to consider the loan accounts and other matters on the return. My check should also be treated as a check into the relief request which was made under section 458 CTA 2010." The letter enclosed a schedule of the information and documentation required by HMRC to give further consideration to the relief request.

24. Mr Sked found the responses provided by the adviser inconsistent. These had first suggested in April and August 2018 that the adviser had simply reported "the substance of the transactions from details provided to us" and that "as reporting accountants (not auditors)... simply applied the transaction as it was presented to us and the made the entries on their face

value". In contrast, later responses dated November 2018 stated that the Asset "was part of a bundle of documents reviewed by Bond Wealth Management at our request, to see if there was any value in previously acquired but expired options"; that "the advice was from Ashwood Capital that the only way to verify was to exercise, which we attempted to do without success"; that Ashwood Capital were the brokers and "were not instructed by Mr Marsden"; that "we advised Mr Marsden that he could vest the option as an asset via his DLA to enable any future expense on optioning to be a trade expense"; and that "Mr Marsden relied on our advice and on the wealth management team we consulted regarding this type of security". We agree with Mr Sked that the responses provided were and continue to be inconsistent. No copies of the documents or advice have been provided.

Mr Purkiss' evidence

25. Mr Purkiss explained that he is a consultant for React Business Services. The business and wealth management advisory operation under the name React Business Services works alongside the accountants practising under the name React Business Services. Mr Purkiss has an accountancy background, but he has not practised for some years.

26. Mr Purkiss made a number of statements about what he believes Mr Marsden was aware of or understood at the relevant time. We found that this evidence was supposition and, as submitted by HMRC, not wholly consistent with the facts established at the hearing. For example, Mr Purkiss said that Grangewood and Mr Marsden had to rely entirely on React Business Services' expertise as regards the accounting treatment for the transfer of ownership of the Asset to the company as it is complex, and that Mr Marsden is not an accountant so far as he is aware. Mr Purkiss suggested that Mr Marsden had not attended the hearing as he is not very well and elderly, and because he is considering a negligence claim against React Business Services. It was then established that previous years' accounts for Grangewood had included accounting entries for the transfer of an asset by Mr Marsden to the company and that they note that, for example, the "directors consider [£430,619 paid] to be the market value at the date of purchase". Mr Marsden must have been aware of these transactions. It was also established at the hearing that Mr Marsden is 67, holds multiple directorships and stated his business occupation as "accountant" in his director's form 288 for Grangewood filed at Companies House.

27. The transactions relating to the Asset were the first and only matter on which Mr Purkiss has advised the Appellants. Mr Purkiss states that he had oversight of the matters which are the subject of the appeal. HMRC queried why React Business Services had initially told HMRC that they had not advised the Appellants on any of the security transfers and that they had only reported the substance from details provided to them, if it is correct that Mr Purkiss had oversight. Mr Purkiss' response was that he was not the author of those letters. It was the business side of React Business Services (in which he works) that had provided the advice to Mr Marsden that the Asset should be vested in Grangewood. Mr Purkiss said that he had sought the advice of a lawyer and Bond Wealth Management (Mr Purkiss said they were financial advisers with whom React "shared offices") on behalf of the Appellants in relation to the Asset, but he does not have a record of any of the advice provided.

28. It was confirmed at the hearing that the 2016 accounts and tax return for Grangewood were prepared by Mr Purkiss' accounting colleagues, led by Mr Papanicola. Mr Papanicola had told Mr Sked that they "simply applied the transaction as it was presented to us and made the entries on their face value", but we have not been able to ask him what information was presented. Mr Purkiss did not say why Mr Papanicola was not providing evidence, but he explained that he is representing the Appellants in this appeal on the basis that he considers that it is for React Business Services to deal with this issue for the Appellants.

29. In light of the circumstances outlined in paragraphs 26-28 above, Mr Purkiss' evidence carries little weight insofar as it is supposition about the undocumented advice given to the Appellants by others, or the knowledge or understanding of Mr Marsden in relation to the accounting entry of the Asset in the company that led to the tax claims.

30. Mr Purkiss explained that the background to the Asset being transferred to Grangewood is that it was discovered in a box of documents that Mr Marsden had given to React Business Services to check through. Mr Marsden had acquired the Asset as a result of over the counter trading and he could not recall what value, if any, he had given for it. Mr Purkiss said that he and his colleagues had been excited that the Asset might have significant value and that he passed the box to Bond Wealth Management "to see if there was any value in previously acquired but expired options". Their advice was that "if it is genuine", it is worth the number of shares multiplied by the share price of Gable Holdings Inc converted to sterling. Mr Purkiss has not provided evidence of the share price used for the valuation, but he informed the Tribunal that it is a matter of public record that Gable Holdings ceased trading and that the Asset proved to be worthless. It is inferred that Mr Marsden's tax return for 2016/17 filed in January 2018 did not include the disposal of the Asset because it had by then been established that the Asset had no value.

31. Mr Purkiss said that he also obtained advice for the Appellants from Ashwood Capital about how to verify the Asset. He said this referred to Ashwood Capital Inc in the United States, and that he used to act as an agent for them. They advised that the Appellants should attempt to exercise the option, but Mr Purkiss said that this exercise was not attempted until some time after the filing of the accounts and tax return for 2016/17 and proved that the Asset was worthless.

32. Our conclusion on valuation is that the advisers were aware that there were doubts about the validity of the Asset and its value before the accounts were filed with HMRC on 28 September 2017.

33. React Business Services stated that as the Asset is a bearer bond, they sent the original certificate to Ashwood to exercise the option. Mr Purkiss said that neither the Appellants, React Business Services or Bond Wealth Management retained a copy of the Asset sent to the United States. We do not find this credible. Asked whether there had been any subsequent contact with Ashwood, Mr Purkiss said not, and that they had "disappeared" in or around 2017-18.

34. Mr Purkiss and React Business Services state that the claim under section 458 was driven by the IRIS software and that they reversed everything as soon as they encountered resistance from HMRC. Mr Purkiss suggested that the automated nature of the IRIS accounting system led to the claim for repayment under section 458. We found the suggestion that the claim was an "unintended consequence" that IRIS produced, and that it was not actively considered is not supported by the copy of the claim form provided by HMRC at the hearing. As the outcome of the claim was that (i) the client was not required to account for the tax charge on the cash withdrawn in the year and, more significantly, (ii) a repayment claim of £723,801 was made, we find that the making of the claim and its outcome must have been considered by React Business Services. This is supported by the fact that when React Business Services wrote to HMRC on 16 March 2018 in response to the opening of the compliance check, their response was that they now understood the delay in the payment (see para 9 above).

35. Mr Purkiss and React Business Services suggest that Mr Marsden had "very little input as to what appeared to be a very technical element of accounting", that he could not have been expected to understand and that he was entitled to rely on the expertise of his advisers. As Mr Marsden had transferred assets to Grangewood in earlier tax years and these had been disclosed in the company's accounts and on his personal tax return, we consider that he must have been

made aware of the accounting transactions as he was sent the accounts for approval as sole director and shareholder, and the accounts included an additional £4m intangible asset and a credit in the director's loan account.

Submissions

36. HMRC's case is that Grangewood's accounts for the APE 30 September 2016 contained an inaccuracy. The inaccuracy was the inclusion of a credit to the director's loan account of £4m in respect of the transfer of the Asset to Grangewood and the claim under section 458 by reference to that valuation.

37. HMRC submit that the inaccuracy was brought about deliberately. The Appellants either knew that the Asset was worthless or chose not to find out its value before including it in the accounts and making the claim.

38. HMRC submit that the decisions to issue the penalties were validly taken, that the potential loss of tax and reduction of the penalty to reflect the quality of disclosure were correctly calculated, and that there were no special circumstances to justify a special reduction.

39. The Appellants claim that the errors were made by the advisers on whom they relied.

40. The Appellants claim that the errors were capable of rectification and indeed were rectified. HMRC identified the errors before allowing the repayment claim. The enquiry therefore cured the position.

41. The Appellants claim that the errors were, at worst, careless. Mr Purkiss confirmed that the timelines and factual submissions made by HMRC in this case are not disputed, but that the Appellants dispute the inferences made from the facts. The appeal is on the grounds that the Appellants' actions were not deliberate.

42. The Appellants claim that the calculation of the potential lost revenue should be zero as the error was rectified before HMRC made the repayment claimed.

RELEVANT LAW

43. The penalty issued to Grangewood under the following provisions in paragraph Schedule 24 Finance Act 2007 (Schedule 24) which provides 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.
>
> 1(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.
>
> 1(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> 1(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy."

44. The penalty issued to Mr Marsden under the provisions of paragraph 19 Schedule 24 which provide as follows:

> "Companies: Officers' liability

19(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

19(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

19(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership "officer" means–

(a)a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46))…

…

19(5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)–

(a)paragraph 11 applies to the specified portion as to a penalty,

(b)the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,

(c)paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,

(d)a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),

(e)paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and

(f)paragraph 21 applies as if the officer were liable to a penalty.

19(6) In this paragraph "company" means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association."

45. Paragraph 3 Schedule 24 sets out the degrees of culpability. An inaccuracy is "careless" if it is due to failure by the taxpayer to take reasonable care and it is "deliberate but not concealed" if the inaccuracy is deliberate but the taxpayer does not make arrangements to conceal it.

46. Paragraph 15 of Schedule 24 sets out a person's right to appeal as follows:

"Appeal

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

15(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

15(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

15(4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person."

47. Paragraph 5 Schedule 24 sets out what the "potential lost revenue" is as follows:

"Potential lost revenue

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.

5(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to–

(a)an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(b)an amount which would have been repayable by HMRC had the inaccuracy or 22 assessment not been corrected.

5(3) In sub-paragraph (1) "tax" includes national insurance contributions.

5(4) The following shall be ignored in calculating potential lost revenue under this paragraph– (a)group relief, and (b)any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section; (but this sub-paragraph does not prevent a penalty being charged in respect of an inaccurate claim for relief)."

48. Paragraphs 9 and 10 Schedule 24 set out the basis on which HMRC must reduce the standard percentage penalty to reflect the quality of the disclosure by the taxpayer, and for this purpose:

"A person discloses the inaccuracy by—

(a)telling HMRC about it,

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

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

(d)providing HMRC with additional information."

49. Paragraph 11 Schedule 24 sets out that if HMRC think it right because of special circumstances, they may reduce a penalty. Paragraph 14 Schedule 24 states that HMRC may suspend all or part of a penalty for a careless inaccuracy, but not if the behaviour is deliberate.

50. The relevant provisions relating to the tax charge and the relief on repayment or release of the loan under sections 455 and 458 Corporation Tax Act 2010 respectively are as follows:

" Section 455

(1) This section applies if a close company makes a loan or advances money to–

(a)a relevant person who is a participator in the company or an associate of such a participator,

(b)the trustees of a settlement one or more of the trustees or actual or potential beneficiaries of which is a participator in the company or an associate of such a participator, or

(c)a limited liability partnership or other partnership one or more of the partners in which is an individual who is– (i)a participator in the company, or (ii)an associate of an individual who is such a participator.

455(2) There is due from the company, as if it were an amount of corporation tax chargeable on the company for the accounting period in which the loan or advance is made, an amount equal to such percentage of the amount of the

loan or advance as corresponds to the dividend upper rate specified in section 8(2) of ITA 2007 for the tax year in which the loan or advance is made.

…"

"Section 458

(1) Subsection (2) applies if a close company has made a loan or advance which gave rise to a charge to tax on the company under section 455.

(2) Relief is to be given from that tax, or a proportionate part of it, if–

(a)the loan or advance or part of it is repaid to the company, or

(b)the whole or part of the debt in respect of the loan or advance is released or written off.

(3) Relief under this section is to be given on a claim, which must be made within 4 years from the end of the financial year in which the repayment is made or the release or writing off occurs.

(4) Subsection (5) applies if– (a)the repayment of the whole or part of a loan or advance occurs on or after the day on which tax under section 455 becomes due and payable in relation to the loan or advance, or (b)the release or writing off of the whole or part of the debt in respect of a loan or advance occurs on or after the day on which tax under that section becomes due and payable in relation to the loan or advance.

(5) Relief in respect of the repayment, release or writing off may not be given under this section at any time before the end of the period of 9 months from the end of the accounting period in which the repayment, release or writing off occurred.

…"

51. The burden of proof is on HMRC to establish that liability for the penalties arises and that the behaviour attributable to the inaccuracy was deliberate. HMRC also has to establish that the calculation and notification of the Penalties are correct, and that the apportionment of 100% to Mr Marsden is correct.

DISCUSSION

52. The Tribunal was asked to consider and determine the following issues in this appeal:

(1) Whether Grangewood provided HMRC with documents that contained an inaccurate statement and an inflated claim.

(2) Whether inclusion of the inaccuracy was deliberate.

(3) Whether the inaccuracy is attributable to Mr Marsden, the director of Grangewood.

(4) Whether the penalty is correctly calculated.

(5) Whether the appropriate percentage of the penalty has been charged to Mr Marsden.

Inaccuracy?

53. The Appellants do not dispute that the £4m credit to the DLA in Grangewood's accounts for APE 30 September 2016 was inaccurate. The Asset was worthless.

54. The inaccuracy led to an underestimate of a liability to tax and an inflated claim to repayment of tax. The Appellants accept that the company was liable to account for £103,472.03 under section 458 and that the company was not entitled to repayment of £723,801.75.

55. The filing of the accounts and tax return on 28 September 2017 containing the inaccuracy satisfies condition 1 in paragraph 1 Schedule 24.

Inaccuracy deliberate?

56. The Appellants' submission is that the inaccuracy was a mistake as a result of the complexity of modern accounting. Mr Purkiss submits that the inaccuracy was careless. HMRC's submission is that the inaccuracy was deliberate on the Appellants' part. Condition 2 in paragraph 1 Schedule 24 is satisfied in either case.

57. We considered whether the inaccuracy was deliberate on the Appellants' part on the basis of the evidence, our findings of fact and the relevant law. Mr Matthews referred us to the guidance on the meaning of 'deliberate' in the decisions in *Auxilium Project Management Limited v HMRC* [2016] UKFTT 249 (*Auxilium*), *Anthony Clynes v HMRC* [2016] UKFTT 369 (*Clynes*) and *Alpine Contract Service Limited v HMRC* [2016] UKFTT 0394 (*Alpine*). We relied in particular upon the following guidance at para 63 in *Auxilium* and para 86 in *Clynes*:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."
>
> "Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

58. Mr Purkiss' witness evidence is that HMRC have drawn the wrong inferences from the facts. His client does not dispute the account of the facts or that there is an inaccuracy, but he argues that the inaccuracy was a mistake made by the advisers to the Appellants that is, at worst, careless. We find that Mr Purkiss' evidence on behalf of the Appellants carries little weight for the reasons set out in paragraph 29 above.

59. Mr Marsden has chosen not to provide witness evidence to explain his knowledge and behaviour when he approved the accounts.

60. The React Business Services' accountancy adviser who was involved in making the accounting entries and tax claim has not provided evidence.

61. In these circumstances, we have had to reach our conclusion on the behaviour of the Appellants by drawing inferences from the facts, based on the balance of probabilities.

(1) The Appellants and their adviser have not provided a copy of the document on which they based the accounting entry and tax claims. As Mr Sked said to React Business Services in his letter dated 27 December 2018, "no actual documentation has been provided to show that your client actually owned the option agreement and there are no documents concerning the transfer to the company or the attempts to exercise the option". Similarly, there is no copy or record of the terms of the Asset, such as the number of shares, the exercise price or date of expiry of the rights.

(2) We have not been provided with copies of the advice given by Bond Wealth Management, Ashwood Capital, or indeed React Business Services. Mr Purkiss has provided oral evidence about the advice that he believes others have provided, but his evidence carries little weight in this respect for the reason set out in paragraph 29.

(3) React Business Services suggested in correspondence that the Asset was transferred to Grangewood so that the exercise price would have been a trade cost for the company. This suggests that the exercise price would have been a significant amount, and yet Mr Purkiss said that the valuation used in the accounts and tax return did not take account of the exercise price. Mr Purkiss admitted that it is on public record that Gable Holdings had ceased trading following difficulties in its insurance business, but neither the number of shares subject to the option nor the evidence of the share price used has been provided to support the valuation in the accounts for APE 30 September 2016.

(4) React Business Services' reply to the opening of the compliance check makes clear that the repayment claim was not an automatic result of the IRIS system, but an intentional claim.

(5) We have made a finding that the advisers were aware that there were doubts about the validity of the Asset and its value before the accounts were filed with HMRC on 28 September 2017.

(6) The valuation in the accounts and the claims in the tax return led to Grangewood not being required to pay the £103,472.03 tax charge due and a claim for repayment of £723,801.75, making a total benefit of £827,273.78. Mr Purkiss submits that HMRC's processes are such that they picked up the error and so no benefit was erroneously received by his client. Mr Purkiss described the accounting entries as being reversed "as soon as there was pushback from HMRC".

62. We have considered HMRC's serious allegation of deliberate behaviour carefully. We find that the parties did not have a reasonable belief in the accuracy of the value or validity of the Asset when the document was submitted to HMRC. Later references to the valuation being 'subject to' the Asset being genuine, referring to it as 'expired', and the immediate reversal of the entries once HMRC queried them supports the picture that there was no basis or belief to support the accounting entry. We agree with the decision in *Clynes* that an inaccuracy may be deliberate because the person "consciously or intentionally chose not to find out the correct position" and we find that this was case when the Appellants' accounts and tax return were filed with HMRC.

63. HMRC accept that there were no attempts to conceal the inaccuracy.

Inaccuracy attributable to Mr Marsden?

64. In the absence of Mr Marsden's first-hand evidence about his acquisition of the Asset, the advice that he received about the transfer of its ownership to Grangewood, and the discussion and approval of the accounts and tax position, we reached our conclusion on behaviours based on the facts available. These included the following findings:

(1) Mr Marsden described his business occupation as "accountant" in a Companies House filing. He is and has been a shareholder and / or experienced director of a number of other companies for many years.

(2) Mr Marsden is the sole director of Grangewood. He is familiar with the accounting entries in Grangewood's accounts in relation to transactions with directors and related parties as they refer to his consideration of the issue. For example, Grangewood's accounts for 2015 were approved and authorised by the board on 24 June 2016. The 'transactions with directors' section includes the following entry:

> "During the year ended September 2014 the company purchased current asset investments totalling £430,619 from Mr A Marsden. The directors consider this to be the market value at the date of purchase."

(3) As the sole director and shareholder of Grangewood, Mr Marsden saw and approved the accounts for 2016 before they were sent to HMRC. It is not plausible that he relied on React Business Services to the extent suggested by Mr Purkiss. Mr Purkiss confirmed that Mr Marsden was advised to transfer the Asset to Grangewood and that he was aware that it had been done. As noted in our finding in paragraph 35 above, Mr Marsden must have been aware of the £4m valuation of the Asset in the accounts. We assume that as Mr Marsden is an experienced director with a past accountancy business occupation, he must have noticed that this led to a credit of over £700,000 in the director's loan account and no charge for the year under section 455.

(4) As Mr Purkiss has suggested that the penalty will bankrupt the Appellants, we can infer that the £723,801.75 repayment claim was of significance to Grangewood and Mr Marsden. We also infer that the fact that the £103,472.03 section 455 charge was not being paid for APE 30 September 2016 (as had been the case for earlier years), notwithstanding the sums of cash withdrawn from the company in the year, must have been discussed with or noticed by Mr Marsden.

(5) Mr Marsden filed his tax return for 2016/17 on 25 January 2018, some weeks before Mr Sked opened HMRC's compliance check. The return did not report a capital gain on the disposal of an asset in excess of the annual capital gains tax exemption. No action was taken to withdraw the tax claims before HMRC opened the compliance check.

65. This is not a case in which we have had clear evidence on behalf of the Appellants or any explanation from Mr Marsden, but our conclusion from the evidence available is that he either knew that the Asset had limited value, or consciously chose not to take steps to check the value of the Asset. Mr Marsden has not established that he took any steps, let alone reasonable steps, to avoid the inaccuracy. We consider that it was reckless not to satisfy himself that the very significant £4m valuation of the Asset in the accounts was accurate, especially given the amount of tax apparently saved and the repayment claimed. As the Tribunal said in *Clynes*, a person "cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position".

Calculation of the penalty and reductions

66. The Appellants claim that the potential lost revenue (PLR) is nil as they reversed the accounting entries for the Asset and withdrew the tax claims. HMRC's check had ensured that the repayment claim was not paid, and that the section 455 charge arose. We have set out how the PLR is calculated in response to this submission below. Mr Purkiss also suggested that even if the Asset had been valuable and the tax claims had been successful, Mr Marsden would have reported a capital gain in his personal tax return when the option was exercised, and that this charge would have reduced the PLR to nil. This is not correct. Even if there had been a capital gains tax charge on Mr Marsden, this would not have affected the calculation of the PLR.

67. Paragraph 5(1) Schedule 24 provides that the PLR is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy. Paragraph 5(2) provides that this includes an amount which would have been repayable had the inaccuracy not been corrected. Paragraph 5(4) Schedule 24 provides that in calculating PLR any relief under section 458 which is deferred until 9 months from the end of the accounting period shall be ignored in calculating PLR, but that this does not prevent a penalty being charged in respect of an inaccurate claim for relief. As Judge Rankin commented in *Alpine*:

> "The fact that there was no actual loss of revenue is immaterial. To find otherwise would render the paragraph meaningless."

68. The PLR in this case is therefore the additional £103,472.03 tax payable as a result of correcting the inaccuracy (paragraph 5(1)), plus the £723,801.75 which would have been repayable by HMRC had the inaccuracy not been corrected (paragraph 5(2), making a total of £827,273.78.

69. The Penalty was assessed and notified in accordance with paragraph 13 Schedule 24 and in the relevant time limit. Mr Sked calculated the penalty on the basis of deliberate but not concealed action. Paragraph 4(2)(b) provides that the standard penalty is 70% of the PLR in these circumstances. Having decided that HMRC have established that the Penalty was correctly imposed on the basis of deliberate behaviour, it is then for the Appellants to establish their grounds of appeal as to the amount of the Penalty payable. Mr Purkiss' submission is that the Appellants reversed the accounting entries and tax claims, and that the Penalty is draconian. We have considered the provisions in Schedule 24 for reductions for disclosure and the special reduction in light of these submissions.

70. Mr Sked's witness statement sets out his reasoning in the calculation of the 50% reduction that he allowed under paragraph 10 Schedule 24. Mr Sked followed the guidance in HMRC's compliance manual and allowed reductions of 10% for telling HMRC about the inaccuracy, 30% for helping HMRC understand it and 10% for giving HMRC access to records. Under this guidance, the maximum reductions which officers can give are 30% for telling, 40% for helping, and 30% for giving access to records.

71. We have considered the reductions for disclosure and make the following observations. The relevant provision states that HMRC "must" reduce the standard percentage to one that reflects the quality of the disclosure. We consider that the provisions of paragraph 9 make clear that their focus is disclosure for the purpose of quantifying and correcting the inaccuracy. The explanation of the Penalty states that the decision on the reductions was the second stage, after Mr Sked's decision on behaviour. We accept that Mr Sked did not receive the information that he was seeking to inform his decision on the Penalty, but we consider that he has not given due weight to the fact that the statute provides that a person discloses an inaccuracy by quantifying the inaccuracy and ensuring that it is fully corrected. As Mr Purkiss submits, the Appellants had reversed the accounting entries and produced revised tax calculations that quantified and corrected the inaccuracy on 11 October 2018, and the tax position had been agreed. Further, Mr Sked has referred to the time taken to disclose in the context of each of the headings, even though disclosure to quantify and correct the inaccuracy was provided eight months after he opened his compliance check in February 2018. Furthermore, the quantification and correction of the inaccuracy was done within only two months (and one exchange of letters) from React's letter of 3 August 2018 disclosing, or conceding, that the Asset could not be verified, agreeing to correct the entries and seeking HMRC's advice on resolving the matter. In the circumstances of this case, we consider that a total reduction of 75% for the quality of disclosure is appropriate. This reduces the penalty to 43.75% of the PLR.

72. No representations were provided by the Appellants on 'special circumstances' in response to Mr Sked's letters asking for relevant information and, having considered the reported and known information, Mr Sked concluded that there were no special circumstances that justify a special reduction of the Penalty under paragraph 11 Schedule 24 in this case. However, in his submissions, Mr Purkiss claims that the penalty regime was not designed to provide such draconian punishment and we have considered this submission in the context of our jurisdiction under paragraph 17 Schedule to substitute our decision on 'special circumstances' if we think that HMRC's decision is flawed.

73. In *Barry Edwards v HMRC* [2019] UKUT 131 the Upper Tribunal considered the proportionality of penalties under schedule 55 Finance Act 2009 in the context of no income tax being due. The Upper Tribunal found that there is a reasonable relationship of proportionality in the relevant provisions of schedule 55, noting that "the levels of penalty are fixed by Parliament and have an upper limit". They concluded [at para 86] that "a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance ... with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty."

74. We considered the provisions of Schedule 24 and the amount charged in the context of all the relevant circumstances of the case and the submissions made. The amount of the penalty is the result of the architecture of the penalty regime fixed by Parliament, and is proportionately based on the £723,801.75 repayment sought and the £103,472.03 tax underdeclared when the documents were submitted to HMRC. Paragraph 5(2)(b) specifically includes "an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected" in PLR. We do not consider that HMRC's decision on special circumstances is flawed or that it should be altered.

75. As we have found that the inaccuracy was deliberate on the Appellants' part, the provisions relating to suspension of the penalty are not in point.

Percentage attributable to Mr Marsden

76. HMRC have established that, on the balance of probabilities, the inaccuracy was deliberate and that it was attributable to Mr Marsden. Mr Sked asked Mr Marsden if he wished to provide any representations on why he should not be personally liable for the penalty before the paragraph 19 Schedule 24 notice was issued. Mr Marsden's response was that his agents, React Business Services "have sole control of conduct of this matter". For the reasons summarised in paragraphs 64 and 65 above we find that the deliberate inaccuracy was attributable to Mr Marsden.

77. In view of our findings and conclusions, we agree with HMRC that Mr Marsden is liable to pay 100% of the Penalty.

DECISION

78. For the reasons set out above, the charging of the Penalty for the deliberate inaccuracy and its attribution to Mr Marsden are upheld, but we reduce the Penalty to 43.75% of the PLR.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

79. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

Release date: 7 SEPTEMBER 2021