[2022] UKFTT 101 (TC)

TC 08431/V

VAT – inaccuracy in returns – whether deliberate behaviour – application of penalty reduction percentages

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00727

BETWEEN

ATLAS GARAGES (MORPETH) LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
MRS SHAMEEM AKHTAR

The hearing took place on 8 September 2021. With the consent of the parties, the form of the hearing was V (video) with all parties attending via Tribunal video platform. A face to face hearing was not held because in light of the current restrictions a video hearing was more practical. The documents to which we were referred were a bundle of documents of 577 pages, further documents particularised in the decision and an authorities bundle of 98 pages.

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.

Mr Mark Hetherington, representative for the Appellant

Mrs Shazana Hussain, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerned a penalty for inaccuracies in VAT returns. There was no dispute as to whether there was an inaccuracy, which was accepted by all parties. The appellant taxpayer, Atlas Garages (Morpeth) Limited, ("**Atlas**") appealed against the penalty on the grounds that its behaviour was not deliberate and that the percentage reductions for taxpayer's behaviour and quality of disclosure had not been correctly applied.

EVIDENCE

2. There was a significant amount of confusion and delay at the hearing due to the "final" bundle submitted by HMRC to the Tribunal (and therefore to the panel and the appellants) not being the same as the final bundle from which the representative and witness for HMRC had in front of them. We worked from a bundle containing 577 pages, and additional documents being:

(1) 6 appendices to the HMRC officer's witness statement, which were made available during the hearing;

(2) 3 additional documents submitted by the appellant shortly before the hearing, being the screenshots referred to below; and

(3) 2 further additional documents that had been included in the appellant's list of documents but had not been included in the bundle.

3. We were also referred to an email from HMRC to the appellants in 2019 which had not been included in the bundle, but which was shared with the tribunal after the hearing.

4. We heard sworn evidence from:

(1) Julie Knowles, officer of HMRC working as VAT case worker in the motor services businesses team; and

(2) Mark Hudspith, company accountant and company secretary for Atlas.

LAW

5. As noted above, this appeal concerns a deliberate inaccuracy penalty. The relevant parts of schedule 24 to Finance Act 2007 provide:

> 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.

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

3—

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

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

(*b*) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(*c*) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

…

4

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

(2) If the inaccuracy is in category 1, the penalty is—

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

(*b*) for deliberate but not concealed action, 70% of the potential lost revenue, and

(*c*) for deliberate and concealed action, 100% of the potential lost revenue.

…

4A

(1) An inaccuracy is in category 1 if—

(*a*) it involves a domestic matter, or

…

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.

(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 assessment not been corrected.

…

Potential lost revenue: multiple errors

6—

(1) Where P is liable to a penalty under paragraph 1 in respect of more than one inaccuracy, and the calculation of potential lost revenue under paragraph 5 in respect of each inaccuracy depends on the order in which they are corrected—

(*a*) careless inaccuracies shall be taken to be corrected before deliberate inaccuracies, and

(*b*) deliberate but not concealed inaccuracies shall be taken to be corrected before deliberate and concealed inaccuracies.

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

(3) In sub-paragraph (2)—

(*a*) "understatement" means an inaccuracy that satisfies Condition 1 of paragraph 1, and

(*b*) "overstatement" means an inaccuracy that does not satisfy that condition.

(4) For the purposes of sub-paragraph (2) overstatements shall be set against understatements in the following order—

(*a*) understatements in respect of which P is not liable to a penalty,

(*b*) careless understatements,

(*c*) deliberate but not concealed understatements, and

(*d*) deliberate and concealed understatements.

(5) In calculating for the purposes of a penalty under paragraph 1 potential lost revenue in respect of a document given by or on behalf of P no account shall be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's).

Reductions for disclosure

9—

…

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment by—

(*a*) telling HMRC about it,

(*b*) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(*c*) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

…

(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".

(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%
70%	35%	20%
100%	50%	30%.

FACTS

6. Based on the evidence presented to us, we find the following (undisputed) background facts:

7. Atlas is a VAT registered car dealer in Morpeth.

8. On 22–24 January 2019, HMRC (represented by Ms Knowles and another colleague) conducted a pre-arranged VAT assurance check at the premises of Atlas.

9. At the end of that visit, Ms Knowles arranged to return on 1 February 2019 to review information that had not been available during the initial visit.

10. On 22 May 2019, a VAT assessment was issued in relation to understated output tax and incorrectly claimed input tax in the VAT returns relating to periods from 1 January 2015 to 31 December 2018.

11. On 7 June 2019 penalty notices were issued to Atlas on the basis of deliberate inaccuracy in the returns.

12. Following two withdrawals and reissues of the penalties, the penalty notice now under appeal was issued to Atlas, again on the basis of deliberate inaccuracy in the returns, on 23 December 2019.

13. Atlas appealed to this tribunal against the penalty on 5 February 2020.

14. Further facts are found later in this decision.

ISSUES IN DISPUTE

15. There is no dispute that there were inaccuracies in the returns and that Atlas had not taken reasonable care in completing those returns.

16. The surviving issues for us to decide are:

(1) Whether the behaviour of Atlas met the standard of 'deliberate behaviour';

(2) Whether HMRC's application of reductions to the penalties for telling, helping and giving had been made correctly;

(3) Whether a 10% restriction on the reductions was correctly applied for the length of delay in remedying the inaccuracy; and

(4) Whether the potential lost revenue (PLR) for the penalties has been correctly calculated.

17. We will address each of these issues in turn.

DELIBERATE BEHAVIOUR

Parties arguments

18. HMRC submitted that the following combination of facts meant that the inaccuracies in the VAT returns relating to the treatment of car sales had been deliberate:

(1) Atlas had made inaccuracies of the same nature in 2014 and was advised of how it should be accounting for their hire purchase sales at that time;

(2) Atlas had not made any changes to the procedures and was still accounting for hire purchase sales in the same incorrect way in 2019;

(3) On the first day of the assurance visit, Ms Knowles had asked Atlas whether there was any 'bumping' and was told there had not been;

(4) The assurance visit had unearthed 'bumping' in relation to negative equity car sales whereby the value of the vehicle sold had been inflated on the documentation entered into with the finance companies, which had in turn given rise to unpaid VAT;

(5) When challenged on this, both Mr Hudspith and the sales manager at Atlas had said that they knew that this happened and that if they didn't do it, the customer would go elsewhere.

19. In support of their submissions, HMRC relied on:

(1) *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC), in particular paragraph 63 (which was also followed by a differently constituted first-tier tribunal in *Angel Rodriguez-Issa v HMRC* [2021] UKFTT 154 (TC)):

> "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.

(2) *Angel Rodriguez-Issa v HMRC* [2021] UKFTT 154 (TC), in particular paragraph 21 and 22:

> "21. HMRC also referred us to the decision in *Clynes v HMRC* [2016] UKFTT 369 (TC) where the Tribunal stated:
>
> > "we consider that the term "deliberate inaccuracy on a person's part can extend beyond this. 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."
>
> 22. We agree that an inaccuracy may be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position. However, as the Tribunal indicated in *Clynes*, this will be a question of fact and degree that must be determined on a case by case basis. Care must be taken not to blur the line between careless and deliberate conduct."

20. *Raymond Tooth v HMRC* [2021] UKSC 17, in particular paragraph 43:

> "First, it is the natural meaning of the phrase "deliberate inaccuracy". Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy". An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate.

21. It is HMRC's submission that Atlas either had the knowledge to submit an accurate return but consciously and intentionally submitted an incorrect one; or consciously and intentionally chose not to find out how to make sure their returns were accurate and that either of these would amount to deliberate behaviour.

22. The Appellant submits that:

(1) The mistakes uncovered in the previous VAT inspection in 2014 were of a similar nature but were very small (amounting only to £2,300 of VAT on 17 vehicles (out of an average of 1000 cars per year) and had not been challenged at the time by Atlas because its resources were stretched due to the development of a new showroom;

(2) The errors in the VAT returns that led to the penalties under appeal came as a complete surprise to the finance team, who were not aware that the VAT returns contained inaccuracies;

(3) The suggestion that Atlas increases the stated selling price of cars sold via finance companies to account for negative equity on part exchange vehicles is wrong. The correct selling price of the vehicle is shown clearly on the sales invoice for the car, together with a separate value disclosed for negative equity, and these are the values that the customer agrees to;

(4) The finance documentation for certain finance providers requires the selling price of the car and the amount of negative equity to be consolidated into a single amount shown as 'cash price' on the finance agreement, which suggests that the finance company is providing a higher amount of consideration for the car, which is contrary to the economic reality;

(5) Atlas now understands that this can result in understated VAT because the finance system works on the basis of the system generated invoices and did not automatically flag up negative equity deals, meaning that the finance team did not investigate each negative equity deal to make sure that the correct figure was used for the VAT returns;

(6) As noted above, Atlas accepts that these were mistakes made in its VAT returns, but does not accept that the inaccuracies were deliberate, which is a serious allegation on which HMRC has the burden of proof and has not met that burden.

Discussion

23. The inaccuracies that have led to the assessments of VAT relate to circumstances where the output tax on vehicles sold to finance companies (i.e. where the purchaser of the car is actually the finance provider, who in turn enters into a contract with the individual who wishes to obtain a car).

24. As noted above, the appellant accepts that there were incorrect figures used in these circumstances. The dispute is whether those errors were deliberate or careless.

25. HMRC argues that the appellant knew (or deliberately failed to find out) that the errors would be included on the tax return because, following an earlier VAT assessment in 2014, they had become aware of the problem and committed to fixing it.

26. The appellant submits that the errors were caused by limitations in the systems of particular finance providers, which do not allow them to put the appropriate figures in relevant boxes, so that the automatically generated information that flows into their VAT returns system is incorrect. The appellant now accepts that this is the case and that, in order to ensure that their VAT returns are correct, they need to manually identify the sales that fall into this category and adjust the VAT returns so that they are correct, before submission. The appellant also accepts that this was not happening and led to the inaccuracies under assessment.

27. HMRC submit that this was caused by a practice called 'bumping'.

28. Ms Knowles' 'visit report', which she stated were completed on the day in accordance with HMRC policy, contains a statement: "There is no finance bumping".

29. Ms Knowles witness statement and evidence under cross-examination was that she asked Mr Hudspith and his head of sales whether they practised bumping on the first day of the VAT inspection. Both gentlemen replied that they did not. She also stated that she would have explained what she meant by bumping because she 'always explains bumping and mentions fictitious deposits and negative equity'.

30. HMRC also submit that Atlas accepted on day 2 of the visit there had been bumping. He witness statement states that they accepted that the value of the vehicle sold had been inflated to the finance company and that if Atlas didn't use this practice, the sale wouldn't be made and the customer would go elsewhere.

31. Mr Hudspith, in his witness statement and evidence at the hearing, agrees that Ms Knowles asked him whether there was any bumping and confirms that he said that there was not, but he also stated that she did not mention negative equity in that context and that this was not mentioned until day 2.

32. He submits that he continues to believe that the inaccuracies that occurred were not 'bumping' and that there is a difference of interpretation between HMRC and the profession's use of the word bumping.

33. He submits that bumping means an artificial inflation of the part-exchange vehicle price in order to ensure that minimum deposit requirement of the finance company is met, in order to make sure that finance is available for the car purchase. He contrasts that with a situation where there is negative equity on the deal, ie the purchaser has an outstanding amount of debt on the vehicle that is being part-exchanged that exceeds the part-exchange value, meaning that the finance needs to be for a greater sum that the value of the car being acquired.

34. It was clear from the evidence given at the hearing that there continued to be confusion about the meaning of the word bumping.

35. With regard to the question of whether the inaccuracies in 2014 and 2019 were exactly the same (as HMRC submits) or similar but not the same (as the Appellant submits), we did not have enough information to establish whether the errors were caused by the same issue. The letter from HMRC to Atlas in 2014 refers to discrepancies between finance documentation and stock book declarations on negative equity deals and highlights that transaction values detailed on documentation to the Finance House and declared to HMRC must be the same.

36. The Appellant's reply to HMRC in 2014 accepted the conclusion of HMRC's enquiry and committed to reviewing its procedures.

37. It is HMRC's burden to show, in accordance with the cases that they cited, that the behaviour of Atlas was deliberate. The two driving arguments they submitted to support this conclusion were the conversations on days 1 and 2 of the visit and the earlier assessment for VAT in 2014. As noted above, neither of these arguments are unequivocal and, even taken together, do not meet the burden of showing that Atlas had consciously and intentionally submitted incorrect returns; or consciously and intentionally chose not to find out how to make sure their returns were accurate.

REDUCTIONS TO PENALTIES

38. HMRC provided part mitigation for the penalties raised:

(1) Telling HMRC about the inaccuracy: 15% (out of a maximum of 30%)

(2) Helping HMRC to quantify the inaccuracy: 30% (out of a maximum of 40%)

(3) Giving access to HMRC to ensure full disclosure): 30% (out of a maximum of 30%)

This gives a total reduction of 75% for the quality of disclosure.

Parties' arguments

39. HMRC submitted that they allowed:

(1) only 15% for telling because Atlas denied bumping at the beginning of the site visit;

(2) only 30% for helping because there were still documents missing at the end of the visit and the follow up visit; and that the final documents were not provided until an agent had been appointed to assist and even then documents were slow to be produced; and

(3) full reduction for giving had been allowed because Atlas had given full access to HMRC.

40. Atlas submitted that they should have been given full mitigation for both telling and helping, specifically:

(1) on telling: as noted above, Atlas still does not accept that it conducted bumping and therefore the basis of HMRC's reduction is flawed, and the reductions for telling are, according to HMRC's guidance, based on the actions taken by the taxpayer throughout the whole compliance check, focused on timing, nature and extent; and

(2) on helping:

(a) at the visit, HMRC requested around 100 documents, most of which were produced before the end of the visit. There were three outstanding.

(b) Within a couple of days of the visit, Ms Knowles had sent an email to Mr Hudspith in the following terms:

"Thank you for your time over the last 3 days and the help you have given John and me by obtaining the deal files promptly. Please also pass on our thanks to Colin for the help he gave to clear a few queries.

As discussed yesterday we will re-visit on Friday 01/02/19 at 9am to view the 3 deal files we haven't seen and the purchase invoices for the commercial vehicles.

I have attached the up dated list of checks we completed we need the deal files for the bottom 3 on UV3 and the purchase invoices highlighted in yellow on UV2."

(c) the company received an assessment by email on 25 February 2019 and responded on 1 March to say that they had appointed an adviser, who proceeded to assist and provide information and documents to HMRC which resulted in the assessment being reduced substantially.

Discussion

41. On telling, from the witness evidence and submissions, we take HMRC's position to be that the response to a single question on day 1 of the site visit was enough to reduce the mitigation by half. As noted regarding our conclusions on deliberate behaviour, we do not find the evidence about this question is unequivocal and therefore it is not a sound basis, without more, to base a decision about mitigation.

42. On helping, the main thrust of HMRC's argument is that Atlas was slow to respond and provide documents. On the penalty notice issued on 4 June 2019, the reduction for helping is stated to be the fact that Atlas did not appoint an adviser to assist until after an assessment had been raised.

43. However, the email from Ms Knowles following the site visit does not support the conclusion of slowness, it rather suggests that the opposite was true at that point. Similarly an email from Ms Knowles providing a draft assessment for consideration dated 25 February 2019 stated "I will of course take into account the quality of disclosure and apply full reductions for telling, helping and giving."

44. We also do not accept that not appointing an adviser to correspond with HMRC until 5 weeks after a site visit is necessarily an example of not helping HMRC. In the intervening period, Atlas had been replying to HMRC and providing them with the paperwork requested.

45. The evidence for the helpfulness of the response after that point also does not support HMRC's position. There was a succession of correspondence between HMRC and Atlas in

which further documents and explanations were requested and provided, leading to a final notice of assessment on 23 May 2019. Given the time between the initial visit and the final assessment was just under 4 months, during which there was constant, timely engagement from Atlas and its advisers, it is not tenable for HMRC to argue that there was tardiness from Atlas in helping HMRC reach the right conclusion.

46. As noted above, on an appeal against the amount of a penalty under paragraph 15(2) of Schedule 24 to Finance Act 2007, this tribunal may affirm HMRC's decision or substitute another decision that HMRC had the power to make.

47. We therefore substitute HMRC's decision by giving full mitigation for telling and helping.

THE 10% ISSUE

48. The 10% issue arises from HMRC's policy, which is set out in the compliance handbook at CH82465. Under this policy, HMRC states that it will restrict the maximum reduction that is available for disclosure by 10 percentage points where there has been a significant delay between the date of the inaccuracy and the date of disclosure.

Parties' arguments

49. HMRC has applied this policy in calculating the penalty. As set out above, the penalty range for a deliberate penalty is between 35% and 70% of the potential lost revenue. By applying this policy, HMRC has restricted the maximum reduction available. HMRC's approach to this is to increase the minimum penalty from 35% to 45%. In the case of a careless penalty (as we have decided this penalty should be), this means that the penalty range would be 10% to 30% (rather than the statutory 0% to 30%).

50. It is clear from the guidance in their manual and in the submissions made by HMRC that this was a policy introduced in 2016. HMRC's statement of case stated:

> "The maximum penalty percentages given for the timing of disclosure were restricted 10% due to the inaccuracy being over 3 years old as referred to in HMRC's penalty factsheets."

51. The statement of case goes on to state that HMRC have calculated the difference between the minimum and maximum percentages as 25%, being the difference between 35% and 60%. This is different from increasing the minimum penalty from 35% to 45%, but has the same numerical effect (albeit that this does add confusion to an already complicated means of calculating penalty percentages).

52. Fact sheet CC/FS7a for penalties for inaccuracies in returns and documents was included in the bundle, but does not contain a reference to this 10% restriction. At the hearing, HMRC pointed us to factsheet CC/FS1a, which relates to compliance checks generally. This factsheet does contain a reference to the fact that HMRC will "usually restrict the maximum reduction we give for the quality of disclosure to 10 percentage points above the minimum of the penalty range". However, it was not clear whether this factsheet was provided to Atlas, nor whether this statement was contained in the factsheet at the time of the compliance check in question.

53. When pressed at the hearing, HMRC submitted that the statutory authority for this policy is in paragraph 9(3) of Schedule 24 to Finance Act 2007 (set out above), specifically that quality of disclosure includes the timing of that disclosure.

54. Atlas submit that:

(a) there is no statutory basis for this additional 10% restriction;

(b) if there is to be a policy about length of time between inaccuracy and disclosure, this could be factored into the stage 2 test and form part of the consideration under "telling"; and

(c) the HMRC guidance is really about error corrections on an unprompted basis where the taxpayer takes a long time to notify HMRC of their error, which is not relevant to this case because everyone is agreed that the disclosure was prompted and it was HMRC that identified the error.

Discussion

55. The starting point here is to recognise that there are no specific statutory rules for HMRC to follow in how it calculates the mitigation of penalties. The rules, as far as they are relevant, are set out above and provide HMRC with minimum and maximum amounts for penalties, dependent on:

(1) the behaviour of the taxpayer, eg careless or deliberate

(2) whether any disclosure was prompted or unprompted; and

(3) the quality, nature and timing of the disclosure, which includes the concepts of telling, giving and helping.

56. The way that HMRC interprets those rules, for example, setting out that they may give a maximum 30% reduction for telling, are very much within the discretion of HMRC (provided it exercises that discretion appropriately).

57. While we would agree with the Appellant that it is confusing to have a separate category of penalty reduction to deal with the delay between the occurrence of the inaccuracy and the disclosure by the taxpayer and that a taxpayer that does not know of their inaccuracy for a long time cannot disclose before it finds out (which may be after 3 years has elapsed). There is nothing irrational about HMRC's policy decision to restrict the amount of penalty mitigation allowed where there has been a long period between the inaccuracy and the correcting of it.

58. The 10% restriction, as applied by HMRC, also does not infringe on the statutory minima and maxima: there are still circumstances where the nature, timing and extent of disclosure will allow for the maximum penalty reduction.

59. Therefore, we affirm HMRC's application of the 10% restriction (albeit that it will need to be applied to the careless inaccuracy penalty percentages as a result of our decision above).

POTENTIAL LOST REVENUE CALCULATION ISSUE

Parties' arguments

60. The taxpayer submits that the order in which HMRC has set off the overstatements of output tax against understatements which did not attract a penalty has resulted in a larger amount being included in the calculation of potential lost revenue for the purposes of the inaccuracy penalties under appeal.

61. HMRC submits that the overstatement of output tax for margin vehicles was offset against the careless inaccuracy first. The balance was then offset against the deliberate inaccuracy pursuant to paragraphs 6(2) and (4) of Schedule 24 to FA 2007.

Discussion

62. We were not taken to the detailed numbers on these issues but rather asked to consider it in principle, which we now do.

63. As HMRC notes, there are statutory rules for calculating the potential lost revenue where there is more than one inaccuracy. They are found in paragraph 6 of Schedule 24 to FA 2007.

64. Paragraph 6(1) requires that, where it makes a difference to the calculation of PLR, careless inaccuracies must be corrected before deliberate inaccuracies. Since we have decided above that the inaccuracies that Atlas has made were careless, this provision is not relevant.

65. Paragraph 6(2) requires that understatements and overstatements made in the same tax period (which in the case of Atlas means a quarter) they should be set off against each other.

66. Paragraph 6(4) provides that were paragraph 6(2) applies, overstatements in the tax period must be set off against understatements on which the taxpayer is not liable to a penalty first and then careless understatements. It goes on to consider deliberate understatements but those are not relevant here.

67. The provisions in paragraph 6 are not optional. Where there are understatements and overstatements in the same tax period, it is a requirement that the overstatements are set off against the understatements on which no penalty arises first and then those on which penalties do arise second.

DISPOSITION

68. For the reasons set out above we substitute the decision of HMRC, concluding that the correct penalty is a penalty for careless inaccuracy, with full mitigation for telling, helping and giving; but that the penalty mitigation is restricted by 10% by virtue of the period between the inaccuracy and the disclosure.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 17 MARCH 2022