[2016] UKFTT 026 (TC)

TC04835

Appeals numbers: **TC/2013/6895, TC/2014/2287, TC/2014/2345, TC/2014/6671, TC/2015/6589, TC/2013/6894 and TC/2014/2244**

INCOME TAX AND VAT –various assessments and penalties – some appeals allowed and some dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TELEMATIQUE LIMITED **Appellants**
and
DR AYAD AL-MUKHTAR
AKA ALEXANDER WAIN

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale
Claire Howell

Sitting in public at the Royal Courts of Justice, London on 2 December 2015

Dr A Al-Mukhtar in person and as director of Telematique Ltd

Mr B Robinson, HMRC officer, for the Respondents

DECISION

Matters in dispute

1. For ease of reference, we include a schedule of the appellants' appeals to this Tribunal. All of these matters were joined for hearing at today's hearing save TC/2014/323 as that had already been determined nearly 18 months ago:

Appeals of Telematique Ltd:		
TC/2013/6895	Decision dated 7/10/13 disallowing £4,385.47 claimed as input tax	
TC/2014/2287	Penalty dated 26/2/14 reduced to £887.96 for above alleged misdeclaration	
TC/2014/323	First PAYE late filing penalty for YE 2013 - £400	Determined on 21 May 2014 – appeal dismissed
TC/2014/2345	Second PAYE late filing penalty issued 10/3/14 for YE 2013 - £400	
TC/2014/6671	PAYE late filing penalty for YE 2014 - £400	Penalties cancelled November 2015 - appeal allowed
TC/2015/6589	First and second PAYE late filing penalty for YE 2015 - £800	Penalties cancelled November 2015 - appeal allowed

Appeals of Dr Al-Mukhtar	
TC/2013/6894	Assessment dated 1/8/13 for £496.30 for alleged underdeclaration on SA return
TC/2014/2244	Penalty issued 18/2/14 for £100 for late filing of Y/E 2013 SA return

2. The Company had appealed against that P11D late filing penalties for years ending in 2014 and 2015 (TC/2014/6671 and TC/2015/6859) but HMRC informed the appellant in its skeleton argument and informed the Tribunal on the day of the hearing that HMRC would withdraw the decisions in these matters and did not require the Tribunal to consider the matters.

3. As the decisions were withdrawn, the Tribunal formally allows the appeal in respect to them.

4. The appellant also wished the Tribunal to consider its appeal against a £400 first penalty for failure to file the P11D for the year ended in 2013. However, that appeal had already been determined by the Tribunal: *Telematique Ltd* TC/2014/323 [2014] UKFTT 502 (TC). The appellant has not applied to appeal that decision and is now out of time to do so; it did seek to have the decision set aside. This was refused by Judge Kempster on the basis that there were no grounds on which to set it aside. The appellant's only options, as I explained at the hearing, were to seek to appeal either or both these decisions out of time, although that was not to suggest that the appellant had grounds on which to do so: but what is quite clear is that the matter has been determined in this tribunal and cannot be re-heard unless and until the original decision is successfully appealed or set aside.

5. That left five matters for consideration and we deal with them below in the same order that we heard submissions on them at the hearing, starting with Dr Al-Mukhtar's appeals.

Decision 1 - TC/2013/6894 - Assessment dated 1/8/13 for £496.30 for alleged underdeclaration on self assessment return

6. We find that HMRC received from Dr Al-Mukhtar's erstwhile employers, Cap Gemini Ltd, a P11D return which showed for JA935249B for year 2009/10 a medical benefit of £1,223. HMRC also received a P11D from Telematique for the same period and for the person with the same NI number a list of benefits. One of these benefits was for entertainment of £19.

7. We find that the appellant's NI number was JA935249B. It is on his tax return.

8. The appellant's tax return did not include these benefits (although other benefits from Telematique Ltd were recorded). The appellant's case was that he had not received a medical benefit from Cap Gemini in that period as he was at the time on permanent sick leave with permanent health insurance. He did not say why the £19 benefit from Telematique had been missed off.

9. He phoned HMRC in May 2013 to explain why he thought his tax return was right: in response HMRC wrote to Cap Gemini on 8 July 2013 to query whether the appellant had really received the benefit. No reply was received to this letter, possibly because HMRC had quoted the wrong NI number, but as they also gave the appellant's name this seems unlikely. In any event, no reply was received and HMRC undertook no further investigations but issued the assessment on 1 August 2013.

10. The appellant was aggrieved that HMRC undertook no further investigations: he did not think it ought to be up to him to contact Cap Gemini particularly when he had a very poor relationship with this company as, he told us, he had taken them to tribunal twice and had ended up on long term sick leave.

11. However, so far as liability is concerned, it is for the appellant to satisfy the Tribunal that the amount assessed is excessive. While it may well be the case that HMRC cannot raise an assessment without good grounds to do so, we consider that the respective P11D returns showing these two benefits amounted to justification for the assessment. It is then for the appellant to disprove the assessment. He has failed to do so. He was mistaken to think that the onus rested on HMRC to investigate the matter.

Validity of assessment?

12. However, although the point was not raised by the appellant in the hearing, there does appear to be a potential issue with the validity of the assessment and as this is for HMRC to prove, the Tribunal must consider it: *Burgess and Brimheath Developments Ltd* [2015] UKUT 0578 (TCC).

13. HMRC accepted that the appellant's tax return was filed on time: it is recorded in letters from HMRC that it was received on 18 August 2010 which was some months before it was due. While HMRC purported by letter of 28 February 2013 to open an enquiry into the taxpayer's return, they were out of time to do so: the last day for opening an enquiry would have been 18 August 2011 as per s 9A(2)(a) Taxes Management Act 1970 ("TMA"). HMRC must have realised this as the subsequent assessment raised on 1 August 2013 was stated to be under s 29 TMA. This type of assessment is known as a discovery assessment and such an assessment may be raised if HMRC discover an underassessment of tax.

14. But there are restrictions on when such assessments can be made. S 29(3) requires that one of two conditions are met. One conditions is s 29(4) that the error:

> "was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf"

The other condition (s29(5)) was that the officer making the assessment could not reasonably have been expected, on the basis of the information made available to him before that time, to be aware of the deficiency in the return at the time the enquiry window closed. S 29(6) operates as a deeming provision, providing that certain information should be deemed as known to the assessing officer but is irrelevant here as it, in brief summary, includes only information which the taxpayer has provided.

15. HMRC, as is apparent from their Statement of Case, rely on both these conditions, although in law only one has to be proved in order for the assessment to be valid.

16. So far as carelessness was concerned, Dr Al Mukhtar was not cross examined on this which left the Tribunal with very little information. I asked him whether he had received his P11D from Cap Gemini in the relevant year: his reply was that he didn't remember and had not found anything.

17. We find that, because it seems unlikely that a company would send its P11D return to HMRC and not to the taxpayer, it is more likely than not that it was sent to

Dr Al Mukhtar. And Dr Al Mukhtar did not deny receiving it: he said he couldn't remember: moreover his memory has been shown not to be entirely reliable (see §39). As things posted usually arrive, so we find it more likely than not it was received by Dr Al Mukhtar even though he does not recollect it. So we find on balance the P11D was both sent to and received by Dr Al Mukhtar, and failing to enter on a tax return the information about benefits on a P11D which has been received by a taxpayer is careless.

18. Moreover, the implication of Dr Al Mukhtar's evidence was that he had assumed he no longer received the health insurance benefit because he was on long term sick leave: but this is an admission he knew he had been entitled to the benefit in prior years. And he knew he remained employed albeit on long term sick leave. We think it careless just to assume the right to the benefit came to an end because of long term leave. We find this assumption was not only careless but erroneous because the P11D shows he was still entitled to the benefit. A natural reluctance to contact his employer due to past difficulties with them would not justify Dr Al Mukhtar's failure to enquire.

19. For both these reasons we find he was careless in failing to include the medical benefit on his return.

20. So far as the entertainment benefit from Telematique was concerned, we find that he included the other benefits shown on the P11D return on his own tax return but simply omitted the one for £19. The inclusion of the other benefits showed that he had received the P11D and we can only conclude it was carelessness in making entries that led to one (albeit a very minor one) being omitted from his return. No other explanation is likely.

21. So far as the second condition is concerned, this concerns what information was available, so the question we have to consider is <u>when</u> the assessing officer had made available to him the two P11Ds provided, on the one hand, by Cap Gemini, and on the other hand, by Telematique Ltd. On this the Tribunal had no information. It had no evidence from the assessing officer and indeed it appears the presenting officer himself had only recently been able to obtain copies of the relevant P11Ds. In the absence of any information about when the assessing officer came to know about them, we must find that HMRC have failed to prove that the condition in s 29(5) was met.

22. But as only one or other of the condition in s 29(4) or the condition in 29(5) must be fulfilled, it is enough for liability that we have found Dr Al Mukhtar was careless in omitting the benefits from his return and so we uphold this assessment.

Decision 2 – TC/2014/2244 - Penalty issued 18/2/14 for £100 for late filing of Y/E 2013 self assessment return

23. Dr Al-Mukhtar accepted that his 2012/13 return was filed late. We find from the documents it was filed in April 2014, by Lowcost Accountants. On 18 February

2014 Dr Al-Mukhtar was sent a penalty notice for late filing of £100, against which he appealed.

computer generated assessment

24. His first ground of appeal was that the penalty had been computer generated without any consideration being given to whether he had a reasonable excuse for the failure. HMRC accepted that the issue of the penalty notice was automated.

25. Mr Robinson pointed out that the legislation provided for a mandatory and not discretionary penalty. The penalty was levied under Finance Act 2009, Schedule 55 which says:

> **Penalty for failure to make returns etc**
>
> **1** (1) A penalty is payable by a person ("P") where P fails to make or deliver a return…on or before the filing date.
>
> **…**
>
> (3) P is liable to a penalty under this paragraph of £100

26. In contrast to the daily penalties for late filing, a taxpayer is liable to this penalty irrespective of any action taken by HMRC. A case is proceeding to the Court of Appeal in respect of daily penalties where, the Tribunal believes, one of the issues is, whether a computer program can take the 'decision' where liability to a penalty depends on a decision by HMRC: *HMRC v Donaldson* A3/2015/0266. For the £100 late filing penalty, however, liability does not depend on any decision by HMRC. Whatever the Court of Appeal decides in *Donaldson* on this cannot have any impact on this case where it is clear that liability does not depend on a discretion held by HMRC.

27. While paragraph 23 provides that, despite the terms of paragraph 1, there is no liability to a penalty "if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure" that again does not import an element of discretion. The taxpayer either is, or isn't, liable to a penalty irrespective of any action by HMRC.

28. We therefore dismiss this ground of appeal

Reasonable excuse

29. His second ground of appeal was that he had a reasonable excuse because he had relied on his accountants and they had let him down.

30. There are two aspects to this: the legal one of whether reliance on a third party is a reasonable excuse and secondly, if it is, whether in fact there had been reasonable reliance which had led to the default.

The law on reliance on a third party

31. So far as the law is concerned, public policy would normally have been against reliance on a third party as amounting to a reasonable excuse. If Parliament has seen fit to impose a liability on a person (such as liability on a taxpayer to submit a return) it would, in our view, normally be assumed that a person was not intended to be able to avoid that liability by handing it on to someone else. Moreover, were a person to be able to escape liability in this way, the law would be favouring those who can afford to employ an agent over those who cannot. It means a person who can afford an agent escapes liability for the agent's carelessness, but the same act of careless committed by someone who cannot afford an agent is punished. It also provides no incentive on the liable person to employ someone who is not likely to let them down.

32. However, while tax law has historically often specifically provided that reliance on another person cannot amount to a reasonable excuse, in respect of the penalty which applies in this case, Parliament has chosen to apply a different policy. Paragraph 23 of Schedule 55 provides:

> "where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure"

The unavoidable conclusion is that Parliament has here decided that reliance on a third party *is* a reasonable excuse as long as the taxpayer took reasonable care to avoid the failure. So we need to consider whether as a matter of fact (a) Dr Al-Mukhtar did rely on a third party to fulfil his obligation to file his return on time; (b) and if so, whether Dr Al-Mukhtar did take reasonable care to avoid the failure.

Our factual findings on reliance on his accountants

33. Dr Al-Mukhtar said his accountants, ClearSky, let him down. His evidence on how ClearSky had let him down was, however, very vague. He said he had papers which showed this, but had left them at home. He chose not, despite the opportunity, to apply for an adjournment so that the papers could be admitted. In this he was probably wise: he had clearly been aware of the need to disclose all relevant documents before the hearing as he had disclosed and insisted on being part of the bundle of documents an amount of material running to 8 ring binders. We decide the case on the material in front of us.

34. We accept that ClearSky did act for him at some point in 2013 and were clearly employed in connection with his return. HMRC pointed to a record of a phone conversation between ClearSky and the HMRC helpline, initiated by ClearSky. This conversation took place on 9 October 2013 and concerned the taxpayer's return: the clear implication is that a return had already been filed but was missing information in box 7 and 8 and was therefore incomplete.

35. We were given no information about why there was a failure to rectify this: it seems another return completed by different accountants was filed in April 2014. Dr Al-Mukhtar's case was simply that ClearSky had all the relevant information to file the return on time but had failed to do so. He said no more on it than that.

36. Dr Al-Mukhtar also blamed ClearSky for a failure to submit Telematique Ltd's return to Companies House on time for which the company was fined £150. The return was due in February 2014 but not filed until March 2014. This failure was therefore after the due date for the tax return so ClearSky's (alleged) failings here were too late to alert Dr Al-Mukhtar to the (alleged) problem with ClearSky.

37. What he did address us on was what he saw as a failure of government in the UK in that (he said) accountants were not regulated. While of course it is true in he UK that a person can provide accountancy services without belonging to a professional body, we do not understand how that relates to Dr Al-Mukhtar's claim that it was ClearSky's fault his return was filed late. He did not give us a clear answer to the question of whether or not ClearSky was regulated by a professional body. He said that their headed paper had indicated that they were regulated but then said none of the professional accountancy bodies would accept any duty to regulate ClearSky: he failed to make it clear whether ClearSky were claiming to be regulated when they were not, or that they were regulated and their regulatory body considered that they had done nothing which required the intervention of their regulatory body. (Even if Dr Al-Mukhtar was right to say ClearSky were negligent, negligence by itself is not normally a regulatory issue. Redress for clients lies in a court claim for damages.)

38. All we can really take from this is that ClearSky either were regulated or were claiming to be regulated, and so Dr Al-Mukhtar's decision to instruct them can not be criticised (and indeed it might well be reasonable in some cases to instruct accountants who were not regulated). But that does not answer the question of whether ClearSky were responsible for the late filing. Do we accept Dr Al-Mukhtar's statement that ClearSky had all the necessary information to file the return on time but failed to do so?

39. We did not find Dr Al-Mukhtar to be a particularly reliable witness. On one occasion in the hearing he made a statement which was shown on the documents to be incorrect. That was when he said that the first time he knew that HMRC had written to Cap Gemini (see §9) was when he read about it in HMRC's statement of case in that appeal. However, there was a letter in the documents which showed he was sent a copy of HMRC's letter in September 2013, shortly after he was assessed. When asked to comment on this, Dr Al-Mukhtar agreed he was mistaken and apologised. It was also apparent that he had made a statement which he ought to have known was untrue and which was actually misleading to an HMRC officer: see discussion below at §86-87.

40. In conclusion, Dr Al-Mukhtar's recollection of events was shown to be flawed. Moreover, his evidence about ClearSky was, as we have said, very vague and unsupported. Moreover, he told us that he returned to Iraq after his divorce in about 2010 and since then had arrangements whereby his post was only collected and delivered to him once every three months. So it appears Dr Al-Mukhtar's arrangements to deal with his UK business post were such that matters could not be dealt with at all expeditiously, and it is clear time was not of the essence to him. Overall, we cannot accept his bare statement that it was ClearSky's fault and so we do not accept he has proved that the late filing was the fault of ClearSky.

41. We reject his case that he had a reasonable excuse for the late filing.

Special circumstances

42. The penalty was imposed by a computer: Dr Al–Mukhtar did not ask for a review. HMRC therefore never had the opportunity to consider whether the penalty should be reduced for special circumstances. In such a case, under paragraph 22 of Schedule 55, the Tribunal can consider whether there should be a special reduction under paragraph 16 because HMRC did not consider this. But we know of no reason why there should be such a reduction.

43. We note that, although it was not drawn to our attention in the hearing, it seems from HMRC's calculation that Dr Al Mukhtar was actually owed a repayment of tax for year ended 2013. However, whereas the penalty for late filing was once capped at the amount of tax unpaid at the date of filing, that cap was removed by Parliament before 2013. It therefore seems to us that as a matter of policy even where the amount of tax outstanding at the due date of filing is nil, it is not a reason to give a special reduction.

44. Nothing else said by the appellant in his combined witness statement and submissions document nor orally at the hearing in our view would justify a special reduction. We are aware that he considers both that HMRC are incompetent (he suggests the UK tax gathering should be outsourced to the IRS) and also have some sort of vendetta against him and (in his view) issue him with far too many penalties. In our view, this was a penalty generated by a computer because the taxpayer met the criteria: he had filed his tax return late, as he accepts. There is nothing in that that would justify a special reduction.

45. We dismiss the appeal against the £100 penalty

Decision 3 – TC/2013/6895 – decision disallowing £4,385.47 claimed as input tax

46. It was not in dispute that in period 08/13 Telematique Ltd had claimed as input tax in its VAT return the VAT charged on the following invoices:

Invoice(s) from	**Addressee**	Description of services	Number and dates
Item 1 C R Child (estate agents)	Worthington's solicitors	Introducing purchase of The Sandlings	1 invoice dated 22/2/13
Item 2 Worthington's solicitors	Blank	Professional charges for advising you in respect of your matrimonial affairs	6 invoices dated from 11/8/10 to 22/3/12
Item 3 Worthington's	Blank	Professional charges re sale of	1 invoice dated 25/2/13

solicitors		The Sandlings	
Item 4 Worthington's solicitors	Unknown – invoice not provided to HMRC	Unknown	1 invoice dated 19/4/12
Item 5 Stour Chambers	Ditto	Ditto	1 invoice dated 1/1/12

The total VAT on these 10 invoices was £4,338.29. The discrepancy with the disallowed figure of £4,385.47 was not explained to us.

47. S 25(2) of the Value Added Tax Act provides that a taxable person is entitled to

> "credit for so much of his input tax as is allowable under section 26".

S 24 defines input tax as:

> " 'input tax', in relation to a taxable person means …
>
> (a) VAT on the supply to him of any goods or services
>
> (b) [irrelevant – deals with invoices from other member states]
>
> (c) [irrelevant – deals with importations from outside the EU]
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

S 26 requires the input tax to be attributable to taxable supplies made by the taxable person.

48. Moreover, the VAT Regulations 1995/2518 Reg 29(2) require that a person who makes a claim for recovery of input tax on a supply by a UK-registered person must hold a VAT invoice.

49. In other words, for a VAT registered person to recover VAT on an invoice, the invoice must be for supplies made to that taxable person, which are then used by that taxable person in making taxable supplies. And he must actually possess the invoice when making the claim.

50. Was the company entitled to reclaim the VAT on any of these invoices? We taken them in turn.

51. Item 1: In so far as the first item on the above table is concerned, the addressee of the invoice was not the appellant. The supply of the services do not therefore appear to meet the requirement of S24(1)(a) of being "to" the appellant. Even if the invoice was misaddressed by C R Childs, which is possible, it would then be an invalid invoice under Regulation 13 which requires it to specify the recipient of the services. The company would then fail to meet the requirements of Reg 29(2) of holding a valid invoice. And even though HMRC could accept alternative evidence in lieu of a valid invoice, the tenor of Dr Al-Mukhtar's evidence was that he accepted that the services were rendered for the sale of The Sandlings, which was the

matrimonial home owned by Dr Al-Mukhtar. He was obliged to sell it by court order following his divorce.

52. Fundamentally, in other words, irrespective of the validity of the invoice itself, it seems the services of C R Childs were neither rendered "to" the appellant company nor were they "used" by the appellant company, and certainly were not "attributable" to any supplies made by the appellant company.

53. Dr Al-Mukhtar did not agree. He gave a number of reasons for saying that the VAT on the invoice could be recovered by Telematique Ltd.

54. Firstly, he said, The Sandlings was used as the registered office of Telematique Ltd and he worked from home. We reject this reason. Even if the appellant company had some kind of property interest in The Sandlings, such as a licence to occupy a part of it, that interest was not what was being sold. What was sold was the freehold and that freehold was owned by Dr Al-Mukhtar. The estate agent provided no service to Telematique.

55. Secondly, he said that he was the company's sole director and shareholder, implying that services rendered to him personally were therefore some how services rendered to the company for its business. We reject this submission. The director's personal expenses, such as legal fees relating to matrimonial affairs and sale of a dwelling house, were not incurred by the company and were certainly not incurred for the purpose of the company's business.

56. Thirdly, he then went on to suggest that because Worthingtons also acted as solicitors to the company, the company was entitled to recover the VAT on any of their invoices, whether or not for services rendered to the company. This is obviously quite wrong.

57. The last reason he gave was more convoluted. Dr Al-Mukhtar was aggrieved by his divorce and considered that his in-laws had slandered him during the course of it. As sole director of Telematique he considered his reputation was important to the company and consulted solicitors (SRS) over whether the company could sue his in-laws for defamation. He considered that this "project", to which he gave the name "Project Hattin", made his divorce the business of the company, so that the costs of the divorce were properly the company's costs, including the costs of the estate agents in selling the matrimonial home.

58. This is, of course, also quite wrong. Putting aside the question of whether the costs of "project Hattin" were properly costs of the business of Telematique, the sale of the matrimonial home and the cost of the divorce was not a cost of the project. The services were certainly not used by Telematique at all and certainly not in the course of its business either in making supplies or as in overheads of the business.

59. The company should not have reclaimed the VAT on this invoice.

60. Item 2: These six invoices are all invalid as they do not contain an addressee. HMRC could of course accept alternative evience in lieu of the invoice but here it is

clear that the addressee ought to have been Dr Al-Mukhtar as the services were in respect of his divorce.

61. Dr Al-Mukhtar claimed, as mentioned above, that they were expenses of the business as his divorce had become the business of the company when he decided to take legal advice on whether the company could sue his in-laws. We have rejected this argument as fundamentally flawed. His divorce was not a business expense: the services were not attributable to any supply made by the business.

62. The company was not entitled to recover the VAT on these invoices.

63. Item 3: Again, this was an invalid invoice as there was no addressee. But that is not the real problem: the real problem is that the servicees were quite clearly supplied to Dr Al-Mukhtar in his private capacity as owner of The Sandlings. They were not supplied to Telematique Ltd, they were not used by Telematique in its business, and they were not attributable to any supply made by Telematique Ltd.

64. The company was not entitled to recover the VAT on this invoice.

65. Item 4: No invoice was provided and this, as mentioned above, prevents a claim for recovery of input tax. While HMRC have a discretion to accept alternative evidence, the appellant has provided no explanation of this invoice. It seems more likely than not that it was a supply in connection with his divorce and/or private property sale and unrelated to Telematique's business.

66. The company was not entitled to recover the VAT on this invoice.

67. Item 5: No invoice was provided and this, as mentioned above, prevents a claim for recovery of input tax. While HMRC have a discretion to accept alternative evidence, the appellant has provided no explanation of this invoice.

68. The company was not entitled to recover the VAT on this invoice.

In summary, HMRC were right to disallow all these invoices. There is, we have noted, a slight discrepancy in the figures. We disallow the total of these invoices which is £ 4,338.29.

Decision 4 – TC/2014/2287 – Penalty for VAT misdeclaration

69. HMRC decided to impose a penalty on Telematique for its above VAT misdeclaration, of £2,071.91 being calculated as 47.25% of the potential lost revenue (calculated as being £4,385.47). Before the hearing this was reduced to £887.96, being 20.25% of the potential lost revenue: the reduction was because HMRC no longer regarded the behaviour of Telematique (by its director Dr Al-Mukhtar) as 'deliberate' but merely as careless. As HMRC no longer allege that the behaviour was deliberate, we do not consider whether it was. We consider only whether it was careless.

70. The penalty was imposed under Schedule 24 of Finance Act 2007. We are satisfied that the taxpayer provided HMRC with a document (the VAT return in question) which contained an inaccuracy in that it had an inflated claim to repayment of VAT. This follows because we have dismissed the appellant's case that there was no misdeclaration: there was a glaring misdeclaration. The company recovered VAT on invoices it did not possess, it recovered VAT on invoices which were not addressed to it, and in circumstances where it was clear that the services had been rendered to the director in his private capacity. It was not entitled to reclaim the VAT on the £4338.29.

71. A penalty is payable if the above misdeclaration was 'careless' (paragraph 1(3) of Schedule 24) as defined in paragraph 3. In paragraph 3, 'careless' is defined as the 'failure by [the taxpayer] to take reasonable care'.

72. Dr Al-Mukhtar denied that the company's behaviour (really, his own) was careless. He did not accept that his company had made a misdeclaration so he did not accept that in reclaiming the VAT as set out above the company (acting by him) had acted carelessly.

73. What does 'careless' mean? We consider that it imports an objective standard. The question is not whether Dr Al-Mukhtar genuinely thought that the company was entitled to recover the VAT but whether it was reasonable for him to think that the company was entitled to recover the VAT.

74. We consider that it was not reasonable. No right thinking person could reasonably believe that a VAT registered person could recover VAT on invoices (a) addressed to someone else and (b) related to the sale of the director's private home or the director's divorce, both clearly private non-business matters. Similarly, no right thinking person could reasonably believe that it was entitled to recover VAT on invoices which it could not produce and the explanation for which appeared to be that they related to the director's private non-business affairs.

Legality of issue of penalty

75. Dr Al-Mukhtar's defence is that levying the penalty broke the law: at the time the penalty was levied a tribunal had not determined whether or not the company had actually made a misdeclaration. He was treated as guilty (he implied), before a court had determined the matter.

76. In this Dr Al-Mukhtar is mistaken. HMRC is entitled to levy a penalty if <u>in HMRC's view</u> the taxpayer is liable to the penalty. Whether the taxpayer is actually liable to the tax and/or penalty is something that can be tried in the Tribunal, but HMRC's entitlement to levy a penalty does not depend on a Tribunal determination of the taxpayer's liability to the tax.

77. It would be most unfortunate for HMRC and taxpayers if this were not the case in that it would mean two hearings instead of one (as the trial of the liability to tax would be split from the trial of liability to the penalty) even though both hearings

would cover virtually the same evidence; it would also inordinately lengthen the dispute with HMRC and the cost of it. But it is the law that a penalty can be levied even if the taxpayer disputes liability to the tax. Indeed, as HMRC pointed out, they are subject to criticism and possible judicial review if they delay making a decision on levying a penalty until after the tax liability is resolved.

78. We dismiss this ground of appeal.

The amount of the penalty

79. The maximum penalty for a careless inaccuracy is 30% of the potential lost revenue (paragraph 4(1) of Schedule 24). The minimum is 15% because there was no unprompted disclosure by the taxpayer: in other words, the taxpayer did not tell HMRC about the inaccuracy. It was discovered by HMRC (paragraphs 9 & 10 of Schedule 24).

80. HMRC have mitigated the penalty from 30% to 20.25% to reflect the taxpayer's cooperation in the enquiry. We were not addressed in the hearing on whether this percentage should be varied. Having heard the evidence we do not think it should be varied: the appellant has never accepted that he was not entitled to reclaim VAT on private expenses and his cooperation with HMRC has never been complete. Mitigation of nearly 10% of a possible mitigation of 15% seems right.

81. We do, however, vary the penalty to reflect our calculation that the potential lost revenue was only £4,338.29. The penalty is therefore reduced to £878.50.

suspension of penalty

82. It does not appear that HMRC considered whether to suspend the penalty: this was probably because suspension is only available for penalties for careless inaccuracies and HMRC had considered the appellant's behaviour deliberate until shortly before the hearing. However, HMRC's failure to consider the matter means that the Tribunal has discretion to consider whether suspension would be appropriate (see paragraph 17(4)). However, suspension is only permitted under paragraph 14 where compliance with a condition of suspension would avoid the appellant becoming liable to further penalties. We do not consider that there are any conditions of suspension which we could impose which would avoid the appellant becoming liable to further penalties.

83. We do not suspend the penalty. In conclusion, the penalty is upheld in the slightly reduced amount of £878.50.

Decision 5 – TC/2014/2345 – second P11D late filing penalty for year ended 2013

84. We find, as it was not in dispute, that the taxpayer failed to make a P11D return by 6 July 2013. Penalties are £100 per month of the failure, so when the penalty was imposed in March 2014 it was for £400 (November 2013 to March 2014).

Telephone conversation with HMRC helpdesk

85. In April 2014 the appellant had a phone conversation with an HMRC officer manning the HMRC helpdesk. Dr Al-Mukhtar recorded that conversation: whether it was legal for him to do so without informing the other party was not discussed. HMRC accept the appellant's recording of it as genuine, and the Tribunal had the benefit of the agreed transcript.

86. In the conversation, Dr Al-Mukhtar asked to close down the company's PAYE record at HMRC on the basis that the company had no employees. He was asked when the company ceased to have employees. His answer was that:

> "we've never had any employees"

87. In the hearing, however, he accepted that his ex-wife had been an employee up to the time of the divorce in 2010. Moreover, he also accepted that his tax return for 12/13, which was before the Tribunal over the late filing penalty as above, recorded Telematique as his employer (although it recorded no payments). Further, the Tribunal decision for appeal TC/2014/323 found that the appellant had received a loan from his employer and was required to make a return of this. Moreover, the Tribunal also had his return for 09/10 (in connection with the under-assessment the subject of 'Decision 1) and that showed Telematique as an employer, including making various payments to Dr Al Mukhtar. Indeed, the failure to include one element of the benefits provided by Telematique was a small part of the assessment the subject of Decision 1.

88. So the statement that Telematique had never had any employees was, we find, quite wrong. However, on the strength of this incorrect statement by Dr Al-Mukhtar, the HMRC officer said that he would close the PAYE record and backdate the closure for three years.

89. This telephone note (dated April 2014) also records that HMRC's own records showed that 'about a year ago' (so about April 2013) HMRC had been told that (at least for that year) the company had no employees.

90. On production of this note, HMRC accepted that they had been told that Telematique had no employees and that they ought to have ceased to require P11D returns going forward, as in fact (they accept) Telematique did cease to have employees. In practice, the HMRC officer who received this call did not action it and Telematique continued to receive demands for PAYE returns and penalties for failure to make the returns. HMRC therefore said they would withdraw the penalties for 2014 and 2015. These were the subject of appeals TC/2014/6671 and TC/2015/6589, which have been allowed by the Tribunal (see §3).

91. HMRC refused to cancel any penalties for failure to submit returns prior to the date of the telephone call. Although Dr Al-Mukhtar's case was that HMRC had agreed to retrospectively cancel the company's PAYE account, HMRC's view was that this promise by HMRC had been obtained by a materially incorrect statement by Dr Al-Mukhtar, as recorded above.

92. What about the phone call which took place in about April 2013? If this related to the tax year 2012/13, the statement that the company had no employees was an incorrect statement as it is clear Dr Al-Mukhtar was an employee in that year. If it related to tax year 2013/14, it is irrelevant to this appeal which relates to a return due for 2012/13.

Can the appellant rely on HMRC's agreement to backdate the cancellation?

93. A recent ruling from the Court of Appeal in the case of *The Trustees of the BT Pension Scheme* [2015] EWCA Civ 713 establishes that taxpayers cannot rely on extra statutory concessions in this Tribunal at least in cases not involving the VAT Act: The Court of Appeal said that a complaint by the taxpayer

> 'that they have been unfairly denied the benefit of the concession…then this is a public law challenge to the application of [the ESC] which should have been brought by way of judicial review because the sole ground of complaint is that they have been denied the benefit of a concession…"

It logically follows that any reliance on legitimate expectations arising out of a refusal by HMRC to abide by what they have said is not justiciable in this Tribunal, at least in a direct tax context.

94. However, even if the law was that an appellant could rely on legitimate expectations arising out of HMRC statements and promises, it is irrelevant on the facts of this case as the appellant clearly had no legitimate expectation: the HMRC officer's promise to backdate the cancellation of PAYE liability was obtained by a misstatement made on behalf of the appellant. It does not matter whether the misstatement was intentional or made with good intentions, as Dr Al-Mukhtar says it was: HMRC can not be held to a promise obtained on the basis of wrong information. The statement in 2013 that the company had no employees, as we have said, if it was made in respect of 2012/13 was also wrong, and if in respect of 2013/14 was irrelevant to this appeal.

95. So the appellant cannot on these facts rely on HMRC's agreement to backdate the cancellation. It was liable to make the returns by the due date and it failed to do so. It is liable to the penalty unless it can show a reasonable excuse.

Reasonable excuse?

96. So far as the telephone call made in April 2014 and the one made approximately a year earlier we do not consider that they establish that the company had a reasonable excuse.

97. While reliance on what an HMRC officer promised would normally be a reasonable excuse, firstly the promise would have to cause the default, and secondly, the promise should have been fairly obtained.

98. In this case the second promise was obtained after a misstatement and the first (if it related to the year in question) must have been obtained after a misstatement. The appellant ought to have known whether it had any employees so at best the misstatements were careless. And a careless misstatement which led to the officer agreeing to do something that it seems likely he would not have agreed to do had he known that Telamatique had had employees, and still had an employee cannot found a reasonable excuse.

99. We are unable to find that he had a reasonable excuse for the default.

Penalty exceeds NI liability?

100. The penalty cannot exceed the NI liability. But as the returns have never been filed, we cannot establish what the NI liability was and so we have not been satisfied that the penalty exceeds the NI liability.

101. We therefore dismiss the appeal.

Conclusion on all appeals

Appeals of Telematique Ltd:		
TC/2013/6895	Decision dated 7/10/13 disallowing £4,385.47 claimed as input tax	Appeal dismissed save that amount of assessment slightly reduced to £4,338.29.
TC/2014/2287	Penalty dated 26/2/14 reduced to £887.96 for above alleged misdeclaration	Appeal dismissed save that amount of penalty slightly reduced to £878.50.
TC/2014/2345	Second PAYE late filing penalty issued 10/3/14 for YE 2013 - £400	Appeal dismissed.
TC/2014/6671	PAYE late filing penalty for YE 2014 - £400	Penalties cancelled November 2015 -appeal allowed
TC/2015/6589	First and second PAYE late filing penalty for YE 2015 - £800	Penalties cancelled November 2015 -appeal allowed

Appeals of Dr Al-Mukhtar		
TC/2013/6894	Assessment dated 1/8/13 for £496.30 for	Appeal dismissed

	alleged underdeclaration on SA return	
TC/2014/2244	Penalty issued 18/2/14 for £100 for late filing of Y/E 2013 SA return	Appeal dismissed

102. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 18 JANUARY 2016