Neutral Citation: **[2026] UKUT 00021 (TCC)**

Case Number: UT-2024-000005

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 26-28 March 2025
Further submissions: 18 November 2025
Judgment date: 19 January 2026

PENALTIES – Schedule 24 Finance Act 2007 – Employee Benefit Trust ('EBT') – EBT contributions made via service provider – allocations to sub-trusts for loans to be advanced to directors – Scheme ineffective to avoid income tax and national insurance on contributions into sub-trusts following Rangers – inaccuracies in returns for omission of PAYE and NICs on loans made via the sub-trusts – whether inaccuracies 'careless'– whether inaccuracy caused by carelessness – whether inaccuracy in relation to the last tranche 'deliberate'

Before

MR JUSTICE MARCUS SMITH
JUDGE GUY BRANNAN

Between

DELPHI DERIVATIVES LIMITED
(in Members' Voluntary Liquidation)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Sherry and Ximena Montes Manzano, Counsel, instructed by Reynolds Porter Chamberlain LLP

For the Respondents: Sadiya Choudhury KC and Matthew Bignell, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

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DECISION

INTRODUCTION

1. This appeal concerns two types of penalties assessed under Schedule 24 of the Finance Act 2007 ("FA 2007"). The first penalty of £525,484.99 involves alleged "careless inaccuracy" in P35 returns[1] for the tax year ended 5 April 2009 and the second penalty of £1,046,775.17 concerns alleged "deliberate inaccuracy" in the same returns for the tax year ended 5 April 2010. The penalties are the result of a failed tax avoidance scheme involving use by the Appellant ("Delphi") of an employee benefit trust ("EBT").

[1] A P35 return is used by an employer to account for deductions of PAYE and national insurance from employees at the end of each tax year

2. By a decision dated 18 August 2023 ("the Decision") the First-tier Tribunal ("FTT") dismissed Delphi's appeal against the penalties.

3. On 21 December 2023, the FTT refused permission to appeal on Grounds 1, 3, 4, 7 and 8(a), but granted permission to appeal on Grounds 2, 5, 6 and 8(b). Subsequently, this Tribunal granted permission on Grounds 1, 3, 4, 7, 8(a) and 9.

4. In the course of the hearing before this Tribunal, it became clear that one of the leading authorities in relation to the causation test relevant to the "careless inaccuracy" penalty, *Mainpay Ltd v HMRC* [2024] UKUT 233 (TCC) ("*Mainpay UT*"), had been appealed to the Court of Appeal and that the hearing of that appeal was due to be heard in late July 2025. In the circumstances and after receiving submissions on the point, we informed the parties that we would postpone issuing our decision until the Court of Appeal had delivered judgment in *Mainpay* and that we would then invite further submissions from the parties in relation to that judgment.

5. The Court of Appeal delivered its judgment in *Mainpay* ([2025] EWCA Civ 1290) ("*Mainpay CA*") on 10 October 2025 and we received and have considered written submissions from the parties filed on 18 November 2025.

FACTUAL BACKGROUND

6. Delphi used a tax avoidance scheme ("the Scheme") which was devised and marketed by Clavis Tax Solutions Ltd ("Clavis"). Schedule 24 to the Finance Act 2003 and, subsequently, section 1290 of the Corporation Tax Act 2009 denied a deduction for corporation tax purposes for contributions by an employer company to an EBT until the contributions were applied to benefit an employee. When the contributions were so applied income tax under PAYE and national insurance contributions ("NICs") became payable in respect of those contributions.

7. The Scheme's objective was to allow employees to receive tax-free remuneration via the use of an offshore EBT whilst Delphi, the employer, obtained an immediate corporation tax deduction for the contribution to the EBT and the fees for the use of the Scheme. The deduction would be obtained under section 1290(4) of the Corporation Tax Act 2009 which provided an exception from the prohibition against deductibility where something was "given as consideration for services provided in the course of the trade or profession…". In other words, the Scheme sought to achieve the best of both worlds – a tax-free receipt for the employees free from any deduction of PAYE and NICs by Delphi and an immediate corporation tax deduction for Delphi, the employer.

8. It has subsequently been held that the Scheme used by Delphi does not (and so did not) work. In *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 ("*Rangers*") the Supreme Court upheld HMRC's view that the sums paid to the EBT were liable to PAYE and NICs. We explain the case-law on this subject later in this decision.

9. In Delphi's case, the Scheme involved a Jersey human resources company called Herald Employment and Recruitment Services Ltd ("Herald"). Herald would offer Delphi a service in the form of a review for the purpose of making recommendations as to how employees, such as the company's directors, ought to be rewarded and incentivised. Herald outsourced that service to Herald Employment Services LLP ("the LLP"), a UK limited liability partnership whose members included Clavis's directors. The findings of that review

would then form the basis for the recommendations made by Herald in a report, which would set out various methods of reward but would invariably recommend that rewards be provided by Delphi settling an amount, equal to that which the review had found would reward and incentivise the directors, into an offshore EBT from which the directors of Delphi could benefit. The trustee of the EBT was Herald Trustees Ltd, whose directors were the same as Herald's directors.

10. Herald would send an invoice at the same time as its report for an amount that included its fees for implementing the recommendation and the sum it had recommended should be made available to the employees. Delphi would then pay the invoice to Herald. Herald would then deduct its fees (approximately 10%) from this amount and the balance would be settled on the EBT in Delphi's name. A sub-trust would then be set up for each employee who was to benefit from the arrangements to which a share of the total sum settled would be allocated. The funds in each sub-trust would then be used to benefit the respective employee, for example, by making loans. Delphi would later claim a corporation tax deduction for the payment it made under the invoice on the basis that it constituted Herald's fees and thus fell within the section 1290(4) exemption.

11. Delphi's main business was the broking and trading of futures and options on the London Metal Exchange. At all material times, Mr Mark Langran was the managing director and the majority shareholder. There were two other directors, Mr James Kelland and Mr Bruce Martin. The Scheme was recommended by Mr Kelland's financial adviser who introduced him to an accountant who was marketing the Scheme. Mr Langran and Mr Kelland attended a presentation on 17 July 2008 in respect of the Scheme.

12. Before entering into the Scheme, Delphi instructed its accountant, Mr Peter Tucker of Dickinsons Chartered Accountants ("Dickinsons"), to review the Scheme on its behalf. Mr Tucker had previously been instructed to evaluate tax planning arrangements for Delphi on two previous occasions and on both occasions he rejected the proposed arrangements as being not technically sound. Delphi had followed Mr Tucker's advice and did not proceed with either of those schemes.

13. Mr Tucker was asked by Clavis to sign non-disclosure and confidentiality agreements.

14. Mr Tucker had two meetings with Mr David Cowen of Clavis. The first meeting was on 31 July 2008 and followed a half-hour telephone call between Mr Tucker and Mr Langran and Mr Kelland. Secondly, on 4 August 2008, Mr Tucker met representatives of Clavis in Jersey. Mr Tucker was given sight of tax opinions of Mr Andrew Thornhill QC, a tax barrister instructed by Clavis, on the proposed Scheme. There were several subsequent meetings between Mr Tucker and Clavis' representatives between 4 and 7 August 2008 and Mr Tucker was provided with copies of the draft documentation used for the Scheme.

15. On 7 August 2008, Mr Tucker wrote to Delphi ("the Tucker Letter") reviewing the Scheme and outlining its strengths and weaknesses. This was an important document and featured heavily in both sides' submissions in this appeal. The FTT described the Tucker Letter at Decision/[41]-[44]. For present purposes we can quote parts of Decision/[43]:

> "(4) Paragraph 4 summarises the Scheme in the following terms:
>
> 'The planning has the merit of simplicity and uses an exemption within the anti-avoidance rules which were brought in to counter the use of Employment Benefit Trusts (EBT's). Whilst the direct use of an EBT by paying money into such an entity will not succeed in obtaining a Corporation

Tax deduction, the use of the payment by way of sub-contracted services appears to circumvent the rules. This is the opinion of Andrew Thornhill a well respected QC at Pump Court Tax Chambers.'

…

(7) Paragraph 7 is a cost-benefit analysis, pitching the costs of entering the Scheme against the anticipated tax savings:

'The projections of tax saving based upon a profit of say £1,000,000 as prepared by Clavis do give a substantial tax saving of approximately 35% in year one but is should be noted that ongoing costs of £1500 to £2000 will be incurred per annum in each subtrust and will continue as long as the structure is required. Broadly this will be at least until the cessation of employment with the principal company and may be for 10 to 20 years or longer. I can explain the impact of that if required.'

…

(9) Paragraph 9 identifies 'possible areas of risk' as follows:

'There are a number of possible areas of risk: –

1) The possible introduction of retrospective legislation.

2) A possible attack on the principal shareholder under the Inheritance Tax legislation – I have seen that line of attack used on EBT's in a way which has caused the breakdown of such arrangements.

3) The use of this scheme might be blocked at the time of the Pre-Budget report which may be in October 2008 if not sooner. This would mean that any planning would have to be implemented before then. I understand that total planning through these arrangements may be approaching £100,000,000.

4) Should the Corporation tax planning fail but the "income tax" side of the planning prove successful, the result would not be completely fatal but would make the savings only marginal.

5) The VAT status of a company using these arrangements is most important. The company must be able to fully recover all VAT as the payment made to the Human Resources company will be within the reverse charge mechanism.'

(10) Paragraph 10 recommended obtaining a second opinion:

> 'My normal and usual advice for any such scheme would be to ask that another Counsel Opinion from a barrister other than the original one is obtained if the Promoters of the arrangements are prepared to permit this.'

(11) Paragraph 11 contains the caveat that the Scheme is open to challenge from HMRC:

> 'Whilst the scheme seems to be most effective any aggressive tax planning will always be open to attack from HMRC and their current policy is to litigate everything. Enquiries have been raised into the computations of companies which have utilised these arrangements but I understand that HMRC are just at the collection of information stage.'

(12) Paragraph 12 relates the promoters' agreement to fund the first stage of litigation:

> ‘The promoters undertake to fund the scheme to the first stage of any appeal process which would be to the new style Tax Tribunal form [*sic*] October 2008. If the tax payer won at the first stage, the promoters have not agreed to fund the matter to higher courts and the cost of such a case at the High Court or Court of Appeal is very expensive. If HMRC took the matter to the higher courts, that is a possible cost which you might have to bear. In other schemes, promoters have created a fighting fund which would allow the costs to be covered if the case went all the way through the appeal system.’
>
> (13) Paragraph 13 assesses the chance of success in litigation and reiterates recommendation for advice from independent tax counsel:
>
> ‘This scheme appears to have a stronger chance of success than many more convoluted schemes but considering the amount you may wish to place in these arrangements I would recommend that the matter be put before independent Tax Counsel.’
>
> (14) Paragraph 14 is the final paragraph with conclusions and a disclaimer:
>
> ‘I can not [original as two words] formally recommend such a scheme to you as there is certainly a risk in entering such arrangements. Should you wish to proceed having taken a commercial view, I would assist to try to ensure that the arrangements are properly implemented. Dickinsons will not be held responsible should you incur losses by entering into these arrangements.’”

16. Delphi’s directors did not obtain advice from independent tax counsel. They proceeded with the Scheme and put four tranches of payments through it as described by the FTT at Decision/[51]:

> “After Tucker’s review letter of 7 August 2008, there were further discussions between Tucker and Delphi’s directors and with representatives of Clavis. In terms of documentary records, the following events took place that led to Delphi’s entering the Scheme. Delphi used the Scheme in the years 2008-09 and 2009-10 by making four tranches of payments to Herald.
>
> (1) On 21 August 2008, Delphi’s board of directors held a meeting at which they agreed to set up an employment committee with responsibility for [Delphi]’s strategy for the establishment of an incentive, reward and retention arrangement for the benefit of its employees. On the same day, [Delphi] sent a letter to Herald asking for details of the services they provided to which Herald responded on 28 August 2008.
>
> (2) On 1 September 2008, [Delphi] entered into an outsourcing arrangement with Herald under which Herald agreed to provide certain services specified in Schedule 1 to that agreement, which included:
>
> (i) the evaluation of the duties of the employees specified by [Delphi];
>
> (ii) conducting interviews with the employees and [Delphi];
>
> (iii) production of a report to [Delphi] recommending the types of benefits to be provided and their approximate costs;
>
> (iv) a proposal for an overall fee which should cover the 16 benefits to be provided to the employees as well as Herald’s costs, and

(v) the implementation of the agreed proposals."

17. Arrangements for the first tranche commenced on 2 September 2008 when Mr Cowen and Ms Sally Fuller, as representatives of the LLP (both of whom were also Clavis employees) attended Delphi's premises and met its directors. Following this meeting, Herald prepared a report dated 30 September 2008 which included an evaluation of all three Delphi directors and outlined and how they could be rewarded and incentivised. It recommended that all three of them be provided benefits by either cash bonuses or a special purpose trust and that a budget of £1.8 million be made available to reward, incentivise and retain them. Herald issued an invoice for that amount to Delphi on the same date. At a board meeting on 6 October 2008, the contents of the report were considered and Delphi's directors agreed to settle the invoice. Delphi paid £1.8 million to Herald, out of which the amount net of fees was settled on the Delphi Derivatives Ltd Settlement ("the Trust") on 7 October 2008. The beneficiaries included Delphi's directors. A proportion of the sums settled was allocated to a sub-trust for the benefit of each of the directors in accordance with the recommendations in Herald's report. The second and third tranches in November 2008 and February 2009 followed broadly similar steps as the first tranche.

18. The fourth and final tranche was entered into in November 2009. A meeting took place between Mr Cowen and Delphi's directors on 27 October 2009. According to the employee evaluation documents, there was a recommended budget of £3 million. On 31 October 2009, Mr Langran emailed Mr Cowen stating: "Have spoken to Peter Tucker and he thinks we should do £5.4 million – I imagine this is ok with you?"

19. Herald's report produced on 19 November 2009 recommended a budget of £5.4m.

20. Herald also issued an invoice for £5.4 million to Delphi on the same date. On 23 November 2009, Delphi paid £2.7 million and Mr Langran emailed Mr Cowen stating that the invoice would have to be paid in two instalments with the first instalment being loaned back to the directors. On 23 November 2009, £2,522,429 was settled on the Trust and allocated to each director's sub-trust. This sum was then loaned back to Delphi's directors and used to pay the second instalment of £2.7 million to Herald on 3 December 2009. Out of that sum, £2,523,364 was settled on the Trust on 4 December 2009 and allocated to the sub-trusts.

21. We refer to these four tranches as "Tranches 1 to 4" respectively.

22. Delphi did not account for PAYE or NICs on the amounts paid into the sub-trusts in its PAYE returns. It included the £1.8 million it had paid to Herald for Tranche 1 as a deduction in its corporation tax return for the accounting period ended 30 June 2008.

23. HMRC opened an enquiry into Delphi's corporation tax return for the accounting period ended 30 June 2008 on 15 September 2009.

24. Delphi also claimed a corporation tax deduction for the sum it had paid to Herald for Tranches 1 and 2 for the period ended 30 June 2009. HMRC opened an enquiry into Delphi's corporation tax return for that period on 12 January 2011.

25. HMRC and Delphi entered into a settlement agreement on 29 March 2017 under which Delphi agreed to pay the PAYE and employer's NICs on the amounts contributed to the Trust under the Scheme, the inheritance tax due on the collapse of the Trust and interest on unpaid PAYE/NICs. The deductions claimed for the tranches of payments to Herald in the

corporation tax returns were allowed to stand. The settlement agreement did not cover penalties.

26. The penalty assessments were issued on 23 March 2018. They were appealed to HMRC on 13 April 2018 and were upheld on review on 5 October 2018. Delphi notified its appeal against the penalties to the FTT on 30 October 2018.[2]

LEGISLATION

27. The provisions of Schedule 24 to the Finance Act 2007 insofar as they are material to this appeal are set out below.

28. Paragraph 1 provides that:

> "(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."

29. A return for the purposes of the PAYE regulations is included in the documents listed in Table 1 in para 1 of Schedule 24.

30. Paragraph 3(1) defines the degrees of culpability and provides:

> "(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."

31. Paragraph 18 concerns agency and relevantly provides that:

> "(1) P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.
>
> …
>
> (3) Despite subparagraphs (1) and (2), P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P

[2] There was some debate as to the correct date – it was either 20 or 30 October 2018.

satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2)."

32. The provisions for a corporation tax deduction for contributions into EBTs as enacted at the relevant time under s 1290 of CTA 2009 were as follows:

> 1290. Employee benefit contributions
>
> (1) This section applies if, in calculating for corporation tax purposes the profits of a company ("the employer") of a period of account, a deduction would otherwise be allowable for the period in respect of employee benefit contributions made or to be made (but see subsection (4)).
>
> (2) No deduction is allowed for the contributions for the period except so far as – (a) qualifying benefits are provided, or qualifying expenses are paid, out of the contributions during the period or within 9 months from the end of it, or (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made during the period or within 9 months from the end of it.
>
> (3) An amount disallowed under subsection (2) is allowed as a deduction for a subsequent period of account so far as – (a) qualifying benefits are provided out of the contributions before the end of the subsequent period, or (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made before the end of the subsequent period.
>
> (4) This section does not apply to any deduction that is allowable – (a) for anything given as consideration for goods or services provided in the course of a trade or profession, …'.

THE DECISION

33. The Decision is detailed and lengthy (over 70 pages) following six days of hearings. It covered a number of matters which are no longer in issue. We only deal with those parts of the Decision which are relevant to the Grounds of Appeal, and will refer to the Decision as appropriate.

GROUNDS OF APPEAL

34. The Grounds of Appeal fall into five groups which reflect the substantive nature of the challenges to the Decision. We set out the groups below:

(1) *Group 1: Carelessness.* Group 1 comprises two grounds of appeal, Ground 1 and Ground 7. By Ground 1, it was contended that the FTT's findings that Delphi has failed to take reasonable care were not findings of fact that the FTT was entitled to make on the evidence. By Ground 7, it was contended that the FTT's finding of fact at Decision/[239(3)] that Delphi did not take care to apply the correct tax treatment to the arrangements for the purposes of rendering its tax returns was one that the FTT was not entitled to make on the evidence.

(2) *Group 2: Causation.* Group 2 comprises three grounds of appeal: (i) Ground 2, which contends that the FTT wrongly held for the purposes of paragraph 3 of Schedule 24 that there need not be any causal connection between a failure to take reasonable care and the inaccuracy in issue; (ii) Ground 3, which contends that the FTT failed to articulate the required nexus between the alleged carelessness and the inaccuracy in issue; and (iii) Ground 4, which contends that the FTT took into account irrelevant

considerations when deciding that HMRC had discharged the burden of proving a causative link between the carelessness alleged and any inaccuracies in the P35 returns.

(3) *Group 3: Agency*. Group 3 comprises two grounds of appeal: (i) Ground 5, which contends that the FTT erred in law by attributing unpleaded and non-existent carelessness/deliberate conduct by Dickinsons to Delphi; and (ii) Ground 6, which contends that the FTT erred in law by holding that paragraph 18(3) of Schedule 24 required Delphi to prove that it had taken reasonable care in general and without reference to the specific inaccuracy found in the return.

(4) *Group 4: Deliberate inaccuracy*. Group 4 comprises a single ground of appeal (Ground 8), comprising two limbs: (i) Ground 8(a), which contends that in holding that Delphi delivered a P35 return containing an inaccuracy which was deliberate on Delphi's behalf, the FTT made findings of fact which were unsupported by the evidence; and (ii) Ground 8(b), which contends that the FTT applied the wrong test of deliberate inaccuracy to the facts in holding that the "inaccuracy" at paragraph 3 of Schedule 24 imposed a wide definition that applied by reference to the potential loss of revenue and not to the inaccuracy in a specific return.

(5) *Group 5: Fairness*. Ground 9 contends that the appeal hearing in the FTT was substantially unfair such that the outcome cannot stand in that the Tribunal "descended into the arena" and acted as an adversary in the proceedings and appeared to be partisan.

We consider the Grounds of Appeal in this order.

GROUP 1: CARELESSNESS (GROUND 1 AND GROUND 7)

The Decision

35. At Decision/[222], the FTT found that Delphi, in appointing Mr Tucker to review the Scheme, did not fall short of the standard of being a prudent and reasonable taxpayer, since Mr Tucker's qualification and experience was commensurate with the task he was entrusted to do. The FTT at Decision/[224] referred to the decision of this Tribunal in *HMRC v Hicks* [2020] STC 254, a decision concerning "carelessness" in the context of section 29 Taxes Management Act 1970 ("TMA") discovery assessments.

36. The FTT at Decision/[230] identified the question before it as being what a prudent and reasonable taxpayer – intent on fulfilling its obligations to render accurate returns to account for all its tax liabilities – would have done when faced with the advice as given by Mr Tucker in the Tucker Letter which, the FTT said, concluded:

> "with an unambiguous lack of endorsement of the Scheme due to the certainty of a risk in it being found to have underdeclared its tax liabilities."

37. The FTT continued:

> "231. The substance of Tucker's advice and his conclusion demands a response from a prudent and reasonable taxpayer intent on meeting its obligations to render correct returns to account for its tax liabilities – but [Delphi] did nothing in response whatsoever. It is in this regard that we conclude that [Delphi] fell short of the standard of being a prudent and reasonable taxpayer by taking no action to address the possible areas of risk

raised in Tucker's letter in order to enable itself to meet the obligations in rendering accurate and complete returns to account for all its tax liabilities.

232. Whilst one obvious action to take by a prudent and reasonable taxpayer on receiving Tucker's advice would be to obtain independent counsel's opinion as recommended, that was by no means the only response open to Delphi on receiving Tucker's advice. For the avoidance of doubt, we conclude that [Delphi] had failed to take reasonable care to avoid inaccuracy not because it did not obtain independent counsel's opinion *per se*, but because it took no action whatsoever to address the certainty of a risk (namely the Scheme failing and tax liabilities owing) that was cogently explained and plainly stated in the advice letter of 7 August 2008.

233. On one interpretation, and by reference to Tucker's understanding of his instruction in terms as stated to Cowen in the phone call, that was '*to review the way [Clavis/Herald] put the scheme together*', Tucker's remit might have been more focused on the logistics of how monies were supposed to flow through the Scheme to find their way home to the directors eventually, and on the legality of each implementing steps of the Scheme (including exit on cessation of employment) than on the critical concern in this appeal – that is to say, whether Delphi would be meeting its taxpayer's obligations in rendering complete and accurate returns to account for its tax liabilities by entering into the Scheme.

234. The interpretation that the critical concern in this appeal was not uppermost in the directors' minds when instructing Tucker is consistent with the fact that there was no action taken in response to the substantive advice on the areas of risk that would have direct bearing on Delphi's obligations as a taxpayer to render accurate and complete returns. This interpretation is also consistent with the part of Tucker's conclusion in the advice letter where he referred to the alternative of the directors wishing to proceed '*having taken a commercial view*'. Taking a commercial view as the premise for proceeding has the implication of setting aside the critical concern that was inherent in '*there is certainly a risk*' in the immediately preceding sentence. Taking a commercial view in terms of the supposed cost-benefit analysis from avoiding taxes over and above the critical concern as a taxpayer to render complete and accurate returns is a failure to take reasonable care to avoid inaccuracy for Sch 24 purposes."

38. The FTT stated its conclusion at Decision/[235]-[236] as follows:

"235. The penalties are pursuant to para 1 Sch 24, and para 3(1)(a) defines an inaccuracy as 'careless' '*if the inaccuracy is due to failure by P [i.e. the taxpayer][3] to take reasonable care*'. The causative link, as we understand it, is derived from the statutory wording of 'due to', which means (per Oxford English Dictionary): '*attributable to, ascribable to*' (as an adjectival phrase) or '*because of, on account of, owing to*' (as a prepositional phrase).

236. We conclude that there was a failure to take reasonable care on the part of [Delphi] for Sch 24 purposes, and that the inaccuracies in the P35 returns were attributable to [Delphi]'s failure to take reasonable care in terms as discussed above. We conclude therefore that HMRC have met the burden of proof that there was a failure on [Delphi]'s part to take reasonable care under

[3] In a footnote the FTT recorded that: "'P' is defined under para 1(1)(a) of Sch 24 as the person who 'gives HMRC a document of a kind listed in the Table below', and for present purposes, P being the taxpayer shall suffice."

the terms of para 3(1)(a) of Sch 24 for a careless penalty to be imposable on all tranches."

39. In relation to Ground 7 the FTT said at Decision/[239]

> "239. We consider the submissions made for [Delphi] by making the relevant findings of fact as follows in the order of the numbering of Mr Sherry's submissions.
>
> (1) *Advice from Clavis* – We accept that [Delphi] drew 'comfort' from Clavis' advice that the Arrangement was 'legitimate'. We find that to ascertain the legality of the Scheme was of 'paramount importance' to Delphi, as testified by Langran, who spoke of the directors' concern not to do anything which would jeopardise their Financial Conduct Authority ('FCA') registration because the FCA registration was 'vital'; hence 'If there was any hint that [the Scheme] was illegal, criminal, bad, naughty, etc. we would not have touched it with a barge pole'. The emphasis of taking advice from Clavis was to ensure the Scheme was 'legal', 'above board', 'legitimate tax avoidance' – as stated by Langran, but that paramount concern for legality did not equate with taking reasonable care to ensure that Delphi did not under-declare its tax liabilities.
>
> (2) *Reliance on Thornhill's opinions* – In relation to Thornhill's Opinion (or his six opinions) being '*the cornerstone*' as Langran put it for Delphi's belief that the Scheme was legally and technically sound, we find that this assurance and comfort to be of the same nature as Clavis' advice.
>
> (a) In other words, Delphi was careful to make sure that it would not jeopardise its FCA registration in entering the Scheme, but that in our view, did not automatically commute [*sic*] to taking reasonable care to avoid Delphi understating its tax liabilities.
>
> (b) Further, the significance of *Sempra* or Thornhill's opinions was over-rated, and this was not just in hindsight. It was evidently clear from the transcript that Tucker was not as enamoured by the taxpayer's win in *Sempra* as Cowen, [n]or was Tucker going to take Thornhill's opinions as the last word on the matter. Tucker's advice, whilst clearly stating Thornhill's credentials, was categorical in pitching the recommendation to be '*independent*' and from '*a barrister other than the original one*' should be obtained.
>
> (c) It is a reasonable inference that Tucker's advice was given in the full knowledge that Clavis would of course only show counsel opinions endorsing the Scheme, and Tucker showed sagacious scepticism by not taking Thornhill's opinions as the last word given the Clavis-Thornhill alliance.
>
> (d) *McClean v Thornhill*[4] was concerned with a claim of professional negligence against Mr Thornhill and was brought by participants in a tax avoidance scheme investing in LLPs taking part in film distribution. Thornhill had provided opinions to the LLPs regarding the arrangements, and Zacaroli J held that the participants could not reasonably rely on those opinions (by Thornhill) and ought to have obtained their own independent advice, which was precisely what Delphi was advised to do by Tucker.

[4] *McClean & Ors v Thornhill* [2022] EWHC 457 (Ch).

> (3) *Legitimate tax avoidance scheme* – We accept that the directors of Delphi, like the taxpayer in *Bayliss*, were assured that the Scheme was a legitimate tax avoidance scheme, on reliance of Clavis' assurance. This does not assist [Delphi], however, since the Scheme being 'legal' (in the sense that the transactions involved were not a sham) has no bearing on the correct tax treatment for the transactions in question. It is accepted that [Delphi] took reasonable care to ensure the legality of the Scheme – but that was no proof that [Delphi] had taken due care to avoid understating its tax liabilities. The central flaw in the submissions for [Delphi] is to conflate (if not to confuse) taking due care to ensure the legality of the Scheme with taking due care to avoid inaccuracy in stating Delphi's tax liabilities.
>
> …
>
> (5) Entering into a scheme is not in itself careless – We accept Mr Sherry's written submission at paragraph 65 on this point, even though we are unable to trace his citation reference to *Hicks* at [287]. We accept that Delphi took reasonable care to ascertain the legality of the Clavis Arrangement before entering into the Scheme, but that in itself does not prove that [Delphi] took reasonable care to avoid inaccuracy in terms as required under para 18(3) Sch 24."

Submissions

40. Delphi's challenge to the Decision is squarely based on *Edwards v Bairstow* [1956] AC 14 i.e. that a decision was reached by the FTT which was not open to it on the evidence before the tribunal.

41. As regards Ground 1, Mr Sherry (appearing with Ms Montes Manzano for Delphi) drew attention to what he described as the FTT's "key finding of fact" at Decision/[232] to the effect that Delphi had failed to take reasonable care "because it took no action whatsoever to address the certainty of a risk (namely the Scheme failing and tax liabilities owing) that was cogently explained and plainly stated in the [Tucker Letter]". This finding, in Mr Sherry's submission, was inconsistent with the unchallenged evidence before the FTT from witnesses whose credibility was not an issue.

42. In particular, Mr Sherry referred to Mr Langran's evidence and that of Mr Tucker. Mr Langran said: "We repeatedly sought the advice of Dickinsons" and "…more importantly, the company was filing its returns on the correct and accurate basis", and [were] relying on Dickinsons to get it right." Mr Tucker's evidence, according to Mr Sherry, was that he continually monitored the implementation of the arrangements and repeatedly advised Delphi. It was common ground that Dickinsons were engaged to prepare and submit the P35 returns on Delphi's behalf and that they were fully aware of the arrangements and were kept appraised of the manner of implementation of each tranche.

43. Furthermore, Mr Sherry argued that the FTT's conclusions at Decision/[220(2)] and [233] that Mr Tucker was not instructed to review the efficacy of the Scheme was not a permissible finding of fact on Mr Tucker's unchallenged evidence, where he had said:

> "I had, at the behest of the company, invested significant time and understanding the Arrangement to ensure that it was technically robust and that the paperwork supported the intended outcome of the planning."

44. Mr Sherry also referred to the Tucker Letter. In addition, Mr Sherry referred to Mr Tucker's reply to questions from Judge Poon when he said:

> "…the instructions from the client were to review the Clavis arrangements and let them know whether the arrangements were effective and I prepared this [advice] letter having reviewed the details of the Scheme and the arrangements."

45. Mr Sherry noted that when asked by Judge Poon what he understood by "effective", Mr Tucker confirmed "that it achieved the stated purpose of a tax saving." Mr Tucker further stated: "I was looking at the Corporation Tax savings and also the amount that the directors might expect to get if they utilised the arrangements. So I was also comparing against taking profits out by way of dividends, by way of remuneration or by use of these arrangements." Later, Mr Tucker, in reply to Judge Poon, said: "it looks that it was an effective arrangement, if any tax planning of that nature could ever be said to be a sound arrangement."

46. Thus, in Mr Sherry's submission, Mr Tucker's repeated use of the word "effective" as an endorsement of the Scheme was ignored by the FTT. Therefore, Mr Sherry argued that the FTT's conclusion that Delphi "took no action whatsoever" was inconsistent with and not supported by the evidence.

47. Moreover, the FTT appeared to be considering whether Delphi took reasonable care before deciding to enter into the arrangements instead of, as it should have done, considering the actions taken by Delphi to comply with its obligations under the PAYE regulations (having carried out the arrangements, which gave rise to the duty to report). This question was not considered by the FTT.

48. Mr Sherry also took issue with the FTT's finding at Decision/[239(10)]:

> "that it was Tucker's view that 'any aggressive tax planning will always be open to attack from HMRC' – the adverb 'always' conveyed certainty of HMRC's challenge on the Scheme that a prudent and reasonable taxpayer would have taken further action to ascertain the tax savings purported to be delivered by the Scheme would be supported by another counsel's opinion."

49. In relation to Ground 7, Mr Sherry contended that the FTT made a finding that Delphi did take reasonable care "…to ensure the legality of the Scheme...." The transactions and their component steps did occur as proposed. It was to be inferred from the FTT's reasoning that this meant that the FTT accepted that each of the four tranches proceeded as originally proposed, including (but not limited to) the carrying out of independent reviews of its directors' performance, the evaluation of what would be appropriate reward and incentive payments that each of them within Delphi's overall budget in the form of available profits. The FTT also accepted that Delphi did hold Board meetings at which valid resolutions were made to proceed with each of the four tranches.

50. The FTT's error of law, according to Mr Sherry, was in finding that Delphi conflated the proper and faithful performance of each tranche "taking due care to ensure the legality of the Scheme with taking due care to avoid inaccuracy in stating Delphi's tax liabilities." At Decision/[239(5)], the FTT concluded: "we accept that Delphi took reasonable care to ascertain the legality of the Clavis Arrangement before entering into the Scheme, but that in itself does not prove that [Delphi] took reasonable care to avoid inaccuracy in terms as required under para 18(3) Sch 34."

51. Mr Sherry submitted that this was plainly inconsistent with the unchallenged evidence referred to at Ground 1. There was, therefore, no proper basis for the FTT to conclude that the

inaccuracies in the P35s were "careless" or "deliberate". There was no explanation as to why the FTT viewed the evidence as anything other than unchallenged.

52. In addressing Ground 1, Ms Choudhury, KC (appearing with Mr Bignell for HMRC) argued that the FTT's findings were rational and well-supported by the evidence. The findings in question were premised on the distinction between: (i) addressing the risks of the Scheme failing and of tax liabilities (including PAYE) arising; and (ii) seeking assistance with the implementation of the Scheme and assurances as to its legality. In Ms Choudhury's submission the FTT had correctly found that Delphi had taken no action to address the former.

53. Essentially, Ms Choudhury contended that Delphi's argument elided the distinction between addressing the tax risks identified in the Tucker Letter on the one hand, and seeking assistance with the implementation and legality of the Scheme on the other.

54. Thus, Ms Choudhury noted that the FTT had set out the content of the Tucker Letter, so far as material, at Decision/[43] and the transcript of an almost contemporaneous telephone call between Mr Cowen (of Herald/Clavis) and Mr Tucker at Decision/[45]-[50]. The FTT considered the meaning of the letter and made findings in respect of the transcript. This was, Ms Choudhury submitted, to enable the FTT to make findings in relation to Delphi's instructions to Mr Tucker, the advice provided by the Tucker Letter, and to decide what actions Delphi took prior to entering into the Scheme in order to determine whether or not there was a failure to take reasonable care by Delphi which resulted in the inaccuracy in its P35 returns.

55. Ms Choudhury argued that the inference at Decision/[220(2)] that Mr Tucker had not been asked to review the efficacy of the Scheme was a reasonable inference to draw. First, Mr Tucker's statement that his role was "really to review the way [Clavis/Herald] put the Scheme together", secondly, his nonchalance about Mr Cowen's efforts to impress the significance of the decision in *Sempra* upon him and, thirdly, his evidence that he understood he was instructed to review the "technical" aspects of the arrangements. That inference was supported by the weight of Mr Tucker's remarks during the call recorded by the FTT at Decision/[220]. These remarks indicated that he was focused on the implementation of the Scheme and an economic analysis of its costs and benefits.

56. Ms Choudhury pointed out that the FTT considered the Tucker Letter at Decision/[221], noting that he had outlined a number of tax risks in relation to the Scheme, including a failure of the corporation tax planning and the implications the income tax planning. In view of those risks, and what Ms Choudhury described as the near certainty of litigation, Mr Tucker was unable formally to recommend entering into the Scheme and advised Delphi to seek an opinion from an independent tax counsel. If, however, Delphi took a "commercial view" to enter into the Scheme having weighed the costs and benefits, Mr Tucker said he would assist in implementing the Scheme properly.

57. The FTT concluded at Decision/[222] and [234] that in the light of that evidence the Tucker Letter was an initial review of the Scheme which outlined the tax risks but advised Delphi to seek expert legal advice on the risks entailed. Ms Choudhury submitted that Delphi had not taken action in respect of those risks, contrary to Mr Tucker's advice. Therefore, Ms Choudhury argued that the FTT had distinguished between taking action in respect of the tax risks in the letter on the one hand, and seeking assistance with the implementation and legality of the Scheme on the other.

58. Ms Choudhury characterised Mr Sherry's submissions as an "island-hopping" exercise which the courts have frequently warned against (*per* Lewison LJ in *Fage UK Ltd and Anor* v *Cobani UK Ltd* [2014] EWCA Civ 5 at [114]).

59. In support of that submission, Ms Choudhury cited paragraph 12 of Mr Langran's witness statement to the effect that Delphi took advice on the legality of the Scheme (i.e. whether it was tax evasion or legitimate tax avoidance) and on filing its P35 returns. Delphi was assured of the legality of the Scheme and engaged Dickinsons to implement the Scheme and to file its P35 returns. The key point, according to Ms Choudhury, was that this evidence did not touch on whether Delphi took any action in respect of the tax risks highlighted in the Tucker Letter.

60. Similarly, Ms Choudhury drew attention to the excerpt in paragraph 35 of Mr Tucker's witness statement[5] and the excerpt from Mr Langran's evidence which, she said, did not run to whether Delphi took advice on the tax risks highlighted in the Tucker Letter.

61. Ms Choudhury submitted that Mr Tucker, in his witness statement, simply confirmed that the risks highlighted in the Tucker Letter remained unchanged before Delphi entered into further tranches of the Scheme. This reinforced, in her submission, that Delphi took no action in respect of the tax risks despite Mr Tucker repeatedly underlining those risks – this supported the finding at Decision/[232].[6]

62. Ms Choudhury addressed the evidence relied on by Delphi, submitting that it could not be regarded as inconsistent with the FTT's findings.

63. First, the excerpt from paragraph 15[7] of Mr Tucker's witness statement was evidence that he was instructed to ensure that the Scheme was "technically robust" and the "paperwork supported the intended outcome". This, in Ms Choudhury's submission, supported the FTT's finding that Mr Tucker was focused on the implementation of the Scheme rather than whether the Scheme actually worked from a tax perspective. Secondly, even if it could be said that the instructions to Mr Tucker dealt with tax efficacy, it could not be said that the findings of the FTT to the contrary were perverse. The FTT did not fail to take account of the relevant evidence – the passage on apparent prospects was noted at Decision/[43(13)], and provided part of the context within which findings of fact were made at Decision/[221].

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[5] "The suggestion in HMRC's case that Herald Employment Services LLP were acting mindlessly and on the implicit instruction of Delphi is clearly not correct. Likewise, as I make clear elsewhere in this statement, I ensured that the relevant processes were properly carried out/followed, and even attended the Trustee's offices in Jersey to ensure that matters were being carried out properly."

[6] "[W]e conclude that [Delphi] had failed to take reasonable care to avoid inaccuracy not because it did not obtain independent counsel's opinion per se, but because it took no action whatsoever to address the certainty of a risk (namely the Scheme failing and tax liabilities owing) that was cogently explained and plainly stated in the advice letter of 7 August 2008."

[7] "By this stage, therefore, I had, at the behest of the company, invested significant time in understanding the Arrangement to ensure that it was technically robust and that the paperwork supported the intended outcome of the planning. I had also inspected leading Counsel's opinions, which seemed robust and technically sound. This is what I told the company:
"The planning has the merit of simplicity and uses an exemption within the anti-avoidance rules which were brought in to counter the use of Employment Benefit Trusts (EBT's). Whilst the direct use of an EBT by
paying money into such an entity will not succeed in obtaining a Corporation Tax deduction, the use of the payment by way of subcontracted services appears to circumvent the rules. This is the opinion of Andrew Thornhill a well-respected QC at Pump Court Tax Chambers."

64. Ms Choudhury argued that the FTT held Delphi to a less rigorous standard than HMRC's pleaded case, viz that Delphi should have obtained an opinion from independent tax counsel before using the Scheme. The FTT at Decision/[232] held that it was not necessary for Delphi to have obtained a second opinion but that it should have taken *some* action to address the risks highlighted by Mr Tucker.

65. In relation to Delphi's argument that it could not have been careless because it engaged Dickinsons to prepare and submit its P35 returns and there was no suggestion that Dickinsons had been careless in doing so, Ms Choudhury submitted that this was a *non sequitur*. The FTT found that Delphi had entered into the Scheme without taking action to address the risks highlighted by Mr Tucker and despite the advice to seek an opinion from independent tax counsel. Dickinsons then completed the P35 return on the basis of the Scheme worked. It did not follow that the FTT was bound to find that the preparation of the P35 return by an adviser who was not considered careless was some form of intervening act which prevented Delphi from being found careless. Delphi should have addressed the risks of the Scheme failing and the tax liabilities occurring. It did not do so. These facts, Ms Choudhury argued, supported a finding that Dickinsons took reasonable care while Delphi did not.

66. In relation to Delphi's submission that the FTT did not consider the evidence of advice obtained before entering into later tranches of the Scheme, this was because, in Ms Choudhury's submission, advice of the relevant kind (i.e. addressing the risks of the Scheme failing), was not obtained by Delphi. Ms Choudhury drew attention to the unchallenged finding of the FTT at Decision/[227] that Mr Tucker was not qualified to give advice as to the efficacy of the Scheme from a legal point of view.

67. Moreover, as regards Delphi's argument that the FTT erred by considering whether it took reasonable care before entering into the Scheme, instead of the actions it took to comply with its obligations to render complete and accurate P35 returns, Ms Choudhury submitted that this argument was misconceived. It failed to recognise the direct bearing of the former upon the latter. The FTT held at Decision/[231] that Delphi had fallen short of the standard of a reasonable and prudent taxpayer because it had failed to address the risks raised in the Tucker Letter in order to enable it to render complete and accurate P35 returns.

68. As regards Delphi's challenge to the FTT's conclusion at Decision/[239(10)], concerning whether a reasonable taxpayer would have taken additional counsel's advice, the FTT found that Delphi's directors were sophisticated taxpayers who had considered other tax avoidance schemes. The FTT considered that a reasonable and prudent taxpayer with this level of sophistication would have obtained additional counsel's advice. Therefore, in Ms Choudhury's submission, the FTT had proper regard for the experience and knowledge of the directors of Delphi.

69. Secondly, in this regard, Ms Choudhury noted that the FTT had found that Mr Tucker had advised that he could not formally recommend the Scheme and that Delphi should seek advice on the risks he had identified from independent tax counsel: Decision/[228]. Therefore, the evidence of Mr Tucker that he had taken soundings from other professionals before giving his advice and had previously advised Delphi not to enter into other schemes reinforced the FTT's finding that Delphi did not take reasonable care in entering into the Scheme without addressing the risks which he highlighted.

70. Thirdly, the FTT found at Decision/[221(9)] that Mr Tucker had assessed the prospect of litigation by HMRC as "close-to-certain". Against that background, the FTT quite properly

found at Decision/[239(10)] that a reasonable and prudent taxpayer would have obtained additional counsel's advice given the certainty of the prospect of challenge from HMRC.

71. In addressing Ground 7, Ms Choudhury noted Delphi's submission that the FTT had made an implicit finding at Decision/[239(3)] that it had failed to take reasonable care to avoid understating its tax liabilities for the purpose of filing its returns and that this finding was contrary to and unsupported by the unchallenged evidence referred to in Ground 1.

72. Ms Choudhury submitted that Delphi's arguments had no merit for the following reasons:

(1) The FTT expressly concluded at Decision/[241] that Delphi had not proved, on the balance of probabilities, that it took reasonable care to avoid inaccuracy in order to avail itself of the defence under paragraph 18(3) of Schedule 24. Because Delphi had not challenged this conclusion either in its initial or in its new argument, it was unclear what Delphi hoped to gain by its challenge to a purportedly implicit finding in Decision/[239(3)].

(2) The finding at Decision/[239(3)] was that Delphi took reasonable care to ensure that the Scheme was "legal" i.e. that the transactions were not a sham. It cannot reasonably be inferred from this that Delphi went on to implement each tranche of the Scheme properly. The FTT make clear that Tranche 4 was not properly implemented at Decision/[258]-[265]. The carelessness in issue had to do with addressing the risk that the Scheme did not work from a tax perspective.

(3) The FTT's finding was consistent with the evidence referred to in Ground 1 which showed that Delphi sought assistance with the implementation of the Scheme and assurances as to its legality but did not take action to address the risks of the Scheme failing and tax liabilities becoming due.

Discussion

73. Ground 1 and Ground 7 are, as we have noted, an *Edwards v Bairstow* challenge to the FTT's findings. As the courts have repeatedly found, the bar is set very high when seeking to overturn the FTT's findings of fact or inferences from the evidence before it. Appeals to the Upper Tribunal are on points of law, and the FTT's factual evaluation of the evidence before it must be sufficiently defective so as to amount to an error of law.

74. Mr Sherry took us to various parts of the transcript and witness statements and submitted that these showed that the FTT had reached a conclusion which was not open to it on the evidence. Inevitably, this involved a large element of "island hopping" – see *per* Lewison LJ in *Fage UK Ltd &Anor v Chobani* [214] EWCA Civ 5 at [114].

75. Briggs J in *Megtian Ltd (In Administration) v HMRC* [2010] EWHC 18 (Ch) described the challenges of mounting an *Edwards v Bairstow* argument:

> "11. There are numerous authoritative statements of the precise meaning of the concept that a finding of fact involves an error of law when it is based upon non-existent or inadequate evidence. They were very recently summarised by Christopher Clarke J in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch) at paragraphs 113-120. The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different

> view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact. As Lord Radcliffe put it in *Edwards v Bairstow* [1956] AC 14, at 39:
>
> > "Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado…"
>
> The restrictions imposed by an appeal limited to points of law are in addition to the well-recognised difficulties facing any appellate court, such as not seeing the witnesses giving evidence, being confined to a review of evidence considered in much greater detail by the court below, and being unable to capture from the judgment (however meticulous) every nuance which played an important part of the evaluation of the court below; see for example per Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1, at p.45."

76. In the present case, there are two issues which Delphi raises in its *Edwards v Bairstow* challenge. There was, first, evidence that Mr Tucker's brief was to examine both the technical tax issues raised by the Scheme and, secondly, to review the implementation of the Scheme to ensure that it was "legal" and did not give rise to problems with the regulatory authorities. However, as the FTT pointed out at Decision/[240(7)], after receiving the Tucker Letter, Delphi took little or no action to address the risks identified by Mr Tucker. In particular, Delphi failed to take legal advice from an independent tax counsel – advice which Mr Tucker clearly felt was desirable and which Mr Tucker, as an accountant, felt unable to give. There seems to be little indication that Delphi, after the Tucker Letter, took any significant steps to re-evaluate whether the Scheme as a whole would produce the desired tax effects. After the Tucker Letter there seemed to be no "stepping back" by Delphi where it reviewed the whole scheme and, importantly, its documentation, and took a decision whether to proceed.

77. Therefore, in our view, in weighing up the evidence as to the steps that Delphi took after the Tucker Letter, the FTT was entitled to reach the conclusion that the steps taken by Delphi to ensure that the P35 returns were accurate were inadequate. This was an evaluative decision of the FTT, having heard and weighed up all the evidence, and was a conclusion with which we cannot properly interfere. As already noted, the *Edwards v Bairstow* test is not whether we would have reached the same conclusion but whether there was evidence to support its conclusion. In our view there was sufficient evidence to support the FTT's conclusion.

78. Accordingly, we dismiss the appeal in regard to Ground 1 and Ground 7.

GROUP 2: CAUSATION (GROUNDS 2, 3 AND 4)

The Decision

79. The FTT's reasoning on causation was at Decision/[164]-[171]:

> "<u>The construction of 'due to' in para 3(1)</u>
>
> 164. The question we direct ourselves to address is whether there is any basis for construing the statutory condition under para 3(1) Sch 24 as

requiring a proof of causation. The statutory phrase 'due to' arguably may have given rise to the notion of causation. The relevant dictionary meaning to be given to 'due to' in para 3(1) is 'attributable to, ascribable to' (as an adjectival phrase) or 'because of, on account of, owing to' (as a prepositional phrase).

165. The change in the statutory wording referred to earlier in relation to sub-s 29(4) TMA, where the wording 'attributable to fraudulent or negligent conduct' became 'brought about carelessly or deliberately by', was part of a number of changes stated in explanatory notes issued in 2008 with the draft amendments to s29 TMA. The explanatory notes referred to the amendments of s 29 TMA as being made to align with the terms used in the new penalty regime under Sch 24 FA 2007, 'as part of introducing a more uniform penalty regime across different taxes': *Alan Anderson*[8] at [118]. In the discovery assessment context of sub-s 29(4), the wording of 'attributable to' and 'brought about' between the insufficiency of tax discovered and the behaviour of the taxpayer similarly connotates [*sic*] with 'due to' in para 3(1) of Sch 24.

166. We are of the view that the nexus required to be established at para 3(1) is one of *attribution* – in the sense that the inaccuracy can be accounted for by a mode of behaviour which is characterised as 'failure to take reasonable care'. Attribution in the sense of *because of*, *on account of*, or *owing to* connotes the sense that the inaccuracy in question being accountable by, or explained by a failure to take reasonable care. In our judgment, 'due to' in para 3(1) of Sch 24 does not equate to the kind of nexus of causation apposite to tort liability.

167. *Blyth*[9] was a case on tort liability. To establish liability in tort, it is necessary to prove the chain of causation whereby a duty of care existed between the parties, there was a breach of that duty (by omission or commission of a certain action), and that breach of duty is the proximate cause of the damage or injury sustained. The most important element of proof is the casual link between the breach and the injury, and causation in tort is often cast in terms of 'but for' the defendant's actions/omissions, the plaintiff's injury would not have occurred.

168. The 'but for' type of causation in tort requires specificity in order to establish the breach of a particular duty of care is the cause of injury. Specificity for each element of proof requires the pinpointing of an action or omission to establish the breach, and that it is a specific breach that is the immediate cause of the injury. Each element of proof in tort is primarily objective, and the causal link required to be established for each element needs to be tight to prove proximity whereby the breach in question is the immediate cause of the injury in question.

169. Unlike the proof of breach in tort, which is an objective test, the characterisation of the mode of behaviour under the description of 'failure to take reasonable care' is an objective test, and at the same time, takes into account the subjective attributes of the taxpayer in question. Unlike the pinpointing of an action or omission to establish a breach in tort, the characterisation of a mode of behaviour for para 3(1) purposes is a broader consideration than the mere focus on a specific action or a particular omission.

[8] *Alan Anderson v HMRC* [2016] UKFTT 335
[9] *Blyth v Birmingham Waterworks Co* [1856] 11 Ex 781

170. The taxpayer's defence under para 18(3) is in a generic sense of: 'took reasonable care to avoid inaccuracy'. The absence of the definite article in 'avoid inaccuracy' is conspicuous, and connotates [*sic*] the generality of a mode of behaviour, rather than the specificity of a particular action or omission. The absence of the definite article in para 18(3) defence points to the construction that the nexus between inaccuracy and behaviour applicable to Sch 24 FA 2007 is not one of causation in the 'but for' sense, which requires the pinpointing of an action or omission to be particularised in order to establish the 'but for' causation.

171. For these reasons, we do not find it appropriate to import the concept of causation apposite to the law of tort to construe the statutory wording 'due to' at para 3(1). We reject the notion that 'due to' in para 3(1) which introduces the nexus between the inaccuracy in question and the taxpayer's behaviour connotates [*sic*] causation in the 'but for' sense required in tort." (*Emphasis added*)

80. Later in the Decision at Decision/[230]-[236], the FTT said:

"230. The question for the Tribunal is what a prudent and reasonable taxpayer – intent on fulfilling its obligations to render accurate returns to account for all its tax liabilities – would have done when faced with such advice as given by Tucker by letter dated 7 August 2008 which concluded with an unambiguous lack of endorsement of the Scheme due to the certainty of a risk in being found to have underdeclared its tax liabilities.

231. The substance of Tucker's advice and his conclusion demands a response from a prudent and reasonable taxpayer intent on meeting its obligations to render correct returns to account for its tax liabilities – but [Delphi] did nothing in response whatsoever. It is in this regard that we conclude that [Delphi] fell short of the standard of being a prudent and reasonable taxpayer by taking no action to address the possible areas of risk raised in Tucker's letter in order to enable itself to meet the obligations in rendering accurate and complete returns to account for all its tax liabilities.

232. Whilst one obvious action to take by a prudent and reasonable taxpayer on receiving Tucker's advice would be to obtain independent counsel's opinion as recommended, that was by no means the only response open to Delphi on receiving Tucker's advice. For the avoidance of doubt, we conclude that [Delphi] had failed to take reasonable care to avoid inaccuracy not because it did not obtain independent counsel's opinion *per se*, but because it took no action whatsoever to address the certainty of a risk (namely the Scheme failing and tax liabilities owing) that was cogently explained and plainly stated in the advice letter of 7 August 2008.

233. On one interpretation, and by reference to Tucker's understanding of his instruction in terms as stated to Cowen in the phone call, that was '*to review the way [Clavis/Herald] put the scheme together*', Tucker's remit might have been more focused on the logistics of how monies were supposed to flow through the Scheme to find their way home to the directors eventually, and on the legality of each implementing steps of the Scheme (including exit on cessation of employment) than on the critical concern in this appeal – that is to say, whether Delphi would be meeting its taxpayer's obligations in rendering complete and accurate returns to account for its tax liabilities by entering into the Scheme.

234. The interpretation that the critical concern in this appeal was not uppermost in the directors' minds when instructing Tucker is consistent with

the fact that there was no action taken in response to the substantive advice on the areas of risk that would have direct bearing on Delphi's obligations as a taxpayer to render accurate and complete returns. This interpretation is also consistent with the part of Tucker's conclusion in the advice letter where he referred to the alternative of the directors wishing to proceed '*having taken a commercial view*'. Taking a commercial view as the premise for proceeding has the implication of setting aside the critical concern that was inherent in '*there is certainly a risk*' in the immediately preceding sentence. Taking a commercial view in terms of the supposed cost-benefit analysis from avoiding taxes over and above the critical concern as a taxpayer to render complete and accurate returns is a failure to take reasonable care to avoid inaccuracy for Sch 24 purposes.

235. The penalties are pursuant to para 1 Sch 24, and para 3(1)(a) defines an inaccuracy as 'careless' '*if the inaccuracy is due to failure by P [i.e. the taxpayer]23 to take reasonable care*'. The causative link, as we understand it, is derived from the statutory wording of 'due to', which means (per Oxford English Dictionary): '*attributable to, ascribable to*' (as an adjectival phrase) or '*because of, on account of, owing to*' (as a prepositional phrase).

236. We conclude that there was a failure to take reasonable care on the part of [Delphi] for Sch 24 purposes, and that the inaccuracies in the P35 returns were attributable to [Delphi]'s failure to take reasonable care in terms as discussed above. We conclude therefore that HMRC have met the burden of proof that there was a failure on [Delphi]'s part to take reasonable care under the terms of para 3(1)(a) of Sch 24 for a careless penalty to be imposable on all tranches."

81. Further, at Decision/[237] and [246]-[250], the FTT said:

"237. We consider Mr Sherry's submissions for [Delphi] as having two aspects.

(1) First, that [Delphi] had taken reasonable care to avoid inaccuracy and we consider this aspect under the terms of para 18(3) defence.

(2) Secondly, that HMRC have not established the causal link that failure to obtain a second opinion was the carelessness which led to the inaccuracies in the PAYE returns.

…

Discussion on submissions on 'causal link'

246. The 'test laid by the case of *Bayliss*'[10] in relation to Mr Sherry's submissions on causation is understood to be a reference to [68] of *Bayliss* where Judge Falk (as she was then) observed:

'In the absence of subsequent reassurances, completion of a tax return on the assumption that the scheme worked might well have amounted to a negligent behaviour. However, in order for s 95 [TMA] to be engaged HMRC would also have needed to show that there was a causal link between the negligence and the errors in the return. Given that HMRC has accepted that the transaction was not a sham this would not be a straightforward point: HMRC would probably need to pursue a line of argument that the errors should have been of sufficient concern to prompt the appellant to seek advice from another tax specialist before completing

[10] *Anthony Bayliss v HMRC* [2016] UKFTT 500(TC)

the return, which should (if the adviser had sufficient expertise) have led to the appellant being advised that the scheme did not work either due to the application of s 16A TCGA or for other reasons. However, HMRC put forward no such argument and it is not obvious to us that such argument would have succeeded.'

247. In terms of the construction of 'due to' as the nexus relevant to Sch 24 provisions, we have considered the relevance of the concept of 'causation' under s 95 TMA and tort liability in some detail. We reject the submissions from [Delphi] that seek to establish a causal link in the 'but for' sense between the inaccuracies in the P35 returns on the one hand and the failure to obtain independent counsel's opinion on the other. The relevant statute to determine this appeal is Sch 24 FA 2007, and we reject [Delphi]'s submissions on 'causation' as derived from the concept of 'negligence' under the superseded s 95 TMA apposite to tort liability.

248. In terms of fact-findings, Mr Sherry has invited the Tribunal to make a finding of fact in support of [Delphi]'s causation argument that a second opinion from counsel would not have differed from Thornhill's. This is a finding of fact that we categorically cannot make. Not only was there no settled law on the tax treatment of EBTs at the time, but the Clavis Arrangement departed from the standard EBTs by trying to invoke the goods and services exemption. To make a finding of fact that a second opinion would necessarily concur with Thornhill's would be pure speculation.

249. Mr Sherry also submits that causation cannot be made out when the sub-trust allocations were made by independent trustees in the amounts set out in the settlement agreement and on which Delphi paid all the tax due. It is argued that Delphi'[s] alleged actions or omissions cannot be said to have caused any potential loss of revenue because Delphi did not control the trustees, so the action of the independent trustees could not give rise to the causal link for Delphi's failure to return PAYE/NICs. We understand the gist of Mr Sherry's submission here is to say that the payer of the sub-trust allocations to the directors was different from Delphi as the taxpayer of the PAYE/NICs liabilities, and the specificity proof required for the 'but for' kind 71 of causation is not made out. We have concluded that the kind of causal link required for tort liability is the wrong model to construe 'due to' in para 3(1) Sch 24. In any event, the factual basis of this argument is unclear to us, given that the PLR has been determined by the settlement agreement which also fixed the identity of 'P' as Delphi for Sch 24 purposes, regardless of the role played by the trustees in the Scheme.

250. For the reasons that we reject [Delphi]'s submissions that 'due to' for Sch 24 purposes is to be construed as connotating [*sic*] the kind of causation as propounded by *Bayliss* for s 95 TMA penalty regime, and the impossibility to make the required finding of fact as invited by [Delphi] to make its case on causation, we dismiss this ground of appeal in its entirety."

Submissions

82. Mr Sherry submitted that the Court of Appeal in *Mainpay CA* held at [106] that the phrase "brought about carelessly" in sections 36 and 29 (4) TMA (as well as "brought about" in section 118(5) TMA) was a synonym for "caused". The Court of Appeal held at [107] that the words in section 118(5) did not alter that meaning but simply explained "that there is a relevant lack of care if a person fails to take reasonable care to avoid bringing about that loss or situation." The Court of Appeal at [108] dismissed HMRC's submission that section

118(5) had the effect of removing a causal link between a failure to take reasonable care and the loss or situation that occurred.

83. Mr Sherry further submitted that the FTT at Decision/[250] was wrong to dismiss Delphi's reliance on the FTT decision in *Anthony Bayliss v HMRC* [216] UKFTT 0500 (TC), (a decision of Judge Falk, now Falk LJ, and Mr Bell). In that case, the FTT were considering the earlier penalty provisions in the TMA. The FTT said at [68]:

> We have given careful consideration to the fact that the appellant did have his own concerns about the implementation of the scheme, including errors made by Montpelier and the clear lack of experience of junior staff apparently left to handle it. In the absence of subsequent reassurances, completion of a tax return on the assumption that the scheme worked might well have amounted to negligent behaviour. *However, in order for s 95 to be engaged HMRC would also have needed to show that there was a causal link between the negligence and the errors in the return.* Given that HMRC has accepted that the transaction was not a sham this would not be a straightforward point: HMRC would probably need to pursue a line of argument that the errors should have been of sufficient concern to prompt the appellant to seek advice from another tax specialist before completing the return, which should (if the adviser had sufficient expertise) have led to the appellant being advised that the scheme did not work either due to the application of s 16A TCGA or for other reasons. However, HMRC put forward no such argument and it is not obvious to us that such an argument would have succeeded. (*Emphasis added*)

84. Thus, in Mr Sherry's submission, the FTT in the present appeal was wrong to treat the words "due to" as representing a weaker (and vague) causative link of "attributable to, ascribable to" or "because of, on account of, owing to" at Decision/[166] and [235].

85. Mr Sherry drew attention to the fact that the Court of Appeal in *Mainpay CA* at [114] stated that the FTT in that case:

> "clearly understood that sections 36(1) and 118(5) require a causal link between carelessness of the taxpayer and the loss of tax. In the relevant paragraphs, the F-tT quoted the statutory words four times, and used various synonyms, including 'cause' (and cognate words), 'as a result of', and 'led directly to'."

86. In *Mainpay CA*, the Court of Appeal was considering a case in which the key question, for present purposes, was whether there was an overarching contract of employment for income tax purposes. The taxpayer had taken advice from employment lawyers but not from its tax adviser. The Court of Appeal noted that the FTT in that case had found that if the taxpayer had consulted its tax adviser "there seemed 'little doubt' that he would 'at the very least have raised [or] alerted the taxpayer to a potential problem" (*per* Elizabeth Laing LJ at [71]).

87. In particular, Mr Sherry drew attention to the Court of Appeal's conclusion at [116] which he said confirmed that factual causation (i.e. a "but for" test) had been applied by the FTT in that case:

> "On the F-tT's findings, it is *obvious* that had Mainpay taken reasonable care, the contracts would have been overarching contracts of employment. If they had been overarching contracts, the reimbursement of those expenses would not have been liable to tax (subject to the issue raised by ground 2).

> Mainpay did not take reasonable care to ensure that the contracts were overarching contracts. Mainpay nevertheless reimbursed the expenses free of tax, as if the contracts were overarching contracts, when, in law, those payments were liable to tax. *Had* Mainpay *taken reasonable care*, therefore, on the F-tT's findings, that *loss of tax would have been avoided*." (*Emphasis added by Mr Sherry*)

88. Mr Sherry noted that at [117] the Court of Appeal upheld the Upper Tribunal's decision that it was unnecessary for the FTT to hypothesise/speculate about what would have happened if Mainpay had taken reasonable care and taken further advice. However, in the present appeal Mr Sherry submitted that it was obvious that taking a second tax counsel's opinion would have made no difference to the advice and/or understanding of the position with respect to the incidence of PAYE and NICs on the scheme under consideration. The FTT had abundant materials before it to enable it to make a finding as to what the understanding of the law was at the relevant time in respect of the incidence of PAYE and NICs. This material consisted of decided caselaw.

89. Ms Choudhury submitted that the FTT had been correct to recognise that the words "due to" in paragraph 3(1) Schedule 24 FA 2007 imposed a causal requirement between the carelessness in question and the inaccuracy in Delphi's P35 return. Furthermore, the FTT had been correct to hold that the causal requirement was one of "attribution" rather than "but for" causation.

90. In *Mainpay CA* it was held, Ms Choudhury submitted, that there was no burden on HMRC to prove a particular counter-factual outcome. Therefore, Delphi's argument that obtaining an independent tax counsel's opinion would have made no difference to Delphi's entries on the P35 return was, in Ms Choudhury's submission, unsustainable.

91. The Court of Appeal did not, Ms Choudhury contended, specify what the causal requirement would be in cases with different fact patterns (for example, in cases in which it was not obvious what would have happened if the taxpayer had not been careless). In particular, Ms Choudhury argued that the Court of Appeal did not decide that HMRC must show "but for" causation in order to make out a prima facie case that a taxpayer's carelessness caused the loss of tax in issue.

92. Ground 3 must fail, Ms Choudhury said, because the FTT expressly stated that the causal test imported by paragraph 3(1) of Schedule 24 was one of attribution and it applied this test to the particular facts of the case.

93. As regards Ground 4 (i.e. that the FTT took into account irrelevant considerations in deciding that HMRC had discharged the burden of proving a causative link between the alleged carelessness and inaccuracy at issue), Ms Choudhury submitted that this must also fail. The submission advanced on behalf of Delphi was that the FTT erred by focusing on the decision to enter into the tax avoidance scheme rather than the process of completing and filing P35 returns. Ms Choudhury argued that this submission ignored the fact that Delphi failed to take any action to address the relevant risks at any point having taken a commercial view on the benefits of the scheme such that its P35 returns were inevitably completed on the basis that the scheme delivered the intended tax savings. The failure to address the risks of the scheme failing, it was argued, had a direct bearing on the completion of the P35 returns which meant that the inaccuracies in those returns were attributable to, i.e. caused by, that failure.

Discussion

94. We consider this matter with the benefit of the decision of the Court of Appeal in *Mainpay CA,* on which the parties specifically addressed us in writing, and where the question of causation in the context of sections 36, 29(4) and 118 (5) TMA was addressed.

95. In the first two of those provisions, the Court of Appeal considered the phrase "brought about carelessly" (or "brought about" in section 118(5) TMA). There is a relationship between these provisions and those of paragraphs 1, 3 and 18 of Schedule 24: see paragraph [34] of *Tooth*,[11] *per* Lord Briggs and Lord Sales giving the judgment of the Court. It seems to us to make little sense to interpret the words "due to" used in paragraph 3 Schedule 24 differently from the words "brought about" used in the above provisions from the TMA. Both phrases require that the inaccuracy must have been *caused* by carelessness. Elizabeth Laing LJ in *Mainpay CA* at [107] held that "brought about" was a synonym for "caused" and we consider that "due to" has the same meaning.

96. At Decision/[166], the FTT, rejecting a "but for" test of causation, interpreted the words "due to" as imposing an attribution test stating:

> "We are of the view that the nexus required to be established at para 3(1) is one of attribution – in the sense that the inaccuracy can be accounted for by a mode of behaviour which is characterised as 'failure to take reasonable care'."

97. The FTT at Decision/[170] placed emphasis on the omission of the definite article in paragraph 18 Schedule 24 stating:

> "The absence of the definite article in 'avoid inaccuracy' is conspicuous, and connotates [*sic*] the generality of a mode of behaviour, rather than the specificity of a particular action or omission. The absence of the definite article in para 18(3) defence points to the construction that the nexus between inaccuracy and behaviour applicable to Sch 24 FA 2007 is not one of causation in the 'but for' sense, which requires the pinpointing of an action or omission to be particularised in order to establish the 'but for' causation."

98. In our view, both the attribution test applied by the FTT and its reliance on the wording of paragraph 18 in Schedule 24 constitute material errors of law. The employment of an attribution/mode of behaviour test is not based on any authority and, as the FTT recognised at Decision/[169], was a wider and more general test of causation than the "but for" test advocated by Delphi before the FTT.

99. In *Mainpay CA*, Elizabeth Laing LJ noted at [114] and [115] that the FTT in that case had applied a test of causation and cited, with apparent approval, the formulation of the test applied by the FTT:

> "[114] …F-tT clearly understood that sections 36(1) and 118(5) require a causal link between carelessness of the taxpayer and the loss of tax. In the relevant paragraphs, the F-tT quoted the statutory words four times, and used various synonyms, including 'cause' (and cognate words), 'as a result of', and 'led directly to'."

[11] *Tooth v HMRC* [2021] STC 1049 at [42]-[44] and [47] ("*Tooth*")

> [115] …On the contrary, the F-tT did apply a causal test. Its conclusion was that it was 'clear that the failure to take reasonable care to ensure that the contract in question was an overarching contract of employment led directly to the loss of tax as a result of Mainpay treating the expenses as deductible when in the absence of an overarching contract, they were not'…"

100. At [116], Elizabeth Laing LJ expressed the Court's conclusion in the following words which, as Mr Sherry submitted, effectively applied a "but for" test:

> "The loss of tax in this case was that part of the workers' pay was treated as tax-free when it should have been subject to the deduction of tax. On the F-tT's findings, it is obvious that had Mainpay taken reasonable care, the contracts would have been overarching contracts of employment. If they had been overarching contracts, the reimbursement of those expenses would not have been liable to tax (subject to the issue raised by ground 2). Mainpay did not take reasonable care to ensure that the contracts were overarching contracts. Mainpay nevertheless reimbursed the expenses free of tax, as if the contracts were overarching contracts, when, in law, those payments were liable to tax. Had Mainpay taken reasonable care, therefore, on the F-tT's findings, that loss of tax would have been avoided."

101. In that case, it was "obvious" that if the taxpayer had taken advice from the appropriate quarter (thereby taking reasonable care) the loss of tax would have been avoided. Whether that is expressed as a "but for" test or a "direct result" test, it seems to us that it is a significantly narrower test than the attribution/mode of behaviour test applied by the FTT in the present appeal. Elizabeth Laing LJ's language points to particular acts or omissions which have caused the inaccuracy in the return.

102. We also consider that the FTT's reliance upon the absence of the definite article in paragraph 18 Schedule 24 was misplaced. That provision is focused on the circumstances in which a taxpayer may be liable for any inaccuracy in a document submitted to HMRC by its adviser. It is not a provision which concerns the nature of the causative nexus between the carelessness of the taxpayer and the inaccuracy in the return.

103. We do not consider the FTT was correct when it distinguished between the objective nature of tort liability and the concept of carelessness in the context of tax penalties. Carelessness in relation to tax penalties is an objective test but applied to the actual circumstances of the taxpayer in question. That does not, in our view, have any direct bearing on the issue of causation.

104. Finally, we consider that the FTT erred in law when it concluded at Decision/[201(1)] that it should apply the same concept and definition of "prevailing practice" as found in section 29(2) TMA. That provision has no application in the present case. The relevant issue was whether the inaccuracies in the P35 returns were caused by Delphi's carelessness. The real question, therefore, was whether Delphi was careless in its understanding of the law relating to payments to/from EBTs and whether those payments were taxable as employment income. Certainly, a general understanding of the tax treatment of certain payments transactions is relevant to that issue, but the specific "prevailing practice" defence under section 29(2) TMA is a narrower concept and is not applicable to the general issue of carelessness.

105. We conclude that the FTT erred in law when it applied an attribution/mode of behaviour test of causation. That error of law was material in the sense that the FTT might have reached a different conclusion had it not misdirected itself in law (*HMRC v Sintra*

Global, Inc & Anor [2025] EWCA Civ 1661 *per* Sir Lancelot Henderson at [152]). Pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007, we set aside the Decision in relation to the careless inaccuracy penalty for the year ended 5 April 2009.

Doubtful penalisation

106. Both parties referred briefly to the rule against doubtful penalisation with Mr Sherry submitting that its application should lead us to adopt a narrower rather than a wider interpretation of the words "due to" if more than one interpretation were possible; see *Agassi v Robertson* [2004] EWCA Civ 1518 at [30] per Buxton LJ. Ms Choudhury argued that the rule did not apply because the submission on behalf of Delphi was that at its highest, "but for" causation was a tenable construction.

107. It is clear that the rule, which is one of statutory interpretation, applies to civil penalties: *ESS Production Ltd (In Administration) v Sully* [2005] EWCA Civ 554, per Arden LJ at [78]. In *R(OAO the Good Law Project) v Electoral Commission & Ors* [2018] EWHC 2414 (Admin) at [34] (Leggatt LJ and Green J) the rule was summarised as follows:

> "If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections" (*Tuck & Sons v Priester*) (1887) 19 QBD 629).

108. We consider that our interpretation, following *Mainpay CA*, of the phrase "due to" would be more consistent with the application of this rule of interpretation than the wider "attribution/mode of behaviour" meaning adopted by the FTT.

Remitting or Remaking the Decision?

109. Given the extensive evidence referred to in the Decision and the FTT's detailed factual findings, it would be disproportionate to remit this appeal to the FTT. Instead we consider that we can re-make the decision, making any decision that the FTT could make on a remittal and that we may make such findings of fact as we consider appropriate: section 12 of the Tribunal, Courts and Enforcement Act 2007.

Remaking the Decision on causation

110. *Mainpay UT* at [159] and *Mainpay CA* at [117] both stand for the proposition that it is not necessary for this Tribunal to speculate on the counter-factual position of what advice would have been received if Delphi had followed Mr Tucker's recommendation that an independent tax counsel's opinion should be obtained. Rather, it is necessary for us to determine what caused the inaccuracies in the P35 returns and whether those inaccuracies were caused by carelessness on the part of Delphi.

111. At various points in the Decision the FTT refers to the two decisions of the Special Commissioners in *Dextra Accessories Ltd v Macdonald* STC (SC) 413 ("*Dextra*") and *Sempra Metals Ltd v HMRC* [2008] STC (SC) 413 ("*Sempra*").

112. In *Dextra*, HMRC were unsuccessful in arguing that contributions to an EBT (where most of (what would have been) the remuneration of the three directors was paid and which

the trustees then allocated to trust sub-funds) were at the absolute disposal of the employees and therefore it was held that those amounts were not subject to tax as employment income.[12] An appeal eventually reached the House of Lords but on the issue of deductibility rather than the employment income issue.

113. Subsequently, in *Sempra*, the company set up an EBT to provide tax-efficient benefits to its employees. The employees could choose to take their annual bonuses in cash or have them paid to the trust. Each employee had the choice of taking the amount allocated to him as a loan from the trust or leaving it invested in the trust. After changes were made by the Finance Act 2003, which prevented the deduction from profits for the purpose of corporation tax of sums paid into such trusts unless they gave rise to an income tax charge on employment income and a liability to pay NICs, the company replaced the EBT with a family benefit trust. The beneficiaries of the family benefit trust were members of the employee's family as nominated by the employee and the trust operated in a similar fashion to the earlier trust. The Special Commissioners held that no transfer of cash or its equivalent was placed unreservedly at the disposal of the employees and therefore the payments did not constitute employment income. The litigation in *Sempra* was settled before any appeal was heard.

114. Several years after the events concerned in this appeal, in *Murray Group Holdings Ltd v HMRC* [2012] UKFTT 692 (TC), the FTT in that case held that payments to and loans from an EBT did not constitute employment income because the funds had not been placed unreservedly at the disposal of the employees. The FTT (Dr Poon dissenting) followed *Sempra* and *Dextra*. The FTT's decision was upheld by the Upper Tribunal in *Murray Group Holdings Ltd and others v HMRC* [2015] STC 1 (Lord Doherty). HMRC appealed to the Court of Session which overturned the earlier decisions in *Advocate General for Scotland v Murray Group Holdings Ltd* 2016 SC 201. Before the Court of Session, HMRC advanced a new argument, namely that the payment of the sums to the remuneration trust involved a redirection of the employee's earnings and accordingly did not exclude those earnings from the charge to income tax. The Court of Session accepted that argument and the Supreme Court upheld that decision in *Rangers*, holding that *Sempra* (and, by parity of reasoning, *Dextra*) had been wrongly decided.

115. Thus, until 2015 (the decision of the Court of Session) the Special Commissioners, the FTT and this Tribunal had upheld the view that payments into and loans from EBTs were not employment income. It is true that throughout this time HMRC continued to hold the view that such payments were employment income and it could not be said that, publicly, they accepted that these payments were not employment income.

116. With the exception of the Upper Tribunal decision in *Murray Group Holdings Ltd and others v HMRC* [2015] STC 1, all the decisions were first instance decisions which were not binding. Nonetheless, they represented a significant body of judicial decisions to the effect that payments to and loans from EBTs did not constitute employment income. The *Murray Group Holdings* decisions, of course, came after the events concerned in this appeal. Nonetheless, they indicate that, even at a relatively late stage, the analysis in *Sempra* and

[12] "[Counsel for HMRC] requests us to make a finding from these points that the money contributed by the group to the EBT trustee and allocated by the trustee to the respective trust sub-funds of the six is at their absolute disposal because the trustee will always do what they require." We do not consider that such a finding would be justified on the facts. "The reason why the employees are not taxed on funds in the EBT is simply that they do not belong to the employees." "*Our conclusions on the facts*", paragraphs 1 and 2.

Dextra, at least as regards the question whether payments to and loans from an EBT constituted employment income, still carried weight.

117. At Decision/[110], the FTT summarised the evidence of Mr Barraclough, an officer of HMRC who determined whether the penalties should be assessed as "careless" or "deliberate". The FTT accepted Mr Barraclough's evidence as to questions of fact: Decision/[6]. The summary of his evidence was as follows:

> "110. Officer Barraclough was extensively cross-examined on the state of authorities in relation to contributions made to an EBT during the tax year 2008-09, and he accepted or agreed that:
>
> (1) *The main objective of the Arrangement was to enable a contribution into an EBT to get a Corporation Tax deduction.*
>
> (2) *If there was a contribution to an EBT and a loan from the EBT to employees, the state of authorities meant that 'there would be no PAYE and NIC at that time*'.
>
> (3) The outcome in *Dextra* where the company sought a tax deduction as well, Barraclough accepted, at least in part, that taxpayers could rely on *Dextra*.
>
> (4) The mischief which the Revenue would be hoping to cure was to work round *Dextra*, and the Scheme was trying to circumvent the effect of the decision of the House of Lords in *Dextra* 'to allow for a CT deduction taken immediately'.
>
> (5) *The arrangements in the present case were different to a 'standard EBT', but he could not explain why if in an ordinary standard EBT, it was permissible not to operate PAYE and NIC, that in the present case, PAYE and NIC needed to be operated.*
>
> (6) Sempra had been decided in 2008 and the view was that with regard to the PAYE element, the Revenue had not succeeded at that point in time in the way it had in Rangers.
>
> (7) *It was 'not clear that the writing was on the wall for Rangers' because the Court of Session judgment was not until November of 2015.*" [*Emphasis added*]

118. Mr Barraclough accepted at Decision/[110(2)] that following the authorities at that time "there would be no PAYE and NIC" on contributions to an EBT and a loan from the EBT to the employees. That was, therefore, HMRC's view, according to the only witness to give evidence on behalf of HMRC. Furthermore, Officer Barraclough was unable to explain why it was permissible not to operate PAYE and NICs on a "standard EBT" (i.e. where no corporation tax deduction was being sought) but, on the other hand, HMRC was seeking to impose PAYE and NICs in the present case.

119. It will also be seen from Mr Barraclough's evidence that there was great emphasis placed on the corporation tax deduction being sought by Delphi for its contributions to the EBT. He described it as the "main objective" of the scheme. As we shall see, in relation to the "deliberate inaccuracy" penalty, the attempt to obtain a corporation tax deduction in the present case seems to have influenced both HMRC's thinking and that of the FTT, although it is unclear why it was thought that affected the analysis of whether the payments constituted employment income and should be returned on the P35 returns.

120. Clavis showed a number of opinions given by Mr Thornhill QC to Mr Tucker concerning the Scheme before the Tucker Letter and before Delphi entered into the Scheme. One of those opinions[13] dealt with the taxation of employment income. The relevant opinion read as follows:

> "I am instructed by Clavis Solutions Limited /Clavis Tax Solutions LLP ('Clavis') to advise on the tax effectiveness of providing benefits through the use of trusts and sub-trusts. The trusts and sub-trusts are ones that may be established by the company referred to as HRC in an accompanying opinion of the same date as this.
>
> One of the possible solutions identified by HRC could be the provision of benefits to employees through such trusts.
>
> If this possibility is pursued then, HRC would identify suitable trustees and establish a trust for the benefit of the employees of the trading company using the services of HRC.
>
> It is envisaged that the trustees would follow the recommendations of HRC in relation to the provision out of the trust of specified benefits to specified key employees. It is further envisaged that separate sub-trusts would be created in respect of each employee.
>
> The beneficiaries of a relevant sub-trust would include the employee, the spouse of the employee, his or her children and his or her grandchildren. Other employees would only benefit if the main class of beneficiaries died out.
>
> The beneficiaries of the sub-trust would then be able to access benefits in a tax efficient manner. In the Dextra Accessories case it was established that the creation of a sub-trust where the beneficiaries extend beyond the "family" of the employee (as defined) was not a benefit in kind, since that section dealt with actual benefits and not potential benefits or the possibility of benefits. HM Revenue and Customs have acknowledged genuine loans made out of sub-trusts to beneficiaries do not constitute emoluments and are therefore not taxable save possibly under the beneficial loan provisions.
>
> It is envisaged that beneficiaries of the sub-trust may request the relevant trustees to make loans to them and it is envisaged that such loans may be made interest free, without security and repayable on demand by the trustees.
>
> It is envisaged that if interest is not paid, then an income tax charge would be likely to be due at the official rate of interest then in force.
>
> As an alternative, loans could be made interest bearing.
>
> In my opinion this is a well-trodden route and the fiscal consequences will be as stated. However, it is important to note that if the claim for a deduction were to fail, the disposition to HRC or possibly through HRC to the trust could constitute a transfer of value apportionable under s.94 IHTA 1984 and resulting in an IHT charge. While this is a risk, it is perhaps an outside one because the whole thrust of the arrangements is to reward successful employees, a situation remote from transfers of value."[Dated: 28 June 2007]

121. It was Clavis who instructed Mr Thornhill and his opinion was addressed to them. Delphi could not rely on Mr Thornhill's advice because Delphi was not Mr Thornhill's client

[13] Some later opinions additionally dealt with beneficial loan provisions.

and he owed Delphi no duty of care.[14] Nonetheless, it was clear that Mr Thornhill considered that the payments into and loans from the EBT were not taxable as employment income.

122. Furthermore, Mr Tucker's evidence in cross-examination was that he relied on Mr Thornhill's opinion and considered Mr Thornhill's views to be correct.

123. In our view, the result of the *Dextra* and *Sempra* litigation provided a reasonable basis for Delphi submitting P35 returns which only subsequently was proved to be inaccurate by the *Rangers* litigation many years later. It is difficult to see how reliance on a series of contemporary decisions, in line with Mr Thornhill's opinion and the views (expressed after the event) by Mr Barraclough can be criticised. In assessing whether Delphi was careless the widely held view that payments into and loans from an EBT were not subject to PAYE and NICs is highly material.

124. The cause of the inaccuracy in the P35 returns was the reasonable but (subsequently determined to be) mistaken view that payments into and loans from EBTs were not subject to PAYE and NICs. We consider that Delphi was not careless when it submitted the P35 returns. Accordingly, the inaccuracy in the P35 returns was not "due to" Delphi's carelessness but due to the reasonable view (albeit ultimately determined to be mistaken) that the payments into and loans from EBT's were not subject to PAYE or NICs. It may well have been, as we have held, that Delphi was careless in proceeding without taking further advice or pausing to take stock, but we do not consider that that carelessness was the cause of the inaccuracies in the P35 return. The cause was a reasonable but mistaken view of the law.

125. We therefore allow Delphi's appeal in relation to the penalty for the year ended 5 April 2009 and set the penalty aside.

GROUP 3: AGENCY (GROUNDS 5 AND 6)

The Decision

126. A taxpayer is liable to a penalty where a P35 return containing a careless inaccuracy is given to HMRC on the taxpayer's behalf under paragraph 18(1) of Schedule 24. However it is a defence if the taxpayer satisfies HMRC that it took reasonable care to avoid inaccuracy in respect of anything done or omitted by the taxpayer's agent: paragraph 18(3) of Schedule 24.

127. The paragraphs in the Decision relevant to this issue are set out below.

128. At Decision/[151]-[155], the FTT said:

> "151. The statutory wording of para 18 therefore directs the burden to be allocated as follows:
>
> (1) Under para 18(1), HMRC have the burden to prove that there is a prima facie case that the P35 returns in question contain a careless inaccuracy; and
>
> (2) By virtue of para 18(3), P (i.e. [Delphi]) has the burden to satisfy HMRC (and on appeal the Tribunal) that it took reasonable care to avoid inaccuracy.

[14] *McClean & Ors v Thornhill* [2022] EWHC 457 (Ch)

152. In other words, if HMRC have met the burden in relation to para 18(1), then [Delphi] (without more) will be held liable to the careless penalty. The onus is then reversed onto [Delphi] to satisfy the Tribunal that it took reasonable care to avoid inaccuracy for the penalty to be discharged. To avail itself of the defence under para 18(3) of Sch 24, [Delphi] has to satisfy the Tribunal that it 'took reasonable care to avoid inaccuracy'. The express provision under para 18(3) which places the onus on P is also in line with the general principle that the person who asserts must prove.

The absence of the definite article in para 18(3) Sch 24

153. We note the omission of the definite article in the statutory wording for para 18(3). While the inaccuracy in a particular penalty case is necessarily specific, and indeed para 3(1) for penalty categorisation refers to 'the inaccuracy' throughout its wording, the definite article is noticeably missing in framing the defence available to P under para 18(3). The exact wording of the defence is: 'P took reasonable care to avoid inaccuracy'.

154. The omission of the definite article, in our view, is not a slip in legislative drafting, but an intentional omission so that P can avail himself of the defence under para 18(3) without having to prove that he has taken reasonable care to avoid the particular inaccuracy in question. (1) To construe the defence under para 18(3) literally, the omission of the definite article means that the reasonable care to avoid inaccuracy is to be exercised in a generic manner, and is not intended to be specific to the inaccuracy in question that has given rise to a potential penalty assessment. (2) On a purposive construction, if reasonable care is to be exercised to avoid the inaccuracy, that would have presupposed knowledge on P's part of the inaccuracy in the first place. If P had the knowledge of the inaccuracy (which gives rise to the penalty in question), P should have taken care to remove the inaccuracy altogether. The formulation of taking 'reasonable care to avoid the inaccuracy' as a defence would not have made any sense. To stand as a defence against a penalty, the reasonable care to avoid inaccuracy cannot presuppose foreknowledge of what the inaccuracy in question is going to be.

155. In our judgment, if HMRC have met the burden under para 1 Sch 24 that the penalties are imposable, then for para 18(3) Sch 24 purposes, it is not sufficient for [Delphi] to traverse HMRC's case, but that [Delphi] has to meet the burden of availing itself of the defence by making a positive case that it '*took reasonable care to avoid inaccuracy'*."

129. Furthermore, at Decision/[170], the FTT observed:

"170. The taxpayer's defence under para 18(3) is in a generic sense of: 'took reasonable care to avoid inaccuracy'. The absence of the definite article in 'avoid inaccuracy' is conspicuous, and connotates the generality of a mode of behaviour, rather than the specificity of a particular action or omission. The absence of the definite article in para 18(3) defence points to the construction that the nexus between inaccuracy and behaviour applicable to Sch 24 FA 2007 is not one of causation in the 'but for' sense, which requires the pinpointing of an action or omission to be particularised in order to establish the 'but for' causation."

130. The FTT's conclusion on the paragraph 18(3) defence is at Decision/[240]-[241]:

"240. In summary, we reject Mr Sherry's submissions as flawed for two main reasons:

> (1) The submissions, at most, establish that [Delphi] had taken reasonable care to establish the legality of the Scheme before entering into it, but that does not prove that [Delphi] had taken reasonable care to avoid inaccuracy in its taxpayers' returns. The flaw in this aspect of submissions is to conflate or to confound the care taken to establish the legality of the Scheme with the reasonable care required to avoid inaccuracy in general for para 18(3) purposes.
>
> (2) The submissions amount to making a defence that [Delphi] had a reasonable excuse for failing to follow the advice stated in Tucker's letter. The flaw in this respect is that the statutory defence for Sch 24 purposes is not whether the taxpayer had a reasonable excuse for the inaccuracy that led to a loss of tax, but whether the taxpayer had taken reasonable care to avoid inaccuracy (in general).
>
> 241. We conclude that [Delphi] has not proved, on the balance of probabilities, that it took reasonable care to avoid inaccuracy (in the sense of being intent that the returns it rendered to HMRC to account for its tax liabilities would be complete and accurate) to avail itself of the defence under para 18(3) Sch 24."

Submissions

131. Under Ground 5, Mr Sherry argued that in the absence of any allegation or finding that Dickinsons had acted carelessly or deliberately, there were no careless acts or omissions capable of attribution to Delphi. Therefore, Mr Sherry argued that paragraph 18(1) had nothing to bite on, so far as attribution of any carelessness to Delphi was concerned. It therefore followed that the P35 returns did not contain any "careless" or "deliberate" inaccuracy.

132. In relation to Ground 6, Mr Sherry challenged the FTT's conclusion at Decision/[241] to the effect that Delphi had not proved, on the balance of probabilities, that it took reasonable care to avoid inaccuracy (in the sense of being intent that the returns it rendered to HMRC to account for its tax liabilities would be complete and accurate) to avail itself of the defence under paragraph 18(3) of Schedule 24.

133. Mr Sherry submitted that Delphi took reasonable care in engaging Dickinsons (properly qualified, independent, professional advisers) and they had been given every opportunity to review the implementation of each tranche and the operation of the arrangements. If there was a careless inaccuracy (which Mr Sherry did not accept) this would have been Dickinsons' and not Delphi's. Secondly, the inaccuracy in the P35s was solely due to the then prevailing view of the law as to what amounted to "earnings". The "inaccuracy" was that there was a different prevailing view of the law at the time the P35s were submitted when compared with the position post *Rangers*. Therefore, the difference between the parties was that Delphi had taken a different technical view from HMRC, where both positions were feasible and credible in circumstances where a subsequent judicial decision identified that HMRC's interpretation was to be preferred.

134. Mr Bignell argued that Delphi's argument on Ground 5 was misconceived. Paragraph 18(1) provided an additional basis for imposing a penalty on a taxpayer i.e. where a careless inaccuracy has been brought about by a person acting on its behalf. It did not have the converse effect of preventing a taxpayer whose conduct has brought about an inaccuracy being liable to a penalty because a person acting on the taxpayer's behalf was not involved in bringing about that inaccuracy.

135. As regards Ground 6, Mr Bignell submitted that Delphi's challenge was erroneous because it did not accurately summarise the conclusion at Decision/[241] where the FTT said:

> "241. We conclude that [Delphi] has not proved, on the balance of probabilities, that it took reasonable care to avoid inaccuracy (*in the sense of being intent that the returns it rendered to HMRC to account for its tax liabilities would be complete and accurate*) to avail itself of the defence under para 18(3) Sch 24." (*Emphasis added by Mr Bignell*)

136. Therefore, Mr Bignell submitted that the FTT had held that Delphi had failed to take reasonable care to avoid inaccuracy in the sense that it was not intent that the returns it rendered to HMRC to account for its tax liabilities were complete and accurate. The FTT did not hold that Delphi had failed to take reasonable care to avoid inaccuracy in some unspecified general sense.

137. Mr Bignell noted that at Decision/[153]-[155] the FTT held that the absence of the definite article (i.e. "the") in paragraph 18(3) was intentional and meant that Delphi could not avail itself of the defence under paragraph 18(3) without having to prove that it had taken reasonable care to avoid the particular inaccuracy in question. The FTT also considered that it was for Delphi to make a positive case that it had taken reasonable care to avoid inaccuracy. The FTT made detailed findings of fact in respect of the steps that Delphi submitted it had taken to avoid inaccuracy and summarised its reasons for rejecting those submissions at Decision/[240]. Mr Bignell argued that Delphi's submissions at most established that Delphi had taken reasonable care to establish the legality of the Scheme (i.e. that it was not criminal) but did not prove that it had taken reasonable care to avoid inaccuracy in its returns.

138. The findings and conclusions at Decision/[239]-[240] make it clear that the FTT considered whether Delphi had taken reasonable care to ensure its P35 return was accurate and concluded that it had not done so.

Discussion

139. As the FTT held in *Stanley v HMRC* [2017] UKFTT 793 (TC), there is a subjective element in the test of reasonable care under paragraph 18(3). In determining whether reasonable care has been exercised, it is necessary to look at all the circumstances including the nature of the matter is being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent.

140. There is nothing in the Decision which suggests that Dickinsons were careless. However, we do not consider that this assists Delphi.

141. As Mr Bignell submitted, paragraph 18(1) provided an additional basis for imposing a penalty on a taxpayer where a careless inaccuracy has been brought about by a person acting on its behalf. That does not mean, however, that conversely a taxpayer whose conduct has brought about the inaccuracy is somehow prevented from being liable to a penalty simply because a person acting on the taxpayer's behalf was not involved in bringing about that inaccuracy.

142. Again, as Mr Bignell noted, Delphi's interpretation of paragraph 18(1) would lead to an absurd result. If a taxpayer carelessly provided incomplete documentation to its accountant and the accountant carefully completed the taxpayer's return on the basis of the information provided and submitted that return to HMRC, the taxpayer could escape a careless inaccuracy

penalty. That would be a strange result which, of itself, indicates that Mr Sherry's submission is incorrect.

143. We should note that both parties acknowledged that paragraph 18 had no application to deliberate inaccuracy penalties.

144. Accordingly, we dismiss Delphi's appeal on Ground 5.

145. As regards Ground 6, at Decision/[241] the FTT held that Delphi had not proved that it took reasonable care to avoid inaccuracy "in the sense of being intent that the returns it rendered to HMRC to account for its tax liabilities would be complete and accurate". Therefore, the FTT held that Delphi could not rely on the defence under paragraph 18(3) of Schedule 24.

146. It is apparent from Decision/[241] that the FTT did not conclude that Delphi had failed to take reasonable care to avoid inaccuracy in some generalised or unspecified sense. Instead, it considered that Delphi's submissions amounted to an argument that it had taken reasonable care only to establish the legality of the Scheme. Accordingly, we dismiss Delphi's appeal on Ground 6.

GROUP 4: DELIBERATE INACCURACY (GROUNDS 8(A) AND 8(B))

The Decision

147. The penalty in respect of deliberate inaccuracy related to Tranche 4. The FTT set out the background facts relating to Tranche 4 at Decision/[55]-[59]:

> "The fourth tranche – November/December 2009
>
> 55. The evaluation report for the fourth and final tranche was produced on 27 October 2009. The correspondence in the run-up to 27 October 2009 in the bundle shows the following:
>
> (1) On 17 September 2009, Officer Walker received a telephone call from Sally Fuller of Clavis Solutions (Clavis Solutions being the 'tax advisers to Herald Resource') in response to Walker's letter of 15 September 2009. The note of the call (by Walker) recorded the following: 'Fuller explained that she had spoken to Dave Jones at SI Liverpool regarding Walker's letter as Jones was overseeing a review of the remuneration scheme provided by Clavis Solutions which had been used by several other companies including Delphi Derivatives. Fuller said that she would confirm the details in writing to Walker and provide a "bible" of documents regarding use of the remuneration arrangement.'
>
> (2) On 21 October 2009, Dickinsons responded to HMRC's letter of 15 September 2009 under the heading 'Check of CTSA Tax Return for Delphi Derivatives Limited/ Period ended 30th June 2008'. The letter opened by referring to Officer Walker's 'recent discussion' with Sally Fuller of Clavis Solutions, and enclosed 'a complete bible of documents' said to support 'the key employee reward and incentivisation arrangement undertaken' by Delphi in the accounting period ended 30 June 2008, together with the correspondence and minutes contained in the 'bible'. Dickinsons' letter also refers specifically to being aware of HMC's enquiries into other scheme users: 'We understand that you [i.e. Officer Walker] have agreed to liaise directly with Mr David Jones from

Specialist Investigations in Liverpool who is coordinating all enquiries into this arrangement.'

(3) On 22 October 2009, Sally Fuller emailed Kerry Hall (and two others) at Clavis Solutions under the subject heading of 'Delphi Derivates new sign up pack for SPT4': 'Can one of you please produce Delphi Derivates new sign up pack for SPT4? David [Cowen] going down to London next Tuesday for sign up, so he'll need it ready before then. They're doing £3m and will relate to their year ended 30 June 2009.'

56. The 'sign-up pack for SPT4' in Sally Fuller's email was a reference to the evaluation report to be produced after the scheduled meeting on 27 October 2009 when Cowen would have met with Delphi's directors to carry out the 'services' to be performed by HES. The sign up pack SPT4 version was completed with a recommendation of a bonus of £1m gross per director with an invoice total of £3m.

57. The final report with the cover title being: 'Company Information Sheets and Employee Performance Evaluation Sheets prepared by Herald Employment and Recruitment Services 18 Limited' changed the recommended budget amount from the initial of £3m to £5.4m. The significant dates of events leading to the amendment in the budgeted amount are as follows:

(1) On 27 October 2009, David Cowen for HES met with [Delphi]'s directors.

(2) The employee evaluation documents supposedly completed on 27 October 2009 stated the recommended budget to be £3m.

(3) On 31 October 2009, Langran's short email to Cowen stated in full as follows: 'Have spoken to Peter Tucker and he thinks we should do £5.4m – I imagine this is ok with you?!'

(4) Herald's report produced on 19 November 2009 recommended a budget of £5.4m.

58. The following correspondence (after Cowen's meeting of 27 October 2009) gives some indication as to the circumstances surrounding the implementation of tranche 4 due to cashflow issues faced by Delphi at the time. While there was this amendment by Herald of the initial £3m to £5.4m, Delphi was unable to pay the invoice total of £5.4m in one go. A 'loan back' arrangement was made between Delphi and Herald Trustees, whereby the first instalment was loaned back to the directors to fund the payment of the second instalment of the invoice.

(1) A letter dated 16 November 2009 by Herald Employment Services LLP (HES in Cheshire) to Christina Kiely of Herald Resource (in Jersey) regarding Delphi, states: 'Following our meeting with the above clients we are pleased to set out our findings for your consideration:- On the basis of the company and employee evaluations we have carried out, our preliminary view is that an overall benefit and incentive budget of approximately £5,000,000.00 to £5,500,000.00 should be able to provide a sufficient level of benefits and incentives to motivate, reward and retain the employees.'

(2) By email dated 20 November from Langran to Pauline Egan of Herald Trustees: 'As discussed please could you send me the necessary paperwork for me to borrow £200,000 from the trust on an interest paying basis (which I think means we have to do slightly more so that I

have enough money left in my […] Jersey account to pay the interest when it becomes due).'

(3) By email dated 23 November 2009 from Langran to Cowen: 'I have paid £2.7mln to Herald today – then I need to arrange for the three of us to borrow it back so we can pay the balance of the invoice. Please could you ask whoever does the paperwork to organise the loan documents for us – we will need to do a loan of £900,000 each as cash flow a bit of an issue at the moment.'

59. Following the discussion of the 'loan-back' arrangement by Langran's email of 23 November 2009, the steps in terms of payment to implement tranche 4 took place as follows.

(1) On 23 November 2009, Langran emailed Cowen that the invoice would need to be paid in two instalments with the first instalment being loaned back to the directors.

(2) On 23 November 2009, [Delphi] paid £2.7m to Herald.

(3) On 24 November 2009, £2,522,429 was settled into Delphi's EBT.

(4) On 25 November 2009, the settled amount was allocated into the sub-trusts.

(5) On 3 December 2009, [Delphi] paid the second instalment of £2.7m to Herald.

(6) On 4 December 2009, the sum of £2,523,364 (net of fees deducted by Herald) was settled into Delphi's EBT.

(7) On 7 December 2009, amounts were allocated to the sub-trusts."

148. The FTT set out what it considered to be the relevant case-law in relation to deliberate inaccuracy at Decision/[255]-[257]. In particular, the FTT referred to the decision in *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC) ("*Auxilium*") (Judge Greenbank and Mr Bell) where the FTT said at [63]:

> "[63] 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."

149. The FTT then went on to make specific findings of fact in relation to the deliberate inaccuracy penalty at Decision/[258]-[259]. Given the nature of the penalty, we set out the FTT's relevant findings in full:

> "Findings of fact regarding tranche 4
>
> 258. With the case law definition for deliberate action in mind, we have regard to the sequence of events and the evidence of Tucker and Langran in relation to tranche 4.
>
> (1) The enquiry into the CT return for the accounting period ended 30 June 2008 was opened on 15 September 2009, and was a fact firmly in the background at the time when [Delphi] embarked on implementing tranche 4.
>
> (2) In fact, the conjunction of events meant that Clavis Solutions (as 'tax advisers to Herald Resource) was responding to Officer Walker's request in

connection with the enquiry into Delphi by way of Sally Fuller's telephone call to Walker, while at the same time preparing for tranche 4 to be implemented – Fuller's call to Walker on 21 October 2009 was followed the next day by her email instruction for the sign up pack for SPT4 to be produced.

(3) [Dickinsons] as Delphi's advisers, would appear to have been updated by Fuller, as inferred from the opening paragraphs in their letter of 21 October 2009, and Dickinsons by making direct reference to Officer Jones of SI Liverpool co-ordinating the enquiries into other users of the Clavis Arrangement, was fully aware of the scale of investigation.

(4) Around the time of tranche 4 being discussed, HMRC's Spotlight 5[15] would have been in circulation since 5 August 2005, and its archived date was 2 November 2009.

(5) Cowen of Herald/Clavis supposedly had prepared an evaluation report dated 27 October 2009 following his attendance at Delphi's premises on the same date, which recommended rewards of £1m for each of the directors. However, Sally Fuller's email of 22 October 2009 (which pre-dated Cowen's visit of 27 October 2009) was to instruct her colleagues to produce 'new sign up pack for SPT4' where she clearly stated to her colleagues: 'They're doing £3m and will relate to their year ended 30 June 2009'.

(6) The reasonable inference, from Sally Fuller's instruction email of 22 October 2009, that the figure of £3m was already determined before Cowen's visit of 27 October 2009 purportedly to carry out an independent review.

(7) Furthermore, the figure per Sally Fuller's email of 22 October 2009 would appear to be referable to Delphi's cash position at the time of tranche 4, being £3m (or £2.7m), according to Langran's evidence.

(8) When Sally Fuller told her colleague 'They're doing £3m' (before Cowen's visit), the most probable inference of the identity of 'they' would be 'the directors of Delphi'.

(9) Tucker's evidence was that the tranche 4 payment was made post-year-end, and included in the final set of accounts by way of an accrual.

(10) The reasonable inference is that the management accounts provided to Cowen by email on 30 October 2009 would not have included the £5.4m.

(11) Between the management accounts on 30 October 2009 and the set of accounts filed on 9 June 2010, an accrual of £5.4m augmented the figure for Directors' emoluments to £11m, (inclusive of the £5.4m invoice paid to Herald), which represents 86% of the 'Administrative expense' total of £12.78m for period ended 30 June 2009.

(12) Tucker's evidence originally stated that the management accounts would not have changed Herald's recommendation, then changed to state that Herald would not have changed the figure without supporting documents, such as the management accounts.

[15] HMRC's publication entitled *Spotlights* (published on 5 August 2009 and archived 2 November 2009) set out HMRC's views on that tax position in respect of arrangements similar to those entered into by Delphi, saying that HMRC's view was that funds allocated to an employee or his/her beneficiaries were liable to PAYE and NICs: "Our view is that at the time the funds are allocated to the employee or his/her beneficiaries, those funds become earnings on which PAYE and NICs are due and should be accounted for by the employer."

(13) Langran's evidence concurred with Tucker's amended evidence, in that the change of recommendation in Herald's report from £3m to £5.4m was due to the set of accounts sent on 30 October 2009.

(14) Langran's statement in cross-examination was that the email of 31 October 2009 was 'to instruct' Cowen of the 'available profits' from accounting period ended 30 June 2009 because Cowen had 'no idea about [the company's profits]'.

(15) Between the email of 31 October 2009 and Herald Employment (Cheshire) informing Herald Resource (Jersey) on 16 November 2009 of the increased amount of remuneration budget, the reasonable inference is that the loan-back arrangements had been agreed to take place for the recommended sum to change from £3m to £5.4m.

(16) Langran's email to Cowen of 23 November 2009 was to signal to Cowen to arrange for the first instalment payment of tranche 4 to be loaned back to the directors to meet the second instalment payment of the tranche 4 invoice.

259. We make the following findings of fact for determining the behaviour for tranche 4.

(1) We find that the original recommendation of £3m was by reference to Delphi's cash position at the time, and the figure of £3m was in correspondence to instruct Herald/Clavis for the purpose of producing the 'sign up pack for SPT4' as related in Sally Fuller's email instruction to her colleagues of 22 October 2009.

(2) We find that the figure of £3m had emanated from the directors of Delphi and was determined before Cowen's supposed review carried out on 27 October 2009.

(3) Herald revised the recommended figure to £5.4m on being 'instructed' by Delphi (via Langran's email of 31 October 2009) of its 'available profit'.

(4) We accept Langran's evidence that Cowen had 'no idea' of Delphi's 'available profits' without being so instructed.

(5) Langran, in turn, was advised by Tucker, who would have known from the draft set of accounts that Delphi's taxable profits stood at around £6.5m without any EBT payment invoice.

(6) The circular loan back arrangements were devised to get round the net funds position at year end 2009, standing at just over £2m (cash plus investments), which was very far short of the £5.4m required to reduce operating profit to £1m.

(7) The original recommendation of £3m referable to Delphi's cash position would have taken into account of what Langran referred to as cash inflow after June 2009.

(8) Without the loan back arrangements, Delphi would only have the cash to make £2.7m (or £3m) and would have to pay Corporation Tax on circa £3.5m instead of £1m.

(9) We find that Langran's evidence (a) that '[t]he suggestion never came from Mr Cowen "we should do £5.4 million", because 'Cowen had no idea about that', and (b) 'We had to instruct him' – to be a truthful representation of what actually happened. To that extent, we find that the final EBT payment £5.4m was attributable to a deliberate action of [Delphi].

(10) We also find that the contrivance of the loan-back arrangements of the first instalment of £2.7m for the sole purpose of providing funds for [Delphi] to pay the second instalment of tranche 4, in order to double the overall CT deduction to £5.4m to be a deliberate action."

150. On the basis of those findings, the FTT reached the following conclusions at Decision/[260]-[265]:

"Conclusion on tranche 4

260. We find that the inaccuracy in relation to tranche 4 was attributable to deliberate action. We have regard to the fact that the test for 'deliberate' inaccuracy is a subjective one, and that we are concerned here with the knowledge and intention of [Delphi] specifically.

261. We find that the original sum of £3m for the purpose of producing the sign up pack to be an instruction emanating from the directors of Delphi and given to Herald/Clavis by 22 October 2009, at least about a week before the remuneration evaluation meeting of 27 October 2009. We conclude that the remuneration evaluation meeting was to give the 'veneer' of an independent review having been carried out, when the figures of remuneration budget were by instruction of Delphi's directors all along, whether it was the original £3m or the revised £5.4m.

262. 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. We have special regard to the fact that Dickinsons, as advisers to Delphi, was in correspondence with HMRC in late October while at the same time, advising Delphi of the sum of £5.4m to enhance the CT deduction for the year to 30 June 2009.

263. We also have regard to the CT return enquiry into [Delphi] for the year 30 June 2008 having been opened in September 2009, and Spotlight 5 having been in the background at the time of tranche 4 being implemented. With the ongoing enquiry into Delphi, and the largescale enquiry into other Clavis Scheme users that Delphi (via Dickinsons as its adviser) would have been aware of, [Delphi] had not taken any steps at that juncture to re-evaluate the Scheme prior to embarking on tranche 4.

264. To the extent that the Scheme purported to obtain a CT deduction through the provision of service in the form of an independent review of Delphi to make the remuneration recommendation so as to qualify for the disapplication of s 1290 CTA 2009 under sub-s (4)(a), we are satisfied that HMRC have met the burden in establishing that on the balance of probabilities, Herald did not carry out an independent review for the exemption to apply in relation to the final figure for tranche 4, and that [Delphi] knowingly instructed Herald to amend the recommended amount to £5.4m with the intention that it could double the CT deduction for the year 2009 in order to reduce its corporation tax liability.

265. We conclude that the inaccuracy in the P35 return for the tax year 2009-10 in relation to tranche 4 was due to the deliberate action on the part of [Delphi] for the deliberate penalty to be imposable."

Submissions

151. Mr Sherry drew attention to the decision of the Supreme Court in *Tooth* at [42]-[44] and [47]. What was required for the imposition of a deliberate inaccuracy penalty was that HMRC had to prove that the taxpayer intentionally misled HMRC as to the truth contained in the return. The Supreme Court distinguished between a deliberate statement that was in fact inaccurate (which was not "deliberate" behaviour), and a statement which, when it was made, was deliberately inaccurate (which could be "deliberate" behaviour). Mr Sherry complained that *Tooth*, although cited in both parties' submissions, was not referred to by the FTT in its decision. This was important because the Supreme Court noted at [33] the intention to align the provisions at issue in *Tooth* with those of the penalty regime in Schedule 24.

152. Thus, in failing to identify *Tooth* as the authoritative decision on the meaning of "deliberate" and to apply the decision in characterising Delphi's behaviour, the FTT misdirected itself in law. Therefore, so it was contended, the FTT's findings of fact which it considered characterised Delphi's behaviour as "deliberate" and its decision as to the meaning of "deliberate" had to be set aside.

153. Moreover, in Mr Sherry's submission, the FTT's findings of fact on this issue fell well short of the requirements set out in *Tooth*. There was no finding in the FTT's decision which identified any acts or omissions by the directors that might amount to Delphi knowing that the P35 return for 2009/10 was wrong when it was submitted in order to mislead HMRC. There were no findings of any intention on the part of Delphi's directors to mislead HMRC. Mr Sherry did not accept that the "alleged behaviour" i.e. instructing Clavis on the amount contributed to Tranche 4 caused the arrangements to "fail" in any way, nor cause them to give rise to a different PAYE outcome. The way in which Tranche 4 was implemented was known to Dickinsons.

154. If there was a deliberate inaccuracy in the relevant P35 return, then Mr Sherry submitted:

(1) That it was not Delphi, but Dickinsons, who delivered the P35 to HMRC (and therefore Delphi was not within the scope of paragraph 1 of Schedule 24);

(2) It was not known to be "incorrect" by Delphi and/or its directors;

(3) The alleged error in the implementation of Tranche 4 had no connection with the PAYE treatment of the arrangements; and

(4) The PAYE treatment of the arrangements as reported was, in any event, consistent with current judicial decisions until 2015.

155. Next, Mr Sherry submitted that the FTT's finding (in the FTT's decision on Delphi's application for permission to appeal) that there was "no genuine review by Herald as evidenced by the correspondence between Delphi and Herald; the loan back arrangements to overcome cash flow shortfall; the intention to double the CT deduction via the loan-back arrangement" was devoid of any proper factual foundation and was insufficient to show the required intention to mislead HMRC through the means of the P35 return which was filed.

156. Furthermore, there was no proper basis for the FTT, in Mr Sherry's submission, to have found that the communications between Delphi's directors and Herald/Clavis amounted to an

instruction to Clavis to amend their report. The overwhelming evidence contradicted such a finding.

157. There was a hiatus between what the FTT described as "deliberate" conduct (allegedly instructing Clavis to amend their review and report) and any finding as to what Delphi had in its mind at the time that the P35 return for 2009/10 was filed by Dickinsons. There was no evidence of finding of intentional conduct to mislead HMRC.

158. Further, the FTT's reliance on *Clynes* v HMRC [2016] UKFTT 369 (TC) ("*Clynes*") to impute "blind-eye" knowledge of (i) an open enquiry into an earlier tax year, (ii) Spotlight 5, and (iii) "the large-scale enquiry into other Clavis Scheme users" by Dickinsons onto Delphi was a misdirection of law. Delphi's knowledge was the knowledge of its directors. Constructive knowledge could not be imputed from an adviser on to a taxpayer.

159. Ms Choudhury addressed Mr Sherry's argument that it was not Delphi but Dickinsons who submitted the P35 return. The fact that the role played by Dickinsons in preparing and completing the returns was irrelevant to the basis on which Delphi was assessed to a deliberate inaccuracy penalty in respect of Tranche 4. That basis, as set out by the FTT at Decision/[258]-[259], was that Delphi knowingly instructed Herald to increase the remuneration budget and entered into circular loan arrangements in order to double the corporation tax deduction is sought.

160. Ms Choudhury argued that the connection between the deliberate behaviour of Delphi and the inaccuracy in the P35 return was clear from the FTT's conclusions at Decision/[260]-[265] in the context of the Decision as a whole:

> (1) Delphi knew Herald had not carried out any genuine review and that it had entered into circular loan arrangements in an attempt to reduce its liability to corporation tax: Decision/[261].
>
> (2) Delphi would also have been aware of the ongoing inquiry into its corporation tax return for the previous year and the large scale enquiries into other users of the Scheme, as well as HMRC's Spotlight 5 in the background, at the time Tranche 4 was implemented: Decision/[263].
>
> (3) The Scheme was intended to achieve both corporation tax and income tax savings. Delphi knew the Scheme had not been implemented correctly in respect of Tranche 4 and, in view of the above, knew that the intended tax savings were in doubt. Delphi consciously chose not to find out the correct position in circumstances where it knew it should do so: Decision/[262].
>
> (4) The inaccuracy in the P35 return for the 2009/10 tax year was therefore due to (i.e. attributable to) deliberate action on the part of Delphi.

161. Ms Choudhury also challenged Mr Sherry's submissions to the effect that the FTT had failed to apply *Tooth*, but instead cited the FTT decisions in *Auxilium* and *Clynes*. The Upper Tribunal had previously held in *CF Booth v HMRC* [2022] STC ("*CF Booth*") and *Campbell v HMRC* [2023] STC 1967 ("*Campbell*") that the approach in *Auxilium* was consistent with *Tooth.* Therefore, it could not be said that the FTT erred in omitting specifically to refer to *Tooth*. In any event, *Campbell* was a case where, as the Upper Tribunal noted at [114], the FTT had failed to refer to any legislation or case law on the meaning of "deliberate". The FTT [258]-[265] found that Delphi had knowingly instructed Herald to amend the

remuneration budget with the intention of doubling the corporation tax deduction and that the inaccuracy in the P35 return was due to the deliberate action on the part of Delphi.

162. Next, Ms Choudhury submitted that Delphi's submissions failed to engage with the FTT's rationale that Delphi had "blind-eye" knowledge of the inaccuracy at issue by consciously or intentionally not choosing to find out the correct position, which led to the conclusion that the inaccuracy in the P35 return was attributable to deliberate action on its part.

163. Furthermore, Ms Choudhury argued that Delphi's submission on causation had no merit. Delphi's submission was that there was no suggestion that its deliberate conduct had any connection with the PAYE treatment of the arrangements and that treatment was in any event consistent with extant judicial decisions until 2015. Delphi's submission, Ms Choudhury argued, was contradicted by the FTT's decision which expressly concluded that the requisite connection between its deliberate conduct and the inaccuracies in the P35 returns was present: Decision/[265].

164. Ms Choudhury submitted that Delphi's argument that there was no proper basis for the FTT to have found that it instructed Clavis to amend their report and that this led the FTT wrongly to conclude that no independent review had been carried out was bound to fail. This challenge could not meet the *Edwards v Bairstow* criteria which required that there should be no evidence to support the finding rather than whether the weight of evidence was against the finding.

165. Finally, Ms Choudhury addressed Delphi's challenge to the FTT's conclusion at Decision/[262]-[263] that the FTT impermissibly imputed "blind-eye" knowledge to Delphi of the ongoing inquiry into its corporation tax return for the previous year and the large-scale enquiries into other users of the Scheme, as well as HMRC's Spotlight 5[16] because Dickinsons, rather than Delphi, knew about all these matters. In Ms Choudhury's submission Delphi had misunderstood the FTT's conclusions. The FTT decided that Delphi "would have been aware" of these matters through Dickinsons, not that it had "blind-eye" knowledge because it shut its eyes to those matters even though Dickinsons knew about them.

The authorities

166. Condition 2 of para 1 of Schedule 24, so far as material, provides that a penalty may be imposed if "the inaccuracy was… deliberate on P's part.[17]"

167. The concept of "deliberate inaccuracy" was considered by the Supreme Court in *Tooth* in the context of section 29(4) TMA,[18] which relates to assessments for income tax and other direct taxes. While not specifically considering the penalty regime in Schedule 24, in paragraph [27] the Supreme Court recognised that "a broadly similar differential treatment of careless and deliberate conduct by the taxpayer is reflected in different levels of penalty

[16] Published by HMRC on 5 August 2009 to indicate their views on the tax position for the type of arrangement entered into by Delphi.
[17] where "P" is the person by whom a penalty is payable.
[18] Section 29(4) provided*:* "The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf."

which may be imposed", and also noted in paragraph [33] that the amended language of section 29(4) was "designed to align section 29 with the language of the penalty regime in Schedule 24 of the 2007 Act [i.e. the penalty provisions in the present appeal], or that the new terminology was at least borrowed from it. The Supreme Court (Lord Briggs and Lord Sales delivering the judgment of the Court) said this in relation to the meaning of deliberate inaccuracy in a tax return:

> "[42] … The question is whether it means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.
>
> [43] We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. 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.
>
> …
>
> [45] …[T]he penalty scheme in Schedule 24 to the Finance Act 2007 had, shortly before the relevant amendments were made to section 29 (including section 118(7)), used the same concept of deliberate inaccuracy for the purpose of triggering penalties more serious than those arising from carelessness, at altogether higher levels of blameworthy conduct (even though subdivided by reference to the presence or absence of concealment). It seems inconceivable that Parliament would have chosen the same language to serve as the gateway to the longest available period of exposure to a discovery assessment, if the phrase was to be interpreted as meaning only that the statement was intentionally made.
>
> [47] … *[F]or there to be a deliberate inaccuracy in a document within the meaning of s 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so*." (*Emphasis added*)

168. The meaning of "deliberate inaccuracy" was considered by this Tribunal in *CF Booth* (Bacon J and Judge Brannan) which considered and approved the earlier FTT decision in *Auxilium* where at [63] the FTT said:

> "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."

169. It is, we think, worth spending some time explaining the decision in *CF Booth*. The issue in *CF Booth* concerned an earlier FTT decision in relation to alleged MTIC-related transactions to the effect that the taxpayer knew that its transactions were connected with

fraud (and, alternatively, that it should have known that its transactions were so connected) i.e. what was described as the "*Kittel* knowledge".[19] HMRC assessed the taxpayer to a penalty for deliberate inaccuracy in its VAT returns, i.e. for accounting for some export transactions on a zero-rating basis and for claiming an input deduction when it knew in both cases that its transactions were connected with fraud – a circumstance which disqualified it from claiming zero-rating or a deduction. In other words, the taxpayer was aware of the circumstances which precluded it from obtaining a tax relief/credit but nonetheless claimed it. The FTT upheld the deliberate inaccuracy penalty and this Tribunal upheld the FTT's decision.

170. The taxpayer's argument in *CF Booth* was that a finding of "*Kittel* knowledge" was insufficient to establish that the taxpayer had submitted a return with a deliberate inaccuracy – it was necessary, so the argument ran, for HMRC to prove dishonesty in relation to such a penalty and a finding of "*Kittel* knowledge" did not necessarily involve a finding of dishonesty. This was because of the decision of the Court of Appeal in *HMRC v Citibank NA & Anor* [2017] EWCA Civ 1416 (Sir Terence Etherton MR, Sir Geoffrey Vos C, and Hallett LJ) where Sir Geoffrey Vos C said at [90]:

> "… I would simply summarise the principles as follows:-
>
> i) The test promulgated by the CJEU in *Kittel* was whether the taxpayer knew or should have known that he was taking part in a transaction connected with fraudulent evasion of VAT.
>
> ii) Ultimately the question in every *Kittel* case is whether HMRC has established that the test has been met….
>
> *iii) It is not relevant for the FTT to determine whether the conduct alleged by HMRC might amount to dishonesty or fraud by the taxpayer, unless dishonesty or fraud is expressly alleged by HMRC against the taxpayer. If it is, then that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court.*
>
> iv) In all *Kittel* cases, HMRC must give properly informative particulars of the allegations of both actual and constructive knowledge by the taxpayer."(*emphasis added*)

171. It was against that background that this Tribunal in *CF Booth* held that it was not necessary for HMRC, when imposing a penalty for "deliberate inaccuracy", to plead or prove dishonesty or fraud. The taxpayer knew of the circumstances which disqualified it from obtaining a tax relief/credit but nonetheless claimed it. This is consistent with the Supreme Court's decision in *Tooth* at [32] and [35], where it was recognised (quoting from [35]) that "the requirement for a deliberate inaccuracy (in section 118(7)) appears on a scale of blameworthy conduct ranging from mere conscious advertence at the bottom to something tantamount to fraud or dishonesty at the top".

172. In cases involving the imposition of a tax penalty the burden of proof, of course, lies on HMRC. We have little doubt that in many cases where deliberate inaccuracy is alleged those cases *may* involve dishonesty or fraud, but pleading dishonesty or fraud is not a requirement of the penalty statute, particularly if what is alleged is a "conscious advertence" at the bottom end of the scale. There will be cases in which HMRC expressly seek to allege dishonesty and

[19] *Axel Kittel & Recolta Recycling SPRL v Belgian State* C-439/04 and C-440/04, issued 6 July 2006

the usual rules about pleading and particularisation, and the need to give the taxpayer a proper opportunity to reply, will apply. However, the penalty statute simply asks whether there is an inaccuracy and whether that inaccuracy is deliberate. These are perfectly straightforward English words which do not require resort to a Thesaurus or alternative judicial paraphrasing. There is no need to over-elaborate the statutory requirement. We do not consider judicial interpretations of the test of deliberate inaccuracy in *Auxilium*, *CF Booth* or *Tooth* to be, in any material sense, different. For our part, we are content to adopt the test in *Tooth* at [47] as the definitive guidance on this point. As to the degrees of culpability, clearly deliberate inaccuracy which is concealed is more likely to involve dishonesty.

173. We should, however, deal with the decision of this Tribunal in *Danapal v HMRC* [2023] UKUT 86 (TCC) ("*Danapal*"), in which *CF Booth* was not cited. In *Danapal* paragraphs [13] and [47] summarise *Tooth*:

> "13. As held by the Supreme Court in [*Tooth*] at [47], for there to be a deliberate inaccuracy in a document within the meaning of s.118(7) TMA there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it was not necessary to decide it in that appeal or in this case) recklessness as to whether it would do so. The Supreme Court observed at [83] that deliberate behaviour generally describes conduct that "amounts to fraud or is akin to fraud".
>
> …
>
> 47. The requirement under s 36 TMA to demonstrate fraud or wilful default has now been replaced with the concept of deliberate behaviour, but as was said in *Tooth*, deliberate behaviour in this context is conduct that amounts to fraud or is akin to fraud and HMRC have accepted that the behaviour alleged in this case can be characterised as dishonest. HMRC also accepted that the burden of proof is on them to prove the deliberate behaviour in question.
>
> 48. It is also clear in this case that HMRC, in its Statement of Case, made no allegation of deliberate behaviour against Firm A. That document pleaded that a loss of tax had arisen because Dr Danapal himself had acted deliberately or carelessly in completing the returns. Likewise, in its skeleton argument before the FTT, HMRC's submissions on deliberate behaviour were confined to making submissions of deliberate behaviour on the part of Dr Danapal, making reference to his defence that he acted on the advice of Firm A. However, no direct allegations were made against Firm A and it is therefore to be assumed that HMRC rejected Dr Danapal's contentions that he acted in accordance with advice given to him by Firm A.
>
> 49. In those circumstances, it was clearly wrong for the FTT to have made the findings they did of dishonesty on the part of Firm A. Such a finding could have had serious implications for Firm A as a professional firm of chartered accountants and it was given no opportunity to refute them."

174. *Danapal* should therefore be understood as a case in which a finding of dishonesty was made against the person (HMRC had accepted that the allegations of deliberate inaccuracy in that case could be characterised as allegations of dishonesty) where dishonesty had not been pleaded or particularised. We do not consider *Danapal* as an authority for the proposition that, in every case where HMRC seek to impose a penalty for deliberate inaccuracy, HMRC must plead dishonesty, but rather, if HMRC do so, they must plead and particularise the dishonesty allegation and the FTT may not make a finding of dishonesty without such pleading and particularisation and affording the taxpayer an opportunity to respond.

175. We should also note that *CF Booth* was cited with approval by this Tribunal in *Campbell v HMRC* [2023] STC 1967 (Judges Thomas Scott and Brannan) where, after referring to *Tooth*, it was stated at [115]:

> "Put simply, in order for HMRC to discharge the burden of demonstrating that an act or omission by a taxpayer was deliberate, they will need to establish to the normal civil standard that the act or omission was intentional; the fact that an act or omission may have been careless, mistaken or stupid is not enough."

176. With those authorities in mind, we now consider whether the FTT's conclusions on deliberate inaccuracy in relation to Tranche 4 can be sustained.

Discussion

177. In our judgment, the penalty for deliberate inaccuracy in relation to the P35 return for the tax year ended April 2010 cannot stand. The FTT's reasoning in respect of the deliberate inaccuracy penalty was set out at FTT [258]-[265], which we have quoted above. The FTT's reasoning focuses largely on the "defective" calculation or implementation of Tranche 4. In short, far from Herald advising Delphi about the appropriate amount to be paid as Tranche 4, Delphi instructed or informed Herald of the amount that it wished to pay i.e. £5.4m rather than £3m. However, the Herald arrangement was intended to take advantage of the exemption provided for by section 1290(4) Corporation Tax Act 2009. This provided an exception to the general prohibition on a deduction for corporation tax purposes "for anything given as consideration for… services provided in the course of the trade or profession…". In other words, even though PAYE and NICs had not been accounted for in relation to the payments, the intention was to secure a corporation tax deduction for the payments made to Herald.

178. The fact that the calculation of the payments made to Herald short-circuited the envisaged route of the LLP making recommendations on the amount of the payments may well have called into question whether those amounts qualified for a deduction under section 1290(4) i.e. whether Herald was really providing a service to Delphi – an issue which is not before us. However, we do not consider that that irregularity or lack of formality, which dominated the FTT's analysis in Decision/[258]-[265], called into question the correct amounts to be recorded on Delphi's P35, still less does it support a finding that *that* return was *deliberately* inaccurate. That issue turned upon whether the payments made by Delphi constituted employment income and whether Delphi knew that the relevant payments should have been returned on the P35 return as employment income. Delphi's assumptions on that issue were first negated in November 2015 when the Inner House of the Court of Session delivered its judgment in *Advocate General for Scotland v Murray Group Holdings Ltd* 2016 SC 201, [2016] STC 468, a judgment which was subsequently upheld by the Supreme Court in *Rangers*. The fact that the Scheme, as well as avoiding income tax also sought a corporation tax deduction, is irrelevant to the issue whether the P35 return was correct.

179. It is clear that this point was raised by Mr Sherry with the FTT. At Decision/[253(7)] Mr Sherry's submission is recorded as follows:

> "These allegations [i.e. in relation to the implementation of Tranche 4] do not explain how the alleged lack of an independent review caused an inaccuracy in the P35 return for 2009-10. It is submitted that even if there was no independent review, this would have only affected the CT position:

> the PAYE/NIC deductibility would have remained the same at the time the P35 was submitted per the applicable case law."

180. The Decision does not adequately deal with this submission, which (for the reasons we have given) seems to us correct. Given that the FTT failed to engage on a point directly affecting its conclusion on deliberate inaccuracy, the FTT's conclusion at Decision/[265] was one which was not reasonably open to it. There was no evidence that the inaccuracy in the P35 return was deliberate.

181. In particular, we consider that the FTT's statement at Decision/[260] that "the inaccuracy in relation to tranche 4 *was attributable to deliberate action*" (*emphasis added*) discloses an error of law. It is not the action to which the inaccuracy is attributable that must be deliberate but rather it is the inaccuracy itself that must be deliberate. The same confusion of thought appears in the FTT's conclusion at Decision/[265].

182. At Decision/[262]-[263] the FTT stated:

> "262. 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. We have special regard to the fact that Dickinsons, as advisers to Delphi, was in correspondence with HMRC in late October while at the same time, advising Delphi of the sum of £5.4m to enhance the CT deduction for the year to 30 June 2009.
>
> 263. We also have regard to the CT return enquiry into [Delphi] for the year 30 June 2008 having been opened in September 2009, and Spotlight 5 having been in the background at the time of tranche 4 being implemented. With the ongoing enquiry into Delphi, and the largescale enquiry into other Clavis Scheme users that Delphi (via Dickinsons as its adviser) would have been aware of, [Delphi] had not taken any steps at that juncture to re-evaluate the Scheme prior to embarking on tranche 4."

183. It is not clear from Decision/[262] whether Dickinsons' correspondence with HMRC was supposed to indicate that Delphi's P35 return was obviously wrong or that HMRC simply disputed the employment tax treatment of the arrangements. The same observation may be made as regards Decision/[263]. The fact that HMRC may have been taking a different view on the tax treatment of the various payments involved or that HMRC had opened an enquiry into Delphi does not, in our view, lead to the conclusion that Delphi's P35 return was *deliberately* inaccurate. We were not informed of any change of law introduced since Tranche 1 which would affect Tranche 4. Indeed, several years later in the *Murray Group Holdings* litigation, described above, both the FTT and the Upper Tribunal maintained largely the same position which the Special Commissioners had adopted in *Sempra*. At most, these factors may (and we express no view on this point) be relevant to a careless inaccuracy penalty but they do not indicate that Delphi's P35 return was deliberately inaccurate and do not, in our view, indicate "blind eye" knowledge of the inaccuracy.

184. For these reasons, we consider that the FTT made a material error of law by reaching a conclusion which was not open to it on the evidence and consequently we set aside the Decision in relation to the deliberate inaccuracy penalty for the year ended 5 April 2010.

Deliberate inaccuracy – remitting or re-making the Decision?

185. For the same reasons that we decided to re-make the Decision in relation to the penalty for careless inaccuracy, rather than to remit it to the FTT, we have also decided to re-make the Decision in relation to the deliberate inaccuracy penalty for the year ended 5 April 2010.

Deliberate inaccuracy – re-making the Decision

186. Having set aside the FTT's Decision on the deliberate inaccuracy penalty, we re-make the Decision by setting aside the penalty. In our view, there was no evidence that the inaccuracies in Delphi's P35 for the year ended 5 April 2010 were deliberate.

GROUP 5: FAIRNESS (GROUND 9)

The hearing before the FTT

187. We were invited to read numerous extracts from the transcript of the hearing before the FTT. Mr Sherry provided us with various extracts from the transcript for us to consider and we have paid careful attention to all the references that he gave us. Mr Sherry submitted that the FTT had effectively cross-examined Delphi's witnesses in a way which would lead an objective bystander to conclude that the FTT had a preconceived view and which sought to undermine the professional competence of Mr Tucker. In short, Mr Sherry argued that, for a number of reasons, Delphi had been deprived of the right to a fair trial.

Submissions

188. By its Ground 9, Delphi submits that the hearing before the FTT was substantially unfair and that the FTT "descended into the arena", acted as an adversary in the proceedings and appeared to be partisan. In particular, Mr Sherry complained about Judge Poon's conduct of the hearing.

189. Mr Sherry submitted that, viewed as a whole and objectively, the conduct of the hearing was unfair and gave the appearance of partiality. The extensive cross-examination, as he described it, of both of Delphi's witnesses was inappropriate and contrary to the adversarial nature of tribunal tax appeals. The questioning went well beyond reasonable clarification of Delphi's witnesses' written and oral evidence. Judge Poon, Mr Sherry submitted, ignored his timely and reasonable reminder to her of her obligations in this regard, thus dismissing the reminder in the eyes of Delphi and creating an impression of unfair treatment.

Discussion

190. It is beyond the scope of this already lengthy decision to record in detail each transcript reference with which Mr Sherry provided us. However, Mr Sherry's complaints about Judge Poon's conduct can be grouped under three main headings. First, that Judge Poon cross-examined Delphi's witnesses with questions that were consistently leading and which could be interpreted as an attempt to elicit evidence to support a theory or a preconceived view. In particular, Mr Sherry drew our attention to questions put to Mr Tucker. Secondly, Mr Sherry suggested that the judge displayed irritation where the answers contradicted what he described as the leading questions that she had put to witnesses, persisting in a line of questioning (which often consisted of leading questions) which, he said, seemed to designed to prompt a different answer specifically on the interpretation of the Tucker Letter. Finally,

Mr Sherry argued that the judge had put questions to Mr Tucker and Mr Langran on matters not in issue.

191. We have reviewed the decision of the Supreme Court in *Serafin v Malkiewicz* [2020] UKSC and the decisions of the Court of Appeal in *Jones v National Coal Board* [1957] 2 QB 55, *London Borough of Southwark v Kofi-Ady* [2006] EWCA Civ 281, *Keane v Sargen* [2023] EWCA Civ 141 and in *Hima v Secretary of State for the Home Department* [2024] EWCA Civ 680.

192. Most of the passages in the transcript related to Judge Poon's questions of witnesses after cross-examination had been concluded. Matters might have been different if cross-examination had been repeatedly interrupted but that was not the case. Whilst it might be said that many of Judge Poon's questions were over-lengthy, diffuse and not, in some cases, bearing directly on the issues in dispute, we consider that there was no unfairness in the judge's questioning.

193. The First-tier Tribunal (Tax Chamber) hears a huge variety of different types of tax appeals. In many of those appeals the taxpayer is unrepresented and HMRC is represented by a non-legally qualified presenting officer – hearings which are sometimes described as "turn up and talk" appeals. In those appeals, inevitably and properly, the tribunal plays a more active and interventionist role. That is the whole point of the flexibility of the tribunal system and is an essential aspect of its role. In that context, "rough justice" procedurally does not equate to injustice. At the other end of the scale, in appeals where both parties are legally represented, as in the present case, proceedings are conducted on more formal basis – largely equivalent to proceedings in the High Court. There are, of course, many appeals which fall somewhere between the two extremes, where the overriding objective of dealing with matters fairly and justly is the guiding star. Nonetheless, we would not wish the formalities of High Court proceedings to entirely eclipse the informality and interventionist role of the FTT as a specialist tribunal. Against this background, we consider that Judge Poon's questions and interventions did not go beyond what was acceptable.

194. In particular, we did not consider that Judge Poon sought to undermine Mr Tucker's professional competence nor do we consider that Judge Poon suggested that Mr Tucker's witness statement had not been written by him. Furthermore, in examining the questions asked by Judge Poon we do not detect an attempt by the judge to elicit evidence to support some unspecified, preconceived point of view. Finally, we do not consider that Judge Poon displayed irritation towards the witnesses nor that she sought to prompt a concession from Mr Tucker in relation to his evidence on the Tucker Letter.

195. In short, our conclusion is that the judge did not "descend into the arena".

196. It is no doubt correct that a judge should not repeatedly interrupt cross-examination, other than to ensure that a witness's response has been understood or to seek clarification or, perhaps, to ensure that a non-verbal response to a question (e.g. a nod or a grunt) is correctly recorded, but an undue interruption of cross-examination did not happen in this case.

197. Looking at the proceedings as a whole, there is nothing to the suggestion that Delphi was obstructed from putting its case properly. We therefore dismiss this ground of appeal.

DISPOSITION

198. For the reasons we have given in this decision, we dismiss the appeal on Grounds 1 and 7; we allow the appeal on Grounds 2, 3 and 4; we dismiss the appeal on Grounds 5 and 6; we allow the appeal on Ground 8 (a) and (b); and we dismiss the appeal on Ground 9.

199. We have set aside the Decision in relation to the question of causation concerning the careless inaccuracy penalty. We have remade the Decision on this point and set aside the penalty for the year ended 5 April 2009. We have set aside the Decision in relation to the question of the deliberate inaccuracy penalty for the year ended 5 April 2010. We have remade the Decision on this point and set the penalty aside.

ADDENDUM

200. On the day that a draft of this decision was released to the parties for the correction of any typographical errors, a decision of this Tribunal in *O'Neil and others v HMRC* [2026] UKUT 00013 (TCC) ("*O'Neil*") was published on the Upper Tribunal's website. In *O'Neil* the Tribunal (Judge Ghosh KC and Lord Clark) endorsed the decision of the FTT in this appeal in relation to causation stating:

> "151. The test for carelessness is that of a reasonable and prudent taxpayer. The phrase "due to" in Schedule 24, paragraph 3 does not import a causal test analogous to delict but rather asks whether the inaccuracy in question (here the absence of any reference to the Redress Payment in the First Appellant's tax return) be accounted for by a failure to take care; we respectfully endorse the analysis on this particular point in *Delphi Derivatives Ltd v HMRC* [2023] UKFTT 722 (TCC) [166], [171]."

201. We note, however, that *Mainpay CA*, upon which we have based our decision on causation as regards the careless inaccuracy penalty, does not appear to have been taken into account by the Tribunal. Consequently we consider that the views which we have expressed above in relation to causation are to be preferred.

202. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE MARCUS SMITH
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

Release date: 19 January 2026