Neutral Citation: [2023] UKUT 00061 (TCC)

Case Number: UT/2022/000011

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London EC4A 1NL

VALUE ADDED TAX – penalties – paragraph 1 Schedule 24 Finance Act 2007 – Appellant submitted VAT returns showing zero-rated export transactions for which it did not hold evidence of export - whether FTT made findings of fact from which it could properly conclude that inaccuracy was deliberate on Appellant's part – No - appeal allowed - decision remade and penalty reduced from deliberate to careless

Heard on: 14 February 2023
Judgment date: 15 March 2023

Before

MR JUSTICE MILES

JUDGE GREG SINFIELD

Between

CPR COMMERCIALS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Bedenham, counsel, instructed by Rainer Hughes

For the Respondents: Karen Robinson, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION AND BACKGROUND

1. The Appellant, CPR Commercials Limited ('CPR'), sold used commercial vehicles to customers. During VAT accounting periods 08/12 to 10/15, CPR sold vehicles to customers registered for VAT in Ireland and treated those supplies as exports which were zero-rated for VAT purposes. HMRC were not satisfied that CPR had provided sufficient evidence that goods supplied by it to customers based outside the UK had been dispatched/exported outside of the UK (and therefore there was no right to zero-rate those supplies). In a series of decisions issued in 2015-2017, HMRC assessed CPR for VAT of £98,820 and penalties of £58,340. The penalty assessments were issued under paragraph 1 of Schedule 24 to the Finance Act 2007 ('FA 2007') on the ground that CPR's VAT returns contained inaccuracies in that they treated supplies as zero-rated when CPR did not hold evidence to support zero-rating of those supplies. HMRC calculated the penalties on the basis that that the inaccuracies were deliberate on the part of CPR.

2. CPR appealed to the First-tier Tribunal (Tax Chamber) ('FTT') against the assessments and the penalties. CPR contended that it was not liable to pay the VAT assessed because the supplies to which the assessments related were properly zero-rated as exports. In relation to the penalties, CPR's primary case was that there were no inaccuracies in its returns because the supplies had been properly zero-rated but, if it was wrong in that contention, then the inaccuracies were not deliberate. In relation to the penalties, HMRC contended that CPR's conduct was deliberate or, in the alternative, that CPR did not take reasonable care when submitting their VAT returns, ie that it made a careless error.

3. In a decision released on 15 November 2021 with neutral citation [2021] UKFTT 408 (TC) ('the Decision'), the FTT (Judge Fairpo and Tribunal Member L Brown) found that CPR had not obtained and retained appropriate evidence of export to support zero-rating of the relevant transactions and that CPR should, therefore, have charged and accounted for VAT at the standard rate on those supplies. The FTT further held that requiring evidence of export in the circumstances of the case did not breach the principle of proportionality.

4. In relation to the penalties for deliberate inaccuracies, the FTT made various findings (set out in more detail below) and concluded in [124] of the Decision that:

> "Considering the 'knowledge and intention' referred to in the decision in [*Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC) ('*Auxilium*')] in the light of the earlier assessments we consider that, after two VAT assessments [due to lack of evidence of export in 2008 and 2011] and repeated information from HMRC as to the evidence required to zero-rate such supplies, CPR cannot have reasonably concluded that they had sufficient evidence of export when they zero-rated the supplies. In these circumstances, we find that the behaviour … was, therefore, deliberate as the returns had been submitted when CPR was at least reckless as to whether it had the required evidence to zero-rate."

5. With the permission of the Upper Tribunal ('UT'), CPR appealed against the Decision on a single ground:

> "The penalties were imposed on the 'deliberate' basis. In dismissing the Appellant's appeal against the penalties, the FTT stated at paragraph 124 '…the behaviour…was, therefore, deliberate as the returns had been submitted when CPR was at least reckless as to whether it had the required evidence to zero-rate.' The FTT erred by wrongly treating behaviour that it found was 'reckless' as satisfying the 'deliberate' criteria for the purposes of

> Schedule 24 of the Finance Act 2007. Even if a taxpayer is reckless as to whether it had sufficient evidence to support zero-rating that does not mean that a return that is submitted claiming zero-rating contains a deliberate inaccuracy; a deliberate inaccuracy requires the taxpayer to know that there is no entitlement to zero-rate and, therefore, to know that the return contains an inaccuracy (see *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC)."

6. In short, CPR submitted that a deliberate inaccuracy requires a finding that the taxpayer knew that a document contained an error and provided it to HMRC with the intention that HMRC should rely on the documents as accurate. Anything less than subjective knowledge, including recklessness as to whether there was an error in a VAT return, does not constitute deliberate behaviour although it may properly found a careless penalty. CPR contended that the FTT did not find that CPR had subjective knowledge of any inaccuracy in its VAT returns or that CPR had suspected that the returns contained inaccuracies which it had deliberately chosen to ignore. Accordingly, the FTT erred when it found that, in being reckless as to whether it had the evidence required to zero-rate the supplies, CPR made a deliberate inaccuracy in its returns.

7. In summary, HMRC submitted that, properly analysed, the findings of fact were findings that CPR had actual or, at the very least, blind-eye knowledge that the returns submitted contained inaccuracies. Ms Robinson, who appeared for HMRC, was very clear that HMRC had not advanced any case on recklessness before the FTT and did not invite us to consider whether recklessness on the part of a taxpayer might satisfy the 'deliberate inaccuracy' test. (We record that HMRC's acceptance that this is the test goes no further than this particular case).

8. In light of the parties' agreement on this point about recklessness, the issues are:

(1) does "deliberate inaccuracy" for the purposes of paragraph 1 of Schedule 24 FA 2007 include blind eye knowledge;

(2) did the FTT interpret and apply "deliberate inaccuracy" correctly in the Decision; and

(3) do the FTT's findings in the Decision support a conclusion that there was a deliberate inaccuracy on the part of CPR?

9. We begin by looking at the penalty legislation in Schedule 24 FA 2007 and then move on to consider the FTT's analysis and findings.

LEGISLATIVE FRAMEWORK

10. The penalties were issued under Paragraph 1 of Schedule 24 FA 2007 which provides:

> "PENALTIES FOR ERRORS
>
> *Error in taxpayer's document*
>
> (1) A penalty is payable by a person (P) where–
>
> (a) P gives HMRC a [VAT return], and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to–
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.

> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy."

11. Paragraph 3 of Schedule 24 FA 2007 provides:

> "*Degrees of culpability*
>
> (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is–
>
> 'careless' if the inaccuracy is due to failure by P to take reasonable care,
>
> 'deliberate but not concealed' if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> '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)."

12. Paragraph 4 of Schedule 24 FA 2007 sets out the standard amounts of penalty for the different categories of inaccuracy. For a 'category 1' inaccuracy (which applies in the present case) the penalty payable (subject to any reduction for disclosure) is: for a careless inaccuracy 30% of the potential lost revenue, for a deliberate but not concealed inaccuracy 70% of the potential lost revenue, and for a deliberate and concealed inaccuracy 100% of the potential lost revenue.

13. Paragraph 5 of Schedule 24 FA 2007 provides:

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

14. Paragraphs 9 and 10 provide for reductions in penalties where the person has disclosed, inter alia, inaccuracies to HMRC. The penalties in this case were reduced by HMRC on the basis that CPR had made a prompted disclosure. Paragraph 11 provides that HMRC may reduce a penalty if they think it right to do so because of special circumstances. It was not suggested that there were any relevant special circumstances in the case of CPR.

15. Paragraph 14 states that HMRC may suspend all or part of a penalty for a careless inaccuracy subject to compliance with specified conditions but there is no power to suspend a penalty for a deliberate inaccuracy.

16. Paragraphs 15 and 16 relate to the bringing of appeals against penalties. Paragraph 17(2) provides that, on appeal, the FTT may affirm HMRC's decision, or substitute for HMRC's decision another decision that HMRC had power to make.

17. Paragraph 19(1) of Schedule 24 FA 2007 provides:

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

CASE LAW

18. In *Auxilium*, the FTT (Judge Greenbank and Tribunal Member Bell) considered the meaning of "deliberate inaccuracy" in the context of the Schedule 24 FA 2007 penalty regime and held at [63] – [64]:

> "63. … 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.
>
> 64. The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT 575 (TCC) at [37])."

19. Following *Auxilium*, the issue of the correct meaning of "deliberate inaccuracy" came before the Supreme Court in *HMRC v Tooth* [2021] UKSC 17. In that case, the Supreme Court considered the correct approach to deliberate and careless conduct in the context of the discovery assessment provisions contained in section 29 of the Taxes Management Act 1970 ('TMA 1970') as interpreted by section 118(7) TMA 1970. Although *Tooth* concerned a different provision, the Supreme Court noted, at [27] of the judgment, the "broadly similar differential treatment of careless and deliberate conduct … reflected in different levels of penalty which may be imposed … [pursuant to] Schedule 24 of the Finance Act 2007." In *Tooth*, the Supreme Court posed the following question, and provided its answer to that question:

> "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 …
>
> …
>
> 47. It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 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."

20. The next case to consider the meaning of "deliberate inaccuracy" was *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) ('*CF Booth*'). In *CF Booth*, the UT (Mrs Justice Bacon and Judge Brannan) expressly approved of [63] and [64] of *Auxilium*. At [38] – [41], the UT said:

> "38. In *Tooth* the Supreme Court considered the test of 'deliberate inaccuracy' in section 118 Taxes Management Act 1970, which was required in order to enable HMRC to serve a 'discovery assessment' within a 20 year window. It held that the natural meaning of the phrase 'deliberate inaccuracy' meant a statement which, when it was made, was deliberately inaccurate, rather than a deliberate statement that was in fact inaccurate. 'Deliberate' attached a requirement of intentionality to the whole of that which it described, namely

> 'inaccuracy'. The required intentionality therefore attached both to the making of the statement and to its inaccuracy (§43).
>
> 39. At §47, Lords Briggs and Sales, delivering the judgment of the Supreme Court, said:
>
> > 'It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of s118(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.'
>
> 40. As the Court of Appeal held in *E Buyer*, it is not necessary for HMRC to plead or prove dishonesty in order to establish *Kittel* knowledge (i.e. that the taxpayer 'knew or should have known' that the transactions were connected to fraud). Mr McDonnell argued that a finding of dishonesty was, however, an essential element of deliberate inaccuracy for the purposes of the penalty assessment, such that the findings in the 2017 Decision could not suffice to establish deliberate inaccuracy.
>
> 41. We disagree. There is in our judgment no requirement for HMRC to plead or prove dishonesty when seeking to impose a penalty for deliberate inaccuracy under Schedule 24 FA 2007. As the FTT held in *Auxilium*, 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. We do not consider that anything said by the Supreme Court in *Tooth* calls that test into question."

21. As already explained, the parties agreed before the FTT that, as stated by the FTT in *Auxilium* and endorsed by the UT in *CF Booth*, the test for deliberate inaccuracy in Schedule 24 FA 2007 is a subjective one which requires proof that the taxpayer knowingly provided HMRC with a document which contained an inaccuracy, intending that HMRC rely upon it as accurate.

22. HMRC contended that the test may be satisfied by proof of 'blind-eye' or 'Nelsonian' knowledge of the inaccuracy (see *Clynes v HMRC* [2016] UKFTT 369 (TC) at [86] and *Chohan Management Ltd v HMRC* [2021] UKFTT 0196 (TC) at [111] – [113]). Mr Bedenham for CPR did not disagree with that proposition but, as we set out in more detail below, submitted that the FTT did not make any finding that CPR took a deliberate decision to shut its eyes to the truth or refrain from making further enquiries so as to avoid discovering the true position. Ms Robinson for HMRC contended that the FTT found that CPR had actual or, at the very least, blind-eye knowledge that the returns submitted contained inaccuracies.

23. In our view, where a taxpayer suspects that a document contained an inaccuracy but deliberately and without good reason chooses not to confirm the true position before submitting the document to HMRC then the inaccuracy is deliberate on the part of the taxpayer. If it were otherwise then a person who believed there was a high probability that their return contained errors but chose not to investigate would never be subject to a deliberate penalty. However, the suspicion must be more than merely fanciful. Lord Scott of Foscote urged caution in this context in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1 at [116]:

> "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-

> eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

24. Although the concepts of blind-eye knowledge and recklessness as to the truth or falsity of a statement may intersect, they are clearly not identical. As we have already stated, HMRC did not ask us to consider whether an inaccuracy is deliberate where a taxpayer is reckless as to whether the document contains any errors. In the absence of any argument on the point from HMRC, and because it is not necessary for the purposes of this decision, we do not consider whether recklessness is a sufficient basis for determining that an inaccuracy is deliberate further in this decision, and make no comment either way.

FTT'S FINDINGS AND DECISION ON PENALTIES

25. CPR is a company. In relation to any question of what CPR knew and intended at any particular time, it is the knowledge and intention of its director, Mr Wright that must be considered. The FTT recorded in [31] that Mr Wright accepted that he was aware of VAT Notice 725 and the requirement to obtain evidence of export within three months of supply of the vehicle. It seems that Mr Wright did not challenge HMRC's evidence, referred to in [44] and [45], that CPR had been assessed for VAT on the ground that it lacked evidence of export in 2008 and 2011.

26. In [82], the FTT considered whether CPR knew and could prove that the vehicles had been exported from the UK. The FTT concluded that:

> "82. … CPR have apparently assumed that the vehicles were exported to Southern Ireland because the customer's registered address is in Southern Ireland and the customer has a Southern Ireland VAT number. In order to zero-rate a supply, a trader requires evidence and not simply an assumption."

27. Again, at [106] – [108], the FTT set out its conclusions that CPR had made certain assumptions about what was required for zero rating supplies:

> "106 … We consider that CPR assumed that a non-UK VAT number or correspondence address meant that the vehicle's destination would be that address, but they did not obtain any evidence to confirm that assumption.
>
> 107. The customer made the arrangements for transport of the vehicle from a port in the UK but provided no documentary evidence to show what this involved. Accordingly, the only documents provided which state a destination are the driver declarations and we find that the information on these was based on CPR's assumption, not from information provided by their customers.
>
> 108. Similarly, CPR assumed that delivery of a vehicle to a port meant that it was to be exported from the UK and could not be removed from the port back onto the UK roads."

28. When considering CPR's contention that the requirement to provide specific documents as evidence of entitlement to zero rate supplies was disproportionate, the FTT observed at [116]:

> "CPR has provided nothing other than their assumption that, as the vehicles were delivered to a port and had been purchased by someone with a non-UK VAT number, those vehicles had been exported from the UK."

29. Specifically in relation to the penalties, the FTT found in [122] that HMRC had previously assessed CPR for VAT assessments on the basis that it did not have adequate export

evidence and that HMRC had drawn CPR's attention to the requirements in VAT Notice 725 and Mr Wright was aware of the Notice. The FTT observed in [123] that it was perplexed by the fact that CPR had continued to zero-rate supplies for which it had no evidence of export and there was no evidence that it had sought any advice about how to comply with Notice 725. The FTT then gave its conclusion in [124] set out in [4] above and dismissed CPR's appeal.

30. CPR made an in time application to the FTT for permission to appeal. In relation to the penalties, CPR sought to appeal on the ground that, in [124], the FTT erred by wrongly treating behaviour that it found was reckless as constituting deliberate conduct for the purposes of Schedule 24 FA 2007. Relying on *Auxilium*, CPR contended that a deliberate inaccuracy requires the taxpayer to know that the return contains an inaccuracy.

31. The FTT refused CPR permission to appeal in a decision released 31 January 2022. The FTT dealt with the ground of appeal relating to the deliberate inaccuracy penalty in paragraphs [11]-[12] of the decision refusing permission to appeal as follows:

> "11. The appellant argues that reckless behaviour cannot be regarded as deliberate, given the meaning of 'deliberate' set out in the decision in *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC).
>
> 12. The decision and definition in *Auxilium Project Management* was addressed at para [124] of the Decision. The decision is also not binding upon another Tribunal. Given CPR's previous assessments and the information provided to them by HMRC, the Tribunal was entitled to conclude that CPR cannot reasonably have concluded that it had sufficient evidence to zero-rate the exports. We note also, although it was not specifically discussed in the hearing and so is not referred to in the Decision, that the Supreme Court in *Tooth* [2021] UKSC 17 (at [47]) indicated that deliberate behaviour may encompass recklessness."

PARTIES' SUBMISSIONS

32. Mr Bedenham submitted that the FTT erred in dismissing CPR's appeal against the deliberate penalties because the FTT did not find that CPR had subjective knowledge that the VAT returns were inaccurate and, therefore, CPR's appeal on that issue should have been allowed. He contended that anything short of actual knowledge (including recklessness) is not sufficient to support a finding of deliberate behaviour. He said that the FTT's finding in [124] that CPR "cannot have reasonably concluded" that it had sufficient evidence of export was not a finding that CPR had subjective knowledge that its VAT returns contained an inaccuracy. That was made clear in the next sentence where the FTT found that CPR had been "at least reckless". He also noted that, in refusing permission to appeal, the FTT did not suggest that the findings made in the decision satisfied the subjective knowledge test set down in *Auxilium* but stated that it was not binding on the FTT in this case and that the Supreme Court had "indicated that deliberate behaviour may encompass recklessness". Mr Bedenham submitted that the FTT did not make any finding that CPR had actual knowledge of the inaccuracies in the returns or that it took a deliberate decision to "shut its eyes" or not to make further enquiries so as to avoid discovering the true position. CPR's case was that there is no finding by the FTT in the Decision that CPR knew that it did not have the necessary proof of export or that CPR had any suspicion that it did not have the documents and deliberately choose not to enquire further.

33. Ms Robinson submitted that, properly analysed, the FTT's findings of fact were findings that CPR had actual or, at the very least, blind-eye knowledge that the returns submitted contained inaccuracies. Accordingly, the FTT did not err in dismissing CPR's appeal and confirming the deliberate penalties. She contended that the FTT's finding in [124] that CPR cannot reasonably have concluded that it had sufficient evidence of export was, in effect, a

finding that no reasonable taxpayer in CPR's position (i.e. a reasonable taxpayer, possessing the knowledge and information that CPR had) could have reached such a conclusion. Ms Robinson relied in particular on the FTT's reference in [124] to the 'knowledge and intention' referred to in *Auxilium* which she contended anchored the factual findings that followed. Those findings were that CPR knew that it was required to obtain evidence of export in order to zero-rate supplies and it knew the nature of the evidence that was required because it had been told repeatedly by HMRC and had been assessed twice previously for not having such evidence.

34. Ms Robinson maintained that there was evidence and the FTT made findings of fact that CPR was aware of the need to obtain evidence that the goods had actually left the UK. She contended that a finding that CPR knew of the requirement to obtain export evidence of a particular type in order to zero-rate supplies must inevitably lead to a conclusion that CPR knew it was not entitled to zero-rate supplies when it did not have such evidence.

35. Ms Robinson also submitted that if the FTT's findings did not amount to a finding that CPR had actual knowledge of the inaccuracy then they amounted to a finding of 'blind eye' knowledge. She contended that, against the background of the earlier assessments and repeated information from HMRC as to the evidence required to zero-rate, the FTT's finding that CPR "cannot reasonably have concluded that they had sufficient evidence of export when they zero-rated the supplies" was, if not a finding of actual knowledge, a finding that CPR made a deliberate and conscious decision not to confirm whether the evidence it did have was sufficient.

DISCUSSION

36. There was no dispute that CPR provided the VAT returns to HMRC. The FTT found that the VAT returns contained inaccuracies and, as a result, CPR's liability to account for output tax was understated. That finding is not the subject of any appeal. There can be no doubt that CPR intended that HMRC should rely on the VAT returns as accurate documents (see the discussion in *CF Booth* at [45] – [47]). The key issue for the FTT to determine was whether, when it submitted the VAT returns, CPR had actual or blind eye knowledge that it did not hold evidence of export in relation to the relevant supplies and so was not entitled to treat them as zero rated in the returns. In this appeal, we must consider whether the facts found by the FTT in the Decision support a finding that there was a deliberate inaccuracy on the part of CPR (in the agreed sense of that term).

37. There is almost no discussion of the penalty provisions or of *Auxilium* in the Decision. In relation to the legislation, the FTT set out paragraphs 1 and 3 of Schedule 24 FA 2007 without comment. In relation to *Auxilium*, the FTT simply recorded the parties' submissions (by CPR at [34] – [36] and for HMRC at [43] – [46]). At [124], the FTT made clear that it had considered the "knowledge and intention" referred to in *Auxilium* but did not expand on what that meant or how it applied to CPR. We conclude that the FTT was aware of the statement in [63] of *Auxilium* that the taxpayer must know that a document contained an inaccuracy at the time that the document is provided to HMRC and that this is a subjective test. We now consider whether and how the FTT applied that test to the facts that it found.

38. The FTT's findings in relation to the penalties are in [124] of the Decision which is set out in [4] above. In short, the FTT made two findings: first, that "CPR cannot have reasonably concluded that they had sufficient evidence of export when they zero-rated the supplies"; and, secondly, that CPR's behaviour was "deliberate as the returns had been submitted when CPR was at least reckless as to whether it had the required evidence to zero-rate." In these passages, the FTT did not make any finding that CPR knew that its VAT returns contained any inaccuracies when it submitted them to HMRC.

39. The first of the two findings was based on the undisputed fact that HMRC had assessed CPR for VAT on exports for which it did not hold evidence of removal from the UK in 2008 and 2011 and, further, had provided CPR with VAT Notice 725, which set out the requirements for zero rating exports, on more than one occasion. The finding that CPR cannot have reasonably concluded that it had the necessary export evidence to support zero rating is a finding that CPR acted unreasonably in treating the relevant supplies as zero rated. A finding that there was a failure by CPR to take reasonable care would certainly justify a finding that the inaccuracy was due to carelessness on CPR's part but, in our view, falls short of a finding that CPR had actual knowledge or blind eye knowledge of the lack of export evidence. The impression that the FTT concluded that CPR acted unreasonably but not knowingly is reinforced by the second finding that CPR was reckless about whether it had the evidence needed to zero rate the supplies. As already explained, we do not express any view on whether an inaccuracy that is attributable to recklessness is deliberate for the purposes of the penalty regime because we were not addressed on that point. We determine this appeal on the basis that the deliberate inaccuracy penalty appeal only applies in this case if CPR provided VAT returns to HMRC knowing that they contained errors. In our view, the conclusion that CPR was "at least reckless" is not a finding that CPR had actual or blind eye knowledge of any error in the VAT returns and, accordingly, did not support a finding that CPR was liable to a penalty for deliberate inaccuracy.

40. We have also considered the permission to appeal decision but it does not assist in understanding the facts or reasons for the FTT's decision to uphold the penalties on the basis that the inaccuracies were deliberate on the part of CPR. Paragraph [11] and the first sentence of [12] refer to *Auxilium* but the (correct) statement that it is not binding give the impression that the FTT did not agree with the decision in *Auxilium* and did not follow it in reaching its decision. The second sentence of [12] does no more than restate [124] using the same term, "cannot reasonably have concluded", without explaining how that constituted deliberate behaviour. The final sentence of [12] "notes" the Supreme Court's comment about recklessness in *Tooth* but does not say whether the FTT had based its decision on a finding of recklessness. At no point in the decision refusing permission to appeal does the FTT say that it made a finding that CPR had knowledge of the inaccuracies. The way the decision was framed indeed supports CPR's submission that the FTT found a want of proper care or recklessness and believed that these were sufficient to amount to knowledge.

41. In summary, we are not satisfied that the FTT correctly applied the test in *Auxilium* to the facts in this case and, in any event, we consider that the FTT's findings of fact do not support a conclusion that the inaccuracies in CPR's VAT returns were deliberate (applying the *Auxilium* test). We find that the making of the decision in relation to the penalties involved the making of an error on a point of law. It follows that CPR's appeal against that part of the Decision that relates to the penalties must be allowed.

42. In the event that we allowed the appeal, Mr Bedenham invited us to re-make the decision and impose a careless penalty under paragraph 1 of Schedule 24 FA 2007. Ms Robinson suggested that we might remit the case if we found that the FTT had based its decision on recklessness. In our view, it would not be appropriate to remit in this case as we have the FTT's findings of fact and are able to apply the penalty provisions to them without the unnecessary expense and delay of a further hearing before the FTT. There is no dispute that if, as we have found, CPR is not liable to a penalty for deliberate inaccuracy then it must, in the circumstances of this case, be liable to a penalty for failure to take reasonable care. Accordingly, we set that part of the Decision aside and re-make it as a decision allowing CPR's appeal relating to the deliberate penalty but imposing a careless penalty in its place.

DISPOSITION

43. For the reasons given above, CPR's appeal is allowed and we exercise our power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA') to set aside the Decision in so far as it relates to the penalties. Exercising our power under section 12(2)(b)(ii) TCEA and paragraph 17(2)(b) of Schedule 24 FA 2007, we remake the Decision to allow CPR's appeal against HMRC's decision to assess CPR for penalties for deliberate inaccuracy and confirm that CPR is liable for penalties for careless inaccuracies.

44. We were not addressed on the quantum of the penalty and, indeed, the calculation should be straightforward. In the event that there is any difficulty in agreeing the amount of the revised penalty, the parties have liberty to apply within 28 days of the date of release of this decision for a decision on quantum on the papers or further directions.

COSTS

45. 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 the order be 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 Miles

Judge Greg Sinfield

Upper Tribunal Judges

Release date: 15 March 2023