[2017] UKFTT 482 (TC)

TC05935

Appeal number: TC/2014/05362
TC/2015/03888

VALUE ADDED TAX – best judgment assessments – Café operated by appellants – whether correct apportionment between zero rated and standard rated sales – held yes save in respect of the Mezza - penalties –whether deliberate or careless – held careless – no reasonable excuse – penalty assessments varied – otherwise appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL LLAMAS **Appellants**
SALINAS CAFÉ LIMITED

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR CHRISTOPHER JENKINS

Sitting in public at Fox Court on 26 September 2016 with further written submissions received from the Respondents

The First Appellant in person and as director of Salinas Café Limited

Mrs Jane Ashworth, Officer of HM Revenue & Customs, for the Respondents

DECISION

Background

1. The appellants appeal against two assessments to VAT made by the respondents (or "HMRC") under Section 73(1) of the VAT Act 1994 ("**assessments**").

2. The assessment in respect of Michael Llamas trading as Salinas Café Limited (i.e. as sole trader) is in the sum of £9,559.00 ("**Mr Llamas' tax assessment**").

3. The assessment in respect of Salinas Café Limited (the "**Company**") is in the sum of £5,342.00 ("**Company tax assessment**").

4. In October 2012 Mr Llamas transferred his business to the Company. The business is the provision of eat-in and takeaway food and drink.

5. The main issue with which we are concerned in this appeal is the split between zero rated and standard rated supplies by both appellants. The respondents say that 85% of the supplies are standard rated and 15% are zero rated. The assessments are based on this split. The appellants say that this is incorrect and the split is 55% standard rated and 45% zero rated.

6. The respondents have also assessed Mr Llamas and the Company to penalties on the basis that the returns which understated the VAT due (which understatement has been corrected by the assessments) were submitted with inaccuracies resulting from deliberate behaviour.

7. No appeal had been made by Mr Llamas or the Company against the penalties. At our suggestion, Mr Llamas requested that we entertain his appeals against the penalties at the hearing. Mrs Ashworth made no objection to this although reserved her position. She requested that if Mr Llamas brought up a matter which she needed time to consider, that the tribunal granted her that time. We agreed. As things turned out, Mrs Ashworth did not need any further time to consider any matter raised by Mr Llamas.

Evidence and findings of fact

8. Mr Llamas gave oral evidence for himself and on behalf of the Company. In addition to his evidence, we were provided with a substantial bundle of documents, which included correspondence between the parties and copies of the till rolls which formed the basis of the assessments.

9. During the hearing, however, it transpired that it was not absolutely clear how HMRC had calculated the numbers in the assessments. So we gave directions on this as well as a number of other matters.

10. The respondents have provided the information in accordance with those directions. Having done so, Mr Llamas and the Company had an opportunity to comment on that information, but declined to do so.

11. On examining the information provided by the respondents, it became apparent that we had not seen the penalty assessment visited on Mr Llamas in respect of the Mr Llamas tax assessment. Mrs Ashworth indicated, in that information, that the penalty assessment ("**Mr Llamas' penalty assessment**") was issued on 13 November 2015, but it was not in the bundle. The amount of this assessment is £5,020.85 based on deliberate behaviour and is 52.5% of the £9,559.00 assessed by Mr Llamas' tax assessment.

12. Since we thought it was in the interests of justice for us to deal with an appeal against Mr Llamas' penalty assessment, we issued a direction for disclosure of this. Mr Llamas' penalty assessment was then provided to us. Neither the Mr Llamas nor the Company provided us with any response to those assessments.

13. We found Mr Llamas to be an honest and credible witness and we accept his evidence.

14. On the basis of the evidence, we make the following findings of fact.

(1) Mr Llamas was registered for VAT with effect from 2 March 2010. He operated a cafe under the name Salinas Cafe which provided (and the cafe still provides) eat in and takeaway food and other services.

(2) On 1 October 2012, Mr Llamas transferred his trade, as a going concern, to the Company of which he is the sole director. The Company registered for VAT with effect from 1 October 2012, and remained registered until 1 November 2014 when it deregistered as it had fallen below the de-registration threshold.

(3) Mr Llamas employed accountants (Accounting Advice Bureau ("AAB")) to compile his VAT returns whilst he operated as a sole trader, and on behalf of the Company.

(4) At the end of each quarter, Mr Llamas would take the till rolls to AAB who would input those into an accounting package called Sage. This was then used by AAB to populate a VAT return.

(5) There would then be a meeting between Mr Llamas and a representative of AAB, either at Mr Llamas' premises or at AAB's premises during which Mr Llamas would be given a folder by AAB which contained within it the Sage print-out, and the VAT return.

(6) Mr Llamas did not check one against the other (in other words he did not check that the numbers in the VAT return corresponded with the Sage print-out). He relied on AAB to do this.

(7) Mr Llamas would then sign the return and it would then be submitted to HMRC.

(8) But whilst Mr Llamas relied upon AAB to accurately transcribe the information from the till rolls into the Sage system, and then into the VAT return, it was Mr Llamas who told AAB about the breakdown of sales between standard rated and zero rated.

(9) During 2011 and 2012, HMRC officer, Timothy Gosling ("Officer Gosling") undertook an enquiry into Mr Llamas' VAT returns. During the course of a visit, Officer Gosling queried the split between zero rated and standard rated sales used by Mr Llamas (being 45% zero rated and 55% standard rated) and asked not only how this split was arrived at, but for calculations for the VAT returns for the periods 07/10 to 01/11.

(10) In response, AAB said that Mr Llamas had arrived at the figure following a month long study of customers. Mr Llamas told us that he provided this month long survey to AAB, but was not certain whether AAB had provided it to Officer Gosling.

(11) It was Officer Gosling's view that the zero rated sales at 45% was high and he requested a copy of the survey and the till rolls for May to July 2011. The till rolls were provided. It was Officer Gosling's view that a significant number of no sales and sales for 1p had been generated. He also thought there were missing z readings. We call this the "suppression investigation".

(12) Following further enquiries and visits, Officer Gosling issued an assessment (the "**suppression assessment**") to collect the VAT due on the difference between the 1p transactions and the lowest priced item on the menu, being £1 for a cup of coffee having extrapolated back to the date of registration.

(13) We find that the suppression assessment was for the periods 04/10 to 04/12 inclusive and was in the total sum of £3,819.00. The date of calculation was 1 October 2012. It is not clear the date on which it was served on Mr Llamas.

(14) No action was taken regarding the split between the standard and the zero rated sales.

(15) An assessment for a penalty under Schedule 24 FA 2007 was visited on Mr Llamas in respect of the suppression assessment (the "**suppression penalty assessment**").

(16) We find that the suppression penalty assessment was notified to Mr Llamas on 22 October 2012 in an amount of £1,887.37, based on a penalty percentage of 52.5% of the potential lost revenue, and was based on a deliberate inaccuracy in the returns for the relevant periods.

(17) Mr Llamas did not appeal against either the suppression assessment or the suppression penalty assessment.

(18) Following notification to HMRC of the transfer of Mr Llamas' business to the Company (and HMRC declining the parties request to transfer Mr Llamas' VAT number to the Company), the first return for the Company (being a repayment return for 01/13) was selected for a check prior to the repayment being made.

(19) Officer Gosling requested supporting documents for this return and having received them sought details of how the split between the zero rated and the standard rated sales had been calculated.

(20) In or around 22 July 2013, AAB supplied Officer Gosling with till z readings for the Company for the period 1 October 2012 to 30 April 2013.

(21) Officer Gosling then used these z readings to calculate the breakdown of sales on an item by item basis, as set out below.

	Total Sales	**Standard Rated Sales**	**Mixed Standard Rated and Zero Rated Sales**
D01 Coffee	28,978.70	28,978.70	
D02 Baguettes	1009.65		1,009.65
D03 Set Menu	134.15	134.15	
D04 Ice Coffee	2.00	2.00	
D05 Tea Breakfast	2,622.91	2,622.91	
D06 Sandwich	2,624.51		2,624.51
D07 Mezza	4,544.34	4,544.34	
D08 Milkshake	192.14		192.14
D09 Cake	3,808.02		3,808.02
D10 Jacket Potato	233.95	233.95	
D11 Wine	1,545.24	1,545.24	
D12 Orange Juice	38.80	38.80	
D13 Soft Drinks	1,513.18	1,513.18	

D14 Panini	2,046.08	2,046.08	
D15 Beer	168.50	168.50	
D16 Set Menu	11.40	11.40	
TOTAL	49,473.57	41,839.25	7,634.32
Percentage of Total Sales		0.85	0.15

(22) Officer Gosling then reviewed the mixed sales (some of which were standard rated and some of which were zero rated). To determine the proportion of standard rated and zero rated sales, he applied Mr Llamas 45% zero rating and 55% standard rating to that 15%. He then applied the VAT fraction ($1/6^{th}$) to give the VAT which should have been declared on the 85% standard rated sales and the standard rated elements of the mixed sales.

(23) The assessment on the Company for the additional VAT of £5,342.00, was issued on 1 April 2014 (i.e. the Company tax assessment).

(24) This was for the period 04/13 to 01/14 inclusive.

(25) An assessment for the VAT arising from the zero rated/standard rated split for Mr Llamas as sole trader for the periods 07/10 to 10/12 inclusive, in an amount of £9,559.00, was issued on 1 April 2014 and notified to Mr Llamas by letter on 24 April 2014 (i.e. Mr Llamas tax assessment).

(26) On 1 October 2014 the Company appealed against the Company tax assessment.

(27) On 26 October 2015 Mr Llamas appealed against Mr Llamas' tax assessment.

(28) On 11 July 2014, the respondents sent a notice of penalty assessment to the Company for £3,467.98 (the "**Company penalty assessment**"). This was calculated at 52.5% of the potential lost revenue, namely the £5,342.00 assessed by the Company tax assessment. The Company's notice of appeal against that assessment did not include an appeal against the Company penalty assessment.

The law

15. It is not disputed that sales of food eaten on the café premises, whether hot or cold, is chargeable to VAT at the standard rate, whereas cold food which is taken away is zero rated (see section 30 of, and group 1 of schedule 8 to, the VAT Act 1994).

16. Section 73(1) of that Act provides:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

17. When considering whether an assessment has been made to the best of the Commissioners judgment, the primary task of the tribunal is to find the correct amount of tax, so far as possible, on the material properly available to it. Save in exceptional circumstances, the tribunal should not be diverted into an attack on the Commissioners exercise of judgment at the time of the assessment.

18. The law relating to penalties is found in Schedule 24 to the Finance Act 2007. This Schedule provides that a penalty is payable by P if (inter alia) P submits a VAT return which contains an inaccuracy which amounts to or leads to an understatement of P's liability to VAT. By paragraph 4, the penalty is 30% of the potential lost revenue if the inaccuracy is careless, but 70% of the potential lost revenue if the inaccuracy is deliberate but not concealed.

19. By paragraph 3(1) an inaccuracy is deliberate but not concealed if "the inaccuracy is deliberate but P does not make arrangements to conceal it". There is no further definition of an inaccuracy being "deliberate". An inaccuracy is "careless" if it is due to P's failure to take reasonable care.

20. Paragraph 5 provides the "normal rule" under which the potential lost revenue is the additional VAT as a result of correcting the inaccuracy.

21. Paragraph 10 provides that where a person who would otherwise be liable to a 70% penalty makes an unprompted disclosure, the penalty may be reduced to no less than 20%; and in the case of prompted disclosure to no less than 35%. For a 30% penalty the related minima are 15% and 20%.

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

23. Under paragraph 17(2) on an appeal under paragraph 15(2) the tribunal may affirm HMRC's decision, or substitute for HMRC's decision another decision that HMRC had power to make.

24. Under paragraph 11, HMRC may reduce a penalty if they think it right because of special circumstances. On an appeal under paragraph 15(2), the tribunal may rely on paragraph 11 to the same extent as HMRC, or to a different extent, but only if it thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

25. Under paragraph 18, P is liable to a penalty for the submission of an incorrect return where that return is given to HMRC on P's behalf. But under 18(3) P is not liable to a penalty in these circumstances if P satisfies HMRC that he took reasonable care to avoid the inaccuracy.

Burden and standard of proof

26. The burden of proving that the assessments to additional VAT are incorrect lies with the appellants. The standard of proof being the balance of probabilities.

27. The burden of proving that the penalty assessments are correct (in other words that the inaccuracies in the returns were deliberate or careless), falls on HMRC. Again the standard of proof is the balance of probabilities.

The assessments

28. There seem to be six assessments to which we have been referred as part of this appeal.

29. The suppression assessment. Mr Llamas does not appeal against this assessment in these proceedings and we therefore make no further comment on it.

30. The suppression penalty assessment. Although the suppression penalty assessment was in the bundle, we do not deal with it as part of this decision. The suppression penalty assessment must be dealt with in conjunction with the suppression assessment. We cannot deal with the suppression penalty assessment in isolation. If the suppression assessment were to be varied or discharged, the suppression penalty would be affected. This is notwithstanding Mrs Ashworth's concession that Mr Llamas might, as part of these proceedings, appeal against the penalties.

31. Mr Llamas' tax assessment. We deal with this in more detail below.

32. Mr Llamas' penalty assessment. Having now seen sight of this in response to our direction, we can deal with this, and we do so below.

33. The Company tax assessment. We deal with this below.

34. The Company penalty assessment. We deal with this below.

35. In the rest of this decision, we refer to Mr Llamas' tax assessment and the Company tax assessment as the "VAT assessments" and Mr Llamas' penalty assessment and the Company penalty assessment as the "penalty assessments".

Discussion and conclusion

<u>The appellants submissions and grounds of appeal</u>

36. Some of the points made by the appellants in their grounds of appeal (which, Mr Llamas admitted, were actually drafted by AAB on the appellants behalf) are relevant only to the suppression assessment and the suppression penalty assessment. Since we are not dealing with either of these, we do not consider these grounds any further.

37. However, in relation to the VAT assessments and the penalty assessments, the appellants submissions are as follows:

(1) The split of zero rated and standard rated sales is 45% zero rated and 55% standard rated.

(2) This had been agreed with the respondents some three years ago and it is not right (it is unfair) that the respondents have now changed their mind.

(3) The sales reporting mistakes had been made by a member of staff.

The respondents submissions

38. The VAT assessments have been made to best judgment and are based on the sales records provided by the Company for the period 1 October 2012 to 30 April 2013.

39. It is reasonable for these figures to be used in the VAT assessments for periods before and after that period since Mr Llamas has confirmed in evidence that the business of the cafe has not changed throughout its operation in his hands (as sole trader) or in the Company's hands.

40. There was no agreement with the appellant or his advisers that the split of the sales was 45% zero rated and 55% standard rated.

41. The assessment should stand save that the sales apportioned to Mezza of £4,544.34 should be changed from being treated as standard rated to being treated as zero rated and the assessments should be amended accordingly.

42. The mistakes in the VAT returns have been brought about, if not deliberately, then certainly by the failure by the appellants to take reasonable care.

Discussion

43. It is simplest to deal with the VAT assessments first and the penalty assessments thereafter.

The VAT assessments

44. We agree with Mrs Ashworth that it is entirely reasonable for HMRC to use the sales figures provided by the Company for the period 1 October 2012 to 30 April 2013 as the basis for their analysis of the split of zero rated and standard rated supplies made by the Company on which the VAT assessments were based.

45. We are also satisfied that the analysis undertaken by Officer Gosling, and the use of that analysis in generating the VAT assessments is a reasonable methodology.

46. In light of Mr Llamas' admission that there has been no change in the way in which the cafe has operated throughout his operation of it as a sole trader, and subsequently when it was transferred to the Company, by the Company, we also think it is entirely reasonable for HMRC to use that analysis as the basis for extrapolating backwards and forwards and generating the VAT assessments in respect of periods

other than those covered by the sales figures provided for 1 October 2012 to 30 April 2013.

47. We remind ourselves that the burden of proving that the VAT assessments are incorrect lies with the appellants. Other than a bold assertion that HMRC's figures are incorrect, the appellants have provided no evidence of this.

48. They have not discharged their burden of proof.

49. So we conclude that the assessments are accurate (save as regards the Mezza) and (save as varied by the transfer of that item from standard rated sales to zero rated sales) the VAT assessments should stand.

50. The appellants second submission on the VAT assessments concerns unfairness. It is their contention that an agreement had been reached with the respondents some time ago and the respondents should now honour the agreement. The contention is that the agreement was reached in October 2011.

51. We have been through the bundle in considerable detail. The only letter that we have relating to October 2011 is one from Mr Gosling to Mr Llamas dated 10 October 2011 which follows up a "recent visit" by Mr Gosling to Mr Llamas premises.

52. In it Mr Gosling says "one of the areas that we discussed was the split between zero rated and standard rated food sales. In completing the VAT returns your Accountant had undertaken the calculation submitting the standard rated to the zero rated sales as a 55% to 45% split. Could you please provide me with details of how this percentage was arrived at?..... This 45% figure does appear to be rather low".

53. AAB respond to that letter on 7 November 2011 indicating that they think it is fit and reasonable to apportion the sales as 55% zero rated and 45% standard rated. Pausing there, it seems to us that AAB's response has confused the zero rated and standard rated percentages. It should have indicated that the sales were to be apportioned 55% to standard rated and 45% to zero rated.

54. There is clearly no agreement in that exchange of correspondence that HMRC were agreeing a 55% standard rated, 45% zero rated split.

55. We have also considered whether there are any other documents evidencing such an agreement and have found none.

56. Neither AAB on the appellants behalf, nor Mr Llamas at the hearing were able to point to any specific evidence of this agreement.

57. Accordingly, we agree that HMRC had reached no agreement with the appellants that the split was 55% standard rated and 45% zero rated.

58. We would add that even if there had been such agreement, this Tribunal would not be competent to hear a complaint by the appellants that by seeking to resile from such agreement, HMRC were acting unfairly or unlawfully. This Tribunal has no

power to consider whether, generally, HMRC have behaved unfairly and if the appellants are asserting that they have a legitimate expectation that HMRC would keep to any such agreement, then their remedy is to bring an action for judicial review. We are not competent to hear such an action.

Penalty assessments

59. Mr Llamas' penalty assessment is an amount of 5,020.84. The Company penalty assessment is £5,342.00.

60. Both penalty assessments are based on deliberate behaviour by the appellants i.e. that they (or someone or their behalf) have submitted VAT returns in which there is a deliberate (but not concealed) inaccuracy.

61. HMRC's guidance is that a deliberate inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy.

62. In *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 the Tribunal adopted what it described as a "similar approach" saying that [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 the taxpayer failed to take all reasonable steps to ensure the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time".

63. This is a subjective test, and it is for HMRC to establish deliberate behaviour by the appellants. Mrs Ashworth has submitted to us that she does not maintain HMRC's position on the penalty assessments that the inaccuracies are a result of deliberate behaviour by the appellants.

64. In such circumstances we have decided that the inaccuracies are not a result of deliberate behaviour.

65. However, Mrs Ashworth does submit that the inaccuracies are careless i.e. they result from a failure by the appellants, or someone acting on their behalf, to take reasonable care, that the returns were accurate.

66. Under paragraph 17(2) we have the power to substitute our decision for any decision HMRC had the power to make. Since HMRC had power to determine that the appellants behaviour was careless, so do we. We can consider the matter afresh.

67. In *Hanson v HMRC* [2012] UKFTT 314 Judge Cannan undertook an analysis of what comprises reasonable care for the purposes of Schedule 24.

68. At paragraph [19] of that decision, and thereafter, he stated as follows:

"19. In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under *section 29 Taxes Management Act 1970*. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer. The test was described by Judge Berner in *Anderson (deceased) v Revenue and Customs Commissioners* [2009] UKFTT 206 at [22], cited with approval by the Upper Tribunal in *Colin Moore v Revenue and Customs Commissioners* [2011] UKUT 239 (TCC):

> "*The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.*"

20. I am satisfied that the effect of *paragraph 18* is to remove the liability of a taxpayer to a penalty where:

> (1) a return is completed and lodged by an agent, and
>
> (2) an inaccuracy in the return is the result of something done or omitted by the agent, but
>
> (3) the taxpayer took reasonable care to avoid that inaccuracy.

21. What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters 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. In my view, if a taxpayer reasonably relies on a reputable accountant for advice in relation to the content of his tax return then he will not be liable to a penalty under *Schedule 24*.

22. I am fortified in these conclusions in relation to *paragraph 18* by the content of the HMRC Compliance Handbook at CH84540 which states in relation to paragraph 18 as follows:

> "*A person cannot simply appoint an agent and deny responsibility for their tax affairs. The person still has a duty to take reasonable care, within their ability and competence, to make sure that what they are signing for is correct. The person has to show that they took reasonable care, within their ability and competence, to avoid default by their agent. This will include*
>
> - *making sure that they give the agent all relevant information with which to work .*
> - *implementing the professional advice received, and not neglecting some vital step*
> - *checking the agent's work to the extent that the person is able to do so. For example, an ordinary person cannot be expected*

to challenge specialist professional advice on a complex legal point. But they ought to be able to recognise the complete absence of a major transaction.

A person saying and meaning 'I leave it all to my agent' is hardly taking care, let alone reasonable care, over their obligations or the work of their agent.

.. The person has an obligation to choose an adviser who is trained and competent for the task in hand ...

The benchmark is a person who goes to an apparently competent professional adviser

- *gives the adviser a full and accurate set of facts*
- *checks the adviser's work or advice to the best of their ability and competence and*
- *adopts it.*

The person will then have taken reasonable care to avoid inaccuracy on the part of themselves and their agent."

23. At one extreme is an error of omission, for example failing to declare a source of income. In those circumstances it seems to me that a taxpayer will almost always be expected to identify the error. At the other extreme an error might involve wrongly construing a complex piece of legislation. In those circumstances the possibility of a penalty may still arise because of the carelessness of the agent, but the taxpayer's liability to a penalty might well be excluded on the basis that he took reasonable care but did not identify the error.

24. I agree with the general thrust of the guidance given in the HMRC Compliance Handbook. In particular that a taxpayer cannot simply leave everything to his agent. A taxpayer must certainly satisfy himself that the agent has not made any obvious error. That might involve the taxpayer seeking to understand the basis upon which an entry on his return has been made by the agent. However in matters that would not be straightforward to a reasonable taxpayer and where advice from an agent has been sought which is ostensibly within the agent's area of competence, the taxpayer is entitled to rely upon that advice. At the heart of this issue is the extent to which a taxpayer is required to satisfy himself that the advice he has received from a professional adviser is correct. The answer to that will depend on the particular circumstances of the case."

69. It is clear from Mr Llamas' evidence and the correspondence that both he and the Company relied on AAB (their agent) for the compilation (and perhaps

submission) of their VAT returns. Hence the reason why the extract from *Hanson* is relevant.

70. The extract in Judge Cannan's Decision from the HMRC compliance handbook is the same today as it was in 2012 when Judge Cannan gave his decision in *Hanson*.

71. Since the respondents were under the correct apprehension that neither Mr Llamas nor the Company were appealing against the penalty assessments, they made no submissions about the behaviour of Mr Llamas or the Company, or their agent AAB. They made no submissions about the appellants careless behaviour.

72. Similarly, because Mr Llamas applied to appeal against the penalty assessments at the hearing, he too made no written, and as things turned out oral, submissions as to why he had taken reasonable care.

73. In the penalty explanation letter of 11 July 2014 given to the Company in relation the Company penalty assessment, the reason for the respondents imposition of a penalty based on deliberate behaviour is that:

> "Mr Llamas adopted the process that 55% of all sales were standard rated and 45% were zero rated. This apportionment was not reflected in the till department summary at the end of each day."

74. We have adopted this as the respondents submission as to why Mr Llamas and the Company, have been "guilty" of careless (rather than deliberate) behaviour.

75. Applying the "Hanson" principles to the facts of this case, our view is that:

(1) It is clear, as mentioned above, that the appellants relied on AAB to compile and complete their VAT returns.

(2) However, Mr Llamas accepts that he gave AAB the split of zero rated and standard rated sales.

(3) In October 2011 Officer Gosling had queried this split and sought justification from Mr Llamas of how he had reached a figure of 55% standard rated and 45% zero rated. It was Officer Gosling's view that the 55% apportioned to standard rated sales was unrealistically low. He followed up this misgiving by asking Mr Llamas to undertake a month long verification exercise, the results of which (if it was carried out) were never communicated to him.

(4) It is not entirely clear to us whether the genesis of the 55/45% apportionment was a result of AAB's advice, or Mr Llamas personal view.

(5) But in either case, prior to the periods under appeal, Mr Llamas was on notice that HMRC did not agree this apportionment.

(6) We accept that simply because HMRC take a different view of an apportionment does not mean that the appellants have failed to take reasonable care if they decided, notwithstanding, to submit their returns on a 55/45% basis.

(7) But in our view a reasonable taxpayer in the appellants position exercising reasonable due diligence in the completion of their returns would have at least reviewed the split in conjunction with AAB. Furthermore, a reasonable taxpayer would have investigated the basis of HMRC's view to see if it had merit. Information about the VAT status of the supplies made by the appellants was, we strongly suspect, available on HMRC's website. It would also have been open to Mr Llamas either directly or via AAB to enter into a dialogue with Officer Gosling to understand why Officer Gosling was taking a contrary view.

(8) But there is no evidence that Mr Llamas did anything other than continue to use the 55/45% split even though it had been questioned by Officer Gosling. He appears to have undertaken no independent verification of his position and, he does not appear to have queried the split which AAB reflected in the returns which were provided to him for checking.

(9) Given that it was Mr Llamas who was responsible (by his own admission) for identifying to AAB the type of supplies that the café made this is unsurprising.

(10) But the failure to check the position in light of Mr Gosling's misgivings does, in our view, mean that the inaccuracies in the VAT returns are a result of the appellant's failure to take reasonable care.

(11) Accordingly, our decision on the Penalty assessments is that they should be reduced from 52.5% to 22.5% of the additional VAT due under the VAT assessments (as revised to take into account the Mezza). We have arrived at that figure by applying the same level of discount (50%) to a carelessness penalty with prompted disclosure, as HMRC have allowed for the deliberate penalties which have been assessed by the Penalty assessments.

Decision

76. Our decision is as follows:

(1) The VAT assessments are upheld save as varied below.

(2) The items described as Mezza should be treated as zero rated, rather than standard rated supplies. The VAT assessments should then be recomputed using the same methodology as has been used by Officer Gosling in computing the VAT assessments ("**revised VAT assessments**").

(3) In the absence of agreement between the parties as to the revised VAT assessments, then the matter should be brought back before this Tribunal for determination.

(4) The Penalty assessments should be varied. The appellants are liable to penalties at the rate of 22.5% of the VAT assessed by the revised VAT assessments.

Appeal rights

77. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 7 JUNE 2017