Analysis

Deliberate behaviour: what you need to know

Speed read

Following the Supreme Court's decision in *Tooth*, questions remained as to the type of knowledge a taxpayer must have when it comes to deliberate inaccuracies in documents. The Upper Tribunal, in *CPR Commercials Ltd*, recently provided further clarity and confirmed that 'blind-eye' knowledge of an inaccuracy would be sufficient. However, the issue of whether recklessness as to accuracy would be sufficient (a question expressly left open by the Supreme Court) has not been engaged with in the same manner, and there remains uncertainty in the area.

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The consequences for a taxpayer that provides a document to HMRC containing a deliberate inaccuracy are severe. The taxpayer can be assessed in relation to tax going back 20 years, will be subject to significant penalties and will face considerable reputational damage. For this reason, it is important that there is a clear test to determine what constitutes deliberate behaviour.

The Supreme Court in *HMRC v Tooth* [2021] UKSC 17 (*Tooth)* clarified that HMRC needed to show deliberate behaviour specifically in respect of the inaccuracy of a statement, but left open the question as to what type of knowledge a taxpayer needed to have in order to be acting deliberately: in particular, could recklessness as to the accuracy of a statement amount to deliberate behaviour? Could turning a 'blind-eye' to the accuracy of a document be sufficient?

Recent cases have seen the First-tier Tribunal (FTT) and the Upper Tribunal (UT) grapple with these issues and provide further clarity on what HMRC must show.

Auxilium Project Management and *CF Booth Ltd*

Auxilium Project Management v HMRC [2016] UKFTT 249 (TC) (*Auxilium)* is an FTT case decided prior to *Tooth* that has often been cited in relation to the test for deliberate behaviour. Indeed, the FTT's finding that '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,' is in line with the Supreme Court decision in *Tooth* – and this was confirmed by the UT in *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) (*CF Booth)* when (subsequent to *Tooth*) it expressly approved the FTT's comments in *Auxilium*.

The confirmation of the *Auxilium* test (that is, requiring HMRC to show an intention to mislead) is helpful, although the UT did add a further gloss, finding that there is no requirement for HMRC to prove dishonesty when seeking to impose a penalty for deliberate inaccuracy under FA 2007 Sch 24. This finding was made by drawing parallels with the Court of Appeal decision in *HMRC v CitiBank NA & E Buyer UK* [2017] EWCA 1416 (Civ) which held that HMRC do not need to plead or prove dishonesty in order to establish so-called *Kittel* knowledge (where HMRC must show the taxpayer knew or should have known transactions were connected with the fraudulent evasion of tax).

Exactly what this means in practice is unclear. Where it is necessary for HMRC to show that the taxpayer was intentionally misleading HMRC with an inaccurate document (which is not part of the *Kittel* test), it is difficult to imagine circumstances in which the taxpayer would not be treated as 'dishonest'.

The test – and the degree of knowledge required – would be raised again in the more recent UT case of *CPR Commercials Ltd v* HMRC [2023] UKUT 61 (TCC) (*CPR).*

CPR and 'blind-eye' knowledge

In the *CPR* case, the FTT determined that CPR's VAT returns contained inaccuracies because supplies were being treated as zero-rated despite the fact that CPR did not hold evidence to support that zero-rating.

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In addition, the FTT upheld penalties for deliberate inaccuracies on the basis that:

> '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' (emphasis added).

CPR appealed on the ground that anything less than subjective knowledge as to whether there is an inaccuracy – that is, evidence that they *did actually know* – does not constitute deliberate behaviour. In the case, HMRC accepted that recklessness was insufficient, but argued that the FTT's findings of fact were conclusions as to actual knowledge or, at least, blind-eye knowledge as to the inaccuracies. In other words, the case considered a different form of 'knowledge' where a taxpayer deliberately does not reflect on the documentation because they knew that, if they did so, it would be clear that it was inaccurate.

Such blind-eye knowledge is different from being reckless as to the accuracy of a document. In simple terms, while blind-eye knowledge suggests that the person 'knows' what they will find if they look, recklessness may amount to taking no steps to form a view one way or another.

This meant that the UT did not need to deal with recklessness, but it did consider if blind-eye knowledge was sufficient. The UT repeated the findings in *Tooth*, *Auxilium* and *CF Booth*, but none of these cases expressly touched on blind-eye knowledge. The UT therefore referred to FTT cases including *Clynes v HMRC* [2016] UKFTT 369 (TC) in

which blind-eye knowledge had been found to be sufficient, and then gave its view that:

> '… 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.'

The UT did, therefore, consider that blind-eye knowledge could be enough, although it also stressed the need for caution, emphasising that the suspicion must be more than merely fanciful. It must be firmly grounded and targeted on specific facts, and there must be a deliberate decision to avoid obtaining confirmation of facts which the taxpayer has good reason to consider will highlight an inaccuracy.

In short, not only is it enough if a taxpayer *did* know but it may be enough, if the facts are sufficient, that they *would* have known (had they looked).

In the case itself, the UT determined that the FTT had not made findings of fact that could support a conclusion that there was actual or blind-eye knowledge.

A note on *Bachra*

Bachra v HMRC [2023] UKFTT 91 (TC) (*Bachra)* was an FTT decision that was published between *CF Booth* and *CPR*.

The question in *Bachra* was, whether a finding for the purposes of *Kittel* knowledge that a taxpayer should have known that transactions were connected with the fraudulent evasion of VAT, necessarily meant that there was a deliberate inaccuracy.

The decision does not refer to *CF Booth* which (as noted above) touched on similar issues, presumably because it was heard before the decision was published. The FTT referred to *Auxilium* and noted the subjective nature of the test for deliberate inaccuracy, before concluding that a finding that the taxpayer *should* have known of the connection with fraud, did not mean that there was inevitably a deliberate inaccuracy.

The FTT's decision in *Bachra* appears consistent with the later UT decision in *CPR*, on the basis the 'should have known' test is not the same as blind-eye knowledge. Nonetheless, while the reference to *Kittel* knowledge is similar to recklessness, the case does not entirely engage with the question of whether recklessness could ever be sufficient. If it were to be found that recklessness was sufficient to meet the test of deliberate behaviour, it would be more difficult to argue that *Kittel* knowledge does not inevitably result in a deliberate inaccuracy.

HMRC's position on recklessness

It is worth highlighting that in *CPR*, HMRC did not suggest there was any wider policy decision that recklessness is insufficient to amount to deliberate behaviour. In fact, the case specifically records HMRC's assertion that they did not regard recklessness as sufficient on the facts of the particular case.

In *Bachra*, it appears that HMRC may have made some submissions that recklessness was sufficient, but it is unclear exactly what they argued on the issue.

HMRC also touched on the question of recklessness in the FTT case *R Jabble v HMRC* [2023] UKFTT 213 (TC), but again its stance was not definitive. It was recorded as common ground that 'recklessness would not suffice' but HMRC is also said to have made submissions as to the significance of the Supreme Court in *Tooth* contemplating that recklessness might well be a sufficient basis for a finding that behaviour was deliberate. Once more, the issue of recklessness did not actually have to be considered in the case, as there was a finding of actual knowledge.

It is, therefore, unclear from the cases if HMRC has a firm position on recklessness and, if so, what that position is.

Where are we at now?

The Supreme Court was clear in *Tooth* that HMRC needed to demonstrate an intention on the part of the taxpayer to mislead HMRC as to the truth of the relevant statement. The subsequent confirmation of the *Auxilium* test by the UT is helpful, not just in the specific context of discovery assessments and deliberate inaccuracies in documents, but also to penalties.

This test is also relatively straightforward to apply, even with the UT's finding in *CF Booth* that it does not require dishonesty (albeit that it begs a question as to how the test could in practice be satisfied without dishonesty).

In *CPR*, the UT confirmed that blind-eye knowledge could be sufficient for a finding of deliberate behaviour. This is not an especially surprising result and remains consistent with the test in *Tooth*.

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Although deliberate behaviour exists where a taxpayer *did* know or *would* have known (but for their deliberate choice not to look), by contrast, as it stands, it is not enough that a taxpayer *should* have known. This does, however, leave the question as to whether there is a space between 'should' and 'would' where a taxpayer is sufficiently reckless as to the accuracy of a document that it can support a finding of deliberate behaviour.

HMRC's policy position on this question is not clear. The cases stop short of properly considering the matter, as HMRC has tended to rely mostly on blind-eye knowledge where it cannot show actual knowledge. In other cases, the FTT has been able to steer clear of the issue as a result of findings that there was actual knowledge.

The statements in *Tooth* and *Auxilium* (and the cases that followed) that confirm an intention to mislead is required are welcome. The lack of arguments on recklessness may also suggest that both HMRC and the courts would regard recklessness as unlikely to be enough. Nonetheless, despite the variety of decisions in recent years, taxpayers may still have to face some uncertainty in this area for a while to come. ■

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