Neutral Citation: [2023] UKFTT 873 (TC)

Case Number: TC08950

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, 88 Rosebery Avenue,
London EC1R 4QU

Appeal reference: TC/2018/01394
TC/2018/01404

PERSONAL LIABILITY NOTICES – Appellants were directors of employment intermediary company – HMRC decided that company had underdeclared tax by understating hours worked and paying false or inflated tax-free expenses – whether there were inaccuracies in company's returns – whether deliberate – whether attributable to the Appellants – held – inaccuracies in returns, but not deliberate – appeal allowed

Heard on: 6 to 15 December 2022
Judgment date: 26 September 2023

Before

TRIBUNAL JUDGE JEANETTE ZAMAN
TRIBUNAL MEMBER JANE SHILLAKER

Between

SHARON SUTTLE

First Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Between

JOHN JAEKEL

Second Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the First Appellant:	Michael Ripley, instructed by Tyr Law
For the Second Appellant:	Michael Firth, instructed by Stewarts Law
For the Respondents:	Jenny Goldring, Joshua Carey and Natalya Segrove, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Ms Suttle and Mr Jaekel (together, the "Appellants") appeal against personal liability notices ("PLNs") which were issued to them under paragraph 19(1) of Schedule 24 Finance Act 2007 ("FA 2007") by HMRC on 26 January 2017. Each PLN is for £5,322,918.45. The PLNs were issued to the Appellants as the joint directors at all material times of Earn Extra 139 Ltd ("EE139").

2. EE139's activities included operating as an umbrella company. Following an investigation conducted by Officer Bruce McConnell, HMRC concluded that EE139 had deliberately submitted taxpayer documents, namely P35 returns, P14 returns and Real Time Information ("RTI") returns (together, the "Returns"), which they knew to be inaccurate and concealed those inaccuracies. HMRC issued to EE139:

   (1) Regulation 80 determinations (pursuant to Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations")) and a Section 8 decision (pursuant to Section 8(1)(c) of the Social Security Contributions (Transfer of Functions) Act 1999 ("SSC Act 1999")) for underpaid Pay As You Earn income tax ("PAYE") and Class 1 National Insurance Contributions ("NICs") totalling £12,524,514 (together, the "Assessments") for the years 2010-2011 to 2015-2016 (this being the "Relevant Period"); and

   (2) a penalty of £10,645,836.90, on the basis that disclosure was prompted, the behaviour was deliberate and concealed, and allowing a reduction of 30% for quality of disclosure.

3. The Appellants were the two directors of EE139 throughout the Relevant Period, and HMRC issued the PLNs to them on the basis that 50% of the penalty which had been issued to EE139 was attributable to each of them.

4. The Appellants have appealed against the PLNs. Their appeals were heard together, but Ms Suttle and Mr Jaekel had separate representation. We have taken into account throughout the different submissions (or different emphasis in the submissions) made by Mr Ripley and Mr Firth on behalf of Ms Suttle and Mr Jaekel respectively.

5. In summary, and for the reasons set out fully below, we have concluded that:

   (1) there were inaccuracies in the Returns which led to an understatement of tax;

   (2) HMRC have not established that the inaccuracies led to an understatement of the amount of tax which was assessed in the Assessments, and on which the amount of the penalty issued to EE139 and thus the PLNs issued to the Appellants was based;

   (3) the behaviour of EE139 was not deliberate (or deliberate and concealed); and

   (4) accordingly, the condition in paragraph 19 of Schedule 24 that a penalty was issued to a company for a deliberate inaccuracy was not satisfied.

6. The appeals are allowed.

BACKGROUND

7. EE139 provided umbrella services for clients operating in various sectors in the UK, including telecommunications and (from September 2012) overhead power lines.

8. Umbrella companies are not defined as such in legislation, but it was common ground that they operate by providing their own employees to other employment businesses or end clients; in this model, the employees provide their labour for the benefit of the end clients'

business, and it is those end clients which will have day-to-day control over the labour to be provided rather than the umbrella company. The umbrella company operates the payroll for the employees and is paid for the services provided.

9. Employees of an umbrella company such as EE139 (as with employees employed directly by the companies requiring their services) could, provided the statutory conditions were satisfied, receive reimbursement of certain expenses tax-free. Throughout the Relevant Period, this also included, for employees of umbrella companies and certain other employment intermediary arrangements, travel and subsistence expenses for home-to-work travel. Some of these benefits were reduced in Finance Act 2016, which treated each engagement undertaken by a worker through umbrella companies (and other employment intermediaries) as a separate employment, such that a workplace would not be a temporary workplace. These changes only applied from 2016-2017 onwards, ie after the Relevant Period.

10. EE139 submitted P14s and P35s for the tax years 2010-2011 and 2011-2012. From April 2012, EE139 submitted RTI returns, the relevant years in these appeals being the four tax years 2012-2013 to 2015-2016 (the "RTI Years"). As to these different types of returns:

(1) P14s were submitted after the end of each tax year, and related to each employee. The forms identify the employee, then set out details of pay (earnings at the various thresholds for NICs purposes), then employee contributions due and income tax deducted in the employment for the year. They do not contain any information in relation to expenses claimed or reimbursed.

(2) P35s were submitted after the end of the tax year and related to all employees. They confirm whether anyone else has paid expenses, or provided vouchers or benefits to the employees whilst they were employed by the company, then set out information as to the number of P14s submitted for the tax year (which was 493 for EE139 for 2011-2012), then set out the total PAYE and NICs due from P14s.

(3) RTI returns were submitted every time an employee was paid (which was generally weekly), and give details of all payments and deductions for each employee in the pay run, including any non-taxable payments.

11. Officer McConnell opened a review into EE139 following enquiries which had separately been commenced by HMRC with two of EE139's clients, Client S and Client P.

12. This investigation resulted in Regulation 80 determinations and Section 8 decisions being issued to EE139 for underpaid PAYE and NICs. The amounts set out below are taken from HMRC's skeleton argument which was served on 21 November 2022 ("HMRC's Skeleton"). The fact of these Assessments and the penalties having been issued to EE139 and for these amounts was not in dispute. However, the hearing bundle did not include the Regulation 80 determinations for 2012-2013 or 2013-2014, a matter to which Mr Firth drew our attention. (We did have the Section 8 decision (which covers the entirety of the Relevant Period), and the penalty notice which was issued to EE139, which was also for the whole of the Relevant Period.)

13. The amounts were as follows:

Year	**Amount of PAYE due pursuant to Regulation 80 Notices**	**NICs due in Section 8 decision**	**Total PAYE and NIC**	**Penalty 85% of total PAYE and NIC**
06/04/2010	£113,337	£0	£113,337	£96,336.45

to 05/04/2011				
06/04/2011 to 05/04/2012	£216,000	£278,640	£494,640	£420,444.00
06/04/2012 to 05/04/2013	£912,600	£1,177,254	£2,089,854	£1,776,375.90
06/04/2013 to 05/04/2014	£1,300,000	£1,677,000	£2,977,000	£2,530,450.00
06/04/2014 to 05/04/2015	£1,420,000	£1,831,800	£3,251,800	£2,764,030.00
06/04/2015 to 05/04/2016	£1,571,128	£2,026,755	£3,597,883	£3,058,200.55
TOTAL	£5,533,065	£6,991,449	£12,524,514	£10,645,836.90

14. Officer McConnell's letter of 21 September 2016 to EE139 which enclosed the Regulation 80 determinations stated that:

(1) EE139 had failed to provide him with sufficient evidence to support the expenses which equate to up to 80% of the employee's total earnings. Evidence obtained from both the employees and clients would suggest that the vast majority of the expenses claimed have not been incurred and are false; and

(2) the tax liability of £5,533,065 was calculated "disallowing around 90% of the expenses payments treating them instead as "additional" pay taxed at 20%".

15. EE139 appealed against the Assessments on 20 October 2016.

16. A Notice of Penalty Assessment was issued to EE139 on 24 January 2017 in the sum of £10,645,836.90. The penalty explanation schedule (which had been issued on 23 January 2017) set out the basis for charging the inaccuracy penalty under Schedule 24 FA 2007:

(1) The company has failed to provide sufficient evidence to support the expenses claims that equate to up to 80% of the employees' earnings. Information supplied by employees and clients has shown that the vast majority of the expenses claimed would not have been incurred and are false. The hours worked are significantly more than are being recorded by the company, and the company either had this information or would have been able to have accessed it.

(2) The potential lost revenue ("PLR") was £12,524,514, this being the total PAYE and NICs for the Relevant Period, set out by reference to each tax year (these amounts being as set out in the table at [13] above).

(3) The behaviour was deliberate and concealed: The company would have or should have known the actual hours worked. These were ignored. The company accepted

mileage claims with little or no detail. Evidence obtained from third parties has confirmed that the vast majority of workers do not perform their duties in their own vehicles. The combination of the company selecting an arbitrary six hours a day times the minimum hourly wage resulting in excessively low wages and large false expenses, to give a total figure close to the charge-out rate, indicates contrivance to re-categorise wages as payment for supposed expenses. The company must have known that its RTI and P35 returns were significantly wrong.

(4) Disclosure was prompted.

(5) The penalty range is thus from 50-100% of the PLR. A reduction of 30% is allowed for quality of disclosure, 5% for telling, 10% for helping and 15% for giving access to records. This results in a penalty of 85% of the PLR.

17. The PLNs were issued to Ms Suttle and Mr Jaekel on 26 January 2017.

18. On 30 January 2017, Armstrong Watson wrote to creditors of EE139, including HMRC, notifying them that Michael Kienien and Mark Ranson of Armstrong Watson had been appointed as administrators of EE139, and that a sale of the company's business and assets had been concluded on 23 January 2017 to Earn Extra CIS Ltd ("EECIS").

19. Officer McConnell offered a review of the Assessments to the administrators on 9 February 2017. The administrators appealed against the penalties on 23 February 2017 and asked that they be subject to a review, and also requested a review of the Assessments. HMRC reviewed the Assessments and the penalty which had been issued to EE139. On 5 June 2017 HMRC sent a review conclusion letter to the administrators of EE139 upholding the Assessments and the penalty.

20. On 24 February 2016 Schofield Sweeney, acting for both of the Appellants, appealed to HMRC against the PLNs, noting that they would also request a review but asking that no review be offered yet.

21. On 6 September 2017 the administrators of EE139 confirmed in a phone call with Officer McConnell that EE139 would not be appealing. EE139 did not appeal to the Tribunal, and went into liquidation on 12 September 2017.

22. On 29 September 2017 HMRC offered a review of the PLNs to the Appellants. They accepted that offer on 27 October 2017, and the PLNs were upheld by review conclusion letters issued on 15 January 2018. The Appellants have appealed to the Tribunal.

RELEVANT LAW

Penalties and PLNs

23. Section 97 and Schedule 24 FA 2007 ("Schedule 24") introduced the relevant penalty regime. Section 97 states:

> "97 Penalties for errors
>
> (1) Schedule 24 contains provisions imposing penalties on taxpayers who –
>
> (a) make errors in certain documents sent to HMRC, or
>
> (b) unreasonably fail to report errors in assessments by HMRC."

24. Paragraph 1 of Schedule 24 states:

> "1 Error in taxpayer's document
>
> (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.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy."

25. Documents listed in that table include any return for the purposes of the PAYE Regulations and any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about a person's liability to tax.

26. Paragraph 1A provides:

"1A Error in taxpayer's document attributable to another person

(1) A penalty is payable by a person (T) where –

(a) another person (P) gives HMRC a document of a kind listed in the Table in paragraph 1,

(b) the document contains a relevant inaccuracy, and

(c) the inaccuracy was attributable to T deliberately supplying false information to P (whether directly or indirectly), or to T deliberately withholding information from P, with the intention of the document containing the inaccuracy.

(2) A "relevant inaccuracy" is 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) A penalty is payable under this paragraph in respect of an inaccuracy whether or not P is liable to a penalty under paragraph 1 in respect of the same inaccuracy."

27. Paragraph 3 deals with degrees of culpability:

"3 Degrees of culpability

(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).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P –

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC."

28. The amount of an inaccuracy penalty is then dealt with as follows:

"4

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is –

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

…

(5) Paragraph 4A explains the 3 categories of inaccuracy.

4A

(1) An inaccuracy is in category 1 if –

(a) it involves a domestic matter,…

(6) If a single inaccuracy is in more than one category (each referred to as a "relevant category") –

(a) it is to be treated for the purposes of this Schedule as if it were separate inaccuracies, one in each relevant category according to the matters that it involves, and

(b) the potential lost revenue is to be calculated separately in respect of each separate inaccuracy.

…

5

(1) "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.

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to –

(a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

…

6

(1) Where P is liable to a penalty under paragraph 1 in respect of more than one inaccuracy, and the calculation of potential lost revenue under paragraph 5 in respect of each inaccuracy depends on the order in which they are corrected –

(a) careless inaccuracies shall be taken to be corrected before deliberate inaccuracies, and

(b) deliberate but not concealed inaccuracies shall be taken to be corrected before deliberate and concealed inaccuracies.

(2) In calculating potential lost revenue where P is liable to a penalty under paragraph 1 in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.

(3) In sub-paragraph (2) –

(a) "understatement" means an inaccuracy that satisfies Condition 1 of paragraph 1, and

(b) "overstatement" means an inaccuracy that does not satisfy that condition.

(4) For the purposes of sub-paragraph (2) overstatements shall be set against understatements in the following order –

(a) understatements in respect of which P is not liable to a penalty,

(b) careless understatements,

(c) deliberate but not concealed understatements, and

(d) deliberate and concealed understatements.

(5) In calculating for the purposes of a penalty under paragraph 1 potential lost revenue in respect of a document given by or on behalf of P no account shall be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's).

…"

29. The provisions relating to reductions for disclosure, special circumstances, assessment and appeals were:

"9 Reductions for disclosure

(A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an underassessment by –

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure –

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the underassessment, and

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

10

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it –

(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

STANDARD %	MINIMUM % FOR PROMPTED DISCLOSURE	MINIMUM % FOR UNPROMPTED DISCLOSURE
30	15	0
45	22.5	0
60	30	0
70	35	20
105	52.5	30
140	70	40
100	50	30
150	75	45
200	100	60

11 Special reduction

(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

…

13 Procedure – assessment

(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall –

(a) assess the penalty,

(b) notify the person, and

(c) state in the notice a tax period in respect of which the penalty is assessed…

…

(1A) A penalty under paragraph 1, 1A or 2 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(2) An assessment –

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(3) An assessment of a penalty under paragraph 1 or 1A must be made before the end of the period of 12 months beginning with –

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.

(4) An assessment of a penalty under paragraph 2 must be made before the end of the period of 12 months beginning with

(a) the end of the appeal period for the assessment of tax which corrected the understatement, or

(b) if there is no assessment within paragraph (a), the date on which the understatement is corrected.

(5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which –

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraphs (3) and (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

(7) In this Part of this Schedule references to an assessment to tax, in relation to inheritance tax and stamp duty reserve tax, are to a determination.

…

15 Procedure – appeal

(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

...

16

(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply –

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

17

(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may –

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11 –

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

…

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(b)… "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

…"

30. Paragraph 19 sets out the circumstances in which officers of a company may be liable for a penalty which had been issued to a company:

"19 Companies: officers' liability

(1) 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.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership "officer" means –

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)),

(aa) a manager, and

(b) a secretary.

(3A) In the application of sub-paragraph (1) to a limited liability partnership, "officer" means a member.

(4) In the application of sub-paragraph (1) in any other case "officer" means –

(a) a director,

(b) a manager,

(c) a secretary, and

(d) any other person managing or purporting to manage any of the company's affairs.

(5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1) –

(a) paragraph 11 applies to the specified portion as to a penalty,

(b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,

(c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,

(d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),

(e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and

(f) paragraph 21 applies as if the officer were liable to a penalty.

(6) In this paragraph "company" means any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association.

…"

Determinations of unpaid tax and NICs

31. The relevant provisions of the PAYE Regulations provide as follows:

"80 Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to [HMRC] that there may be tax payable for a tax year under 67G, as adjusted by regulation 67H(2) where appropriate, or regulation 68 by an employer which has neither been –

(a) paid to the Inland Revenue, nor

(b) certified by the Inland Revenue under regulation 75A, 76, 77, 78 or 79.

(1A) In paragraph (1), the reference to tax payable for a tax year under regulation 67G includes references to –

(a) any amount the employer was liable to deduct from employees during the tax year, and

(b) any amount the employer must account for under regulation 62(5) (notional payments) in respect of notional payments made by the employer during the tax year,

whether or not those amounts were included in any return under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B).

(2) [HMRC] may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

(3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation.

(3A) A determination under this regulation must not include tax in respect of which a direction under regulation 72F has been made.

(4) A determination under this regulation may–

(a) cover ... any one or more tax periods in a tax year, and

(b) extend to the whole of [the amount of tax determined by HMRC under paragraph (2)], or to such part of it as is payable in respect of –

(i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A ... and 6 of TMA (assessment, appeals, collection and recovery) as if –

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications.

..."

32. The relevant provision of SSC Act 1999 provides as follows:

"8 Decisions by officers of Board

(1) Subject to the provisions of this Part, it shall be for an officer of the Board –

…

(c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay, …"

PAYE Returns

33. The obligation to file the various returns is contained in Regulation 73 of the PAYE Regulations:

"73 Annual return of relevant payments liable to deduction of tax (Forms P35 and P14)

(1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.

(2) The information is –

(a) the tax year to which the return relates,

(b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and

(c) the total net tax deducted in relation to those payments.

(3) The return must be supported by the following information in respect of each of the employees mentioned in paragraph (2)(b).

(4) The supporting information is –

(a) the employee's name,

(b) the employee's address, if known,

(c) either –

(i) the employee's national insurance number, or

(ii) if that number is not known, the employee's date of birth, if known, and sex,

(d) the employee's code,

(e) the tax year to which the return relates,

(f) the total amount of the relevant payments made by the employer to the employee during that tax year, and

(g) the total net tax deducted in relation to those payments.

(5) Paragraphs (2)(c) and (4)(g) are subject to regulation 64(7) (trade disputes).

(6) If an employee was taken into employment after the beginning of the tax year, the employer must also provide the total amounts of –

(a) any amounts required by regulation 43(9), 52(11), 53(3) or 61(3) to be treated as relevant payments made by the employer to the employee during the tax year,

(b) any amounts treated as tax deducted by the employer by any of those regulations,

(c) the sum of the figures given under sub-paragraph (a) of this paragraph and paragraph (4)(f),

(d) the sum of the figures given under sub-paragraph (b) of this paragraph and paragraph (4)(g).

(7) The return must include –

(a) a statement and declaration containing a list of all deductions working sheets which the employer was required to prepare or maintain at any time during that tax year; and

(b) a certificate showing –

(i) the total net tax deducted or the total net tax repaid in the case of each employee, and

(ii) the total net tax deducted or repaid in respect of all the employees,

during that tax year.

(8) The statement and declaration and the certificate must be –

(a) signed by the employer, or

(b) if the employer is a body corporate, signed either by the secretary or by a director."

34. With effect from 6 April 2012, Regulation 67B of the PAYE Regulations introduced a requirement for Real Time Information employers, before making a "relevant payment" to an employee, to deliver to HMRC the information specified in Schedule A1 thereof.

35. The obligations in these provisions relate to "relevant payments". Regulation 4 provides that any reference to relevant payments means payments of, or on account of, "net PAYE income" (except certain specified payments). By virtue of Regulation 2, "net PAYE income" has the meaning given in Regulation 3, namely PAYE income less any allowable pension contributions and allowable donations to charity. PAYE income has the meaning given in s683 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), which provides that PAYE income consists of PAYE employment income, PAYE pension income and PAYE social security income. PAYE employment income means income which consists of any taxable

earnings from an employment in the year and any taxable specific income from an employment for the year.

Deductible expenses and mileage claims

36. ITEPA 2003 provides for "earnings-only exemptions" and "employment income exemptions", preventing liability to tax arising in respect of certain specified payments.

37. One such exemption is for approved mileage allowance payments ("AMAPs"). The relevant provisions are:

> "229 Mileage allowance payments
>
> (1) No liability to income tax arises in respect of approved mileage allowance payments for a vehicle to which this Chapter applies (see section 235).
>
> (2) Mileage allowance payments are amounts, other than passenger payments (see section 233), paid to an employee for expenses related to the employee's use of such a vehicle for business travel (see section 236(1)).
>
> (3) Mileage allowance payments are approved if, or to the extent that, for a tax year, the total amount of all such payments made to the employee for the kind of vehicle in question does not exceed the approved amount for such payments applicable to that kind of vehicle (see section 230).
>
> (4) Subsection (1) does not apply if –
>
> (a) the employee is a passenger in the vehicle, or
>
> (b) the vehicle is a company vehicle (see section 236(2)).
>
> 230 The approved amount for mileage allowance payments
>
> (1) The approved amount for mileage allowance payments that is applicable to a kind of vehicle is –
>
> M × R
>
> Where –
>
> M is the number of miles of business travel by the employee (other than as a passenger) using that kind of vehicle in the tax year in question;
>
> R is the rate applicable to that kind of vehicle.
>
> (2) The rates applicable are as follows –

Kind of vehicle	Rate per mile
Car or van	45p for the first 10,000 miles
	25p after that
Motor cycle	24p
Cycle	20p

> (3) The reference in subsection (2) to "the first 10,000 miles" is to the total number of miles of business travel in relation to the employment, or any associated employment, by car or van in the tax year in question.
>
> ...
>
> 231 Mileage allowance relief
>
> (1) An employee is entitled to mileage allowance relief for a tax year –
>
> (a) if the employee uses a vehicle to which this Chapter applies for business travel, and

(b) the total amount of all mileage allowance payments, if any, made to the employee for the kind of vehicle in question for the tax year is less than the approved amount for such payments applicable to that kind of vehicle.

(2) The amount of mileage allowance relief to which an employee is entitled for a tax year is the difference between –

(a) the total amount of all mileage allowance payments, if any, made to the employee for the kind of vehicle in question, and

(b) the approved amount for such payments applicable to that kind of vehicle.

(3) Subsection (1) does not apply if –

(a) the employee is a passenger in the vehicle, or

(b) the vehicle is a company vehicle.

…

233 Passenger payments

(1) No liability to income tax arises in respect of approved passenger payments made to an employee for the use of a car or van (whether or not it is a company vehicle) if –

(a) the employee receives mileage allowance payments for the use of the car or van, and

(b) the cash equivalent of the benefit of the car or van is treated as earnings from the employment by virtue of section 120 or 154 (cars and vans as benefits).

This is subject to subsection (2).

(2) The condition in subsection (1)(b) needs to be met only if the car or van is made available to the employee by reason of the employment.

(3) Passenger payments are amounts paid to an employee because, while using a car or van for business travel, the employee carries in it one or more passengers who are also employees for whom the travel is business travel.

(4) Passenger payments are approved if, or to the extent that, for a tax year, the total amount of all such payments made to the employee does not exceed the approved amount for such payments (see section 234).

(5) Section 117 (when cars and vans are made available by reason of employment) applies for the purposes of subsection (2).

234 The approved amount for passenger payments

(1) The approved amount for passenger payments is –

$M \times R$

Where –

M is the number of miles of business travel by the employee by car or van –

(a) for which the employee carries in the tax year in question one or more passengers who are also employees for whom the travel is business travel, and

(b) in respect of which passenger payments are made;

R is a rate of 5p per mile.

…

235 Vehicles to which this Chapter applies

(1) This Chapter applies to cars, vans, motor cycles and cycles.

(2) "Car" means a mechanically propelled road vehicle which is not –

(a) a goods vehicle,

(b) a motor cycle, or

(c) a vehicle of a type not commonly used as a private vehicle and unsuitable to be so used.

(3) "Van" means a mechanically propelled road vehicle which –

(a) is a goods vehicle, and

(b) has a design weight not exceeding 3,500 kilograms,

and which is not a motor cycle.

(4) "Motor cycle" has the meaning given by section 185(1) of the Road Traffic Act 1988 (c. 52).

(5) "Cycle" has the meaning given by section 192(1) of that Act.

(6) In this section –

"design weight" means the weight which a vehicle is designed or adapted not to exceed when in normal use and travelling on a road laden;

"goods vehicle" means a vehicle of a construction primarily suited for the conveyance of goods or burden of any description.

236 Interpretation of this Chapter

(1) In this Chapter –

"business travel" means travelling the expenses of which, if incurred and paid by the employee in question, would (if this Chapter did not apply) be deductible under sections 337 to 342;

"mileage allowance payments" has the meaning given by section 229(2);

"passenger payments" has the meaning given by section 233(3).

(2) For the purposes of this Chapter a vehicle is a "company vehicle" in a tax year if in that year –

(a) the vehicle is made available to the employee by reason of the employment and is not available for the employee's private use, or

(b) the cash equivalent of the benefit of the vehicle is to be treated as the employee's earnings for the tax year by virtue of –

(i) section 120 (benefit of car treated as earnings),

(ii) section 154 (benefit of van treated as earnings), or

(iii) section 203 (residual liability to charge: benefit treated as earnings), or

(c) in the case of a car or van, the cash equivalent of the benefit of the car or van would be required to be so treated if sections 167 and 168 (exceptions for pooled cars and vans) [and section 248A (emergency vehicles)]1 did not apply, or

(d) in the case of a cycle, the cash equivalent of the benefit of the cycle would be required to be treated as the employee's earnings for the tax year under Chapter 10 of Part 3 (taxable benefits: residual liability to charge) if section 244(1) (exception for cycles made available) did not apply.

> (3) Sections 117 and 118 (when cars and vans are made available by reason of employment and are made available for private use) apply for the purposes of subsection (2)."

38. ITEPA 2003 then provides for deductions to be allowed from earnings. Section 333(1) provides that a deduction from a person's earnings for an amount is allowed if the amount is paid to the person. Section 336 then provides:

> "336 Deductions for expenses: the general rule
>
> (1) The general rule is that a deduction from earnings is allowed for an amount if –
>
> (a) the employee is obliged to incur and pay it as holder of the employment, and
>
> (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.
>
> (2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.
>
> (3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses)."

ISSUES

39. The parties did not agree as to the burden of proof or the issues to be determined by this Tribunal.

40. The PLNs were issued under paragraph 19 Schedule 24 and this involves consideration of:

(1) whether there were any inaccuracies in the Returns that amounted to, or led to, an understatement of liability to tax;

(2) whether such inaccuracies were deliberate and, if so, whether they were also concealed – paragraph 19(1) requires the penalty to be payable for a deliberate inaccuracy, whereas the question of concealment is relevant to quantum;

(3) whether the penalty has been correctly calculated; and

(4) whether any amount of any penalty is attributable to Ms Suttle and/or Mr Jaekel.

41. HMRC had also pleaded that what they allege was the deliberate and concealed behaviour of EE139 was dishonest, and specified this as an issue to be determined. Mr Ripley and Mr Firth both denied dishonesty on behalf of the Appellants, but also took the position that this was not an issue to be determined in any event. We address this in the Discussion.

42. Whilst the issues as set out at [40] above are based on the requirements of paragraph 19, HMRC and the Appellants did not agree as to where the burden of proof lies (all acknowledging that the standard of proof throughout is the balance of probabilities) or the extent to which (if at all) issues (1) and (2) are open to be determined by this Tribunal. These matters are addressed at [46] to [97] below.

43. Ms Suttle's and Mr Jaekel's grounds of appeal are different; but they nevertheless both challenge HMRC's position in relation to inaccuracies in the Returns, whether any inaccuracies were deliberate and concealed, the calculation of the penalty including the credit given for the co-operation provided by EE139 and how much, if any, of the penalty is attributable to each of them:

(1) Ms Suttle's grounds of appeal were:

(a) any underpayment of tax was not the result of a deliberate inaccuracy and EE139 endeavoured to comply with its known obligations. As none of the alleged errors led to a deliberate inaccuracy by EE139, no penalty can be attributed to Ms Suttle;

(b) alternatively, any deliberate inaccuracy is not attributable to Ms Suttle, and if it is, less than 50% should have been so attributed;

(c) the process by which HMRC reached their decision was flawed as it failed to give either EE139 or Ms Suttle time to respond to allegations or to set out other matters relevant to the decision to impose penalties;

(d) the penalties charged were too high as HMRC have over-estimated the tax and NICs payable by EE139. The sample used by HMRC was not representative of all expense claims made by EE139 workers in the period and HMRC misinterpreted the sample. This has led to penalties being calculated by reference to PLR which is too high;

(e) there was no concealment by EE139, and at all material times EE139 assisted HMRC in their investigations; and

(f) HMRC have failed to give EE139 adequate credit for their co-operation with the investigation.

(2) Mr Jaekel's grounds of appeal were:

(a) the PLN is defective due to lack of particularisation of which document or documents are said to contain the deliberate inaccuracies, which Mr Jaekel says that it is incumbent upon HMRC to do;

(b) to the extent to which HMRC have identified documents with inaccuracies, which is denied, Mr Jaekel was unaware of any falsity in expense claims and played no role in facilitating such claims;

(c) HMRC have failed to identify how the inaccuracies are attributable to Mr Jaekel, other than his being a director of EE139, despite the burden of proof being on HMRC to do this;

(d) the failure of particularisation means that HMRC's case must fail and the PLN should be annulled;

(e) HMRC have failed to identify which of Mr Jaekel's actions, omissions, or deliberate failures to take action relate to the inaccuracy in general, the deliberate element of the inaccuracy, and the concealment of the inaccuracy;

(f) Mr Jaekel is unclear as to what intention or set purpose he is said to have had in respect of the deliberate and concealed inaccuracies or how he concealed these from HMRC at the time that the relevant documents were submitted to HMRC;

(g) specifically, Mr Jaekel was (a) not involved with the verification of submitted expenses; (b) he was not involved with the preparation or submission of expenses documents to HMRC, (c) his involvement and responsibilities within EE139 were confined to business development, sales and recruitment, meaning that he had no involvement in the day-to-day running of the business or management of the office, (d) he understood that the accounting systems which were put in place were legitimate, and EE139 used a qualified accountant to oversee the work, and (e) to the extent that he had knowledge of matters relating to the submission of expense

claims, he relied at all times on professional advice, and HMRC have failed to set out how he failed to take reasonable care to check the information provided; and

(h) the calculation of the penalty is flawed – (i) contrary to HMRC's assertion that EE139 did not actively work with them, EE139 did co-operate with HMRC, (ii) some liability has been accepted by EE139, again contrary to what is stated by HMRC, (iii) the methodology used to analyse the RTIs is not robust and requires explanation, (iv) the claim that the records submitted to HMRC were intended to mislead is not understood and (v) in the circumstances, the level of penalty is unduly harsh.

44. Paragraph 15 of Schedule 24 sets out the powers of the Tribunal in a matter where, as here, the Appellants have appealed against both whether a penalty is payable and the amount of the penalty. We have an appellate jurisdiction in this regard, save in respect of considering whether there are special circumstances. We make this point as Ms Suttle and Mr Jaekel have both criticised the investigation undertaken by Officer McConnell in different respects. We do consider the process of that investigation so far as we consider it is relevant to making findings of fact and the calculation (and mitigation) of the penalty; but we do not address the reasonableness of the decision-making process.

45. We had the benefit of skeleton arguments from all parties ahead of the hearing, oral submissions during the hearing, written closing submissions from all parties and, following a request by the Tribunal, further written submissions from all parties in July 2023. We found all of these submissions to be very helpful (and record our thanks to all counsel instructed in these appeals) and have taken them all into account in reaching our decision, but have not found it necessary to refer to all matters raised in those submissions.

ABUSE OF PROCESS

46. The administrators of EE139 did not appeal against the Assessments to the Tribunal. The administrators did appeal against the penalty, on 23 February 2017, but that appeal was later withdrawn.

47. HMRC submitted that for the Appellants to re-litigate EE139's liability in these appeals is an abuse of the Tribunal's process which should not be permitted. It was HMRC's position that this applied to the amount of the Assessments and the penalty which had been issued to EE139. This therefore included the fact of the inaccuracies in the Returns and also that the behaviour was deliberate and concealed (as that was the basis on which the penalty had been issued to EE139). HMRC drew attention to the following:

(1) the PLNs were issued to the Appellants before the decision not to appeal was taken by the administrators of EE139;

(2) the Appellants (and their advisers) were involved in representations made to HMRC on behalf of EE139 ahead of HMRC's statutory review (eg Schofield Sweeney, acting for the Appellants, wrote to HMRC on 28 April 2017); and

(3) the decision not to pursue the appeal against the penalty issued to EE139 had been taken by the administrators after they had conducted their own review (having possession of all the books and records of the company) and such review had concluded that an appeal would be unlikely to be successful, albeit that the review had concluded that 75% of expenses paid should be treated as taxable earnings (rather than 90%).

48. The Appellants disagreed, submitting that there was no abuse of process:

(1) Mr Ripley submitted that the present appeal does not amount to "re-litigating" any liability – there has never been any litigation of the Regulation 80 determinations or

Section 8 decisions, as EE139 had not appealed those matters; they are now final as regards EE139, and this appeal will have no bearing on that. Furthermore, the decision not to appeal was taken by the administrators of EE139, not the Appellants. That the administrators of EE139 were in contact with the Appellants and gave them the opportunity to make representations makes no difference in this regard.

(2) Mr Firth submitted that there was no conceivable abuse where an individual on whom a penalty is imposed had no control over the decision by the company not to proceed with an appeal. The ability to make representations to the administrators in the context of the administrators' review of the Assessments, where there was no prescribed procedure and little transparency as to their reasoning, is very different from the right to make an appeal to an independent tribunal.

49. All parties agreed that Article 6 of the European Convention on Human Rights ("ECHR") applies to these proceedings as the PLNs amount to criminal penalties for these purposes and that the doctrine of abuse of process applies to proceedings before the Tribunal.

50. Article 6 ECHR provides as follows:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

51. The doctrine of abuse of process has been considered extensively in the authorities, and we gratefully adopt the exposition by Judge Berner in *Hackett v HMRC* [2016] UKFTT 781 (TC):

> "33. The principle of abuse of process is based on the underlying public interest that there should be finality in litigation, and efficiency and economy in the conduct of litigation. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse of process if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at

all. That principle was explained by Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, at p 31, where he went on to say:

"It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.""

52. The authorities to which we were taken by the parties included *Hackett* and *Galvin v HMRC* [2016] UKFTT 577 (TC).

53. In *Galvin*, HMRC had issued assessments to Reddrock Ltd ("Reddrock"), a company of which Mr Galvin was the sole director. Reddrock had appealed to the Tribunal, but the Tribunal had dismissed the appeal, and the Tribunal's findings included that Mr Galvin was an unsatisfactory and unreliable witness. HMRC then issued a penalty to Reddrock and also apportioned the penalty to Mr Galvin (under s61 Value Added Tax Act 1994) as its director. Mr Galvin and Reddrock appealed. Both appeals were struck out for failure to comply with Tribunal directions. Reddrock went into liquidation, and Mr Galvin applied for his appeal to be reinstated.

54. The Tribunal refused to reinstate the appeal. The Tribunal followed the approach in *Denton v TH White Ltd* [2014] EWCA Civ 1537 in refusing the application, considering the seriousness and significance of Mr Galvin's failure to comply with directions, the reason for the default and all the circumstances of the case. The Judge recognised that the imposition of penalties were criminal proceedings for the purposes of Article 6 ECHR. The Tribunal had made findings of fraud or dishonesty in Reddrock's appeal. The Judge concluded that it did not make any difference that it was Reddrock (and not Mr Galvin) that was party to the original appeal – he was the sole director and entered into each of the transactions in question. Any fraud perpetrated by Reddrock could only have been undertaken by and through Mr Galvin.

55. In *Hackett*, Mr Hackett was the sole director of Intekx Ltd ("Intekx"). HMRC had denied repayment of input VAT of £12 million in various decisions, some on the basis of MTIC fraud, others on the basis of failure to provide accounting records to substantiate the input tax claimed, and Intekx appealed against those decisions to the Tribunal. Some of the MTIC appeals were heard by the Tribunal and were dismissed. The appeal against the remaining MTIC decisions was withdrawn by Intekx, as was its appeal against denials on the basis of failure to provide

accounting records. HMRC issued a deliberate inaccuracy penalty assessment to Intekx and a PLN to Mr Hackett. Mr Hackett appealed the PLN.

56. HMRC had applied for the appeal against the PLN to be struck out, on the basis that Mr Hackett was seeking to re-litigate issues which they said were determined by the decision of the Tribunal in Intekx's first appeal and its withdrawal of the other two appeals, and that to permit him to do so would be an abuse of process.

57. The Tribunal refused:

> (1) At [33] (cited above) Judge Berner recorded that the principle of abuse of process is based on the underlying public interest that there should be finality in litigation, and efficiency and economy in the conduct of litigation. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse of process if the court is satisfied that the claim or defence should have been raised in earlier proceedings if it was to be raised at all.
>
> (2) What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in all the circumstances a party's conduct is an abuse.
>
> (3) The appeal before the Tribunal was by a different party to that which had been the appellant in the MTIC proceedings. That did not prevent the principle of abuse from applying. Mr Hackett had a sufficient degree of identification with Intekx to enable the principle to be applied – he was the sole director, made decisions and gave instructions on its behalf.
>
> (4) As regards the VAT period where the MTIC appeal was the subject of a final determination by the Tribunal, which had involved a hearing of the substantive appeal and the evidence of Mr Hackett, it would be an abuse of process for Mr Hackett to seek to re-litigate the relevant issues determined by the Tribunal in that appeal. Mr Hackett, as director of Intekx, had had an opportunity to put forward his case; it would be contrary to the principle of finality of litigation to allow that determination to be re-visited in Mr Hackett's appeal, a clear abuse of process and there were no circumstances that could justify such a course.
>
> (5) The circumstances for the other periods were different. There had not been any determination by the Tribunal; there had been a withdrawal of those appeals. Those withdrawals were stated at least in part to be due to the difficult financial position of the company as a result of the denial of repayment of input VAT; this was not decisive, but nor was it irrelevant. Other relevant factors were that the present appeal was made by Mr Hackett and not by Intekx and that, at the time when the earlier appeals were withdrawn, Mr Hackett was unaware that he might be exposed to a PLN in respect of a penalty assessment not then made upon Intekx.
>
> (6) For the appeals which had been withdrawn it would not be an abuse of the processes of the Tribunal for the facts and issues to fall to be determined by the Tribunal on this appeal by Mr Hackett. Judge Berner went further – to fix Mr Hackett with deemed findings in respect of those appeals, where he is appealing against a PLN which has arisen only after those appeals were withdrawn, would be contrary to the interests of justice.

58. Whilst the circumstances which have previously been considered by other compositions of this Tribunal are very fact-specific, we adopt the approach taken by Judge Berner in *Hackett* – where he had regard, in relation to the company's appeal, to whether there was a hearing of the substantive appeal, offering the director the ability to give evidence, and still recognised that other circumstances may be relevant to justify the director having the right to pursue an

appeal of those same issues, contrasting this with a situation where there had been no determination by the Tribunal – and consider the facts and circumstances before us in these appeals.

59. The facts and circumstances in these appeals include:

(1) There has not been a substantive hearing by any Tribunal of an appeal by EE139 against either the Assessments or the penalty.

(2) The PLNs were issued to the Appellants in January 2017, very shortly after the penalty was issued to EE139. The existence of the PLNs was known at all times when decisions were taken by EE139 in relation to the Assessments and penalty which had been issued to EE139.

(3) The administrators of EE139 had considered and sought advice as to whether EE139 should pursue the appeals which had been made. The administrators had all the books and records of the company, engaged with HMRC and this process had included various opportunities for the Appellants to make representations:

(a) Tom Roseff of Armstrong Watson called Officer McConnell on 23 February 2017 saying he had been appointed to follow up on the appeal and penalties. He was in touch with Nigel Brook of Schofield Sweeney and they were meeting with Chartergates the following week.

(b) In further correspondence (relating to whether the administrators were accepting the offer of a review on 23 February 2017, as they had until 9 March 2017 to do so), Mr Roseff said they were not triggering it that day but would do so separately and later. Mr Roseff said he hoped that this would allow Armstrong Watson to collate any additional representations that the company wished to be considered in the context of the review.

(c) On 7 April 2017 Mr Roseff asked that HMRC conduct a review (in relation to EE139). He had no further information or representations to bring to HMRC's attention at that stage, but had asked Schofield Sweeney to liaise with its clients (ie the Appellants) and let him know if there was anything that should be provided. Representations were then provided on 13 April 2017.

(d) On 6 September 2017 Mr Roseff told Officer McConnell that the administrators had carried out an in-depth review of the records, and that although their review had identified a lesser figure (75%) than that assessed they decided that as any adjusted figure would still be substantial there would be no point in continuing with EE139's appeal.

(e) The advice received, and the review which had been conducted in order to reach a conclusion, was set out in a letter from Armstrong Watson to the administrators dated 2 October 2017. Armstrong Watson advised that no appeal to the Tribunal should be made against HMRC's decisions, and included:

(i) They had selected a sample of EE139's expense records and undertaken a review. That review was conducted in a week by a qualified and experienced accountant, and the findings were reviewed by an experienced and qualified tax specialist.

(ii) That review concluded that 75% of the expenses considered could not be substantiated such that they would expect HMRC to treat those as taxable remuneration. They identified matters such as a significant proportion of mileage claims appeared to overstate the distance travelled, supporting

receipts were not provided, and the proportion of expenses reimbursed as a percentage of total earnings was significantly in excess of their expectations.

(iii) They estimated the costs of an appeal as being in excess of £100,000 plus VAT, and considered it unlikely that an appeal would be successful.

(iv) They reviewed the expense and payroll records for a randomly generated 21 employees (out of 185 employed by EE139 at the date of administration) for three randomly selected months. Upon completion of the initial phase of the review they had increased the sample size to 35, this being 18.9% of the workforce.

(4) The relevant decisions as to whether to make or pursue an appeal were taken by the administrators of EE139 and not by the Appellants as directors of EE139.

(5) The administrators are officers of the court and Ms Goldring referred to them as having various duties to act in good faith, be impartial and act in the best interests of creditors as a whole. We did not have the benefit of detailed submissions as to the duties of insolvency practitioners.

(6) The scope of the review which was conducted by Armstrong Watson was described in the letter dated 2 October 2017. The description of the review does refer (when summarising the conclusions and the scope of the review) to both the Assessments and the penalty, and it is clear that Armstrong Watson were advising not to appeal against either. However, we infer from that letter and all of its attachments that the focus of the exercise conducted was on the Assessments – they looked at the expenses claimed, the records available to evidence those expenses and the controls/systems of EE139. There is no reference therein to the fact that the penalty was issued on the basis of deliberate (and concealed) behaviour, or any conclusions expressed in relation thereto.

60. Taking account of all of the relevant facts and circumstances, we have concluded that it is not an abuse of process for all of the facts and issues relevant to the validity and amount of the PLNs to be determined by us. Whilst HMRC's submissions as to abuse of process were framed in terms of EE139's liability being re-litigated, there has been no substantive hearing of any of these matters before an independent tribunal (in respect of the liability of EE139 or the Appellants), and the fact that the administrators of EE139 conducted a review before deciding how to proceed in respect of EE139's liability to HMRC is not a basis for concluding that the Appellants should be denied such a hearing. Whilst we recognise that the review involved a sample of 35 employees and reached a conclusion that there were significant inaccuracies, that review was conducted without hearing detailed evidence from the Appellants on which they could be cross-examined. In short, we have concluded that the review by the administrators cannot serve as an adequate substitute for a hearing by an independent tribunal.

61. Furthermore, we consider that the administrators were primarily concerned with HMRC's decisions on whether there were inaccuracies in the Returns and the Assessments which had been issued, whereas before us HMRC sought to contend not only that the inaccuracies should not be "re-litigated" but also that HMRC's conclusion that the behaviour was deliberate and concealed (this being the basis on which the penalties were issued to EE139) should be final. The administrators had not expressed any conclusions on whether the behaviour was deliberate; and this reinforces our conclusion that it is not an abuse of process for this issue to be argued before us and determined by us.

62. We have concluded that the Appellants can challenge whether there were inaccuracies in the Returns that amounted to, or led to, an understatement of liability to tax and whether such inaccuracies were deliberate (or deliberate and concealed).

BURDEN OF PROOF

63. HMRC had served a Statement of Case in respect of the appeal by each Appellant – initially on 11 May 2018 and then an amended version (again, for each Appellant) on 17 February 2021 (these amended Statements of Case being, together, the "SoCs"). In those SoCs, HMRC had accepted that they bear the burden of proof in respect of all of the issues in these appeals. HMRC's position was set out as being (at [44] and [50] for Ms Suttle and Mr Jaekel respectively):

> "[ ] In relation to the penalty and personal liability notice, the Respondents bear the burden of proving that:
>
> (1) EE139's P35 returns and P14 forms and RTI returns were inaccurate and that such inaccuracies amounted to, or led to, an understatement of liability to tax;
>
> (2) That such inaccuracies were deliberate and concealed;
>
> (3) That the deliberate and concealed inaccuracies were attributable to the Appellant as an officer of the company; and
>
> (4) That the penalty amounts as attributable to the Appellant are correct."

64. HMRC's Skeleton for these appeals was served on 21 November 2022, and was a combined skeleton dealing with both appeals. That document repeated the above at [10] (with some additional details and an additional pleading (if considered relevant) of dishonesty), and reiterated this burden at [12] thereof. HMRC's Skeleton then set out HMRC's position on abuse of process and then stated:

> "28. If the Respondents are wrong about this, and Ms Suttle and Mr Jaekel are permitted to litigate the underlying Regulation 80 determinations, and Section 8 decisions, the burden rests, in the ordinary way, on them to show that they were wrongly imposed. That is irrespective of the fact that they form part of the penalty appeal (see *The Commissioners for His Majesty's Revenue and Customs -v- Zaman* [2022] UKUT 252 (TCC) at [34] – [35]."

65. There was nothing further in HMRC's Skeleton on this point.

66. The Appellants served their (separate) skeleton arguments on 28 November 2022. Mr Ripley and Mr Firth both submitted that, having accepted the burden of proof throughout the course of this appeal, it was now far too late for HMRC to seek to resile from this by reference to this decision in *HMRC v Zaman* [2022] UKUT 252 (TCC). Their submissions included that the Appellants had prepared for the hearing on the basis that HMRC would discharge the evidential burden that it had accepted, HMRC were using the size of the adjustments made in Assessments as support for treating the inaccuracies as deliberate, which is an issue in relation to which HMRC still accept that they bear the burden, and, in contrast to the position stated by HMRC at [28] in HMRC's Skeleton, the Appellants are not seeking to litigate the underlying Assessments issued to EE139, they are appealing the issue and the amount of the PLN.

67. We heard oral submissions from all parties on the question of the burden of proof, the potential significance of the decision in *Zaman* and the timing of this issue being raised by HMRC at the beginning of the hearing. All parties addressed this again in their closing submissions (written and oral). None of the parties made any application (either formally described as such or otherwise) for the hearing to be adjourned for further submissions or further evidence. We have taken account of all of the submissions made, but the approach taken by counsel may be summarised as follows:

(1) Ms Goldring submitted that *Zaman* also concerned a challenge to a PLN, and the matter determined by the Upper Tribunal was thus the same as that before us. Even if

there is a question as to the timing of HMRC's reliance on this case, *Zaman* is a decision of the Upper Tribunal, released on 16 September 2022, and not only are HMRC entitled to rely on it, but this Tribunal is bound to follow it. Explaining HMRC's position as to the burden of proof in written closing, Ms Goldring set it out as follows:

> (a) HMRC have accepted in the SoCs that they bear the burden of proof that "EE139's P35 returns and P14 forms and RTI returns were inaccurate and that such inaccuracies amounted to, or led to, an understatement of liability to tax". That does no more than reflect who bears the burden of showing that Ms Suttle and Mr Jaekel are liable to a penalty because there is an inaccuracy in a relevant paragraph 1 document.
>
> (b) HMRC have identified that there is an overclaim of expenses (indeed, even the administrator accepted as much).
>
> (c) Having done so, Ms Suttle and Mr Jaekel have not sought to discharge the evidential burden that shifts to them. In essence they are in the same territory as *Zaman*. All HMRC have accepted is that they bear what is sometimes referred to as "the ultimate burden" or "persuasive burden". That is not the same thing.

(2) Mr Ripley emphasised that this Tribunal is not required to abandon principles of procedural fairness when faced with new authorities. Ms Suttle had prepared for the hearing on the basis that HMRC would discharge the evidential burden which it had accepted, and HMRC should be estopped from changing its position.

(3) Mr Firth submitted that it was too late for HMRC to change its position. He also submitted that *Zaman* could be distinguished, drawing attention to the fact that the appellant in that case had not been represented and that his grounds of appeal had been that the assessment (issued to the company) was wrong. Mr Firth acknowledged that it may be thought to be unsatisfactory to distinguish on such grounds, as the application of the decision in *Zaman* would then depend on how an appellant had framed its case.

68. The SoCs and HMRC's Skeleton do refer to HMRC having reduced the penalty in accordance with paragraph 9 of Schedule 24 to reflect HMRC's view of the quality of the disclosure. The level of this reduction was not listed as one of the issues to be determined in the context of HMRC's position on the burden of proof. It is clear from the grounds of appeal of both Appellants that they take the position that a greater reduction should have been applied, and their submissions recognised that the Appellants bear the burden of proof on this matter. That the Appellants bear this burden was not in dispute between the parties, and is unaffected by the discussion which follows.

69. HMRC had not made an application to amend their SoCs, but when assessing whether HMRC has changed its pleaded case and whether to permit such a change, we have approached the matter as if HMRC's Skeleton had included such an application, ie applied to rely on [28] of HMRC's Skeleton.

70. The Tribunal has power to allow the making of such an amendment by rule 5 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). Rule 5 provides:

> "5(1) Subject to the provisions of the 2007 Act [ie the Tribunals, Courts and Enforcement Act 2007] and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction –

(a) …

(c) permit or require a party to amend a document; …"

71. Under rule 2(3) of the Tribunal Rules the Tribunal must, when exercising any power under the rules, "seek to give effect to the overriding objective" to deal with cases "fairly and justly". Rule 2(2) provides that so dealing includes:

"(b) avoiding unnecessary formality and seeking flexibility in the proceedings,

(c) ensuring so far as practicable that the parties are able to participate fully in the proceedings".

72. Rule 25 provides that HMRC must deliver a statement of case which sets out the legislative provisions under which an appealed decision was made and their position in relation to the case.

73. The principles to be applied in considering an application to amend were summarised by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) as follows:

"36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.

37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

37. Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

74. These principles apply equally to an application by HMRC to amend its statement of case. The Upper Tribunal has considered this scenario more recently in *HMRC v Ritchie* [2019] UKUT 71 (TCC), where one of the grounds of appeal was whether the Tribunal had erred in its conclusion because of the way it dealt with the carelessness issue, and whether HMRC had pleaded that two advisers to the taxpayers were careless and acting on the taxpayers' behalf. The Upper Tribunal cited the relevant provisions of the Tribunal Rules and then continued:

"36. In *Tower MCashback LLP 1 and anor v HMRC* [2011] UKSC 19 the Supreme Court considered, inter alia, the question of whether HMRC could pursue arguments supporting a conclusion in a closure notice which had not been advanced in the notice itself. Lord Walker at [15] quoted with approval the words of Henderson J in the High Court:

"There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners [the predecessors of the FTT] in exercise of their statutory functions to have regard to that public interest. [The judge then considered changes in the tax system and continued] For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the commissioners [that is to say now the FTT] are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

37. These sources make clear that in determining what arguments the tribunal may permit to affect its decision the guiding principle must be fairness in the circumstances of the case. Fairness does not require formality, and Rule 2(2)(b) expressly requires formality to be avoided. Fairness does not require, for example, that to advance an argument not present in its statement of case

or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.

38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account.

39. When the argument gives rise to the possibility that it may be rebutted by further evidence, the other party must have a fair opportunity to bring that evidence to the tribunal. Depending on the circumstances that may mean no more than asking a few extra questions of a witness who is at the hearing in any event; or it may mean arranging for documents to be provided, or further evidence called, the next day; or seeking a longer adjournment. We do not wish to be thought to be laying down any particular rules, as what fairness requires will depend on all the circumstances of the case, and cases in the FTT vary enormously from informal appeals that take a very short time to elaborately argued cases that last for many days.

40. On the other hand, there will be circumstances where it is simply too late for a point to be raised. Where it is not reasonably possible in the circumstances of the case – having regard in particular to the resources of the parties and the need to avoid delay – for the other party to have a fair opportunity to rebut a new point, that is likely to mean that it would be unfair for a new point to be taken.

41. These requirements of fairness seem to us to arise however a new point emerges, that is whether the argument is one raised expressly or implicitly by: the appellant – for example by a non-represented appellant who has provided only a rudimentary notice of appeal; by HMRC – for example an argument which arises as a result of the questioning of a witness; or by the tribunal itself.

42. In the same way that a statement of case should set out HMRC's arguments clearly and unequivocally with sufficient detail, a new argument should only be taken into consideration if, among other things, it has been made clear to all parties what it is, and that it is being made.

43. In HMRC's case the FTT's Rules require the statement of case to set out their position in relation to the appeal, but flexibility, fairness and the tribunal's duty to seek that taxpayers pay "the correct amount of tax" require that they should not be so constrained by the arguments there set forth that no other argument may be raised. Whether or not that is permissible will depend upon whether the taxpayer can be given a fair opportunity to meet it. It would be contrary to the objectives of avoiding unnecessary formality and seeking flexibility if a greater hurdle for raising a new argument were placed in front of HMRC simply because it had set out its view at a particular time in the proceedings. That would risk Statements of Case becoming burdened by boilerplate and generalities rather than plainly indicating HMRC's real concerns."

75. These authorities thus set out the principles which we should consider when exercising our discretion, emphasising a range of factors including the prospects of success, fairness and prejudice, timing, and the public interest in taxpayers paying the right amount of tax. They also clearly envisage that there may well be circumstances where it is simply too late for a point

to be raised. From the context, we consider this must apply to arguments which may, on closer analysis, prove to be very good arguments.

76. We were mindful from the outset that the position being put by HMRC does not involve the making of a new argument about the expenses (eg that some of the employees were office staff working in EE139's offices, with a permanent workplace and not entitled to claim reimbursement for home-to-work travel), but about the burden of proof which forms the very basis for this Tribunal's fact-finding. We have some concern about approaching this issue as a question of whether to exercise judicial discretion such that we could be proceeding on a basis which is simply wrong in law. Against this, we recognise that in *Zaman* the appeal was remitted by the Upper Tribunal to the Tribunal to re-make the relevant findings of fact, self-evidently after the hearing, in circumstances where the extent to which the issue had been canvassed before or at the time of the first hearing was not clear. Nevertheless, we have considerable sympathy with the position as put on behalf of the Appellants that they had relied on HMRC having accepted the burden of proof and we should not be required to abandon principles of procedural fairness when dealing with new authorities.

77. To seek to address this concern, and crucially to decide how to proceed in these appeals, we have considered the underlying legal issue (ie the significance of *Zaman*, and what it means), which itself involves consideration of the authorities on which the Upper Tribunal relied, and the timing of HMRC's application in the light of all surrounding information about these appeals. We deal with the latter point first.

78. We have set out how this issue arose at [63] to [66] above. As to this:

(1) We consider that HMRC had clearly assumed the burden of proof in the SoCs as regards all matters which were set out as being in issue. There was no distinction drawn (either expressly or by implication) between the "ultimate" or "persuasive" burden versus an evidential burden.

(2) Mr Firth referred in his skeleton argument to another recent decision of the Upper Tribunal (by way of illustration), that of *Ellis v HMRC* [2022] UKUT 254 (TCC) (released on 21 September 2022). That was an appeal against case management directions in relation to disclosure, but in the course of setting out the background to the substantive appeals the Upper Tribunal set out the following:

> "10. The issues likely to be decided by the FTT on the VAT PLN appeals are, in summary:
>
> i) Were SLL, SLRL and SLRCL's VAT returns inaccurate and did such inaccuracies amount to, or lead to, a false or inflated claim to repayment of tax?
>
> ii) Were such inaccuracies deliberate and concealed?
>
> iii) Were the deliberate and concealed inaccuracies attributable to Mr Ellis as a director of the companies?
>
> iv) Were the penalty amounts as attributed to Mr Ellis correct?
>
> 11. The burden of proof will be on HMRC in the VAT PLN appeals to establish that there was an inaccuracy leading to a potential loss of revenue, that this was brought about by the deliberate and concealed action of the three companies, and that the deliberate action was attributable to Mr Ellis as a director of them."

(3) The approach set out in *Ellis* is how we would, but for *Zaman* (or the authorities referred to therein, considered further below) being drawn to our attention, have approached the issues in these appeals. HMRC continue to accept that they bear the

burden of proving "deliberate and concealed". This is used in paragraph 3 of Schedule 24 to describe the inaccuracy, such that our approach would have been to consider whether HMRC had established (on the balance of probabilities) that any inaccuracy on which they relied was deliberate and concealed, and this required them to establish both the inaccuracy and the conduct for each inaccuracy.

(4) There is, arguably, a leap within HMRC's pleadings from (unspecified and unquantified) inaccuracies to the penalty amounts being attributable to the Appellants (and this also occurred at [10] of *Ellis*). HMRC had accepted that they bear the burden of proving the Returns "were inaccurate", and that the inaccuracies amounted to or led to an understatement of liability to tax; that such inaccuracies were deliberate and concealed and that the "penalty amounts as attributable to the Appellant" are correct. The SoCs do not expressly refer, as a separate limb, to the calculation of the PLR, or to each inaccuracy which is relied upon in support of the Assessments which themselves form the basis for the calculation of the PLR. We consider that the sub-paragraph referring to the penalty amounts is referring to the proportion to be attributed to each Appellant (ie the stage after calculation of the amount of the penalty). The point remains, as stated at [(3)] above, that we would not have focused on this in the absence of considering [28] of HMRC's Skeleton and its reference to *Zaman* and we are now looking at these pleadings with the benefit of hindsight and infer that the missing link (if indeed there is one) was not intentional. Furthermore, and significantly in this context, there was no reference in the SoCs to HMRC considering that the Appellants bore the burden of proof on any issue in these appeals.

(5) HMRC first indicated that they sought to rely on *Zaman* in HMRC's Skeleton, on 21 November 2022. The Upper Tribunal had released its decision in that case on 16 September 2022. As party to that appeal, HMRC would have known of the decision shortly after its release. There was no explanation from HMRC as to the failure to draw attention to its reliance on this decision in the way proposed prior to the service of its skeleton.

(6) Our view is that HMRC could and should have informed the Appellants that they would be seeking to rely on the decision in *Zaman* and their interpretation of that decision before they served their skeleton argument; we would not expect them to have been in a position to do this immediately, but we would expect a delay of no more than two weeks for this purpose. We nevertheless recognise that such a notification by HMRC (whether framed as an application to amend the SoCs or otherwise), even at the beginning of October 2022, would still have prompted these same objections from the Appellants given the hearing was listed for December 2022.

79. We accept that the Appellants have prepared for this hearing on the basis that HMRC bore the burden of proof on all issues and that HMRC had accepted that they bore such burden. One area where (we accept) this has affected the approach taken by the Appellants is in relation to the calling of witnesses. As discussed further below (under Evidence), both Appellants gave evidence as witnesses, as did a former employee of EE139 (a member of the office staff rather than an umbrella employee). None of the parties called evidence from clients of EE139 or umbrella employees whose expense claims and pay were (indirectly) within the subject-matter of these appeals. HMRC criticised this approach of the Appellants, inviting the Tribunal to draw adverse inferences from the absence of such witnesses, whereas Mr Firth submitted it was open to HMRC to have called such witnesses if it wished to rely on their evidence. We consider that this choice of witnesses was a clear illustration of one way in which the Appellants have prepared for this hearing in reliance on HMRC needing to prove its case.

80. We now turn to the decision of the Upper Tribunal in *Zaman*.

81. *Zaman* also concerned an appeal against a PLN which had been issued to Mr Zaman following an assessment being issued to Zamco Limited ("Zamco") (of which Mr Zaman was the sole director) in respect of under-declared VAT. The assessment was issued on the basis that Zamco's supplies of alcohol took place in the UK and were therefore subject to VAT. The Upper Tribunal recorded the agreed issues before the Tribunal as having included whether Zamco's VAT returns in the relevant period contained inaccuracies, which itself turned on whether all Zamco's supplies were in the UK for the VAT purposes (at [6]). The Tribunal had concluded that it had not been proven that the goods were removed to the UK and so it was not proved that the place of supply was the UK – and given the burden of proof on HMRC this meant that they had to allow the appeal.

82. Permission to appeal was granted on two grounds, one of which was whether the Tribunal erred in its approach to the burden of proof because it held that the burden rested solely with HMRC. It is not clear from the Upper Tribunal's decision, or from the decision of the Tribunal (at *Zaman v HMRC* [2021] UKFTT 228 (TC)), how HMRC had presented its case on burden of proof to the Tribunal (either in its written pleadings or at the hearing).

83. The Upper Tribunal approached its decision as follows:

(1) At [20] the Upper Tribunal referred to the well-established law that on an appeal from an assessment to VAT the assessment stands good unless the appellant is able to produce evidence to show that it is wrong. They had referred to the judgments of the Upper Tribunal and Court of Appeal in *Award Drinks Ltd v HMRC* [2020] UKUT 0201 (TCC) and [2021] EWCA Civ 1235, the extracts cited themselves referring to *Brady v Group Lotus Car Companies plc* [1987] 3 All ER 1050, *Ingenious Games v HMRC* [2015] UKUT 0105 (TCC) and *Khan (trading as Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2006] EWCA Civ 89.

(2) HMRC had accepted that they bore the burden in relation to the validity of issuing the PLN, and that Mr Zaman could appeal the PLN on the basis that the underlying assessment and penalty were wrongly issued. However, where Mr Zaman asserted that there were no VATable supplies, at that point Mr Zaman assumed the evidential burden of displacing the assessment. The challenging of the VAT assessment in the context of an appeal against a PLN did not and could not affect the applicability in the PLN proceedings of the rules governing the way in which assessments to VAT are challenged.

(3) At [23] the Upper Tribunal set out HMRC's submission that the Tribunal erred in treating the appeal as a penalty appeal in which the legal and evidential burden of proof remained with HMRC throughout in relation to all issues. HMRC's position was that once Mr Zaman challenged the issuing of the PLN on the sole ground that the assessment to VAT on Zamco was wrong, "the FTT should have approached the appeal by considering firstly whether HMRC had established that the PLN was validly issued and, if that burden was discharged, by then considering whether Mr Zaman had established that the assessment to VAT on Zamco was wrong". In relation to that latter issue, the evidential burden was on Mr Zaman to establish that the assessment should be discharged in the same way as it would have been on Zamco to establish that it had been overcharged by the assessment if it had decided to bring an appeal against that assessment.

(4) At [34] the Upper Tribunal recorded their conclusion that HMRC were plainly right that, as per their submissions, if the challenge to the PLN was brought on the basis that the assessment to VAT on Zamco was wrong, the legal rules relating to the way in which the assessment could have been challenged by Zamco if it had appealed the assessment remain in play in any appeal against the PLN. It is well-established law that it is for the

taxpayer to prove, by evidence, that an assessment to VAT issued by HMRC is incorrect. HMRC do not have that evidential burden and that cannot sensibly be affected by the fact that the challenge to the assessment occurs in satellite litigation where, as in this case, a penalty charged on Mr Zaman is sought to be defended on the basis that the assessment to VAT on Zamco was wrong. In their judgment, it was clear that the Tribunal lost sight of the fact that after establishing whether the PLN was validly issued, the evidential burden in relation to the assessment to VAT on Zamco shifted to Mr Zaman when he sought to positively challenge the assessment as the sole basis on which the PLN was invalidly issued

84. This decision does not contain additional guidance on what needs to be shown in order to establish whether a PLN is validly issued. The Upper Tribunal does clearly reference at [23] that the "sole ground" of challenge to the PLN in that appeal was that the underlying assessment (which had been issued to Zamco) was wrong. The Upper Tribunal did not set out the legislation imposing the penalties or PLN, but does reference at [4] that the penalty had been imposed under paragraph 1 of Schedule 24, ie the same provision as that relied upon by HMRC for the penalty issued to EE139.

85. We also considered the authorities to which the Upper Tribunal had referred in *Zaman*, to assess the timing of HMRC's reliance upon that decision before us – those authorities would also be binding upon us, and the judgments were several years old – and to gain a fuller understanding of the relevant issues.

86. *Award Drinks* and *Brady* concerned appeals against assessments to tax (VAT and direct tax respectively) and accordingly do not address the consequences for the burden of proof in a penalty appeal of a challenge to the underlying assessments. We did not find them of particular assistance in the light of the issue before us.

87. *Khan* did include an appeal against penalties – Mr Khan had appealed against a decision to register him compulsorily for VAT, an assessment to VAT of £20,793 and a penalty of £12,759, which had been calculated by reference to the amount of the VAT assessed (with mitigation allowed). Penalties had been imposed under s60 Value Added Tax Act 1994 ("VAT Act 1994"), which provided:

> "(1) In any case where −
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct
>
> …
>
> (7) …the burden of proof as to the matters specified in subsection (1) (a) and (b) above shall lie upon the Commissioners."

88. There could thus be no dispute that Customs bore the burden of proving both that Mr Khan had acted or omitted to act for the purpose of evading VAT, and that his conduct involved dishonesty. Mr Young (representing Mr Khan) submitted before the Court of Appeal that the Tribunal had failed to appreciate that the burden of proof was on Customs to show that the VAT threshold had been exceeded and, for the purposes of the penalty calculation, that the best of judgment assessment (by reference to which the penalty was calculated) was correct.

89. Hart J had accepted that the burden lay on Customs to show that the VAT threshold had been exceeded, but regarded the point as academic in that appeal, referring to the fact that Mr Khan had chosen not to adduce evidence himself. Hart J said that in practice Customs both assumed and discharged the burden of showing Mr Khan had been trading above the VAT threshold.

90. Counsel for Customs conceded that the burden lay on them to show that Mr Khan had exceeded the VAT registration threshold and to establish the quantum of tax evaded, and agreed with Hart J that "in a case such as this, where the tribunal is also considering the quantum of the assessment to which the penalty is referable, the effect of that burden is likely to be academic".

91. Carnwath LJ, in a judgment with which Lloyd LJ and Buxton LJ agreed, stated at [68] that he found some difficulty with that analysis and was reluctant to allow the judgment to rest on concessions, whilst acknowledging that the issues may not have been fully argued. He referred to the well-established principle that on an appeal against a "best of judgment" assessment, the burden lies on the taxpayer to establish the correct amount of tax due. He added that this burden does not change merely because of allegations of fraud (citing *Brady*). Carnwath LJ stated the general principle at [70] that when a statute gives a right of appeal against enforcement action taken by a public authority, the burden of establishing the grounds of appeal lies on the person appealing. At [71] Carnwath LJ referred to the principle that the burden of establishing the grounds of appeal lies on the person appealing as also being well-established in other statutory contexts, particularly where the facts are peculiarly within the knowledge of the person appealing. At [73] he stated that the ordinary presumption is that it is for the appellant to prove his case, and that this is the correct starting-point for all categories of appeals in that case, including the appeal against the civil penalty, except where the statute has expressly or impliedly provided otherwise. Then, "as to the precise calculation of the amount of tax due, in my view, the burden rests on the appellant for all purposes", and continued:

> "[74] This view is reinforced by a number of considerations: (i) it is the appellant who knows, or ought to know, the true facts; (ii) s 60(7) makes express provision placing the burden on Customs in relation to specified matters. This suggests that the draftsman saw it as an exception to the ordinary rule, and seems inconsistent with an implied burden on Customs in respect of other matters; (iii) the distinction is also readily defensible as a matter of principle. Mr Young relied on 'the presumption of innocence' under art 6 of the Convention, but he was unable to refer us to any directly relevant authority. The presumption clearly justifies placing the burden of proof on Customs in respect of tax evasion and dishonesty; but once that burden has been satisfied, a different approach may properly be applied (compare *R v Benjafield* [2002] UKHL 2, *R v Rezvi* [2002] UKHL 1 (on appeal from *R v Benjafield, R v Leal, R v Rezvi, R v Milford*) [2003] 1 AC 1099, [2002] 1 All ER 815, in relation to confiscation orders in criminal proceedings); (iv) in relation to the calculation of tax due the subject-matter of the assessment and penalty appeals is identical. This link is given specific recognition by s 76(5) (allowing combination in one assessment). It would be surprising if the Act required different rules to be applied in each case; (v) s 73(9) provides that the assessed amount, subject to any appeal, is 'deemed to be an amount of VAT due …'. In a case where either there was no appeal against the assessment, or the penalty proceedings followed the conclusion of any such appeal, this provision would appear to preclude any attempt to reopen the assessment for the purpose of assessing the penalty. The subsection does not apply directly where, as here, the penalty appeal is combined with an appeal against the

assessment, and the assessment has not therefore become final, but it indicates another link between the two procedures. (I do not see the provision as necessarily confined to enforcement, as Mr Young argues. Nor in the present context do I need to spend time on his argument that this interpretation could cause unfairness in proceedings against a third party under s 61, although I note that under that provision there appears to be a general power to mitigate the penalty.); (vi) to reverse the burden of proof would make the penalty regime unworkable in many cases. In a case such as the present, a 'best of judgment' assessment is needed precisely because the potential taxpayer has failed to keep proper records, so that positive proof in the sense required in the ordinary civil courts is not possible. The assessment may be no more than an exercise in informed guesswork. Indeed to put the burden on Customs would tend to favour those who have kept no records at all, as against those who have kept records, which are merely inadequate, but may be enough to give rise to an inference on the balance of probabilities.

[75] We were referred in this connection to *Hindle (t/a DJ Baker Bar) v Customs and Excise Comrs* [2003] EWHC 1665 (Ch), [2004] STC 412, a decision of Neuberger J given shortly after the tribunal decision in this case. That case also concerned a small trader who had failed to make VAT returns, and was subject to compulsory registration, followed by a 'best of judgment' assessment and an assessment to a civil penalty, all of which were upheld on appeal to the tribunal. The appeal to the High Court failed on the facts (see [2004] STC 412 at [34]). However, Neuberger J had earlier made some observations on the statutory criteria. It had been argued on behalf of the trader that different approaches were required in considering, on the one hand whether the statutory threshold for registration was exceeded, and, on the other, whether the 'best of judgment' assessment should be upheld. The judge agreed (see [2004] STC 412 at [29]–[32]):

'[29] … As a matter of ordinary language, it seems clear to me that s 73(1) involves two issues where they are both being fought, as here. The first is to determine whether the person concerned has failed to make any returns required under this Act, which in this case involves the tribunal satisfying itself on the evidence before it whether or not the trader's turnover would or was reasonably expected to exceed £55,000. If so satisfied, the tribunal would then go on to consider the assessment by reference to determining whether the commissioners had indeed made the assessment to the best of their judgment.

[30] The point is reinforced when one considers a case where the commissioners have simply registered a trader for VAT and he appeals against that decision, without there being any assessments against which he has appealed. In those circumstances, Miss Shaw, I think realistically, concedes that the tribunal would make its own assessment, based on the evidence before it and the balance of probabilities, as to whether or not there has been a failure to make returns "as required under this Act", ie in a case such as this, whether, on the evidence before it, the tribunal considers that the trader's turnover exceeds or is reasonably likely to exceed £55,000. It would be very odd if the proper approach to determining whether or not there has been a failure to make returns required under this Act depended on whether or not there happened to be a challenged assessment at the same time.

[31] Miss Shaw makes the point that, in a case such as this, if the argument which I favour is correct, then there is a slightly odd double requirement of the tribunal: first, to decide on the evidence before it and the balance of probabilities whether, in this case, the turnover of the appellant exceeded or is likely to exceed £55,000; secondly, on a more familiar reviewing *Wednesbury*

type approach (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223), whether the Commissioners' assessment was to the best of their judgment.

[32] I think there is something in that point, but I do not find it particularly powerful. In each case the tribunal is being asked to look at different things. The first is whether the turnover exceeds, or is likely to exceed, a particular figure on the evidence before it. The second is whether, on the evidence before them, the actual figure for turnover which resulted in the VAT assessment of the commissioners was one arrived at to the best of their judgment. If slightly different questions involve slightly different approaches to the burden of proof or other matters, it is not that surprising. Certainly there is nothing so surprising in the result that it justifies what seems to be to be a re-wording of s 73(1), which is what the commissioners' argument involves.'

[76] I make two comments on that passage. First, it was concerned with a different issue from the present: that is, the basis of calculation for the appeal against compulsory registration. No argument appears to have been addressed to the question of calculation for the purposes of the penalty assessment. Secondly, I think the judge was presented with a false dichotomy. As has now, I hope, been made clear by this court in *Pegasus Birds*, a *'Wednesbury* type approach' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, [1947] 2 All ER 680) to a VAT assessment is the exception not the norm. In an ordinary case there is no reason for different approaches to the two forms of appeal. Whenever an appeal raises an issue of the correct calculation of turnover for the purposes of VAT, the primary task of the tribunal is, as we said in *Pegasus Birds*, 'to find the correct amount of tax, so far as possible on the material properly available to it', and, in the absence of any provision to the contrary, the burden of proof lies on the appellant. (In fairness to Miss Shaw, I note as already mentioned that she had summarised the position accurately in her skeleton argument before the tribunal in the present case, a few months before *Hindle*.)

The present case

[77] If this is the correct approach, I agree with the judge that the tribunal's decision is unimpeachable. There was ample material to support a prima facie case that there had been evasion of tax, and that this had been intentional and dishonest. In the absence of evidence from Mr Khan to the contrary, the tribunal was clearly entitled to reach its conclusion. As to the precise amount of tax evaded, I do not see how it was possible in the absence of better records for Customs to do more than they did. Whether or not this would have been sufficient if the burden of proof had truly been on them, on the view I take of the law it was enough to support the tribunal's conclusion. For these reasons I would dismiss this ground of appeal."

92. The Court of Appeal in *Khan* thus clearly concluded that, in an appeal against VAT penalties imposed under s60 VAT Act 1994, the burden was on the appellant as regards the calculation of the amount of tax due, and explained the considerations reinforcing this conclusion, albeit acknowledging that the concession by Customs meant the point had not been fully argued before them.

93. As a matter of principle, we would see no reason to differentiate between the position for VAT and for direct taxes. However, we recognise that there is a difference in the drafting of the penalty provisions at issue, namely between the approach in s60 in *Khan* (which refers to actions taken by a person in general terms) and that in Schedule 24 in *Zaman* and these appeals (which is based on whether there is a relevant inaccuracy in a document and the categorisation

of that inaccuracy). We refer to this further below. Nevertheless, whilst HMRC rely on *Zaman* for their submissions as to burden of proof, and could not have referred to *Zaman* in the SoCs, it was open to them to express the principle as set out at [28] of HMRC's Skeleton by reference to the decision of the Court of Appeal in *Khan*. That is not to say that HMRC's pleadings would have been agreed in this respect; rather that they could have made it clear that this was part of their case. Conversely, it is not the case that this amendment to HMRC's pleadings in these appeals has no real prospect of success – HMRC are relying on recent Upper Tribunal authority, addressing the imposition of a PLN, and such a decision is binding upon this Tribunal albeit that its ratio would need to be ascertained in light of the grounds of appeal in that case and its reliance on Court of Appeal authority based on a different statutory provision.

94. Considering how to proceed in the present appeals:

(1) The submissions from the parties on [28] of HMRC's Skeleton and *Zaman* were made as part of the hearing of the Appellants' appeals against the PLNs. We have heard all of the evidence. On the basis of the evidence put before us in these appeals, it cannot be said that the question of where the burden of proof lies is academic.

(2) We have already accepted (at [79]) that the Appellants have prepared for this hearing on the basis that HMRC bore the burden of proof on all issues and that HMRC had accepted that they bore such burden. Allowing (if this is a question of judicial discretion, our hesitation being based on this being a question of burden of proof) HMRC now to adopt a different position would cause significant prejudice to the Appellants. This is particularly significant where, as here, there is criticism of the lack of evidence from, eg, clients and umbrella employees – it was the Appellants' position that it was for HMRC to choose to call them as witnesses if it wished to rely on their evidence. This absence of evidence from third parties was not something that could be rectified by, eg, a short adjournment, even one of a couple of days at the beginning of the hearing.

(3) We recognise that refusing permission (if indeed permission is required) would prejudice HMRC – but consider this is to a lesser extent as HMRC had accepted it bore the burden in its SoCs, and has only changed its position subsequently.

(4) We considered whether HMRC's submissions as to burden of proof are qualitatively different from, eg, introducing a new line of argument on which it relied as to inaccuracies. We are, obviously, reluctant to proceed to make a decision on a basis which is, or may be, in error. However, this is the same issue as is faced when a party is refused permission to rely on a new ground of appeal (whether as appellant or respondent), and even more so if an appeal is struck-out (or the respondent is barred from proceedings) as a consequence of an exercise of judicial discretion following repeated failure to comply with directions (rather than based on there being no realistic prospect of success).

(5) As a subsidiary issue, we considered that there were practical difficulties with the approach being put forward by HMRC. Mr Firth had (separately from the parties' differing positions as to burden of proof) referred to the fact that not all of the Returns are in the bundles before us, and submitted that the burden of proof as regards deliberate inaccuracies (and HMRC continue to accept that they bear the burden as regards behaviour) means that HMRC must establish that each inaccuracy (which amounts to or leads to an understatement of tax) was deliberate. If HMRC do not have to establish the amount of the inaccuracy, just that there was some level of inaccuracy, how then does that sit with them being required to show that each inaccuracy which formed the basis of the calculation of the PLR and thus the PLN, was deliberate? We recognise that this Tribunal can and does draw inferences when making findings of fact; but accept that Mr

Firth raises a fair point as regards the evidence, in particular where HMRC's submissions and the evidence before us identified a range of potential inaccuracies, as well as some potential inaccuracies but on which HMRC does not rely (eg as to the treatment of holiday pay).

95. In the light of all of the facts and circumstances, we have decided it is not in accordance with the overriding objective to permit HMRC to introduce in HMRC's Skeleton a different approach to the burden of proof to that which had been maintained in the SoCs; and that [28] of HMRC's Skeleton is such a different approach (notwithstanding our identification of a potential "leap" within the pleadings) on the basis that HMRC had not previously referred to the Appellants as bearing the burden of proof on any issue.

96. We add the following, primarily in case this is relevant on any appeal:

(1) The hearing of the appeals took place on the basis that no decision had been made by us as to [28] of HMRC's Skeleton. Witnesses who had been called to give evidence were cross-examined on their evidence, with no party being restricted in the approach they took to such cross-examination.

(2) In the present appeals, whilst the grounds of appeal of both Appellants challenged the decisions reached by HMRC in relation to EE139, both also challenged the calculation of the penalty (and thus the PLNs) by reference to PLR which – they submit – is too high. Importantly, this contrasts with the position in *Zaman*, where the decision expressly referred to the limited grounds on which Mr Zaman had challenged the PLN.

(3) In *Zaman* the Upper Tribunal had not addressed the significance (or otherwise) of the differences in the legislation pursuant to which HMRC had imposed the penalty in *Khan* and that at issue in *Zaman*.

(4) In the present appeals:

(a) The penalty which had been issued to EE139 was imposed on the basis of what were said to be inaccuracies in numerous Returns (most of which were not before us).

(b) Schedule 24 provides for penalties to be issued in respect of inaccuracies in documents which are submitted to HMRC and makes clear that culpability is to be assessed by reference to the inaccuracies.

(c) All parties agreed that HMRC bear the burden of proving "deliberate and concealed".

(5) We do not accept that we are required by the authorities to apply different burdens of proof to whether a Return was inaccurate and whether an inaccuracy was deliberate (or deliberate and concealed) when the subject-matter of the appeals is that of penalties which have been issued to the Appellants.

97. In the light of all of the above, the approach we adopt in this decision is as follows (and we set this out here to make it completely clear in the event of an appeal):

(1) The Appellants are not appealing against the Assessments issued to EE139 (and indeed could not do so). (We make this point simply because [28] of HMRC's Skeleton refers to "If…Ms Suttle and Mr Jaekel are permitted to litigate the underlying Regulation 80 determinations, and Section 8 decisions…".) The Assessments are final.

(2) The appeals against the PLNs include (when read as a whole) the grounds of appeal that the PLR used for the purpose of calculating the penalty issued to EE139 and thus the

PLNs issued to the Appellants was incorrectly calculated by HMRC, and is not the amount of tax assessed in the Assessments.

(3) In the context of these appeals against the PLNs, HMRC bear the burden of proving that the PLNs were validly issued. Paragraph 19 provides that HMRC may issue a PLN to an officer of a company "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 approach taken by paragraph 19, namely that of attributing a penalty payable by a company under paragraph 1, means that an appeal under paragraph 19 necessarily involves establishing the validity of the penalty issued to EE139, and that includes the calculation thereof.

(4) The burden on HMRC requires them to establish, to the required standard (namely the balance of probabilities) that each of these components was met. In these appeals (and ignoring provisions relevant to carelessness) this requires HMRC to establish:

(a) EE139 provided relevant documents to HMRC (this being common ground between the parties), the relevant documents being the Returns.

(b) The Returns contain inaccuracies which amount to or lead to an understatement of a liability to tax.

(c) Each inaccuracy relied upon above was deliberate and concealed on EE139's part – this is the basis on which HMRC assessed the penalty, although if we find that each inaccuracy was deliberate but not concealed this goes to quantum (by virtue of paragraph 4(2)).

(d) The additional amount of tax due or payable as a result of correcting the inaccuracies in the Returns, ie the PLR, is £12,524,514, this being the amount used by HMRC when calculating the penalty at 85% of the PLR

(e) The deliberate inaccuracies were attributable to the Appellants, such that 50% of the amount of the penalty issued to EE139 is payable by each of them.

(5) HMRC have reduced the percentage penalty payable by EE139 to reflect their position on the quality of the disclosure in accordance with paragraphs 9 and 10. The Appellants bear the burden of establishing that a higher percentage than that which has been allowed should be applied, or that HMRC's decision not to exercise their discretion under paragraph 11 to reduce the penalty was flawed.

EVIDENCE

98. We had witness statements from Ms Suttle, Mr Jaekel, Alexandra Robson (a former employee of EE139), Officer McConnell (who had conducted the investigation into EE139, and issued the various decisions and penalties) and Officer Mark Carbery. Officer McConnell has retired from HMRC and did not attend the hearing to be cross-examined on his witness statements. Officer Carbery had adopted Officer McConnell's witness statement, and did give evidence. There were extensive exhibits and additional documents in the hearing bundles to which we were taken by the parties.

99. We heard evidence from Ms Suttle, Mr Jaekel, Ms Robson and Officer Carbery. The parties made submissions as to the reliability of that evidence, which we consider below. There are three additional evidential matters on which we heard submissions which are also addressed below, namely the admissibility of, or weight to be placed on, matters of opinion, whether adverse inferences should be drawn from the absence of witness evidence from others, namely end clients and former employees of EE139, and the weight to be placed on the witness statements of Officer McConnell.

Evidence from witnesses who gave evidence at the hearing

100. By way of overview of the evidence given by the Appellants:

(1) Ms Suttle had prepared very detailed witness statements, addressing the detailed points made by Officer McConnell in his witness statements and his conclusions in relation to expenses and earnings, both generally and in relation to the employees within the samples. Ms Suttle was based in EE139's offices throughout (other than when she was on maternity leave) and had initially processed expenses herself, and as the business expanded and they hired more office staff she remained the director physically present in the office and to whom questions could be addressed.

(2) Mr Jaekel's evidence was much less detailed, both in his witness statements and at the hearing. In part this is due to passage of time and the medical difficulties he has experienced, but in large part we accept that this is a consequence of his role in the business. Mr Jaekel's role largely involved travelling to clients and potential clients, marketing the services offered by EE139; whilst he and Ms Suttle were both directors of EE139 and discussed matters regularly, he was not routinely in EE139's office. He did not process expenses and payroll himself.

(3) If it is established that there were inaccuracies in EE139's Returns, it is readily apparent that the interests of Ms Suttle and Mr Jaekel are not aligned. Nevertheless, their evidence as to each other's roles within the business, knowledge of HMRC's investigation and discussions with each other was broadly consistent with each other.

101. Our conclusions as to the reliability of Ms Suttle's evidence were somewhat mixed. There were areas (eg the background to the establishment of EE139, its client base, their initial approach to processing of expenses claims) where we considered that her evidence was reliable; it was supported by some documentation and other witness evidence. Ms Suttle did acknowledge some areas where mistakes had been made and compliance was deficient, eg where holiday pay had been treated as non-taxable, and where further information was not requested or required in relation to some mileage claims. As noted above, her evidence as to Mr Jaekel's role was broadly consistent with his explanations, a factor which supports the reliability of her evidence (as well as that of Mr Jaekel, addressed separately below).

102. However, there were some matters where we were not satisfied as to the accuracy of her evidence, eg the steps taken by EE139 to verify vehicle ownership with end clients (referring to a questionnaire, which was not produced, nor any emails to clients in relation to this), changes which were made to the expense claim forms in the light of HMRC's investigation (where there were no examples of such forms, and the bundle showed that even in mid-2016 employees were still using the "old" form). In these areas the conclusion we reached was that Ms Suttle was describing what had happened over a period of time, which extended beyond the Relevant Period and was sometimes vague as to the timing of particular events. One difficulty which pervades the evidence of Ms Suttle relates to the various expense claim forms and payslips relied upon by HMRC – these were from several years ago (most of those to which we were taken were from 2014, although there were many from 2016 as well), Ms Suttle had not reviewed or processed them herself at the time, and was thus seeking to explain (sometimes by reference to screenshots from Merit) what would or could have happened, or if some claims would have been rejected, without clear documentary records to assist (eg an email informing the employee that a claim had been rejected). This means that we have approached with caution assertions as to what would have happened, as we were not satisfied that this would have been within Ms Suttle's own knowledge and she was in part putting to us her own conclusions based on the documents that were before us. This is far from saying that we reject her evidence; we do not, we generally found her to be a credible witness, doing her best to assist the Tribunal.

103. We have already referred to Mr Jaekel's evidence as being much less detailed. Mr Jaekel was not able to answer questions about specific employees, particular expense claims or payslips. That is understandable. Mr Jaekel also refused to speculate where he did not know the answer to questions put to him by Ms Goldring. Again, that is understandable. The difficulty we have is that we considered there were some key areas where we would have expected Mr Jaekel to be able to provide clear, specific evidence, in particular in relation to the actions taken by EE139 in response to concerns identified by Officer McConnell in the context of expenses claimed by employees working for a few key clients, but he did not do so. Mr Jaekel's own evidence was that he sought to develop relationships and understand these clients' business activities; he travelled to meet with them; he had contacts there (and these were often owner-managed businesses, with only a handful of their own staff) and he was well-placed to obtain information from them. However, having regard to all of the evidence before us we concluded that this is not a criticism of the reliability of his evidence, or its accuracy, rather it is a conclusion as to the fact that questions were not asked and actions were not taken by him at the time (which is potentially relevant to whether any inaccuracies were deliberate).

104. Ms Robson had joined EE139 in February 2007 as a part-time administrative assistant – she was 16 at the time, and worked about four hours per week. In around 2010 her hours increased to 26 hours per week, and whilst Ms Suttle was on maternity leave (in 2010-2011) Ms Robson was responsible for processing payroll and expenses. She became team leader by around 2012. Ms Robson's evidence mainly addressed the training given to office staff and the processing of expense claims. We accept that her evidence was given honestly, to the best of her recollection. There were some areas where her evidence was not consistent with that of Ms Suttle, in particular in relation to the status of expenses shown on the Merit software (as to whether the line items had been processed and accepted as valid claims). We address this in the context of making our findings of fact on expense claims and processes.

105. Officer Carbery has been employed by HMRC since May 1991, and has worked as a compliance investigator since February 2015. His witness statement states that prior to the PLNs being issued he had been aware of the case, being a member of the same team as Officer McConnell. However, he had not been involved in any aspect of the decision-making process. Once Officer McConnell retired, Officer Carbery acted as a liaison between Solicitor's Office and the Fraud Investigation Service, giving instructions when required, and assisted with enabling Officer McConnell to prepare his witness evidence, eg by facilitating his return to the office. He goes on to state that he had conducted a thorough review of Officer McConnell's witness statements and exhibits and was content to adopt them as his own, with one exception. The exception is that he had identified that one of the exhibits was not that which had been intended (and duplicated another exhibit) and provided the intended exhibit.

106. Officer Carbery's witness statement was thus short and clear. Giving evidence at the hearing, Officer Carbery expanded upon this as follows:

(1) He accepted that he did not know more than what was stated in the witness statements and exhibits of Officer McConnell.

(2) The Regulation 80 determinations for 2012-2013 and 2013-2014 are not in the bundle of exhibits. He had not previously identified this in his review.

(3) For those after April 2012, he confirmed that Officer McConnell had taken the expenses to be disallowed from the RTI returns submitted by EE139. They had been disallowed at 90% of the amount of the expenses. Officer Carbery had not reviewed the constituent parts of these amounts of expenses for the employees to trace through from the RTI returns to the underlying expenses. He was not able to comment on what Officer McConnell had done.

(4) As to how Officer McConnell had reached the conclusion that 90% was to be disallowed, Officer Carbery was only able to say that this was based on Officer McConnell's investigation into the expenses; he could not say how he had reached 90%, rather than a different percentage.

(5) As to whether any mileage claims were "excessive", Officer Carbery was not aware of any employee having been asked if they had claimed for more mileage than actually travelled.

107. We accept that Officer Carbery was an honest witness, seeking to assist the Tribunal. We also accept that, in preparing his own witness statement and to be in a position to adopt the witness statements of Officer McConnell, he had conducted a thorough review of those witness statements and exhibits. Nevertheless, he was not able to add anything to the evidence set out in Officer McConnell's witness statements.

Admissibility of and weight to be given to evidence of opinion

108. It is clear from rule 15(2) of the Tribunal Rules that this Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial in the UK. That includes evidence of opinion, and also hearsay evidence.

109. The submissions from the parties on opinion evidence focused in particular on two parts of the evidence, namely the witness statements of Officer McConnell which included his opinions and the conclusions reached by the administrators of EE139 (and their advisers) as to whether or not to pursue appeals against the assessments and penalties issued to EE139, which were set out in the letter dated 2 October 2017 from Armstrong Watson to the administrators.

110. The simple point to our mind is that this evidence of opinion is admissible, but we need to consider the weight (if any) to be placed upon it. In the present appeals, we did not hear directly from Officer McConnell or from those at Armstrong Watson who gave advice to the administrators, the latter of whom were not expert witnesses to this Tribunal (or indeed witnesses at all). We place no weight on these opinions when making our findings of fact.

Absence of certain witness evidence

111. The documentary evidence before us included communications between Officer McConnell and four clients of EE139 (meeting notes, notes of phone calls and email exchanges) and copies of some expense claims submitted by employees of EE139 and some correspondence between EE139 and those employees (as well as vast amounts of other material). All parties drew attention to the fact that there was no witness evidence from any client of EE139 or from employees of EE139 who had claimed expenses during the Relevant Period (Ms Robson being a member of the office staff).

112. HMRC invited us to draw adverse inferences from the absence of such evidence. HMRC's position was that Ms Suttle and Mr Jaekel have sought to suggest that the evidence of meeting notes and conversations exhibited by HMRC cannot be relied upon and/or are open to a different interpretation. HMRC submit that such evidence is clear on its face in terms of both hours worked by employees and also the provision of vehicles. Ms Suttle and Mr Jaekel have not sought to call live witness evidence from the end clients to support their assertions that this evidence is unreliable or bears a different meaning to that obvious on its face. Other than Ms Robson, they have not sought to call any other employees who could give evidence about Merit, and the processing of timesheets and expenses generally. This is despite the obvious relevance of the evidence that any of those other individuals might give. HMRC invited the Tribunal to draw adverse inferences from Ms Suttle and Mr Jaekel's failure to call anyone involved in the way in which the claims were processed, other than Ms Robson, or who could have spoken about issues in dispute in line with the ordinary principles for so doing.

HMRC then referred to the relevant principles as being set out in Lord Sumption's speech in the Supreme Court in *Prest v Prest* [2013] 2 AC 415 at [44], and in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324. Morgan J has summarised the principles in *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) at [141-143] (which we set out below).

113. HMRC then put it as follows in their written closing:

> "If the Tribunal is satisfied that there is a prima facie case that Ms Suttle and Mr Jaekel either knew they were submitting misleading information to the Respondents, or turned a blind eye to it, then the Tribunal can, if no proper reason has been given for the absence of key witnesses, draw the inference (per *Jones v Dunkel*) that Ms Suttle and Mr Jaekel fear to call witnesses who could have provided useful evidence about the end users, whether they disagreed with the evidence adduced by the Respondents (i.e. if it is to be said that Mr McConnell is lying or made an error) and this fear is evidence that if they were brought to give evidence they would have exposed facts unfavourable to Ms Suttle and Mr Jaekel. The same applies to their failure to call evidence from further employees at EE139."

114. Mr Ripley and Mr Firth were also critical of the evidence before us, observing:

(1) HMRC had not called any witness with contemporaneous knowledge of the matters in issue (whereas the Appellants had three such witnesses, including themselves).

(2) It was open to HMRC to call evidence from the witnesses to which it referred (in particular given that Officer McConnell had been in communication with those clients and HMRC were seeking to rely on those communications).

(3) Further, given that the Appellants' position was that HMRC bear the burden of proof and they sought to rely on this evidence, as Mr Firth put it – if HMRC rely on end clients saying that workers were engaged for more than six hours, where is the evidence from those end clients, or from the employees. Mr Firth's submission was that it is insufficient for HMRC to seek to rely on the email exchanges which raise questions of their own (eg whether travel time is included within ranges given) and show that Officer McConnell was pushing for particular answers. Conversely, what is the evidence in relation to distances claimed to have been travelled – HMRC submit that the distances are implausible, yet this has not been put to employees. Officer McConnell did send a questionnaire to some employees; but this was not one of the questions.

115. The relevant principles were summarised by Morgan J in *British Airways* as follows:

> "141. The consideration which a court should give to the fact that a potentially relevant witness has not been called is well established. I can take the principles from the judgment of Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 at P340 where, having reviewed the authorities, he said:
>
> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

142. This statement of principle is in accordance with the earlier decisions of the House of Lords in *R v IRC ex p. T C Coombs & Co* [1991] 2 AC 283 and *Murray v DPP* [1994] 1 WLR 1 and the comments of Lord Sumption in the Supreme Court in *Prest v Prest* [2013] 2 AC 415 at [44].

143. These principles mean that before I draw an inference and made a finding of fact adverse to a witness who was not called, I need to ask myself:

(1) is there some evidence, however weak, to support the suggested inference or finding on the matter in issue?

(2) has the Defendant given a reason for the witness's absence from the hearing?

(3) if a reason for the absence is given but it is not wholly satisfactory, is that reason "some credible explanation" so that the potentially detrimental effect of the absence of the witness is reduced or nullified?

(4) am I willing to draw an adverse inference in relation to the absent witness?

(5) what inference should I draw?"

116. We start from the position that clients and former employees of EE139 would be able to give relevant, material, evidence in relation to various of the issues before us – including as to ownership of vehicles, distances travelled in fact, hours worked and use of timesheets. We understood this to be common ground between the parties, but we so find in any event.

117. Mr Ripley and Mr Firth, whilst critical of the absence of this evidence, did not invite us to draw specific inferences, rather their submissions went to HMRC not having established the facts on which they seek to rely. HMRC did, however, invite us to draw adverse inferences, and did, in somewhat general terms, suggest the inferences they wished us to draw.

118. We have considered the principles as set out by Morgan J, and refuse to draw any adverse inferences. Whilst we recognise that the documentary evidence before us does provide some support for the suggested inferences (although we put it no higher than that and consider the documentary evidence very carefully in its entirety when making our findings of fact), we are completely satisfied by the reason for the Appellants' failure to call evidence from these potential witnesses, namely that they do not rely on the matters set out, and they had approached the hearing of the appeals on the basis that it is for HMRC to prove its case. We accept it would have been open for the Appellants to choose to call these witnesses; they had decided not to do so. That was a choice that was open to them.

119. We do have the various documentary evidence in relation to the communications with end clients and the expenses claimed. We have had regard to that evidence when making our findings of fact, assessing it carefully in the light of all of the evidence available to us.

Witness statements of Officer McConnell

120. Officer McConnell had sworn two witness statements, which detailed his investigation, the sampling of expense claims, communications with EE139 and four clients, and setting out his conclusions. Those witness statements exhibited a significant amount of documentation to which he had referred.

121. Officer McConnell did not attend the hearing and was not available to be cross-examined on his evidence. The witness statements were admitted in evidence. We have considered them in detail and take the following position:

(1) There are many statements of opinion in Officer McConnell's witness statements and we place no weight on such opinion.

(2) Officer Carbery's adoption of Officer McConnell's witness statement and attendance at the hearing as a witness does not of itself result in our placing more weight on the matters of fact set out in Officer McConnell's witness statements than if Officer Carbery had not adopted those statements (or if Officer Carbery had not been available for cross-examination). We make this point as Ms Goldring sought to submit that Officer McConnell's witness statements contained detailed evidence of his investigation and the information obtained by him and had not been challenged; that is correct, but the reason it was not challenged is that Officer McConnell did not attend the hearing for cross-examination and Officer Carbery had given clear evidence as to the scope of his review of the witness statements and exhibits.

(3) The Appellants were clear that they did not accept the matters of fact set out in the witness statements. By way of illustration, Mr Ripley indicated that they would have wanted to cross-examine Officer McConnell on:

(a) the assumptions he made that specified expenses which had been claimed were processed;

(b) his firm conclusions that specified employees did not use their own vehicles or hire fleet hire vehicles themselves;

(c) the evidence that workers used company vehicles to travel to site;

(d) incomplete evidence exhibited to his witness statements in relation to his communications with Client N, where the remainder of the emails (which had been disclosed to EE139) were provided to the Tribunal in an additional bundle;

(e) his conclusion that claims for mileage of, eg, 250 miles per day were extremely unlikely, yet EE139 expected some workers to travel between various sites;

(f) issues around the sampling of 20 employees (where Mr Ripley's submission was that the reliability of this sampling was overstated) – they were selected by Officer McConnell from a list provided, and Mr Ripley's challenge would have been that they were not randomly selected, as Officer McConnell appeared to have deliberately chosen those with large non-taxable payments, and there was a disproportionately high number of overhead power line workers, whereas EE139 workers predominantly worked in telecoms; and

(g) the lack of explanation as to how the 90% was computed, with no methodology being provided. Officer Carbery could not explain further.

(4) The Appellants were not provided with an opportunity to challenge these (or other) aspects of Officer McConnell's evidence (and our recitation above of matters that Mr Ripley would have sought to challenge should not be taken to mean that Mr Firth would not similarly have wished to challenge Officer McConnell's evidence). The panel also had questions in relation to Officer McConnell's witness statements. We would have had to decide whether, in the light of questions put to him in cross-examination, it was in accordance with the overriding objective to raise these matters (in particular so as not to open matters which were not in fact challenged by the Appellants) but we would also

have sought clarification as to, eg, the approach to sampling of employees, the decision to disallow 90% of expenses (rather than, eg, 85% or 95%), and how he had ascertained the amount of expenses for the first two years of the Relevant Period (before the RTI returns, where the returns filed by EE139 did not include details of non-taxable payments made). We also had questions as to the communication with clients, eg Client S's statement to Officer McConnell (recorded in his notes of that meeting) that they did not source their own workers contradicts information provided a few weeks later to him by EE139 – had he identified this contradiction?

(5) Officer McConnell has exhibited what appears to be most of the information he relied upon. We say "most" as, eg, it was clear that some communications with clients were incomplete and there was no direct evidence which assisted us with the 90% or calculation/estimate of the total expenses claimed.

122. Taking account of these matters, we consider that the witness statements themselves are hearsay evidence and we have discretion as to the weight which we attach to them. When making our findings of fact we have paid careful attention to the documents exhibited by Officer McConnell and our interpretation thereof. We have assessed this evidence by reference also to the evidence given by Ms Suttle, and in particular her evidence in relation to Officer McConnell's exhibits and to the documents which she had exhibited.

FINDINGS OF FACT

123. We have made findings of fact below in relation to:

(1) the experience and background of the Appellants and the business of EE139 and the advice taken by EE139;

(2) the investigation conducted by Officer McConnell, and his communications with EE139 and its advisers (primarily Chartergates). Unless expressly stated to the contrary, we record Officer McConnell's findings and conclusions, and his record of the explanations provided by or on behalf of EE139 as such – these are not findings of fact by this Tribunal;

(3) EE139's sourcing of employees and the employment contracts, its processes, the treatment of claims received from employees, the hours worked and expenses claimed by employees and reimbursed to them, as well as the awareness or means of knowledge of the Appellants.

124. We refer throughout to the Appellants by name (or as the Appellants), and have identified Ms Robson, Mr Hulin and some office staff. We have also named some of the clients of EE139, but refer to the four clients who provided information to Officer McConnell as Clients S, P, N and D; we also refer to G, which is connected to Client D. We have referred to umbrella employees whose expenses or payslips were before us by their initials and by reference to the client to whom their services were supplied.

Establishment and business of EE139

125. EE139 was incorporated on 15 November 2006, with two issued shares, one each held by Ms Suttle and Mr Jaekel. Ms Suttle and Mr Jaekel were appointed as directors on 12 December 2008. They were the directors throughout the Relevant Period. There was an informal understanding that a third person, Mark Hulin, would receive a one-third share of the profits; this was later formalised and from 15 November 2015, Mr Hulin became a shareholder, such that Ms Suttle, Mr Jaekel and Mr Hulin each owned one-third of the shares in EE139.

126. The background to the establishment of EE139 was:

(1) Ms Suttle had worked for SDH Global Source Ltd ("SDH") since around April 2003. SDH predominantly worked in the telecoms industry, as well as in construction. They focused on large projects and recruited workers. SDH used payroll companies, one of which was MaxiPay Accounting Services Ltd ("MaxiPay"). Ms Suttle became Office Manager at SDH, and her role included raising invoices, paying suppliers, looking after the software database, reconciling the invoice factoring account, liaising with the accountant, collating timesheets and submitting these to payroll companies.

(2) In around 2005, Ms Suttle approached Mr Hulin, one of the founders of SDH, with the idea which ultimately became Earn Extra, namely that they set up a payroll company which SDH could use.

(3) Mr Hulin approached Mr Jaekel, who was at that time working for MaxiPay, as Mr Jaekel had a better knowledge of the payroll industry and had client contacts. There were a series of meetings over several months, and Mr Jaekel agreed to join them in taking this forward.

127. EE139 was initially intended to operate as a composite payroll company, pursuant to which employees would receive a basic salary and dividend payments. The introduction of the managed service companies legislation meant that this was no longer commercially viable. Instead, they re-structured to provide different payroll services – umbrella, construction industry scheme ("CIS") arrangements and PAYE (for employees who had no or minimal expenses). EE139 has provided all these services at different times, although from 2012 workers who would not need to claim expenses were generally employed by Earn Extra PAYE Ltd and later CIS workers were generally engaged by EECIS.

128. There were a relatively small number of employees working for EE139 itself, rather than being provided to clients. We have referred to these employees as office staff, but do not use this term to describe either of the Appellants:

(1) In the initial years there were three people working for EE139 itself – the Appellants and one member of office staff, Melanie Crowther. The roles of Ms Suttle and Mr Jaekel are described further below, but Mr Jaekel's role meant he was not based in the office.

(2) They recruited four more office staff in 2007-2009, but three of those left by 2010, as did Ms Crowther. These office staff had been very young (in their late-teens) with little work experience, and had included Ms Robson.

(3) By 2010, it was the Appellants and Ms Robson. Ms Robson had joined part-time in February 2007, whilst she was still at school, helping with administrative tasks. Ms Robson later started assisting with the processing of timesheets and expenses.

(4) Ms Suttle went on maternity leave in October 2010. Whilst she was on leave, Ms Robson was the only member of office staff, but she and Mr Jaekel were supported by an accountant who worked on a consulting basis, Martin Bignell.

(5) Ms Suttle started to return to EE139 from June 2011, and by November 2011 Ms Suttle was working for EE139 for four days per week.

(6) They did recruit four additional office staff in 2014 to 2015, but two of those roles were short-lived.

(7) EE139 later recruited office managers with payroll backgrounds. Rick Tomlinson joined in February 2014. He started to get familiar with the business, and after HMRC's visit in July 2014 Mr Tomlinson assisted with obtaining the information requested by HMRC. Mr Tomlinson was absent for various periods of time. He left in May 2015, but

did return as a consultant. Terri Radcliffe then joined in July 2016, and her role also included oversight of the payroll and expenses process.

129. Whilst Ms Suttle's role changed over the years, she was always based in the office. Initially, Ms Suttle registered employees (and the employees who provided their services to EE139's clients are generally referred to in the Findings of Fact and Discussion as "workers" or "umbrella employees") on EE139's system, received the worksheets from clients, and claims from umbrella employees and was responsible for processing them. As EE139 started to recruit office staff (during the period from 2007-2009), she became less involved in the day-to-day processing tasks, but was responsible for managing the small team of office staff and was present in the office and available if questions arose. Once Ms Suttle had returned from maternity leave, her role continued to have a more supervisory nature – this included looking at recruitment needs, training office staff on how to process expenses (which is considered further below), credit control, processing internal payroll (ie of office staff), and working with Merit on the development of the software which they used for payroll.

130. Mr Jaekel's experience was in sales and marketing. He had undertaken this role in various industries, as well as within payroll management prior to joining EE139. As set out at [126(3)] above, he had worked at MaxiPay, which provided payroll and accountancy services across various industries, being employed in business development there – his role had been to approach employment agencies and contractor-type organisations within the construction and telecoms sectors and sell MaxiPay's services.

131. At EE139, Mr Jaekel's role was client-facing – he was canvassing for new business, visiting clients and potential clients at their offices or work sites, and was not based in EE139's office. Mr Jaekel attracted new business for EE139 from his existing contacts, his own research to identify possible new clients, or if an employee of a contractor who was using EE139 moved to a new company and then recommended EE139's services. Mr Jaekel sought to understand the nature of a client's business and developed relationships with individuals at EE139's top clients. He knew the relevant individuals and had a point of contact with them, and would visit them in person.

132. We were satisfied that, whilst Mr Jaekel was not based in EE139's office, and did not verify expense claims, process claims or submit the Returns himself, he understood the way in which the taxable pay of umbrella employees was calculated. This can be illustrated by the fact that he had worked with Ms Suttle on developing the approach which was encapsulated in the Excel spreadsheet referred to at [196] below. When Ms Suttle went on maternity leave, Mr Jaekel also took over responsibility for registering employees onto the payroll system, and he was the contact for Ms Robson on questions on all matters, including expenses.

Growth of EE139 business

133. EE139 was launched with SDH as its first client, and thus inherited the sector-focus of SDH, ie telecoms. As EE139 found new clients, it started to operate in other industries, particularly overhead power lines. The move into power lines was around September 2012, and this resulted in significant growth in a short period of time.

134. The number of workers, or umbrella employees, fluctuated dramatically. The average numbers were:

Tax year	Number of umbrella employees
2007-2008	109
2008-2009	42
2009-2010	37
2010-2011	32
2011-2012	251

2012-2013	310
2013-2014	404
2014-2015	468
2015-2016	430
2016-2017	265

135. EE139's turnover grew as follows:

Year ended	Turnover (million)
31 March 2009	£1.156
31 March 2010	£3.038
31 March 2011	£2.465
31 March 2012	£10.029
31 March 2013	£10.796
31 March 2014	£15.501
31 March 2015	£18.347

136. EE139's income was a margin which it deducted from the amounts paid by clients. Whilst Ms Suttle's evidence was that this was "generally" 5% of amounts paid by clients, we were not taken to any evidence of it being any amount other than 5%, whereas the marketing materials refer to a fee of 5% and this was the amount which we could see had been taken from Company Receipts on the payslips to which we were taken. We find that EE139 received 5% of the gross amount paid by clients as a fee for its services. This amount was not pure profit – overheads were funded from this margin.

Advice taken by EE139

137. EE139 had obtained tax advice from Accountax at a meeting on 30 March 2006. That meeting was attended by Ms Suttle, Mr Jaekel and Ms Crowther from EE139 and David Harmer and Sarah Rogers from Accountax. That meeting addressed:

(1) Review of contracts – These included the employment contract where there was discussion of the share allocation (namely that it must not be included).

(2) Review of processes – This looked at banking, invoicing and administrative processes.

(a) They discussed minimum wage requirements and the note says "JJ questioned what about people on a day rate and SR stated that if on a day rate then the worker should keep a log of hours worked to get round this."

(b) Ms Crowther said she felt that workers could lie on their expense forms and asked what would happen if this was caught out. The note records "SR explained that as the worker is self certifying then the onus would be on them and that they would be the only person who was liable although she did suggest performing random route planner checks on mileage distances."

(3) Review of different options – They outlined single person companies, umbrella companies, composite companies and CIS composite companies.

(4) Flow of contracts/monies – Flowcharts illustrating the position for these different models.

(5) CIS Changes – This referred to changes to the CIS scheme being introduced from April 2007.

138. We conclude from these detailed meeting notes that the focus of the advice from Accountax in that meeting was the composite model (whereby employees would own shares

of a particular class and receive some amounts from the company as dividends). This is apparent throughout the notes, including in discussion of the employment contract and payslips (where there is reference to showing the gross dividend only on the dividend voucher). This finding is supported by the follow-up correspondence from Accountax (on 6 April 2006), where the pay calculation is worked through on the composite basis.

139. There are various aspects of these notes that address transparency:

(1) In context of Review of processes, it is said "If any agency, employer or contractor requires a breakdown on their invoice this is to be done as an attached schedule that we send out but do not file or keep ourselves."

(2) They also address the possibility of a VAT enquiry, and the notes record:

> "If we should have a VAT enquiry it was advised that on no account should we give them access to anything other than the accounts. If they ask to view anything such as contracts/timesheets then we must say that we are unable to locate them and could they put the request in writing and we will forward on. If the Taxman should make an enquiry on one of our workers then we should advise that they only allow them access to their contract and expense forms."

140. Whilst the focus of this advice in 2006 was the composite model, the umbrella company model was outlined therein.

141. HMRC challenged whether EE139 ever obtained updated tax advice. Ms Suttle's evidence was that EE139 relied heavily on the support of external advisers, and used them for ad hoc questions as well as on the running procedures. Ms Suttle's evidence was that EE139 used Accountax (primarily David Harmer) until 2012. From 2013 they moved to Acumen Legal (Mark Taylor had moved there from Accountax), and at some point Acumen Legal became Chartergates so they used Chartergates.

142. It is clear from the documentary evidence (notably the correspondence with HMRC once Officer McConnell started his investigation) that EE139 had instructed Chartergates to advise them on the enquiry in November 2014. This correspondence is described in detail below. However, there was minimal documentary evidence of tax advice being taken by EE139 between March 2006 and this date as to, eg good practice as to the checking and processing of expense claims, conditions for entitlement to AMAPs or record-keeping. The only documentary evidence to which we were taken was:

(1) EE139's application to NatWest for a loan in 2009, which referred to them having gone back to Accountax after the changes to composite companies were announced in March 2007; and

(2) In September 2014 Ms Suttle had forwarded a question about whether visa fees incurred by an employee to change from a spouse visa to a leave to remain visa were allowable to Acumen Legal.

HMRC Enquiry

143. On 30 May 2014 Officer McConnell notified EE139 that HMRC intended to conduct a check of their VAT and PAYE records. In a phone call to Ms Suttle on 6 June 2014 he informed her they would be concentrating mainly on expenses, looking at employee contracts, payroll, job sheets, and time sheets for what he described to Ms Suttle as a random sample of 12 employees (out of 450) for a 12-month period.

144. The first visit by HMRC to EE139 took place on 8 July 2014 (the "July 2014 Meeting"). That visit was attended by Officer Bernadette O'Neill and Officer McConnell from HMRC, Ms Suttle and Mr Jaekel. The meeting note prepared by HMRC records:

(1) The Officers informed EE139 that the review had been initiated by a referral following the identification of the fact that several power companies with a large annual turnover but no workforce were using umbrella companies, of which EE139 was one. HMRC had examined EE139's payroll submissions on RTI. This examination had shown that both the tax and NICs being paid by EE139 were low. EE139 were told that the review would involve checks with both the company and its workers, and end users of the company.

(2) Ms Suttle confirmed that EE139 had been able to obtain all of the requested records, other than contracts between EE139 and their clients but these could be made available at a later date. Ms Suttle provided records for the 12 employees selected by Officer McConnell.

(3) Mr Jaekel explained that EE139:

(a) provided umbrella services where workers were employed by EE139 on overarching contracts and then supplied to other companies;

(b) mostly worked with power line and telecommunications companies, as well as providing CIS workers for new-build areas;

(c) took advantage of tax laws to benefit both their workers and their clients; and

(d) was not an employment agency.

(4) Ms Suttle explained workers were obtained from a number of sources – marketing material at training sites, referrals from fellow workers, some end clients (eg Client S) would obtain the workers and ask EE139 to employ them, and they would approach end clients direct.

(5) In relation to expenses, Ms Suttle said that the workers were reimbursed for business travel at 45p per mile for the first 10,000 miles and 25p per mile thereafter, and that this was paid from the workers' homes "or digs". Many workers were away from home for up to six months. They all owned and used their own cars/vans to go to site. Mileage claims were submitted along with claims for phone bills, hotel bills, together with receipts. No general meal/lodging allowance is paid. Everything has to be receipted.

(6) In relation to wage calculation, Ms Suttle explained that EE139 was paid a set amount for each contract by their client, and took 5% of this as their fee, before deducting employers' NI, holiday pay and pension contributions. The employees were paid for six-hour days at the minimum wage, five days a week. No time sheets are maintained by EE139. The six hours per day is based on the knowledge that British Telecom control gave jobs that lasted six hours per day, excluding travel. Expenses were reimbursed and any surplus money from the contract was paid to employees as a bonus, which was taxed. Ms Suttle said that EE139 provided employees with payslips and paid them by BACS. When the Officers pointed out that they were unable to reconcile the weekly mileage claim to the payslips, Ms Suttle explained that sometimes there would not be enough money in the contract to pay all the expenses and this this would have to be carried forward as a credit recorded at the top of the payslip.

(7) Officer McConnell referred to his visit with Client S who had said that the workers worked a ten-hour day and only worked at one site per day. The director had said that time sheets would have been EE139's responsibility. Ms Suttle said that timesheets were not kept and that she was unaware that workers only worked at one site.

(8) The client told EE139 what they were prepared to pay on a particular contract. For example, Client S emailed an offer to EE139 and EE139 invoiced Client S. Although Client S showed a daily rate for the workers, EE139 paid the workers the minimum wage.

145. Giving evidence Ms Suttle and Mr Jaekel both pointed out that these were HMRC's notes of the meeting and had not been agreed with them at the time. Nevertheless, the explanations recorded as having been given by Ms Suttle and Mr Jaekel in that meeting as to how umbrella companies operated (eg the pay calculation used) are broadly consistent with their evidence in these appeals. There are some areas where explanations provided through Chartergates did later differ (eg as to agency expenses and the reason for six hours per day being used), but giving evidence Ms Suttle did not support the description of the latter as an anomaly – EE139 had set it at six hours. These meeting notes were made contemporaneously, and whilst there was some challenge to accuracy, that was in substance a challenge to the interpretation to be placed on them, eg as to no general meal/lodging allowance being paid. We do find that the meeting notes are a broadly accurate record of what was said at that meeting.

Correspondence with EE139/Chartergates

146. On 22 October 2014 Officer McConnell wrote to Ms Suttle following his review of the records supplied at the July 2014 Meeting. He said the review had raised a number of concerns:

(1) The company not maintaining time sheets. From enquiries made with end clients it appears hours worked are well in excess of the arbitrary six hours a day used to calculate taxable pay.

(2) Agency expenses are paid as a non-taxable amount and he needs to understand to what these relate.

(3) There is a lack of detail on mileage claims and sometimes no detail at all. Sometimes passenger names are not included and there are daily home-to-site claims of up to 560 miles per day.

(4) Expenses claims include weekly hotel bills, personal items and multiple meals near the home address appear to have been allowed.

147. Officer McConnell said that he had decided to extend his review to 20 workers and requested records for a three-month period from 1 April to 30 June 2014. He also expressed doubt as to whether the employment contracts were an overarching contract, questioning whether there was a mutuality of obligation between assignments.

148. On 3 March 2015 Chartergates (acting for EE139) wrote to HMRC and agreed to provide the records requested and they responded to points made on overarching contracts.

149. On 23 June 2015 Officer McConnell wrote to Chartergates setting out his position:

(1) Overarching contracts – He expressed doubts as to whether the contracts with employees were overarching contracts (in particular whether there were obligations relating to payment between assignments).

(2) Failure to tax the correct hours – He considers EE139 is not taxing all the hours worked. He had received a time sheet submitted to EE139 that confirms that all those workers involved in the power lines work operate out of depots using vehicles supplied by the client. They commence work at between 7am and 8 am and work a ten-hour day.

(3) Agency expenses – No receipts have been supplied to support these. The payment of a round sum allowance to an employee by their employer is taxable. He asked for the total paid out to all workers in 2014-2015.

(4) Mileage claims – In virtually all cases there is a total lack of records being maintained to support the mileage expenses. This questions the authenticity of the pay records as a whole. The company guidelines to employees on mileage claims state: state each journey and the miles for that journey, not "various sites"; and mileage claims are randomly audited so do be accurate when quoting your mileage. The guidelines do not appear to have been followed.

(5) Other expenses – Only five employees within the sample claimed other expenses.

(6) His summary records that it is his opinion that workers are not employed on overarching contracts, and it is likely that each assignment is a separate contract of employment and a permanent workplace. As a result, all expenses from home to site would be taxable. If the worker then travels to a series of temporary workplaces throughout the day then that travel may be allowable, subject to evidence.

(7) He then records that he has major concerns at the way EE139 is managing its payroll and expenses. The client would appear to be paying EE139 at the going rate for the jobs undertaken by the worker which is well in excess of the minimum wage being applied by EE139. The evidence would suggest that with many of the contracts, EE139 has a starting point at which the worker will pay little or no tax and any balance of earnings will be treated as expenses. There is also a lack of evidence that the expenses are actually incurred.

150. Officer McConnell concluded:

> "Going forward the company should only allow genuine expenses incurred while the employee is travelling in the performance of their duties or travelling to or from a place they have to attend in the performance of their duties – as long as the journey is not ordinary commuting or private travel."

151. He requested a face-to-face meeting.

152. On 28 July 2015 Chartergates wrote to Officer McConnell. They attached a spreadsheet in relation to letters of request for information issued to employees, and acknowledged receipt of the letter of 23 June 2015 saying that they would be in touch in respect of the points raised in due course.

153. There was an exchange of emails in November 2015 with Chartergates explaining that delays in providing a response were due to sickness.

154. HMRC sent a warning letter to EE139 on 22 January 2016 (copied to Chartergates), which included noting that HMRC had been provided with some but not all records requested on 22 October 2014, setting out the concerns detailed in their letter of 23 June 2015, referring to the lack of response to the letter of 23 June 2015 and stating that they would issue Regulation 80 determinations and Section 8 decisions. They required a response by 22 February 2016.

155. On 5 February 2016 Chartergates wrote to Officer McConnell. They addressed points made on overarching contracts and then provided responses to points made by Officer McConnell:

(1) Taxing of correct hours – EE139's agreement with their client provided for them to provide services for six hours per day. The six hours per day was provided within the payroll software as being the number of hours required, this was also during days where less than six hours was required. The software is updated annually but it would seem this anomaly was never rectified by the software provider.

(2) Agency expenses – They do not believe these are round sum allowances; but in any event EE139 is now applying PAYE to all payments unless employees submit a receipt.

(3) Mileage claims – The claim forms reviewed are in their original form as submitted by employees; it is likely some were rejected. EE139 has invested significantly in their payroll software, and the software monitors each employee's mileage claim for the year.

(4) Other expenses – Claims reviewed are purely claims submitted in their original form and do not represent the reimbursement that may have been made.

156. On 24 February 2016 Officer McConnell responded as follows:

(1) On the taxing of correct hours he said:

(a) HMRC had spoken to one of the telecoms workers. They are supplied with a tablet that the worker is required to log in and log out of at the start and end of the day, so times should be recorded. He estimated that Monday to Thursday he worked 8am to 6pm and on Friday 9am to 7pm.

(b) His enquiries with clients working on overhead power lines was that workers would also do a ten-hour day.

(c) He asked for correspondence relating to the agreement to provide services for only six hours a day.

(2) He asked for records used to review the mileage claimed, he had no evidence that the mileage claims were being rejected. The same point was made in relation to other expense claims.

157. On 17 March 2016 Chartergates asked that formal proceedings be stayed to allow EE139 to provide the relevant information requested by the 24 February 2016 letter.

158. On 7 July 2016 Chartergates wrote again:

(1) Taxing of correct hours – The calculation is based on "mean hourly output rate"; the original agreement was based on a calculation provided by BT of a job every two hours at three jobs per day. EE139 used this as BT are an industry leader.

(2) Mileage and other expenses claims – EE139 does operate a system of checking expenses. EE139 requests details of receipts in every case where these are not included as part of the claim. EE139 insists employees complete their claim form which requests details including details of all journeys. These claims are then checked by EE139. In most cases where the claim cannot be substantiated the claim is rejected.

159. There was a phone call between Officer McConnell and Chartergates on 11 July 2016. The note of that call (prepared by HMRC) records:

(1) Hours – it had been admitted in previous correspondence that the correct hours had not been taxed and they were now stating that the correct hours were taxed. Officer McConnell had evidence that workers in telecoms and overhead power cabling started at 7 or 8am at the depots and returned between 5 and 6pm. They were paid by the end client at daily rates of between £100 to £200, which EE139 then reduced by what it claimed to be legitimate expenses.

(2) Expenses – after two years, Officer McConnell had not received evidence that expenses were rejected.

160. On 28 July 2016 Officer McConnell re-iterated his views, and said he would be prepared to view any additional information supplied by EE139, giving specific examples of any additional mileage records EE139 held for the period 1 April to 30 June 2014 and evidence that claims were rejected, and evidence it was the workers who hired the vans from the fleet hire companies and supplied the fuel for those vehicles.

161. Chartergates responded on 19 August 2016:

(1) The response included a significant amount of supporting documentation, including what it described as a typical contract between EE139 and its client, payslips for six employees (in the context of points which had been made about overarching contracts), examples of agency expenses, copies of expense claim forms that set out mileage for two employees, information about vehicles used for travel, further information in relation to other expense claims for eight employees (which were within HMRC's original sample), and examples of rejected expenses claims from 2014 to 2016.

(2) That letter also addressed s339A ITEPA 2003 (which removed the exemption for home-to-work travel for temporary workplaces). In that letter Chartergates said EE139's employees travel and work at multiple sites for EE139's clients; each of these sites continues to meet the definition of a temporary workplace. In addition, a majority of the travel carried out by EE139's employees was in the performance of their duties of employment; s339A is unlikely to affect that position.

162. On 30 August 2016 Officer McConnell said that HMRC would be issuing Regulation 80 determinations and Section 8 decisions, calculated on 90% of the expenses paid to EE139 employees, shortly. In that letter he added:

(1) He noted EE139 were now saying that agency expenses are in relation to lodging allowances (they had said they were not at the meeting of 8 July 2014).

(2) Mileage claims should record all sites visited during the day. Checks show that nine of the 12 vehicle registrations provided are registered to fleet hire companies.

163. There was further correspondence, and the Assessments were issued on 21 September 2016.

164. There was a telephone conference between HMRC and Chartergates on 18 October 2016. There was discussion about HMRC's position and the meeting included:

(1) When asked about how Officer McConnell had arrived at his assessed figures, he said they were taken from the non-taxable amounts returned on RTI returns. Based on the evidence to hand he had given a 10% adjustment for expense claims, but he could have assessed 100% of the expense amounts.

(2) Chartergates explained that EE139 had employed two new office staff to check claims and that EE139 had also dismissed some employees for fraudulent claims. In Chartergates' opinion there had been massive changes at the business.

165. There were further emails and telephone conferences between Officer McConnell and Chartergates, during the course of which Chartergates provided (in December 2016 or January 2017) a USB stick containing payslips and expenses for all employees for August 2016. That was then reviewed by Officer McConnell, who again found deficiencies (noting absence of completed forms, claims lacking detail) but recorded that no agency expenses were now being claimed and holiday pay was being taxed.

Overview of investigation by Officer McConnell

166. The investigation conducted by Officer McConnell, some of which has already been referred to above, included:

(1) Officer McConnell met with Client S on 12 June 2014;

(2) he selected a sample of 12 employees of EE139 for review – KM at Client P, RI at SDH, MA at NGIS, HT at Client D, MH at Capital, MMcE at Client N, CZ at Client P, CS at Client S, MG at G/Client D, AT at Client D, MP at Inspirium and AC at Client P;

(3) he attended the July 2014 Meeting with EE139 at which the Appellants provided records for these 12 employees. He reviewed these records, which were a sample of the expense claims and payslips for these individuals;

(4) he spoke to Client P on 14 August 2014, and followed up by email later that month;

(5) he received information from Lisa Cam from HMRC's National Minimum Wage ("NMW") team, who was conducting a NMW enquiry in relation to one EE139 employee, SH. SH was not within Officer McConnell's sample, but he was working for Capital Outsourcing Group UK Ltd ("Capital Outsourcing"), and was sub-contracted to a telecoms project for Kelly's;

(6) he extended his review to 20 employees (which he communicated to Chartergates on 22 October 2014), for the three-month period 1 April to 30 June 2014. Those 20 employees included 11 of the initial 12 (not HT at Client D), and the records were received from Chartergates in March 2015. The additional employees were selected from what Officer McConnell described as EE139's largest clients – 318 out of 430 umbrella employees were supplied to these clients;

(7) he sent questions to Client N in February 2015 about their use of intermediaries, with a response by email from Client N's accountant on 5 May 2015;

(8) he prepared a questionnaire to be sent to the 20 employees in May 2015 (the "Employee Questionnaire");

(9) on 9 February 2016 he wrote to the DVLA to check the registered keeper of vehicles identified from the Expense Claim Forms submitted by the sample of 20 employees, with further requests to the DVLA being sent in May and September 2016;

(10) he requested information from Client D on 24 May 2016, had a telephone conference with them on 27 June 2016, with further information provided by email in September and October 2016; and

(11) he reviewed additional information which he was sent by Chartergates in August 2016, and additional material which he was sent by them in December 2016 and January 2017.

167. Client S, Client P, Client N and Client D were clients of EE139. The information provided by them is considered, together with other evidence in relation to workers provided to them by EE139, at [210] to [241] below.

168. Whilst Officer McConnell had told Ms Suttle on 6 June 2014 that he wanted the records of what he described as a random sample of 12 employees for a 12-month period, on the basis of the evidence before us we conclude that:

(1) The 12 employees named by Officer McConnell were not randomly selected. His witness statement says that for the purposes of his review at least one worker was selected from each of EE139's larger clients. We agree that this was the case. We do not have any information as to how that one (or more) worker(s) was then chosen, ie whether it was based on amounts of expenses claimed or truly random.

(2) The note of the July 2014 Meeting refers to Ms Suttle as having provided records for the 12 employees. It is apparent from the description of the review then conducted that only a sample of the records for these employees was provided.

169. Similarly, there was no evidence as to how the wider sample of 20 employees was selected, save for the explanation in Officer McConnell's witness statement that they were from

the largest clients and that 318 out of 430 umbrella employees were being supplied to these clients.

170. We did not have a copy of the Employee Questionnaire which was sent to the 20 employees, or the responses thereto in the form in which they were provided by the employees. Mr Firth was particularly critical of this approach. However, whilst the bundle included a form of a letter (dated 12 May 2015) on HMRC's letterhead addressed to the employees, overall the documentary evidence suggests that this questionnaire was later sent by EE139 or Chartergates to the 20 employees. We make no finding as to whether this was in addition to or instead of the letter being sent by HMRC. In any event, we find on the facts that responses to the Employee Questionnaire were sent by employees to EE139 or Chartergates, and not to HMRC. Eight out of the 20 in the sample responded to the Employee Questionnaire. A spreadsheet summarising these responses was then sent by Chartergates to HMRC, and it is that summary table that was exhibited in the bundle. This is consistent with a letter from Chartergates to HMRC and also Officer McConnell having referred in his witness statement to the responses being returned in a summarised form via Chartergates. We have taken account of the information provided in this form, but assessed it against all of the evidence available to us when making our findings, and bore in mind throughout that the responses were from just eight employees at a time when EE139 had over 400 umbrella employees.

Assessments

171. Officer McConnell's letter of 21 September 2016 to EE139 which enclosed the Regulation 80 determinations stated that:

(1) EE139 had failed to provide him with sufficient evidence to support the expenses which equate to up to 80% of the employee's total earnings. Evidence obtained from both the employees and clients would suggest that the vast majority of the expenses claimed have not been incurred and are false; and

(2) the tax liability of £5,533,065 was calculated "disallowing around 90% of the expenses payments treating them instead as "additional" pay taxed at 20%".

172. Mr Ripley and Mr Firth submitted that the Assessments were thus based on a disallowance of expenses, and that submissions by Ms Goldring as to matters relevant to the hours worked by umbrella employees and the provision of timesheets were simply not relevant. We address those legal submissions in the Discussion.

173. We make findings of fact here on the range of challenges identified by Officer McConnell. Potentially relevant to whether there was an under-declaration of taxable pay are matters relating to hours worked and timesheets, and relevant to whether expenses were properly reimbursed are facts relating to ownership of vehicles, mileage claimed and payment of agency expenses to employees.

174. One issue that was identified in Officer McConnell's witness statement was that there were various examples of the payment to umbrella employees of what was labelled holiday pay or holidays in lieu and these payments were not taxed, eg:

(1) JB at Inspirium received holiday pay as non-taxable amounts;

(2) JF at Capital Outsourcing received a non-taxed payment of £748 for holidays in lieu in April 2014;

(3) MG at G, received £233 in lieu of holidays;

(4) MH at Capital Outsourcing received holiday pay in week ending 25 May 2014; and

(5) MP at Inspirium received pay in lieu of holiday.

175. These payments were made in April and May 2014, and are evident throughout the sampling of 20 employees that was conducted during this period of April to June 2014. Officer McConnell recorded in his witness statement that when he reviewed the August 2016 records he identified that holiday pay had started to be taxed.

176. The Tribunal asked HMRC after the hearing to clarify its position on holiday pay, asking whether it was part of HMRC's case that these payments being reported as non-taxable in the relevant Returns was a relevant inaccuracy for the purposes of Schedule 24 and, if so, where this was first set out (in HMRC's pleadings).

177. HMRC responded as follows:

(1) Holiday pay not being taxed was noted as a concern in Officer McConnell's witness statement.

(2) At the hearing, the references to holiday pay occurred during the cross-examination of Ms Suttle, volunteered by Ms Suttle as opposed to it being put to her as a specific issue.

(3) Whilst holiday pay and payments in lieu of holiday should have been taxed by EE139, this was not part of the quantum of the Assessments and penalties. Holiday pay was not a relevant inaccuracy for the purposes of Schedule 24 and HMRC did not plead that it was in the SoCs.

178. Whilst we agree with HMRC (as did Ms Suttle) that holiday pay and payments in lieu of holiday should have been taxed, we proceed on the basis of HMRC's pleaded case, namely that this was not a relevant inaccuracy for the purposes of Schedule 24. We take no further account of this when considering matters relating to inaccuracies and the calculation of the PLR. We do not disregard the evidence relating to the treatment of holiday pay for all purposes, as it was relied upon by Ms Suttle as an example of a mistake (her explanation being that it arose from an error in the software) that was corrected by EE139 when they realised (and this was recognised by Officer McConnell when he reviewed the records).

Overview of expenses and taxable pay

179. The RTI returns submitted by EE139 record taxable pay and non-taxable payments (ie expenses reimbursed) for the four RTI Years. From reviewing the RTI returns for the RTI Years, Officer McConnell calculated that of the amounts paid to employees in the tax years 2012-2013, 2013-2014, 2015-2016 and 2016-2017, the non-taxable proportion was 62%, 63%, 59% and 46% respectively (albeit that we recognise that this final year was not within the Relevant Period). There was no corresponding data for 2014-2015 (which was one of the RTI Years).

180. We find that the expenses reimbursed by EE139 were consistently higher than the taxable pay of umbrella employees. Looking at a week for which EE139 provided data to HMRC (week ending 6 April 2014):

	Taxable pay	**Expenses**
MH	£176.67	£649.80
AT	£189.30	£495.39
JF	£176.68	£873.46
MG	£189.30	£542.89
RI	£394.54	£455.75

181. This is a handful of employees over a single week – on any view, this is a very small sample. The evidence before us included a large number of payslips for April to June 2014, as

well as various from earlier and later in the Relevant Period as well as some from after the Relevant Period. Whilst the amounts in the above table cannot purport to be an average, we find that these amounts are not atypical – they are a fair illustration.

182. The decisions taken by Officer McConnell as to how to conduct his investigation have had a significant impact on the range of evidence before us – there is a concentration of documentary evidence relating to Client S, Client P, Client N and Client D, and it is mainly the expense claims and payslips from employees who were within the samples that were exhibited to witness statements. Ms Suttle did exhibit additional specific documentary evidence in relation to employees, both these and others, in the context of rebutting conclusions reached by Officer McConnell. We make the following points in this regard:

(1) We consider that the evidence before us as to working patterns from clients was broadly representative of EE139's clients from September 2012 (once it had moved into overhead power lines). This is supported by the (limited) evidence before us in relation to turnover and customers, which included evidence that in 2013 80% of the sales to date were from seven customers (demonstrating the concentration of EE139's business).

(2) The number of employees in the samples was relatively small, at 12 and then 20, at a time when EE139 had over 400 umbrella employees. We have made findings of fact in relation to this evidence, and take account of the size of the sample alongside other evidence (or lack of evidence) when reaching our conclusions in the Discussion.

(3) We have approached the evidence throughout on the basis that the burden is on HMRC to establish the PLR in respect of the inaccuracies on which they rely.

Umbrella employees – sourcing, employment contracts, expense claim forms and payslips

183. We set out here our findings as to how EE139 operated the umbrella model, albeit with occasional examples by reference to specific umbrella employees.

Sourcing of employees

184. At the first meeting with Officer McConnell, the July 2014 Meeting, Ms Suttle explained that workers were obtained from a number of sources – marketing material which they left at training sites, referrals from fellow workers, some end clients (eg Client S) would obtain the workers and ask EE139 to employ them, and EE139 would approach end clients directly.

185. Giving evidence at the hearing:

(1) Ms Suttle confirmed not only the range of different ways that EE139 sourced employees, but also that the majority of workers were introduced to EE139 by a client – the client would then provide EE139 with the workers' contact details and a member of the office staff would make contact to explain how they operated. In addition, Mr Jaekel would attend training schools, and this offered an opportunity to take on a large number of employees at once.

(2) Mr Jaekel (who had attended that meeting with HMRC) confirmed this was correct.

186. We accept that evidence. This explanation, which has been given consistently by the Appellants, is also reflected in the documentary evidence (eg emails with end clients). Two illustrations are:

(1) The Appellants have consistently referred to Client S as an example of a client which had its own workers and asked EE139 to employ them. Before meeting with EE139, Officer McConnell had met with Client S on 12 June 2014. At that meeting, Officer McConnell's notes record that Client S denied sourcing their own workers and then referring them to EE139. There was no documentary evidence that Officer

McConnell told EE139 at the July 2014 Meeting that Client S had given a different explanation about the workers used to provide services to Client S. The meeting had only taken place the previous month. We find that he did not tell them. We also find that Client S did source its own workers and refer them to EE139 – this is consistent with the documentary evidence, eg an email from Client S dated 29 October 2013 headed "New starts", giving names and contact details of three "new starts" and asking EE139 to get in touch with them and register them.

(2) Client D also recruited the workers that were then supplied to them by EE139. This was explained to Officer McConnell by SG of Client D in the call on 27 June 2016.

187. The employment relationship was between EE139 and the workers, and EE139 provided their services to its clients. However, the clients would then give instructions directly to the workers – EE139 did not have oversight of their work, and did not know what workers were doing on a day-to-day basis.

Employment contracts

188. We were taken to what was described as a sample employment contract between EE139 and an umbrella employee and accept that this was the standard form used between EE139 and the umbrella employees. The employment contracts include the following clauses:

(1) There is no fixed place of work.

(2) Normal working hours are to be decided at the beginning of each scheduled assignment.

(3) The employee will be paid NMW. They will be paid any allowable expenses they incur in performing their duties including mileage upon completing and submitting expense/mileage claim forms and providing any evidence requested by EE139.

Expense claims

189. Umbrella employees joining EE139 were sent a standard form introductory email. The email contains a reminder that employees should only claim for expenses that were wholly and exclusively incurred whilst working on their job.

190. The documents attached also included:

(1) Letter on expenses claims – employees must state each journey and the miles for that journey, as EE139 cannot accept milage claims stating "various sites". Meal and subsistence claims must have a receipt.

(2) Guidelines for expenses – The section on mileage claims refers to travelling expenses for private vehicle usage.

(3) expense claim form (the "Expense Claim Form") – This includes:

(a) employees must attach all original receipts;

(b) "We are required by the Inland Revenue to validate as far as is possible, that only legitimate expenses are processed.";

(c) form refers to "use of private car";

(d) table for claiming mileage has headings for "date", "destination and reason for journey" and "number of miles"; and

(e) The declaration is that "I declare that the above expenses were incurred wholly, exclusively and necessarily in the performance of my duties as an employee…I confirm that my car remains insured…"

191. Ms Suttle's evidence was that this Expense Claim Form was an old form, used at the beginning of the Relevant Period, and that EE139 had changed its claim forms at some point during the Relevant Period in the light of the concerns being raised by Officer McConnell. Ms Suttle accepted that employees did still use these old forms (even in September 2016) and that they were accepted by EE139. We find that the version produced before us, as described above, was the Expense Claim Form used by umbrella employees throughout the Relevant Period and any new version was only introduced after April 2016:

(1) These Expense Claim Forms were the only version before us – we had blank samples of them, completed versions used by the employees within Officer McConnell's samples (both the initial 12 and the 20 during the period of April to June 2014), and completed versions provided on the USB from August and September 2016. We were not taken to any other version during the hearing.

(2) There were email exchanges amongst the office staff (and with Ms Suttle) in August 2016 which referred to the development of a new version. We infer that EE139 was seeking to improve the forms, with suggestions being that they require a postcode to be provided (rather than simply destination) and that number of passengers be changed to name of passengers. These were changes being discussed at that time.

Payslips

192. We were taken to a number of payslips prepared by EE139 – a sample which was used as an illustration, as well as various actual payslips which had been provided to Officer McConnell at different times during his investigation as well as some disclosed subsequently. The form of these payslips was not in dispute between the parties.

193. A payslip for a particular week records:

(1) Company Receipts - This is the amount agreed between the client and EE139, received by EE139 for the work to be provided by a particular worker that week. All of the payments to be made by EE139 (to the umbrella employee or HMRC, or as its own fee) were funded from this amount;

(2) Company deductions – This box shows how the total of Company Receipts are allocated. These are Employer Costs (a company deduction, calculated on basic pay element, and includes employers' NI and pensions), Expenses (total of allowed expenses that are being used in that week), Margin (EE139's margin, which was 5% of the Company Receipts), Retained Holiday Pay (calculated at 12.07% of basic pay) and the amount Paid to Employee;

(3) Employee payments – Basic pay (at NMW) and Expenses (total of allowed expenses that are being used that week); and

(4) Employee deductions – PAYE Tax and NI, calculated and deducted from the Basic pay.

194. The illustrative payslip showed Company Receipts of £500 from the end client for the week. The fictional employee then receives taxable basic pay of £185.70 and expenses of £261.60. PAYE and NI of £5 are deducted, leading to a "net pay" (ie amount credited to bank account) of £442.30. The payslip shows where the balance of the £500 is allocated (£5.20 for Employer Costs, Margin of £25 and retained holiday pay of £22.50, in addition to the £5 PAYE and NI).

195. This illustration deals with a situation where the expenses being paid match exactly the amount available to reimburse them (once taxable Basic pay had been calculated on the basis of NMW). In reality, this was not the case:

(1) If the expenses claimed and reimbursed were less than the £261.60 in this example, this difference would be paid to the employee as what EE139 describe as a taxable bonus. The additional amount is not separately identifiable as such by a separate line on the payslips, but is paid within Basic Pay. There were some specific examples of this having happened in the bundle (eg MP at Inspirium).

(2) If expenses claimed and to be reimbursed by EE139 were higher, then as the basic pay cannot be reduced (as it is paid at the NMW), the excess is carried forward by EE139 and available to be paid in future weeks (if there is sufficient money being paid by the client in such weeks). This amount of outstanding expenses carried forward is recorded at the top of the payslip. A large number of the payslips in the bundle recorded such carried forward amounts, and several were £2,000-£3,000, with some being higher.

Administration and processing of expenses claims by EE139

196. Payroll software, known as Merit, had been developed for use by umbrella companies. When EE139 launched, they initially decided not to purchase a licence to use the Merit software as it was expensive, and instead used a combination of TASBooks payroll software and Microsoft Excel. Ms Suttle and Mr Jaekel together created an Excel spreadsheet which calculated the taxable element of an umbrella employee's pay.

197. Each week:

(1) clients would send to EE139 a document setting out the work which had been performed by EE139's workers. That document, sometimes referred to as a timesheet, would set out the rate which the client was paying and the quantity (often expressed at a day rate by number of days); and

(2) EE139 received Expense Claim Forms from employees.

198. The office staff at EE139 would then process, using the Excel spreadsheet, a given employee's gross receipts and the expenses. (The approach to dealing with claims for and payment of expenses throughout is set out at [204] to [207] below.) The outputs would then be entered into TASBooks. EE139 would then need to make further adjustments to this to deal with, eg pension contributions.

199. As EE139 started to grow, this process of using Excel, TASBooks and manual adjustments became cumbersome, so they purchased a licence to use the Merit software in around 2007. EE139 was therefore using Merit for their payroll throughout the Relevant Period. Ms Suttle referred to this software as being bespoke, as EE139 had worked with Merit to develop it over a period of time.

200. Initially, Expense Claim Forms were sent by email to EE139, although some employees did make claims without using this form and instead provided amounts and some further information in the body of an email (and such claims were not rejected for this reason alone). For an employee to receive reimbursement, the expenses needed to be entered onto Merit by a member of the office staff. From around May 2013, employees could use an online portal within Merit to submit their expenses, but uptake on the use of this portal was slow, and many employees continued to use the Expense Claim Forms or the body of an email.

201. The office staff would then set Merit to run payroll for the week. The Merit software would automatically send a text to the employees giving them information about their pay. The member of office staff dealing with payroll would then email or print payslips for employees (again, this was largely automated by Merit). Merit would then generate a BACS file, which would be imported onto EE139's banking software and an email would be sent asking for the payment to be co-authorised. All office staff could either import this data or co-authorise a payment – initially only the Appellants could both import and co-authorise a particular

payment, but Ms Robson was also given equivalent authority from October 2010. The office staff dealing with payroll would then (from April 2012 onwards) generate EE139's RTI submission to HMRC for the week through Merit, and the system would file the RTI return using the government gateway.

202. EE139's record-keeping involved filing Expense Claim Forms together for each employee, and the documents for each client. From around April 2014, they moved to an online "drive filing" system, and stored all of this information on a centralised EE139 server. The exception was for expenses claims submitted via the portal, as they were only accessible on Merit.

203. The above sets out the overall process which was adopted by EE139. We now deal with the checking of expense claims by EE139, and how this relates to the processing of them.

204. Ms Suttle's evidence included that:

(1) EE139 gave guidance to employees about the claiming of expenses (referring to the introductory email sent to them as set out at [189]). This guidance included that all claims (other than for mileage and agency expenses) had to be receipted;

(2) the office staff at EE139 were trained on processing of claims;

(3) office staff checked some claims. They were not able to check all expenses claims – they were processing payroll weekly and there was insufficient time to check all claims;

(4) EE139 introduced further checks after receiving the letter from Officer McConnell on 22 October 2014; and

(5) EE139 rejected claims that did not meet the guidance.

205. We have already found that EE139 did send guidance to umbrella employees with the introductory email. However, we also find that:

(1) There was no additional, more detailed guidance given to office staff than this short note that was sent to all umbrella employees. We were not taken to any such detailed written guidance, and when Ms Robson referred to guidance which the office staff had received, she confirmed that she was referring to this document.

(2) There was no formal training given to office staff about allowable expenses, or about the nature of the jobs that were being undertaken by the umbrella employees for different clients. They were trained on how to use the Merit software to process expenses and generate payroll. Office staff could raise questions they may have had as to particular claims with Ms Suttle, or Ms Robson after she became team leader in 2012.

206. We make findings in relation to agency expenses at [262] to [265] below. At this stage, we record our finding that agency expenses were amounts that were paid by EE139 to umbrella employees in certain circumstances (based on payments that were made by clients to EE139) and did not necessitate a claim being made for them. We base this finding on the absence of any documentary evidence of such claims being made or required, explanations provided by Chartergates and the evidence of Ms Suttle.

207. We make the following findings in relation to EE139's approach to expenses claims:

(1) EE139 accepted claims for processing that were made by Expense Claim Forms, in the body of an email or (later) on the online portal.

(2) EE139 did not check the vast majority of the expenses claims which were submitted. Claims that were submitted but not checked were paid to employees as non-

taxable reimbursement of expenses or AMAPs (with no distinction being drawn between these forms of payment on payslips).

(3) At the beginning of the Relevant Period, all expenses claims were received by way of an Expense Claim Form or in the body of an email. After May 2013, this continued alongside some claims being submitted by employees using Merit's online portal.

(a) For claims submitted using the Expenses Claim Form or in the body of an email, any check was conducted at the time of entering it onto Merit. Office staff were not checking every form or email, and where a form or email was not checked it was processed by entering it onto the system (which led to it being reimbursed). If the claim was checked and the office staff decided it needed to be rejected, eg on the basis that there was no receipt, it was not entered onto Merit. The form was, however, retained in the file together with other expenses claimed by that particular employee.

(b) For claims submitted using the online portal, EE139 could then tick or untick a box to state whether the claim was accepted or rejected, or if a receipt required had been provided. However, the office staff were not checking every claim to make an individual decision as to whether to accept or reject. Claims were only rejected if they were subject to a manual spot-check and the decision taken to reject. Otherwise, they were accepted and processed.

(4) EE139 did make some spot-checks, but this involved a very small minority of the expense claims submitted. EE139 had identified by February 2014 that there were significant deficiencies in its approach to processing of claims (and this had led to their decision to employ Mr Tomlinson). Even when EE139 sought to improve its processes after receiving the letter from Officer McConnell in October 2014, they only aimed to check 10% of claims which had been processed (ie after the event) with a view to identifying whether any claims had been wrongly accepted, and Ms Suttle's evidence in relation to Mr Tomlinson's time spent on providing documents to HMRC and his absences leads us to infer that EE139 did not achieve this intended level of checking.

(5) Ms Suttle was critical of the approach adopted by Officer McConnell in his investigation, saying that he had equated a claim being made by a worker with it being accepted and processed by EE139 and then reimbursed. We have approached the documentary evidence before us very carefully when making our findings about checks and rejections. Where EE139 did check expenses claims by way of spot-checks:

(a) The office staff did check whether receipts had been provided. They did reject claims where they identified that there was no receipt or if all that was provided was a non-itemised credit or debit card receipt. This could be seen from emails in February and March 2016.

(b) EE139 did identify some claims for non-allowable expenses, which were rejected eg grocery shopping, van mats, diesel, restaurant meals at weekends and parking fines. There were, however, very few examples of claims being rejected (to which either we were taken directly or which were referred to in evidence or submissions) – there was a range of dates, from 7 June 2013 to January 2016, and two or three of the emails to relevant employees explaining the rejection were from Ms Suttle.

(c) If the claim was for AMAPs, EE139 did check that the employee had been working that week, ie was not on holiday. However, they did not ask employees about the vehicle they were using (and Ms Robson was not aware that the vehicle

needed to be the employee's own (or one they had hired themselves) rather than one provided to them by the client, from which we infer that the other office staff processing claims would not have been aware of such a requirement either). Prior to October 2014, there were no checks to assess whether mileage claims were accurate – the office staff would just process the mileage which was claimed. Ms Suttle and Ms Robson both gave evidence that after Officer McConnell started to raise questions about mileage the office staff started to check distances claimed by using Google Maps (or MileCapture app). However, there was no specific evidence about the timing of this (and we infer these changes did not start to be introduced until mid- 2015), the checks were only made on a random spot-checking basis (not necessarily checking the largest claims). Furthermore, it remained the case that office staff did not know where the employees were working or about the number of sites visited on any day, so did not know if it represented allowable mileage – they could only check that the number of miles was consistent with any postcodes provided. They then processed and paid this mileage (without asking employees about the totals). We do not accept Mr Jaekel's evidence that EE139 automatically checked claims over 500 miles per week – this was contradicted by Ms Robson's evidence and we consider that she was better placed to know what was actually being done as regards processing and checking by the office staff who were dealing with the claims.

(6) As regards the claims for AMAPs:

(a) There was no documentary evidence before us of any claim for AMAPs having been questioned by EE139 before it was processed on the basis either as to the number of miles claimed or ownership of the vehicle used.

(b) EE139 processed claims for AMAPs where there were minimal details on the Expense Claim Form, eg no vehicle registration number, description of journey being "work" or "various" and mileage not broken down into daily amounts. This was still the case in 2016, after the Relevant Period, eg a payslip for week ending 14 September 2016, where the registration number had been obviously incorrectly filled in using the employee's registration number with EE139 rather than vehicle registration, and description was "going to work" against a claim for 1,500 miles. This claim for AMAPs was paid by EE139.

(c) There were a few examples, from the very end of the Relevant Period, of EE139 refusing to process a claim for AMAPs which had been submitted in the form of an email rather than using the Expense Claim Form, eg one rejection by email on 29 March 2016 to PB.

208. The Returns were generated by Merit. The P35s show each employee's taxable income, PAYE and NICs. When these were produced, Ms Suttle checked that they showed for all employees the NI numbers, addresses, dates of birth, and that the totals matched what had been paid to HMRC. EE139 did not conduct further checks on the amount shown as taxable income at this stage, ie looking back at the split between basic pay and expenses. Merit was then used to generate the P60s and P14s. Merit generated the RTI returns during the RTI Years.

209. The P11Ds (which HMRC have not pleaded as being inaccurate) were completed manually by EE139, using information from Merit. P11Ds did not include the amounts of AMAPs.

Evidence in relation to four of EE139's clients

210. During the Relevant Period, EE139's clients included businesses in the telecoms and overhead power lines sectors. In some instances, their immediate client was another intermediary, eg Capital Outsourcing, which then supplied the workers to another business (eg Kelly's, which worked in the telecoms sector).

211. As part of his investigation, Officer McConnell asked questions of four of EE139's clients, Client S, Client P, Client N (each of which worked on overhead power lines) and Client D (telecoms), and we had documentary evidence of the responses (whether by way of meeting notes, notes of phone calls (in both cases prepared by Officer McConnell) or email exchanges) – these address the factual questions at issue in these appeals. The evidence as to EE139's arrangements with these clients and the work performed by the umbrella employees (whether as to hours worked, or ownership of vehicles) was not confined to these responses. We also had evidence from the Appellants in relation to these matters (including evidence and submissions challenging the notes exhibited by Officer McConnell), and various documentary evidence in relation to specific employees working for them. We have taken all evidence into account for each client, but do start by recording for each client the information they provided to Officer McConnell before then making our findings of fact.

212. Three of the four clients questioned by Officer McConnell were, as stated above, working on overhead power lines, a sector which EE139 moved into from September 2012. We did also have other evidence in relation to umbrella employees in the telecoms sector (not just Client D, but also workers supplied to Capital Outsourcing and SDH).

Client S

213. HMRC had a meeting with Client S on 12 June 2014. That meeting was attended by Officer McConnell and Claire Scullion of HMRC, GH (director) and KMcC (accountant) of Client S.

214. HMRC's meeting notes record that:

> (1) Client S started in March 2012; GH is the director and shareholder, MH is the operational director and SH was commercial director. Their office is in Wetherby, near Leeds. They work on refurbishment and installation of overhead power lines. All the work is carried out in Northern England, although they were expecting to move into Scotland shortly. Their current contract was with Morrison Utility Services, who would have contracts with many of the utility power and water companies. Both MH and SH had previously been employed by Morrison's.
>
> (2) The company owns two vans which are used to transport men to site. All other vehicles including additional vans, cherry pickers, lorries, diggers and trailers are either rented from Morrisons or from a local hire company 2Rent.
>
> (3) The company has three direct employees, all other labour is sourced and provided by EE139. Currently 17 workers were supplied by EE139, and the reason for this was they had tried to recruit directly and been unable to do so. Officer Scullion asked if they ever found workers and referred them to EE139 for payment purposes but they said this was not the case. They reverted to this subject later in the meeting and it was again confirmed that none of the workers had originally been sourced by either Morrison's or Client S and then referred on to EE139.
>
> (4) They did not have a copy of the contract with EE139 to hand, but Client S did identify that there was a "digs" allowance included in the payment to EE139 for each worker, but they did not know what the amount was. KMcC said he had not even received an invoice from EE139, and assumed SH would have something.

(5) The type of workers included linesmen, digger drivers, general labourers and one planner. The planner, NH, worked within Morrison's offices planning the work.

(6) Workers came from all parts of the UK and Ireland and tended to work either five days on two days off or ten days on four days off. They all worked a ten-hour day and would have to report to Morrison's premises in Leeds every morning where they would be picked up and driven to a particular site. During a typical day they would visit one particular area which may involve the replacement of one or two poles. Only the earth guys whose job is to cut the power at the transformers would be required to travel to several sites during the day, however this would still tend to be within the same area.

(7) On the question of timesheets, GH said that all he knew was that EE139 employees kept these.

(8) They only paid for the flights home for all the Irish employees of EE139.

215. Client S is a small company, with three direct employees. The meeting was with the director and shareholder – Officer McConnell was undoubtedly meeting with those who could tell him about how they used employees from EE139 and how Client S conducted its business.

216. In his witness statement Officer McConnell summarised these notes (and exhibited them) stating that Client S had confirmed that the employees worked ten-hour days, they owned two vans which were used to transport the workers to site, and all other vehicles were hired.

217. Officer McConnell did not mention the explanation he was given about workers being supplied by EE139. Client S told him that EE139 "supplied" their workers, and specifically denied that they (or Morrison's) found workers and referred them to EE139. At the July 2014 Meeting, Ms Suttle told Officer McConnell, in the context of how EE139 obtained workers, that one way was "as in the case of Client S the end client would obtain the workers and then ask EE to employ them on overarching contracts". We have found that Ms Suttle's explanation was correct. There was no evidence before us as to why Officer McConnell did not tell EE139 that he had received contradictory information on this matter (given that he did tell them that clients told him at workers did ten-hour days rather than six-hour days) or if he had identified that Client S was telling him contradictory information.

218. In addition to various expense claims made by workers supplied by EE139 to Client S and payslips, we also had a copy of a charge sheet prepared by Client S for CS (one of the initial sample of 12) that had been sent to EE139. That charge sheet was prepared on a day rate basis, with no mention of hours worked.

219. We make the following findings of fact in relation to workers provided by EE139 to Client S:

(1) There was a digs allowance included in the payment to EE139 for each worker. On the basis of the payslips of workers provided to Client S, this was £200 per week and was paid to workers as agency expenses, and was pro rated where a worker worked fewer than five days in a week.

(2) Employees provided to Client S worked a ten-hour day (on the basis of the meeting notes).

(3) Client S did not provide timesheets recording the number of hours worked each day by the workers to EE139.

(4) Workers used their own vehicles to travel between home and the depot each day. Whilst the meeting notes refer to Client S having two vans, these were said to be used to transport workers to the site, and we infer this was from the Leeds depot to the site and

back. We do not consider it feasible that the other leased vehicles, eg cherry pickers and lorries, would have been made available for workers to travel home in, particularly given the uncertainty as to where the employees would leave them overnight.

(5) Workers did not use their own vehicles to travel from the depot to sites or between different sites during one day – either there was no such travel, or if there was then it was in Client S's vehicles (either its own vans or the leased additional vehicles).

Client P

220. We had an exchange of emails and a note of a telephone conversation between Officer McConnell and CO'N, the director of Client P. CO'N had sent various documents to HMRC, one of which is a timesheet listing a number of workers for the week ending 11 July 2014. It is labelled as a sample timesheet for EE139. That sheet lists all named workers as working ten-hour days, and specifies various charge rates. These charge rates are all presented as sets of, eg, basic, overtime 1 and overtime 2, and are per hour. The named workers include the three selected by HMRC, KM, CZ and AC.

221. Officer McConnell spoke to CO'N on 14 August 2014. We had Officer McConnell's note of that conversation. That note records:

(1) Client P is in the overhead power industry. CO'N used to work for Leven Energy but set up on his own as a sub-contractor to Leven. He could offer workers work in Manchester, Cornwall and the Lake District. Client P has two employees, CO'N and a secretary. As well as working out of the company premises in Barnsley, he also works out of an office in Leven.

(2) He supplied all vehicles and equipment. Vans are hired from Northgate and he owns two lorries. No vehicles are supplied by Leven.

(3) When asked whether the workers would have used their own cars to travel to sites, he said some might but he held no records.

(4) He would have about five crews of between two and four men and each crew would service about 18 sites a day. There would be sufficient seating in the vehicles provided for all members of the crews.

(5) Rates per day varied according to the job skill. There were three categories – foremen, linesmen and digger drivers.

(6) Officer McConnell pointed to the ten hours recorded each day on the timesheet. CO'N said he used a 2nd sheet, based on a daily rather than hourly rate. The time sheet recording hours and hourly rate was from EE139 which was completed and returned by his secretary. He confirmed that the workers did work ten hours a day as recorded and that the hourly rate recorded was the rate applicable to the job carried out by the worker.

(7) Workers were mostly from Northern Ireland and would generally fly in on Monday and return to Northern Ireland on Friday. He estimated that around 95% of the total workforce would fly. Some workers would also use the ferry. He had nothing to do with these costs.

(8) Some workers might have worked ten days on and four days off, some might have worked continuously. These different working patterns would have been rare.

(9) No accommodation was provided by Client P. Only exceptionally during storm work would the power companies provide accommodation. Generally, the workers would stay in B&Bs, pubs, etc. They would also have to pay for their meals. He assumed they would have kept receipts and presented these to EE139.

(10) The workers would report to various depots daily. Depots could be owned by Leven or one of the major power companies. He was allowed to keep his equipment vehicles at these sites. Line managers employed on the books of EE139 would oversee. Instructions would come from power companies and Leven and these would be agreed between himself and representatives of these companies. Daily work sheets were all hard copies.

222. The record of the telephone conversation was sent to CO'N afterwards, and he was asked to read and make any amendments and clarify if the same workers always report to the same depots each morning. CO'N replied on 20 August 2014, saying he wanted to clarify some of the points noted, including:

(1) The hourly rates on the timesheet are the rates they, Client P, pay EE139 for their services. This may not be the same as what they pay their own employees.

(2) They do not record the number of hours worked per day by an employee, they simply record their attendance and if the issue was completed. The work is issued on a "job and knock" basis so the guys on site could be working considerably less hours per day if they are productive. The ten hours documented on the timesheet is for record purposes only and is simply used as a division of the agreed day rate.

223. Officer McConnell emailed asking for clarification, saying "surely in order to maximise your profit you will make sure that the jobs per day will involve a full days work. Why did you put 10 hours and not 8 hours for example. When do the employees normally leave the depots? When do they normally return." He also asked him to identify the workers that fly in every week.

224. CO'N's response was that ten hours is just a measure they use, it could be six hours or ten hours, always a day rate is paid. Client P get paid on a day rate so as long as the required productivities are achieved it doesn't really impact them. He did not provide any start and finish times, stating that work is started first thing, from various depots and they return when the programmed amount of work is complete. He doesn't know who flies – from chats with them, most of them are flying but he has no record.

225. There is then a further email from Officer McConnell on 22 August 2014, referring an earlier discussion (of which there was no other record before us), stating "Can you confirm that the workers start at 7am every day and work through until after 4pm. They would never work less than 8 hours a day and would often work more than the 50 hours recorded on the time sheets." CO'N sent a short email on 27 August saying "I can confirm you are correct in which you are saying below."

226. From this, Officer McConnell set out in his witness statement and correspondence that Client P had confirmed they supplied all vehicles and equipment, workers worked a ten-hour day and a timesheet was provided by the director and emailed to EE139 each week.

227. The other documentary evidence before us included expense claims made by various workers, payslips and DVLA records.

228. We make the following findings of fact in relation to workers provided to Client P:

(1) Workers supplied to Client P were paid on the basis of a day rate. They were also paid agency expenses of £200 per week (on the basis of the payslips of workers provided to Client P).

(2) The payment per day meant that Client P did not necessarily need to keep records of the number of hours worked. We find that Client P did not send timesheets to EE139 specifying the number of hours worked per umbrella employee. We accept that the

sample timesheets in the form provided to HMRC were used as standardised documents and were not seeking to record actual hours (as they record ten hours for every named employee for every working day).

(3) Client P did have the means to find out and record the number of hours worked by the umbrella employees each day. Whilst CO'N's email of 27 August 2014 confirming that workers never worked less than eight hours, and often more than ten hours per day, is unambiguous on its face, we have carefully considered whether to take this at face value. It is apparent from the correspondence that Officer McConnell was pressing CO'N to confirm that employees worked ten hours per day (as had been shown on Client P's timesheet which they had provided to HMRC). Officer McConnell kept asking the same question, and the first confirmation which had been provided (on 14 August 2014) had been by reference to the timesheet. We find that workers did work not less than eight hours per day (but go no further than this).

(4) From the explanation provided to Officer McConnell, we find that umbrella employees were using vehicles supplied by Client P to travel between sites during the working day.

(5) As to vehicles used to travel from home to work, CO'N's evidence about the proportion of workers who would fly from Northern Ireland each week would suggest that those workers would be likely to stay locally to the depots to which they would be expected to report (assuming this was known in advance), and would be less likely to have access to their own private vehicles. However, of the three Client P employees in the sample of 12, none had addresses in Northern Ireland – AC's was Cardiff, KM was Powys and CZ was Torquay – and there was no evidence that these were temporary addresses or that they otherwise lived in Northern Ireland. The vehicle that CZ declared he was using was registered to him, whereas the vehicle declared by AC was fleet hire (which could in theory have been leased by him or by Client P and supplied to him). Whilst we accept that some umbrella employees supplied to Client P were flying from Northern Ireland, we consider that the picture was more mixed than that conveyed by CO'N. We conclude that some employees were using their own vehicle to travel from home to depot, whereas others were supplied with a vehicle by Client P.

Client N

229. Officer McConnell obtained information about Client N from KM, the company's accountant. Client N installed and maintained overhead power cables in England.

230. The email from KM set out that Client N worked for Morrison's and Leven, on overhead power lines. Client N worked anywhere in the UK, machinery is provided by Client N. Workers are costed at a daily rate, but this is up to EE139 – Client N do not supply timesheets to EE139. On a Monday morning, workers report to site, where that site is varies from job to job. Start and finishing times vary. Workers make their own way to site. Workers use their own vehicle to travel to site, and the amount of site visits per day varies, it could be anything from one to ten sites per day.

231. On 20 January 2015 KM had said vehicles are kept in a yard on site or secure storage close to site, in the last six months Client N had worked in Yorkshire, Durham and Derbyshire. Client N does not work for customers on an amount per man per day, but for an agreed price per contract. Start and finishing times can vary.

232. There was a telephone conversation between Officer McConnell and KM on 12 February 2015, after which Officer McConnell sent questions to KM. Officer McConnell asked KM

about the vehicles used, and for confirmation that workers worked a minimum of nine hours a day five days a week.

233. KM responded on 5 May 2015 by email setting out:

(1) The workers provided by EE139 drive company vehicles. At night they are stored at a secure yard with no personal use of the vehicles.

(2) Workers are paid on the basis of day rate/price per job as agreed between Client N and EE139.

(3) Officer McConnell asked if workers would work a minimum of nine hours a day five days a week. The response was that on most days they would work full days but all depends on the job being done. There is a job of work and they engage EE139 to provide the labour service until the job is complete.

(4) He does not have access to the names of the workers for which the flights are paid. There is just an agreed rate between Client N and EE139 for the supply of services on any particular job. Flights would not be invoiced as a separate item.

234. Officer McConnell recorded in his witness statement that workers used company vehicles to travel to site, and employees did work full days (nine to ten hours) most days.

235. We make the following findings of fact in relation to workers provided by EE139 to Client N:

(1) Client N paid EE139 for workers on the basis of a day rate.

(2) Client N's accountant would not confirm that workers worked nine hours per day, instead referring only to full days. We do not consider this supports Officer McConnell's conclusion that they were working nine to ten hours, but accept, on the basis of general working practices, that they were working not less than eight hours per day.

(3) Client N did not provide timesheets recording the number of hours worked to EE139.

(4) Workers used their own vehicle to travel between home and the relevant depot each day.

(5) During the working day, they then used vehicles provided by Client N to travel between sites, and this could be anything from one to ten sites per day.

Client D

236. Officer McConnell wrote to Client D on 24 May 2016 explaining he was making contact to obtain information about their use of intermediary businesses and temporary labour. There was a call with SG of Client D on 27 June 2016. Officer McConnell's note of that call sets out:

(1) Client D is within the telecoms industry; they work for KN Networks, who work for BT. The work involves putting fibre cabling into homes and surveying.

(2) The contract with KN is for the supply of usually two men, a van/fuel and hand tools. They do not own any of the vans but hire them on a weekly basis from West Wallasey Fleet Hire. They might have anything up to 40 vans on the road at any one time. Vans hired would be transit size and would have no equipment.

(3) They would supply ladders, but any cabling materials would be picked up at KN/BT depots. Client D supplied the mens' belts/kits.

(4) Fuel was provided – workers are provided with an All Star fuel card.

(5) G was her sister's company. G did overhead cabling. As her sister did not have any credit facilities when starting her business, Client D supplied her with the vans/fuel/labour. This has now ceased since September/October last year.

(6) When asked about the labour, SG said they had around 8-10 on PAYE. As a lot of the work was reactive and fluctuated from week to week, they also used labour providers. The main one was EE139; she estimated that EE139 supplied between 20-30 employees. She also identified other external providers.

(7) She had never checked payslips or PAYE but had been with EE139 for years without any trouble.

(8) When asked how the workers were hired, she said that they would advertise but generally it was by word of mouth. When the worker contacted them, they would have to provide ID. They would then be asked to use a payroll company and most chose to use EE139. No contract would be drawn up between the worker and Client D.

(9) The fleet hire company would normally deliver the vans to the worker's house, or the worker might agree to pick it up at a yard after they had received their induction.

(10) When asked if any of the workers supplied by EE139 would use their own vehicles, SG said that there would be a few and that they would be on a higher rate. She said she could identify these individuals.

237. There was then some follow-up by email. On 12 September 2016 SG emailed Officer McConnell and provided:

(1) documentation relating to the workers including names/rates of pay/amounts paid; and

(2) a list of contractors who provide their own vehicle. The remaining staff named in the schedules were either provided with a vehicle by Client D or the end customer.

238. SG responded to follow-up on 14 October:

(1) Drivers providing their own vehicle receive a premium rate, £20 a day more, but she acknowledged this was difficult to see from the schedule.

(2) They do not keep records of exact hours worked, however the standard working day with their clients is from 8am to 4pm Monday to Friday and staff would be expected to work within these hours.

239. Officer McConnell concluded from this that Client D provides vans to workers, as well as a fuel card. There is a list of employees paid by EE139 who were also supplied with a company van and fuel card. Yet all Client D workers employed by EE139 identified as having been provided with a van and fuel were receiving mileage allowance.

240. We had various expense claims and payslips for umbrella employees within the samples, but also had the following:

(1) For AT at Client D, there was a timesheet which showed the contract amount being paid by Client D to EE139 for each week for AT. That showed a Daily Rate of £150, with five units being paid most weeks, four in others (consistent with a pattern we would expect around bank holidays), and then a number of units of different rates, which we infer were hours worked at different overtime rates. In the payslips the total amounts were shown in Company Receipts, with Daily Rate (5 x £150), Normal Time at two different rates (16 x £19.50 and 10 x £24). Basic pay was £353 in one particular week, up from £189 in a different week when no such additional "Normal Time" payments had been made by the client to EE139. The increase in additional pay can only be explained

as based on knowledge of hours worked, as the level of expense claims, coupled with the ongoing carry forward of expenses, meant that there was no surplus in the contract.

(2) There was an email exchange on 11 February 2015, in relation to the hours worked by a particular worker. Client D sent a copy of a payslip to EE139 that had been issued to PB. The email (from Client D) said he was contracted to work 15 hours per week, whereas his current payslip shows 40 hours per week which was said to be incorrect. Client D asked that his payslips reflect the 15 hours. The response was from Ms Suttle, asking Client D to detail the hours worked on the schedule that they send to EE139 to ensure that the correct hours are applied when calculating the wages.

(3) We had a document which Client D had sent to Officer McConnell, headed "Earn Extra payroll schedule", listing 43 employees for a week in August 2016 and pay rates (which is expressed as a single total amount). The amount differs between the employees, and we infer it already reflects any difference in rates of pay and also the number of days worked. There is a column which is part of that table headed Additions, with amounts varying from £20 to £308. There are then further columns on the document (separate from the table), marking "own vehicle" against seven names. We find that the table headed "Earn Extra payroll schedule" was provided to EE139 each week. We accept that it didn't have the further columns in relation to vehicles – Ms Suttle didn't recall seeing them, and the emails between SG and Officer McConnell indicate that these additional columns had been added by her to illustrate her explanations to him.

(4) There was a time sheet for two workers for the week ending 17 July 2016, recording number of hours worked each day, relevant rates per hour, and that shows that they were working more than 50 hours per week

241. We make the following findings of fact in relation to workers provided to Client D:

(1) Workers were working not less than eight hours per day.

(2) Client D kept records of the hours worked by employees. They provided pay schedules to EE139 which recorded total amounts to be paid and did not generally specify the number of hours worked. Client D did provide to EE139 the number of hours worked for some employees, including in situations where the relevant employee questioned their payslips (eg PB) or, we infer, where employees had worked overtime hours in a particular week (eg AT).

(3) Client D provided vehicles and fuel cards to most of its workers. The fleet hire company used by Client D delivered the van to the worker's house, or worker might collect from a yard after their induction. We infer from this that the vans provided were being made available for use by workers to travel from home to the sites, as well as for their use during the working day.

Whether understatement of hours worked

242. HMRC's case included that EE139 was understating the hours worked by employees when it paid them basic pay calculated at NMW per hour for six hours per day, and that EE139 knew that this was the case as it had timesheets.

243. We find that EE139 generally paid employees basic pay (ie the taxable element of the amounts paid to them) calculated at NMW per hour, for six hours per day. This was evident from many of the payslips before us, eg JB at Inspirium, where Inspirium was paying EE139 a daily rate of between £107 and £182 per day, but taxable pay was £189 each week.

244. Ms Suttle's evidence was that taxable pay paid to employees would be higher than this in two situations:

(1) If EE139 received (we infer from clients) details of hours worked, they would pay for actual hours; sometimes a client would send a timesheet to EE139, and they would use this information.

(2) If expenses claimed by an employee were relatively low such that there was money left from that which had been paid by the client to EE139, the surplus or excess would be paid as a taxable bonus (in addition to the payment of basic pay calculated on the basis of NMW per hour for six hours per day).

245. We find that both of these scenarios did take place. We have already found that the situation in [244(2)] did occur. We also find that EE139 did pay some employees on the basis of actual hours that differed from six hours per day, eg:

(1) MH at Capital Outsourcing was paid at three different hourly rates for a total of 26 hours in the week ending 6 April 2014 (plus a "client bonus" of £150),

(2) PJ at Client N was paid for 54 hours at two different hourly rates, and

(3) AMcK at Capital Outsourcing was paid for 19 hours at two different rates.

246. We would add that where EE139 paid employees on the basis of actual hours worked, our own review of all of the payslips in the bundle leads us to conclude that in many of these instances the result was that taxable pay was of a lower amount than would have been the case using the default approach of six hours per day. Furthermore, whilst Mr Ripley submitted that there were numerous examples of EE139 having paid workers on the basis of different hours specified on a timesheet, we would say there were just some examples.

247. We have found above that EE139 generally paid employees at NMW for six hours per day. We make findings here as to the decision to pay on this basis, and whether EE139 generally received timesheets recording (a higher) number of hours worked by employees.

248. We accept the Appellants' evidence that the initial reason for using six hours per day was that which was given to HMRC in the July 2014 Meeting, namely that within the telecoms sector, each fault or referral was assumed to take on average two hours, and workers were expected on average to fix three faults per day. Clients would pay EE139 a day rate, but the Appellants' understanding of work in this sector was that engineers would attend multiple sites in a day, complete three jobs per day, taking two hours each. This resulted in EE139 deciding to pay employees for six hours per day at the NMW. This number of hours was then set within Merit (in around 2009-2010) as the standard number of hours for workers who were paid on a day rate (and Ms Suttle denied this was an anomaly, as it had been described by Chartergates in their letter of 5 February 2016).

249. We accept the Appellants' evidence that at the time this number of hours was set as the standard or default rate within Merit, around 90% of EE139's business was with telecoms clients. They started to provide workers to clients in the overhead power lines sector in September 2012.

250. We have made findings as to the hours worked by employees for four of EE139's clients:

(1) Client S – ten-hour days;

(2) Client P – not less than eight hours per day;

(3) Client N – not less than eight hours per day; and

(4) Client D – not less than eight hours per day.

251. We had some additional, somewhat isolated, evidence for other workers:

(1) The Employee Questionnaire asked employees how many hours per week they were contracted to work. There were just eight responses, and these were – varied (two responses), 40 hours, minimum 30, 30 to 40 (three), not given any. Four of these workers who responded were working for Quinn's in the telecoms sector (with EE139's client being, we infer, Capital Outsourcing) and their responses were mixed across this range – varied, minimum 30, 30-40 and not given any.

(2) RI at SDH, a telecoms worker, had worked 31 hours in one week in July 2015.

(3) SH at Capital Outsourcing, who was working for Kelly's, told HMRC in a NMW questionnaire that each single job would take from one hour to three hours depending on how difficult the individual job was, and on average he would carry out three jobs per day. He said his working day always started at 8am, and most of the time ended at 6pm, although it did vary depending on workload.

252. On the basis of the evidence before us, we are satisfied that HMRC have established that generally umbrella employees were working more than six hours per day. This finding applies to all umbrella employees, and is not confined to those in the overhead power lines sector.

253. Addressing additional evidence as to how this divergence between the default rate of six hours and the actual hours worked occurred:

(1) Ms Suttle acknowledged that this default setting may have been used when it was less clear that the employee would have been working for six hours per day. The move into powerlines was several years after the Merit software settings had been set up. She described this as an unintentional oversight on EE139's part.

(2) Ms Suttle's evidence went further, and she accepted that even in July 2014 she knew this was not accurate for workers in overhead power lines (and they had been in this sector since September 2012) and said she had told Officer McConnell that they realised they needed to adjust the methodology. We find that this same information was known by Mr Jaekel – he maintained relationships with clients and spoke to them directly (and was thus even better placed than Ms Suttle to be aware of this) and he was present at the July 2014 Meeting where Officer McConnell told them that Client S had said workers did ten-hour days.

254. Ms Suttle's explanation for any understatement of hours (which was not admitted for the purposes of this appeal) was essentially that EE139 did not have more accurate information for specific employees (saying that the employees' admin was poor) and that clients did not generally provide them with details of hours worked on timesheets (but they did use this information where they had it).

255. Ms Goldring submitted that there must have been timesheets, and referred to a button on Merit for timesheets; and that we should be cautious of Ms Suttle's evidence to the contrary because of the advice EE139 had been given by Accountax in 2006 (in particular around disclosure of information). Mr Firth's submissions included that the evidence as to the four clients did not support the conclusions reached by Officer McConnell and that HMRC had not produced the required evidence as to actual hours worked by specific employees.

256. We have considered all of the evidence relating to whether EE139 received timesheets recording the number of hours actually worked by employees. In this regard:

(1) At the meeting in March 2006 (which was attended by both Appellants), Accountax had advised EE139 that if there was a VAT enquiry then EE139 should only give HMRC access to the accounts, and if asked for timesheets they must say that they were unable to locate them and ask HMRC to put the request in writing.

(2) The sales and marketing packs which were developed and used by Mr Jaekel when he met with new and existing clients included a series of documents. One of those, "Extra News Update", referred to timesheet management, and another "Earn Extra Contractor Support" refers to employees being able to submit timesheets at their convenience. Mr Jaekel said that whilst he used these documents, he wouldn't necessarily have handed all of them over; he did not accept that these documents meant there were timesheets (by inference, recording hours worked).

(3) We were not taken to any forms which an employee would complete and return to EE139 to record the hours they had worked. Furthermore, Ms Suttle's evidence, in various contexts, was that employees were generally poor at providing paperwork and documentation, and generally EE139 would take the approach that they should approach the clients with questions, not employees.

(4) The screenshots of the Merit system show the online portal which was used by employees to claim expenses. They show a button for timesheets, and this was included within the technical specification which had been agreed between EE139 and Merit. Ms Suttle's evidence was that this functionality did exist within Merit, but that it was an optional add-on and EE139 had not paid for it to be included within its licence. Mr Jaekel's evidence was also that employees couldn't enter timesheets on the portal.

(5) There were various references to EE139 receiving a document or schedule from clients which recorded all the people that had to be paid, and what amount, which was then input into Merit. That document was sometimes referred to as a timesheet; but it was not clear from these references that this would necessarily include information as to hours worked. Ms Robson's evidence was that she didn't recall seeing hours worked on schedules from clients.

(6) As regards the four clients focused on by Officer McConnell, we have found that:

(a) Client S did not provide timesheets recording the number of hours worked each day by the workers to EE139.

(b) Client P did not send timesheets to EE139 specifying the hours worked per umbrella employee.

(c) Client N did not provide timesheets recording the number of hours worked to EE139

(d) Client D kept records of the hours worked by employees. They provided pay schedules to EE139 which recorded total amounts to be paid and did not generally specify the number of hours worked. Client D did provide to EE139 the number of hours worked for some employees, including in situations where the relevant employee questioned their payslips (eg PB) or, we infer, where employees had worked overtime hours in a particular week (eg AT).

(7) In the context of being taken to expense claims and payslips of various employees within the sampling exercise, the bundle contained various charge sheets which appeared to have been produced by the end clients and sent to EE139. Those were considered in the context of making findings for the four clients, above.

(8) The picture which emerged from the emails about particular employees is mixed – there are references to timesheets being needed for various clients, but on only one of the four clients below does it appear that the worker was to be paid by hours worked, or that hours were being recorded:

(a) An email from Mr Jaekel of 3 October 2013 to the accounts team, regarding GTL Europe Ltd, with key details of GTL and an employee SP who had started working there. On Invoicing, that says that SP will submit his timesheet weekly to GTL for authorisation purposes. There is then a reference to the September Invoice, which says that SP has sent his timesheet for September and he has worked nine days, and specifies the daily rate.

(b) Then an email of 10 October, in similar format, from Mr Jaekel, about PH returning to EE139 and working on an assignment with Ceema Technology. On invoicing, it is said that the invoice must contain the worker's name, amount of hours worked and at what rate. There is then a reference to the first invoice for the previous week, where he worked 23.75 hours at £10 per hour.

(c) There was an email of 30 October 2013 about a new client, MLS Systems. In invoicing it is said that the company will pay monthly. There is no reference to timesheets, days or hours.

(d) There was a further email of 28 August 2014 about a new client, Fuel Recruitment. On invoicing, it specifies that it is the worker's responsibility to get his timesheet signed and in to Fuel Recruitment. There is no need for EE139 to invoice Fuel, as they operate a self-bill system. If the timesheet deadline is missed, the worker gets paid the next week, and this particular individual's rate is £250 per day.

(9) Where clients were paying day rates to EE139, there was said to be no commercial need for clients to record and inform EE139 of the number of hours worked. This is not necessarily correct – commercially, clients should want to ensure that the workers were paid the NMW for the hours worked; and to be satisfied that employees were working for the number of hours that the client had assumed when calculating the day rate it was prepared to pay.

257. Taking account of all of the evidence before us, we are not satisfied that EE139 was routinely provided with timesheets (from clients or employees) which informed them of the number of hours worked by specified employees. Sometimes documents labelled or referred to as timesheets existed and were sent to EE139, but did not record this level of information; they could equally have been described as a pay schedule.

258. We have concluded that where EE139 was provided with a timesheet which recorded actual hours worked by a specified employee in a particular week, the basic taxable pay of that employee was calculated using these actual hours.

Expenses

259. The correspondence from Officer McConnell identified concerns or questions in relation to the agency expenses paid by EE139, AMAPs (as to distances travelled and ownership of vehicles) and other expenses reimbursed to employees. All of these amounts were paid to employees as non-taxable payments. Whilst AMAPs are not reimbursement for expenses incurred, neither HMRC, EE139 nor the Appellants have generally drawn a distinction in terminology (save where the Appellants rebut Officer McConnell's statements as to employees effectively working at a loss on the basis of mileage claimed) and where we refer to HMRC's challenges as to expenses claimed, we are also referring to claims for AMAPs.

260. We have already described, in the context of setting out the correspondence with Chartergates, the concerns raised by Officer McConnell. Those concerns (or challenges) were maintained by HMRC in this appeal. We do not lose sight of the submissions made by Mr Ripley and Mr Firth as to the basis on which HMRC subsequently issued the Assessments to

EE139, or that the expense claims made by employees are not themselves PAYE documents for the purposes of Schedule 24. We do make findings in relation to the claims and entitlements to expenses.

261. We first refer to three payslips simply to illustrate some of the challenges which were being put by HMRC:

(1) MA at NGIS was claiming AMAPs in a particular week of £672.50 based on his declaration of miles travelled. Yet the net amount paid to him that week (ie including AMAPs and reimbursement of expenses) was £546.38 (with some of the expenses claimed being carried forward). Officer McConnell's conclusion was that this meant he was working at a net loss; and, by implication, this cannot be what was happening. The Appellants disagreed, referring to AMAPs as being payments in line with statute that did not necessarily reflect actual expenses incurred, and drawing attention to the absence of direct evidence of, eg, likely cost of fuel for this level of mileage.

(2) JF was submitting claims for daily mileage of 350 miles, with his payslip showing basic pay of £177, and expenses of £876. HMRC challenged the proportion of pay represented by reimbursement of expenses.

(3) Employees built up large amounts of carried forward expenses, where there was no visibility as to what this comprised of, and where there was not enough money in the contract between EE139 and the client to meet all the claims which had been processed and accepted by EE139 in relation to the relevant employee, eg KM at Client P, in the week ending 13 April 2014, had carried forward expenses of £6,425.

Agency expenses

262. EE139 made non-taxable payments of what were identified on payslips as "agency expenses" to some employees. The amounts varied (and were not made to all employees).

263. The explanations relevant to these amounts has differed:

(1) At the July 2014 Meeting, the Appellants had told Officer McConnell that no general meal or lodging allowance was paid. Everything had to be receipted.

(2) In their letter of 19 August 2016 Chartergates said, in relation to agency expenses, that based on the considerable costs incurred by EE139's employees, they often agree additional payments, made by EE139 in line with the industry's working rule agreement, and all such payments made by EE139 are in relation to lodging allowances.

(3) Ms Suttle's evidence sought to explain the different versions of events as being that these agency expenses were not EE139 paying general meal or lodging allowances, or lump-sum expenses, rather that clients would pay such allowances to EE139, which were then being paid on by EE139 to the employees.

264. There were various examples of agency expenses being paid from the sampling of employees. These were always treated as non-taxable and in the vast majority of instances were paid in addition to a separate line item of Expenses on the payslips:

(1) MA at NGIS was paid agency expenses of £12 in week ending 6 April 2014;

(2) JB at Inspirium was paid agency expenses of £250 each week;

(3) AC at Client P was paid agency expenses, usually of £200 per week, and for some weeks this was shown at £160 per week (on weeks where there were four units of daily rate being paid);

(4) MG at G was paid agency expenses of £200 per week;

(5) RI at SDH was paid agency expenses of £76 and £100 in different weeks;

(6) KM at Client P was paid agency expenses of £200 per week;

(7) SN at Client S was paid agency expenses of £200 per week;

(8) MP at Inspirium was paid agency expenses of £250 per week; and

(9) CS at Client S was paid agency expenses of £40 per day – this was recorded separately on the charge sheet which was prepared by Client S and sent to EE139. This amount was simply multiplied by the number of days worked each week and paid separately on payslips.

265. We find as facts:

(1) Agency expenses were round-sum allowances paid to some employees.

(2) They were not claimed by employees (on an Expense Claim Form or otherwise), and employees did not need to produce any receipts for any expenditure in order to receive these amounts. They were paid irrespective of the amount of expenses incurred by employees, and were paid in addition to such reimbursement.

(3) They were treated as non-taxable payments, not as part of taxable income.

266. In February 2016 Chartergates told Officer McConnell that EE139 was now applying PAYE to all payments unless the employee submitted a receipt; and, following a review of all claims and payslips for August 2016 (ie after the Relevant Period), Officer McConnell recorded that no agency expenses were now being claimed. We accept that EE139 stopped paying these round-sum allowances as tax-free amounts during the Relevant Period; and having regard to the timing of the confirmation from Chartergates, the progress of the investigation, the slow pace of making changes which was explained by Ms Suttle and the evidence of agency expenses being paid during 2015, we find that EE139 continued making these payments until the end of December 2015.

Mileage allowances

267. EE139 paid AMAPs to employees for the mileage which they claimed. Officer McConnell identified various concerns in relation to the AMAPs that were claimed and reimbursed – he considered that the large claims being made meant that some employees were effectively operating at a loss; he challenged the distances for which claims were being submitted (including the lack of details) and (in June 2015) the ownership of vehicles (which affected eligibility for AMAPs, irrespective of distances travelled).

268. We have addressed the submission of claims, the declarations by employees on the Expense Claim Forms, the processing and spot-checking of claims above.

269. The additional evidence as to ownership of vehicles comes from the notes of the communications between Officer McConnell and four of EE139's clients, the information from the NMW enquiry (which related to an employee working for a fifth client), DVLA records, the eight responses to the Employee Questionnaire and information provided by clients to EE139 (or EECIS).

270. The DVLA records provide details of the registered keeper of a vehicle. Where such registered keeper is a fleet hire company, the Appellants did not accept that this meant that it had been hired by the client and provided by them to the relevant employee, submitting that it was entirely possible that the employee had hired the vehicle themselves from the fleet hire company. Whilst we accept that it is possible for an employee to hire a vehicle from a fleet hire company, on the basis of all of the evidence before us we have inferred that vehicles which were registered to a fleet hire company had been hired by EE139's client (whether directly, or,

in the case of intermediaries, that client's client). We reach this conclusion on the basis of evidence as to how some clients sourced vehicles which were provided to employees, and inferences as to the type of vehicles and equipment which may be required for the relevant jobs. This is relevant to the application of the requirement (in s229(4) ITEPA 2003) that the vehicle is not a "company vehicle".

271. We have made findings of fact in relation to four of EE139's clients:

(1) Workers at Client S used their own vehicles to travel between home and the depot each day. Workers did not use their own vehicles to travel from the depot to sites or between different sites during one day – either there was no such travel, or if there was then it was in Client S's vehicles (either its own vans or the leased additional vehicles).

(2) Workers at Client P were using vehicles supplied by Client P to travel between sites during the working day. Some employees were using their own vehicle to travel from home to depot, whereas others were supplied with a vehicle by Client P which they were using for this purpose.

(3) Workers supplied to Client N used their own vehicle to travel between home and the relevant depot each day. During the working day, they then use company vehicles to travel between sites, and this could be anything from one to ten sites per day.

(4) Client D provided vehicles and fuel cards to most of its workers. The vans provided were being made available for use by workers to travel from home to the sites, as well as for their use during the working day.

272. We make the following findings in relation to other clients of EE139:

(1) SDH provided vehicles to EE139's umbrella employees. SDH's main client was Morrison's, and the vehicles on Expense Claim Forms were mainly fleet hire, and one was registered to Morrison's.

(2) Capital Outsourcing, or those to whom it was sub-contracting the workers (Quinn and Kelly's) provided vehicles to EE139's umbrella employees. This was confirmed by SH as part of the NMW enquiry.

(3) Professional Quality Management Services Ltd ("PQMS") confirmed to EECIS that they supplied vehicles to workers.

273. The following claims were made by umbrella employees of EE139 (and, for the avoidance of doubt, we also find that such claims were processed and paid):

(1) MA at NGIS claimed AMAPs of 1,247 miles for the week ended 28 September 2013, and 199 to 242 miles per day in week ending 6 April 2014 with description "work/various". He also claimed passenger miles for an unnamed passenger in the week ending 13 April 2014. The details he provided were for a van on fleet hire, which we infer was provided to him by NGIS.

(2) JB at Inspirium claimed AMAPs each week. The Expense Claim Form has five entries, each "Destination and Reason for Journey" being "working" and then listing miles per day of varying amounts, but the weekly total was always 2,228 miles. In the Employee Questionnaire he said he used his own vehicle to pick up the company van. There were no details or separation of journeys between his own vehicle and the company van, and we consider it very unlikely that he was travelling 2,228 miles per week in his own vehicle separately from journeys in a company van (and infer that he did not do so).

(3) AC at Client P claimed AMAPs of around 340 miles per day. The vehicle was registered to a fleet hire company, and we have found that this was provided by Client P.

He would have been entitled to claim AMAPs for his home to work journey, which Officer McConnell estimated at 40 miles (from Cardiff to Bedlinog), yet no separate identifiable claim was made.

(4) JF at Capital Outsourcing claimed AMAPs for week ending 6 April 2014 for 350 miles per day for five days. In the Employee Questionnaire he said he was using his own vehicle. However, SH (who was provided by Capital Outsourcing to Kelly's) had confirmed he was provided with a vehicle plus fuel. JF was working at Quinn's, as was MH (another EE139 employee who was supplied to Capital Outsourcing), and MH was claiming mileage for a vehicle registered to fleet hire and had said he drove to site to collect a company van. On balance, we conclude that JF had also been provided with a vehicle.

(5) MH at Capital Outsourcing claimed AMAPs of 277 to 309 miles per day. The Expense Claim Form records the Destination and Reason for Journey as Nottingham/Derby. The vehicle is registered to fleet hire, and in the Employee Questionnaire he had said he drove to site (we infer using own vehicle) to collect a company van. Officer McConnell records that the distance from Nottingham (where MH lived) to Derby is 15 miles. This journey, in his own vehicle, would be allowable; but additional mileage in a company vehicle is not.

(6) We did not have Expense Claim Forms or payslips for SH at Capital Outsourcing, but the RTI return for 2013-2014 declares taxable pay of £578.58 and non-taxable payments of £1678.19. We infer that most if not all of this were AMAPs. SH had told HMRC that Kelly's (to whom his services had been provided by Capital Outsourcing) supplied a van and fuel, as well as equipment. We conclude that he was not entitled to AMAPs.

(7) RI at SDH claimed AMAPs (as well as the cost of fuel), yet the vehicle was a fleet hire vehicle. We infer it was provided to him by SDH (or Morrison's) and he was not entitled to AMAPs.

(8) PJ at Client N claimed AMAPs for his daily mileage. All claims for mileage in April 2014 were round numbers (multiples of 50), with one exception of a claim for 220 miles. His address was in Northern Ireland, and he claimed various expenses including four nights in a B&B for £200 in week ending 4 May 2014. In the Employee Questionnaire he had said he sometimes used his own vehicle. Client N only worked on sites in England. We infer that PJ was flying over to England and staying near the work sites. Client N supplied vehicles for travel between sites; the only potentially allowable mileage was for return journeys from B&B to the depot.

(9) MMcE at Client N claimed AMAPs for between 210 to 280 miles per day. The details he provided were for his own car, which we infer he used to travel to the work site each day, but we have found that he would then be using Client N vehicles for travel between sites.

(10) AMcK at Capital Outsourcing claimed AMAPs for 53 to 81 miles per day in the week ending 13 April 2014. He worked at Quinn's, and although he said he had his own vehicle, we infer that (as with JF) he was provided with a vehicle for work during the day. He would be entitled to claim AMAPs for travel from home to and from work.

(11) JM at PQMS claimed AMAPs for more than 300 miles per day. He did not provide any vehicle details, described the journey as various and claimed for an unnamed passenger. Some of the Expense Claim Forms claim AMAPs for seven days per week, yet we could only identify two weeks in the sample period where JM was paid the day

rate for seven days; most weeks he was paid the day rate for four or five days. PQMS were providing vehicles to workers.

(12) KM at Client P claimed AMAPs for daily journeys of either 260 or 300 miles. The payslips indicate that these claims were being paid. Client P provided vehicles to workers for travel between the depot and sites.

(13) SN at Client S claimed mileage of 350 to 490 miles per day. The first journey in the week is described as Perth/Leeds, the final one being Leeds/Perth. This is consistent with a journey from home in Perth to Client S's depot in Leeds, and staying locally during the week (he was also claiming accommodation costs). Yet within his claims for AMAPs are daily mileage that we infer relate to travel during the working day (which would be in Client S vehicles).

(14) MP at Inspirium claimed AMAPs. His Expense Claim Forms provided vehicle details and listed the sites visited each day, with claims for varying amounts – the majority for less than 100 miles per day, but an occasional 203 miles, and some were as low as 54 or 60 miles. The DVLA records show this was a fleet hire vehicle, and we infer this was provided by Inspirium.

(15) PS at Client D claimed AMAPs for 188 to 304 miles per day. Whilst Client D generally provided vehicles, PS was one of the workers identified in SG's pay schedule as using his own vehicle. He confirmed in July 2016 that he was using his own vehicle, but we do accept that in September 2016, ie after the Relevant Period, he was provided with a vehicle by Client D (this being clear from an exchange of emails). PS was thus entitled to claim AMAPs for distances travelled for the purposes of his employment.

(16) AT at Client D claimed AMAPs, and for one week against a worksite of Lincoln he claimed 1220 miles. He also claimed £640 for overnight stays that week. Client D provided vehicles and fuel to AT. He was not entitled to claim AMAPs.

(17) HT at Client D claimed mileage for around 300 miles per day; the vehicle was fleet hire, and Client D identified HT as having been provided with a vehicle. In the Employee Questionnaire HT said he used his own vehicle to collect a van. We do not accept that the mileage of 300 miles per day related to journeys in his own vehicle; the mileage travelled in the van provided by Client D was not eligible for AMAPs.

(18) PT at PQMS claimed AMAPs for daily journeys of 130 to 170 miles. He lived near Cardiff, journeys are described as "various destinations throughout mid, south and west Wales". He was not using his own vehicle – DVLA records show it is fleet hire, PQMS said they provide vehicles and on the Employee Questionnaire he had said he did not use his own vehicle. He was not entitled to these AMAPs.

(19) CZ at Client P claimed AMAPs, and the Expense Claim Form includes details of a vehicle that is registered to him. He lived in Torquay, with work sites in Gainsborough and Coventry. He was being paid an overnight allowance, and was claiming mileage for 578 or so miles per day, with claims totalling 2312 miles in one week (and this was repeated in other weeks). He was provided with a vehicle by Client P for journeys during the working day.

274. On mileage, to illustrate what HMRC submitted were false or excessive claims (that were paid), we were taken to:

(1) CS at Client S, who lived in Dunfermline, was reporting to a depot in Leeds, a distance of about 250 miles. His mileage claims were 1340 per week. He was being paid

agency expenses of £40 per day. We infer that he was driving down to England each week and saying locally.

(2) CZ at Client P was claiming mileage for 578 miles per day. Officer McConnell's opinion was that this is a nine-hour round trip, which is "clearly not happening". We do not place any weight on the opinion, but recognise the underlying fact as to the time that would be taken for such journeys.

275. Mr Firth emphasised that HMRC had not asked any umbrella employees if they had submitted false claims for AMAPs, or introduced evidence from the clients to show that these distances were overstatements of the journeys that were in fact undertaken. We recognise that. Nevertheless, whilst evidence from employees (or clients) would have been of direct relevance, the panel is permitted, when making findings of fact based on evidence before it and drawing inferences therefrom, to use its own experience and knowledge, and reach conclusions, bearing in mind that the standard of proof is the balance of probabilities.

276. Considering both the evidence before us and being mindful of evidence that we do not have, we agree with HMRC that some of the claims for AMAPs by employees were for distances in excess of those that were actually travelled; CZ at Client P is one such illustration. This can only affect entitlement to AMAPs for employees who were using a vehicle which was not a "company vehicle" (ie where they are otherwise eligible to claim AMAPs and the only question is whether the mileage claimed is accurate).

277. As we seek to assess whether claims made (and paid) were valid, we find as follows:

(1) There were very few employees who were using their own vehicle both for the journey from home to work and for travel between sites during the working day. PS at Client D is the only example from the sample of 20. He was claiming between 188 and 304 miles per day. HMRC have not satisfied us that such claim was not valid.

(2) Some employees were provided with a vehicle and fuel from the client (eg Client D) and we find that the arrangements for provision of that vehicle were such that they were allowed to use that vehicle for journeys from home to work as well as between sites during the day. This doesn't apply to all employees for a particular client (eg PS from Client D used his own vehicle).

(3) The vast majority of employees were using their own vehicle to travel from home (or the place they were lodging) to work at the beginning and end of the day, and using a vehicle provided by the client (whether the client's own vehicle or hired by them or by the client's client) for any travel between work sites during the day. Examples are JB at Inspirium, AC at Client P, JF at Capital Outsourcing, MMcE at Client N and SN at Client S. However, none of the employees separated out the distances travelled for the various journeys – they did not distinguish between, and separately declare, journeys from home to work and journeys during the working day. All declared a single, total mileage, and we conclude that only some of this was allowable. HMRC have adduced some evidence as to the length of home to work journeys (by way of estimates produced by Officer McConnell based on the employees' home address and what was known about either the location of the depot or where the employee said they were working); and the panel takes judicial notice of the actual location of various addresses and destinations.

278. There were claims for passenger miles at 5p per mile (eg by MMcE); none of these claims complied with HMRC guidance that the names of passengers be provided, nor was there any way for EE139 to check that the passenger was working for the same client as the relevant employee; it had to rely on the employees only making eligible claims. Of itself, this does not mean that the claims were not allowable. Whilst HMRC drew our attention to these claims,

noting the lack of detail, there was no submission by HMRC that there were in fact no passenger(s). We do have a concern that (with the exception of one employee in the sample of 12, who did not claim any expenses) as all employees were claiming AMAPs, and passenger miles are only able to be claimed where the passenger is another employee of EE139, this presupposes that those within the sample claiming passenger miles were always travelling with fellow employees who were outside the sample. This is factually possible on the numbers, and in any event it was for HMRC to put the challenge that there was no passenger and they did not do that. (HMRC's challenge (for the purposes of these appeals) to the payment of passenger miles was that the relevant employee was not entitled to AMAPs in the first place, and in that situation the claim for passenger miles must also fail.)

Other claimed expenses

279. The expenses claimed and reimbursed by umbrella employees included claims for amounts other than mileage, eg accommodation costs.

280. Officer McConnell concluded that some of these expenses should not have been reimbursed, on the basis either that receipts were not provided, or that they were not allowable expenses in any event (eg restaurant meals for groups, not just the employee).

281. We have made findings in relation to the checking of such claims, and found that some claims were rejected by EE139. Examples of claims being rejected are:

(1) MA at NGIS was claiming £10 for a van wash weekly in the three-month period April to June 2014. There was one example of such a claim being rejected due to absence of receipt. Whilst there was no other evidence of rejection of claims by emails, we accept that Merit screenshots show that only expenses being paid out in several of these weeks were AMAPs. These claims were being rejected.

(2) PJ at Client N claimed for parking, which was rejected.

282. However, we do accept that EE139 was processing claims which were not allowable expenses:

(1) MMcE at Client N claimed for meals in restaurants (for two or three people, sometimes more), one of which was paid for at 10.54pm for £233, alcohol, and goods from a hardware store (sheep wire, posts, barb wire). Whilst Ms Suttle's evidence was that not all expenses were actually paid to him, she was not processing these claims herself, there were no emails rejecting these claims and Merit screenshots do show that MMcE was being paid expenses in addition to his claims for AMAPs. We infer that these claims were reimbursed.

(2) AMcK at Capital Outsourcing claimed AMAPs in the week ending 13 April 2014 as well as £204 of other expenses, including £117 for subsistence costs but receipts show one meal had included two children's meals, another was a set meal for two, another was on a Sunday. Payslips show reimbursement of expenses of more than £390 each week. Whilst it is difficult to reconcile the claims with payslips exactly, the amounts being paid lead us to infer that not only was the AMAPs being paid but most (if not all) of these claimed expenses were also being paid.

(3) SN at Client S claimed reimbursement of a variety of expenses – there was a receipt from Next in Perth for £36, and the items were described thereon as a yellow spot top and cream floral top, clothing from River Island for £16, footwear from River Island for £28, £91 for groceries from Tesco. There are restaurant receipts from restaurants in Perth at weekends. SN claimed for dinner, bed and breakfast for £350, with no further details provided. There is a receipt for diesel (of £83) in addition to claims for AMAPs. The payslips show he was being paid basic pay of £189 per week, and the remainder of the

contract amount was being paid as reimbursement of expenses (or payment of agency expenses), and there was no documentary evidence of any of these claims being rejected. We find that they were processed and paid.

(4) AT at Client D claimed £640 for overnight stays (and the form indicates that receipts were provided, but they were not all exhibited). We accept this was allowable (in that HMRC have not established otherwise). However, in one week AT claimed for shoes, printer ink, shelving, food of £261 and overnight stays of £435. We infer this claim was processed in full – the payslip for the week pays expenses of £495.49, shows carried forward expenses of £188.71, and by the following week the payslip shows these carried forward expenses have increased to £542. The overnight stays were allowable, but the food and other expenses were not.

Awareness or means of knowledge of inaccuracies or potential inaccuracies in claims being made and payments made or expenses reimbursed

283. HMRC have issued the PLNs on the basis that inaccuracies in the Returns were deliberate and attributable to both of the Appellants. We address the relevant requirements in the Discussion; here we make findings as to knowledge, actions taken (or not taken) and other matters potentially relevant.

284. Both Appellants denied that they had actual knowledge of any inaccuracies. The evidence from the Appellants included:

(1) From Ms Suttle:

(a) The treatment of holiday pay as non-taxable was caused by a software issue and they corrected this.

(b) When she had worked for SDH, none of the workers for whom she processed pay schedules had a vehicle from SDH or its clients.

(c) They knew that EE139 was not providing vehicles. If EE139 were told that an umbrella employee was provided with a vehicle and fuel, EE139 would recommend they register with a different Earn Extra company, either PAYE or EECIS.

(d) They were relying on the honesty of employees and clients, eg Inspirium told EE139 that they did not supply vehicles to EE139's employees, and an employee (who was working for them) claimed AMAPs. That employee later told HMRC that Inspirium had provided him with a van.

(e) Whilst SH told HMRC (in the context of the NMW enquiry) that Kelly's supplied him with a van and fuel, EE139's client was Capital Outsourcing and not Kelly's. EE139 did not know that a van and fuel was being provided.

(f) They tried on numerous occasions to get clarity from clients and employees on vehicle ownership, but were met at almost every turn with no response. In cross-examination, Ms Suttle explained that they only started asking clients these questions in 2016, and it took a long time to get any response.

(g) Ms Suttle accepted that there were significant deficiencies in EE139's processing of claims, eg accepting claims for AMAPs that simply said "work"; and that not all of these had been remedied by the time EE139 went into administration. However, Mr Ripley submitted that deficiencies in processing does not necessarily mean that claims were wrong.

(2) From Mr Jaekel:

(a) Before 2014, he had no reason to suspect that EE139 was not processing expenses claims and mileage correctly.

(b) Following the July 2014 Meeting, he was worried, discussed the matter with Ms Suttle who told him that the concerns were misplaced and to the extent that there was an issue it was relatively minor as to the incorrect processing of a small number of claims. They both agreed that Chartergates should be instructed in relation to HMRC's enquiries. They told office staff to follow the required processes, and improved them, eg using an app to help with monitoring mileage claims and automatically checking mileage claims over 500 miles per week.

(c) He thought he had discussed whether vehicles were provided with some clients, but not all.

(d) The actual mileage claimed could be completely variable. EE139 was not notified of sites where employees were working, and just because mileage claims were large, doesn't mean it is wrong.

285. We make the following findings:

(1) Whilst the umbrella employees were employed by EE139, they were provided by EE139 to clients such that clients would then give instructions directly to the workers. We accept that this meant that EE139 did not have (direct or indirect) oversight of their work, and did not know (without asking or being told by either the relevant employees or clients) what workers were doing on a day-to-day basis, either as to the number of hours worked, where they were working, or which vehicles they were using.

(2) In the first few months of the Relevant Period, Ms Suttle was still processing some of the expense claims submitted by umbrella employees herself, but had been recruiting office staff to take over this role. Once Ms Suttle returned from maternity leave the following year, her role was more supervisory and she was not processing claims herself. Mr Jaekel was not based in the office, and whilst he did register, or enter details of, new employees onto Merit he did not (and never had) process expense claims.

(3) Both Appellants knew that, unless they were provided with timesheets recording different hours worked by clients, the basic pay of umbrella employees was being calculated by the Merit software used by EE139 on the basis of NMW for six hours per day. Whilst Mr Jaekel accepted that he knew this for, eg, telecoms clients, he said he didn't know this was being used for all workers, eg overhead power lines. We do not accept this recollection as accurate – the documentary evidence from the beginning showed this approach of six hours per day, and whilst this pre-dated EE139's move into overhead power lines, it was going to apply to all workers unless EE139 decided to change it, and there was no documentary evidence about making such a change, or even considering making such a change (other than that where, as found, EE139 had timesheets recording different hours actually worked).

(4) Both Appellants knew, before the July 2014 Meeting, that this default approach of six hours per day did not reflect the hours worked by those in overhead power lines. This was then reinforced by what they were told by Officer McConnell in relation to Client S.

(5) Whilst EE139 were not generally receiving timesheets recording hours worked from clients, both Appellants knew that some clients were keeping their own records of actual hours worked, as can be seen, eg, from Ms Suttle's correspondence with Client D and Mr Jaekel's emails when setting up the processes for new clients.

(6) The facts found at [207] in relation to the processing of claims were known to both Appellants. As part of this processing:

(a) There were many examples of claims being processed and paid contrary to EE139's own guidance, or where (even ignoring challenges as to the number of miles claimed to be travelled or ownership of vehicles) the claim should have been rejected, eg:

(i) RI at SDH claimed expenses by email rather than using the Expense Claim Form. Whilst some of his claims were rejected on the basis that no receipt was provided (eg toll charges), he was regularly claiming for fuel (generally £65-£80 per week), and although one such claim was declined on basis that there was no receipt, others were processed and paid in weeks where he was also claiming and being paid AMAPs (yet such claims should not be paid alongside each other). In reaching this conclusion, we have taken account of the fact that there were some weeks where no AMAPs were being paid to RI.

(ii) PJ at Client N claimed expenses by an email listing the mileage per day, without any details of journeys and these were round numbers (being multiples of 50, with one exception in a month of a claim for 220). All of the claims for April mileage were sent in a single email on 13 May 2014.

(iii) MMcE at Client N did not use Expense Claim Forms and instead, for April to June 2014, emailed his weekly mileage in a single email on 29 June 2014. There was no information about journeys.

(iv) JM at PQMS was being paid the day rate for four or five days most weeks, yet during this period there were several weeks where he was claiming mileage for seven days per week.

(v) AT at Client D was claiming mileage, and did not provide vehicle details, and claims were for round numbers per day – 150, 200, 250, 220 miles per day in one week.

(b) EE139 did not ask questions about or challenge the number of miles for which AMAPs were being claimed by employees (subject to our finding about starting to ask for postcodes). We have referred above to claims being made for consistently round numbers, and we draw attention to:

(i) CS at Client S was claiming expenses by email. His claims on 9 April 2014 and 23 April 2014 were identical to each other, claiming 1342 miles each week plus passenger miles for two passengers. EE139 did not raise any questions as to the likelihood of the distances matching exactly.

(ii) CZ at Client P was claiming mileage of 2312 per week. Ms Suttle acknowledged that this is very high, of an amount that she would have queried. The reality is that no questions were asked, and this was a claim that was being routinely submitted, thus was being processed every week without any questions being asked.

(iii) AT at Client D submitted an Expense Claim Form for 22 to 27 April 2014 (six days), which recorded "Work" (with no further details provided) as the "Destination and Reason for Journey" and listed the number of miles as 150, 120, 120, 120, 200 and 220 miles, giving a total for the week of 930 miles. This claim is referenced above in the context of claims for rounds

sums. That same form then includes claims for a further £854.08 of non-mileage that week, including food of £261.19 and overnight stays of £400. EE139 did not question the plausibility of this.

(7) Both Appellants attended the July 2014 Meeting, and all correspondence from Officer McConnell to EE139 or Chartergates was seen by both Appellants. They were both therefore aware of the nature of the concerns being expressed by Officer McConnell and his statements as to what he was being told by their clients. This included, eg:

(a) that Client S told him that workers did ten-hour days (this first being mentioned in the July 2014 Meeting); and

(b) that workers on overhead power lines were using vehicles supplied by the client, and they worked ten-hour days (from the letter of 23 June 2015 to Chartergates).

(8) Drafts of the letters that were sent by Chartergates to HMRC were sent to both Appellants, such that both knew what was being said on EE139's behalf.

(9) Mr Jaekel had relationships with all of EE139's clients throughout. Ms Suttle also had direct contact with each of them, as clients provides schedules to EE139 of the amounts to be paid to the umbrella employees, and would engage directly with them to ask or answer questions. The email exchange between Ms Suttle and Client D in February 2015 makes it clear that Client D were keeping records of hours worked. Both Appellants were thus in contact with individuals at clients who would be in a position to answer questions about hours worked, distances travelled and provision of vehicles.

(10) Whilst the number of EE139's clients varied, a large proportion of turnover was attributable to its top seven or eight clients.

(11) The responses to the Employee Questionnaire were provided to Chartergates, and Chartergates provided the summary to Officer McConnell. We find that this summary table would have been provided by Chartergates to EE139, and both Appellants had this information in September 2015.

(12) EE139 had not been told by any client that they (or their client) were providing a vehicle to an umbrella employee of EE139 in circumstances where that employee was claiming AMAPs.

(13) EE139 did not send a questionnaire to clients asking for additional information relevant to the matters raised by Officer McConnell until after the Relevant Period. There was no documentary evidence of the existence of such a questionnaire (eg a blank pro forma), no documentary evidence of it having been sent (eg emails attaching it or chasing a response), Chartergates made no reference to it in their correspondence with Officer McConnell and any evidence of responses was confined to matters several months after the end of the Relevant Period, eg PQMS confirmed that they did supply workers with vehicles, but this confirmation was given to EECIS, after EE139 had entered administration.

(14) Whilst Officer McConnell had told EE139/Chartergates about some of the information he learned from clients at various time (as referred to in the correspondence), he sent Chartergates a copy of the relevant notes of meetings/telephone calls and emails in November 2016, ie after the Relevant Period.

DISCUSSION – WHETHER INACCURACY IN EE139'S RETURNS

286. Paragraph 1 of Schedule 24 provides that a penalty is payable where a person gives HMRC a document of a kind listed in the table and conditions 1 and 2 are satisfied. The kind

of document listed in the Table for income tax purposes, and on which HMRC relies here, is a "return for the purposes of PAYE regulations" – in this case the P14s and P35s for the first two years and the RTI returns for the remaining four years. Condition 1 is that the document contains an inaccuracy which amounts to or leads to an understatement of tax. Condition 2 is that the inaccuracy was careless or deliberate on EE139's part.

287. The Assessments issued by HMRC to EE139, which set out the amount of the inaccuracy on which HMRC relies, are:

(1) the Section 8 decision issued on 21 September 2016 which states the amount EE139 is liable to pay on the earnings for the period 6 April 2011 to 5 April 2016 is £6,991,449; and

(2) the Regulation 80 determinations issued on 21 September 2016 for each year. The tax assessed is recorded at [13] above. Each determination refers to Employee Expenses Payments, and states the pay for which tax remains unpaid. The amounts of pay for 2010-2011, 2011-2012, 2014-2015, 2015-2016 are £566,687, £1,080,000, £7,100,000, £7,855,643 (with E indicating that these figures are estimated).

288. The Section 8 decision is a single decision. The Regulation 80 determinations were issued for each tax year, but we only had four of them, as specified above.

289. In HMRC's Skeleton they state that their case is that EE139 deliberately understated the earnings of its employees and overstated their expenses in order to reduce the PAYE income tax and the NICs that it had to pay:

(1) EE139 calculated its employees' pay on the basis of an arbitrary figure of six hours work per day at the NMW, resulting in excessively low wages. The figure of six hours per day was lower than the hours that were actually worked by the employees.

(2) EE139 accepted expense sheets for mileages which were unsupported by records and, in many cases, clearly false. Claims for other expenses, such as accommodation, were also accepted without sufficient evidence.

290. The Appellants' submissions included:

(1) The decision taken by HMRC was expressly based on disallowing 90% of the expenses paid to EE139's employees, which itself was based on Officer McConnell's conclusions as to vehicle ownership, and that the consequence of this is that questions and concerns raised by Officer McConnell and relied upon by HMRC in the course of the hearing as to whether there was an understatement of hours, or even distances travelled, are irrelevant.

(2) In any event, these allegations are not made out on the basis of the evidence. Even if (which was not accepted), the use of six hours as a default did lead to an understatement of tax, it would be necessary for HMRC to identify what the quantum of the resulting understatement of tax was. The decisions issued are not based on an alleged understatement of hours and HMRC have not identified what they say was the resulting inaccuracy.

(3) HMRC must identify an inaccuracy in a relevant document (ie something which amounts to or leads to an understatement of a liability to tax), and Schedule 24 envisages that one document may include multiple inaccuracies such that it is necessary to identify the culpability of each of the errors (which is acknowledged by paragraph 6 of Schedule 24). Here, HMRC's arguments are in the realm of generalities, detached from the Returns, and this is particularly significant where it is alleged that the inaccuracies are deliberate.

(4) HMRC had produced no evidence that the expenses claimed were wrong – asserting that distances claimed are implausible, or "clearly not happening", or lacking in detail does not make them incorrect or false. The umbrella employees submitted these claims, declaring them to be true, and HMRC have not asked the employees if they claimed for the correct mileage. As to vehicle ownership, ITEPA 2003 does not make ownership of a vehicle a condition of AMAPs, the requirement is that the vehicle must not be a "company vehicle" yet no clients have been called as witnesses.

(5) Even if HMRC can establish some inaccuracies, that does not lead to the conclusion that 90% of expenses claims were inaccurate. An inaccuracy in relation to payment of mileage allowance for one employee in a period does not prove anything about inaccuracies of different returns for different individuals for the same or other periods.

(6) HMRC have not set out the basis on which they decided to disallow 90% of the expenses.

291. We turn to the basis of the decisions taken by HMRC as to the issue of the Assessments, with a view to deciding the relevance of the matters relied upon by HMRC and addressing submissions as to evidence of the 90% disallowance:

(1) As set out under Background and Findings of Fact, the following were sent to EE139/Chartergates in relation to the decisions reached by HMRC:

(a) In his letter of 30 August 2016 to Chartergates, Officer McConnell said HMRC's Dispute Resolution Boards had decided HMRC should proceed with the issue of formal Regulation 80 and Section 8 decisions calculated on 90% of the expenses paid to EE139 employees.

(b) The letter of 21 September 2016 enclosing the Assessments states that the tax has been calculated disallowing around 90% of the expenses payments, treating them instead as "additional" pay taxed at 20%.

(2) The Regulation 80 determinations themselves (for the years which were included in the bundle) refer to "Employees Expenses Payments". We infer that the determinations for 2012-13 and 2013-2014, which were not in the bundle, were issued on the same basis.

(3) The Section 8 decision states that EE139 is liable to pay contributions for the period from 6 April 2011 to 5 April 2016 "in respect of the earnings of Linesmen and Telecom workers".

(4) The penalty explanation schedule (which had been issued to EE139 on 23 January 2017) set out the basis for charging the inaccuracy penalty under Schedule 24 FA 2007 as being that the company has failed to provide sufficient evidence to support the expenses claims that equate to up to 80% of the employees' earnings. Information supplied by employees and clients has shown that the vast majority of the expenses claimed would not have been incurred and are false. The hours worked are significantly more than are being recorded by the company, and the company either had this information or would have been able to have accessed it. In the context of helping, the schedule sets out that EE139 has declared the non-taxable payments on RTI returns, helping HMRC to produce estimated determinations.

(5) HMRC's review conclusion letter dated 15 January 2018 (in respect of the review of the PLN which had been issued to Ms Suttle, but we infer one was also sent to Mr Jaekel in similar terms) includes:

(a) Most of the employees would probably not qualify for home to work travel anyway since the employment contracts do not appear to be "overarching" on the grounds that there was generally no provision to pay the employee between engagements and so no mutuality of obligations existed.

(b) The method of calculating the Assessments appears reasonable in that 90% of expenses paid for the years covered by RTI returns were treated as being taxable payments with the estimated balance of 10% being treated as relating to genuine allowable employee expenses. For the pre-RTI Years, the amounts have been estimated at 50% of the company's turnover in line with the RTI Years.

(6) In his witness statement, Officer McConnell explained his decision as follows:

> "The vast majority of claims which I estimated at around 90% made by the employees was for travelling to various destinations throughout the day would be considered as travel in the performance of the employees duties of the employment as would be allowable as a deduction from general earnings…if the expenses were actually incurred. However, no deduction is due when employees are provided with a vehicle and fuel as no expense has been incurred by the employee…The evidence established that the vehicles used in the performance of the employees' duties were not owned or hired by the employees. EE139 failed to provide any evidence to contradict this. This led to my decision to disallow the vast majority of the mileage claims, which I estimated at 90% of the total mileage claimed."

(7) The SoCs cite the correspondence between EE139/Chartergates and HMRC and plead that the company ignored timesheets, used false records of working hours, accepted mileage claims with little or no detail and reveal implausible figures, approx. 88% of the total expenses claimed was for mileage, the vast majority of workers did not perform their duties in their own vehicles and most employees would not qualify for home to work travel in any event as the employment contracts were not overarching.

292. Additional evidence potentially relevant to consideration of how the amount of the total expenses claimed (and decided by HMRC to be disallowed) is the letter from Armstrong Watson – when describing how they selected the sample for their review, they referred to what they described as total expense claims of £27,665,330 reimbursed in the Relevant Period. There is no further information to which we were taken, or which we could find in the Armstrong Watson letter, which explains the source of this number. We consider the most likely explanation is that it was simply based on the amounts of the Assessments, albeit that on our estimation they are referring to the total expenses disallowed rather than those reimbursed. (The total PAYE assessed was £5,533,065, which is 20% of £27,665,325, which is itself 90% of £30,739,250.)

293. HMRC's Skeleton sets out an explanation of HMRC's case, a very high-level summary of which is referred to at [289] above, and it does (very briefly) refer to overarching contracts at [101(viii)], where HMRC summarise their conclusions on deliberate and concealed inaccuracy:

> "(viii) Most employees would not qualify for home to work travel in any event as the employment contracts were not "overarching". There was generally no provision to pay the employee between engagements and so no mutuality of obligations existed."

294. Having considered the basis on which the decisions are expressed, in the context of all of the correspondence between HMRC and EE139, and in light of the way in which HMRC

have put their case and having regard to the overriding objective in rule 2 of the Tribunal Rules, we reach the following conclusions as to the range of matters that are in issue before us:

(1) Overarching contracts – We proceed on the basis that the contracts between EE139 and the umbrella employees are overarching contracts. We recognise that HMRC have never accepted that they are overarching contracts – Officer McConnell had doubts about this (referring in correspondence to the absence of mutuality of obligations), never expressed himself satisfied with explanations provided by Chartergates during the course of the investigation, the reviewing officer considered the contracts were not overarching, and the SoCs include a pleading that most employees would not qualify for home to work travel as the contracts were not overarching. However, HMRC's Skeleton makes only passing reference to this (in the context of type of conduct rather than as precluding any expenses being allowable even if the submissions as to vehicle ownership were not made out) and, more fundamentally, whilst we were taken to a sample employment contract in the context of provisions for payment for hours worked, HMRC have not put forward any detailed submissions as to the requirements for overarching contracts or sought to provide any evidence of the factual position between engagements (or even made submissions as to inferences from the lack of such evidence). HMRC did not cross-examine any of the witnesses of fact (ie the Appellants and Ms Robson) on this factual issue. Other than in the most general terms, HMRC have not put forward a clear case for the Appellants to seek to meet. In all the circumstances, we consider it is not open to us to reach any conclusion other than that the employment contracts are overarching contracts.

(2) Relevance of hours worked – We do not accept the Appellants' submission that the basis of the decision to disallow 90% of expenses means that HMRC's arguments as to the understatement of hours worked (even if correct, which was not admitted) are irrelevant. We agree with Ms Goldring that, if such understatement is established, the understatement of hours and calculation of taxable pay on the basis of these understated hours provided space for EE139 to pay a higher amount of (non-taxable) expenses. This is a consequence of the approach to calculation of taxable pay, seen from the payslips and the methodology of which was not in dispute, which involved EE139 receiving an amount from the client, taking its own margin from this, then applying the balance towards, first, its calculation of taxable pay, then the amounts it was required to pay to HMRC (or hold back on account of holiday pay, etc), with the balance being available to pay as reimbursement of expenses. That approach resulted in some expenses claimed and processed not being reimbursed, but instead carried forward for reimbursement in future weeks (subject to sufficient funds being available). A higher level of taxable pay (based on a greater number of hours worked) would have had a direct impact on the amount available to reimburse expenses (or pay AMAPs). We do therefore assess the submissions, evidence and our findings as to hours (and those aspects of the expenses claims which are not related to vehicle-ownership) when considering whether there are inaccuracies in the Returns.

(3) Amount of expenses reimbursed – The Appellants challenged HMRC's decision to disallow 90% of the expenses (with submissions relating to the need to identify inaccuracies, lack of evidence as to how this 90% was arrived at (rather than, say, 85%) and criticism of Officer McConnell's investigation). Whilst there was minimal evidence before us as to how HMRC had calculated what it treated as the total amount of expenses reimbursed (and to which Officer McConnell applied the 90% disallowance), particularly as regards the first two years for which there were no RTI returns, such that EE139 had not declared (on any form of returns to HMRC) the total amount of non-taxable payments

made to employees, no challenge was made to the quantum of this non-taxable amount by the Appellants (either in the grounds of appeal or subsequently). We proceed on the basis that the total expenses reimbursed by EE139 during the Relevant Period was £30,739,250, but recognise that the Appellants did challenge HMRC's decision as to how much of this to disallow and treat as additional pay.

295. With this in mind, we thus revert to the issue as to whether HMRC have established that there were inaccuracies in the Returns submitted by EE139, in order that we can then consider whether such inaccuracies were deliberate (or deliberate and concealed). We have made extensive findings of fact on which we base our conclusions below, and reiterate (for the avoidance of doubt) that the question is not whether expense claims submitted by umbrella employees were correct, whether appropriate receipts were provided, or whether EE139 checked those claims, but whether the Returns submitted by EE139 to HMRC, which declared the taxable pay and, for the RTI Years, the non-taxable payments, contain inaccuracies which amount to or lead to an understatement of tax.

296. We reach the following conclusions in relation to the non-mileage related matters:

(1) We have found (at [252]) that generally umbrella employees were working more than six hours per day. However, whilst there was some evidence of employees being paid for more hours than this (and of some being paid for fewer hours), generally workers were being paid for six hours per day. To the extent that EE139 paid workers for fewer hours than they actually worked, calculating their basic pay on this basis and reporting this as their taxable income in the Returns constituted an inaccuracy which amounted to or led to an understatement of tax.

(2) EE139 paid agency expenses to some umbrella employees as non-taxable payments, and these amounts were paid irrespective of the amount of expenses incurred by employees, and in addition to such reimbursement. The amounts varied between £12 and £250 per week, with the majority in number being paid at £200 per week. They were paid to workers in both telecoms and overhead power lines, albeit that they were not provided for by all clients, eg Client D did not pay these amounts to EE139 to be paid to employees. These amounts should have been treated as taxable, and failing to report these amounts as taxable income in the Returns constituted an inaccuracy which amounted to or led to an understatement of tax.

(3) EE139 was processing claims made by some employees which were not allowable expenses. We do not refer here to the absence of receipts, rather claims for a type of expenditure which was not incurred wholly, exclusively and necessarily for the duties of the employment, eg personal clothing.

297. Dealing with claims for AMAPs, for cars from 2011-2012, the claimable rates of AMAPs were 45p per mile for the first 10,000 miles and 25p per mile thereafter. Officer McConnell expressed the opinion that the levels of AMAPs being claimed by employees in some weeks meant that those employees were (when looking at the amounts of net pay received) operating at a loss. HMRC did not adduce evidence as to costs incurred by these employees to enable us to find that employees claiming any particular level of AMAPs were working at a loss. We agree with Ms Suttle that a claim for AMAPs of, eg, £450 does not necessarily mean that the employee has incurred expenses (whether fuel or repairs or otherwise) of that amount.

298. When considering whether there were inaccuracies resulting from payment of AMAPs by EE139 (and the consequent treatment of such payments as non-taxable in the Returns) we focus on our findings as to the ownership of vehicles used and (to a lesser extent, for reasons explained below) the distances claimed to have been travelled.

299. Section 229(1) ITEPA 2003 provides that there is no liability to income tax on AMAPs for a vehicle to which that chapter applies. These are defined by s235, and cars and vans are such vehicles. The legislation then provides:

> (1) Mileage allowance payments are amounts paid to an employee for expenses related to the employee's use of a car or van for business travel (s229(2)).
>
> (2) Mileage allowance payments are approved if, or to the extent that, for a tax year, the total amount of all such payments made to the employee for the kind of vehicle in question does not exceed the approved amount for such payments applicable to that kind of vehicle (s229(3)). As stated above, the amounts are 45p per mile for the first 10,000 miles (40p per mile for the tax year 2010-2011) and 25p thereafter for cars.
>
> (3) Section 229(1) does not apply if the vehicle is a company vehicle (s229(4)). Section 236(2) provides that a vehicle is a "company vehicle" for this purpose if it is made available to the employee by reason of the employment and is not available for their private use, or the cash equivalent of the benefit is to be treated as earnings by certain provisions.
>
> (4) There is no liability to income tax for approved passenger payments made to an employee for the use of a car (whether or not it is a company vehicle) if the employee receives mileage allowance payments and (if the car is made available to the employee by reason of the employment) the cash equivalent of the benefit of the car is treated as earnings. Passenger payments are amounts made to an employee for carrying one or more passengers who are also employees for whom the travel is business travel.

300. There was no dispute over the rate at which EE139 was making payments. The issue was as to the entitlement to AMAPs. On the basis of our findings of fact, we have concluded that EE139 paid some AMAPs and passenger payments to employees which did not meet the conditions for eligibility thereto. In reaching our conclusions, we have recognised that we may make findings and reach conclusions based on extrapolating from samples of data, but also taken account of the relative amount of that data compared to the number of employees and the length of the Relevant Period. Taking this and all of the evidence before us into account:

> (1) We have found that some of the claims for AMAPs were for distances in excess of those that were actually travelled, and, separately, we have found that some (albeit very few) employees used their own vehicle for all journeys (ie home to work and throughout the working day, travelling between the depot and any sites). It could theoretically be the case that those two findings overlap, such that an employee in their own car was claiming and being paid AMAPs for distances that they had not travelled. However, on the facts we were not persuaded that this was the case in respect of any of the particular employees or claims before us. In view of this, we conclude that HMRC have not established that there was any inaccuracy based on payment of AMAPs (or passenger payments) being made to employees who were using their own car for all journeys.
>
> (2) There were inaccuracies to the extent that AMAPs (and passenger payments) were paid to umbrella employees who were provided with a vehicle by a client for use for all journeys (ie home to work as well as between the depot and sites), irrespective of whether or not fuel was also provided. No payments of AMAPs should have been made in these circumstances. This situation was not confined to a single client, or single sector, but it was a relatively small percentage of employees, which we conclude to be 10% of employees, but for whom the entirety of the payments should have been treated as taxable.

(3) There were inaccuracies to the extent that AMAPs (and passenger payments) were paid to umbrella employees who were provided with a vehicle for use for journeys between the depot and sites during the day but whose distances claimed included both distances travelled in their own vehicle from home to work and also the distance travelled in the vehicle provided by the client and, in some instances, additional distances which we concluded was not travelled at all. This was the vast majority of employees, and we are satisfied that the same percentage should be applied throughout the relevant period, as these inaccuracies result not only from payments to employees working on overhead power lines (eg Client N and Client S) but also for those working for SDH, EE139's first client. Based on all of the evidence, we conclude that 85% of EE139's employees were in this situation. The difficulty is that on the basis of our findings of fact, some part of the distance claimed to have been travelled by these employees was for home to work travel in their own vehicles (and for the avoidance of doubt we do not find that the mileage claimed only purported to relate to home to work travel in their own vehicle); they are entitled to AMAPs for this amount. Our interpretation of the legislation is that where payment is made for a claim for AMAPs for, say, 100 miles but we conclude that the valid claim (ie for home to work travel) was for a lesser distance, then the claim was valid to that lesser extent. It is not "all or nothing" as regards validity. Whilst we have reached a conclusion that 85% of employees were in this factual situation (and have taken account of Mr Ripley's and Mr Firth's submissions as to the size of the sample, HMRC's failure to ask questions of employees about mileage and lack of direct evidence from employees in so doing and being wary of what they submit would be effectively reversing the burden of proof), we have concluded that these evidential issues have not been overcome to any significant extent by HMRC for the purpose of satisfying us as to the amount of the AMAPs (and passenger payments) that should be treated as taxable. We considered that there were various potential questions arising from the evidence before us, eg:

(a) The information provided by Client S to Officer McConnell would indicate that distances travelled could vary significantly each day (and some days there may not be any travel between sites in company vehicles).

(b) Where workers flew in for the week (eg for Client N), we would expect that as a practical matter they might choose to stay relatively close to the depot which they were required to attend each morning, yet there was no evidence as to whether or not this was the case.

(4) We did have some evidence as to the possible length of journeys from home to work; and we have concluded that these employees (ie those who used their own car for these journeys but a company vehicle during the working day) were claiming for distances in excess of this. We are satisfied that at least 50% of the mileage claimed by these employees was for journeys in company vehicles and was not eligible for AMAPs (or passenger payments). We have considered carefully whether the evidence supports a conclusion that a higher percentage should be treated as taxable; but whilst it does provide some support, the burden is on HMRC and they have not met that burden.

(5) There is then the possibility that employees, who were provided with vehicles (whether for all journeys including home to work or just for use between the depot and sites) but not with fuel, were incurring the costs themselves of buying fuel. If this had occurred, then they would have been entitled to claim reimbursement of these amounts as expenses incurred in the performance of their duties (but not for AMAPs). This scenario was alluded to by the parties, but none of the parties put forward detailed

submissions, or indicated evidence on which we may seek to make findings on such a basis. We take no account of this possibility.

301. The way in which expenses were carried forward by EE139 means that in a particular week, inaccuracies which arose from the payment of AMAPs or non-allowable expenses could arise from claims which had been made by the relevant employee in that week, or claims which had been made previously but not paid and thus formed part of the carried forward balance which was recorded on payslips.

302. HMRC have treated 90% of the non-taxable payments made to employees as additional earnings (and issued the Assessments to EE139 accordingly). Our conclusions above as to inaccuracies are expressed in general terms. On an appeal against a penalty (including a PLN), the Tribunal has power to determine the amount of a penalty; as the amount is calculated as a percentage of the PLR, we would need first to determine the amount which we find to be the PLR for this purpose. In present case, we are satisfied that:

(1) as set out above, there are inaccuracies in the Returns which amounted to or led to an understatement of tax; but

(2) HMRC have not established that the inaccuracies were such that 90% of the non-taxable payments made to employees should be disallowed and treated as additional earnings, ie that the additional amount of tax due by EE139 is the amount of the Assessments.

303. We have already set out in the Introduction that we have concluded that the inaccuracies were not deliberate, and for this reason the appeal is allowed. That means that the calculation of the penalty (and thus, logically, the prior step of determination of the amount of the PLR) cannot affect the outcome of our decision. We have made detailed findings of fact above which would need to be applied to determine the amount of the PLR if this was to become relevant in the event of a successful appeal.

DISCUSSION – PENALTIES

304. Paragraph 19(1) of Schedule 24 provides that 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. Paragraph 19 therefore cannot apply where a penalty is imposed on a company for a careless inaccuracy.

305. HMRC issued a penalty to EE139 on the basis that the inaccuracy was deliberate and concealed. They have issued the PLNs to the Appellants on the basis that 50% of this inaccuracy was attributable to each of them.

306. We have summarised the parties' submissions in relation to the PLNs below. However, we record at the outset that the approach of paragraph 19 is to attribute liability for payment of a portion of a penalty which is payable by a company to the officer(s). This means that it is necessary first to address the penalty payable by EE139, which includes not only the basis of imposition (ie whether deliberate), but also the amount. Paragraph 19(5) provides that where HMRC have issued a PLN under paragraph 19(1), paragraph 11 applies to the specified portion as to the penalty (ie whether there are special circumstances) and the provisions relating to appeals and the powers of this Tribunal (to affirm, cancel, or substitute a different amount) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer.

307. HMRC's position can be summarised as follows:

(1) The Appellants knew of the deficiencies in EE139's system, that they did not know the hours or mileage of their employees, that expenses were not being properly checked, yet they continued submitting documents to HMRC with that knowledge. There was an intention to mislead. If they had checked, they would not have been able to obtain the level of growth in the business that they achieved. Even when notified of the problems, EE139 continued to pay out the carried forward expenses, and did not remedy the issues identified (eg EE139 referred to introducing new expenses claim forms which required more detail, but did not require these to be used and still accepted claims on the old forms, and EE139 did not obtain confirmations from the end clients about the vehicle ownership). What HMRC submit were large false and substantiated expenses claims were added to the wages sum (calculated on the basis of NMW) to give a total figure which equated to the charge-out rate being paid by the end client to EE139.

(2) The Returns include a declaration of truth, and it is not enough for EE139 to say that the information provided to HMRC matched that which had been paid as taxable pay to employees on Merit. The legal obligation is to ensure the information is accurate by reference to what was properly claimable and payable as expenses. By declaring to HMRC that the information provided was accurate, this was both deliberate and concealed.

(3) Deliberate includes both actual knowledge and blind-eye knowledge, relying on various decisions including, eg, *Martyn Arthur and Denise Arthur v HMRC* [2022] UKFTT 216 (TC). Whilst HMRC submitted that EE139 had actual knowledge of the inaccuracies, in the alternative they submitted that EE139 had blind-eye knowledge of the inaccuracies.

(4) The re-categorisation of wages as payments for supposed expenses was concealment. Furthermore, relying on the facts asserted by HMRC, this behaviour was dishonest.

(5) Alternatively, HMRC submitted in their written closing submissions that recklessness amounts to deliberate behaviour. We address the timing of this alternative pleading below, but at this stage simply record that HMRC's submission was that if a taxpayer does an act which in fact creates an obvious risk that an inaccurate document will be submitted, and either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and nonetheless gone on to do it, that is deliberate behaviour (ie this is an objective test).

(6) The Appellants were the sole directors of EE139 and the deliberate inaccuracies should be attributed to both of them (50% each).

308. For the Appellants, Mr Ripley and Mr Firth denied that the conduct was deliberate, or deliberate and concealed. There was, understandably, considerable overlap in their submissions, and we have outlined their approach below.

309. For Ms Suttle, Mr Ripley submitted as follows:

(1) To the extent that incorrect claims were made by EE139's workers, EE139 was unaware. HMRC have failed to have regard to the facts that EE139 was a new business with a small number of office staff, Ms Suttle had no experience of processing expenses and was heavily reliant on external advisers, they took advice from Accountax (who advised that self-certifying employees would be responsible for ensuring the accuracy of their expense claims), Ms Suttle had various responsibilities within the business and was not solely focused on expense claims, employees were informed about the correct approach to expenses, Ms Suttle did disallow some expenses, and neither Ms Suttle nor

Mr Jaekel stood to gain directly from any reductions in tax liabilities of the umbrella employees.

(2) Matters raised by HMRC as regards inaccuracies (eg reliance on a six-hour day, insufficient detail in claims) do not support a conclusion that the conduct was deliberate.

(3) There is no direct evidence of a concerted attempt by EE139 to inflate the expenses of its employees, and there is no recognisable pattern to the inaccuracies alleged by HMRC. The examples given by Officer McConnell (if proven) are consistent with flawed internal controls or procedures within EE139.

(4) Furthermore, the explanation of a "deliberate inaccuracy" at [63] of *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC), which has been approved by the Upper Tribunal in *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC), is inconsistent with any objective notion of recklessness or blind-eye knowledge which are based not on the most common meaning of "deliberate" but instead on objective standards of what the taxpayer should have done but did not. The Tribunal decisions relied upon by HMRC pre-date the Upper Tribunal's decision in *CF Booth*.

(5) HMRC's approach to attribution fails to take account of the fact that it was the employees who submitted the claims for expenses and have benefitted from any inaccuracies.

310. For Mr Jaekel, Mr Firth submitted as follows:

(1) Allegations of deliberateness must be properly particularised so that the Appellants know what case they have to meet, including the facts, matters and circumstances relied upon. HMRC's submissions must be assessed by reference to their pleaded case. Mr Jaekel has made clear since July 2018 that they consider HMRC's pleaded case to be inadequate. HMRC's approach to the inaccuracies on which they seek to rely is significant in this context – HMRC relies on generalities, yet how can the Tribunal consider whether an error is deliberate if it is not shown what the particular error is said to be.

(2) Pleadings that EE139 should have known of actual hours worked do not support a finding of deliberate behaviour. There is no evidence that any particular expense claim was reviewed, identified as being false but nevertheless processed.

(3) HMRC had not pleaded recklessness, and did not assert a case on recklessness in HMRC's Skeleton or in opening. They cannot seek to raise such an argument in closing.

(4) Any deliberate inaccuracy could not be attributed to Mr Jaekel, as he did not have the required knowledge and intention. He was not involved in the processing of expenses. HMRC's approach fails to recognise the culpability of employees submitting expenses claims.

311. The Upper Tribunal's decision in *CPR Commercials Ltd v HMRC* [2023] UKUT 61 (TCC) was released after the hearing of these appeals. We requested and received written submissions from all parties on this decision. Those submissions addressed the boundaries to blind-eye knowledge, the application of them to the facts in that case and the pleadings (or lack thereof) in these appeals; we found these written submissions to be very helpful and have taken them into account when reaching our decision.

312. We address below certain matters arising in relation to HMRC's pleadings, whether the conduct was deliberate and concealed (including submissions made as to scope of deliberate behaviour, blind-eye knowledge and recklessness), the calculation of the penalty (including the

reduction given for disclosure), special circumstances and whether any inaccuracy (if deliberate) was attributable to either or both of the Appellants.

Particularisation and scope of HMRC's pleadings

313. We first address three matters which arise out of HMRC's pleadings (or what is said to be the lack thereof). These relate to dishonesty, blind-eye knowledge and recklessness:

(1) HMRC pleaded in the SoCs that what it said was the deliberate and concealed behaviour of EE139 was dishonest.

In *CF Booth Ltd* the meaning of "deliberate", and its relationship to dishonesty, was considered by the Upper Tribunal at [38]-[41] as follows:

> "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).
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> […]
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> 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.
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> 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."

It is clear from this decision of the Upper Tribunal that the test of deliberate conduct in Schedule 24 does not require HMRC to plead or prove dishonesty. Whilst HMRC have pleaded dishonesty in these appeals, we do not make any findings or reach any conclusions in relation thereto.

(2) Separate from the Appellants' submissions as to whether blind-eye knowledge can amount to deliberate conduct, Mr Firth submitted that in any event HMRC have not pleaded blind-eye knowledge of particular facts or the basis for a finding of blind-eye knowledge. (These submissions have been made throughout on behalf of Mr Jaekel, not only in the written skeleton before the hearing but also during the hearing, in written closing and referred to in the further written submissions after the hearing.) We consider that it is clear from the SoCs that HMRC were seeking to rely on the blind-eye knowledge of both Appellants:

(a) The SoC in Ms Suttle's appeal states at [22(i)] that "The scale of the unsubstantiated and false expense claims must have been accepted with the

agreement of both directors. It is not possible for such conduct to have been repeated so frequently for so long without the Appellant's knowledge. The Appellant must have turned a blind eye to the obvious inaccuracies that were evident which included false and unsubstantiated expense claims (including mileage allowance payments) being submitted with under recorded hours. This was not isolated conduct…".

(b) The SoC in Mr Jaekel's appeal states at [26(i)] that "The scale of the unsubstantiated and false expense claims must have been accepted with the agreement of both directors. The Appellant must have turned a blind eye to the obvious inaccuracies that were evident which included false and unsubstantiated expense claims (including mileage allowance payments) being submitted with under recorded hours. This was not isolated conduct…".

We take account of the submissions relevant to the adequacy of this pleading, and the matters relied upon by HMRC, in the context of our discussion of blind-eye knowledge as deliberate behaviour when applying the relevant principles to the facts in these appeals.

(3) In their written closing submissions (which were handed up on 14 December 2022), HMRC argued that EE139 had been reckless as to whether the Returns were inaccurate, and that this of itself can constitute deliberate behaviour. Mr Firth submitted that this had not been pleaded by HMRC, and that it was far too late to seek to rely on this in written closing submissions, after all of the evidence has been heard. In this regard:

(a) We are obviously aware that the question of whether recklessness can constitute deliberate behaviour was left open by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17.

(b) The overriding objective in rule 2 of the Tribunal Rules requires that we deal with matters fairly and justly. Rule 25(2) requires that HMRC's statement of case must set out their position in relation to the case.

(c) We have carefully considered the SoCs and agree with Mr Firth that HMRC had not clearly pleaded that it was alleging that the Appellants, as directors of EE139, were reckless as to whether the Returns were inaccurate and that this recklessness was, as a matter of law, capable of constituting deliberate behaviour. We recognise that the SoCs do contain a passing reference that EE139 "should have known" the actual hours worked by the employees.

(d) HMRC's Skeleton did not include any indication that HMRC was asserting that recklessness was sufficient (and we make no comment on whether express reliance on recklessness in the skeleton would have been sufficient in any event).

(e) Whilst the question of whether recklessness can constitute deliberate behaviour is a question of law which is potentially relevant in this appeal (and we use potentially as this is an alternative argument relied upon by HMRC), we have concluded that in the absence of a clear pleading by HMRC in the SoCs (which is not satisfied by the brief references cited above), or an application in sufficient time ahead of the hearing to amend their pleadings, it would not be in accordance with the overriding objective to permit HMRC to seek to rely on this alternative ground – the Appellants had not been given the opportunity to prepare to address this ground (which preparation may well have included considering whether to adduce additional witness evidence) and it would unfairly prejudice them to permit HMRC to rely on this ground at such a very late stage.

314. We do not lose sight of the different submissions of Mr Firth as to the adequacy of HMRC's pleaded case in relation to deliberate behaviour (in particular the lack of particularisation of the evidence on which HMRC relied, and what he submitted was the failure to identify specific inaccuracies in particular Returns) but take those submissions into account when assessing whether HMRC have established that the inaccuracies in EE139's Returns were deliberate for the purposes of Schedule 24.

Meaning of deliberate and scope of blind-eye knowledge

315. The Tribunal in *Auxilium* explained a deliberate inaccuracy in the following terms:

> "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.
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> 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])."

316. This explanation has been approved by the Upper Tribunal in *CF Booth* at [36]-[37].

317. The meaning of "deliberate inaccuracy" was considered by the Supreme Court in *Tooth* (after the decision in *Auxilium*, but before the decision of the Upper Tribunal in *CF Booth*). The decision in *Tooth* related to the approach to deliberate and careless conduct in the context of the discovery assessment provisions in s29 Taxes Management Act 1970 ("TMA 1970"), as interpreted by s118(7) TMA 1970, rather than the penalty provisions in Schedule 24. However, the language of "deliberate inaccuracy" is used in both Acts, and at [27] in *Tooth* the Supreme Court referred to the "broadly similar differential treatment of careless and deliberate conduct by the taxpayer" being reflected in the different levels of penalty which may be imposed under Schedule 24. Further, this decision of the Supreme Court was considered by the Upper Tribunal in relation to Schedule 24 in *CF Booth*.

318. In *Tooth*, Lord Briggs and Lord Sales in their judgment (with which Lord Reed, Lord Leggatt and Lord Burrows agreed) addressed the meaning of "deliberate inaccuracy" as follows:

> "42. […] It is sufficient to say (not least because it was a dictum about the contextual meaning of wilful rather than deliberate) that it offers no assistance on the true construction in this very different context of the phrase "deliberate inaccuracy" in section 118(7). 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.
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> 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.

> 44. Secondly, "deliberate inaccuracy" is the gateway to the taxpayer's exposure to a 20-year period for the making of a discovery assessment, because of the importation of that phrase from section 118(7) into section 29(4). If the first interpretation were to be preferred the taxpayer could incur that exposure by making an honest but in fact inaccurate statement, even after taking reasonable care as to its truth or falsehood. The taxpayer would not even need to be careless, and yet would incur a much longer exposure than if he had been.
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> 45. Thirdly, the 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.
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> 46. Fourthly, as already noted, the phrase was introduced at the same time as a substantial shortening of the exposure period for carelessness, which leads to the clear inference that Parliament must have regarded "deliberate inaccuracy" as conduct substantially more blameworthy. It is to be noted that, as Ms McCarthy submitted, there are other triggers for a 20-year time limit for an assessment which do not necessarily lie on a scale of blameworthiness between carelessness and fraud, but their existence does not displace the powerful inference as to Parliament's intention already described.
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> 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."

319. There was no disagreement between the parties as to these principles, which we apply in these appeals.

320. The parties did then diverge, not only as to the application of these principles to the facts, but whether blind-eye knowledge may form the basis of the necessary knowledge and intention for deliberate conduct.

321. In *CPR Commercials*, the Upper Tribunal concluded at [23] 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. 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."

322. We follow this decision, and accept that in principle blind-eye knowledge may be sufficient to constitute deliberate behaviour. However, the earlier authorities on the meaning of blind-eye knowledge remain significant, and we refer to two in particular:

(1) The parties referred us to the authority cited by the Upper Tribunal in *CPR Commercials*, *Manifest Shipping Company Ltd v Uni-Polaris Shipping Company Ltd* [2001] UKHL 1 and in particular the judgment of Lord Scott:

"112. …"Blind-eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground - and if it is not, it should be - that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in Jones v. Gordon (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty".

…

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. That, in my opinion, is not warranted by section 39(5)."

(2) The meaning of blind-eye knowledge has more recently been considered by Sir Geoffrey Vos MR in *Stanford International Bank Ltd (in liquidation) v HSBC Bank Plc* [2021] EWCA Civ 535, where the appellant had pleaded that HSBC dishonestly and/or recklessly assisted Mr Stanford in the perpetration of the fraud by providing and continuing to operate the bank accounts. Sir Geoffrey Vos MR gave judgment as follows:

"41. It is interesting to note that the basic law of dishonesty does not seem to be in dispute. It has recently been restated in this context in Group Seven. As was explained there at [58]-[61], in the light of Ivey v. Genting, it was settled law that the touchstone of accessory liability for breach of trust or fiduciary duty is indeed dishonesty, as Lord Nicholls so clearly explained in Royal Brunei. The defendant's actual state of knowledge and belief as to relevant facts forms a crucial part of the first stage of the test of dishonesty. Once the relevant facts have been ascertained, including the defendant's state of knowledge or belief as to the facts, the standard of appraisal which must then be applied to those facts is a purely objective one: namely whether the defendant's conduct was honest or dishonest according to the standards of ordinary decent people. Moreover, the imputation of blind-eye knowledge requires two conditions to be satisfied: (i) the existence of a suspicion that certain facts may exist, and (ii) a conscious decision to refrain from taking any step to confirm their existence (see Lord Scott at [112] in Manifest Shipping). The suspicion in question must be firmly grounded and targeted on specific facts, and the deliberate decision not to ask questions must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. Blind-eye knowledge cannot be constituted by a

> decision not to enquire into an untargeted or speculative suspicion (Manifest Shipping at [116]). Suspicions falling short of blind eye knowledge are relevant in that suspicions of all types and degrees of probability may form part of a person's state of mind, and therefore part of the overall picture to which the objective standard of dishonesty is to be applied. We were told that the UK Supreme Court refused the LLP defendant permission to appeal in Group Seven on the grounds that the applications did not raise an arguable point of law in the light of the recent case law in the UKSC.
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> …
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> 46. Secondly, the reality of SIB's pleading, looked at as a whole, is that it is alleging gross neglect on a grand scale. This is a case that falls squarely within Lord Scott's strictures in Manifest Shipping. If a plea of dishonesty were to be permitted in these circumstances, it would be to allow blind eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion rather than a targeted and specific one. It would be to allow gross negligence to be the basis for a finding of dishonesty, which can never be the case."

323. In *CPR Commercials* the Upper Tribunal had cited [116] of Lord Scott's judgment in *Manifest Shipping* and continued:

> "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."

324. The facts in *CPR Commercials* concerned whether the taxpayer had submitted VAT returns with deliberate inaccuracies and whether the taxpayer knew it had insufficient evidence to zero-rate exports of goods. The Upper Tribunal did not accept that there had been blind-eye knowledge of an inaccuracy despite the Tribunal having found that the taxpayer's director was aware of VAT Notice 725 and the requirement to obtain evidence of export within three months of removal and the taxpayer had previously received assessments on the basis of the lack of export evidence.

Discussion and conclusions on whether inaccuracies were deliberate

325. We have made detailed findings as to the hours worked by umbrella employees, payment of agency expenses, claims made by umbrella employees, the way in which EE139 processed expenses claims, the spot-checking, and the Appellants' awareness of inaccuracies or potential inaccuracies.

326. We have found that there were inaccuracies in the Returns arising from various situations – taxable pay being calculated at six hours per day when workers were generally working more than six hours, payment of tax-free round sum agency expenses, reimbursement of non-allowable expenses and invalid claims for AMAPs.

327. Mr Firth submitted that HMRC could only prove its case in relation to deliberate inaccuracies by taking us to each Return which was said to be inaccurate, showing us the inaccuracy and then evidencing the allegation that this was deliberate. We do not accept that that is the only way HMRC can prove its case to the required standard of proof. We can make findings of fact, draw inferences and reach conclusions based on all of the evidence before us

and extrapolate therefrom. We take account of the full, detailed picture which is drawn by all of the evidence, and in the light of the overall context as set out in this decision notice.

328. We remain mindful throughout that the inaccuracies which we have found are of various different types, and that it is open to us to reach differing conclusions as to EE139's conduct in relation to these various inaccuracies.

329. We have set out above the authorities on the meaning of deliberate. Without prejudice to the detailed guidance therein, which we follow and apply in these appeals, we would summarise the position by stating that an inaccuracy will be deliberate both:

(1) 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 and we refer to it here as involving actual knowledge; and

(2) where a taxpayer suspects that a document contains an inaccuracy but deliberately and without good reason chooses not to confirm the true position before submitting the document to HMRC, similarly with the intention that HMRC should rely upon it as an accurate document; we refer to this as involving blind-eye knowledge. The authorities establish that the suspicion must be more than merely fanciful – it must be firmly grounded and targeted on specific facts. The deliberate decision in this scenario must be a decision to avoid obtaining confirmation of facts in whose existence the taxpayer has good reason to believe.

330. There was no dispute that EE139 had, when submitting the Returns, intended that HMRC rely upon them as accurate. The evidence and submissions instead focused on the knowledge (or otherwise) of EE139 in relation to the inaccuracies.

331. We refer to the findings we made at [285] in relation to the awareness or means of knowledge of EE139 of the inaccuracies. Our assessment of all of the facts (including these) when viewed together is as follows:

(1) EE139 had been told by Accountax in 2006 that the onus was on workers to self-certify their expenses, but Accountax did suggest that EE139 performed random route planner checks on mileage distances. From the outset, EE139 had thus questioned whether workers might lie on expenses forms; this was raised by Ms Crowther, but both Appellants were at the meeting. They were told that it was only workers who would be liable. We consider that this single piece of advice, from one meeting in 2006, permeated the approach which EE139 took to its business in the years thereafter.

(2) EE139 did not take any detailed advice thereafter which addressed its responsibilities when dealing with claims submitted by umbrella employees, or to test whether the processes which they adopted (including the level of detail on forms, whether to ask questions, spot-checking) met objective standards of good practice for employment intermediaries. The advice they took was ad hoc and related to questions arising from particular claims, eg allowability of visa fees.

(3) EE139 knew the way in which amounts received from clients were paid to employees, and how they were split between taxable pay and non-taxable expenses. This knowledge was precise in the RTI Years, as it was set out on the face of each of the Returns. They also knew the broad picture during the first four tax years in the Relevant Period. Ms Suttle oversaw the generation and submission of all of the Returns; Mr Jaekel did not, but he knew the methodology used and we are satisfied that he knew taxable pay was generally based on NMW for six hours per day and was generally aware of the level of payments being made as expenses.

(4) We have made findings as to how umbrella employees were sourced by EE139. There was no evidence that EE139 told either its clients or the umbrella employees to inflate their claims for expenses, or, if different, to submit false claims. Indeed, the introductory email sent to umbrella employees told them only to claim for expenses that were wholly and exclusively incurred whilst working on their jobs.

(5) EE139 did not check the vast majority of expense claims. Spot-checking focused on the provision of receipts for non-mileage related claims; that workers were working on the days for which they were claiming expenses and, after mid-2015, on postcodes having been provided for journeys.

(6) The Expense Claim Forms contained declarations by workers that expenses were incurred wholly, exclusively and necessarily in the performance of their duties, refer to the vehicle as being "my car" and refer to EE139's duty to ensure that only legitimate claims are processed. Employees were thus declaring to EE139 that they were submitting their expenses claims correctly. EE139 was entitled to take some comfort from this declaration by employees.

(7) We are not satisfied that it would have been clear to employees that, if they were provided with a vehicle by the client, then they were not entitled to claim AMAPs. The references to "my car" do not necessarily equate to ownership – and indeed a person could be using a family member's car, or a car they had leased, and still be entitled to AMAPs. Whilst guidance was given to employees about expenses, it was brief and did not set out clearly that AMAPs were not available for miles driven in a "company vehicle" or what this meant. EE139 should have known of this requirement, and we infer that Ms Suttle was aware, on the basis of her evidence in relation to her knowledge about SDH and the number of vehicles provided by SDH to employees, and her evidence that if she knew someone was provided with a vehicle and fuel, she would have recommended they use the PAYE model. Ms Robson's evidence, which we accept, was that she was not aware of this requirement until after it was raised by Officer McConnell. We consider that the lack of detailed guidance and understanding around vehicle ownership requirements limits the weight which can reasonably be placed on the declarations by employees (that their claims were correct) in this regard (but we recognise that, when assessing knowledge, it is the subjective knowledge of EE139 which needs to be assessed and not whether this was objectively reasonable).

(8) There was no evidence of any client telling EE139 that they were providing vehicles to the umbrella employees in circumstances where those employees were claiming, and being paid, AMAPs.

(9) There was evidence, which we accept, that office staff were not in a position to know the work sites of umbrella employees, or the actual distances travelled by umbrella employees in any particular week. Ms Suttle's evidence included that junior office staff who did not drive themselves would not necessarily be familiar with possible travel times for various distances. This hearsay evidence was speculative, and did not relate to Ms Suttle's knowledge of the position of any particular member of office staff, and we place minimal weight on this point.

(10) Many of the Expense Claim Forms, and emails claiming expenses, do raise questions on their face, from the failure to provide requested details (vehicle registration, separation of journeys, destinations) to the high levels of mileage claimed to be travelled, and also to the totality of amounts being claimed. We have detailed at [285(6)(b)(iii)] above the claims made by AT at Client D; this is not an isolated example, either for AT or for other umbrella employees.

(11) EE139 had set up the Merit software on the basis of a six-hour working day. We accept EE139's explanation as to why the system was initially set up on this basis. However, they were not receiving, as standard, details of hours worked by each umbrella employee for clients. Documents from clients often recorded the number of days rather than hours. This, coupled with the lack of information from employees, meant that EE139 knew they did not have precise records and were relying on generalisations. This was in circumstances where EE139 knew that some workers were working different hours; this was known not to be accurate for workers on overhead power lines by July 2014, and could be seen not to be invariable for telecoms either (eg where Client D provided timesheets for specific employees).

(12) We are not satisfied that EE139 paid any identified worker on the basis of a six-hour working day in circumstances where EE139 had received a timesheet or other document recording that such person was working more hours.

(13) By February 2014, EE139 had identified that there were significant deficiencies in its approach to the processing of expense claims. From the July 2014 Meeting, Officer McConnell made it clear that he was challenging the correctness of the position being taken by EE139, and the issues he was raising were those which have been pleaded by HMRC throughout (albeit that we recognise that the question of vehicle ownership, which was the factor used by HMRC to calculate the amount of the additional taxable income, was only raised in July 2015). Whilst that meeting was not immediately followed by assessments being issued to EE139, there was nothing said by Officer McConnell which could have led EE139 to conclude that the matters being identified, if they involved false claims being submitted and processed, would not be their responsibility.

(14) There was a very slow response by EE139 to these challenges. We are not referring to the way in which the correspondence between Chartergates and HMRC was conducted, rather the way in which EE139 reacted to test the accuracy or otherwise of the points being made by Officer McConnell. Officer McConnell told EE139 at the first meeting that Client S said workers were working ten-hour days, yet there was no documentary evidence that EE139 raised this with Client S or the workers they used. This was against the background that:

> (a) Most employees were submitting claims weekly. Whilst Ms Suttle's evidence was that employees were generally poor at admin, and we can see that there may well be difficulties in requiring explanations or information "after the event", when employees have already been paid and have no apparent reason to answer more questions, this doesn't completely explain why adding further tick-boxes to the Expense Claim Forms, eg to record hours worked each day, would not have given EE139 some more information.
>
> (b) Both Appellants had contacts with individuals at the clients of EE139 – Ms Suttle was emailing them with questions about employees and payslips; Mr Jaekel was meeting with them, and providing information to EE139's accounts team to set up new clients on the system.

(15) EE139 thus had the means to find out more information about the matters which Officer McConnell was questioning – as to hours worked, vehicles used, and also more information about journeys. There would have been a risk that the responses they received were not completely clear (eg may not be sufficient to distinguish between distances travelled in circumstances where workers used their own vehicle for home to

work but company vehicles for travel between the depot and sites), or may not have been completely accurate.

(16) EE139 did seek to make some improvements to its processes. It corrected its treatment of holiday pay, and, from the beginning of 2016, treated payments of agency expenses as taxable income unless the employee had submitted receipts for expenditure incurred. However, where expense claims were spot-checked, EE139 focused on checking for receipts and allowable expenditure. They were very slow to grapple with the substance of the points Officer McConnell was making about mileage (in circumstances where payments of AMAPs represented the majority of expenses being paid) – even after October 2014, EE139 was processing claims with minimal information on distances, and whilst they did start to refuse claims that were submitted by email rather than on the Expense Claim Form, it is significant that there was no documentary evidence before us of any claim for AMAPs having been questioned by EE139 before it was processed either as to the number of miles claimed or ownership of the vehicle used.

(17) The way the carry-forward of expenses worked meant that those balances comprised "excess" expenses which had been processed by EE139 (ie accepted as valid claims) but not paid out. The issues and problems identified by HMRC were effectively built-in to these amounts, but EE139 continued to pay them out throughout the Relevant Period without scrutinising the balances in the light of the concerns being identified by Officer McConnell.

332. Taking account of all of the evidence before us, we have concluded that HMRC have not established that EE139 had actual knowledge of inaccuracies in the Returns. We make the following points in this regard (which should be considered alongside our detailed findings of fact and the preceding discussion):

(1) We considered that the Appellants had not fully understood the responsibilities and obligations upon EE139 to ensure that it was operating payroll correctly (relying on the initial advice from Accountax, without challenging it or asking for detailed guidance). Whilst they were aware of the steps involved in calculation of basic pay, and the impact on this (and the resulting calculation of tax liability for each employee) of processing expense claims (including for large amounts), we were not satisfied that they fully considered the implications of the decisions which had been taken in 2009-2010 about setting up six hours per day as a default setting. This conclusion has affected our consideration of all the facts as found in relation to the matters which gave rise to inaccuracies in the Returns, and whether there was actual knowledge of them.

(2) HMRC submitted that the growth in EE139's business (with the resultant increase in its profit given that the margin received by EE139 was calculated as a percentage of amounts paid by clients) was an incentive on EE139 to understate hours and/or accept inflated expense claims such that its operating model was more attractive to potential clients and employees, and we have found that there was such a growth and increase in profits. However, this factor does not require this conclusion. We took this into account as a possibility but ultimately were not persuaded by HMRC's submissions.

(3) Whilst we have not accepted Mr Firth's submission that HMRC can only satisfy the burden upon them by taking us to what is said to be each inaccuracy and establishing (to the required standard) that it was deliberate – which he submitted HMRC had not even sought to attempt given the number of the Returns and that most were not in the bundles before us – we have paid close attention to the information provided on the various Returns (at least, those that are before us) and the evidence relevant to whether or not EE139 knew that the figures set out in the various boxes were inaccurate for the

purposes of Schedule 24. We consider that such an approach is required by the language of Schedule 24, which makes it clear that the conduct is not to be assessed in isolation but is intrinsically linked to what is said to be the relevant inaccuracy.

(4) We have already set out that we are not satisfied that EE139 told employees to inflate expenses claims, or calculated taxable pay on the basis of six hours per day where they had timesheets showing that the relevant employee had worked more hours. We have thus focused on the appropriate inferences and conclusions to be drawn from the findings we have made.

(5) Whilst we have identified areas of inaccuracies, we do not consider that our findings are sufficient to support a conclusion of actual knowledge of inaccuracies in any Return. We have found it straightforward to reach this conclusion in relation to the payment of non-allowable expenses and AMAPs (including those that became part of the carried-forward expenses). We have made findings relevant to the lack of checking, but that is very different from concluding that EE139 knew that the expenses which it was reimbursing, or AMAPs it was paying, were not allowable, or were invalid. We have found the position more difficult in relation to hours worked, and the payment of tax-free round sum agency expenses, but nevertheless we have concluded that HMRC have not established, on the basis of the facts as found, that EE139 had actual knowledge that any Return was inaccurate. In particular:

(a) Hours worked – EE139 knew that the use of six hours per day when calculating taxable pay was a generalisation, the default setting which was built into the Merit software unless specifically overridden. EE139's knowledge that some umbrella employees worked a different number of hours was not confined to overhead power lines, but also applied to some in the telecoms sector. However, the difficulties faced by HMRC in establishing that any resultant inaccuracies in Returns were deliberate include:

(i) During the first two years in the Relevant Period (2010-2011 and 2011-2012), which were also the years in which EE139 submitted P14s and P35s (ie less detailed information than in the RTI returns), EE139's clients were primarily in the telecoms sector. The company did not move into overhead power lines clients until September 2012. Although we have found that telecoms workers did not always work six hours per day, we do not accept that EE139 knew this at that time. This is sufficient to deal with HMRC's submissions on actual hours worked during the first two years and deliberate conduct.

(ii) We have found that in some instances the actual hours worked by umbrella employees was less than six hours; so a generalised approach was not inextricably linked to an understatement of hours.

(iii) EE139's knowledge about some umbrella employees working more than six hours per day was generic, both as regards the relevant employees and the precise number of hours. The RTI returns, on the other hand, set out specific information in relation to the taxable pay and non-taxable payments of each umbrella employee during each pay period (which was usually one week).

(iv) A general level of knowledge on the part of EE139 that some umbrella employees were working more than six hours does not, in our opinion, translate to a conclusion that EE139 had actual knowledge that any particular RTI return was inaccurate.

(b) Agency expenses – EE139 should not have been paying any agency expenses to umbrella employees as tax-free round sum allowances. These amounts were taxable. We concluded that this was a mistake on EE139's part at the beginning, in that they did not understand that these amounts could not be treated as payments of (tax-free) expenses just because they were paid to EE139 by clients for such purpose, labelled separately from the contract amounts. This misunderstanding persisted, even after the issue was raised by Officer McConnell at the July 2014 Meeting, as we are satisfied from the evidence of Ms Suttle that it took many months for them to understand the point being made. EE139 then applied the correct treatment.

333. Having reached this conclusion about the absence of actual knowledge on the part of EE139, we have considered whether this is a situation where EE139 suspected that the Returns contained an inaccuracy but deliberately and without good reason chose not to confirm the true position before submitting the Returns to HMRC, ie whether there was blind-eye knowledge of the inaccuracies such that the inaccuracies were deliberate.

334. We have summarised at [307] to [310] above the parties' submissions on whether the conduct was deliberate, and this summary referred to their positions on blind-eye knowledge. However, we consider it is helpful to refer here to the additional written submissions which we received after the hearing, in light of the decision in *CPR Commercials*.

335. Mr Ripley submitted that:

(1) the principal focus of the Upper Tribunal in *CPR Commercials* was in setting out the boundaries to blind-eye knowledge by reference to the authorities, citing the factors laid out in *Manifest Shipping*:

(a) there must have been a suspicion that there was an inaccuracy;

(b) that suspicion must have been firmly grounded and targeted on specific facts (ie the suspicion must have been neither untargeted nor speculative); and

(c) a deliberate decision must have been taken to avoid confirming the existence of the inaccuracy.

(2) The decision in *CPR Commercials* concerned whether the taxpayer had submitted VAT returns with deliberate inaccuracies and (in particular) whether the taxpayer knew it had insufficient evidence to zero-rate exports of goods. The Upper Tribunal in *CPR Commercials* did not accept that there had been blind-eye knowledge of an inaccuracy despite the following facts having been found by the Tribunal:

(a) the taxpayer's director was aware of VAT Notice 725 and the requirement to obtain evidence of export within three months of removal; and

(b) the taxpayer had previously received assessments for the same lack of export evidence.

(3) Accordingly, for blind-eye knowledge to be relevant in any case, there needs to be a specific allegation satisfying each of the elements identified by the Upper Tribunal. In the present case, a general allegation that EE139 took insufficient care or had inadequate regard for its compliance responsibilities (however unreasonably) is not the foundation for a case that there was a deliberate inaccuracy, let alone that all possible inaccuracies were deliberate.

336. Mr Firth submitted that:

(1) The decision of the Upper Tribunal in *CPR Commercials* did not advance matters. HMRC had neither pleaded nor particularised a case of blind-eye knowledge such that the issue did not properly arise for consideration. Nothing in *CPR Commercials* allows HMRC to get around that failure. Furthermore, the legal propositions confirmed by the Upper Tribunal were in any event based on recent binding Court of Appeal authority.

(2) The Upper Tribunal decision is useful in confirming that there is a difference between recklessness and blind-eye knowledge and that is illustrated by the facts of that case.

(3) The Tribunal had concluded that the taxpayer was reckless in relation to the later periods that were assessed which, logically, means that the Tribunal concluded that the taxpayer was subjectively aware of at least a general risk that it did not hold sufficient evidence of export such that it would be inaccurate to zero-rate the supplies and, equally, did not take reasonable steps to avert the risk. Nevertheless, there was no finding (based on the evidence) of a deliberate decision by the taxpayer not to investigate whether it had obtained sufficient evidence of export because it wanted to avoid confirmation of its suspicion (targeted at specific facts) that the evidence held was insufficient. This is an essential element of a finding of blind-eye knowledge, in contrast to recklessness, and explains why the finding of recklessness did not lead to or justify a finding of blind-eye knowledge.

(4) Not only was blind eye knowledge not pleaded (and particularised) in these appeals, but HMRC did not come close to proving that each of the elements of that test was satisfied in relation to EE139 or the individual Appellants.

337. HMRC submitted:

(1) *CPR Commercials* accords with their position in relation to the meaning of deliberate and the relevance of blind-eye knowledge as set out in their written closing, referring in particular to [23] of the Upper Tribunal decision.

(2) Both Appellants had knowledge of the problems with their accounting systems and expenses processing, but nonetheless chose to continue submitting documents to HMRC without making checks of the expenses. This behaviour was deliberate because it involved an intention to mislead.

(3) The factors identified by the Upper Tribunal which are required to make a finding of blind-eye knowledge (and which had been set out by Mr Ripley) are met in this case.

338. At the outset we record that we agree with Mr Ripley's summary referred to above of the approach laid down by the Court of Appeal in *Manifest Shipping*. We consider HMRC's pleadings and then address the position in the light of the facts as found to assess whether EE139 had blind-eye knowledge of inaccuracies such that they were deliberate.

339. The SoCs include the following in relation to HMRC's pleading that the behaviour was deliberate:

> "[] The company's clients and employees have provided documents to HMRC and identified systems which show that the company would have or should have known the actual hours worked by the employees. The company ignored these.
>
> [] The company accepted mileage claims with little or no detail. Evidence from third parties has confirmed that the vast majority of workers did not perform their duties in their own vehicles.

> [] The company selected an arbitrary 6 hours a day which when multiplied by the minimum hourly wage resulted in excessively low wages. Large false expense claims were then added to this sum to give a total figure which equated to the charge out rate. This was indicative of contrivance to re-categorise wages as payments for supposed expenses. In the circumstances the company must have known that its [Returns] were significantly wrong."

340. HMRC's pleadings do thus refer to the allegation that EE139 should have known or must have known of inaccuracies. The SoCs do go on to set out further explanations of these paragraphs, including some specific examples of information provided by clients, or claims made by umbrella employees, but do not use the terminology of blind-eye knowledge. However, we consider that the SoCs are sufficiently clear as to HMRC's position being that EE139 should have known that of the facts which gave rise to what HMRC submits were the inaccuracies and that this resulted in the inaccuracies being deliberate.

341. We proceed on the basis that the question of whether EE139 had blind-eye knowledge of any inaccuracies is before us, but continue to have regard to the submissions from both Mr Ripley and Mr Firth as to the need to identify whether any suspicions are firmly grounded and targeted on specific facts.

342. Viewing all of the circumstances as a whole, we consider that EE139 had various grounds for suspicion at different times during the Relevant Period:

(1) The possibility of umbrella employees lying on their claim forms was raised at the outset by Ms Crowther in the meeting with Accountax in 2006. EE139 was thus aware that there was a risk that claims would be made for false or non-allowable expenses.

(2) Whilst the spot-checking of claims was minimal, it was apparent from claims that were spot-checked that the claims for non-mileage related expenses would include non-allowable expenses.

(3) We have made findings as to the knowledge of EE139 about hours worked by umbrella employees, which show that EE139 should have known that the default approach of calculating taxable pay based on six-hour days would not always be correct.

(4) Some umbrella employees were claiming for high levels of mileage on a regular basis, in circumstances where EE139 did not have direct knowledge of their daily travel between sites and minimal information was provided by the employees making the claims. Some of the distances being claimed to be travelled were sufficiently high that they would take several hours per day.

(5) The information that the Appellants were told by Officer McConnell about his discussions with clients should have raised concerns about the processes they were following (as regards hours worked and expenses claims, including AMAPs). This information was the only source of any suspicion as regards vehicle ownership – we have not found that EE139 otherwise knew that some clients were providing vehicles in circumstances where the employees were then claiming AMAPs.

343. Our view of the actions taken and not taken by EE139 in response was that there was a high level of inertia, and a failure to grapple with the substance of both the points being made by Officer McConnell and also the patterns evident before them. EE139 had two groups of potential sources of information available to them – the umbrella employees and its clients. There may well have been concerns about whether employees would respond to requests for information (but at times there were more than 400 employees, so there should have been a prospect of some responses); and both Appellants had contact with individuals at clients, who could have provided additional information (and did indeed do so later when specifically asked,

eg PQMS replied to the questionnaire). Yet EE139 did not send a questionnaire to clients until after the Relevant Period and there was no documentary evidence of a concerted attempt to obtain information from employees (eg as to hours worked), rather than random requests for additional information about particular expense claims.

344. The overall picture is one where EE139 should not have had confidence that it was calculating taxable pay and reimbursing expenses (or paying AMAPs) correctly. Their processes were inadequate, and EE139 persisted with this approach when being confronted with information from Officer McConnell that, whilst they were not obliged to accept it at face value, at least merited full and prompt investigation.

345. However, when we consider the facts and circumstances in the light of the authorities, in particular *Manifest Shipping*, and the focus (at [116] thereof) on what is required of both the suspicion and the decision not to enquire, namely that the suspicion must be firmly grounded and targeted on specific facts, and the deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe, we have concluded that HMRC have not established that EE139 had blind-eye knowledge of the facts:

(1) As regards the suspicion, whilst there was more than a "vague feeling of unease", we nevertheless conclude that it was not sufficiently targeted in the light of the nature of the inaccuracies in the Returns.

(2) As regards the decision not to obtain confirmation of the facts, we conclude that from the beginning of the Relevant Period until around February 2014, any decision was simply based on EE139's view that any deficiencies were not their problem or responsibility. They relied on the advice from Accountax (which was pertinent to expenses) and as regards any issues with hours, we consider that there was a failure on the part of the Appellants to understand the significance and implications of the approach which they were adopting. Their position was not reasonable; but that is not the test. Later in the Relevant Period, we consider that delays were a combination of lack of resources and a failure again to appreciate the importance of the points being made. This was not a case where the decision not to obtain additional information was to avoid being told facts which they had good reason to believe existed.

346. We have therefore concluded that any inaccuracies in the Returns were not deliberate on EE139's part. The appeals by the Appellants are therefore allowed. However, we have addressed the remaining issues briefly as they were argued before us.

Whether any inaccuracies were concealed

347. Paragraph 3 of Schedule 24 distinguishes between inaccuracies that are deliberate but not concealed and those that are deliberate and concealed in the following terms:

> "3 Degrees of culpability
>
> (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is –
>
> …
>
> (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)."

348. In submitting that the conduct was concealed, HMRC's submissions were that:

(1) Knowingly submitting the Returns which contained inaccuracies is deliberate behaviour and conceals the inaccuracies. EE139 operated a system which misrepresented remuneration as non-taxable expenses. This led to true employee hours and wages being concealed, leading to an understatement of liability to tax as EE139 did not pay the correct amount of PAYE properly due or NICs (at [14] of HMRC's Skeleton)

(2) In the context of their pleading of dishonesty, but which was also relied upon for concealment, (at [102] of HMRC's Skeleton), HMRC submitted that EE139 operated a system which misrepresented remuneration as non-taxable expenses; this was concealment. Over a lengthy period EE139 operated a scheme of systemic concealment.

(3) In their written closing, at [76], HMRC submitted that "Indeed, the fact that [EE139] continued to provide inaccurate information, and failed to implement changes to any systems such that inaccurate information was produced, is evidence of the concealment of the inaccuracy itself."

349. Mr Ripley and Mr Firth submitted that HMRC's approach to the question of concealment was misconceived. The statement that some of the expenses represented taxable pay and should have been declared as such was no more than a statement that there is an inaccuracy. In order for a penalty to be deliberate a taxpayer must have intended HMRC to rely on a document knowing it was inaccurate. That necessarily entails misleading HMRC and if that were all that is required to constitute concealment, all deliberate inaccuracies would be concealed. That would leave no room for inaccuracies which are deliberate but not concealed. The concealment has to be something separate from the submission of a return containing an inaccuracy itself.

350. As a matter of principle, in the context of inaccuracies in documents, we agree with these submissions for the Appellants.

351. Schedule 24 itself does not include a definition of what is meant by "concealed" for this purpose. Paragraph 3 does, however, include two indicators which are of assistance:

(1) to state that which is obvious, an inaccuracy may be deliberate but not concealed, ie submitting a return which is known to contain an inaccuracy which amounts to or leads to an understatement of tax with the intention that HMRC relies upon it constitutes deliberate behaviour; concealment requires something else; and

(2) the example which is given of deliberate and concealed behaviour is of submitting false evidence in support of an inaccurate figure. This is only an example, but is one illustration of what the something else might involve.

352. We remind ourselves of the information contained in the Returns themselves:

(1) For the first two years of the Relevant Period, EE139 was filing P35s and P14s. Those forms require an employer to declare the taxable pay (and the amount of PAYE deducted that is to be paid to HMRC). There is no box for declaration of the amount of non-taxable payments being made.

(2) Once EE139 filed RTI returns, EE139 reported the taxable pay and amounts it was paying as non-taxable payments. Whilst we did not accept Ms Suttle's attempt to argue in the course of her evidence that there was no inaccuracy (her position being based on the non-taxable payments declared to HMRC being a correct declaration of the amounts shown on Merit that were used for payroll purposes), the RTI returns were a straightforward and clear statement by EE139 of the payments it was making to employees.

353. On the facts, we consider that the submission of the Returns themselves did not involve any arrangements by EE139 to conceal the inaccuracy. The P35s and P14s included less information than the RTI returns, and notably did not include details of non-taxable payments made; but that was a consequence of the information required by such forms, and did not reflect any decision by EE139 not to provide this information.

354. HMRC's pleadings largely seek to rely on the facts which they submit support a conclusion that the behaviour was deliberate. They do reference a scheme of systematic concealment; if that is merely a reference to the fact that there was a large number of Returns being submitted, that does not add anything to the pleadings in relation to deliberate behaviour. HMRC have not pleaded that any specific statement made, or document provided by EE139, or inaction of EE139 (separate from submission of the Returns) constituted concealment of the inaccuracies for this purpose.

355. Taking account of all of the evidence, we have considered whether subsequent actions (or omissions) provide evidence that EE139 attempted to conceal or cover-up the inaccuracy, having regard to the example given in the legislation (which we remind ourselves is simply an example, not an exhaustive definition) of submitting false evidence in support of an inaccurate figure.

(1) There was no requirement that EE139 provide additional information at the time it submitted the Returns.

(2) Once Officer McConnell started his investigation into EE139:

(a) He asked for records for a sample of employees (that he had selected) and those were provided. Whilst he asked for records for a period of one year and we found that only a sample was provided, there was no challenge to the legitimacy of those records (ie they were the claims which had been submitted). We did find that he was not provided with the full records for a year, but we also find that this was based on practicalities, and consider this was recognised by Officer McConnell when he then asked for records for a period of three months (which were provided).

(b) By the time of the July 2014 Meeting Officer McConnell had already viewed the RTI returns and decided that the tax and NICs paid by EE139 were low. We have considered all of the information given by EE139 at that meeting. Ms Suttle explained to him that EE139 paid employees on the basis of a six-hour day at the NMW, and explained how they came to decide that pay should be calculated on this basis. We found that EE139 did not generally receive timesheets from clients; it was not failing to provide them to HMRC. We have considered the statement that no general meal/lodging allowance was paid in the light of our findings as to agency expenses (in particular that this was paid without evidence of particular expenditure) but accept Ms Suttle's explanation that the explanation being given was that EE139 did not pay a standard lodging allowance to all employees, but would, where the client paid a subsistence allowance for the workers, pay that across.

(c) We have also considered the explanations provided by Chartergates on EE139's behalf. Both Appellants accepted that drafts of these letters were sent to them for review before they were sent to HMRC. There are aspects of those letters which they sought to disavow, notably the reference to the six hours being a glitch in the Merit software. These letters were sent on EE139's behalf, and EE139 was responsible for ensuring that statements being made to HMRC were an accurate reflection of the position.

356. In concluding that no statements made by EE139 in the July 2014 Meeting (or in subsequent correspondence) constituted concealment we have taken into account:

(1) the factual position that records were being handed over which showed how expense claims were made (ie on the Expense Claim Forms and by email), illustrated the level of detail which was being provided by umbrella employees, and that payslips record taxable pay calculated at the NMW; and

(2) Officer McConnell was speaking directly to various of EE139's clients. He did refer to some, but not all, of what he was told by them when he met with and wrote to EE139, but did not provide the contemporaneous records to EE139 until November 2016. Whilst we have found that EE139 could have asked more questions, more quickly, of its clients, HMRC have not established that those clients had given the same information or explanations to EE139 by the time that EE139 was dealing with HMRC's investigation and Officer McConnell's questions.

357. We reject HMRC's submission that the inaccuracies were concealed.

Calculation of the PLN

358. Paragraph 4 of Schedule 24 sets out the amount of the penalty payable as a percentage of the PLR (30% for careless action, 70% for deliberate but not concealed and 100% for deliberate and concealed). The PLR is defined by paragraph 5(1) in respect of an inaccuracy in a document as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy.

359. The Assessments issued to EE139 were based on 90% of the expenses payments made to umbrella employees being disallowed and treated as "additional" pay, taxed at 20%. This led to a calculation of £5,533,065 in unpaid PAYE tax and £6,991,449 in unpaid Class 1 NICs, a total of £12,524,514, and these were the amounts treated by HMRC as the PLR for the purpose of calculating the penalty.

360. The Appellants submitted that HMRC's approach to the calculation of the PLR was wholly unreliable (with detailed submissions addressing the lack of evidence as to the use of 90% and the need to identify each inaccuracy which was then relied upon as a component of the PLR).

361. The discussion at [286] to [303] above sets out our consideration and conclusions on whether there were relevant inaccuracies in the Returns. We took account of the submissions of all parties, irrespective of whether they were made in the context of identifying inaccuracies or the calculation of the PLN.

Reduction for disclosure

362. Paragraph 10(1) provides that if a person who would otherwise be liable to a penalty has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure. Paragraph 9(1) provides that a person discloses an inaccuracy by:

> "(a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected."

363. Paragraph 9(3) then provides that the quality of the disclosure includes its timing, nature and extent.

364. HMRC calculated the penalty on the basis that the disclosure was prompted and a reduction of 30% was made to reflect HMRC's view of the quality of the disclosure (5% for telling, 10% for helping and 15% for giving access to records). For a deliberate and concealed inaccuracy, with a prompted disclosure, the penalty range is 50% to 100% of the PLR. The penalty percentage was then calculated as 85% of the PLR, which brought the amount of the penalty issued to EE139 to £10,645,836.90.

365. Both Appellants challenged HMRC's refusal to allow a full deduction for cooperation (ie reducing the penalty to 50% of the PLR in the context of a deliberate and concealed inaccuracy), as well as the reasons given by HMRC for its position.

366. Paragraph 10 provides that HMRC "must" reduce the standard percentage to one that reflects the quality of the disclosure, and paragraph 17(2) provides that, on an appeal against the amount of a penalty, the Tribunal may affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had power to make. We thus have appellate jurisdiction in relation to the amount of the penalty (save in respect of reduction under paragraph 11, considered separately below). As was accepted by the Appellants, the burden is on EE139 to satisfy us that a greater reduction should have been given for the quality of disclosure.

367. We agree with HMRC that the disclosure was prompted, because EE139 did not inform HMRC about the inaccuracies before it had reason to believe that HMRC had or was about to discover it. Following submission of the Returns, EE139 had not sought to engage with HMRC until Officer McConnell commenced his investigation.

368. The penalty explanation schedule explains the reduction given by HMRC of 30%:

(1) Telling us about it – 5% – Although EE139 has accepted that the employees may have worked more than six hours a day it states that any error was made in good faith. There has been no admission that EE139 knew that the expenses were wrong;

(2) Helping us understand it – 10% – EE139 has not volunteered any information or actively worked with HMRC to quantify the inaccuracy. EE139 has yet to accept there is a liability. It has declared the non-taxable payments on RTI returns enabling HMRC to produce estimated determinations; and

(3) Giving us access to records – 15% – The majority of the information and documents requested at the start of the enquiry were provided on time. EE139 has provided additional information during the review but has failed to produce evidence to substantiate the hours or expenses claimed.

369. We consider that the reasons given by HMRC are unsatisfactory to the extent that they expressly rely (in the context of telling and helping) on EE139 not admitting that it knew the expenses were wrong, and not accepting there was a liability. A taxpayer is entitled to maintain its position that there is no inaccuracy in relevant documents, or that it did not have relevant knowledge, whilst nevertheless providing full co-operation and disclosure to HMRC. EE139's refusal to admit knowledge or liability should not be relevant to the assessment of the quality of the disclosure.

370. On the basis of the facts:

(1) The Appellants first met with HMRC when requested in July 2014, providing Officer McConnell with records in relation to his sample of employees, providing them for a three-month period when Officer McConnell identified that the snapshots initially provided were not sufficient for him to follow through the claims which were made into payslips.

(2) They instructed Chartergates in relation to the investigation, who then provided some further explanations and records. The description of the communications demonstrates that there were various delays during the engagement with HMRC. Some of these delays were as a result of absences of Chartergates personnel, but the responsibility remained with EE139.

(3) Looking at whether EE139 provided material to HMRC to enable them to quantify and assess the inaccuracy:

(a) There was no evidence that Officer McConnell had ever asked EE139 for information relating to the quantum of expenses payments made to employees in the first two tax years, ie those prior to RTI. Nevertheless, this was information which we expect EE139 would have had and could have been disclosed, but was not.

(b) We have found that EE139 had not asked clients for information about hours worked (nor had it generally received timesheets), vehicle ownership or mileage, the consequence of which is that there was minimal information which EE139 could provide to HMRC from clients – the lack of information was a failing of EE139's processes not a lack of disclosure to HMRC.

(c) There was a confusing mismatch of explanations given to HMRC between EE139 and Chartergates on some matters, eg in relation to agency expenses and how EE139 had come to make payments on the basis of six-hour days. This was unhelpful.

(d) EE139 did not refuse to provide records to HMRC. They did provide a voluminous amount of material (eg in August 2016). However, there are clear concerns with the timing of provision of much of this information (given that Officer McConnell was very clear throughout as to the range of matters of concern, recognising that the question of vehicle ownership did emerge a year after he started his investigation). Furthermore, Officer McConnell was specifically asking for EE139 to produce evidence of claims being rejected yet they were not producing documentation showing claims made (the papers for which were being kept for each employee), and tracking through how those claims were then dealt with by EE139.

371. We are not satisfied that the maximum reduction should have been given for the quality of disclosure – there were delays, and EE139 did not take the opportunity to provide a clear narrative in relation to the expenses claims and acceptance/rejection of claims within the samples. However, we would have considered that a higher reduction than the 30% allowed should have been granted, to reflect the volume of material which EE139 provided, and would allow a reduction of 50% for cooperation.

Special circumstances

372. Paragraph 11 of Schedule 24 provides that if they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1. Paragraph 11(2) provides that "special circumstances" does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

373. HMRC had concluded that there were no special circumstances and did not reduce the penalty under this provision. Paragraph 17(3) provides that if the Tribunal substitutes its decision as to the amount of the penalty for HMRC's, the Tribunal may rely on paragraph 11 to a different extent only if the Tribunal thinks that HMRC's decision was flawed.

374. This discretion has been considered by the Upper Tribunal in *Harrison v HMRC* [2022] UKUT 216 (TCC) by reference to its previous decision in *Edwards v HMRC* [2019] UKUT 131 (TCC). At [54] in *Harrison* the Upper Tribunal stated:

> "54. We will address the legal test first. The UT's decision in *Edwards* made clear there was no reason to add any gloss to the phrase "special circumstances". It endorsed the discussion of the interpretation of that phrase in Advanced Scaffolding (Bristol) Limited v HMRC [2018] UKFTT 0744 (TC) (at [72]- [74]) that:
>
> "…The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."
>
> The UT also agreed that "special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration"."
>
> …
>
> 57. *Edwards* ultimately confirmed that HMRC, and where appropriate the FTT, simply need to focus on the term used in the legislation. Beyond being relevant to the issue under consideration, the circumstances must be "special" – no more and no less. There is nothing special about the term "special". Although the test HMRC used was expressed in different terms, we consider it reflected the substance of the applicable test. HMRC referred to the circumstances being "uncommon or exceptional". Those terms, as pointed out by the FTT in Advanced Scaffolding, did not "really take the debate any further". In other words those terms did not add anything; neither did they detract from the term "special". In so far as HMRC referred, by reference to Hesketh, to the circumstances not being ones which amounted to a reasonable excuse, that was not relevant as HMRC had not accepted that any of the circumstances amounted to a reasonable excuse. To the extent HMRC had in mind the suggestion in Hesketh that to be special the circumstance had to render the penalty "…in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions" we would note that there is plainly a great deal of overlap between that and the circumstances which HMRC or the tribunal might consider to be special. The appellant does not identify in what respect this imposed a more stringent requirement."

375. Neither Mr Ripley nor Mr Firth put forward any detailed submissions as to evidence of special circumstances on the facts in these appeals. They did both refer, in the context of whether the penalty was attributable to the Appellants, to the fact that the expense claims (including for AMAPs) which HMRC submitted to be invalid had been submitted by the umbrella employees, that any inaccuracies resulted in the employees receiving higher net pay, and that EE139 (and thus the Appellants) had not benefitted from any understatement of tax.

376. We have considered all of the facts and circumstances in these appeals. We recognise that:

(1) Claims were being submitted by umbrella employees, and that there was no submission that EE139 had fabricated claims. EE139 had been advised in 2009 that as employees were self-certifying, they (ie the employees) were the only ones who would be liable (we infer, for invalid claims). Yet EE139 had the ability to ask further questions, but did not do so. Further, EE139's own approach to the calculation of taxable pay based

on six hours per day was what provided scope for higher levels of expenses to be paid from the contract amounts.

(2) Any understatements of tax (be it PAYE or NICs) had the effect of increasing the net pay of umbrella employees. However, save where it is alleged that an employment intermediary has been fraudulent, this is typically the fact pattern in respect of understatements of taxable pay by such intermediaries.

377. We are not persuaded that there was anything special about EE139's circumstances. We are not satisfied that HMRC's decision to this effect was flawed.

Attribution of penalty to Appellants

378. Paragraph 19(1) of Schedule 24 provides that 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.

379. The PLNs were issued by HMRC on the basis that each Appellant is liable for 50% of the penalty. HMRC's position was that the Appellants were the joint directors of EE139 at all material times and there was no-one else to whom the inaccuracies are attributable. HMRC submitted that the Appellants were both responsible for the submission of inaccurate Returns, in particular:

(1) Mr Jaekel had previous experience of the payroll industry, was involved with training the office staff on expenses and met with clients, discussing their businesses with them; and

(2) Ms Suttle was based in the office and supervised the processing of the expenses claims and payroll.

380. HMRC submitted that the scale of unsubstantiated and false expense claims must have been accepted with the agreement of both Appellants, who must have turned a blind-eye to the obvious inaccuracies that were evident in both the overstated expense claims and understated hours.

381. Mr Ripley submitted that the benefit of any understatement of tax has been enjoyed by the employees, not by EE139 or the Appellants, and that HMRC's approach fails to allocate any of the culpability to the workers. Paragraph 19 does not require that a total of 100% of the penalty is attributed to officers of the company, and any attribution must reflect culpability.

382. Mr Firth submitted that the deliberate conduct, not just the inaccuracy, must be attributable to the officer for paragraph 19 to apply. "Attributable to" means brought about by. HMRC appear to be relying on a submission that the scale of the false expense claims was such that Mr Jaekel must have known of them. Mr Firth rejected this – even if there were false expenses, there is no basis for concluding that Mr Jaekel was aware of them. Mr Jaekel was not office-based, was not involved in processing expenses or filing the Returns. Even if he did have some involvement in processing expenses, it would not follow that he would realise if a false expenses claim was sent in. There is no basis for attributing any part of deliberate conduct, in particular an intention to mislead HMRC, to Mr Jaekel. Furthermore, HMRC's own case includes reliance on inaccuracies which are directly and immediately attributable to the employees who made false expenses claims, who sought to profit from such claims. It is thus wrong to assert that there is no one else to whom the inaccuracies are attributable.

383. Having concluded that the inaccuracies were not deliberate, the question of attribution cannot arise. We have found that EE139 did not have the necessary knowledge (either actual knowledge or blind-eye knowledge) and intention to mislead HMRC. Our view is that the

basis for reaching the conclusion that behaviour was deliberate (eg whose knowledge and intention) should inform the question of attribution. In the present appeals, given that we have concluded the inaccuracies were not deliberate, it is difficult to reach a final conclusion as to attribution.

384. We therefore confine ourselves to the following:

(1) Ms Suttle and Mr Jaekel were the directors of EE139 throughout; they were thus officers of the company and potentially liable to a penalty under paragraph 19. We agree with the Appellants that it is not necessarily enough to say that where there is a penalty for deliberate behaviour then responsibility must sit entirely with the Appellants as directors.

(2) Whilst Ms Suttle was primarily responsible for the office staff who processed the expenses and filed the Returns, Mr Jaekel was aware of the way in which expenses were processed.

(3) They were both responsible as directors for the guidelines given to umbrella employees about claiming expenses, but also the guidance, or lack thereof, given to office staff about checking and processing expenses.

(4) Both Appellants had relevant knowledge as to the hours worked. Both Appellants had the means of obtaining additional information from clients about the concerns identified by HMRC and did not do so.

(5) Umbrella employees made claims for expenses to which they were not entitled to be paid as tax-free amounts. Those employees did thus receive a benefit from the claims they made (in their Expense Claim Forms or otherwise). These forms (or other documents forming their claims) were not themselves the Returns for the purpose of Schedule 24. Viewed in this light, the finding that employees made invalid expense claims, which were then acted upon by EE139, does not necessarily mean that the directors of EE139 should not be responsible for deliberate inaccuracies in the Returns – they are different documents, not all inaccuracies can be explained by reference to the claims made by employees (eg the approach to agency expenses), and there were failures of EE139 in the way it processed and paid claims which resulted in inaccuracies in the Returns.

(6) We agree with the Appellants that paragraph 19 does not require that the amounts attributed to officers aggregate to 100% of the amount of the penalty which was issued to EE139.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

385. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 26 September 2023