Neutral Citation: [2024] UKFTT 00051 (TC)

Case Number: TC09033

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/07686

VALUE ADDED TAX – Schedule 24 FA 2007 penalties for inaccuracies in VAT returns – personal liability notice given to director at time of alleged VAT return inaccuracies – company's appeal against VAT assessments unsuccessful at First-tier Tribunal, Upper Tribunal and Court of Appeal – company in liquidation by time of litigation against assessments – application by appellant to amend grounds of appeal against PLN so as to argue that VAT returns not inaccurate – objection to application on basis that it was abuse of process, given outcome of company litigation – key issue: was there sufficient identification between company and appellant, so as to "fix" appellant with outcome of company litigation? – Held (on facts): yes – application for that new ground refused – application permitted as regards other grounds ("deliberate" inaccuracy and "attribution" to then-director)

Heard on: 6 November 2023
Judgment date: 3 January 2024

Before

TRIBUNAL JUDGE ZACHARY CITRON

Between

PAUL JUDD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Bedenham of counsel, instructed by TT Tax

For the Respondents: Brendan McGurk of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

PRELIMINARIES

1. This is a case management decision on an application by the appellant to amend his grounds of appeal. The appeal was against a notice (the "**PLN**") given to the appellant under paragraph 19 Schedule 24 Finance Act 2007, apportioning to him (as a company officer) a penalty assessed on Award Drinks Ltd (the "**company**").

2. The form of the hearing was V (video) using the Tribunal's Video Hearing Service. A video hearing was fair and just in the circumstances. The (electronic) documents to which I was referred were a hearing bundle of 679 pdf pages and an authorities bundle of 296 pdf pages.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND TO THIS APPLICATION

The company's appeal to the FTT against the VAT assessments on the company

4. On 1 October 2018, following a 5 day hearing in June that year, the Tribunal (the "**FTT**") released a decision ([2018] UKFTT 570 (TC)) dismissing an appeal by the company against VAT assessments relating to supplies of alcoholic drinks (the "**2010-2013 company supplies**") made by it:

(1) the appeal was against so-called "best of judgement" VAT assessments issued under s73 Value Added Tax Act 1994 on 30 September 2014 in the sum of £1,543,714 in relation to its VAT accounting periods between September 2012 and June 2013 and on 6 January 2015 in the sum of £3,029,677 in relation to VAT periods between December 2010 and June 2012;

(2) the VAT assessments were on the basis that the place of supply of the 2010-2013 company supplies was the UK;

(3) the bona fides or rationality or the sum assessed by the "best of judgment" assessments were not challenged by the company. The FTT decision noted that the VAT assessments were prima facie right, and remained right, unless and until the taxpayer were to show that they were wrong and also showed positively what corrections should be made in order to make the assessments right or more nearly right;

(4) the company contended that the assessments were wrong, saying it had not made taxable supplies in the UK. Its case was that it sold goods in France and that the sums lodged in its UK bank account related to in-bond sales of alcohol to cash and carry outlets in and around Calais. These outlets accepted cash in Sterling from UK tourists and "booze cruise" day trippers. The company asserted that it and its customers arranged for the cash to be delivered by courier and deposited at various UK branches of its bank;

(5) the FTT decision commented on the company's case as follows, at [79-80]:

(a) there was no positive documentary evidence adduced by the company, and nothing from the entities from which the company was said to have received payments, that they were genuine retail cash and carry operators or genuine wholesalers that had made any payments to the company;

(b) there was a distinct absence of cash declarations to French Customs by couriers, customers or the company;

(c) cheques said to be from three different French customers were drawn on same UK bank account;

(d) there was a complete lack of commerciality in the transactions said to have occurred. No costs analysis was provided by the company comparing the costs of French banking facilities to cost of couriers despite this being requested by HMRC;

(e) it was not credible to contend that French cash and carry operators would bear costs of couriers to banks throughout the UK without any recompense from the company;

(f) there was no rational explanation for cash deposits being made all around the UK but not in the branches nearest the channel ports or Eurotunnel terminus. The FTT could not accept the company's assertion that this was because the Dover branch of Barclays would not accept cash payments;

(g) there was no evidence to connect any named courier with any of the deposits, nor was there any evidence of travel by any courier;

(6) the FTT found that the factual case advanced by and on behalf of the company was not supported by the evidence and did not hold water; it was not sufficient to displace the VAT assessments which therefore remained "right" ([82]);

(7) [15]-[18] of the FTT decision dealt with the appellant as the company's witness in the proceedings, as follows:

> 15. Although there was a reluctance on the part of HMRC's witnesses, other than Ms Kenning and Mr Llewellyn, to provide direct and straightforward answers to questions which they perceived as unhelpful to HMRC's case we do not have any particular issue with their evidence. However, the same cannot be said of Mr Judd who we did not find to be a convincing or indeed a truthful witness. He appeared to change his evidence during cross-examination, e.g. initially saying that customers of Award Drinks were cash and carry retailers who accepted cash in sterling from their "booze cruise" customers and describing how he had seen couriers collecting cash but subsequently saying that they were wholesalers suppling the cash and carry outlets but being unable to name the managers or operators of these businesses or the cash and carry operators they supplied. Also, his evidence was inconsistent e.g. he said both that he knew who his customers were as they were selling to booze cruise day trippers and that he had no knowledge of what happened to the goods after they left the account of Award Drinks at the warehouse.
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> 16. Additionally, Mr Judd gave new evidence when cross-examined, e.g. he made serious allegations against a former employee of Award Drinks in connection with criminal activities. He asserted that Award Drinks had received of a letter from Banque du Scalbert in Calais withdrawing account facilities (a letter which he did not produce) and he said that he had been told by HMRC that it "was for me to decide" whether to make customs declarations, as required under French law, when he couriered large sums of cash from France to the UK. His evidence was also inconsistent, e.g. after stating that he had made "loads of declarations" to French Customs he subsequently said that did so "infrequently". However, there was no evidence of any such declarations having been made by him or by the couriers said to have been sent to Award Drinks.
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> 17. Further, Mr Judd's assertions that HMRC officers had mis-stated the facts in almost every note of meeting or visit that had taken place, that letters from HMRC following such meetings or HMRC visits would only "include what they wanted to put" and would "never include everything" that he said and that a description of the business of Award Drinks in a FAME Report that was

> exhibited to his witness statement was "not correct", was, in our view, simply not credible.
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> 18. Accordingly, when there was a conflict, we preferred the documentary evidence and the evidence of other witnesses to that of Mr Judd.

(8) at [14], the FTT decision said:

> We were also provided with a witness statement made by Mr Manuel Gluck, the Warehouse Manager of Import Export Fonderies De Wimille ("IFEW") a bonded warehouse in Wimille, France with which Award Drinks is said to have had an account. Documents summarising transactions concerning Award Drinks, but not the original documents underlying the summaries, was exhibited to the statement. However, Mr Gluck did not give evidence. While we admitted his witness statement as hearsay evidence (i.e. a statement made otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated) we attach less weight to it than would have been the case had Mr Gluck given oral evidence which could have been tested under cross-examination.

5. The FTT decision stated (at [19]) that the company's directors included the appellant and another named individual. It also stated (at [24]) that following a members voluntary liquidation the company, on 26 June 2013, appointed a liquidator. At that time its director was the appellant.

The company penalties and the PLN

6. On 27 September 2019 (i.e. about a year after the release of the FTT decision) a paragraph 1 Schedule 24 Finance Act 2007 penalty assessment (the "**company penalties**") was raised against the company for inaccuracies in its VAT returns relating to the 2010-2013 company supplies, and the (related) PLN was given to the appellant.

7. The company penalties were in the sum of £5,579,841.60, representing 96% of the potential lost revenue. That percentage was arrived at on the basis that

(1) the company's action was deliberate and concealed

(2) disclosure of the inaccuracy in the VAT returns was prompted

(3) the quality of the disclosure was such that the reduction was limited to 4%.

8. The PLN was for 100% of the company penalties.

9. On 24 October 2019, the company notified its appeal against the company penalties, and the appellant notified his appeal against the PLN. Both the company and the appellant were represented by TT Tax. The grounds for both appeals were very similar (and use the defined term "Appellants" to mean the company and the appellant, in their respective appeals). The "grounds of appeal" document in the appellant's notice of appeal said this at paragraph 4:

> The Appellants consider that this appeal could only properly proceed if the appeal against the VAT assessments was not successful and the assessments stand. As such, these appeals do not challenge whether there was an inaccuracy. It is the Appellants' knowledge of any inaccuracies which would be relevant. As such, nothing in these grounds should be considered an admission that the Respondents' decisions that there had been inaccuracies were correct and the Appellants maintain their support of the separate appeals challenging those decisions.

10. Paragraph 5 of the "grounds" document submitted that the decision to raise the PLN was wrong in that:

(1) HMRC had not expressly alleged any deliberate behaviour by the appellant. They asserted that the appellant's actions were directly responsible for the inaccuracy – but that was insufficient.

(2) Insofar as HMRC were alleging deliberate wrongdoing, that amounted to an allegation of fraud. It was unreasonable for HMRC to seek to allege this after having expressly disavowed any allegation of fraud in the FTT litigation. The decision to raise a penalty based on deliberate inaccuracies was unlawful.

(3) The appellant did not cause the company to submit returns whilst either he or the company knew them to be inaccurate.

(4) The findings of the FTT were not relevant to either the company's or the appellant's state of knowledge at the time of submitting the VAT returns. The FTT's decision takes matters no further than that the relevant returns contained inaccuracies. All other matters fall to be decided afresh.

11. On 4 December 2019 the Tribunal directed that the two appeals (the company's and the appellant's) be heard together. It also allocated them to the "complex" category, and stayed them behind the company's appeal against the FTT's decision on the VAT assessments on the company.

The company's appeals against the FTT decision on the VAT assessments on the company

12. On 22 June 2020 the Upper Tribunal released its decision ([2020] UKUT 201 (TCC)) on the company's appeal against the FTT decision:

(1) The first ground of appeal, which is of most relevance to this decision, related to certain French transaction documents (the "**FTDs**") exhibited to the appellant's witness statement in the FTT proceedings; the FTDs were said to be examples of the sales carried out by the company in France under bond and out of bond. Eight entities were named for in bond sales, and one for out of bond sales.

(2) The company's case, in that first ground of appeal, centred on arguments that (1) the company could not have made any of the supplies on which the assessments were based because it had lost possession and control of the goods in France, and (2) that state of affairs was proved by the FTDs, and those FTDs were not challenged by or before the FTT.

(3) The Upper Tribunal concluded (at [82]) that the initial premise of the ground, that the FTDs were not challenged, was not made out. In circumstances where the FTDs were challenged, those documents did not mean it was unreasonable of an FTT to find possession and control had not been divested (in France); it was at least open to them not to be so satisfied. That meant there was no error of law in the FTT failing to be satisfied on the balance of probabilities, on the basis of all the evidence, that possession and control of the goods had been lost by the company while the goods were in France.

(4) Because it considered that there was some merit in the company's complaint (and the second ground of appeal) that the FTT did not give reasons why it did not consider that the FTDs called for a reasoned analysis of whether the company had divested itself of the possession and control of the goods while located in France, so that it could not then have been the person making supplies of those goods in the UK, the Upper Tribunal set aside the FTT decision for inadequacy of reasons; but the remade decision adopted in its entirety the decision the FTT made but incorporated by way of addition the reasons as articulated by the Upper Tribunal (at [76-79]) as to why the FTDs could not be taken at face value and did not therefore mean possession and control of the goods had been divested by the company.

13. On 6 August 2021 the Court of Appeal released its decision dismissing the company's appeal against the Upper Tribunal's decision. The Court of Appeal rejected the company's contention that there had been a misunderstanding by the Upper Tribunal of HMRC's pleaded case which resulted in unfairness to the company.

THIS APPLICATION

14. On 30 November 2022 the appellant applied to the Tribunal for

(1) permission to file and rely upon replacement grounds of appeal; and

(2) a preliminary hearing to consider whether the appellant, in his appeal against the PLN, was able to challenge HMRC's case that company's VAT returns contained inaccuracies (in that taxable supplies made by the company in the UK were omitted from its VAT returns).

15. The basis for the appellant's appeal against the PLN was set out at paragraph 3 of his "Replacement grounds of appeal" document, as follows:

> i. [The company's] VAT returns were not inaccurate. To the extent that HMRC maintain that there were inaccuracies because [the company] made supplies in the UK that were not declared, [the appellant] disputes that. [The appellant] will say that [the company] lost possession or control of the goods in France such that [the company] was not making (indeed, could not make) taxable supplies of those goods in the UK.
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> ii. Any inaccuracies in [the company's] VAT returns were not deliberate. It is for HMRC to prove the extent of any deliberate inaccuracies. [The company] did not know any UK supplies (other than those properly declared) were taking place and did not knowingly fail to account for those transactions in its VAT returns.
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> iii. Any deliberate inaccuracies in any VAT return provided to HMRC by [the company] were not attributable to [the appellant]. It is for HMRC to prove the extent of any deliberate inaccuracies that are attributable to [the appellant] and that the PLN has been correctly calculated. The appellant did not know any UK supplies (other than those properly declared) were taking place and did not knowingly cause [the company] to fail to account for those transactions in its VAT returns. [The appellant's] case is that he believed that [the company] had lost possession or control of the goods in France such that [the company] was not making taxable supplies of those goods in the UK.

16. At paragraph 4 of the replacement grounds of appeal, it was submitted that the FTT decision (as upheld on appeal) was not determinative of whether or not there were inaccuracies in the company's VAT returns, because:

(1) the FTT dismissed the company's appeal against the VAT assessments on the basis that the company did not provide sufficient evidence to displace the assessments (without there being any "positive finding" by the FTT that the company had made undeclared taxable supplies in the UK).

(2) there was "further evidence" that was not before the FTT: the appellant would contend that the company lost possession or control of goods in France, whether it received cash, cheque, or electronic payments for them.

(3) whilst he was a witness in the FTT proceedings, the appellant was not in control of the company at the time (it being in liquidation); and had his first choice of professional representation (for the company) rejected by the liquidator of the company. Whilst the appellant did have "input" into the company's appeals and was permitted by the

liquidator to give some instruction on behalf of the company, the appellant was not himself a party to the company's appeals against the VAT assessments.

17. On 23 August 2023 the Tribunal gave notice of a hearing, on 6 November 2023, of the applications to amend the grounds of appeal and to consider whether the appellant was able to challenge HMRC's case that the company's VAT returns contained inaccuracies and that the company made taxable supplies in the UK that were not declared on its VAT returns.

18. On 14 September 2023, the Tribunal received an email from a recently-appointed liquidator of the company, notifying the Tribunal of the change in liquidator. The company withdrew its appeal against the company penalties on 16 October 2023.

19. On 13 October 2023, the appellant applied for permission to file and rely upon witness statements and exhibits in support of his application to amend his grounds of appeal:

(1) a witness statement of the appellant dated 4 October 2023 said (amongst other things):

(a) that he did not know, at the time when the company went into members voluntary liquidation, that HMRC intended to raise assessments on the company (and had he known this, he would not have proceeded with his plans for liquidation)

(b) that he was "overruled" by the liquidator as regards the company appointing Tristan Thornton as its legal representative in challenging the VAT assessments (the liquidator was concerned that Mr Thornton was then working as a sole practitioner); but that he did persuade the liquidator to appoint Mr Thornton in that role, in June 2017

(c) that, prior to Mr Thornton's appointment, he had concerns about the way that the company's solicitors and counsel were conducting the FTT litigation.

(2) a witness statement of Christina Judd dated 2 October 2023; Ms Judd worked for the company (and other of what she described as the appellant's companies) between 2005 and 2013; she was married to the appellant's son; examples are given of how Ms Judd and other company staff monitored and recorded payments received against sales made. The statement exhibits examples of packs of transaction documents.

(3) a witness statement of Manuel Gluck (see [4(8)] above) dated 5 October 2023; he refers to the witness statement he gave in the FTT proceedings – in that, he provided an extract from IEFW's systems covering periods September 2010 to July 2012; he provides an extract from the same source covering the period 1 October 2012 to 30 June 2013; he describes various of IEFW's procedures.

(4) a witness statement of Glyn Davies, formerly of Tamaz France Logistics SA in France dated 2 October 2023; Mr Davies no longer had access to Tamaz's full records (it went into liquidation in 2017) but had found an old hard drive with some Tamaz files which he had searched for records relating to the company's transactions; these were exhibited; he also describes various of Tamaz's procedures.

DISCUSSION

General approach to this application

20. This is an application to amend the appellant's grounds of appeal. It was described as including a further (second) application, to determine as a preliminary issue whether the appellant could argue that that there was no inaccuracy in the relevant VAT returns of the company. However, as that argument appears for the first time in the appellant's "replacement" grounds of appeal (his original grounds of appeal expressly declined to raise this argument, assuming (as is now definitively the case) the FTT decision was upheld on appeal), the question

of whether to permit the amended grounds of appeal wholly subsumes the "second" application.

21. Where (as here) lateness in the making of the application is not an issue, the key consideration on an application to amend grounds of appeal is whether the new grounds are within the Tribunal's powers to strike out cases, or parts of cases, on grounds of their having no reasonable prospect of succeeding (rule 8(3)(c) of the Tribunal's procedure rules). For a recent authority to this effect, see *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs & anor* [2023] EWCA Civ 480 at [69]: "There is no doubt that permission to amend should be refused if it is apparent that a proposed claim would have no real prospect of success".

22. As with any case management decision, the Tribunal is required, when exercising powers under its procedure rules, to seek to give effect to the overriding objective of dealing with cases fairly and justly.

23. I have had regard to the witness statements and other documents submitted by the appellant, to the extent I have found them relevant to the issues for consideration in this application.

24. References in what follows to "**paragraphs**" are (unless the context indicates otherwise) to paragraphs of Schedule 24 Finance Act 2007.

The "no inaccuracy in the company's VAT returns" ground in the amended grounds

25. An inaccuracy contained in a document (including a VAT return) which amounts to, or leads to, an understatement of a liability to tax, is one of the conditions for a penalty under paragraph 1. A notice under paragraph 19 requires, in turn, that a paragraph 1 penalty is payable.

26. In my view, the necessary implication of the company litigation (as summarised at [4, 12 and 13] above) is that the company's VAT returns *did* contain inaccuracies which amounted to understatement of liability to VAT: the company's VAT returns accounted for the 2010-2013 company supplies as if they did not attract VAT, whereas the FTT decision, in deciding that the VAT assessments were right, concluded that they did.

27. The essential question before the Tribunal was whether the appellant was to be "fixed" with the outcome of the company litigation, such that he could not "reopen" the question of "inaccuracy in the company's VAT returns" in his appeal against the PLN.

28. HMRC opposed this new ground on the basis that it was an abuse of process, given the outcome of the company litigation.

29. I follow previous Tribunals in finding, based on *Shiner v HMRC* [2018] EWCA Civ 31, that the Tribunal's power to strike out a case where there is no reasonable prospect of it succeeding (and so, as explained at [21] above, refuse an application to amend grounds of appeal), encompasses a case where it would be an abuse of process to allow the party's grounds to be argued (see for example *Trees v HMRC* [2023] UKFTT 339 (TC) at [37]).

30. As Lord Bingham said in *Johnson v Gore Wood & Co* [2002] 2 AC 1, a finding of abuse of process should be a broad, merits-based judgement, taking into account the public and private interests involved and all the facts of the case; the crucial question is whether, in all the circumstances, the party is misusing or abusing the process of the court (or tribunal) by seeking to raise before it the issue that could have been raised before.

31. The concept of abuse of process sits entirely comfortably with Article 6 European Convention on Human Rights, which is engaged here because a penalty assessment is to be regarded as a 'criminal charge' for such purposes. As the Upper Tribunal said in *CF Booth v*

HMRC [2022] UKUT 217 (TCC) (concerning the striking out of parts of an appellant's case by the Tribunal, including on the grounds of abuse of process):

> [56] It is clear from cases dealing with the civil head of art 6 that the right to a fair trial does not preclude a court or tribunal from striking out an action or giving summary judgment either on the grounds that it is an abuse of process or because there is no reasonable prospect of success …
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> [58] In our judgment, the essential requirement of art 6 is that in the current proceedings the Appellant has a right to a fair trial, bearing in mind that fiscal penalties do not fall within the hard-core of the criminal law and that the 'criminal-head' requirements of art 6 do not (as the ECtHR found in *Jussila*) apply with their full stringency. The exact requirements necessary to ensure a fair trial will depend on the nature of the issue to be tried, its seriousness and all the circumstances of the individual case. What is required is a broad assessment of whether the particular charge brought against the Appellant is dealt with in a manner which provides a fair hearing when the proceedings are viewed as a whole.
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> …
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> [61] We also accept HMRC's submissions that art 6 does not override the FTT's case management powers or other limitations on appeals against tax penalties. For example, the ordinary rules that apply to the making of a late appeal (as set out in *Martland v Revenue and Customs Comrs* [2018] UKUT 178 (TCC)) apply equally to penalty appeals and appeals against the substantive liability to tax. It cannot be correct that time limits have no application to tax penalty appeals which constitute a 'criminal charge'. By the same token, it cannot be correct that an appeal against the tax penalty that constitutes an abuse of process must be allowed to proceed simply on the basis that the penalty constitutes a 'criminal charge'. Furthermore, as we have noted at [48] above, the FTT in the 2020 Decision did not reach its conclusion on the basis of issue estoppel but rather on the broader merits-based approach set out in *Johnson v Gore Wood*.

32. The facts and circumstances to be considered here include:

(1) the company litigation – which determined, as between the company and HMRC, that the company's VAT returns *did* contain inaccuracies amounting to understatement of liability to VAT (following my analysis at [26] above);

(2) paragraph 19(5)(e), read together with paragraph 15(1) and (2), gives the appellant here a free standing right of appeal against the PLN; prior Tribunals have held that this right of appeal is not affected by the fact that the related company penalty has not been appealed: see *Bell v HMRC* [2018] UKFTT 225 (TC) (cited by the Upper Tribunal in *HMRC v Zaman* [2022] UKUT 00252 (TCC) as authority for HMRC's acceptance that a PLN could be appealed on the basis that the underlying assessment and penalty were wrongfully issued) at [160], basing itself on *Andrew v HMRC* [2016] UKFTT 0295 (TC) at [38];

(3) the appellant was not a party to the company litigation;

(4) up to 26 June 2013, when the company was put into members voluntary liquidation (and including at the times of the 2010-2013 company supplies), the appellant was a controlling director/shareholder of the company: I make this finding based on facts found in the FTT decision as well as the appellant's witness statement (which is expressed in a way that indicates that, until it was put into liquidation, the appellant controlled the

company (e.g. at paragraph 3 of the witness statement: "once the company was in liquidation, I lost the power to make key decisions on behalf of the company"); it is also consistent with the appellant being the company's (only) witness to give oral evidence in the FTT proceedings, as these were concerned with the nature of 2010-2013 company supplies;

(5) the liquidator's role in the members voluntary liquidation was to collect the company's assets, settle its liabilities, and distribute any surplus to its members;

(6) the appellant was significantly involved in the company's preparation for the FTT hearing; he was the company's witness; he persuaded the liquidator to appoint his preferred legal adviser, Mr Thornton, as the company's legal adviser in the litigation in June 2017; he funded the company litigation (this is mentioned at paragraph 15 of Mr Bedenham's skeleton argument). However, after 26 June 2013, it was the liquidator who was the ultimate decision maker for the company;

(7) the appellant proposes, in his appeal against the PLN, to adduce evidence about the 2010-2013 company supplies that was not before the FTT, to show that the company lost control of the goods in France;

(8) the company penalties were assessed, and the PLN given, after the FTT decision i.e. at the time of the FTT hearing, the company had not been so assessed, and the appellant had not been given the PLN.

33. Given the above, any broad, merits-based judgement on abuse of process in this case will recognise that

(1) the principles of finality in litigation, and not vexing HMRC twice in the same matter, point towards the "no inaccuracy" ground being an abuse of process; and, on the other hand,

(2) the principle of a fair hearing of the appellant's statutory appeal, given that he was not a party to the company litigation and not, as a formal, legal matter, in control of the company at the time of that litigation, points in the opposite direction.

34. The dicta from *Gleeson v J Wippell* [1977] 1WLR 510, approved by Lord Bingham in *Gore Wood*, suggest that a key consideration in the circumstances of this case (where the issue of the correctness of the VAT assessments on the company has been comprehensively litigated, as between *the company* and HMRC, but not as between *the appellant* and HMRC) is whether there was *sufficient identification* between the appellant and the company (at the time of the company litigation); those dicta make clear that, for there to be abuse of process, it is not necessary that the company was the appellant's alter ego.

35. It seems to me that there was considerable identification between the appellant and the company at the time of the company litigation:

(1) as the only witness of the company to give oral evidence, the appellant was in effect the company's voice, as regards factual matters, at the FTT hearing

(2) the appellant's involvement in the preparation for, and conduct of, the company litigation was, as found at [30(6)] above, significant; such involvement was logical and intuitive, given the appellant had been a controlling director/shareholder at the time of the 2010-2013 company supplies (see [30(4)] above) (whereas the liquidator had not been involved in those supplies and, moreover, had a defined, limited role: see [30(5)] above)

(3) although the appellant was not in control of the company in legal terms, his interests, and those of the liquidator, were aligned: both wanted the company to succeed in the company litigation.

36. In my view, this adds up to *sufficient* identification between the appellant and the company; *sufficient*, because it satisfies the litmus test that the appellant, despite not being a party to the company litigation, had, through the company, a fair hearing of *his* case as to how (and where) the 2010-2013 company supplies were carried out. It is telling that, in his witness statement, the only instance the appellant gives of being "overruled" (his word) by the liquidator was as regards the initial decision not to appoint Mr Thornton as the company's legal representative in challenging the VAT assessments on the company; and that this point was, in the event, reversed about a year before the FTT hearing, when the appellant's powers of persuasion won out and the company *did* appoint Mr Thornton. Apart from this, the concerns expressed in the witness statement (such as the company's advisers editing his witness statement in a way that he now says was disadvantageous to the company's case) are in substance more in the nature of complaint (with the benefit of hindsight) about the company's lawyers' conduct of the litigation (as opposed to evidence of lack of substantive "identity" between the appellant and the company).

37. This finding of "sufficient identification" between the appellant and the company, tips the balance in favour of adjudging the "no inaccuracy" ground an abuse of process. For completeness, I have also considered the following facts and arguments put forward by the appellant as relevant to "fair hearing" considerations in reaching a broad, merits-based judgement:

(1) the fact that, as at the time of the FTT hearing, the PLN had not been given to the appellant – I afford this relatively little weight, given the appellant's significant role in the FTT proceedings, and the fact that the law did not require HMRC to raise the company penalties, and give the PLN, prior to the outcome of the FTT proceedings. In other words, I am satisfied that, in the FTT proceedings, the appellant, through his sufficient identification with the company, and despite not knowing with certainty whether Schedule 24 penalties would be raised and a paragraph 19 notice would be given, received a fair hearing of the "inaccuracy in the company's VAT returns" issue (which, per [26] above, was tantamount to the "correctness of the VAT assessments on the company" issue in the FTT proceedings);

(2) the fact that the FTT decision was made on the basis that the company had not discharged the burden of proof to "displace" the VAT assessments (as opposed to what the appellant called a "positive finding" by the FTT that the 2010-2013 company supplies were made in the UK) – I afford this point little or no weight: the decision of the FTT was that the VAT assessments on the company were correct and, again per [26] above, this was tantamount to finding that there were inaccuracies in the corresponding company VAT returns; the fact that this decision was made due to the company failing to discharge the burden of proof, does not diminish the clarity or force of the finding. As Lord Hoffmann said in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35 at [2]:

> "If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having

> happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

As to any suggestion that the party bearing the "burden of proof" in challenging a VAT assessment should be different in a penalty appeal, the Upper Tribunal addressed that in *HMRC v Zaman* at [22]:

> Whether an assessment to VAT was challenged directly (which, as we note above, did not happen in this case as Zamco brought no such appeal) or whether it was challenged as a defence to the bringing of penalty proceedings relating to the original assessment could not affect who bears the evidential proof in relation to any challenge brought to the VAT assessment.

(3) the argument that the FTT decision (in the words of Mr Bedenham's skeleton argument) "did not make factual determinations in relation to the issue of loss of control in France as now argued by [the appellant] in his PLN appeal" – this overlaps with the point above and, for similar reasons, I afford it little weight; in addition, it seems to me that the Upper Tribunal made clear, at [82] (" … there was no error of law … in the FTT failing to be satisfied on the balance of probabilities, on the basis of all the evidence, that possession and control of the goods had been lost by [the company] while the goods were in France"), that the FTT *had* made findings about whether the company lost control of the goods in France (it found that it had not) – and the Upper Tribunal confirmed this at [92], where it said that its restated decision "incorporates by way of addition the reasons we have set out above at [76] to [79] as to why the FTDs could not be taken at face value *and did not therefore mean possession and control of the goods had been divested by [the company]*" (emphasis added). It does not seem to me that anything at [69] of the Upper Tribunal decision (dealing, in the context of deciding whether the FTDs were challenged in the FTT proceedings, with the different submissions made by the company at the FTT and Upper Tribunal hearings) suggests otherwise.

(4) the fact that the appellant was proposing to adduce evidence not before the FTT – I attach little weight to this point; in particular, I do not see it as pointing up, in any significant way, limitations to the appellant's ability to put forward the arguments and evidence he wished to, in the company litigation; rather, I see it as, perhaps not surprisingly, using the judgements in the company litigation as a guide (with the benefit of hindsight) to what further evidence might have turned the outcome against confirmation of the VAT assessments on the company. Such an approach clearly runs counter to the principle of finality in litigation.

38. I conclude that, in all the circumstances, the appellant, in advancing the "no inaccuracy in the company's VAT returns" ground, is misusing or abusing the Tribunal process by seeking to raise issues that were, or could have been, raised in the company litigation; or, to put it the other way round, I conclude that it is, on balance, fair and just in the circumstances of this case to "fix" the appellant with the outcome of the company litigation.

39. It follows that the appellant's application to amend his grounds of appeal to include this ground (which appears at paragraph 3(i) and paragraph 4 in the appellant's "Replacement grounds of appeal" document dated 30 November 2022) falls to be refused.

The "deliberate inaccuracy" and "attributable to the appellant" grounds

40. A paragraph 19 notice may only be given where the paragraph 1 penalty is for a deliberate inaccuracy which was attributable to an officer of the company concerned.

41. The appellant's "replacement" grounds of appeal (like his original grounds) state that any inaccuracy in the company's VAT returns was not deliberate on the company's part; and, in

any case, any deliberate inaccuracy was not attributable to him. They also refer to the burden of proof falling on HMRC in a penalty appeal.

42. The FTT decision did not need to, and did not, make findings on these "deliberate inaccuracy" and "attributable to the appellant" issues. The question of abuse of process, as considered above, does not therefore arise.

43. HMRC submit that the appellant's amended grounds on these issues are inadequate; they should not be permitted but, rather, the appellant should be directed to "plead out" his "positive case" on these issues.

44. I do not accept this submission. Rule 20(2)(f) of the Tribunal's procedure rules requires that appellants include "the grounds for making the appeal" in their notice of appeal. It seems to me the appellant has done that, as regards these issues. Moreover, it is of some relevance that HMRC (generally) bear the burden of proof to show that the PLN was validly issued: in *HMRC v Zaman* the Upper Tribunal noted at [21] that "HMRC have always maintained that they bore the burden of proof in relation to the validity of issuing the PLN" – and endorsed this at [34] when the Upper Tribunal said: " … the FTT 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 [the company involved] *shifted* to [the taxpayer challenging the PLN] when he sought to positively challenge the assessment as the sole basis on which the PLN was invalidly issued". As the emphasised words show, the general rule is that HMRC bear the burden of proof in relation to the validity of issuing a paragraph 19 notice.

45. It is in my view fair and just to move this appeal to the next stage – HMRC's statement of case, followed by the parties' document lists – which may prompt an application by one or other of the parties for, or indeed the Tribunal directing on its own initiative, further details of the evidence to be adduced by the appellant to support his case.

CONCLUSION ON THIS APPLICATION AND FURTHER CASE MANAGEMENT DIRECTIONS

46. The appellant's application to amend his grounds of appeal is granted with the omission of paragraph 3(i) and paragraph 4 in his "Replacement grounds of appeal" document dated 30 November 2022. Paragraph 2 of that document is also to be omitted, as it is out of date (the company has now withdrawn its appeal against the company penalties).

47. I direct that HMRC must send or deliver a statement of case to the Tribunal and the appellant within 60 days after the release date of this decision; and, for the avoidance of doubt, rule 27 (further steps) of the Tribunal procedure rules shall then apply in the usual way.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 3rd JANUARY 2024