Neutral Citation: **[2023] UKUT 215 (TCC)**

Case Number: UT/2022/000076

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, 7 Rolls Building,
Fetter Lane, London EC4A 1NL

*VALUE ADDED TAX – preliminary issues – scope of "*Ablessio*" principle in relation to HMRC's powers to remove the registration of a person for VAT where that person has facilitated the VAT fraud of another – whether such powers are contrary to UK VAT legislation – whether HMRC can deregister a taxpayer in reliance on* Ablessio *where that taxpayer has made supplies untainted by fraud which exceed registration threshold – whether deregistration breaches EU law principles*

Heard on: 19 May 2023
Judgment date: 01 September 2023

Before

MR JUSTICE EDWIN JOHNSON
JUDGE THOMAS SCOTT

Between

IMPACT CONTRACTING SOLUTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Daniel Margolin KC, Iain MacWhannell and David Bedenham, instructed by Joseph Hage Aaronson LLP

For the Respondents: Howard Watkinson and Joshua Carey, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Impact Contracting Solutions Limited ("ICSL" or "the Appellant") operated in the labour provision market. Its customers were temporary work agencies and its suppliers were approximately 3,000 mini-umbrella companies ("MUCs") which supplied labour. On 16 September 2019, HMRC decided to cancel ICSL's VAT registration number with immediate effect. That decision was made in reliance on the principle in the decision of the Court of Justice of the European Union (the "CJEU"[1]) in *Valsts ienemumu dienests v Ablessio SIA* (C-527/11) ("*Ablessio*"). HMRC considered that ICSL was registered for VAT principally or solely to abuse the VAT system by facilitating VAT fraud, and that, in such circumstances, they were empowered by the principle in *Ablessio* to cancel the registration. In particular, HMRC considered that the arrangements between ICSL and the MUCs were contrived, with the effect that the MUCs failed properly to account for VAT on their supplies to ICSL.

2. By reference to the same transactions which it considered justified deregistration, HMRC also denied ICSL various credits for input tax. That decision was the subject of a separate appeal by ICSL.

3. ICSL appealed against HMRC's decision to cancel its registration. The First-tier Tribunal (Tax Chamber) (the "FTT") directed that there be a hearing to determine various preliminary issues in relation to that appeal. Those preliminary issues were as follows:

> Question 1
>
> Does the principle in *Ablessio* apply only to a party that has itself fraudulently defaulted on its VAT obligations, or does it similarly apply to a party who has facilitated the VAT fraud of another party?
>
> Question 2
>
> If the principle in *Ablessio* does apply to a party who has facilitated the VAT fraud of another party, is simple facilitation sufficient, or must it additionally be proved that:
>
> (a) the facilitating party was itself dishonest; or
>
> (b) the facilitating party knew that it was facilitating the fraud, and/or
>
> (c) the facilitating party should have known that it was facilitating the fraud?

4. The FTT concluded as follows in relation to these two questions, as set out at [106]-[108] of its decision:

> Question 1
>
> 106. The principle in *Ablessio* applies both to a party that has fraudulently defaulted on its VAT obligations and to a party who has facilitated the VAT fraud of another party.
>
> Question 2
>
> 107. Simple facilitation by a party of the VAT fraud of another is not sufficient to apply the principle in *Ablessio*.
>
> 108. It is not necessary to prove that the facilitating party was itself dishonest. It must, however, be proved that the facilitating party knew or should have known that it was facilitating the VAT fraud of another party.

[1] We use this abbreviation to refer both to the CJEU and to the Court of Justice of the European Communities.

GROUNDS OF APPEAL

5. The Appellant has been granted permission to appeal on the following grounds, with the permission of the FTT as to Grounds 1, 2 and 3 and the permission of the Upper Tribunal (Judge Richards as he then was) as to Ground 4:

> (1) **Ground 1**: The FTT erred in law when finding that the principle in *Ablessio* could be extended to deregistering existing taxable persons which did not themselves fraudulently evade VAT and in particular those which conducted taxable transactions which were not connected with VAT fraud. In other words, it misinterpreted the principles established in *Ablessio* and that they could be extended to persons already registered for VAT.
>
> (2) **Ground 2**: The FTT erred when it found it was bound by the decisions in R (*Thames Wines Ltd) v HMRC [2017] EWHC 452 (Admin) ("Thames Wines")* and R (*Ingenious Construction Ltd) v HMRC [2020] EWHC 2255 (Admin) ("Ingenious")*. Both decisions were in respect of judicial review matters, not substantive VAT law. Additionally, it should be noted that both decisions were pre-permission and therefore non-binding.
>
> (3) **Ground 3**: The FTT erred when it found it was proportionate for tax authorities to deregister a taxpayer on the basis it knew or ought to have known it was facilitating fraud by another party. It is disproportionate to do so where the taxpayer had made and continues to make legitimate taxable supplies and contradicts the principles of equal treatment and fiscal neutrality and it makes the correct application of VAT impossible.
>
> (4) **Ground 4**: Reading the domestic legislative scheme as somehow providing, implicitly, a general power of deregistration in cases of misuse is to adopt an interpretation that is *contra legem*. Accordingly, the FTT erred in concluding that *Ablessio* permits HMRC to deregister a taxable person who knew or should have known that it was facilitating the VAT fraud of another party.

6. While Grounds 1 and 2 were argued before the FTT (where the Appellant was represented by different counsel to the counsel in this appeal), Ground 4 was not, and Ground 3 was not argued as a separate ground in the same terms. That has implications for the form taken by our decision. While Grounds 1 and 2 give rise to conventional appeals against the findings of the FTT, in substance we are required to reach our own determinations of Grounds 3 and 4 as preliminary issues, and that is the basis on which we have proceeded.

7. In common with the parties, we will first consider Ground 4, since it is, in effect, a knockout blow for the Appellant if it succeeds. We then consider Grounds 1 and 2 together, since they are facets of the same challenge. Finally, we will consider Ground 3.

8. Before we do so, it is helpful not only to set out the relevant legislation, but also to put in context the decision in *Ablessio*.

RELEVANT LEGISLATION

9. The relevant legislation is set out below. References to the PVD are to the Principal VAT Directive, being Council Directive 2006/112/EC, and references to VATA 1994 are to the Value Added Tax Act 1994.

10. It was common ground that EU law remains applicable for the purposes of the appeal, because the decision by HMRC to deregister, and the appeal against that decision, gave rise to proceedings commenced prior to 31 December 2020[2].

[2] Section 4 of the European Union (Withdrawal) Act 2018 and section 16 of the Interpretation Act 1978.

The PVD

11. Article 9 defines "taxable person" and "economic activity" as follows:

> 1.'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'.

12. Article 213 provides that every taxable person "shall state when his activity as a taxable person commences, changes or ceases".

13. Article 214 deals with the provision of a VAT number as follows:

> 1. Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:
>
> (a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199…

14. The following powers are conferred on Member States by Article 273:

> Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

VATA 1994

15. Section 3(1) VATA 1994 provides as follows:

> (1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.

16. A "taxable supply" is defined by section 4(2) as a supply of goods or services in the United Kingdom other than an exempt supply.

17. Registration for VAT is dealt with primarily in Schedule 1 to VATA 1994. Liability to be registered is provided for by paragraph 1 of Schedule 1:

> (1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—
>
> (a) at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded £85,000; or
>
> (b) at any time, if the person is UK-established and there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £85,000.

18. Paragraph 5 of Schedule 1 states that:

> (1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.
>
> (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

19. Cancellation of a VAT registration is provided for by paragraph 13 of Schedule 1 as follows:

> (1) Subject to sub-paragraph (4) below, where a registered person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him.
>
> (2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable[3], they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him.
>
> …
>
> (4) The Commissioners shall not under sub-paragraph (1) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement to be registered under this Act.
>
> (5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act.
>
> …
>
> (7) In this paragraph, any reference to a registered person is a reference to a person who is registered under this Schedule.

The position following European withdrawal

20. Section 6 of the European Union (Withdrawal) Act 2018 provides as follows:

> (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
>
> (a) in accordance with any retained case law and any retained general principles of EU law, and
>
> …
>
> (7) In this Act—
>
> "retained case law" means—
>
> (a) retained domestic case law, and
>
> (b) retained EU case law;
>
> …

[3] Paragraph 18 of Schedule 1 states that in Schedule 1 "registrable" means liable or entitled to be registered under Schedule 1.

> "retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—
>
> (a) relate to anything to which section 2, 3 or 4 applies, and
>
> (b) are not excluded by section 5 or Schedule 1,
> (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
>
> "retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);
>
> "retained general principles of EU law" means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—
>
> (a) relate to anything to which section 2, 3 or 4 applies
>
> …

21. In relation to EU law regarding abuse of the VAT system, section 42 of the Taxation (Cross-border Trade) Act 2018 ("TCBTA") states as follows:

> **42 EU law relating to VAT**
>
> …
>
> (3) Further provision relevant to the law relating to value added tax is made by the European Union (Withdrawal) Act 2018: see, for example, section 6 of that Act (interpretation of retained EU law).
>
> (4) One of the consequences of the provision made by that Act is that the principle of EU law preventing the abuse of the VAT system (see, for example, the cases of *Halifax* and *Kittel*) continues to be relevant, in accordance with that Act, for the purposes of the law relating to value added tax.
>
> (4A) Accordingly, that principle may continue to be relied upon in determining any matter relating to value added tax (including in determining the effect of any provision made by or under an enactment).
>
> …

22. Section 42(4A) TCBTA was inserted into the TCBTA with retrospective effect by section 98 of the Finance Act 2021 ("FA 2021"), headed "Continuing effect of principle preventing the abuse of the VAT system", which states:

> (1) In section 42 of TCTA 2018 (EU law relating to VAT), after subsection (4) insert—
>
> "(4A) Accordingly, that principle may continue to be relied upon in determining any matter relating to value added tax (including in determining the effect of any provision made by or under an enactment)."
>
> (2) That section has effect, and is to be deemed always to have had effect, with the amendment made by subsection (1)[4].

[4] We have not considered the effect, if any, on section 42 TCBTA of sections 3 and 4 of The Retained EU Law (Revocation and Reform) Act 2023, which obtained Royal assent on 29 June 2023, since sections 3 and 4 do not apply to anything occurring before 31 December 2023: section 22(5) of the 2023 Act.

THE EU PRINCIPLE OF ABUSE OF LAW: *HALIFAX* AND *KITTEL*

23. The issues in this appeal, which relate to the scope of the *Ablessio* principle, must be considered in the context of general EU law on the prohibition of abusive practices in relation to VAT, since *Ablessio* concerned the application of that general law to the particular situation of registration for VAT.

24. The genesis of the principle relating to abuse of law in the VAT context is found in the decision in *Halifax plc and others v Commissioners of Customs & Excise* C-255/02 ("*Halifax*"). As Advocate General Bobek somewhat floridly observed in 2017[5]:

> Tax authorities do not fall in love easily. There is (arguably at least) one notable exception to this rule: the 2006 judgment in *Halifax*, in which this Court confirmed the existence of the principle of prohibition of abusive practices in the area of value added tax (VAT) law. That judgment appears to have been embraced with a passion by tax authorities across the Member States.

25. In *Halifax*, one question referred to the CJEU was whether under the Sixth Directive a taxable person has no right to deduct input VAT where the transactions on which that right is based constitute an abusive practice. An "abusive practice" was a reference to the Community law principle of abuse of rights which was well established outside the field of tax.

26. The CJEU decided as follows, at [68]-[76] of its judgment:

> 68 … it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (see, in particular Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, 27 paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).
>
> 69 The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21; Case C-8/92 *General Milk Products* [1993] ECR I779, paragraph 21; and *Emsland-Stärke*, paragraph 51).
>
> 70 That principle of prohibiting abusive practices also applies to the sphere of VAT.
>
> 71 Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C487/01 and C-7/02 *Gemeente Leusden* and *Holin Groep* [2004] ECR I5337, paragraph 76).
>
> 72 However, as the Court has held on numerous occasions, Community legislation must be certain and its application foreseeable by those subject to it (see, in particular, Case C-301/97 *Netherlands v Council* [2001] ECR I-8853, paragraph 43). That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them (Case 326/85 *Netherlands v Commission* [1987] ECR 5091, paragraph 24, and Case C-17/01 *Sudholz* [2004] ECR I-4243, paragraph 34).

[5] Advocate General's Opinion, *Edward Cussens and others v TG Brosman* (C-251/16).

> 73 Moreover, it is clear from the case-law that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system (see, in particular, *BLP Group*, paragraph 26, and Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 33). Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, as the Advocate General observed in point 85 of his Opinion, taxpayers may choose to structure their business so as to limit their tax liability.
>
> 74 In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> 75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.
>
> 76 It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting such an abusive practice has taken place in the case before it (see Case C-515/03 *Eichsfelder Schalchtbetrieb* [2005] ECR I-7355, paragraph 40).

27. The CJEU in *Halifax* therefore laid down a general principle of interpretation, which applies regardless of any specific provision in the relevant legislation. An abusive practice arises where the two conditions described at [74] and [75] of the decision apply, which is to be determined by the national court on a case-by-case basis.

28. The decision in *Halifax* left at large precisely how the principle of abusive practice might apply to particular provisions in the VAT legislation enacted by Member States pursuant to the PVD. Given that in practice two of the most significant rights arising in relation to VAT are the right to deduct input tax and the right to zero-rate certain exports, it is not surprising that the *Halifax* principle has spawned offspring in both of those contexts. In relation to zero-rating, *Mecsek-Gabona Kft v Nemzeti Ado Foigazgatosaga* (C-273/11) ("*Mecsek-Gabona*") confirmed that the principle applies to a right to exemption from VAT. In relation to the right to deduct input tax, the application of the principle was confirmed in *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C/440-04) ("*Kittel*").

29. Relevantly to this appeal, in *Kittel* the CJEU explained why the *Halifax* principle was not prevented from applying by the need for objective certainty in the application of the VAT provisions, and also addressed the position of a person who was not evading VAT but who knew or should have known that he was taking part in a transaction connected with fraudulent evasion of VAT, at [53]-[59] of its decision:

> 53 By contrast, the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met where tax is evaded by the taxable person himself (see Case C-255/02 *Halifax and Others* [2006] ECR I-0000, paragraph 59).
>
> 54 As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see

> Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76). Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).
>
> 55 Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-110/94, *INZO* [1996] ECR I-857, paragraph 24; and *Gabalfrisa*, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H*, paragraph 34).
>
> 56 In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> 57 That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58 In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59 Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

ABLESSIO

30. Since this appeal is concerned entirely with the scope of *Ablessio*, it is helpful to summarise the relevant passages in that decision.

31. *Ablessio* concerned a request for a preliminary ruling from the CJEU in relation to a refusal by the Latvian tax authority to register a company for VAT, on the basis that (1) the authority considered that the company did not have the resources or capacity to carry out the declared economic activity, and (2) its shareholder had made previous applications for VAT registration of undertakings which did not carry out any real economic activity. The Court held that the principle of abuse of law did not justify a refusal to register "solely" on those grounds, "where the tax authority concerned has not established, on the basis of objective factors, that there is sound evidence leading to the suspicion that the value added tax identification number assigned will be used fraudulently".

32. The Court issued its ruling without an Advocate General's opinion. It began by summarising the relevance and practical importance of VAT registration, at [18]-[21] of its decision:

> 18. The essential aim of identifying taxable persons, as provided for under Article 214 of Directive 2006/112, is to ensure that the VAT system operates properly (see, to that effect, Case C-438/09 *Dankowski* [2010] ECR I-14009, paragraph 33).

> 19. In that regard, the Court has already held that the allocation of a VAT identification number provides proof of the tax status of the taxable person for the purposes of applying VAT and simplifies the inspection of taxable persons with a view to ensuring the correct collection of the tax…
>
> 20. In addition, the VAT identification number is an important piece of evidence of the operations carried out. Indeed, Directive 2006/112 requires, in a number of provisions relating, in particular, to invoicing, declarations and summary statements, that this identification number of the taxable person or the recipient of the goods or services be referred to in those documents.
>
> 21. The referring court's questions should be answered in light of those considerations.

33. It then stated that while Article 213 of the PVD confers a discretion on tax authorities as to registering a person, they cannot refuse registration without legitimate grounds:

> 22. It must be observed that, although Article 214 of Directive 2006/112 lists the categories of persons who must be identified by an individual number, that provision does not stipulate the conditions which may be placed on the issuing of the VAT identification number. Indeed, it follows from the wording of that article and Article 213 of Directive 2006/112 that Member States have a certain discretion when they adopt measures to ensure the identification of taxable persons for the purposes of VAT.
>
> 23. However, that discretion cannot be unrestricted. Although it is possible for a Member State to refuse to assign an individual number to a taxable person, it cannot do so without legitimate grounds.

34. The Court placed emphasis on the broad interpretation which should be given to the concept of a "taxable person". Tax authorities could not refuse to register a person for VAT solely on the grounds relied on by the Latvian authority. However, it was legitimate to refuse registration where a risk of abuse existed, but within limits:

> 28. However, according to settled case-law of the Court, Member States have a legitimate interest in taking appropriate steps to protect their financial interests, and the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see, in particular, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 71; Case C-285/09 *R.* [2010] ECR I-12605, paragraph 36; and Case C-525/11 *Mednis* [2012] ECR I-0000, paragraph 31).
>
> 29. Furthermore, Member States are obliged to guarantee the accuracy of the entries in the register of taxable persons to ensure that the VAT system operates properly. It therefore falls to the competent national authority to check an applicant's status as a taxable person before it assigns that person a VAT identification number (see *Mecsek-Gabona*, paragraph 63).
>
> 30. Therefore, Member States can, in accordance with Article 273, first paragraph, of Directive 2006/112, legitimately take measures that are necessary to prevent the misuse of identification numbers, in particular by undertakings whose activity, and consequently their status as taxable persons, is purely fictitious. However, these measures must not go beyond what is necessary for the correct collection of the tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of that tax (see, to that effect, Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 26; *Nidera Handelscompagnie*, paragraph 49; *Dankowski*, paragraph 37; and *VSTR*, paragraph 44).

35. Importantly, the Court made clear what was necessary in order for a refusal to register to be proportionate:

> 34. In order to be considered proportionate to the objective of preventing evasion, a refusal to identify a taxable person by an individual number must be based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently. Such a decision must be based on an overall assessment of all the circumstances of the case and of the evidence gathered when checking the information provided by the undertaking concerned.
>
> …
>
> 38. It is for the referring court to examine whether, having regard to all the circumstances of the case, the tax authority has established to the requisite legal standard the existence of sound evidence from which it may be concluded that the application for registration in the register of taxable persons subject to VAT by Ablessio might result in the misuse of the identification number or other VAT fraud.

36. It was necessary for a national court to assess whether the relevant tax authority had "established, on the basis of objective factors, that there is sound evidence leading to the suspicion that the VAT identification number assigned will be used fraudulently": [39] of the decision.

GROUND 4: DEREGISTRATION ON *ABLESSIO* BASIS NOT PERMITTED BY DOMESTIC LEGISLATION

37. The Appellant's skeleton argument frames Ground 4 in the following terms:

> HMRC cannot, in the absence of express legislative amendment, rely on the principle in *Ablessio*, because domestic legislation circumscribes the situations in which a person is required (and entitled) to be registered for VAT and the circumstances in which a person can be deregistered for VAT, and reading that legislation as somehow providing, implicitly, a general power of deregistration in cases of misuse is to adopt an interpretation that is *contra legem*.

38. For a summary of the *contra legem* limitation in the EU law context, the Appellant referred us to the description of Advocate General Bot in *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* (Case C441/14) EU:C:2016:278 at [68]:

> The Latin expression '*contra legem'* literally means 'against the law'. A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority.

39. The skeleton argument clarifies that this ground is a submission that, by reading into Schedule 1 to VATA 1994 "a power to deregister a taxable person who at the time of deregistration was entitled, and indeed required, by an Act of Parliament to be registered", the FTT adopted an interpretation of the legislation which was *contra legem* and crossed the boundary into impermissible judicial amendment of legislation.

40. It is clear that the argument presented in the Appellant's skeleton is that the *Ablessio* principle cannot apply *in any situation* to allow HMRC to deregister a person on the basis of

suspected involvement in VAT fraud. However, in Mr Margolin's oral submissions in this appeal that argument was the subject of material revision. The revised argument was that the *Ablessio* principle cannot be relied on to deregister a person who is able to demonstrate that he has carried out non-fraudulent transactions which would cumulatively exceed the threshold for VAT registration, because in such circumstances that would be *contra legem*.

41. Mr Margolin confirmed that the argument in the form advanced in the skeleton argument was abandoned in favour of this narrower argument. To his credit, Mr Watkinson did not object on behalf of HMRC to the argument being presented in this revised fashion, and we have considered Ground 4 on this amended basis.

Arguments of the parties

42. Mr Margolin's arguments were as follows:

(1) It is accepted that general principles of EU law relating to VAT such as the abuse of rights doctrine are not ignored simply because a Member State has not incorporated them into domestic law. However, where, as here, there is specific legislation, this is subject to the obligation of domestic courts to interpret VAT legislation in the light of the wording and purpose of the PVD as understood by the CJEU. This is referred to as the "*Marleasing* principle", after *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 ("*Marleasing*").

(2) The *Marleasing* principle was described in *Impact v Minister for Agriculture and Food* Case C-268/06 as "inherent in the system of the EC Treaty". In that decision, the CJEU summarised the limitations on that principle, at [100]:

> 100 However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and *Adeneler and Others*, paragraph 110; see also, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 44 and 47).

(3) The authorities make it clear that the *Marleasing* principle does not permit a court to cross the boundary into an interpretation of the legislation which goes against the grain of that legislation or is *contra legem*. This has been described as "a Rubicon which courts may not cross"[6].

(4) In this case, ICSL was both entitled and required to be registered for VAT by paragraph 1 of Schedule 1 VATA 1994. HMRC are only able to cancel a VAT registration of their own volition under paragraph 13(2) of Schedule 1 where they are "satisfied that a registered person has ceased to be registrable", and by paragraph 13(5) are prohibited from cancelling a registration "with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered" under VATA 1994. An interpretation which allows HMRC to deregister a person who is entitled and required to be registered who is making untainted supplies above the VAT threshold is *contra legem* and crosses the boundary into judicial amendment.

(5) Further, the absence of legislation setting out with specificity the circumstances in which deregistration can occur on the basis of *Ablessio*, and the consequences where a

[6] Lord Steyn at [49] of *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

taxpayer continues to make supplies which exceed the VAT threshold, breaches the principle of legal certainty.

43. For HMRC, Mr Watkinson argued as follows:

(1) In order to apply in the UK, the *Ablessio* principle does not require domestic legislation, and a *Marleasing* approach is not required to apply it. That is made clear by the CJEU's decisions in *Cussens and others v Brosnan* Case C-251/16 ("*Cussens*") and *Staatssecretaris van Financien v Schoenimport 'Italmoda' Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone's BV v Staatssecretaris van Financien* (Joined Cases C-131/13, C-163/13 and C-164/13) ("*Schoenimport*"). The Court of Appeal has approved HMRC's interpretation of those two decisions in *Butt v HMRC* [2019] EWCA Civ 554 ("*Butt*").

(2) Because *Marleasing* is not in point, the *contra legem* principle, which operates to limit *Marleasing*, is irrelevant.

(3) In any event, there is no contradictory domestic legislation to which the *contra legem* principle properly applies.

(4) The EU abuse principle, including *Ablessio*, now has a statutory basis in UK law, and is deemed always to have applied. Applying the *Ablessio* principle cannot, therefore, be *contra legem*.

Discussion

44. In considering Ground 4, it is necessary to keep in mind that this does not seek to determine as a preliminary issue that deregistration by HMRC in reliance on *Ablessio* is disproportionate, or subject to limitations, but rather that it is *never* permissible when the person in question has taxable supplies unconnected with fraud which exceed the threshold for registration, because that requires an impermissible *contra legem* interpretation of the domestic legislation.

45. The first question raised by Ground 4 is whether the *Halifax* abuse principle is a principle which applies to the interpretation of domestic legislation (as the Appellant contends) or is a broad free-standing principle of EU law which applies regardless of domestic legislation (as HMRC contend).

46. This question is not really addressed in the Appellant's skeleton argument, which proceeds on the basis that it is a principle applicable to the interpretation of specific domestic legislation. In his oral submissions, Mr Margolin sought to distinguish *Cussens* and *Schoenimport* on the basis that in the present case there were specific legislative provisions dealing with registration and deregistration. He also argued that the application of the abuse principle always required a process of statutory interpretation, and relied on a statement by Moses LJ in *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] EWCA Civ 517 ("*Mobilx*").

47. *Mobilx* concerned a denial of input tax credits on the basis of *Kittel*. The first point to note is that the decision lends support to HMRC's position as to the nature of the *Halifax* principle. In that case the taxpayers argued that *Kittel* could not be applied without specific domestic legislation: see [45] of the decision. The Court of Appeal firmly rejected that contention, Moses LJ stating as follows:

> [47] Accordingly, the objective criteria which form the basis of concepts used in the Sixth Directive form the basis of the concepts which limit the scope of VAT and the right to deduct under ss 1, 4 and 24 of the 1994 Act. Applying the principle in *Kittel*, the objective criteria are not met where a taxable person knew or should have known that by his purchase he was participating in a

> transaction connected with fraudulent evasion of VAT. That principle merely requires consideration of whether the objective criteria relevant to those provisions of the VATA 1994 are met. It does not require the introduction of any further domestic legislation.

48. Mr Margolin relied on a statement by Moses LJ at [49] of *Mobilx* regarding the obligation of national courts to apply the *Marleasing* principle to domestic VAT legislation. However, that statement must be seen in its context. As we have just described, Moses LJ in fact rejected the argument that domestic legislation was required in order to apply *Kittel*. He then went on to consider the taxpayers' argument that, in any event, *Kittel* could not be extended to deny input tax to a person other than the fraudster because this would "impose a new accessory liability for fraud which does not exist in domestic law": [48]. This was in effect another attempt to argue that the imposition of the abuse principle required enabling domestic legislation. When the relevant paragraph of *Mobilx* is considered in full, it is apparent that Moses LJ was stating that, while the *Marleasing* principle is settled law, it does not necessarily lead to the conclusion that the abuse principle requires enabling domestic legislation:

> [49] It is the obligation of domestic courts to interpret the VATA 1994 in the light of the wording and purpose of the Sixth Directive as understood by the ECJ (*Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305) (see, for a full discussion of this obligation, the judgment of Arden LJ in *Revenue and Customs* Comrs *v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 at [69]–[83], [2006] STC 1252 at [69]–[83]). Arden LJ acknowledges, as the ECJ has itself recognised, that the application of the *Marleasing* principle may result in the imposition of a civil liability where such a liability would not otherwise have been imposed under domestic law (see para [111]). The denial of the right to deduct in this case stems from principles which apply throughout the Community in respect of what is said to be reliance on Community law for fraudulent ends. It can be no objection to that approach to Community law that in purely domestic circumstances a trader might not be regarded as an accessory to fraud. In a sense, the dichotomy between domestic and Community law, in the circumstances of these appeals, is false. In relation to the right to deduct input tax, Community and domestic law are one and the same.

49. We agree with HMRC that *Cussens* and *Schoenimport* also support the view that the EU abuse principle is a free-standing principle which does not require domestic legislation[7]. The following passage from the decision in *Cussens*, for example, is consistent with the reasoning of Moses LJ some years previously in *Mobilx*:

> 32. It should also be added that, according to the Court's case law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis (see, to that effect, judgment of 14 December 2000, *Emsland-Stärke* (Case C-110/99) EU:C:2000:695, para 56; judgment in *Halifax*, para 93; and judgment of 4 June 2009, *Agenzia Dogane Ufficio delle Dogane di Trieste v Pometon SpA* (Case C-158/08) EU:C:2009:349, [2009] ECR I-4695, [2009] All ER (D) 135 (Jun), para 28).
>
> 33. Therefore, the principle that abusive practices are prohibited may be relied on against a taxable person to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for

[7] See, in particular, *Schoenimport* at [42]-[46], [59] and [62], and *Cussens* at [26]-[28], [30]-[33] and [43]-[44].

> such refusal (see, to that effect, judgment of 18 December 2014, *Staatssecretaris van Financiën v Schoenimport Italmoda Mariano Previti vof* (Joined cases C-131/13, C-163/13 and C-164/13) EU:C:2014:2455, para 62).

50. In 2019, the Court of Appeal in *Butt* conducted a comprehensive review of the relevant domestic and EU authorities in this area, and discussed the issue of whether a conforming interpretation of domestic law was necessary in applying the abuse of rights principle. Rose LJ (as she then was) delivered the judgment of the Court, summarising (at [21]-[23]) the conclusions and approach of Moses LJ in *Mobilx*, including in particular the passages set out above. There followed a discussion of *Cussens* and *Schoenimport*, prefaced by the following statement, at [23]:

> More recently, the CJEU has moved away from describing the *Halifax* abuse of rights principle as deriving from the meaning of the EU instrument and hence as requiring a conforming interpretation to be made of the relevant domestic legislation.

51. Rose LJ summarised the central conclusions in those two decisions as follows, at [24]:

> [24] The Court [in *Schoenimport*] therefore concluded that the refusal of the VAT credit was not dependent on there being some wording in the Dutch domestic law that could be given a conforming interpretation to bring about that result. The same answer was given to questions referred by the Irish Supreme Court in [*Cussens*]. The CJEU restated one of the questions referred as asking 'whether the principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt sales of immovable goods, such as the sales at issue in the main proceedings, from VAT.': para 25. The CJEU drew a distinction between directives which do not have horizontal direct effect and the effect of settled case law, holding that the principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in *Halifax*, 'displays the general, comprehensive character which is naturally inherent in general principles of EU law': (para 31). The principle could therefore be relied on against a taxable person to refuse him a right to exemption from VAT, even in the absence of provisions of national law providing for such refusal.

52. Importantly in relation to Ground 4, Rose LJ described the effect and application of *Kittel*, *Cussens* and *Schoenimport* as follows, at [39]:

> Those cases establish that the fact that the taxpayer fraudulently carried out the transactions in respect of which the VAT credit is claimed does not mean that those transactions are not 'economic activity' or that he is not a 'taxable person acting as such'. It is not the meaning of those specific terms in the Sixth Directive that is affected by the *Halifax* line of cases; the principle is more subtle than that. The abuse of right principle is, according to *Cussens*, 'naturally inherent in general principles of EU law' as a free-standing principle that applies irrespective of the ability of the wording of the national provisions to be subjected to a conforming interpretation.

53. We consider that these EU and domestic authorities establish that the abuse of rights principle, of which *Ablessio* forms part, is a free-standing principle, and its permissible application does not require a conforming interpretation of UK VAT legislation[8]. If a

[8] While it is not binding on this Tribunal, we note that this conclusion is consistent with Sir Ross Cranston's conclusion in *Ingenious* at [44]-[45], where he rejected as unarguable the submission that deregistration on the basis of *Ablessio* required national implementing legislation.

conforming interpretation is not required, then *Marleasing* is not in point. If *Marleasing* is not in point, then it follows that the *contra legem* principle said to apply by the Appellant as a limitation on *Marleasing* is not relevant.

54. Mr Margolin asserted that deregistration by HMRC on an *Ablessio* basis is "specifically prohibited" by the legislation, because paragraph 13(5) of Schedule 1 VATA 1994 prohibits HMRC from cancelling a VAT registration "with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act". However, this submission ignores the opening words of paragraph 13(5), which begins "[HMRC] shall not **under sub-paragraph (2) above** cancel a person's registration…" (emphasis added). The significance of this is that the prohibition extends only to a cancellation pursuant to paragraph 13(2). Where, as we have concluded, deregistration is based on the EU principle of abuse of rights, there is no applicable statutory code, and no statutory prohibition. There is no contradiction of "the very wording of the national provision at issue": Opinion of the Advocate General in *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* (Case C441/14) at [68].

55. This absence of any specific statutory code indeed forms part of the argument raised by the Appellant that the application of the *Ablessio* principle to an existing registered trader with untainted supplies above the VAT threshold breaches the EU principle of legal certainty. We consider the issue of legal certainty further below in our discussion of Ground 3.

56. The principle of legal certainty "requires, in particular, that rules of law be clear, precise and predictable in their effect, especially where they may have negative consequences for individuals and undertakings": *U.I. Srl v Agenzia delle Dogane e dei monopoli* Case C-714/20 at [61]. As the CJEU stated in *Netherlands v Commission* Case 326/85 at [24], "Community legislation must be certain and its application foreseeable by those subject to it".

57. We do not agree that the application of the *Ablessio* principle to an existing registered trader with untainted supplies above the VAT threshold breaches the EU principle of legal certainty. There is no indication in the decision in *Ablessio* that this was a concern, and, while we acknowledge that there may be uncertainties arising as a consequence of deregistration which do not arise following a refusal to register (as was considered in *Ablessio*), that does not mean that deregistration itself, pursuant to *Ablessio*, breaches the principle of legal certainty. A taxpayer who knew or should have known that his transactions were connected with the fraudulent evasion of VAT can be certain that if he is found out he will not be entitled to deduct input tax. We see no principled reason why the same should not be true in relation to entitlement to register. In relation to input tax, Moses LJ explained the position in *Mobilx* as follows, at [61] (emphasis added to original):

> Such an approach does not infringe the principle of legal certainty. It is difficult to see how an argument to the contrary can be mounted in the light of the decision of the court in *Kittel*. The route it adopted was designed to avoid any such infringement. **A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into the transaction that if found out, he will not be entitled to deduct input tax.** The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct.

58. In relation to the amendment made by Mr Margolin to the formulation of Ground 4, we consider that this is in substance an argument about the scope of the *Ablessio* principle rather than an argument that the principle is *contra legem*. In any event, there is no indication in *Ablessio* that the existence of other untainted supplies would mean that registration could not be refused where the national authority could demonstrate the necessary "strong evidence" of the risk of fraud. Nor do we consider that such a limitation would be appropriate or justified. The existence of other legitimate transactions might be relevant to whether a refusal of registration or a deregistration was proportionate, but to exclude those actions completely solely on the basis that other legitimate transactions existed would create a charter for fraud.

59. These conclusions are sufficient to determine the preliminary issue raised by Ground 4. However, in addition we consider that the effect of section 42 TCBTA, read together with section 98 FA 2021, is that "the principle of EU law preventing the abuse of the VAT system (see, for example, the cases of *Halifax* and *Kittel*)" has a clear statutory basis in UK law and is deemed always to have applied. *Ablessio* is an aspect of that principle, and is therefore applicable (whatever its scope and limitations) to registration and deregistration for VAT. While that does not resolve any debate as to the scope of that principle, as we have said that is not what Ground 4 seeks to determine. Ground 4 seeks to determine that, for a trader with untainted supplies above the VAT threshold, deregistration by HMRC in reliance on *Ablessio* is **necessarily** *contra legem*. In our opinion, section 42 TCBTA means that argument must fail, as *Ablessio* is an aspect of the principle described in section 42, and, whatever its scope, its application in applying the VAT legislation is not *contra legem.*

60. Our conclusions mean that we do not need to address Mr Watkinson's fall-back argument that a deregistration based on *Ablessio* in any event falls within the wording of paragraph 13(2) of Schedule 1, and we prefer not to do so.

Ground 4: Conclusion

61. Our conclusion in relation to the preliminary issue raised by Ground 4 is as follows:

> **The application by HMRC of the *Ablessio* principle is not *contra legem* or otherwise prohibited by the VAT legislation where it is applied to deregister a taxpayer who (1) has either fraudulently defaulted on its VAT obligations or facilitated the VAT fraud of another party and (2) at the relevant time or times has also made taxable supplies unconnected with such fraud or facilitation of fraud and which would result in a liability to be registered under paragraph 1(1) Schedule 1 VATA 1994.**

GROUNDS 1 AND 2: *ABLESSIO* DOES NOT PERMIT DEREGISTRATION OF A REGISTERED PERSON AND DOES NOT EXTEND TO THOSE WHO FACILITATE VAT FRAUD

62. Ground 1 of the appeal is that the FTT erred in law when finding that the principle in *Ablessio* could be extended to deregistering existing taxable persons which did not themselves fraudulently evade VAT, and in particular those which conducted taxable transactions which were not connected with VAT fraud. Ground 2 is that in reaching its conclusions on this issue the FTT erred in finding that it was bound by certain previous decisions, and those decisions are, in any event, wrong.

63. Grounds 1 and 2 are integrated aspects of the same complaint by the Appellant. We will deal first with the substantive arguments, and then with the question of the relevance of the authorities.

Arguments of the parties

64. Mr Margolin emphasised the use of the words "appropriate steps" by the CJEU in *Ablessio* at [28]:

> However, according to settled case-law of the Court, Member States have a legitimate interest in taking appropriate steps to protect their financial interests, and the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see, in particular, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 71; Case C-285/09 *R.* [2010] ECR I-12605, paragraph 36; and Case C-525/11 *Mednis* [2012] ECR I-0000, paragraph 31).

65. He argued that what constitutes an "appropriate step" would depend on the risk of evasion, avoidance or abuse, taking into account principles such as fiscal neutrality. He pointed out that at [30] of *Ablessio* the CJEU warned that any measures taken by Member States to combat abuse "must not go beyond what is necessary for the correct collection of the tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of the tax".

66. Mr Margolin argued that various references in *Ablessio* to the factual situations when refusal of registration might be an "appropriate step" showed that the CJEU did not consider that such a power extended to a taxable person without fraudulent intentions; that was doubtless because to do so would systematically undermine the right to deduct.

67. Additionally, he said, because CJEU authority establishes that registration is only a formal requirement, and cannot undermine the right to deduct where the substantive conditions to deduct are met, cancellation of registration cannot logically be a measure which prevents VAT fraud.

68. Mr Margolin submitted that the FTT was wrong to have regarded the decisions in *Thames Wines* and *Ingenious* as binding, because they were decisions on applications for permission to apply for judicial review, and therefore not binding precedent. In any event, those decisions were wrong, as were a number of other court and tribunal decisions, in holding or assuming that the *Ablessio* principle was not limited in the ways suggested by the Appellant.

69. HMRC argued as follows:

(1) Nothing in *Ablessio* itself limits the power of deregistration to those who are already registered for VAT, or who are themselves fraudulently evading VAT.

(2) Consideration of wider principles shows that the CJEU cannot have intended such limits. No CJEU decision has sought to limit the broad anti-abuse and anti-fraud principle on which *Ablessio* is based in such a manner.

(3) No domestic court or tribunal has accepted the limitations on *Ablessio* proposed by the Appellant.

(4) The consequences of the Appellant's suggested limitations would be remarkable and unprincipled and amount to a charter for fraud.

Discussion

70. We first consider what can be gleaned from *Ablessio* itself in relation to the issues raised by Ground 1. We then consider those issues as a matter of principle, taking into account wider CJEU case-law in relation to abuse of rights. Finally, we consider the relevance of certain domestic authorities relating to the *Ablessio* principle.

Decision in Ablessio

71. The decision in *Ablessio* does not address the question of whether the right to refuse registration extends to a person who is not fraudulent but who knew or should have known that it was facilitating VAT fraud. As to whether the terms of the decision indicate or imply the CJEU's position on this issue, each party essentially renewed the arguments before the FTT. References below in the form [x] are, unless stated otherwise, to paragraphs in *Ablessio*.

72. In relation to [28], set out above, the Appellant argues that the reference to *Halifax* indicates that the CJEU was solely concerned with evasion or fraud and not a tax loss in a transaction chain. We have no hesitation in rejecting that argument. As we have described, the abuse of law principle in the VAT context is broad and extends to those who facilitate VAT fraud. The three decisions referred to at [28] and the remainder of the decision in *Ablessio* lend no support for this argument.

73. At [30], the CJEU refers to the ability of Member States to "take measures that are necessary to prevent the misuse of identification numbers, in particular by undertakings whose activity, and consequently their status as taxable persons, is purely fictitious". The Appellant argues that the words "in particular" mean that the measures must relate to purely fictitious undertakings. In fact, those words carry the opposite implication, namely that the measures are not so restricted. It is also of note that the CJEU refers to "misuse" rather than fraudulent use of identification numbers, the former being of wider import. Finally as regards [30], it is relevant that the CJEU did not refer to misuse by the taxpayer or undertaking, but misuse in general, which again is not suggestive of the restriction put forward by the Appellant.

74. At [34], reference is made to the requirement that "a refusal to identify a taxable person by an individual number must be based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that person will be used fraudulently". The Appellant invites us to infer that this must be a reference to fraudulent use by the taxpayer who is refused registration. We do not accept that that is a reasonable inference; indeed, it is again of note that in fact the CJEU did not refer to the probability of the number being used fraudulently *by that person*.

75. At [36], the CJEU refers to the probability that a taxable person "intends to commit tax evasion". While in isolation that does address the position of a fraudster and not a facilitator, in the following sentence the Court refers to the taxable person's "fraudulent intentions", which is somewhat wider wording. In any event, the Court's focus at [36] is on the factors which might be relevant in "the overall assessment of the risk of tax evasion", not on the question of the extent of the principle.

76. The CJEU refers at [38] to "the existence of sound evidence from which it may be concluded that the application for registration…by Ablessio might result in the misuse of the identification number or other VAT fraud". This wording in our view points away from the Appellant's narrow reading of the *Ablessio* principle, since it is encompassing *either* misuse *or* "other VAT fraud". Additionally, we note once again the absence of any reference to misuse or other VAT fraud *by Ablessio.*

77. In its answer to the question referred, the CJEU refers to "the suspicion that the VAT identification number assigned will be used fraudulently" and to "the existence of a risk of tax evasion". For the same reasons as those given above, we do not agree with the Appellant that these are impliedly references only to fraudulent activity by the person to whom the number is assigned.

78. In conclusion, while the CJEU in *Ablessio* does not address the question of whether registration may be refused to a facilitator of VAT fraud, there is nothing which suggests that

the CJEU considered that it could not or should not. Rather, we consider that the language used is in several respects suggestive of the broader construction proposed by HMRC and confirmed by the FTT.

Principles applicable to abuse of rights doctrine

79. So, we have concluded, in agreement with the FTT, that the statements made and language used by the CJEU in *Ablessio* itself do not support the restrictions proposed in Ground 1, and indeed, in some respects, suggest that the CJEU did not intend such restrictions to apply.

80. While there have been several CJEU decisions which have referred with approval to *Ablessio*, none have proposed or suggested either of the restrictions contained in Ground 1.

81. We turn to whether, as a matter of principle, it is necessary or justifiable to import such restrictions, taking into account the principles established by CJEU jurisprudence, particularly regarding abuse of rights in relation to VAT.

82. As we have said, *Ablessio* must be seen in context. It was a decision issued without an Advocate General's opinion, which is an indicator that the CJEU did not consider that it was breaking new ground. Like *Kittel* and *Mecsek-Gabona*, *Ablessio* is a manifestation in a particular situation of the *Halifax* principle, which was itself an application of the EU principle or concept of abuse of rights. Particularly as respects the application of the broad *Halifax* principle to the right to deduct input tax, it is helpful to consider the rationale for its application in relation to a person who facilitates VAT fraud by another.

83. In *Kittel*, the CJEU explained that rationale in the following terms, at [55]-[59]:

> 55…It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H*, paragraph 34).
>
> 56 In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> 57 That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58 In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59 Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

84. So, the rationale for extending the abuse principle to a facilitator of fraud was said by the CJEU to be that such a person must be regarded as a *participant* in that fraud, who aids the perpetrators and becomes their accomplice. The conduct of such a facilitator was described in *Schoenimport* (at [64]) as *itself constituting fraudulent conduct*. In *Mobilx*, the Court of Appeal said this about the approach in *Kittel* (at [41]):

> Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct.

85. As a matter of principle, we can see no good reason why this approach and rationale should not apply in relation to the right of a facilitator of VAT fraud to be or remain registered. As the CJEU emphasised in *Schoenimport*, in relation to the right to deduct, at [68]:

> … any interpretation other than that adopted above would not comply with the objective of preventing tax evasion, as recognised and encouraged by the Sixth Directive (see, inter alia, judgment in *Tanoarch*, C-504/10, EU:C:2011:707, paragraph 50).

86. As set out above, in *Kittel* the CJEU noted that "*such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them*". That observation is, it seems to us, particularly pertinent in relation to a refusal to register or a deregistration based on *Ablessio*, because such an action is prospective and forward-looking. Unlike a refusal to deduct input tax, it addresses *future* risk of abuse of the VAT system. The restriction proposed in Ground 1 would prevent that course of action in relation to a facilitator of VAT fraud, in circumstances where the CJEU's rationale is that such a person is a participant in the VAT fraud. In our opinion, such an approach would not be consistent with the authorities, or, indeed, the broad scope of the abuse principle in *Halifax*.

87. We do not consider that the position differs simply because a facilitator of another's VAT fraud is already registered for VAT, and/or has made taxable supplies untainted by VAT fraud which would exceed the threshold for VAT registration. In either situation, a tribunal would need to be satisfied, taking such factors into account, that HMRC's decision to deregister on the basis of *Ablessio* was "based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently…based on an overall assessment of all the circumstances of the case and of the evidence gathered when checking the information provided by the undertaking concerned": *Ablessio* at [34]. HMRC's decision would also need to be proportionate in all the circumstances: *Ablessio* at [30]. To prevent *Ablessio* from *ever* applying to a facilitator of VAT fraud in such a situation would create a charter for fraud. If a decision to prevent registration of a person facilitating VAT fraud would otherwise satisfy the significant safeguards described at [34] and [30] of *Ablessio*, it cannot in our opinion be consistent with the *Halifax* principle as explained in authorities such as *Kittel* and *Schoenimport* for that person to be able to escape the risk of deregistration altogether merely by prior registration or the making of untainted supplies. Such a result would be directly contrary to the aim stated in the PVD of preventing fraud and abuse of the VAT system.

88. Mr Margolin argued that because the absence of registration could not undermine the right to deduct where the substantive conditions to deduct were met, refusal to register or deregistration could not logically be a measure which prevented VAT fraud. We reject that argument for two reasons. First, as we discuss below in relation to Ground 3, registration produces potential VAT benefits (and therefore potential for VAT fraud) which are much wider than the right to deduct, and a refusal to register or a deregistration based on *Ablessio* may in any event address not only the right to deduct of the taxpayer in question, but also that taxpayer's participation in the VAT fraud of another. Second, there is a distinction between the existence of a right to deduct and the ability to exercise that right: *Tower Bridge GP Ltd v HMRC* [2022] EWCA Civ 998 at [107]. A refusal to register or a deregistration addresses the risk of future abuse because it curtails that ability to exercise.

89. For the reasons above, we have concluded that as a matter of principle the restrictions set out in Ground 1 are neither justified nor appropriate.

Ground 2: Domestic authorities

90. The FTT discussed certain domestic authorities on which HMRC relied to support the proposition that the principle in *Ablessio* extended to the facilitator of a VAT fraud. The authorities mainly relied on by HMRC were the High Court decisions in *Thames Wines* and *Ingenious.*

91. In *Thames Wines* a taxpayer who had been deregistered for VAT by HMRC in reliance on *Ablessio* sought permission to apply for judicial review of HMRC's decision and for interim relief to suspend that decision. Mr Bedenham, who was counsel for Thames Wines, argued that (1) the decision was unlawful because it was not permitted by domestic VAT legislation, (2) insofar as the decision purported to rely on European law as confirmed in *Ablessio*, HMRC did not have sound evidence to demonstrate that the claimant's VAT registration was being used fraudulently, and (3) in any event deregistration was disproportionate. Relevantly to Ground 2, Mr Bedenham argued that the *Ablessio* principle did not extend to a person who merely facilitated the VAT fraud of another person in the chain, and did not encompass abusive action falling short of fraud: [14] of the decision. In rejecting the application for permission to apply for judicial review, Judge Purchas did not accept that submission as being arguable, stating (at [43]):

> I am not persuaded that it is arguable that the principle in *Ablessio* should be restricted to the extent to which Mr Bedenham contends. In particular, where there is sound evidence of fraudulent use of a VAT number, it is in my judgment wholly unarguable that that use is to be discounted because it does not directly constitute unlawful trading but is, as here, in a facilitating role.

92. *Ingenious* also concerned an application for permission to apply for judicial review and interim relief in respect of a decision by HMRC to deregister the taxpayer in reliance on *Ablessio*. The taxpayer argued that there was no power in domestic law to deregister, and that *Ablessio* applied only to a refusal of registration, not cancellation of an existing registration. Sir Ross Cranston decided that it was not arguable that HMRC lacked power to deregister, because that power arose not under domestic legislation but under the EU principle, described in *Halifax*, of abuse of law: [44] and [45] of the decision. In relation to whether the principle extended to a facilitator of a VAT fraud, Sir Ross Cranston said this (at [48]);

> Despite being a decision on interim relief and permission, *Thames Wines* [2017] EWHC 452 (Admin) is also authority that deregistration in accordance with *Ablessio* extends beyond situations where a VAT registration is itself being directly used for fraudulent purposes to those where it is being used as part of a chain which includes other suppliers who are acting fraudulently. In this regard it seems to me that the best approach is to ask whether the taxpayer who is not itself fraudulent is nonetheless facilitating fraud or abuse as a participant in the *Kittel* sense of having knowledge or the means of knowledge of a connection with fraud.

93. The FTT rejected various challenges to the correctness of *Thames Wines* and *Ingenious*, and decided that it was bound by those decisions. In this appeal, by Ground 2, ICSL asserts that the FTT erred in finding that it was bound by those decisions, because they were decisions on applications for permission to apply for judicial review, and were therefore not authoritative. Further and in any event, says ICSL, in common with a number of other decisions of the High Court, FTT and Upper Tribunal relating to *Ablessio*, they were wrongly decided.

94. It is the case that decisions on applications for permission to apply for judicial review are "generally not regarded as authoritative": see *R (Burkett) v Hammersmith and Fulham LBC (No 1)* [2002] UKHL 23 at [41]. Further, Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 generally restricts the citation as case-law authority of "decisions on applications

that only decide that the application is arguable"[9]. We note, however, that in *Ingenious* Sir Ross Cranston cited *Thames Wines* as authority in reaching his decision even though, as he noted, *Thames Wines* was itself a decision on an application for permission to apply for judicial review.

95. In any event, in this appeal we are required to determine as a preliminary issue the substantive issues raised by Ground 1, so the real question in practical terms is whether *Thames Wines*, *Ingenious*, or any of the other decisions of the High Court, FTT and Upper Tribunal which have concerned *Ablessio*, cause us to alter the conclusions we have reached and set out above regarding those issues.

96. Decisions of the High Court are not binding on the Upper Tribunal: *JP Gilchrist v HMRC* [2014] UKUT 0169 (TCC) at [85]-[86]. The Upper Tribunal may depart from a decision of the High Court if the Upper Tribunal is convinced or satisfied that the decision is wrong: *Gilchrist* at [94]. The Upper Tribunal is also not bound as a matter of precedent by earlier decisions of this Tribunal: *HMRC v Raftopoulou* [2018] EWCA Civ 818 at [24]. However, as a matter of judicial comity, we would normally follow an earlier decision of this Tribunal as a court of co-ordinate jurisdiction unless we were satisfied that it was wrong: *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) at [12]. Decisions of the FTT are, of course, not binding on this Tribunal.

97. So, as a matter of precedent none of the domestic decisions which have concerned *Ablessio* is binding on us. However, for the reasons we have set out above we agree with the clear conclusions in *Thames Wines* and *Ingenious* to the effect that (a) HMRC have power pursuant to the principle in *Ablessio* to deregister an existing taxpayer and (b) that power extends to a taxpayer who has facilitated the VAT fraud of another where that taxpayer knows or should have known that his transactions were connected to VAT fraud.

98. Those conclusions are consistent with other decisions of the High Court and Upper Tribunal regarding *Ablessio* such as *R (on the application of Nourish Trading Ltd) v HMRC* [2023] EWHC 350 (Admin); *R (on the application of S&S Consulting Services (UK) Ltd v HMRC* [2021] EWHC 3174 (Admin); *R (on the application of Tidechain Ltd) v HMRC* [2015] EWHC 4031 (Admin) and *GB Fleet Hire Ltd v HMRC* [2022] UKUT 307 (TCC). We note that in several of those cases those conclusions were common ground, so were not the subject of judicial consideration. Nevertheless, ICSL has identified no domestic authorities which would support the restrictions on *Ablessio* suggested by Ground 1, and, while only persuasive, *Thames Wines* and *Ingenious* are strongly supportive of the conclusions which we have reached.

Grounds 1 and 2: Conclusions and determination of preliminary issues

99. Taking into account the terms of the decision in *Ablessio*, the applicable EU principles relating to the abuse of law doctrine and relevant domestic case law, we reject the appeal under Grounds 1 and 2.

100. Our conclusion in relation to the preliminary issues raised by Grounds 1 and 2 is as follows:

The principle in *Ablessio* applies:

[9] Paragraphs 6.1 and 6.2 of the Practice Direction. Mr Watkinson argued that this wording did not prohibit citation of decisions that an application was *not* arguable. In *R (on the application of Hexpress Healthcare Ltd) v The Care Quality Commission* [2023] EWCA Civ 238, at [4] the Court of Appeal expressly gave permission for its decision to refuse an application for judicial review because the grounds were not arguable to be cited in accordance with the terms of the Practice Direction. That implies that Mr Watkinson's construction is incorrect, but we do not have to decide that point in this appeal and do not do so.

> **(a) to the deregistration for VAT purposes by HMRC of a person as well as to a refusal by HMRC to register a person.**
>
> **(b) to enable the deregistration of a person for VAT purposes who has facilitated the VAT fraud of another, where the person to be deregistered knew or should have known that it was facilitating the VAT fraud of another.**
>
> **(c) notwithstanding that the person whom HMRC seek to deregister has at the relevant time or times also made taxable supplies unconnected with such facilitation of fraud and which would result in a liability to be registered under paragraph 1(1) Schedule 1 VATA 1994.**

GROUND 3: DEREGISTRATION PURSUANT TO *ABLESSIO* BREACHES EU PRINCIPLES

101. Ground 3 of the appeal is that deregistration pursuant to *Ablessio* of a person who has merely facilitated fraud and who has also made or intends to make taxable supplies that are not connected with fraud would breach the EU principles of proportionality, fiscal neutrality and legal certainty[10].

102. Mr Margolin's submissions largely related to the argument regarding proportionality, but we discuss all three principles below.

Proportionality

103. Mr Margolin relied on the following passage from the judgments of Lord Reed and Lord Toulson JJSC (with whom the other judges agreed) in *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41 at [33]:

> Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.

104. Mr Margolin argued that (1) as to the first question, deregistration would not be appropriate to achieve the objective pursued because it does not prevent VAT fraud (an argument which we have rejected above), and it would systematically undermine the right to deduct by a taxable person, which is defined as a person registered or required to be registered under the VATA 1994, and (2) as to the second question, there are clearly less onerous ways in which the objective of preventing evasion could be achieved. These would include denying input tax under *Kittel*, and imposition by HMRC of a condition as to security and/or production of evidence[11].

105. Mr Watkinson argued as follows:

[10] ICSL's grounds of appeal also included reference to the EU principle of equal treatment, but that argument was not pursued in Mr Margolin's skeleton argument or in the hearing before us, so we do not consider it in this decision.

[11] Such conditions are permitted under paragraph 4 of Schedule 11 VATA 1994.

(1) This submission as to proportionality was rejected in *Thames Wines*, which the FTT was correct to follow.

(2) The test of proportionality is not abstract and is always fact-dependent.

(3) The applicable test is not that in *Lumsdon*, but whether the relevant measure is "manifestly disproportionate": *R (on the application of Seabrook Warehousing Ltd) v HMRC* [2019] EWCA Civ 1537 at [84]-[85] and [92].

(4) It has long been recognised in the case law of the CJEU that the objectives of prevention of tax avoidance and evasion may be relied on to justify restrictions on the exercise of any of the fundamental freedoms.

(5) Deregistration of a taxpayer with other transactions untainted by fraud does not "systematically undermine" the right to deduct.

(6) The less onerous methods suggested by ICSL would not achieve the same objectives as deregistration in relation to the containment of the risk of future avoidance.

106. In considering this ground, it is important to keep in mind that the preliminary issue we are asked to determine is whether it is *necessarily, in any circumstances*, a breach of the principle of proportionality to deregister a person who has facilitated fraud and who has made untainted supplies which would require VAT registration. The determination of this preliminary issue would therefore apply in the same way to a person who had facilitated a VAT fraud where the loss of tax was £10,000 and who had made untainted supplies of £100 million as it would to a person who had facilitated a VAT fraud where the loss of tax was £100 million and who had made untainted supplies of £85,000 (and regardless of whether those untainted supplies had been made in a deliberate attempt to engineer an entitlement to register).

107. Particularly given the requirement for proportionality (whatever the applicable legal test) to be assessed in light of all the facts and circumstances, we have serious doubts whether Ground 3 is really an appropriate matter to be determined as a preliminary issue. We note that in granting permission for this ground, Judge Richards identified this concern and encouraged the parties to consider this question. We think he was fully justified in doing so. In any event, we have considered the preliminary issue raised by Ground 3 as framed, and it would not be appropriate for us to comment in this decision on factual matters potentially relevant to ICSL's substantive appeal which remain to be determined by the FTT.

108. In short, we reject Mr Margolin's submissions.

109. The CJEU in *Ablessio* stated that a refusal to register must be based on "legitimate grounds"[12], and said this at [34]-[35]:

> 35 In order to be considered proportionate to the objective of preventing evasion, a refusal to identify a taxable person by an individual number must be based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently. Such a decision must be based on an overall assessment of all the circumstances of the case and of the evidence gathered when checking the information provided by the undertaking concerned.
>
> 35 It is for the referring court – which alone has jurisdiction both to interpret the national law and to find and assess the facts in the case before it and, in particular, the way in which that law is applied by the tax authority (see, to that effect, *Mednis*, paragraph 33 and the case-law cited) – to determine whether the national measures are compatible with European Union law, in

[12] *Ablessio* at [23].

> particular the principle of proportionality. The Court of Justice is competent only to provide that court with the criteria for the interpretation which may enable it to make such a determination as to compatibility (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 19 and Case C-188/09 *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski* [2010] ECR I-7639, paragraph 30).

110. In reaching its decision in these terms, the CJEU was therefore concluding (1) that a refusal to register might or might not be proportionate and (2) that the assessment of proportionality in any particular case would be for the local court, to be made in light of all the circumstances and evidence. We have already decided that there is no good reason to approach a deregistration in a different way to a refusal to register as a matter of principle (though the circumstances relevant to an assessment of proportionality may differ in relation to a person who is already registered). There is no suggestion in *Ablessio*, or indeed in any subsequent CJEU or domestic decisions applying *Ablessio*, that neither of the CJEU's conclusions in relation to proportionality should apply to a situation where the person in question is a facilitator of fraud and/or has made untainted supplies, because a deregistration in such circumstances requires no assessment of proportionality, since it could never be proportionate.

111. We do not accept Mr Margolin's argument that deregistration of a person who has merely facilitated fraud and who has made untainted supplies would, by definition, "systematically undermine" the right to deduct VAT and therefore be disproportionate. A facilitator of VAT fraud is to be treated as a participant in that fraud, and, as explained in *Kittel* and *Mobilx*, such a person effectively forfeits the right to deduct by that participation. As regards input tax on supplies unrelated to fraud, and not denied by *Kittel*, input tax on any such supplies made prior to the effective date of deregistration would not be retrospectively prevented from being deductible by virtue of deregistration. Put another way, deregistration is a prospective measure. So, this argument properly understood relates only to the right to deduct in respect of potential future supplies made after the effective date of deregistration. However, the inability of a person who is not registered for VAT to exercise a right of deduction in respect of future supplies would also apply to any supplies by a person who has not been registered but who is refused registration, in reliance on *Ablessio*. At [30] of its decision, the CJEU in *Ablessio* stated that any measures to prevent the misuse of VAT identification numbers "must not go beyond what is necessary for the correct collection of the tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of that tax". However, in then proceeding to decide that registration could nevertheless be legitimately refused in cases related to fraud where the necessary "sound evidence" is found to exist and the local court determines that such a course is proportionate, in our opinion the CJEU was concluding that, with those safeguards, a refusal to register would *not* systematically undermine the right to deduct. That is also our conclusion.

112. It is not necessary for us to decide in determining Ground 3 whether the approach to proportionality in considering a deregistration on the basis of *Ablessio* is that suggested by ICSL or that suggested by HMRC, and we prefer not to do so. However, even if we assume that Mr Margolin's formulation, based on *Lumsdon*, is correct, we do not agree that alternative less onerous measures than deregistration would *necessarily* be available. A refusal to register or a deregistration is a measure with more far-reaching implications than other available measures. It is prospective, and, in addition to removing the ability to exercise a right to deduct input tax, as the CJEU recognised in *Ablessio* (at [18]-[20]), registration is also very important in proving the status for VAT purposes of a taxable person. Some counterparties might be less willing to transact with a person without a VAT identification number; as the CJEU said in *Ablessio*, at [20]:

> In addition, the VAT identification number is an important piece of evidence of the operations carried out. Indeed, Directive 2006/112 requires, in a number of provisions relating, in particular, to invoicing, declarations and summary statements, that this identification number of the taxable person or the recipient of the goods or services be referred to in those documents.

113. In relation to both proportionality and legal certainty, Mr Margolin pointed out the damage that could be caused to a trader who is deregistered and then faces a substantial delay before his appeal against the deregistration decision can be heard. As he put it, in the meantime the trader's business may "bleed to death". We understand that argument, which also features in the various judicial review applications for permission and injunctive relief in relation to registration decisions. However, the procedural issues which may arise do not in our opinion mean that a decision in the circumstances posited by Ground 3 must necessarily breach the principle of proportionality or legal certainty.

114. In conclusion, we consider that deregistration in the circumstances described in Ground 3 is not a breach of the principle of proportionality. The question of whether a particular decision by HMRC to deregister a person is proportionate is to be determined by applying the approach described by the CJEU in *Ablessio*, "based on an overall assessment of all the circumstances of the case".

Fiscal neutrality and legal certainty

115. The EU principle of fiscal neutrality broadly requires equal VAT treatment for similar supplies which are in competition. Mr Margolin argued that deregistration of a facilitator of fraud with untainted supplies "breaches the principle of fiscal neutrality by increasing the costs of supplies by the Appellant when compared to competitors (because competitors will be in a position to deduct input tax on their purchases)".

116. We do not agree. If a refusal to register breached the EU principle of fiscal neutrality, then it is not evident why the CJEU approved it as a potential measure in *Ablessio,* subject to the safeguards described in the decision[13]. In any event, the effect of deregistration is simply to place the registered person in the same position as any other unregistered competitor; they can neither charge output tax nor deduct input tax. That is not a breach of the principle of fiscal neutrality.

117. The principle of legal certainty requires that the application of Community legislation is foreseeable by those subject to it. We have already explained at paragraphs 55 to 57 above why we do not consider that deregistration in the circumstances described in Ground 3 would breach the principle of legal certainty, and we need not repeat those reasons here.

118. Our conclusion in relation to the preliminary issue raised by Ground 3 is as follows:

> **Deregistration pursuant to *Ablessio* of a person who has merely facilitated fraud and who has also made or intends to make taxable supplies that are not connected with fraud would not of itself breach any of the EU principles of proportionality, fiscal neutrality or legal certainty.**

CONCLUSION AND SUMMARY

119. The appeal is dismissed.

120. Our decisions on the preliminary issues raised in this appeal are as follows:

> **Ground 4: The application by HMRC of the *Ablessio* principle is not *contra legem* or otherwise prohibited by the VAT legislation where it is**

[13] See, for instance, the statement at [34] of *Ablessio* that a refusal to register would need to be based on sound evidence "in order to be considered proportionate to the objective of preventing evasion".

applied to deregister a taxpayer who (1) has either fraudulently defaulted on its VAT obligations or facilitated the VAT fraud of another party and (2) at the relevant time or times has also made taxable supplies unconnected with such fraud or facilitation of fraud and which would result in a liability to be registered under paragraph 1(1) Schedule 1 VATA 1994.

Grounds 1 and 2: The principle in *Ablessio* applies:

(a) to the deregistration for VAT purposes by HMRC of a person as well as to a refusal by HMRC to register a person.

(b) to enable the deregistration of a person for VAT purposes who has facilitated the VAT fraud of another, where the person to be deregistered knew or should have known that it was facilitating the VAT fraud of another.

(c) notwithstanding that the person whom HMRC seek to deregister has at the relevant time or times also made taxable supplies unconnected with such facilitation of fraud and which would result in a liability to be registered under paragraph 1(1) Schedule 1 VATA 1994.

Ground 3: Deregistration pursuant to *Ablessio* of a person who has merely facilitated fraud and who has also made or intends to make taxable supplies that are not connected with fraud would not of itself breach any of the EU principles of proportionality, fiscal neutrality or legal certainty.

MR JUSTICE EDWIN JOHNSON
JUDGE THOMAS SCOTT

Release date: 01 September 2023