[2019] UKFTT 529 (TC)

TC07325

Appeal number: TC/2017/07111

VALUE ADDED TAX – VOIP and Electronic Communication Services - Penalty imposed on company in relation to inaccuracies in three successive quarterly VAT returns - Company entered liquidation - Personal Liability Notice for 100% of the Company's liability issued to Appellant sole director – Schedule 24 Paragraph 19 Finance Act 2007 – Did the Company know or have reason to suspect that the transactions were connected to fraud? - Yes - Were the inaccuracies attributable to deliberate conduct of the Appellant director? - Yes, but only in relation to the last two periods - Comments on the need to consider special reduction in relation to a Personal Liability Notice - Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR KAMRAAN HUSSAIN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR MOHAMMED FAROOQ

Sitting in public at Tribunals House, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 4 and 5 March 2019

Mr Jide Lanlehin, Counsel, for the Appellant

Ms Charlotte Brown, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is our decision in relation to Mr Hussain's appeal (made by way of a Notice of Appeal dated 24 September 2017, which put in shorter form submissions made in a letter dated 17 July 2017) against HMRC's decision (19 June 2017, and upheld at departmental review on 25 August 2017) to make Mr Hussain personally liable for payment of inaccuracy penalties totalling £86,743 issued to a company - Digital Elevation Ltd ('DEL', or 'the Company').

2. The inaccuracy penalties charged to the Company ('the Company Penalties') (and by virtue of the Personal Liability Notice now charged to Mr Hussain) were:

(1) 01/15 - £37,902.72

(2) 04/15 - £48,271.12

(3) 07/15 - £569.92

3. These inaccuracy penalties were calculated at 61.25% of the Potential Lost Revenue ('PLR'). The PLR was:

(1) 01/15 - £61,882

(2) 04/15 - £78,810

(3) 07/15 - £930

4. DEL did not appeal. Shortly after a notice of penalty assessment was issued to it (16 June 2017) it was placed into voluntary liquidation (7 September 2017). One feature of this case, to which we shall return below, is that the PLN which is the subject matter of this appeal was issued to Mr Hussain a mere three days after the penalty assessments were issued to the Company.

5. DEL requested reviews on 25 August 2017 and 16 October 2017, but HMRC indicated that the 30 day period in which a review could be requested had passed and HMRC therefore treated the Company Penalties as upheld.

6. Despite the Company's failure to appeal, we are nonetheless satisfied that Mr Hussain, as part of his challenge to the PLNs against him, can put the Company's underlying liability into issue.

7. In this regard, we find support in the Tribunal's decision in *Jason Andrew v HMRC* [2016] UKFTT 295 (TC) (Judge Peter Kempster and Mrs Beverley Tanner).

8. In that case, Mr Andrew (who had been the sole director and shareholder of a Company) appealed against a Personal Liability Notice ('PLN') issued to him by HMRC pursuant to Schedule 24 Paragraph 19 of the Finance Act 2007. HMRC had originally charged the Company a penalty for a deliberate inaccuracy in one of its quarterly VAT returns. The Company was then dissolved. Shortly thereafter, HMRC issued the PLN to the Appellant in the full amount of the Company Penalties. Mr Andrew appealed the PLN. The Company did not appeal the Company Penalties.

9. The FTT accepted the Appellant's argument that it would be unjust if Mr Andrew was not permitted to challenge the validity of the Company Penalties; it would result in the Company Penalty being "rubber stamped" despite points Mr Andrew wished to raise: see Paras [33]-[38] of its decision.

10. At Paragraph [35], the FTT remarked

> "We have considered carefully whether the wording on appeal rights in Schedule 24 entitles the officer to challenge the company penalty – at least insofar as aspects relevant to the personal liability notice which he or she is appealing. Our concern is that where a company penalty has crystallised without any challenge by the company, that may be not because the company has actively considered the matter and decided not to appeal to the Tribunal but simply because events such as liquidation or dissolution overtake the company, or because the issue of personal liability notice(s) totalling the entire company penalty render the company with no remaining interest in contesting the company penalty (because para 19(2) prevents double recovery of penalties). Any officer of the company who faces an apportionment of that penalty (by way of a personal liability notice) would, on HMRC's analysis, be faced with an unchallengeable company penalty. We think that (at least in cases more complicated than the current appeal) that could give rise to problems for the Tribunal in achieving a fair and just result on the officer's appeal against the personal liability notice."

11. Having considered the provisions of the predecessor legislation (sections 60-61 of the VAT Act 1994 and section 14 of the Finance Act 1996), the FTT in *Jason Andrew* held that Schedule 24 of the Finance Act 2007 permits a named officer of a company to appeal against the decision that the conduct of the company is in whole or in part, attributable to him and also against the decision as to the portion of the penalty which the Commissioners prepare to recover from him.

12. At Paragraph [38] of *Jason Andrew*, the FTT concluded that the Tribunal has jurisdiction to consider relevant points concerning the company penalty in an appeal against a personal liability notice that apportions part or all of that company penalty to an officer. The Tribunal (Judge Jennifer Dean and Mr John Wilson) endorsed the reasoning in *Jason Andrew* and put it this way in *Bell and Hoyers v HMRC [*2018] UKFTT 272 (TC) at Para [160]: *"it cannot have been the intention behind the legislation to leave an unchallengeable penalty...the over-riding objective and interests of justice require us to consider the company penalty in order to achieve a fair conclusion on the PLNs*". We agree.

13. In the present case, the Company's penalties have not been paid. Therefore, no question of double recovery arises. It is lawful for HMRC to seek to impose a PLN on Mr Hussain, but subject to Mr Hussain's right to put the Company penalty in issue.

Mr Hussain's Grounds of Appeal

14. Mr Hussain's Grounds of Appeal, in summary, are as follows:

(1) He does not agree that the input tax which is the subject of the penalty was the subject of fraud. This was a legitimate claim;

(2) He was not aware that the company with which Digital Elevation Ltd traded was acting fraudulently;

(3) He was not aware that the transactions were connected to fraud;

(4) The level of penalty charged is excessive.

15. At the outset of the hearing, Mr Lanlehin clarified and confirmed that there was no dispute that the Company's returns contained inaccuracies, but that Mr Hussain's position was that he did not accept that the inaccuracies were deliberate, but were - at the highest - careless.

16. We were also made aware that the Appellant had, without any admissions, and without prejudice, offered to pay HMRC a certain amount so as to resolve the appeal. Mr Lanlehin explained this as a matter of pragmatism, so as "to forestall the process". We wish to make it clear that, in reaching our decision, we have had no regard to the Appellant's offer, one way or the other. In particular, the making of such an offer is not a factor which weighs against the Appellant.

Facts not in dispute

17. The following facts are not in dispute:

(1) DEL was first incorporated as Lucky Discount Furniture Ltd on 20 August 2007;

(2) It was registered for VAT with effect from 1 September 2009;

(3) Mr Hussain was appointed a director on 1 March 2012;

(4) Between 9 May 2012 and 1 January 2013, a Mr Matthew Skelton was also a director;

(5) The Company traded under the name as Asos Solutions Ltd until 27 July 2015;

(6) DEL (whether as Asos, or DEL) made VAT input claims for the periods 01/15, 04/15, and 07/15;

(7) Mr Hussain was the sole director at the time of the VAT periods relevant to this appeal;

(8) DEL was deregistered for VAT, at its own request, with effect from 15 December 2015;

(9) On 12 May 2017, HMRC sent DEL a Penalty Explanation letter about the penalties which it intended to charge;

(10) On 16 June 2017, HMRC issued DEL with a penalty, pursuant to Schedule 24 of the Finance Act 2007, for deliberate behaviour leading to an inaccuracy. The total was said to be payable within 30 days of the issue of the notice: i.e., by 16 July 2017;

(11) On 19 June 2017, HMRC issued Mr Hussain with a Personal Liability Notice, pursuant to Paragraph 19(1) of Schedule 24 of the 2007 Act, making him liable for the whole penalty amount. The Personal Liability Notice set out that, if DEL chose to pay an amount that Mr Hussain was personally liable for, then HMRC would not pursue Mr Hussain personally for that amount;

(12) On 19 June 2017, HMRC wrote to DEL informing DEL that it had sent a PLN to Mr Hussain. That letter said that if, after HMRC had considered all appropriate recovery action, Mr Hussain did not pay in full, HMRC might take steps to recover any outstanding amounts from the company.

(13) On 7 September 2017, DEL resolved to wind up voluntarily;

(14) DEL was dissolved on 19 January 2018.

The liability of the Company

18. In the light of the above discussion, we must begin by evaluating the underlying liability of the Company.

19. Here, the law is well-known, and is not apparently in dispute.

20. The right to deduct input tax is derived from Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 which has been implemented into UK domestic law by sections 24-26 *Value Added Tax Act 1994* and Regulation 29 of *The VAT Regulations 1995* (SI 1995/2518).

21. In brief terms, if a trader has incurred input tax which is properly allowable, he is entitled to set it against his output tax liability (or to receive a repayment if the input tax credit due to him exceeds that liability). Evidence is required in support of a claim: see Article 18 of the Sixth Directive and Regulation 29(2) of the 1995 Regulations. Traders are required, amongst other things, to hold or provide any document required by Regulation 13 of the 1995 Regulations or such other evidence to support the claim as HMRC may direct.

22. An exception to the above entitlement was identified by the European Court of Justice in the joined cases *Axel Kittel v Belgium; Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR I-6161. In a judgment on references for a preliminary ruling, the ECJ articulated the legal basis and circumstances in which the right to deduct may be lawfully denied by the taxation authorities:

> "51 […] it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT [...]
>
> 52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of

national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

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 [...]

54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive...Community law cannot be relied on for abusive or fraudulent ends [...]

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 … 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 [...]

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’.

[...]

61 …where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent

evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

23. These principles - often referred to, in shorthand, as the 'Kittel' principles - were amplified and clarified, in a domestic context, by the Court of Appeal in *Mobilx Ltd (in administration) v HMRC [2010] EWCA Civ 517*. Moses LJ (with whom Carnwath LJ, as he then was, and Sir John Chadwick agreed) remarked:

> "[30] ... the Court made clear that the reason why fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits fraud he will not be able to establish that the objective criteria which determine the scope of VAT and the right to deduct have been met...
>
> [...]
>
> [41] ...*Kittel* did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud, but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct."

24. On the issue of knowledge, the Court of Appeal gave the following guidance:

> "MEANING OF *'SHOULD HAVE KNOWN'*
>
> [52] If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in Kittel. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises.
>
> [...]
>
> EXTENT OF KNOWLEDGE
>
> [56] It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader knew or should

have known that by his purchase he was taking part in such a transaction, as the Chancellor concluded in his judgment in *Blue Sphere Global*:-

> "The relevant knowledge is that Blue Sphere Global ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough." (Para 5).

[57] HMRC object that the principle should not be restricted to those cases were a trader has deliberately refrained from asking questions lest his suspicions should be confirmed. This has been described as a category of case which is so close to actual knowledge that the person is treated as having received the information which he deliberately sought to avoid...

[58] As I have endeavoured to emphasise, the essence of the approach of the court in *Kittel* was to provide a means of depriving those who participate in a transaction connected with fraudulent evasion of VAT by extending the category of participants and, thus, of those whose transactions do not meet the objective criteria which determine the scope of the right to deduct. The court preserved the principle of legal certainty; it did not trump it.

[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel.*

[60] The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

25. The Court of Appeal referred with approval to the judgment of the then Chancellor, Sir Andrew Morritt, in *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch) where, in relation to the issue of 'connection' with fraud, the judge remarked (see Paras. [42]-[45]):

> "…The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case

is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.

Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra-trading, the right to reclaim enjoyed by C ... in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B, is transferred to E .. in the clean chain. Such a transfer is apt…to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B."

26. We also have regard to the remarks of Christopher Clarke J (as he then was) in *Red12 v HMRC* [2009] EWHC 2563 at [109]-[111] which were also approved by the Court of Appeal in *Mobilx:*

> "[109] Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> [110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three

suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

[111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

27. In *Megtian Limited (in administration) v HMRC* [2010] EWHC 18 (Ch) Briggs J (as he then was) stated at [34], and [37]-[38]:

"In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.

Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including Livewire, that may be an appropriate basis for analysis."

28. The burden of proof in this type of case rests with HMRC. Moses LJ made this clear in *Mobilx*:

"[81] ...it is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion.

[82] But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant....tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a tribunal from asking the essential question posed in Kittel, namely whether the trader should have known by his purchase that he was taking part in a

transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.

[85] ....A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud, and, by his own choice, deprives himself of the right to deduct."

29. The test in *Kittel* is simple and should not be over-refined.

30. The standard of proof in this case is the ordinary civil standard, namely, the balance of probabilities. In *Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35*, the Supreme Court made it clear that there is no enhanced burden even if the allegations - as in this case - are ones where the gravity of misconduct alleged is serious, with serious consequences. In *Re B*, Lord Hoffmann also made the following helpful remarks concerning the operation of the standard when it comes to fact finding:

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

[...]

[13] ... I think that the time has come to say, once and for all, that there is only one civil standard of proof and that if proof that the fact in issue more probably occurred than not."

31. Insofar as material, Schedule 24 of the Finance Act 2007 reads as follows:

1(1) A penalty is payable by a person (P) where—
(a) P gives HMRC a document of a kind listed in the Table below, and
(b) Conditions 1 and 2 are satisfied.

1(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
(a) an understatement of P's liability to tax,
(b) a false or inflated statement of a loss by P, or
(c) a false or inflated claim to repayment of tax.

1(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

Degrees of culpability

3(1) Inaccuracy in a document given by P to HMRC is—
(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
(b) "deliberate but not concealed" if the inaccuracy is deliberate but P does not make arrangements to conceal it, and
(c) "deliberate and concealed" if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

3(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate when the document was given, is to be treated as careless if P—
(a) discovered the inaccuracy at some later time, and
(b) did not take reasonable steps to inform HMRC.

Reductions for disclosure

9(1) A person discloses an inaccuracy or a failure to disclose an under-assessment by—
(a) telling HMRC about it,
(b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

9(2) Disclosure—
(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and
(b) otherwise, is "prompted".

9(3) In relation to disclosure "quality" includes timing, nature and extent.

10(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.
10(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.
10(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.
10(4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

10(5) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.
10(6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure.

Special Reduction

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2

[...]

Companies: officers' liability

19(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer

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

(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership,"officer" means—
(a) a director [...]

[...]

(5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)
(a)paragraph 11 applies to the specified portion as to a penalty;
(b)the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,
(c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty
[...]
(e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and
(f) paragraph 21 applies as if the officer were liable to a penalty.

32. The Tribunal's powers are set out in Schedule 24 Paragraph 17:

17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.
(2) On an appeal under paragraph 15(2) the appellate tribunal may—

(a) affirm HMRC's decision, or
(b) substitute for HMRC's decision another decision that HMRC had power to make.
(3) If the tribunal substitutes its decision for HMRC's, the appellate tribunal may rely on paragraph 11—
(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
(b) to a different extent, but only if the appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

[...]

(6) In sub-paragraphs (3)(b), 4(a) and (5)(b), "flawed" means flawed when considered in the light of the principles applicable to proceedings for judicial review.

33. Paragraph 3 of Schedule 24 reads:

Degrees of culpability

"3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

34. Hence, there are four issues to be addressed:

(1) Was there a tax loss? (Issue 1)

(2) If so, did this loss result from a fraudulent evasion? (Issue 2)

(3) If so, were the transactions which are the subject of this appeal connected with that evasion? (Issue 3)

(4) If so, did (or should) the Company have known that the transactions were so connected? (Issue 4)

35. Mr Hussain's Response to the Notice of Issues confirms that the following matters are not in dispute:

(1) That there was a tax loss (Issue 1);

(2) That this tax loss resulted from fraudulent evasion (Issue 2);

(3) That the transactions which are the subject of this appeal were connected with that evasion (Issue 3).

36. We note Mr Hussain's position that his admissions on those issues are made without any admission as to knowledge or means of knowledge of the alleged fraud, i.e. without any admissions as to Issue 4.

37. HMRC bears the burden in establishing that the Company knew or ought to have known that the transactions were connected to fraud. The standard of proof is the balance of probabilities (i.e., whether something is likelier than not).

38. In more detail, and as to the tax loss, 24 of DEL's transactions for the relevant periods had Chellsey FMC ('Chellsey') as DEL's immediate supplier:

(1) Period 01/15 - 9 transactions - (invoice dates) 1 December 2014 to 28 January 2015;

(2) Period 04/15 - 12 transactions - (invoice dates) 2 February 2014 to 27 April 2015;

(3) Period 07/15 - 3 transactions - (invoice dates) 5 May 2015 to 18 May 2015.

39. The purchases from Chellsey were all traced back to a defaulting trader, Hydro Serv Ltd. Hydro Serv Ltd was assessed in relation to its supplies to Chellsey in the sum of £294,562. Those assessments were unpaid and Hydro Serv was deregistered as a missing trader on 21 April 2015.

40. Therefore, the issue upon which we must focus our attention is whether the Company did know, or should have known, that the transactions were so connected.

41. HMRC's contention is that the penalties issued to the Company on 16 June 2017 were on the basis that the Company's VAT returns for 01/15, 04/15, and 07/15 were inaccurate, and that its behaviour in submitting inaccurate VAT returns was deliberate *"in that the company knew the transactions covered by the claim for input tax were connected with the fraudulent evasion of VAT":* see Para [29] of HMRC's Statement of Case.

The evidence

42. We heard evidence from Officer Stefan Tosta. He had given two witness statements, dated 30 April 2018 and 9 August 2018. Those stood as his evidence-in-chief. He had been personally involved in the visits to the Company. He explained the reason for the visits so that companies "could hopefully stay well clear of fraud". He accepted that it was not 100% possible to cope with every scenario if people were bent on achieving fraud, but he said that his efforts were to try to minimise the risk.

43. We heard evidence from Mr Hussain. He had given two witness statements, dated 31 July 2018 and 19 September 2018, and he also confirmed the Grounds of Appeal (24 September 2017) and a letter dated 17 July 2017 as setting out his position.

44. Our impression of Mr Hussain is that he is an intelligent and financially astute individual who is genuinely knowledgeable about the technical fields in which he has been involved:

(1) His academic and practical experience was in the technical sector;

(2) He has a degree in information systems, and an MBA;

(3) Having graduated, he worked as the Head of IT at a firm in Canary Wharf in the late 1990s;

(4) He then went to work abroad (in the UAE) for about 10 years as a freelance project manager.

45. On his return to the UK in 2011, he decided to offer management consultancy services via a limited company rather than as a sole trader, and he acquired the Company for this purpose. The Company, concurrently with its management consultancy activities, began trading in mobile phones from 2013, but had stopped in mid 2014 when Mr Hussain had a visit from HMRC which warned him of the risk of fraud.

46. In or about November 2014, the Company began trading in Electronic Communication Services ('ECS').

47. Mr Hussain accepted that he took full responsibility for making the VAT returns in issue, and for preparing the Company's accounts. He accepted that he had the sole responsibility for ensuring that the accounts and VAT returns were accurate. He accepted that the VAT returns in issue in this appeal were inaccurate.

Discussion

48. We consider that it is appropriate to look at the periods for each of the three VAT returns discretely.

49. Therefore, in relation to each period, we must address the following:

(1) Did the Company know, alternatively should it have known, that the transactions were connected to fraud?

(2) Only if the answer to (1) is 'yes', were the admitted inaccuracies in the Company's VAT returns attributable to conduct which was "deliberate" (within the proper meaning and effect of Schedule 24) or not so as to justify the issue of a deliberate inaccuracy penalty.

50. All cases of this character are inevitably fact-sensitive. The present appeal is no different. If we get to question (2) then it falls to us to assess, with reference to the facts, and the inferences to be fairly derived from those facts, into which band, if indeed any, the conduct falls: namely, whether it was deliberate or careless.

51. We remind ourselves that, in relation to an appeal against a penalty, the burden is on HMRC to establish that the statutory conditions are satisfied. It is HMRC's task

to show that behaviour was deliberate. It is not for the taxpayer or person subject to the penalty to show that their behaviour was not deliberate.

52. We consider that 'careless' for these purposes can be equated with 'negligent conduct' in the context of discovery assessments, which is to be judged with reference to the reasonable taxpayer, and what the (hypothetical) reasonable taxpayer, exercising reasonable diligence in the completion and submission of his return, would have done. Hence, careless does connote some fault, sufficient to attract censure when measured against an objective standard.

53. 'Deliberate' must go beyond that. In terms of inaccuracy, we consider it to mean 'done with a set purpose'. That purpose must be to produce an inaccuracy, within the meaning of Schedule 24. There is an element of intent in 'deliberate' which is not present in 'careless'. It represents a higher degree of fault.

54. In *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 0249 (TC), the Tribunal (Judge Greenbank and Mr Bell) gave useful guidance as to the meaning of 'deliberate' in the context of Schedule 24. The only issue before the Tribunal on that occasion was whether the inaccuracy in a single VAT return was 'deliberate'. The Tribunal commented (at Para [63]): "*In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely on it as an accurate document ... This is a subjective test. It is a question of the knowledge and intention of the particular taxpayer at the time*".

Period 01/15

55. In relation to 01/15, HMRC's allegation of the Company's knowledge of fraud is supported by the following matters:

(1) The provision of copies of VAT Notice 726 and the 'How to Spot Missing Trader Fraud' leaflet, as well as MTIC awareness and Alternative Banking Platform letters on 7 June 2012; 11 June 2012; and 4 December 2013;

(2) Invoices from Chellsey FMC displaying a bank account for Royal Bank of Scotland but payments instead being made through the 'Akirix' banking platform (which was also used by Hydro Serv);

(3) Invoices expressed in US Dollars without a VAT invoice showing the VAT payable in GBP sterling and without a conversion rate being displayed.

56. We are not satisfied that HMRC has succeeded in showing, for this period, that the Company (through Mr Hussain) did actually know that the transactions for 01/15 were connected with fraud.

57. We do however consider that the Company ought to have known that the transactions were connected to fraud. We take account of the following:

(1) The provision of information at the meetings from 7 June 2012 to 11 July 2014 did not, in our view, give Mr Hussain (or, through him, the Company)

sufficient notice as to the prevalence of fraud in the *ECS* market, as opposed to fraud in the *mobile phone* market;

(2) We are not satisfied that the Company's earlier involvement in the mobile phone industry (which, as Mr Hussain accepted, was carried on despite advice from HMRC that the mobile phone sector was vulnerable to fraud) establishes any indifference to risk generally, or VAT fraud in particular, on the part of Mr Hussain and/or the Company;

(3) It was not challenged that the Company had 'a clean bill of health' in relation to its mobile phone deals, and the Company ceased to trade in the mobile phone sector when it was given explicit warning;

(4) Given Mr Hussain's background, knowledge and experience, we do not see anything inherently untoward or suspicious in the combination of mobile phone trading and management consultancy, nor in the combination of ECS and management consultancy;

(5) Nor do we see anything inherently suspicious in the Company moving from one high risk area (mobile phones) with small profit margins to another risky area (ECS) with even smaller margins. There was no real evidence as to the Company's treading or profit margin in relation to mobile phones (and no evidence that the Company had been denied any claim to input tax in relation to its earlier business in mobile phones);

(6) We accept that Mr Hussain's evidence that he reached the point where he felt that the nature of the mobile phone industry was "getting toxic", and that he should walk away from it. This feeling was partly caused by repeated visits and warnings from HMRC;

(7) We accept his evidence that, when he entered the ECS business, he did not get the same feeling of 'toxicity' from it, and moreover was genuinely attracted by the fact that - dealing in dematerialised services rather than goods - it felt "cleaner" (for example in terms of logistics);

(8) Mr Hussain accepted that the move from mobile phones to ECS was a move from one high risk industry to another, but we accept his evidence that, until July 2014, he was getting regular visits from HMRC and providing HMRC with all the information which it was asking for;

(9) We accept Mr Hussain's evidence that, up to and including the meeting with HMRC on 11 July 2014, he had not been told by HMRC that the due diligence which he was doing, and which he was showing to HMRC, was insufficient. It was not in dispute that, up to that point, the Company was taking copy documents such as passport copies and showing them to HMRC when asked to do so, as well as using the EUROPA website to verify VAT numbers;

(10) The Company was not involved in the ECS market until later in 2014 - that is to say, until after the meeting on 11 July 2014;

(11) The fact that Hydro Serv used Akirix is not evidence that DEL knew, or should have known, in relation to this period, that the transactions were connected to fraud. Hydro Serv was not DEL's supplier: Chellsey was. There

was no direct link between DEL and Hydro Serv. DEL was one step removed from Hydro Serv;

(12) The assertion (in HMRC's Statement of Case that the use of Akirix by DEL and Hydro Serv *'is more than coincidence and is evidence of an orchestrated scheme'* is a bare assertion and is not, in our view, made out on the evidence. The submission is suggestive (to put it no more highly than that) that any use of Akirix raises or should have raised suspicion of fraud. We disagree. That factor, in and of itself, would not, in our view, be sufficient to found an allegation that the recipient of those invoices had actual knowledge of fraud.

58. Whilst the Company's VAT return for 01/15 contained inaccuracy, we nonetheless consider - adopting HMRC's suggested approach of considering the 'basket of evidence' - that the conduct which led to this was "careless", in the above sense, being due to Mr Hussain's failure to take reasonable care: see Sch 24 Para 3(1)(a).

59. In reaching this conclusion, we have had regard to the fact that the Company cannot, when dealing with Pryority in December 2014, have undertaken a VAT check at all, since Pryority had already been deregistered, in June 2014. It seems to us that the best explanation for this is that the Company's due diligence, in relation to Pryority, for this period, was a superficial or a 'box-ticking' exercise. However, that said, a failure to conduct due diligence does not - in and of itself - conclusively establish knowledge (even constructive knowledge) of connection to fraud. It is simply one element in a wider picture (some aspects of which are set out above) and its overall significance must depend on the other elements of that wider picture.

60. We consider that the Company ought to have known that the transactions for this period were connected to fraud, and thus its sole director, Mr Hussain, ought to have known that the transactions were connected to fraud. But we are not satisfied that the Company, or Mr Hussain, actually knew that the transactions for this period were connected to fraud.

61. Having thus resolved the character of the Company's underlying liability, we then must come to the Personal Liability Notice issued in relation to the inaccuracies for this period.

62. We have to ask whether the admitted inaccuracies in the Company's VAT returns for this period were attributable to conduct on the part of Mr Hussain which was careless or deliberate (within the proper meaning and effect of Schedule 24). That is to say, we have to ask whether the inaccuracies in the VAT return were the result of Mr Hussain doing something with a set purpose (deliberate) or whether they were attributable to him failing to take reasonable care (careless).

63. In the light of our findings for this period, set out above, and which we do not repeat here, we consider that HMRC has fallen short of showing that Mr Hussain's conduct in relation to the inaccuracies was deliberate. It was careless.

64. That means that the PLN imposed on Mr Hussain in relation to the period 01/15 has to be set aside because Schedule 24 Paragraph 19(1) only permits the imposition of a PLN on a director where that conduct can be shown to be deliberate.

65. The appeal in relation to the PLN for 01/15 is therefore allowed.

Periods 04/15 and 07/15

66. In relation to periods 04/15, and 07/15, we consider the position to be materially different. For each of these periods, there are several factors present, which were not present for 01/15, which, taken together, in the round, and as part of the 'basket of evidence', point much more clearly to the Company having actual knowledge that its transactions were connected to fraud.

67. On 6 February 2015, two officers from HMRC visited DEL's premises. They spoke with Mr Hussain. This was an MTIC Assurance visit. The Company was part of an MTIC monitoring programme.

68. At the beginning of the meeting, Mr Hussain was given a long, personally addressed, letter from HMRC's Specialist Investigations Team, detailing the issues of concern that HMRC wanted to discuss. The letter began by saying: "With reference to our visit today, I must draw your attention to some concerns that HMRC have in respect of your business transactions and trading activities." After general comments concerning MTIC fraud, it noted that MTIC fraud "had mutated and may exploit intangible products and services...". The letter invited the Company "to review its trading activities and to take steps to minimise its exposure to the very real risks of potentially participating in transaction chains in which taxable persons (either in the EU or in the UK or indeed both) have failed to account for VAT...".

69. Paragraph 4 was headed 'HMRC concerns'. This paragraph went beyond generic. It drew attention to HMRC's concerns with the Company's current trading activity. It drew attention to third party payments. Paragraph 4(c) read:

> "**VOIP & Electronic Communication Services (ECS)**
>
> I understand ... that you are now dealing in ECS trade. This tied in with the other indicators detailed in this letter is a concern for HMRC. ECS trading is a particular sector that MTIC fraudsters are currently using to steal money from the Treasury. **[The Company] should now be aware of this fact and take appropriate measures to protect its business and trading activities**" (emphasis in the original).

70. The last page of that letter set out, in a number of bullet points, some entries from 'How to Spot Missing Trader Fraud'. It said "**Unfortunately, your business is showing some of these indicators (e.g. Third Party Payments) and you as director .. should now take seriously HMRC's concerns in relation to your trading activity and take appropriate action**" (emphasis in the original).

71. We agree that DEL, through Mr Hussain, was, on 6 February 2015, made aware that HMRC had concerns relating to (i) the integrity of DEL's trading chains; (ii) third party payments, especially from Poland; (iii) transactions being conducted with traders in Poland with which country there was not (at that time) any reverse charge mechanism. The accuracy of HMRC's lengthy visit report from 6 February 2015 was not challenged.

72. We agree that the Company did face particular risks on 6 February 2015.

73. On 9 February 2015, Mr Hussain emailed HMRC. This was an important email. No-one made Mr Hussain write it. He chose to do so, having reflected on the content of his meeting with HMRC.

74. His email went on to say:

> "I will take heed of your advice and scale down the VOIP and Electronic Services Trading from today to zero trading, but with the level of time and investment I have put into the business its difficult to cease trading altogether without ensuring that my investment is protected. So yes in the short term [I] will cease trading but if or when [I] do proceed I would like to have another meeting with you first so that we can address all your concerns and take further advice from you."

75. We find that Mr Hussain had been clearly warned by HMRC on 6 February 2015, and had apparently taken that warning on board.

76. On 10 February 2015, Mr Hussain sent a further email, which read that he would scale down his business activity and "[I] have already told 2 of the customers today that [I] can no longer provide them with traffic any longer. The only customer remaining is Hollywell (HTS Ltd)."

77. Taking Mr Hussain's own words at face value, and reading those emails most favourably to him, it is quite clear that Mr Hussain recognised and understood, on 6 February 2015, the risks to which his trading was exposing him. Whilst there is perhaps some ambiguity or equivocation in his email of 9 February 2015 (with the suggestion that he would only cease trading in a manner which protected his investment) the underlying gist is plain and clear.

78. In his evidence concerning his earlier trade in mobile phones, Mr Hussain said that, if HMRC had told him, or given him sufficient warning, to stop trading in mobile phones, he would have stopped. Indeed, in relation to mobile phones, that is what eventually happened. We have read this in Mr Hussain's favour in relation to the earlier period. But it is striking that although he stopped trading in mobile phones when he perceived the risk of becoming involved in fraud as too great, he did not do the same with ECS trading in early February, when the risks - not simply generic industry risk, but particular risks affecting this Company and its trading - were made clear to Mr Hussain.

79. Mr Hussain's own evidence about the meeting on 6 February 2015 was clear: "I thought enough is enough, and stopped trading".

80. However, and despite what Mr Hussain (as the person with sole control of the Company) wrote, the Company did not cease trading immediately, nor reduce its trading to zero:

(1) Transactions 11-24 were all undertaken on dates from 9 February 2015 to 18 May 2015;

(2) In 04/15, there were 11 transactions with Chellsey FMC with dates from 9 February 2015 to 27 April 2015;

(3) In 07/15 there were 3 transactions, with dates from 5 May 2015 to 18 May 2015.

81. The decision to carry on trading from 9 February 2015 to 18 May 2015 was Mr Hussain's decision, and his alone.

82. Whilst there was some scaling down in the Company's operation (which Officer Tosta accepted), reflected in a downwards movement in the overall value of the transactions (which go, in broad terms, from the hundreds of thousands of US dollars - translating to over £100,000 - up to and including 16 February 2015; then in the tens of thousands of dollars (and also pounds) from 23 February 2015 to 30 March 2015; thereafter in the thousands (and, generally, below 5000 USD), the sums involved are nonetheless significant.

83. This business did not cease until 18 May 2015.

84. Even if the business was tapering off, or 'winding down', this was not being done, in the circumstances which were known to and understood by Mr Hussain at the time, with sufficient rapidity. Instead, the trading continued, at a non-trivial level, and was strung out over the course of several months.

85. Mr Hussain did not give us any satisfactory explanation either for the decisions (i) to carry on trading at all after 6 February 2015, or (ii) to carry on trading for as long as he did (approximately 3 months and 2 weeks), or (iii) for the decision not to "wind down" more quickly.

86. We disagree that the Company's actions from 6 February to 18 May demonstrated that it was acting in proper response to the alarm bells which, as Mr Hussain accepted, were ringing loud and clear.

87. Even though the reasons for the Company's decisions and actions after 6 February 2015 were explored carefully in cross-examination, they remain far from clear. Mr Hussain was given fair opportunity to explain the situation and did not.

88. We reject any suggestion that the Company did not stop trading immediately with Chellsey because HMRC (in not imposing an outright ban of trade with Chellsey) was somehow giving tacit approval to continuing trade. It was down to Mr

Hussain to conduct the Company's business and to conduct due diligence. It was not down to HMRC to run his business for him, or to conduct due diligence for the Company.

89. In relation to the deals which the Company did on 9 February 2015 (that is to say, between the two emails) Mr Hussain's explanation was that some of the deals were "in dispute." He said that could not bring the deals to "an immediate stop", since this would be difficult to do. However, no evidence was put forward to explain this, or in particular to demonstrate (for example) genuinely unavoidable commercial consequences for the Company had it stopped, then and there, dealing in ECS on 6 February 2015.

90. There was no evidence from Chellsey. Mr Hussain's evidence as to what he considered to be the commercial risk of an uncompleted transaction pointed the other way: the Company was paying for something which it had not yet received because the Company did not release the minutes until paid, and therefore regarded the risk as on its supplier, and not as on itself.

91. Mr Hussain's evidence was that he had been promised more lucrative routes by Chellsey, at better rates, with a bigger profit margin; but there was no evidence to substantiate this assertion.

92. Mr Hussain was asked questions about the Company's written contract with Chellsey, and in particular the term (Clause 3.2(g)) which provided that the contract could not be ended unilaterally by either party. Mr Hussain's evidence in this regard made little sense. He said that he had told Gerard Bassey, from Chellsey, in a phone call (rather than face to face, or in a letter), that he was going to walk away from the industry, but he could not recall when this conversation had taken place, and there was no written evidence of it.

93. He could not recall Mr Bassey's response, except that 'he was OK, would go through all the figures and get back to the Company'. In fact, Chellsey never did get back to the Company, despite apparently being owed USD 50,000.

94. There is a strong sense of commercial unreality about this scenario, as described. Moreover, Mr Hussain's evidence as to the apparent ease with which the commercial relationship with Chellsey was brought to an end is plainly at odds with Mr Hussain's evidence that he could not stop.

95. Given that Mr Hussain had given contractual obligations as a reason for why it took the Company over three months to totally stop ECS deals, the Tribunal asked Mr Hussain what he thought those contractual obligations were. He could not answer the question. He did not point to any contractual obligation which, in his view, obliged him to continue trading. His answer was much more vague: he said that it was "*more to do with the odd deal coming in"* and "*conversations in relation to the money which was owing"*. Mr Hussain's summary of this was accurate - the Company was "stepping back in a slow manner".

96. As Mr Hussain revealed to HMRC at the meeting on 18 May 2015, the Company had not paid its switch provider (One Call Connect) for almost six months (since December 2014) but One Call was nonetheless continuing to provide the service and did not cut the Company off. Mr Hussain told HMRC that One Call had not been paid

because there was a dispute regarding service charges and technical fees. However, the non-payment for 6 months (i.e., almost the entire period of the Company's dealing in ECS) was at odds with other things which Mr Hussain had earlier told HMRC at the same meeting, including that One Call monitored the amount of minutes and would cut him off when the limit was reached. This inconsistency casts doubt on the reliability of Mr Hussain's evidence.

97. There was no evidence before us from One Call. It was put to Mr Hussain that the situation, as described, was "quite odd commercially". The question is an entirely fair one. The situation is self-evidently (at the very least) odd. It does not make commercial sense, and is suggestive of some other arrangement between the provider and the Company. Mr Hussain agreed that this was odd but said that he could "not recall the reason why". We found this evidence striking, and we reject it. Other parts of Mr Hussain's evidence about the switch provider were vague (for example, the amount the Company was paying them).

98. At a later stage of his evidence, Mr Hussain suggested that the reason that the switch provider did not cut off his service was that it could not do so without affecting its other customers using the switch, but he accepted that he did not know "the technicalities" and professed not to know why the switch provider "did not go after [the Company] more aggressively". It is a fair point, and one which inevitably excites suspicion. The Company was apparently pursuing a conspicuously risky strategy - not paying its supplier, and being in jeopardy at any moment of having its connection cut off, thereby leaving the Company unable to provide its own customers with a contracted-for service.

99. The situation is doubly strange when, as was put to Mr Hussain, the Company's one and only supplier (Chellsey) was giving the Company credit, its customers (Holywell, Emerald and Manhattan, from whom there was no evidence) had paid in advance, and the switch provider (One Call) was not being paid.

100. The overall situation is commercially abnormal to a high degree. Mr Hussain was asked by the Tribunal why Chellsey was giving the Company credit: his answer was that he did not know, and could not answer. Nor could he give any explanation, when asked by the Tribunal, as to how the credit arrangement with Chellsey had come about.

101. In a nutshell, the circumstances of the deals in these periods are highly suspicious. The abnormality is pervasive, cannot satisfactorily be explained, and indeed was not explained by Mr Hussain. Ultimately, he was driven to agree in cross-examination that the deals did not make commercial sense. We do not consider that this was a realisation which had suddenly dawned on him on the second day of the hearing.

102. Mr Hussain was asked about documents which indicated that Chellsey and Emerald were in fact known to each other, with the suggestion that there was therefore no obvious need for the Company to act as an intermediary. He was not able to give any satisfactory answer to this question.

103. His evidence was that the margins were very small - less than 1%. In response to this, it was put to him that there was no real commercial rationale for the deals. We agree. His answer was that this was the reason the Company "did not step up or increase" its deals after 6 February 2015. That may have been right, but it does not answer the point.

104. In reality, it fits neatly together with another part of Mr Hussain's oral evidence, which throws a revealing and unflattering light as to his true attitude to the situation which the Company, as at 6 February 2015, was in. He said that the deals from 9 February 2015 had to be put in the context of 'potential deals'. The gist of this evidence was that the scope and timescale of the winding down had to be looked at against the background that the Company could have been doing 3 or 4 times as much business as it actually did. We reject this approach. The subject matter of the appeal is the deals which the Company did - not those ("potentially a hundred") which it did not. The Company does not get a form of credit for any deals connected with fraud which it refrained from doing.

105. Ultimately, no good reason was put forward why the Company did not cease to trade in early February 2015, when Mr Hussain said it would. The extrinsic factors, looked at objectively, point clearly to the transactions being connected to fraud. We simply do not believe that Mr Hussain, as an educated and insightful individual, and with knowledge of the industry, did not know that this was the case. Any reasonable trader in his position (let alone one with his knowledge and experience) would have realised the connection to fraud.

106. We agree with HMRC that there was no meaningful consideration by the Company of the commercial bona fides or integrity of its supplier or customers. The impression from the evidence was that the Company was limiting itself - without good reason - simply to establishing, but in a shallow way, the existence of its counterparties. It should have gone much further than it did.

107. We are confident that, as of 6 February 2015, the Company (through Mr Hussain) actually knew that the transactions for the period were connected to fraud, but nonetheless carried on trading.

108. We are satisfied that the Company, through Mr Hussain, actually knew that its VAT return for 04/15 contained inaccuracy.

109. We are satisfied, for the reasons detailed above, that the inaccuracies in those returns were attributable to deliberate conduct on the part of Mr Hussain, and were not attributable to careless conduct.

Period 07/15

110. There are additional factors in relation to 07/15. The first is that, at the meeting on 18 May 2015, DEL was given a copy of VAT Notice 726: 'Joint and Several Liability for unpaid VAT', and a leaflet entitled 'How to spot missing trader fraud'. Mr Hussain's evidence was that, at that time, he still considered that he could make a profit from the deals.

111. The second is that, on 5 June 2015, HMRC issued a letter entitled 'VAT Fraud Alert', to which was attached an explanation of how MTIC fraud operates, as well as guidance on how to validate the VAT details of any new or potential customers or suppliers.

112. We are satisfied that the Company actually knew, for 07/15, that its transactions were connected with fraud. We are satisfied that it knew that its VAT return contained inaccuracy, and that was attributable to conduct on the part of Mr Hussain which was deliberate and not careless.

Reductions

113. The Penalty Explanation as against DEL (see File 4/171-2) deals with reductions for disclosure (coming to a penalty percentage of 61.25%) and 'Other reductions or adjustments'. That Penalty Explanation in relation to the Company was relied upon in relation to the PLN issued days later to Mr Hussain.

114. We have considered the deductions applied, vis-a-vis DEL, for 'telling' (0% as against a maximum of 30%); 'helping us understand it' (10% as against a maximum of 40%); and 'giving us access to records' (15% as against a maximum of 25%). Those give a penalty percentage of 61.25% of Potential Lost Revenue.We see no reason to intefere with these.

115. In relation to 'other reductions or adjustments', HMRC said, in relation to the Company, that "Where relevant we then reduce the penalty for any special circumstances or default surcharge and make adjustments for other penalties that we have charged.". HMRC's comment was "Based on the information we have, we do not consider that there are any special circumstances which would lead us to further reduce the penalty."

116. This is a reference back to the 'special reduction' provisions of Schedule 24 Paragraph 11(1). This expression is usually treated as connoting something 'exceptional, abnormal, or unusual', or 'something out of the ordinary run of events'. There was no challenge by the Company, whilst it still existed, on the footing that its circumstances were such as to merit a special reduction.

117. However, and as Paragraph 19(5) of Schedule 24 makes clear, where HMRC have specified a portion of a penalty (which may be 100%: Paragraph 19(1)) in a notice given to an officer, then paragraph 11 applies to the officer as it did to the company. In effect, the provisions for officers' liability leave it open to an officer facing a PLN to advance, in his own right, reasons why he should be afforded a special reduction, even if the company did not do so, or did so and was refused.

118. Here, HMRC simply advanced against Mr Hussain the same explanation for the penalty percentage of 61.25% as it had done against the company. That was done by way of reference in its letter of 19 June 2017 enclosing copies of the penalty assessments and the penalty explanations sent to the Company. It seems to us that the decision to issue the PLN against Mr Hussain was not apparently accompanied by any consideration of Paragraph 11(1) as against him.

119. On the other hand, Mr Hussain did not advance any special circumstances of his own, as opposed to those of the company. For the sake of completeness, the furthest he seems to go is a case, advanced as 'Ground 2' of his witness statement, that the

PLR could or should be claimed by HMRC from Chellsey. However, this is incapable of justifying a special reduction since Paragraph 11(2)(b) of Schedule 24 expressly excludes "the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another."

120. The result of this analysis is that HMRC does not appear to have expressly considered Paragraph 11(1) in relation to Mr Hussain, as opposed to the Company. Paragraph 122 of Officer Tosta's first witness statement says that there were no special circumstances which would allow a special reduction *for the Company* (emphasis added by us) but his witness statement is silent as to the position in relation to Mr Hussain.

121. In an appeal against the amount of a penalty under Paragraph 15(2), the Tribunal may (a) affirm HMRC's decision or (b) substitute for HMRC's decision another decision that HMRC had power to make. If were to substitute our own decision, then the Tribunal could rely on Paragraph 11 to a different extent to HMRC (here, it would be to a different extent of more than 0%, since the Company penalty was 61.25% of PLR and Mr Hussain's penalty was 100% of that) "but only if the appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed".

122. Although the point was not taken, and we did not hear adversarial argument on it, it is at least arguable that that HMRC's decision in respect of the application of paragraph 11 to Mr Hussain was flawed, "when considered in the light of the principles applicable in proceedings for judicial review" (Paragraph 17(6)) because HMRC has not made any identifiable decision as to the application of paragraph 11 to him at all, other than (but only by inference) the decision that no special circumstances lay to Mr Hussain over and above, or differently from, those lying to the Company.

123. We have concluded that, even on the footing (most advantageous to the Appellant) that HMRC's approach to the application of Paragraph 11 to Mr Hussain was flawed in a public law sense, nonetheless (i) Mr Hussain did not advance any special circumstances of his own, and HMRC cannot be criticised for failing to make a decision in an evidential vacuum; and (ii) the only circumstances available to Mr Hussain were those already advanced to and considered by HMRC; meaning that, had HMRC expressly considered Paragraph 11 and special circumstances in relation to Mr Hussain, its decision as to the penalty percentage applicable to him would inevitably have been the same: *John Dee v Customs and Excise Commissioners* [1995] STC 941.

124. Although this has not affected the outcome of this appeal, in our view, this discussion serves to expose circumstances which can potentially be seen as imperfect and potentially productive of substantive difficulty:

(1) Despite giving DEL 30 days to pay or make representations (and DEL was still in existence for those 30 days), HMRC issued the PLN against Mr Hussain 3 days later;

(2) Having done so, and as against Mr Hussain, HMRC reposed entirely - and simply by way of enclosure in its letter - on the conclusions as to the penalty percentage already reached in relation to the Company. We are not sure that this form of incorporation by reference is the right approach;

(3) Perhaps in consequence, HMRC did not address (as Schedule 24 Paragraph 19(5)(a) says it should have done) whether any special reduction was available to Mr Hussain;

(4) Although, in the circumstances of this case, we do not consider that has made any difference, it is easily possible to imagine circumstances where it could have done.

125. Although Officer Tosta's first witness statement (Paragraph 81) refers to issuing the Company Penalties and the PLN, he does not explain (i) why, having issued the Company penalties, HMRC waited only 3 days before issuing the PLN, at a time when the Company was still in existence and had not resolved to wind-up; and (ii) when issuing the PLN, what process of reasoning was gone through to establish that 100% of the Company's liability should be placed on Mr Hussain (save for the obvious fact that he was the sole director). Paragraph 141 of Officer Tosta's first witness statement simply says that these things were done *'as the Company was likely to become insolvent (and was placed into voluntary liquidation on 7 September 2016).*' But this is obviously written with the benefit of hindsight, and does not really answer the point.

126. The impression (in the absence of adversarial argument and submissions, it cannot be put higher than that) is that HMRC issued the penalty against the Company as a matter of form, and regarded the PLN against Mr Hussain, levied at 100% of the Company's penalty, as a species of personal guarantee, rather than an as independent penalty assessment itself subject to the safeguards of Schedule 24.

The effect of sections 69 C-E of the Value Added Tax Act 1994 (as amended)

127. In his witness statement, Mr Hussain recognises that there should be a penalty (and, regardless of such concession, we have found that there should be, but only for 04/15 and 07/15) but seeks to argue that this should be capped at 30% of the PLR due to the changes implemented by new sections 69C-69E of the *Value Added Tax Act 1994*, implemented by virtue of the *Finance (Nr 2) Act 2017*.

128. Section 69C(7) sets a penalty of 30% of the potential lost VAT where the conditions in section 69C(1)(a) and (b) are satisfied.

129. We have no hesitation in rejecting this argument. The 2017 Act, and the amendments which it made to the 1994 Act, received Royal Assent on 16 November 2017, and came into force on that date. The changes to the law therefore post-dated (i) the transactions in issue in this case; (ii) the Company Penalties; (iii) the Personal Liability Notice.

130. Although the changes - like many legislative changes - were discussed in Parliament and were the subject of consultation before 16 November 2017, those anterior discussions and consultation do not mean that the changes can be 'back-dated'.

131. There is nothing in the Act itself to indicate that these amendments were intended to have retrospective effect. In our view it would be a straightforward error of law on our part to apply the provisions of the 2017 Act to this appeal.

132. Even if we were wrong about this, the argument that HMRC 'wrongly and unfairly adopted a new policy to apply this new law to cases after the date of the Royal Assent and not to ongoing cases like mine' is essentially an argument as to rationality in a public law sense. As such, it is not one which this Tribunal has jurisdiction to consider. That was made clear in *HMRC v Hok Limited [2012] UKUT 363 (TCC)*, which binds us. There, a panel of the Tax and Chancery Chamber of the Upper Tribunal consisting of the then-President, Sir Nicholas Warren, and Judge Colin Bishopp, held that the First-tier Tribunal had no judicial review jurisdiction: see Paragraph [41] of that decision.

Conclusions

133. The appeal against the PLN for 01/15 is allowed because we have found that the inaccuracy was attributable to careless and not to deliberate conduct.

134. However, for the reasons already set out, in relation to 04/15 and 07/15, we have found that the inaccuracies were attributable to conduct which was deliberate and not careless. The appeal against the PLNs for 04/15 and 07/15 is therefore dismissed.

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

CHRISTOPHER MCNALL
TRIBUNAL JUDGE
RELEASE DATE: 12 AUGUST 2019