Neutral Citation: **[2022] UKUT 217 (TCC)**

UT (Tax & Chancery) Case Number: UT/2020/000385

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Procedure – Value Added Tax – appeal against penalties under Schedule 24 FA 2007 for deliberate inaccuracy in returns – application by HMRC to strike out parts of appeal for abuse of process – 2017 FTT decision that Appellant knew that its transactions connected to fraudulent evasion – 2020 FTT decision striking-out parts of the penalty appeal – whether appeal an abuse of process – application of Art 6 European Convention on Human Rights – whether issue not raised before FTT suitable for determination even though permission to appeal granted – Mullarkey v Broad applied

Hearing venue: The Royal Courts of Justice, Rolls Building, London

Heard on: 28 June 2022
Judgment date: 09 August 2022

Before
MRS JUSTICE BACON
and
JUDGE GUY BRANNAN

Between

C F BOOTH LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Conrad McDonnell, of counsel, instructed by Mark Pownall FCA

For the Respondents: Howard Watkinson and Joshua Carey, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against the decision of the First-tier Tribunal ("**FTT**") (Judge Christopher McNall), reported at [2020] UKFTT 0035 (TC), granting an application made by the Respondents ("**HMRC**") to strike out parts of the Appellant's appeal against a penalty assessment made on 4 May 2018 under Schedule 24 Finance Act 2007 ("**FA 2007**") in respect of VAT periods 10/12–09/13 and 02/14 ("**the penalty assessment**").

2. The penalty assessment was issued on the basis that the Appellant's VAT returns for the periods in question contained deliberate inaccuracies. For the periods 03/13–09/13 and 02/14 the penalty amount is £1,369,082, and for the periods 10/12–03/13 the penalty amount is £75,731.

3. The background to the penalty assessment was that, in an earlier decision of the FTT released on 8 November 2017 and reported at [2017] UKFTT 813 (TC) (the "**2017 Decision**"), following a hearing which took place over the course of 13 days in June and July 2017 (the "**2017 Hearing**"), the FTT found that the Appellant knew or should have known that a number of its transactions were connected to the fraudulent evasion of VAT.

4. On 2 November 2018 the Appellant appealed against the penalty assessment.

5. On 3 December 2018 HMRC applied to strike out parts of the Appellant's appeal against the penalty assessment on the basis that it had no reasonable prospect of success, either as an abuse of process or on the basis that it was unarguable ("**the Application**").

6. Following a hearing on 20 November 2019 (the "**2019 Hearing**") the FTT gave its decision on the strike out application on 17 January 2020 (the "**2020 Decision**") striking out parts of the Appellant's appeal on the basis that it constituted an abuse of process. The FTT further expressed the view that, regardless of its decision in relation to abuse of process, the Appellant's Grounds of Appeal did not have a realistic prospect of success. It is against the 2020 Decision that the Appellant now appeals, with the permission of this Tribunal.

7. We affirm the 2020 Decision and dismiss this appeal.

BACKGROUND

8. First, in 2014 HMRC assessed the Appellant to output VAT after refusing its zero-rating of eight sales of metal to Metaux Groupe Belge ("**MGB**") in monthly VAT periods 10/12–03/13. The assessment was based on inadequate evidence of export, and a conclusion that the Appellant could not rely on the defence set out in Case C-409/04 *Teleos* [2007] ECR I-7797.[1] Additionally, HMRC contended that the sales were part of a tax fraud committed by MGB, of which the Appellant knew or should have known, and which the Appellant had not taken every reasonable step in its power to prevent its own participation in (referring to Case C-273/11 *Mecsek-Gabona* [2013] STC 171).

9. Secondly, in 2015 HMRC denied the Appellant the right to deduct £2,607,776 of input VAT claimed on 655 transactions, in which the Appellant purchased scrap metal in monthly VAT periods 03/13–09/13 and 02/14, on the basis that the transactions were connected with

[1] i.e. that if an exporter acts in good faith and submits evidence establishing a right to zero rate an intra Community transaction, has no involvement in fraudulent tax evasion and takes every reasonable step in its power to ensure that the transaction did not lead to their participation in tax fraud, then the Member State cannot hold the supplier to account for the VAT on those goods if the information relied on subsequently proves to be false.

the fraudulent evasion of VAT, and the Appellant either knew or should have known of that connection (referring to Case C-439/04 *Axel Kittel v Belgium* [2008] STC 1537).

10. The Appellant appealed against those decisions to the FTT (Judge Brooks and Ms Hunter). The hearing before the FTT lasted 13 days, in which the FTT heard evidence from 12 HMRC witnesses and 7 witnesses for the Appellant. The documentary evidence comprised 23 lever arch files.

11. The 2017 Decision, released on 8 November 2017, was lengthy and detailed, running to 90 pages and comprising over 300 paragraphs. The FTT concluded that:

(1) it was more likely than not that the Appellant knew that the eight MGB zero-rated transactions were connected with the fraudulent evasion of VAT,

(2) In relation to the 655 input tax transactions, transactions in the supply chains leading up to them were part of an orchestrated scheme to defraud the HMRC, and the Appellant knew that its transactions were connected with the fraudulent evasion of VAT.

12. The Appellant did not appeal the 2017 Decision.

13. On 4 May 2018 HMRC notified the Appellant of a penalty in the sum of £1,444,813.71 under Schedule 24 FA 2007 for VAT periods 10/12–09/13 and 02/14. The Penalty Explanation letter stated that HMRC considered that the Appellant's VAT returns for those periods were deliberately inaccurate because, referring to the 2017 Decision:

(1) the Appellant must have known that the returns that recorded the MGB transactions were wrong, and

(2) the Appellant had claimed input tax credits which it knew to be false as a result of artificially contrived transactions which were connected to fraudulent tax losses.

THE PENALTY APPEAL AND STRIKE OUT APPLICATION

14. The Appellant appealed the penalty to the FTT. The Appellant accepted that pursuant to the 2017 Decision there was an inaccuracy in its VAT returns for each VAT period in question. The Appellant's Grounds of Appeal before the FTT were that:

(1) it denied that the inaccuracies in its VAT returns were "deliberate", noting that the burden of proof in relation to deliberate inaccuracy lay upon HMRC;

(2) it denied that the inaccuracies in its VAT returns were "careless";

(3) it denied having actual knowledge at the time it completed its relevant VAT returns of the frauds by other parties, on the basis that HMRC only informed it of tax losses in the underlying transactions after the submission of the relevant VAT returns;

(4) a finding of "should have known" of frauds by earlier suppliers in the transaction chain did not equate to deliberate action by the Appellant in relation to its VAT returns;

(5) the Appellant had completed its VAT returns with reasonable care, at least not with deliberate inaccuracy, taking into account the actual information it held at the time, the state of VAT law and practice at the time, and the commercial circumstances and information reasonably available to it as a commercial trade in metals.

(6) any penalty should not exceed the amount based on careless conduct and that such amount should be reduced for the quality of the Appellant's disclosure; and

(7) any penalty should be suspended.

15. The Appellant also referred to arguments put forward in correspondence by its accountants Ernst & Young, seeking a reduction in respect of special circumstances and also in relation to the proportionality of the penalty.

16. HMRC applied to strike out the Grounds of Appeal referred to at §§14(1)–(7) above (save for the ground that there should have been a further reduction for the quality of disclosure), on the basis that they were an abuse of the FTT's process as they involved the Appellant re-litigating matters that had already been decided against it, or were otherwise unarguable.

17. The Appellant's position on the strike out application was as follows:

(1) it contended that *Kittel* knowledge ("knew or should have known") of fraud in the supply chain did not amount to knowledge of fraud by others, still less the "deliberate conduct" in the filing of the Appellant's own VAT returns which it would be necessary for HMRC to show;

(2) "deliberate" conduct involved conscious intent to deceive or purposeful choice and was tantamount to fraud;

(3) the evidence would show that the Appellant was a reputable and long-established business, intended to file its VAT returns correctly, and in good faith believed that it had done so correctly;

(4) in relation to the MGB penalty, the Appellant believed that its conduct had been only "careless";

(5) in relation to the input tax transactions, the Appellant's VAT returns were correct at the time they were completed; disallowance of input tax on the *Kittel* principle only arose later; and nothing in the 2017 Decision established that the Appellant had the relevant knowledge or understanding, at the time it filed its returns, that the *Kittel* principle would apply to deny it relevant input tax;

(6) the Appellant was not seeking to re-argue points that it could or should have raised in the 2017 Decision because the issues in the penalty appeal were different from those in the 2017 Decision, and the 2017 Decision cannot in any event determine the outcome of a subsequent penalty appeal which is criminal in nature; and

(7) striking out would be contrary to the Appellant's rights under Article 6 of the European Convention on Human Rights ("**ECHR**").

THE 2020 DECISION

18. The FTT allowed HMRC's strike out application. It noted that it followed from the 2017 Decision that the Appellant's VAT returns in relation to the MGB transactions and the 655 other transactions were inaccurate, which had prompted the issue of inaccuracy penalties (§17). In relation to the FTT's findings in the 2017 Decision, at §32 the FTT commented that those findings were not only unchallenged, but also "by dint of the application of the usual principles applicable to judicial fact-finding, stand as what actually (as opposed to notionally) did, or did not, happen".

19. The FTT rejected the Appellant's submission that the finding in the 2017 Decision that the Appellant knew the fraud concerning the MGB transactions was *per incuriam*, redundant, or otherwise did not operate as a finding of fact adverse to the Appellant. The FTT noted that the finding had been specifically requested by HMRC, and that if the Appellant considered that the FTT had fallen into error on this point, the correct course of action would have been to appeal the 2017 Decision (§38).

20. At §40 the FTT also rejected the Appellant's "ambitious" submission that the question whether the VAT returns contained an inaccuracy remained at large until the 2017 Decision such that the returns were not incorrect until the 2017 Decision was issued, and were therefore not deliberately inaccurate. Rather, the FTT said, the right to deduct input tax depends on the application of objective criteria which define the scope of the right to deduct; either those are met, in which case there is and always was a right to deduct, or they are not met, in which case there is not and never was such a right. A denial of a claim to input tax therefore means that the taxpayer was never entitled to the input tax, because it never met the objective conditions for the repayment of VAT.

21. As regards the question of dishonesty, the FTT disagreed that an allegation of deliberate conduct was tantamount to an allegation of fraud and/or inevitably involved some element of dishonesty. In support of that conclusion, the FTT referred to the decision of the Court of Appeal in *E Buyer UK v HMRC* [2018] 1 WLR 1524, noting that the statement of case in that appeal was very closely aligned to the way in which HMRC presented its case to the FTT in the 2017 Decision (§§44–5).

22. On the question of whether deliberate inaccuracy necessarily involved dishonesty, the FTT applied *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC) and *Anthony Leach v HMRC* [2019] UKFTT 352 (TC), and considered that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document (§52). Accordingly, the FTT was satisfied that the concept of "deliberate" in Schedule 24 caught the situation where a taxpayer has been found to have actually known that the transactions were connected to fraud (§58).

23. The FTT did not consider that its exercise of the power contained in Rule 8(3)(b) First-tier Tribunal (Tax Chamber) Rules ("**the Tribunal Rules**") to strike out an appeal infringed any of the requirements of Article 6 ECHR, noting that the Appellant had had a full opportunity to address the Tribunal in relation to the Application (§59).

24. The FTT then considered the question of abuse of process, concluding that Rule 8(3)(b) was wide enough to include a power to strike out an appeal on that basis (§63). It concluded that it would be an abuse of process for the Appellant to seek to relitigate the relevant issues which were already determined by the FTT in the 2017 Decision. The Appellant's knowledge as to the inaccuracy of the input tax and zero rating claimed was the subject of a final determination by the FTT in the 2017 Decision, and the Appellant could not in those circumstances permissibly argue that its conduct was anything other than deliberate (§§73–6).

25. Noting that the conclusion on abuse of process was sufficient to determine the appeal, the FTT then considered, in the alternative, whether the Appellant had a reasonably arguable case. The FTT concluded that the Appellant's argument did not have more than a fanciful prospect of success, given the "overwhelming" weight of the relevant and unchallenged findings in the 2017 Decision (§§85–6).

26. The FTT summarised its decision as follows:

> "89. I strike out Paragraphs 5, 6, 7, 8, 9, and 10 (except for 'and such amount should then be reduced for the quality of disclosure') of the Grounds of Appeal.
>
> 90. I also strike out Paragraph 11 of the Grounds of Appeal, which seeks to argue that any penalty should be suspended on the basis that a deliberate inaccuracy penalty cannot be suspended. Only a penalty imposed for careless inaccuracy can be suspended.

> 91. Insofar as Paragraph 12 of the Grounds of Appeal seeks to rely on two letters from Ernst and Young, I do not strike out that Paragraph, but the matters in those letters are relevant only insofar as they deal with the narrower scope of the appeal as it now stands.
>
> 92. HMRC accepts – in my view, correctly – that CFB is still left with the ability to argue, before the Tribunal, that any further/greater deductions should be applied for 'telling', 'helping', and 'giving' (which is the gist of that part of Paragraph 10 of the Grounds of Appeal which I have not struck out). The scope of the appeal is narrowed accordingly."

GROUNDS OF APPEAL

27. On 27 August 2020 the Upper Tribunal gave the Appellant permission to appeal on the following grounds:

> (1) Deliberate conduct requires a conscious element which has to be proved by HMRC in these penalty proceedings, beyond the findings already reached in 2017 ("**Ground 1**").
>
> (2) Applying the approach of the Court of Appeal in *E Buyer*, the conclusions of the FTT in 2017 on *Kittel* knowledge cannot be taken to have determined the question of deliberate conduct or the conscious element (alternatively, the element of dishonesty) which is inherent in that ("**Ground 2**").
>
> (3) Further and in any event, in these proceedings which are criminal proceedings for the purposes of Article 6 ECHR, the findings in the earlier civil proceedings should not be taken to determine any issue, whether by the application of a principle of issue estoppel or abuse of process or otherwise ("**Ground 3**").
>
> (4) The arguments on proportionality and special circumstances should be permitted to proceed, and should be taken into account, either to re-characterise the penalty as a penalty for "careless conduct" or otherwise to mitigate the amount of it ("**Ground 4**")."

LEGISLATIVE FRAMEWORK

28. Schedule 24 FA 2007 contains the relevant penalty legislation and provides:

> "PENALTIES FOR ERRORS
>
> *Error in taxpayer's document*
>
> **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.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	Document
…	…
VAT	VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994
VAT	Return, statement or declaration in connection with a claim
…	…

…

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).

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

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

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

…

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

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

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

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

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

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

4A. (1) An inaccuracy is in category 1 if— (a) it involves a domestic matter…"

29. In relation to the power to strike out an appeal, §8(3) of the Tribunal Rules provides:

"(3) The Tribunal may strike out the whole or a part of the proceedings if—

…

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

30. Article 6 ECHR provides:

"**Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be

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

31. It was common ground that a penalty assessment is to be regarded as a "criminal charge" for the purposes of Article 6 ECHR.

GROUNDS 1 AND 2

32. It is convenient to take Grounds 1 and 2 together.

33. Mr McDonnell, who also appeared for the Appellant in the FTT (at the 2019 Hearing, but not the 2017 Hearing), submitted that the knowledge found by the FTT in the 2017 Decision did not amount to deliberate conduct for the purposes of the penalty assessment. He argued that in order for there to be a "deliberate inaccuracy" for the purposes of the penalty assessment, HMRC had to prove three elements:

> (1) that the Appellant had completed its relevant VAT returns incorrectly, by claiming input tax in excess of the amount to which it was entitled;
>
> (2) the knowledge of the Appellant, at the time, that the relevant VAT returns were completed incorrectly: that is to say, knowledge on the part of the Appellant that in all the circumstances it was not entitled to claim input tax (which he said required dishonesty); and
>
> (3) that the Appellant intended that HMRC should rely on the VAT returns as accurate documents.

34. Mr McDonnell accepted that (1) was present in this case because the Appellant accepted the outcome of the 2017 Decision i.e. that it was not entitled to the relevant input tax. However, he argued that (2) and (3) were in dispute because the required mental or conscious elements had to be proven by HMRC, and did not follow inexorably from the findings in the 2017 Decision.

35. We reject these arguments.

36. It seemed to be common ground that the formulation used by the FTT in *Auxilium* was correct. In that case the FTT said:

> "63. In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.
>
> 64. The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT 575 (TCC) at [37])."

37. We agree with these comments of the FTT in *Auxilium*.

38. In *Tooth* the Supreme Court considered the test of "deliberate inaccuracy" in section 118 Taxes Management Act 1970, which was required in order to enable HMRC to serve a "discovery assessment" within a 20 year window. It held that the natural meaning of the phrase "deliberate inaccuracy" meant a statement which, when it was made, was deliberately inaccurate, rather than a deliberate statement that was in fact inaccurate. "Deliberate" attached a requirement of intentionality to the whole of that which it described, namely "inaccuracy". The required intentionality therefore attached both to the making of the statement and to its inaccuracy (§43).

39. At §47, Lords Briggs and Sales, delivering the judgment of the Supreme Court, said:

> "It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of s118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so."

40. As the Court of Appeal held in *E Buyer*, it is not necessary for HMRC to plead or prove dishonesty in order to establish *Kittel* knowledge (i.e. that the taxpayer "knew or should have known" that the transactions were connected to fraud). Mr McDonnell argued that a finding of dishonesty was, however, an essential element of deliberate inaccuracy for the purposes of the penalty assessment, such that the findings in the 2017 Decision could not suffice to establish deliberate inaccuracy.

41. We disagree. There is in our judgment no requirement for HMRC to plead or prove dishonesty when seeking to impose a penalty for deliberate inaccuracy under Schedule 24 FA 2007. As the FTT held in *Auxilium*, deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. We do not consider that anything said by the Supreme Court in *Tooth* calls that test into question.

42. Mr McDonnell also submitted that prior to the release of the 2017 Decision the required mental or conscious element in relation to deliberate inaccuracy had not been established. Prior to the 2017 Decision, he said that the position was uncertain or "inchoate" as regards the Appellant's entitlement to claim input tax. Mr McDonnell also argued that HMRC would need to prove that the Appellant's employee who completed and filed the VAT returns knew that they were inaccurate.

43. We have no hesitation in rejecting those submissions. In the present case, the FTT in the 2017 Decision held that Appellant knew that its transactions, for which it was claiming input tax and zero-rating, were connected with fraud. Those findings have not been appealed. As the

FTT correctly held at §40 of the 2020 Decision, this meant that the Appellant never had any entitlement to an input tax deduction as a result the application of the *Kittel* principle. The same must apply in relation to the Appellant's claims for zero-rating of the MGB transactions. Because it knew, before submitting its returns, that its transactions were connected with fraud, the Appellant also knew that it had no entitlement to an input tax deduction or, in relation to the MGB transactions, an entitlement to zero rating. The FTT's 2017 Decision therefore simply identified and confirmed the Appellant's existing state of knowledge – a state of knowledge which disqualified it from any entitlement to an input tax deduction (and to zero rating in respect of the MGB transactions) in the first place. The FTT's decision on this point is, in our view, unimpeachable.

44. The relevant knowledge is, moreover, that of the Appellant as a corporate entity, not that of the individual within the Appellant who completed the VAT returns. As the FTT noted in the 2017 Decision at §315 in relation to the *Kittel* principle, it is not necessary for HMRC to identify an individual whose knowledge can be vicariously attributed to the Appellant. Similarly, in relation to the penalty assessment for deliberate inaccuracy, it is not necessary for HMRC to prove or plead that the individual who completed the VAT returns was aware of the deliberate inaccuracy. If it were otherwise, a penalty could simply be avoided by keeping the person completing the returns in the dark as to the Appellant's knowledge that its transactions were connected with the fraudulent evasion of VAT.

45. Mr McDonnell also argued that HMRC must also establish that the Appellant intended HMRC to rely on the returns which it made. This seems an odd proposition to put forward in the context of VAT returns which are effectively a form of self-declaration or self-assessment by the taxpayer. We asked the parties what declaration the Appellant had made, when submitting its VAT returns, as to the correctness of the returns. We were not given a specific reply but it was acknowledged that the Appellant would most probably have certified that the return was accurate.

46. In fact, the answer to our question lies in Regulation 25 of the Value Added Tax Regulations SI 1995/2518, which regulates the contents of VAT returns, including declarations to be made in respect of the return. In particular, Regulation 25(1) provides that the VAT return must show the amount of VAT payable by or to the relevant taxpayer and containing "full information in respect of the other matters specified in the form", and must also contain a declaration, signed by the taxpayer (or by a person authorised to sign on their behalf) certifying that the return is "correct and complete".

47. Accordingly, when the Appellant made that declaration in the present case it must have envisaged and intended that HMRC would rely on the contents of the return being correct and complete. We see no sensible argument to the contrary.

48. Finally, Mr McDonnell suggested at various points in his argument that the FTT had effectively accepted HMRC's strike out application on the basis of issue estoppel, which he argued was inapplicable in tax cases. We are satisfied that the FTT in the 2020 Decision did not reach its conclusion on the basis of issue estoppel. At §§69–76 of the 2020 Decision it is clear that the FTT was applying the broad merits-based approach propounded in *Johnson v Gore Wood* rather than the principle of issue estoppel. There was no error in the FTT's approach on this point.

49. Against that background, the FTT in its 2020 Decision did not fall into error when it reached the conclusion that that the Appellant had submitted returns containing deliberate inaccuracies. Accordingly, we dismiss Grounds 1 and 2 of the Appellant's appeal.

GROUND 3

50. As we have already indicated, it was common ground that the penalty assessment constituted a "criminal charge" for the purposes of Article 6 ECHR, even though as a matter of domestic law it is treated as a civil rather than a criminal matter.

51. In summary, Mr McDonnell's argument comprised two elements. First, he submitted that in relation to a "criminal charge", domestic UK principles concerning abuse of process and issue estoppel are not applicable since they would deprive the Appellant of the right to a fair trial. Secondly, Mr McDonnell argued that the 2017 Decision was "largely" based on hearsay evidence which he said is not admissible in what he described as "criminal proceedings", since Article 6(3)(d) guarantees a defendant in criminal proceedings the right "to examine or have examined witnesses against him." In relation to this second aspect of the Appellant's Article 6 case, there was a dispute as to whether the Appellant had permission to appeal on this point and, even if permission had been granted, whether we should decline to hear the Appellant's submissions on this point.

52. Mr McDonnell did not disguise the fact that the desired consequence of his Article 6 submissions was that in the appeal against the penalty assessment the Appellant would be able to reopen the findings in the 2017 Decision to the effect that the Appellant had actual knowledge that its transactions were connected to fraud.

53. We address each head of the Article 6 arguments in turn.

Applicability of strike out based on abuse of process/issue estoppel

54. Essentially, Mr McDonnell submitted that a strike out of the Appellant's appeal would breach the procedural protections of Article 6. These protections included:

(1) Article 6(3)(b): which has been held to include "the opportunity to organise [the Appellant's] defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings" (*Neftyana Kompaniya Yukos v Russia* (application 14902/04, judgment of the ECtHR of 8 March 2012, §538));

(2) Article 6(3)(c): the Appellant's right to defend itself in person or through legal assistance, including the right to address all points in its defence at the trial of the proceedings;

(3) Article 6(3)(d): the Appellant's right to examine or have examined witnesses against it and to obtain the attendance of witnesses on its behalf.

55. The leading case on the application of Article 6 to tax penalties is the decision in *Jussila v Finland* [2007] 45 EHRR 39. In that case the ECtHR was considering a small penalty for an under-declaration of VAT. The taxpayer's appeal was dealt with on the papers but he argued that he was, instead, entitled to an oral hearing. In dismissing the taxpayer's application the ECtHR said at §43:

> "Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example

> administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80), customs law (*Salabiaku v. France*, judgment of 7 October 1988, Series A no 141-A), competition law (*Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendenoun* and *Janosevic*, §46 and §81 respectively, where it was found compatible with Article 6 §1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body: *a contrario, Findlay v. the United Kingdom*, cited above)."

56. It is clear from cases dealing with the civil head of Article 6 that the right to a fair trial does not preclude a court or tribunal from striking out an action or giving summary judgment either on the grounds that it is an abuse of process or because there is no reasonable prospect of success: see *Rampal v Rampal (No 2)* [2001] EWCA Civ 989 *per* Thorpe LJ at §32, *Summers v Fairclough Homes Ltd* [2012] UKSC 26 *per* Lord Clarke at §46 and *Mannion v Ginty* [2012] EWCA Civ 1667 *per* Lewison LJ at §13.

57. It is also clear that although the penalty assessment involves a "criminal charge" for the purposes of the Convention, the proceedings in relation to tax penalties are, as a matter of domestic law, conducted through the civil tribunals, namely the FTT and, on appeal, the Upper Tribunal. The underlying procedure in the FTT is governed by the Tribunal Rules which are essentially civil in nature. The domestic rules relating to criminal procedure and evidence do not apply. No authority was cited to us which indicated that civil tax penalties, even those which constitute a "criminal charge", should be dealt with otherwise than by civil tribunals, that the civil rules of procedure and evidence must be displaced by rules of criminal procedure and evidence or that the usual case management powers of the FTT should be overridden by Article 6.

58. In our judgment, the essential requirement of Article 6 is that in the current proceedings the Appellant has a right to a fair trial, bearing in mind that fiscal penalties do not fall within the hard-core of the criminal law and that the "criminal-head" requirements of Article 6 do not (as the ECtHR found in *Jussila*) apply with their full stringency. The exact requirements necessary to ensure a fair trial will depend on the nature of the issue to be tried, its seriousness and all the circumstances of the individual case. What is required is a broad assessment of whether the particular charge brought against the Appellant is dealt with in a manner which provides a fair hearing when the proceedings are viewed as a whole.

59. In relation to the 2017 Decision, which determined the question of the Appellant's knowledge that the relevant transactions were connected with fraud, we consider that the Appellant received a fair hearing before an independent tribunal. The 2017 Hearing was held in public. The Appellant received fair notice of the case against it in the form of HMRC's detailed Statement of Case and evidence. Both parties were legally represented. The Appellant had the right to present its evidence and to have HMRC's witnesses cross-examined. The burden of proof lay upon HMRC, albeit to the civil standard of proof (see the 2017 Decision at §275). Both parties were entitled to make submissions to the FTT on both the law and the evidence. The FTT gave a carefully considered decision which was meticulous in detail. The Tribunal Rules governing the FTT's procedure required the FTT to act fairly and justly in accordance with the overriding objective. As we have already discussed, the findings of the FTT in the 2017 Decision are, in effect, determinative of the issues raised by the penalty assessment, and in respect of those issues, taking all of the above factors into account, we conclude that the Appellant received a fair hearing at the 2017 Hearing.

60. In relation to HMRC's strike out application resulting in the 2020 Decision, we are again satisfied that the Appellant received a fair hearing at the 2019 Hearing. The hearing, again held in public, took place before an independent tribunal. The Appellant received notice of HMRC's strike out application. Both sides were legally represented and were able to present their respective cases to the FTT. The FTT again gave a carefully reasoned decision.

61. We also accept HMRC's submissions that Article 6 does not override the FTT's case management powers or other limitations on appeals against tax penalties. For example, the ordinary rules that apply to the making of a late appeal (as set out in *Martland v HMRC* [2018] UKUT 178 (TCC)) apply equally to penalty appeals and appeals against the substantive liability to tax. It cannot be correct that time limits have no application to tax penalty appeals which constitute a "criminal charge". By the same token, it cannot be correct that an appeal against the tax penalty that constitutes an abuse of process must be allowed to proceed simply on the basis that the penalty constitutes a "criminal charge". Furthermore, as we have noted at §48 above, the FTT in the 2020 Decision did not reach its conclusion on the basis of issue estoppel but rather on the broader merits-based approach set out in *Johnson v Gore Wood*.

62. Accordingly, in this case, taking a broad assessment in relation to a "criminal charge" concerning a civil tax penalty, we are satisfied that the Appellant has received a fair trial, and that the powers of the FTT under Rule 8 and their exercise in this case did not infringe Article 6.

Hearsay evidence

63. Ground 3 in the Appellant's application for permission to appeal to the Upper Tribunal was put in terms that: "for the purposes of Article 6 ECHR, the findings in the earlier civil proceedings should not be taken to determine any issue, whether by the application of a principle of issue estoppel or abuse of process or otherwise."

64. Mr McDonnell contends, in addition to this, that the 2017 Decision was largely or materially based on hearsay evidence, which he submitted is inadmissible in criminal proceedings. Mr McDonnell argued that the use of hearsay evidence must be limited to the exceptions contained in the Criminal Justice Act 2003.

65. Mr Watkinson, appearing with Mr Carey for HMRC, objected to this argument, contending that it was a point which had not been raised before the FTT and was one which raised questions of both law and fact. Mr Watkinson referred to the decision of the ECtHR in *SA-Capital Oy v Finland* [2019] ECHR 1 at §§66–92, which confirmed that the reliance on hearsay will not automatically lead to a breach of Article 6; rather, it is necessary to consider the importance of the hearsay evidence and the fairness of the proceedings as a whole. The Appellant's argument in relation to hearsay evidence would therefore, he said, require a detailed review of the evidence from the FTT at the 2017 Hearing (including examination of transcripts of the hearing, witness statements and documents), to determine the nature and quality of the hearsay evidence when balanced against non-hearsay evidence. Mr Watkinson observed that it was not sufficient simply to "island hop" by looking at different and isolated pieces of evidence referred to in the 2017 Decision and note that they were or might be hearsay. A review of this nature was not a task that could be undertaken for the first time by an appellate tribunal, which had not been provided with the witness statements and exhibits, documentary evidence and transcripts of proceedings at the 2017 Hearing.

66. Mr McDonnell accepted that this point had not been raised before the FTT but noted that it had been raised in the Appellant's application for permission to appeal to the Upper Tribunal and that the Upper Tribunal had given permission to appeal generally, without limiting the arguments which could be advanced on appeal. He disputed that it would be necessary to

consider voluminous evidence, in the context of a strike out application which is not intended to be a mini-trial.

67. We agree with HMRC's submissions. It is well-established that an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court, particularly where that would necessitate new evidence or would have resulted in the trial below being conducted differently: see e.g. *Singh v Dass* [2019] EWCA Civ 360, §§15–18. We also note the comments of Warby LJ in *Sivier v Riley* [2021] EWCA Civ 713, §18, that "[w]e do not usually allow entirely new points to be taken on appeal. It is often procedurally unfair to do so, and normally wrong because appeals are by way of review and not re-hearing. Ordinarily the place for arguments to be given their first run-out is the court of first instance."

68. In similar vein in *Jones v MBNA* [2000] EWCA Civ 51, May LJ commented at §52 that:

> "Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. … The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view, this is not such a case."

69. Those passages from *Singh v Dass, Siver v Riley* and *Jones* were all relied upon by the Upper Tribunal in *Wyatt Paul v HMRC* [2022] UKUT 1166 (TCC), refusing permission to admit a new estoppel point on appeal.

70. In the present case, we do not consider it seriously open to dispute that it would be necessary for any tribunal considering the issue to review, in some detail, the evidence that was before the FTT at the 2017 Hearing and assess the extent to which the hearsay evidence was relied upon as being decisive in the 2017 Decision. Mr McDonnell argued that the "building blocks" for the finding of fraud in the 2017 Decision were based on hearsay; but that is disputed by Mr Watkinson who contended that the 2017 Decision was primarily based on the documentary evidence before the FTT. We cannot determine which of these submissions is correct simply by conducting the cursory review of the 2017 Decision which Mr McDonnell appeared to suggest would be sufficient.

71. Any argument based on the admission of hearsay evidence and any potential breach of Article 6 in this regard should therefore have been raised before the FTT at the 2019 Hearing. The FTT would have had to consider what case management directions to make in that regard, and the parties would have had to consider how to conduct this aspect of the case, including considering the material that would need to be put before the FTT to determine the point. We agree with Mr Watkinson that the FTT would, in particular, have had to consider the nature and the quality of the evidence relied upon in the 2017 Decision. It is quite clearly, in these circumstances, not appropriate for this issue to be dealt with for the first time by an appellate tribunal without the relevant underlying material before us.

72. That permission to appeal on this issue was granted can be explained by the fact there is no indication that it was made clear, in the application for permission to appeal, that this point had not been raised before the FTT. As Mr Watkinson observed, HMRC had no right to be heard in the permission to appeal process, in which the application was determined on the papers.

73. Moreover, the mere fact that permission to appeal on this issue has been granted does not mean that it is necessarily appropriate for us to hear argument on the point. In *Mullarkey v Broad* [2009] EWCA Civ 2 permission to appeal had been granted ahead of the substantive hearing, but the question nevertheless arose at the subsequent hearing of whether the appellant should be allowed to present its case on appeal on new points that had not been raised in the case below under appeal. Lloyd LJ explained:

> "29. Points of this kind more often arise at the stage of an application for permission to appeal or, if permission has been granted, on seeking to amend the grounds of appeal. Here, by contrast, permission to appeal has been given on grounds which include the new points. However, the grant of permission, on which the Respondent was not heard, only shows that there were thought to be reasonable prospects of success. It does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing ...
>
> 30. The authority cited by Counsel in relation to the question whether a concession should be allowed to be withdrawn is *Pittalis v Grant* [1989] 1 QB 605, in particular a passage in the judgment of Nourse LJ at page 611, as follows:
>
> > 'The stance which an appellate court should take towards a point not raised at the trial is in general well settled … It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 ChD 419, 429, per Sir George Jessel M.R.:
> >
> > > 'the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'
> >
> > Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it.' "

74. In the event, the Court of Appeal could not properly be satisfied that the case at first instance would not have gone in a materially different way as regards the evidence if the new arguments had been advanced. Accordingly, the appellants were not allowed to change their case.

75. Likewise in *Paltank Ltd v HMRC* [2020] UKUT 211 (TCC), §7, the Upper Tribunal noted that HMRC had identified in their respondents' notice and skeleton argument that certain grounds were new arguments which were not pursued before the FTT, and held that "the fact that permission to appeal has been granted in respect of a ground does not mean that it is

necessarily appropriate for this tribunal to consider it in reaching its decision, particularly where it may raise mixed questions of law and fact."

76. For the reasons given above, and even though permission to appeal on the point was granted, we do not consider the hearsay issue to be one which is suitable for determination by this Tribunal; we therefore reject it on that basis.

GROUND 4

77. Mr McDonnell argued that the penalty assessment was disproportionate and excessive, offending against the principle of proportionality. The penalty assessment should be reduced either to comply with proportionality requirements of EU VAT law or, alternatively, the FTT should provide that no penalty was payable or that only the penalty rates for "careless conduct" should apply with mitigation. Mr McDonnell submitted that the 2020 Decision precluded the second path.

78. In support of that submission, Mr McDonnell argued that the Appellant was in fact the victim of the fraud, having paid VAT to its suppliers but having had its input tax disallowed. Moreover, in most cases HMRC had collected VAT twice by disallowing input tax from other suppliers in the chain of transactions, and now sought in addition a substantial penalty. Mr McDonnell submitted that the FTT had not taken these issues properly into account.

79. We reject these arguments. Whilst it is true that proportionality is a fundamental principle of EU VAT law, the FTT in the 2020 Decision at §91 noted that the Ground of Appeal relating to the two letters from Ernst & Young upon which the Appellant sought to rely was not struck out, but that the matters raised in those letters (regarding proportionality and/or special circumstances) were instead relevant to the extent that they dealt with the narrower scope of the appeal as it stood after the 2020 Decision.

80. It follows that to the extent that the Appellant's arguments in relation to proportionality and/or special circumstances go to the quantum of liability rather than the incidence of liability concerning the penalty assessment, the Appellant's appeal has not been struck out; but the appeal can only proceed on the footing that deliberate inaccuracy was the basis for the penalty.

OTHER NEW ARGUMENTS

81. Mr McDonnell raised number of further arguments, some of which had not been raised before the FTT.

82. The first related to the Appellant's interactions with HMRC before the Appellant submitted its VAT returns. The gist of the argument was that that the Appellant's staff were in constant contact with HMRC in the period that the VAT returns were submitted by the Appellant, and that the returns were submitted on the understanding that HMRC would then review the underlying transactions and disallow them as appropriate.

83. Mr Watkinson objected to this point being raised on appeal. He submitted that this new argument sought to engage with the evidence underlying the 2017 Decision. If this argument had been made before the FTT, Mr Watkinson submitted that HMRC would have put the actual evidence before the Tribunal. The issue could not be dealt with satisfactorily based on the assertions in Mr McDonnell's skeleton argument. We agree. Our comments above regarding the hearsay point apply equally in this context.

84. In addition, Mr McDonnell argued that the Appellant was entitled to take a "filing position" on its returns. As we understand it, a "filing position" is where a taxpayer makes a claim in a return (e.g. to a tax relief or an amount of the receipt) in circumstances where the relief (or the amount of the receipt) may be the subject of dispute. It does not, as we understand

it, apply to a position where a taxpayer knows in advance that it has no entitlement to a relief. The fallacy in the argument in this case is that the effect of the 2017 Decision was (as we have found, above) that the Appellant knew that it was not entitled to claim an input tax deduction on its VAT returns but did so nonetheless. That is not "a filing position" but a deliberate inaccuracy. There was no evidence that the Appellant had adopted what Mr McDonnell described as a "filing position".

85. In any event, this was again an entirely new point raised on appeal. The point should have been addressed before the FTT when considering HMRC's strike out application. Mr Watkinson argued that, had the point been raised before the FTT, HMRC would have produced the Appellant's VAT returns with the declarations that the returns were correct and complete. We accept that submission.

86. We do not, therefore, consider it appropriate for these issues to be raised for the first time on appeal.

87. Finally, Mr McDonnell argued that in relation to the MGB Appeal the FTT in the 2017 Decision did not formally determine the "knowledge" point and that its findings on that were obiter. We consider that this is clearly incorrect, and the FTT in the 2020 Decision was right to reject it (at §38). The FTT's findings in the 2017 Decision expressly determined the Appellant's state of knowledge in relation to the eight MGB transactions, and those findings were made specifically at HMRC's request.

CONCLUSION

88. For the reasons given above, we consider that the 2020 Decision discloses no error of law and we therefore dismiss this appeal. The Appellant's appeal is struck out, save for the matters preserved by the 2020 Decision as referred to at §80 above.

Signed on Original

MRS JUSTICE BACON

JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 09 August 2022