[2020] UKFTT 0035 (TC)

TC07541

Appeal number: TC/2018/06906

PROCEDURE - VALUE ADDED TAX – Schedule 24 penalties for deliberate inaccuracy - Application by HMRC to strike-out parts of the Appeal - Rule 8(3) - Findings of fact in relation to this Appellant previously made by the Tribunal in relation to this Appellant's appeal against liability assessments - Whether parts of the present appeal an abuse of process? - Yes - Even if not, whether parts of the appeal reasonably arguable? - No - Application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

C F BOOTH LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Alexandra House, Parsonage, Manchester on 20 November 2019

Conrad McDonnell, Counsel, for the Appellant

Howard Watkinson, Counsel, and Joshua Carey, Counsel, both instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

Introduction

1. This appeal, made by way of a Notice of Appeal dated 2 November 2018, challenges HMRC's decision, made on 4 May 2018 (upheld at departmental review on 4 October 2018) to notify the Appellant, C F Booth Ltd ('CFB'), of a penalty assessment in the sum of £1,444,813 under Schedule 24 of the Finance Act 2007 for VAT periods 10/12-09/13, and 02/14.

2. The penalty assessment is on the footing that the Appellant's VAT returns for those periods contained deliberate inaccuracy. The penalty sum is made up of two smaller sums (i) for periods 03/13 to 02/14, £1,369,082; (ii) for periods 10/12 to 03/13, £75,731.

3. This is my decision in relation to HMRC's Application, made on 3 December 2018, to strike-out part of the Appellant's appeal as having no reasonable prospect of success, either as an abuse of process or on the basis that it is unarguable: 'the Application'. There is a subsidiary application by HMRC for an extension of time in which to file a Statement of Case.

The earlier assessments

4. The penalty assessment was issued against the background of HMRC's decisions:

   (1) (in October 2014) to issue an assessment against the present Appellant, C F Booth Ltd ('CFB'), for £160,281 under section 73 of the Value Added Tax Act 1994; and

   (2) (in March 2015) to deny input tax in the sum of approximately £2.6 million.

5. Decision (1) denied a claim by CFB to zero-rate eight supplies of metal to a Belgian trader, Metaux Groupe Belge ('MGB').

6. Decision (2) was on the basis that 655 purchases of various metals, on which the input tax was incurred, were connected to the fraudulent evasion of VAT and that CFB knew or should have known of the connection.

The earlier appeal(s) and the 2017 decision

7. CFB appealed both those decisions to the Tribunal. The two appeals (TC/2014/06344, and TC/2015/03798) were heard together.

8. On 8 November 2017, the First-tier Tribunal (Judge John Brooks and Gill Hunter), having considered the extensive written and oral evidence placed before it over the course of a 13 day hearing (at which HMRC, then as now, was represented by Mr Watkinson and Mr Carey) released its decision in relation to both appeals, contained in a single decision notice ('the 2017 Decision'). The 2017 Decision is reported at [2017]

UKFTT 813 (TC). The appeal in relation to decision (1) was referred to in the 2017 Decision as *'the MGB Appeal'*. The appeal in relation to decision (2) was referred to in the 2017 Decision as *'the Kittel appeal'* (referring to the decision of the CJEU in *Axel Kittel v Belgium* [2008] STC 1537).

9. It is important to identify what the Tribunal was being invited to adjudicate upon.

10. HMRC's secondary case in relation to the MGB Appeal was set out in Paragraph 73 of its Statement of Case:

> "Should the Tribunal find that the Appellant has discharged the burden of proving either that it complied with the legislative requirements for zero-rating or that it can avail itself of the defence in Teleos, the Respondents assert in the alternative that Appellant (sic) either knew, or should have known, that its dispatch transactions to MGB were part of a tax fraud committed by its customer MGB and that the Appellant had not taken every reasonable step within its power to prevent its own participation in the fraud."

11. HMRC's case in relation to the Kittel Appeal was set out in Paragraph 93 of its Statement of Case:

> "i. The Appellant's transactions formed part of an orchestrated scheme to defraud the Revenue. The relevant transaction chains had been orchestrated for the purposes of the fraudulent evasion of VAT. The Appellant's suppliers as well as the fraudulent defaulting traders were knowing participants in the scheme. The Appellant had actual knowledge that its transactions were connected with the fraudulent evasion of VAT. The Respondents do not point to one piece of evidence as establishing that the Appellant was a knowing participant but instead rely upon the cumulative circumstantial evidence for the inference that it was; and
>
> ii. In the alternative, the Appellant should have known that its transactions were connected with the fraudulent evasion of VAT by another taxable person, because the relevant transactions permitted of no other reasonable explanation."

12. In the 2017 Decision, the Tribunal dismissed both the MGB Appeal and the Kittel Appeal. CFB did not appeal the First-tier Tribunal's findings to the Upper Tribunal. Nor did either party invite the FtT to clarify or elaborate any of its findings.

13. In relation to the MGB Appeal, the FtT's telegraphic abstract was as follows:

> "VAT – Zero-rating denied – Whether satisfactory evidence goods had left United Kingdom – Whether within defence to denial of zero-rating (as in R (on the application of Teleos plc and others) v Commissioners of Customs & Excise) – Whether supplies part of fraud and if so whether appellant knew or should have known – Appeal dismissed"

14. At Paragraphs 76 and following of its 2017 Decision, the FtT said:

"**Discussion and Conclusion**

76. It is accepted that to succeed in its claim for the MGB transactions to be zero-rated, it is for CFB to establish the goods in these transactions have left the UK and that it had obtained and kept valid commercial evidence of this. However, the evidence, particularly that of N S Clarke and Global Freight Systems which Mr Lall said he could not dispute, was that the goods involved in the MGB transactions did not leave the UK. Therefore, the supply of goods to MGB can only be zero-rated if, applying Teleos, documents held by CFB provide sufficient evidence of export. Additionally, CFB must establish that it acted in good faith and took every reasonable measure to ensure that the intra-community supply did not lead to its becoming a participant in the fraudulent evasion of VAT.

77. Mr Lall relies on Teleos and contends that, on the basis of the letter from HMRC to CFB dated 10 October 2014 (see above), which referred to the documents being "satisfactory" at "face value" and that they "appeared at first glance to be satisfactory, that the documents held by CFB provided sufficient evidence of export and consequently CFB should be entitled to zero rate its supplies to MGB. However, as Mr Watkinson contends, the issue is not whether HMRC "at first glance" considered the documents to be satisfactory evidence of export, but whether the documents do, in fact, provide sufficient evidence of this.

78. For there to be sufficient evidence it is necessary for the information contained in paragraph 5.2 of Notice 725 (which has the force of law), to be shown on the documents. This information includes a record of the route of movement of the goods which is not shown on any of the documents provided by CFB. Accordingly, CFB has not complied with legislative requirements for zero-rating and, irrespective of whether it acted in good faith and took every reasonable measure to ensure that it did not become a participant in any fraud, the MGB appeal cannot succeed.

79. While this is sufficient to dispose of the MGB appeal, Mr Watkinson urges us to make further findings in relation to this appeal and, taking a holistic approach, apply those findings and evidence in the MGB appeal to the issues in the Kittel appeal particularly in relation to CFB's state of knowledge.

80. Mr Lall submits that the evidence does not show that CFB had any knowledge that the goods were going elsewhere than out of the UK. However, the evidence of Nigel Clarke of N S Clarke Freight Forwarders (albeit hearsay but nonetheless admissible under rule 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) would suggest otherwise. Mr Clarke's description to HMRC of metal emanating from CFB and being diverted to other traders and metal originating from other suppliers eg Marren ostensibly destined for MGB but in fact delivered to CFB under cover of false documentation, stating that it had originally come from Fulham Metals, would seem to indicate that, by being a supplier and receiving metal as part of the same fraud, it is more likely than not that CFB must have had knowledge of what was happening and cannot

have either acted in good faith or taken every reasonable measure not to become a participant in any fraud and consequently, even if the documentation had provided sufficient evidence of export (which it did not), it would not have been entitled to rely on Teleos in the MGB appeal.

81. Similarly, as CFB either knew or should have known of the fraud, had it been necessary to do so, we would have found that HMRC were entitled to rely on Mecsek-Gabona to deny CFB any entitlement to zero rate the MGB transactions." (emphasis added by me).

15. In relation to the Kittel Appeal, the FtT's telegraphic abstract was as follows:

"VAT – Denial of input tax – Whether fraudulent tax loss – Whether transactions connected with such loss – Whether appellant knew or should have known of connection – Appeal dismissed"

16. In relation to the Kittel Appeal, the FtT remarked and concluded as follows:

"318. Turning to whether CFB knew or should have known its transactions, other than those with BMC, were connected to the fraudulent evasion of VAT, we find that the only inference that can be drawn, having come to the conclusion that there was an orchestrated or contrived scheme to defraud the revenue, is that CFB did know of the connection to fraud. In our judgment, it is not feasible that an established and experienced business such as CFB could be placed in such a pivotal position, at the top of the transaction chains, without such knowledge.
[...]

322. In relation to the BMC transactions, we also consider that CFB knew that these were, as we have found, connected to the fraudulent evasion of VAT.

[...]

326. In conclusion, we find that CFB, given its standing and history in the scrap metal business, its experience and financial strength (taking account of its £21 million overdraft facility) must have known of the connection to fraudulent evasion of VAT in its transaction for the following reasons:

(1) the lack of any commercial rationale for its position at the end of the chains in which a number of other participants were frequently able to obtain metal at a better price than CFB;

(2) its continued trading with companies controlled by individuals, such as Jonathan France and Mr Cooper, notwithstanding that companies with which they were previously associated had been wound up, irrespective of the risk in doing so:

(3) its failure to act on repeated warnings by HMRC of tax losses in deal chains in which it participated;

(4) its continued trade with businesses notwithstanding being warned of the dangers of doing so by HMRC;

(5) the absence of any critical analysis of due diligence, by staff conducting checks or directors; and

(6) third party payments made outside the UK when identified by HMRC as a risk.

327. Even if this were not the case we find, for the above reasons, that the only reasonable explanation for the transactions in which input tax had been denied is that they were connected to the fraudulent evasion of VAT. As such CFB should have known that they were connected to fraud and accordingly cannot succeed in the Kittel appeal." (emphasis added by me).

17. One outcome of the 2017 Decision was that CFB's VAT returns in relation to the 8 MFB transactions and the 655 other transactions were found to have contained inaccuracy. That is what has prompted the issue of inaccuracy penalties.

The Penalties

18. The Penalty Explanation in relation to the matters which were under consideration in the MGB Appeal is set out in the Schedule to HMRC's letter of 16 February 2018, and is as follows:

"Description of the inaccuracy

You were denied the right to zero-rate for VAT 8 sales of goods made to MGB in VAT periods 10/12, 11/12, 12/12, 01/13, 02/13, and 03/13 and consequently you were assessed for output tax of £160,281. The grounds for the decision were that (i) insufficient evidence was produced to demonstrate that the goods sold had left the UK; (ii) you did not fall within the defence provided by the ECJ in Teleos; and (iii) the sales were part of a tax fraud committed by MGB and you did not take every reasonable step to prevent your own participation in the fraud.

Behaviour

We consider that the behaviour was 'deliberate' [...]

The senior officials of CF Booth Ltd .. have considerable experience of trading in the scrap metal sector and have a good general awareness of VAT fraud. The Tribunal who heard the denial of zero-rating appeal which you made said 'it is more likely than not that CFB must have had knowledge of what was happening (with the MGB transactions) and cannot have either acted in good faith or taken every reasonable measure not to become a participant in any fraud'. The company must have known their returns which recorded the MGB transactions were wrong, and the inaccuracies were therefore deliberate."

19. The Penalty Percentage was calculated at 47.25% of Potential Lost Revenue, giving deductions for the quality of the Appellant's disclosure.

20. The Penalty Explanation in relation to the matters which were under consideration in the Kittel Appeal, set out in that same Schedule, is as follows:

> "Description of the inaccuracy
>
> You were denied the right to recover input tax under the Kittel principle of £2,607,776 incurred on 655 purchases of various scrap metal goods in VAT periods 03/13, 04/13, 05/13, 06/13, 7/13 [sic], 08/13, 09/13 and 02/14 - on the grounds that the transactions were connected with the fraudulent evasion of VAT and that you either knew or should have known of the same
>
> Behaviour
>
> We consider that the behaviour was 'deliberate' [...]
>
> The senior officials of CF Booth Ltd .. have considerable experience of trading in the scrap metal sector and have a good general awareness of VAT fraud. The Tribunal who heard the 'Kittel appeal' which you made said 'we find CFB, given its standing and history in the scrap metal business, its experience and financial strength (taking account of its £21m overdraft facility) must have known of the connection to fraudulent evasion of VAT in its transactions.' CFB acted deliberately by claiming input tax credits which they knew to be false as a result of artificially contrived transactions which were connected to fraudulent tax losses. The business must have known that they should not use their VAT return to facilitate VAT fraud, therefore the returns are deliberately inaccurate"

21. The Penalty Percentage was calculated at 52.5% of Potential Lost Revenue, giving deductions for the quality of the Appellant's disclosure.

The Grounds of Appeal

22. In the Grounds of Appeal behind its Notice of Appeal, CFB accepts (as, in the circumstances, inevitably it must) that its VAT returns in those regards did indeed contain inaccuracy for each of the accounting periods in question. The contrary is unarguable.

23. However, CFB does now seek to contend, as its primary argument, that the inaccuracy was not 'deliberate'. Paragraphs 7 to 9 of its Grounds of Appeal read, in full, as follows:

> "7. The Appellant denied having actual knowledge, at the time it completed its relevant VAT returns, of the frauds by other parties which were later brought to its attention by HMRC. In each case, any relevant 'tax loss' letter

was sent to the Appellant by HMRC only some months after submission of the relevant tax return.

8. A finding that, based on the circumstances, the Appellant "should have known" of fraud by earlier suppliers in the transaction chain does not equate to deliberate action by the Appellant in the submission of its VAT returns.

9. The Appellant completed its VAT returns with reasonable care, alternatively at least not with deliberate inaccuracy, taking into account:

(a) the actual information the Appellant held at the time
(b) the state of VAT law and practice at the time
(c) the commercial circumstances and the information reasonably available to the Appellant as a commercial trader in metals"

24. CFB goes on to argue that if, contrary to its case, any penalty is due at all, the amount of the penalty should not exceed the amount applicable for 'careless' action, which should then be reduced for quality of disclosure, or should be suspended in whole or in part.

25. CFB does accept (albeit in its Skeleton Argument) that the decision to zero-rate the MGB supplies and accordingly not to include output tax on them in the corresponding VAT returns was 'careless'. But there is no such concession in relation to the transactions which were the subject of the Kittel Appeal.

The parties' arguments

26. In summary, HMRC's argument (in the Skeleton Argument settled by Mr Watkinson and Mr Carey dated 13 November 2019, and as developed orally before me by Mr Watkinson) in support of the Application is as follows:

(1) The doctrine of abuse of process applies in the FTT (*Littlewoods v HMRC* [2014] EWHC 868 (Ch)) and can apply so as to permit a striking-out under Rule 8(3)(c) e.g. *Foneshops Ltd v HMRC* [2015] UKFTT 410 (TC); *Hackett v HMRC* [2016] UKFTT 781 (TC); and *Kishore v HMRC* [2018] UKFTT 759 (TC);

(2) 'Deliberate' for the purpose of Schedule 24 penalties is widely drawn (see *Leach v HMRC* [2019] UKFTT 352 (TC) and *HMRC v Raymond Tooth* [2019] EWCA Civ 826), and extends to the submission of VAT returns intending that HMRC should rely on them as correct, when the taxpayer knew that they were incorrect, and catches both claiming input tax and zero-rating that a taxpayer knew it was not entitled to;

(3) The Appellant's Grounds of Appeal at [5]-[10] (except the final clause) 'represent the most clear-cut abuse of the FtTs process, in that they seek to re-litigate exactly the same issues that have already been determined by the FtT in the liability appeals', and are a 'nakedly abusive attempt at re-litigation';

(4) There is 'an air of complete unreality' about the Appellant's argument that nothing in the FtTs decision establishes the fact that it knew that its VAT returns were inaccurate;

(5) The strike-out application does not offend ECHR Article 6: see (e.g.) *Galvin v HMRC* [2016] UKFTT 577, esp at [88]-[93] and [102];

(6) The Appellant's argument that, under the principle in *Hollington v Hewthorn* [1943] LB 587, the Tribunal dealing with CFB's penalty appeal cannot take into account the 2017 Decision is:

> "obviously wrong. It has been clear for nearly 20 years that the principle in *Hollington v Hewthorn* does not apply in the Tax Tribunals (*King v Walden (HM Inspector of Taxes)* [2001] EWHC 419 (Ch) at [84] per Jacob J (as he then was), an appeal that itself concerned tax penalties."

(7) The earlier findings are not *res inter alios acta,* being between the same two parties.

27. In summary, the Appellant's argument (in Mr McDonnell's undated Skeleton Argument, and as developed orally before me), in response and opposition to the Application, is as follows:

(1) The burden of proof in the underlying appeal lies on HMRC, meaning that HMRC would still (and even if the Appellant had not advanced any positive case) have been required to prove all the elements essential to the penalty assessment;

(2) In the context of a penalty appeal, where HMRC allege 'deliberate conduct', a finding of knowledge or means of knowledge, does not amount to a finding of deliberate conduct;

(3) 'Deliberate conduct' means making a statement which a person knows to be untrue, or where the person does not hold any reasonable belief in its truth: *Farrow v HMRC* [2019] UKFTT 200, although this can encompass consciously or intentionally choosing not to find out the correct position: *Clynes v HMRC* [2016] UKFTT 369. It has to be something 'done with a set purpose' (*Faux Properties v HMRC* [2019] UKFTT 203) and is 'tantamount to a test for fraud': *Sharif v HMRC* [2019] UKFTT 278;

(4) Without actual knowledge, there can be no 'deliberate' conduct. Without a conscious decision to deceive HMRC "(which the Appellant vehemently denies)" there can be no 'deliberate' conduct;

(5) The Appellant is entitled to a hearing of its penalty appeals under the Tribunal's Rules; 'the principles of natural justice'; and Article 6;

(6) The Appellant is in any event entitled to ask the Tribunal to review HMRC's decision not to suspend the penalty or to set conditions for suspension, which inevitably involves an inquiry into whether the conduct was 'deliberate' or not;

(7) It is 'incorrect, unfair, and wrong in law' to characterise the 2017 Decision as one which portrayed the Appellant as a taxpayer deliberately involved in the evasion of substantial sums of VAT;

(8) The allegation now of deliberate conduct is one arrived at only ex post facto, following investigation of the full supply chains by HMRC, which had access to information not available to the Appellant;

(9) In a subsequent decision, *Premier Metals Leeds* [2019] UKFTT 218 (TC), the FtT upheld a decision to deny Premier Metals' input tax, which were also transactions involving CFB, and hence amounts to double recovery, which either offends principle, or is at the very least relevant to questions of proportionality and special circumstances;

(10) Striking-out is Draconian, and the Tribunal must be satisfied that 'no lesser order would meet the justice of the case': *Foulser v HMRC* [2013] UKFTT 038 (TC).

28. With particular reference to the 2017 Decision, the Appellant argues that the findings in the 2017 Decision must be read in the context of the issues which the Tribunal was being asked to consider, with intense focus on those questions; but that, in any event, the findings made in 2017 fall short of a finding of actual knowledge of fraud by others (and, hence, fall short of a finding of 'deliberate conduct' in the filing of the Appellant's own VAT returns). The Appellant argues that the 2017 findings were 'generally circumstantial', and fall short of any finding that any specific individual acting on behalf of the company held relevant actual knowledge that the VAT return was incorrect as filed. The Appellant argues that HMRC is still bound to demonstrate, in this appeal that the Appellant, at the time, had sufficient understanding of the *Kittel* principle so that it could know that its returns were inaccurate.

Discussion

29. I remind myself that the Schedule 24 penalty is a “criminal charge” for the purposes of Article 6 of the European Convention on Human Rights, with the effect that the burden of proof in relation to the penalty accordingly lies on HMRC, and does not lie on CFB. Moreover, the burden in relation to this Application also lies on HMRC, as the Applicant, to establish that Rule 8(3) is met, and not on CFB. I agree with the Appellant that, in considering the Application, I should not conduct a 'mini-trial'.

30. Rule 8(3)(c) of the Tribunal's Rules provides that:

> 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.

31. I begin by considering the FtT's findings in the 2017 Decision. I begin with consideration of the status of those findings, before moving on to the actual findings themselves.

32. Those findings are set out in a reserved decision following a contested hearing. They not only stand as unchallenged, but, 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: see the remarks of Lord Hoffmann in *Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35* at [2]:

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

33. I now turn to consider what the FtT was asked to decide, and what it actually did decide. In relation to the former, I have already set out the relevant parts of HMRC's pleaded case in relation to the MGB Appeal and the Kittel Appeal.

34. The 2017 Decision is the one and only definitive articulation of what was decided. It would not be appropriate to descend to any intricate textual gloss in this case. In any event, there is no need to do so. The FtT's findings and reasons are clear and intelligible. I have set them out, in extenso, above. Without wishing to sound trite or facile - the findings are the findings.

35. In my view, and reading the 2017 Decision objectively, the FtT found:

> (1) In relation to the MGB Appeal, CFB must have had knowledge of what was happening and cannot have either acted in good faith or taken every reasonable measure not to become a participant in any fraud (Decision §80)
>
> (2) In relation to the Kittel Appeal, and the non-BMC transactions, CFB did know of the connection to fraud (Decision §318);
>
> (3) In relation to the Kittel Appeal, and the BMC transactions, CFB knew that these were connected to the fraudulent evasion of VAT (Decision §322).

36. Insofar as Decision §326 refers to 'must have known', it is clear that this is consistent with the findings in the previous paragraphs, not least given the alternative conclusion at Decision §327.

37. Lest I should be criticised for seeking to do what I have said should not be done, i.e., a gloss of the 2017 Decision, I emphasise that the 2017 Decision has primacy.

38. No-one sought to challenge the 2017 Decision on the footing that it had gone beyond the scope of the dispute, and decided matters which were not properly before it. I reject the Appellant's argument that Paragraph 79 of the 2017 Decision, relating to the MGB Appeal, was per incuriam, or redundant, or (regardless of nomenclature) otherwise did or does not operate so as to give rise to a finding of fact capable of still subsisting adversely to the Appellant. The question addressed in that Paragraph was not a creature of the FtT's own initiative (although I am not sure that it would have mattered had it been). It did not emerge from nowhere. As the FtT recorded, it was specifically

requested by Counsel for HMRC. In turn, it had also been expressly foreshadowed in Paragraph 73 of HMRC's consolidated Statement of Case ('The Respondents' Secondary Case in relation to the zero-rating appeal'): see above. But, and in any event, if the Appellant considered that the FtT had fallen into error in making that finding, then the appropriate time and place for challenge would have been an appeal.

39. As set out above, I was pressed by Mr McDonnell to treat the findings made in the 2017 Decision as being in the context of *Kittel*. As far as it goes, I agree with the submission. I have already set out the questions which the Tribunal was being asked to consider, and what it decided. However, he goes on to contend that the question of whether the VAT returns contained inaccuracy remained at large until the 2017 Decision and thus, the returns were not, as a matter of law, incorrect until the 2017 Decision was issued, meaning that any inaccuracy found cannot have been deliberate at the time it was made.

40. I reject this ambitious argument. Although, in the context of linear time, it is perhaps right, that is not the context. The correct context (as Mr Watkinson submitted, and I accept) is to be found deeply embedded in the structure of VAT. As articulated by the Court of Appeal in *Mobilx* [2010] EWCA Civ 517, the right to deduct input tax depends on the application of objective criteria which define the scope of the right to deduct. Either those were met, in which there was a right to deduct (and there always was) or they were not met, in which case there was not (and there never was). If a person does not meet the objective criteria then and there, then the taxpayer never met the objective criteria at all. A denial of a claim to input tax means that the taxpayer was never entitled to the input tax because the taxpayer never met the objective conditions for the repayment of VAT: see *Mobilx* at [20] and [25]. The principle of legal certainty requires that the application of Community legislation be foreseeable by those subject to it, even if not actually foreseen.

41. An argument along the same lines was succinctly dismissed by the Tribunal (Judge Mosedale) in *Kishore v HMRC* [2018] UKFTT 0759 (TC) at Para [125]:

> " It is really a claim that in some way the return was valid but *Kittel* operated after the event to reverse the effect of the returns rather than to make them invalid. I do not consider this arguable. It is clear that the effect of *Kittel* was that the taxpayer, who entered into a transaction which he knew or ought to have known was connected with fraud, never met the objective criteria which would give him the right to deduct the input tax on that transaction. It is not the case that the appellant had the right to deduct the input tax up until the moment that HMRC denied it: the appellant never had the right to deduct the input tax so his returns were erroneous..."

42. I agree.

43. I am also satisfied that the penalty explanations, set out in full above, accurately reflect the FtT's reasoning, and do not introduce any new material.

'Deliberate'

44. I disagree with the Appellant that an allegation of deliberate conduct is tantamount to an allegation of fraud and/or must inevitably involves some element of dishonesty. I disagree with the thrust of the Appellant's submissions that deliberate conduct in Schedule 24 has a higher threshold than actual knowledge of connection to fraud in a Kittel-type appeal. I simply do not see (whether as a matter of law or language) why that should be the case.

45. The Court of Appeal in *E Buyer UK Ltd v HMRC* [2018] 1 WLR 1524 considered the short but important point whether a denial of input tax on a *Kittel* basis did necessitate a pleading of dishonesty. HMRC's argument, in essence, was that it was not necessarily alleging fraud or dishonesty merely by contending that the trader knew that its transaction was connected with a scheme for the fraudulent evasion of VAT. The relevant part of HMRC's statement of case was set out by the Court of Appeal at Para [15]. It was strikingly similar to HMRC's statement of case in the 2017 appeals (which was settled by Mr Watkinson, but signed by Mr Carey, who was then at the Revenue). Hence, the discussion in the leading judgment of Sir Geoffrey Vos C in *E Buyer* is very closely aligned with the circumstances in this present case.

46. At Paragraph 76, Sir Geoffrey Vos C remarked:

> "The Judge... was also wrong ... to find that the allegations ... necessarily involved an allegation of dishonesty. Those allegations were classic first limb Kittel allegations of actual knowledge. The allegations are not pleadings of fact, but inferences from facts. The facts alleged are (1) that Citibank's transactions formed part of an overall scheme to defraud HMRC, (2) that the scheme involved an orchestrated and contrived scheme of transactions. The inference that HMRC contend for is that certain features of those transactions demonstrate that Citibank knew or ought to have known that this was the case. It follows that, in my judgment, that inference was not an allegation of dishonesty, but simply of knowledge"

47. The Chancellor (at Paragraph [78]) expressed doubt as to the proposition advanced by Briggs J (as he then was) at first instance in *Mobilx* [2010] STC 1436 to the effect that "A person who knows that a transaction in which he participates is connected with fraudulent tax evasion is a participant in that fraud" and "has a dishonest state of mind." The Chancellor commented that "I do not think that such a bald proposition is right in law because, as is acknowledged by all parties to this case, a person who knows that a transaction in which he participates is connected with fraudulent tax evasion may or may not have a dishonest state of mind." I respectfully agree.

48. In terms of language, Schedule 24 (which establishes what is a civil, and not a criminal, penalty regime, albeit treated as criminal for the purposes of ECHR Article 6) does not repose on any notion of 'dishonesty'. Paragraph 3 of Schedule 24 addresses 'degrees of culpability'. The modern sense of 'culpable' (which comes from the Latin word 'culpa', meaning fault or liability, and which was a lesser species of wrongdoing

than 'dolus') means 'deserving blame or censure, blameworthy'. 'Deliberate' is a higher degree of culpability than carelessness, which is defined as 'failure to take reasonable care': Para 3(1). Beyond that, Schedule 24 does not go.

49. To this extent therefore, I must respectfully disagree with the observations of the FtT in *Sirforaz Sharif v HMRC* [2019] UKFTT 278 (TC) (Judge Richard Thomas and Rayna Dean FCA), and upon which CFB seeks to rely, that, for a penalty to be deliberate, "HMRC has to show that the behaviour was tantamount to fraud, i.e. that the appellant knew that what he did was to make an inaccurate return and that he did so dishonestly" (at Para [135]).

50. The decision in *Sharif* was released on 26 April 2019, which was after the Court of Appeal heard, but before it had handed down, its decision in *HMRC v Raymond Tooth* [2019] EWCA Civ 826. There, the Court of Appeal (Floyd LJ, with whom Patten LJ, and, on this point, Males LJ agreed) considered whether an inaccurate entry on a self-assessment return had been produced deliberately. As the Court of Appeal made clear, there was no question that Mr Tooth or his advisers had behaved dishonestly, 'or even reprehensibly' (at Para [108] per Males LJ). But, as Floyd LJ set out (at Para [86]) "...the incorrect insertion of the employment losses in the boxes reserved for partnership losses was ... a deliberate inaccuracy. Whilst it is no longer suggested that Mr Tooth and his advisers were, by this means, deliberately seeking a reduction in his liability to tax, the inaccuracy was, on any view, deliberate." A majority of the Court held that even a purely mechanical error, if made intentionally, was a deliberate inaccuracy.

51. That is a relatively modest threshold. But I do not adopt and apply the Court of Appeal's analysis in *Tooth* here. The decision (as the Tribunal (Judge Anne Redston and Mr John Robinson) identified in *Anthony Leach v HMRC* [2019] UKFTT 0352 (TC) recognised, at Para [88]) (i) did not deal with Schedule 24 and (ii) its discussion of deliberate was obiter.

52. I agree with the Tribunal's analysis in *Anthony Leach*, which in turn also considers and endorses this Tribunal's decision in *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 0249 (TC) (Judge Ashley Greenbank and Mr Michael Bell) 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': *Auxilium* at Para [63] and *Leach* at Para [102].

53. I do not derive much substantive assistance from my own previous decision in *Faux Properties (A Partnership) v HMRC* [2019] UKFTT 0203 (TC), upon which CFB also relies. It does not bind me. It would not be proper to gloss my own previous decision, save to say that it was a decision made following a final hearing, at which I had the opportunity to hear and consider Mr Faux give oral evidence. And so the case was to that extent fact-sensitive and turned on my assessment of the evidence, and whether HMRC had succeeded in discharging the burden of establishing that Mr Faux's conduct was deliberate: see Para [44].

54. The Appellant draws my attention to two further decisions at first instance. In *Anthony Clynes v HMRC* [2016] UKFTT 0369 (TC) (Judge Harriet Morgan and Mr

Philip Jolly) dismissed a taxpayer's appeal against a Schedule 24 penalty imposed on the basis of a deliberate inaccuracy. There, the Tribunal said:

> "82. On its normal meaning, therefore, the use of the term indicates that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way" (emphasis added by me)
>
> [...]
>
> "86. However, we consider that the term "deliberate inaccuracy on a person's part" can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

55. Here, it is clear that the Tribunal recognised that 'deliberate' is a concept capable of carrying shades of meaning; and that the assessment of whether conduct is deliberate is fact-sensitive.

56. In *Farrow v HMRC* [2019] UKFTT 200, the Tribunal (Judge Christopher Staker and Mr David Moore) decided that an inaccuracy was not a deliberate one. The Tribunal remarked (at Paras [44] and [45]):

> "44. A false statement is made deliberately where the person making it positively knows it to be untrue. A false statement might also be deliberate in circumstances where the person making it does not positively know that it is untrue, but does not have any real belief in its truth (compare Derry v Peek (1889) 14 App Cas 337, 374). However, if a person in good faith believes a false statement to be true, that person will not be making a false statement deliberately merely because the person ought to have known (but did not know) that it was untrue. In this last circumstance, the making of the false statement might be careless, but it would not be deliberate.
>
> 45. Thus, where an inaccuracy in a return consists of the omission of information that is required to be included in the return, the omission of the information will be deliberate if the person responsible for the omission knows that it needs to be included, or does not have any real belief that the information can be omitted. However, if the person in good faith believes that it is unnecessary to include the information in the return, the omission of that information will not be a deliberate inaccuracy merely because the person ought to have known (but did not know) that the information needed to be included, or

ought to have realised that advice should be obtained before submitting a return omitting that information."

57. Two things are clear from the Tribunal's decision in *Farrow* (which antedates the Court of Appeal's decision in *Tooth*, and the Tribunal's decision in *Lynch*): (i) the Tribunal was not addressed extensively on the issue of the meaning of 'deliberate'; (ii) the Tribunal's decision was ultimately fact-specific.

58. In short, I am satisfied that the concept of 'deliberate' in Schedule 24 is sufficient to catch the situation where a taxpayer has been found to have actually known that the transactions were connected to fraud.

The power to strike out

59. In principle, and although I agree with the Appellant that striking-out is a strong step to take, I disagree that to strike-out the Appellant inherently violates either the principles of natural justice, or any of the requirements of ECHR Article 6. In terms of natural justice, I was not referred to any particular principle, but this was an adversarial hearing, and hence did not violate the principle of hearing both parties (*audi alteram partem*). The Appellant, through Counsel has had a full opportunity to address the Tribunal in relation to the Application. A similar conclusion was arrived at by the Tribunal (Judge Nicholas Aleksander) in *Galvin v HMRC* [2016] UKFTT 0577 (TC), and I respectfully agree.

60. Striking-out is a power expressly contained in the Tribunal's Rules, and a permissible exercise of the Tribunal's discretion, albeit that the power should only be deployed in appropriate cases, and (of course) in accordance with the overriding objective. The question for me here is whether this is such a case.

61. I reject the Appellant's argument that striking-out should not be available in this present case because the Appellant is entitled to ask the Tribunal to review HMRC's decision not to suspend the penalty or to set conditions for suspension. This misreads the legislation and seeks to reverse the iterative process. Suspension and conditions are only available in relation to a non-deliberate inaccuracy. Therefore, arguments as to suspension and conditions are parasitic on the substantive quality of the inaccuracy, and can only come into consideration once that quality has been determined.

62. If, as argued by HMRC, there are already final and binding findings which operate so as either (i) bar the Appellant from arguing that the inaccuracies were not deliberate, or (ii) make the Appellant's argument as to absence of deliberate conduct not reasonably arguable, then there is no permissible scope for argument as to suspension.

Abuse of process

63. I am satisfied that Rule 8(3)(c) does extend to striking-out as an abuse of process. That was the decision of the Court of Appeal (Patten and Sales LJJ) in *Shiner and Sheinman v Commissioners for HMRC* [2018] EWCA Civ 31. There, HMRC had issued

closure notices against the Appellants amending their self-assessment returns. Those notices were the subject of appeal to the FtT, which included a challenge on the footing that the retrospective effect of FA 2008 section 58 contravened Article 56 of the EC Treaty: see Para [6]. But, in that regard, the taxpayers had also, as a 'pre-emptive strike' sought permission to bring a claim for judicial review against HMRC. The judicial review claim came to an end when it was dismissed by the Court of Appeal and the Supreme Court refused permission to appeal. On the basis of the Court of Appeal's decision, HMRC applied to the FtT for an order striking out the FtT appeals against the closure notices insofar as they relied on a breach of Article 56 EC, on the basis that the point was either (i) res judicata or (ii) an abuse of process because the taxpayers were seeking to relitigate a point which had already been decided against them.

64. Patten LJ remarked (at Para [19]):

> " The need to exercise caution in relation to any power to strike out proceedings prior to a full hearing is obvious. But it is a consideration which goes to the exercise of the power rather than to whether such a power exists. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in Rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed. A power to strike out could also be said to be part of the power of regulation by the First-tier Tribunal of its procedure under Rule 5(1) (which was the view of the Upper Tribunal), but Rule 8(3)(c) is enough. There is no need to imply a power. It is worth observing that the equivalent provision in CPR 3.4(2) separates out a case where a statement of case discloses no reasonable grounds for bringing or defending the claim from a case where the statement of case is an abuse of the court's process. But for the First-tier Tribunal the Tribunal Procedure Committee has chosen a different but composite criterion of no reasonable prospect of success, which is wide enough to cover appeals which are legally hopeless as well as appeals which can be said to amount to an abuse of process. There is in my view express power to strike out on both grounds."

65. In *Lindsay Hackett v HMRC* [2016] UKFTT 0781 (TC), the FtT (Judge Roger Berner) considered a somewhat similar scenario. Mr Hackett was the sole director of a company called Intekx Ltd, which had appealed, unsuccessfully, HMRC's decision to deny a claim for input tax for period 09/06 on the basis that Intekx either knew or should have known that the transactions were connected to fraud: reported at [2014] UKFTT 277 (TC).

66. Intekx had also made, but then withdrew, two further appeals: (i) in relation to periods 07/09 to 10/12 (where the denial was based on an allegation of connection to fraud) and (ii) in relation to 01/13 to 07/13 (where the denial was based on the failure to provide accounting records).

67. HMRC then imposed a deliberate inaccuracy penalty on Intekx, with a Personal Liability Notice against Mr Hackett, who appealed it. HMRC then applied to strike-out

various parts of his Grounds of Appeal on the footing that he was seeking to re-litigate issues which HMRC said had already been determined in Intekx's appeal. In Hackett, those issues were said to be:

> (1) Whether Intekx's relevant transactions were connected with the fraudulent evasion of VAT of which Intekx at least should have known;
>
> (2) The consequent inaccuracy of Intekx's relevant VAT returns since the input tax claimed on them was never due, as the relevant transactions fell outwith the scope of VAT;
>
> (3) The inaccuracy of Intekx's VAT returns where the company refused to provide any evidence of the underlying transactions; and
>
> (4) The accuracy of the 'Potential Lost Revenue' figures on which the Personal Liability Notice was based: see Paragraph [29].

68. Judge Berner rejected the Appellant's argument that the assessment of the deliberate inaccuracy penalty, and the issue of the Personal Liability Notice, were, as a matter of principle, a misuse of the Tribunal's procedure, or would result in any manifest unfairness to Mr Hackett so as to amount to an abuse of process, or so as to bring the administration of justice into disrepute: see Paragraph [12]. I respectfully agree.

69. In terms of abuse, following consideration of the authorities (as they then stood) Judge Berner remarked as follows:

> "38. [...] it is clear from the speech of Lord Bingham in [Johnson v Gore Wood] that one does not start with the premise that the fact that issues could have been litigated in earlier proceedings means that to litigate them in the proceedings in question is an abuse of process, and only excluded from that conclusion if there are special circumstances. What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in all the circumstances a party's conduct is an abuse. Although that will often give the same result as asking whether the conduct is an abuse and then, if it is, asking whether the abuse is excused or justified by special circumstances, it will not invariably do so, and it is always necessary for the question of abuse to be considered by reference to all the circumstances of the individual case.
>
> 39. Foneshops was a case on different facts, as the penalty appeal in that case was made by the same party that had been the appellant in the prior MTIC proceedings. By contrast, in this case, the penalty appeal is by Mr Hackett, as the recipient of a personal liability notice attributing to him the whole of the penalty assessed on Intekx by reference to the refusals to allow deduction of input tax which were the subject of Intekx's earlier appeals to the tribunal.
>
> 40. That does not prevent the principle of abuse of process from applying. That is clear from Johnson v Gore Wood where, at p 31, Lord Bingham rejected a formulaic approach to application of the rule. It was enough in that case that the company, which had earlier commenced proceedings against a firm of solicitors for negligence, and which claim had been settled, was the corporate embodiment

of Mr Johnson, who sought to make a similar claim. The correct approach was that formulated by Sir Robert Megarry V-C in Gleeson v J Wippell & Co Ltd [1977] 1 WLR 510, at p 515, namely that "there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party".

41. There can be no doubt in this case that Mr Hackett has that sufficient degree of identification with Intekx to enable the principle to be applied in this case. Indeed, there was no serious argument to the contrary. Mr Hackett was the sole director of Intekx at the material time, and it was he who made decisions and gave instructions on its behalf.

42. The question therefore is whether, in all the circumstances, it would be an abuse of process for Mr Hackett to argue in his own appeal against the personal liability notice, and as part of that against the penalty assessed on the company, matters which either were the subject of determination by the tribunal (in respect of the 09/06 period) or in relation to other periods could have been determined by the tribunal had the appeals in those respects not been withdrawn.

43. So far as the 09/06 period is concerned, the relevant issues were the subject of a final determination by the tribunal in Intekx 2014, having considered on a hearing of the substantive appeal all the facts and evidence including the evidence of Mr Hackett. I have no doubt in that respect that it would be an abuse of process for Mr Hackett to seek to re-litigate the relevant issues determined by the tribunal in that appeal. Mr Hackett, in his capacity as director of Intekx, has had an opportunity to put forward his case that in that period there was no connection between the transactions of Intekx in that period and fraudulent evasion of VAT, and that Intekx did not know of any such connection. It would be contrary to the principle of finality of litigation to allow that determination to be re-visited on this appeal. It would be a clear abuse of process to do so, and there are no circumstances that could justify such a course.

44. The circumstances for the other periods are different. In those cases there has not been any determination by the tribunal, whether on a substantive hearing or otherwise. There has been a withdrawal of those appeals. Those withdrawals were stated to be, at least in part, due to the difficult financial position of Intekx as a result of the actions of HMRC (from which it can be inferred that this was a reference to the denials of repayments of input VAT). That is not a decisive factor, but nor is it irrelevant, as Lord Bingham explained in Johnson v Gore Wood & Co, in the passage referred to earlier. Although there is sufficient identification between Mr Hackett and Intekx not to preclude the application of the abuse of process principle, the fact that the present appeal is made by Mr Hackett and not by Intekx is also a relevant factor. It is also relevant that, at the time when the earlier appeals were withdrawn, Mr Hackett was unaware that he might be exposed to a personal liability notice in respect of a penalty assessment not then made upon Intekx.

> 45. As Lord Millett explained in Johnson v Gore Wood, at p 59, the abuse of process principle is no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In the case of the prior appeals of Intekx for which on account of the withdrawal of those appeals there has been no determination of the facts and issues by the tribunal, it would in my judgment not be an abuse of the processes of the tribunal for those facts and issues to fall to be determined by the tribunal on this appeal by Mr Hackett. I would go further. To fix Mr Hackett with deemed findings in respect of those appeals, in the circumstances where he is appealing against a personal liability which has arisen only after those appeals were withdrawn would in my judgment be contrary to the interests of justice. Nor do I consider that requiring HMRC, on whom the burden of proof is accepted to fall in this appeal, to prove relevant facts which have so far not been substantively determined could be regarded in any sense as oppressive."

70. That passage draws a careful distinction between (i) the matters which the FtT had considered in 2014 in relation to 09/06 where, for the reasons explained by Judge Berner (and with which I agree) it was an abuse of process for Mr Hackett to seek to reargue them, and (ii) the matters in relation to other periods, where there had not been any judicial determination, and where it would not be an abuse of process for Mr Hackett to dispute facts and issues in relation to the periods of the withdrawn appeals: see his order at Paragraph [46].

71. HMRC here, adopting a similar (although not completely identical) approach to that which it adopted in *Hackett*, set out four issues in relation to which it says there should be no relitigation:

> (1) "Whether the Appellant's relevant transactions were connected with the fraudulent evasion of VAT of which the Appellant knew"
>
> (2) "The consequent inaccuracy of the Appellant's relevant VAT returns since the input tax and zero rating claimed on them was never due"
>
> (3) "The deliberate nature of the inaccuracy of those returns because the Appellant knew that it was not entitled to the input tax and zero rating claimed"
>
> (4) "The accuracy of the Potential Lost Revenue"

72. (1), (2), and (4) are not in dispute. (3) is in dispute.

73. I am entirely satisfied that it would be an abuse of process for the Appellant now to seek to re-litigate the relevant issues which were already determined by the FtT in 2017.

74. I am entirely satisfied that the matter of the Appellant's knowledge in (3) is a matter which was the subject of a final determination by the FtT in the 2017 Decision; and that the issue of whether that was 'deliberate' cannot now be argued.

75. I do not consider that CFB can permissibly argue, in the context of this appeal, that its conduct in relation to the inaccuracies was anything other than 'deliberate',

within the proper meaning and effect of Schedule 24. To do so would allow CFB, impermissibly and as an abuse of process, to revisit (but not by way of an appeal) the final and binding findings of fact already made by the FtT.

76. The Appellant had a full opportunity to put forward its case as to the absence of connection to fraud, and its want of knowledge of such connection. In short, and in alignment with Hackett, it would be contrary to the principle of finality of litigation to allow the FtT's determinations in 2017 to be re-visited in this appeal. There are no circumstances which could justify such a course.

Applicability of *Hollington v Hewthorn* in tax cases

77. I have noted HMRC's position, in this appeal, as set out in its Skeleton Argument, that "it has been clear for nearly 20 years that the principle in *Hollington v F Hewthorn Ltd* [1943] QB 598 does not apply in the Tax Tribunals (*King v Walden (HM Inspector of Taxes)* [2001] EWHC 419 (Ch) at [84] per Jacob J (as he then was), an appeal that itself concerned tax penalties."

78. That is an accurate description of *King v Walden*, in which the Court rejected the taxpayer's final line of argument that findings about him made by the Commissioners in two previous decisions, in 1991 and 2000, should nonetheless not be binding.

79. Alerted by HMRC's Skeleton, at the beginning before of the hearing before me, I raised with the parties the Tribunal's decision in *Microring Ltd v HMRC* [2019] UKFTT 456 (TC) (released on 12 July 2019) and placed a copy of that decision before them.

80. In *Microring*, the Tribunal (Judge Victoria Nicholl) recorded that Counsel for HMRC referred the Tribunal to *Hollington v Hewthorn* (see Paragraph 14(3) of the decision) in connection with its argument concerning res judicata / abuse of process and recorded HMRC's submission that *Hollington v Hewthorn* 'makes clear that a judgment is not conclusive against anyone who was not a party'. That is to say, HMRC was taking the stance in that case, unlike its stance in this case, that *Hollington* was of relevance to tax proceedings in this Tribunal.

81. The Tribunal there did place some reliance on *Hollington v Hewthorn* in dismissing the argument that issue estoppel was in point, and cited with approval the remarks of Lord Goddard LCJ that "it is in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal."

82. I was concerned at what appeared to be the inconsistency between HMRC's submission, as put and as set out above, in this case, and the Tribunal's view in *Microring*. However, here, it ultimately seems to me - and regardless of whether *Hollington v Hewthorn* does apply to tax proceedings or not - that in considering this Application there is no legal bar to my giving proper regard to the findings in the 2017 Decision for the purposes of assessing whether the present appeal is an abuse of process. For the sake of completeness, and insofar as may be material, I agree that the 2017 Decision was not *res alios inter acta*.

Conclusion of Abuse of Process

83. My conclusion on abuse of process is sufficient to determine the Application. Nonetheless, and lest my conclusions in that regard should come to be reconsidered, I consider it appropriate to deal with the alternative way in which the Application is advanced.

'Reasonably arguable'

84. I adopt the Upper Tribunal's guidance in *HMRC v Fairford Group plc and other* [2015] STC 156 where, at Para [41], Simon J and Judge Bishopp said:

> "In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to application under CPR 3.4 ... The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing ... A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable..."

85. Regardless of my conclusion in relation to abuse of process, I nonetheless have no hesitation in concluding that the argument contained in the identified paragraphs of the Grounds of Appeal does not enjoy any prospect of success which is more than fanciful.

86. In short, much of the foregoing discussion could be repeated. The weight of the relevant and unchallenged findings in the 2017 Decision is overwhelming. Very extensive documentary and oral evidence was heard, tested, and weighed up by the Tribunal. Extensive and detailed findings of fact were made as to the nature or quality of CFB's conduct: what had been done, what had not been done; by whom; and why.

87. Despite the attractive way in which Mr McDonnell framed and put his submissions, I am nonetheless entirely satisfied that those of HMRC are to be preferred, not only in respect of their articulation of general principle, but also in respect of their application to the circumstances of this particular appeal.

Outcome and Consequences

88. The Application is granted in the following terms.

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.

HMRC's Statement of Case

93. HMRC had requested that the obligation to file a Statement of Case be suspended pending resolution of this Application. No Statement of Case has yet been produced. Within 28 days of the date of release of this Decision, HMRC shall file with the Tribunal and serve on the Appellant a Statement of Case. Either party may apply to vary that direction. I also invite the parties to now seek to agree case management directions for the further management of this appeal.

Right to apply for permission to appeal

94. 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.

Dr Christopher McNall

TRIBUNAL JUDGE

RELEASE DATE: 17 JANUARY 2020