Neutral Citation: [2024] UKFTT 00415 (TC) Case Number: TC09175

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2017/06223

Penalties – Personal Liability Notice – Company of which Appellant was sole director subject to VAT assessment on Kittel basis – Whether inaccuracies in company's VAT return – If so, whether such inaccuracies were deliberate – If so, whether such deliberate inaccuracies attributable to Appellant – Appeal dismissed

Heard on: 9 – 16 April 2024
Judgment date: 17 May 2024

Before

TRIBUNAL JUDGE BROOKS
TRIBUNAL MEMBER GABLE

Between

ANANDPREET SINGH POWAR

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Joshua Carey and Laura Stephenson, both of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Drinks 4 Less (UK) Limited (the "Company") was, before its liquidation on 16 November 2023, an alcohol wholesaler. Mr Anandpreet Singh Powar who was its sole director and shareholder appeals against a personal liability notice ("PLN") issued against him by HM Revenue and Customs ("HMRC"), under paragraph 19(1) of schedule 24 of the Finance Act 2007, on 28 July 2017.

2. Prior to issuing the PLN against Mr Powar, HMRC had, on 3 March 2017, denied a claim by the Company for a deduction of input tax in the total sum of £186,694.46 it had incurred in 179 of its transactions during its VAT accounting periods 02/13 to 05/16 (inclusive). On 17 July 2017 HMRC had issued an assessment against the Company in the sum of £182,455. The denial of the claim for the deduction of input tax and the assessment were made by HMRC on the basis that the 179 transactions were connected to a fraudulent loss of VAT and that the Company knew or should have known of that connection.

3. On 17 July 2017 HMRC issued a Notice of penalty assessment, in the sum of £83,019.70, against the Company pursuant to schedule 24 of the Finance Act 2007. The penalty was issued on the basis that because the Company claimed a deduction of input tax, for which it knew it was not entitled, there were deliberate (but not concealed) inaccuracies in its 02/14 to 05/16 VAT returns.

4. On 4 May 2017 the Company appealed against HMRC's decision to deny its claim for a deduction of input tax and issue an assessment. It appealed against the schedule 24 penalty assessment on 7 August 2017. However, on 12 January 2024, its liquidator confirmed that the Company did not wish to proceed with the appeals which were subsequently withdrawn.

5. On 22 June 2017, as it was considered that the Company was likely to become insolvent and that Mr Powar, as its sole director, was responsible for the inaccuracies in the Company's VAT returns, HMRC issued the PLN against Mr Powar making him personally liable to pay the penalty of £83,019.70. The PLN was upheld on 28 July 2017 following a review. However, having reviewed the calculation of the penalty prior to the hearing, as HMRC accepted that it could not be established that 45 of the deal chains could be traced back to a fraudulent loss of tax, the amount of the PLN was reduced to £74,823.63.

6. On 7 August 2017 Mr Powar appealed to the Tribunal.

7. Mr Powar represented himself. HMRC were represented by Mr Joshua Carey and Ms Laura Stephenson. We have not found it necessary to make specific reference in our decision to all of the submissions or materials to which we were referred but we have taken all of them into account.

LAW

VAT and Right to Deduct Input Tax

8. The right to deduct input tax is derived from Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT. These have been incorporated into UK domestic law by ss 24 – 26 of the Value Added Tax Act 1994 ("VATA").

9. Therefore, although a trader is entitled as of right to claim a deduction of input tax and either set it against his output tax liability or, if the input tax credit due to him exceeds the output tax liability, receive a repayment, there is an exception to this principle where a trader knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT.

10. This is because in such a situation the trader is an "accomplice" and aids the perpetrators of the fraud (see *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR 1 - 6161 ("*Kittel* ") at [56] – [57]).

11. The decision in *Kittel* was considered by the Court of Appeal in *Mobilx Ltd (in Administration) v HMRC; HMRC v Blue Sphere Global Ltd ("BSG"); Calltel Telecom Ltd and another v HMRC* [2010] STC 1436 ("*Mobilx* ") in which Moses LJ, giving the judgment of the Court of Appeal, said:

> "[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel* .
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> [60] The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

12. It is clear, from the approach taken by Christopher Clarke J (as he then was) in *Red12 v HMRC* [2010] STC 589, and adopted by Moses LJ in *Mobilx* that the Tribunal should not unduly focus on whether a trader has acted with due diligence but consider the totality of the evidence. As Moses LJ said In *Mobilx* , at [83]:

> "… I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:
>
> > '[109] Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
> >
> > [110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage

> mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
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> [111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.'"

13. It is not necessary for the trader to know the specific details of the fraud with which his transaction is connected to deprive it of the right to deduct input tax (see *Megtian Ltd v HMRC* [2010] STC at [38] and *POWA (Jersey) Ltd v HMRC* [2012] STC 1476 at [52]).

14. In *Fonecomp* Limited *v HMRC* [2015] STC 2254 it was argued that the words "should have known" as used by Moses LJ in *Mobilx* meant "has any means of knowing" (per Moses LJ at [51]) and that Fonecomp could not have found out about the fraud even if it made inquiries because the fraud did not relate to the chain of transactions with which it was concerned. However, Arden LJ (as she then was, with whom McFarlane and Burnett LJJ agreed) observed, at [48], that:

> "Lack of knowledge of the specific mechanics of a VAT fraud affords no basis for any argument that the decision of either tribunal was wrong in law: what is required is simply participation with knowledge in a transaction 'connected with fraudulent evasion of VAT'…"

She continued at [51]:

> "However, in my judgment, the holding of Moses LJ does not mean that the trader has to have the means of knowing how the fraud that actually took place occurred. He has simply to know, or have the means of knowing, that fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected. The participant does not need to know how the fraud was carried out in order to have this knowledge. This is apparent from [56] and [61] of *Kittel* cited above. Paragraph 61 of *Kittel* formulates the requirement of knowledge as knowledge on the part of the trader that "by his purchase he was participating in a transaction connected with fraudulent evasion of VAT". It follows that the trader does not need to know the specific details of the fraud."

15. It is not disputed, as noted by the Upper Tribunal in *AC (Wholesale) Ltd v HMRC* [2017] UKUT 191 (TCC) at [30], that the burden of proof is on HMRC and that the civil standard of proof, the balance of probabilities, applies (see *Re S-B (Children)* [2010] 1 AC 678 at [34]).

Penalties

16. Schedule 24 to the Finance Act 2007 makes provision for penalties in errors in certain documents sent to HMRC (see s 97(1) of the Finance Act 2007).

17. Paragraph 1 of schedule 24 provides that a penalty is payable by a person who gives HMRC a VAT return that contains a careless or deliberate understatement of a liability to tax or a false or an inflated claim to repayment of tax. In this case HMRC contend that Mr Powar and the Company deliberately made a claim for input tax to which to Company was not entitled but did not make any arrangements to conceal it.

18. The amount of a penalty, payable under paragraph 1, is set out in paragraph 4 of schedule 24. Insofar as it applies to the present case, paragraph 4(2) provides that the penalty for careless action is 30% of the potential lost revenue; for deliberate but not concealed action, 70% of the potential lost revenue; and for deliberate and concealed action, 100% of the potential lost revenue.

19. The "potential lost revenue" is defined in paragraphs 5 – 8 of schedule 24. However, for present purposes it is only necessary to refer to paragraph 5(1) which provides that potential lost revenue is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

20. Paragraph 9(1) of schedule 24 provides for a penalty to be reduced where a person has made a disclosure by (a) telling HMRC about it, (b) helping HMRC by giving them reasonable assistance in quantifying the inaccuracy and (c) giving or allowing HMRC access to records for the purpose of ensuring that the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected. In penalty explanations provided with a Notice of Penalty assessment such disclosures are for brevity and convenience described as "Telling", "Helping" and "Giving".

21. Paragraph 9(2) of schedule 24 provides that such disclosure is "unprompted" if it is made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment. Otherwise the disclosure is "prompted".

22. Under paragraph 10(1) of schedule 24 HMRC "must" reduce the standard percentage of a person who has made a disclosure and who would otherwise be liable to a penalty. However, the table in paragraph 10(2) sets out the extent of any reduction which "must" not exceed the minimum penalty. For a prompted deliberate and not concealed error this is 35% of the potential lost revenue.

23. HMRC may also reduce a penalty because of "special circumstances". However, the ability to pay or the fact that a potential loss from one taxpayer is balanced by a potential payment from another are precluded from being special circumstances (see paragraph 11 of schedule 24).

24. Paragraph 15 of schedule 24 provides that a person may appeal against a decision of HMRC that a penalty is payable by the person and may appeal against a decision as to the amount of a penalty payable by the person. On an appeal against a decision that a penalty is payable the Tribunal may affirm or cancel HMRC's decision. However, where the appeal is against the amount of a penalty paragraph 17(2) of schedule 24 allows the Tribunal to substitute HMRC's decision for another decision provided that it was within HMRC's power to make the substituted decision.

25. Where a reduction of a penalty is sought because of "special circumstances", the Tribunal may only substitute its decision for that of HMRC if it "thinks that HMRC's decision in respect of the application of paragraph 11 was flawed" (see paragraph 17(3) of schedule 24). For such purposes "Flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review (see paragraph 17(6) of schedule 24).

26. Paragraph 19 of schedule 24 provides:

19 Companies: officers' liability

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

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

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

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)),

…

27. The Supreme Court considered the meaning of "deliberate" in relation to whether there was a "deliberate inaccuracy" in a document in *HMRC v Tooth* [2021] 1 WLR 2811 in which, it said:

> "42. … The question is whether it means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.
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> 43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase "deliberate inaccuracy". Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy". An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate."

28. Although this was in in relation to s 29 of the Taxes Management Act 1970, the Supreme Court recognised, at [33] and [45], the alignment of the language used with that of the schedule 24 penalty provisions. Accordingly for there to be a "deliberate" inaccuracy there will have to be an intention "to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement" (see *Tooth* at [47]).

29. *Bachra v HMRC* [2023] UKFTT 91 (TC) was in many ways similar to the present case. It too concerned an appeal against a PLN by a director of a company that had been denied the right to deduct input tax incurred on transactions connected with the fraudulent evasion of VAT on the grounds that it knew or should have known of that connection and was subject to a deliberate inaccuracy penalty. Although the company did not appeal against that penalty its appeal against the denial of input tax was withdrawn following its liquidation leaving only the PLN against the director.

30. In that case the Tribunal (Judge Zaman and Mr Agboola) concluded, at [4], that although all of the transactions with which the appeal was concerned were connected with the fraudulent evasion of VAT and that the company should have known of that connection, because the company did not know (ie did not have actual knowledge) of the connection:

> "... the inaccuracy was not deliberate and the conditions were not satisfied for HMRC to be able to issue the PLN to Mrs Bachra. Accordingly, Mrs Bachra's appeal is allowed."

31. However, it was not disputed in *Bachra* that if it had been found that the company knew (as opposed to should have known) that its transactions were connected with the fraudulent evasion of VAT it would have constituted a deliberate inaccuracy (see *Bachra* at [253]).

32. It is for HMRC to establish, to the civil standard of proof, that the Company's VAT returns were inaccurate and that such inaccuracies amounted to a false or inflated claim to repayment of tax, that such inaccuracies were deliberate but not concealed and were attributable to Mr Powar as the sole director of the Company. It is also for HMRC to establish that the penalty amounts are correct and that there not any special circumstances that warrant a reduction in those penalties.

EVIDENCE AND FACTS

Evidence

33. In addition to two bundles comprising 10,799 and 2,153 pages respectively, we heard from HMRC Officer Jennifer Howse and Mr Powar.

34. Officer Howse, a Senior Officer of HMRC's Fraud Investigation Service, joined the Inland Revenue in March 2002 as a customer services adviser. She has been part of a cross tax team investigating businesses involved in the wholesale and retail supply of alcohol since November 2014. She was the allocated officer for the Company from 2018 until its liquidation in November 2023. We found her to be a helpful and credible witness.

35. Mr Powar, by contrast, was not a wholly reliable witness. Although we very much appreciate the difficulties he faced in representing himself and have taken this into account wherever possible, this does not explain inconsistencies in his evidence and how he was able to provide detailed explanations in relation to some matters, particularly where it supported his case, but could not recall other matters which occurred around the same time that did not. For example, at the hearing he was able to recall discussions, not previously mentioned, that he had had regarding one of his suppliers and the change of its name and trade classification but could not remember why he had told HMRC during a VAT visit that the Company had a 15% mark up when in fact it was around 2% or less.

36. Additionally, his evidence was inconsistent with documentary evidence. For example, in his second witness statement Mr Powar had said that he was not aware of a company, Blueray Enterprises Limited ("Blueray") even though he had exhibited to his third witness statement an invoice dated 10 June 2013 issued to the Company by Blueray for mixed alcohol at a net cost of £17,490.12. Similarly, in his second witness statement Mr Powar denied ever dealing with Mr Cash & Carry Limited ("Mr Cash & Carry") despite exhibiting to his third witness statement an invoice that was issued to the Company on 1 April 2013 by Mr Cash & Carry for the sale of mixed alcohol with a net value of £6,586.35. Mr Powar, who at the commencement of his evidence had confirmed that, having checked them, his witness statements were true to the best of his knowledge and belief, was unable to explain these inconsistencies and blamed the solicitors that had previously been acting for him, claiming that although he had trusted them to prepare his witness statements for him he now felt that they had let him down.

Facts

Background

37. The Company was incorporated on 5 September 2011. Its registered office on incorporation was at the principal place of business of its accountants, JSP Accountants Limited ("JSP"). On 5 May 2015, the registered office was changed to a serviced office address in Greenford, Middlesex. In addition to its registered office the Company also

operated from a warehouse in Slough before surrendering the lease to the landlord and re-locating to a shared warehouse premises also in Greenford, Middlesex.

38. The director on incorporation was a Mrs Elah Shah whose appointment was terminated the same day. Mr Powar's former wife, Ms Monika Nieradko, was also appointed as a director on 5 September 2011. She remained a director until 8 September 2014 when she was replaced by Mr Powar who then became the Company's sole director until its liquidation on 16 November 2023. Notwithstanding Ms Nieradko's appointment Mr Powar was, as he confirmed in evidence, responsible for everything done by the Company, including all trading activities, from its incorporation until its liquidation.

39. The Company was registered for VAT with effect from 5 September 2011. Its main business activity, as stated on the VAT1 registration application form, was as "a wholesaler and distributor of drinks". Its estimated annual turnover was £120,000, an amount derived from a "rough idea" of Mr Powar. The Company's actual net turnover in its accounting periods ending 30 September was £81,728 for the accounting period ended 30 September 2012, £139,908 for the year ended 30 September 2013, £147,306 for the year ended 30 September 2014, £662,947 for the year ended 30 September 2015 and £826,288 for the year ended 30 September 2016.

40. The table below sets out the details of the VAT returns filed by the Company for the periods with which this appeal is concerned:

VAT Period	Output tax £	Input tax £	Net tax £	Outputs £	Inputs £
02/13	3,700	3,661	39	18,500	18,307
05/13	11,269	10,376	893	56,345	53,079
08/13	7,401	6,615	786	37,006	33,170
11/13	7,078	5,955	1,123	35,392	30,259
02/14	3,905	3,187	718	19,524	15,984
05/14	5,987	5,087	901	29,937	25,476
08/14	5,508	4,450	1,057	27,539	22,322
11/14	10,453	6,776	3,677	52,265	34,056
02/15	27,640	25,014	2,626	138,198	125,595
05/15	32,364	30,663	1,702	161,882	161,130
08/15	62,364	60,728	1,636	311,818	304,624
11/15	31,110	28,913	2,197	155,548	146,656
02/16	68,803	66,601	2,202	344,015	335,536
05/16	26,885	24,343	2,542	134,426	122,842

41. The business activity of the Company was changed, following a letter of 28 May 2012 to HMRC from JSP, to the "wholesale of wine, beer, spirits and other alcoholic beverages". On 23 November 2011 the Company registered with HMRC as a High Value Dealer under the Money Laundering Regulations.

42. Before establishing the Company Mr Powar had, from 2009, been employed by Great Western Cash and Carry Limited ("Great Western"). Initially he did whatever he was instructed to do, such as moving pallets. He became gradually more aware of the alcohol industry learning which products were "fast moving" and when and what to order from

suppliers. However, although he was always eager to learn, Mr Powar, as he was keen to emphasise, did not undertake any administrative activities at Great Western. He did, however, have the opportunity to meet Great Western's customers and it was from those customers that he said he learned the importance of having a VAT number. Mr Powar also made contacts with Great Western's suppliers during his employment which eventually led to his decision in 2011 to establish the Company.

43. Great Western was subsequently deregistered for VAT by HMRC as a missing trader having been subject to at least one seizure of alcohol and an assessment for undeclared sales.

44. Mr Powar's research into the wholesale alcohol trade prior to the Company's incorporation "mostly" involved him "going around" cash and carries and local shops to explore what was happening in the market and looking at prices. He said he did not research the existence or prevalence of fraud in the marketplace and, as such, claimed to be unaware of it. As a result of his research Mr Powar "slowly, slowly" gained knowledge of the wholesale alcohol business and became aware of the need to trade with legitimate traders, which he understood to be those with a valid VAT number.

45. In addition to the Company, on 9 December 2014 Mr Powar established Thames Wines Limited ("Thames Wines") of which he was the sole director and shareholder. He resigned as director of Thames Wines, which had never traded, on 14 September 2015 and transferred his interest without charge to Manjit Singh Sahota, who he had met at a cash and carry in Exeter. Mr Powar said that this was because Thames Wines was a "kind of liability" and that rather than close the company he had offered it to Mr Sahota, who he described as "not a close friend", and did not ask for any money as it was not trading. Thames Wines Limited was subsequently de-registered for VAT by HMRC on the basis that it knew or should have known its transactions were connected with the fraudulent evasion of VAT, something Mr Sahota did not mention to Mr Powar.

46. Although Thames Wines appealed to the Tribunal against HMRC's decision it withdrew its appeal following the provision of the statement of case by HMRC.

Contact with HMRC

47. During the period in which it traded the Company received several visits from HMRC officers. One such unannounced visit occurred on 26 August 2015 when HMRC officers Mike Oades and Lucy Fisher attended the Company's registered office address. The report of that visit, prepared by Officer Fisher, recorded that:

> "Mr Powar stated that [the Company's] opening hours are 9-5 but that it is a delivery based business. The customer calls the 017…69 number which is re-directed to Mr Powar's mobile [number …] . Mr Powar takes their order if he has the products requested and delivers it to them the following day, sometimes the same day. The customer does not know the prices until they call when Mr Powar will calculate the price in his head while he is on the phone. The price will depend on what Mr Powar has paid for the stock and what he thinks the customer will pay for it. He stated his mark up is approximately 15%.
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> …
>
> Mr Powar confirmed that he has no stock record and does not undertake stock checks. I advised that he should keep a stock record and undertake regular stock checks and keep a record of them in future. Mr Powar had begun to keep a notebook as a cash book on the advice of Mr Sibbering but this was only started on 22 July 2015."

48. The Mr Sibbering referred to in the Visit Report is Mr Steve Sibbering of Bacchus Solutions Limited who was introduced to the HMRC officers as a trade adviser to the Company. It was on the advice of Mr Sibbering that, from July 2015, the Company obtained due diligence reports prepared by Mr Eugene Walsh of Sertorius Solutions ("Sertorius"). These reports and the extent of the due diligence undertaken are described in more detail below.

49. Immediately after leaving the Company's registered office at the serviced office premises Officers Oades and Fisher visited the Company's warehouse together with Mr Powar and Mr Sibbering. Stored at the warehouse was a small quantity of beers and wines, estimated by the HMRC officers to be 20 pallets of mixed beers and 10 pallets of wines. Following that visit Officer Fisher wrote to Mr Powar.

50. In her letter, dated 3 September 2015 and headed "Warning Letter", Officer Fisher reminded Mr Powar of the statutory obligation to keep business records and warned that a failure to do so could result in penalties. She also reminded Mr Powar about the due diligence on the Company's customers and suppliers that was needed to satisfy himself that he was dealing with reputable traders. The letter continued:

> "Please be advised that we [ie HMRC] require you to show that you have made adequate checks to address the risks identified, that you have considered the data within those checks, and come to a reasoned decision based on the evidence you have collected as to whether or not you should trade with a company. We also require that these checks are reviewed regularly to take account of any changes within companies and we require you to keep a full audit trail of your checks and reasoned decisions."

51. Officers Oades and Fisher conducted another visit to the Company on 10 February 2016 where they met with Mr Powar and Mr Sibbering. The officers informed Mr Powar that evidence they had gathered and subsequent research had established that the Company had been supplied by companies from which HMRC had suffered tax losses. There was a discussion concerning due diligence as a means to enable Mr Powar to make informed decisions about the integrity of suppliers.

52. During a telephone conversation, on 1 September 2016, concerning suppliers Officer Fisher told Mr Powar that many of the Company's suppliers did not have warehouse premises. Mr Powar's response was that he did not know this and had not asked about warehouse premises but had assumed that goods must have been with the supplier and that he had accepted their offer to deliver these to him.

53. On 31 October 2016 HMRC issued a letter to the Company denying the claim for input tax for the period 11/12 to 05/16, in the sum of £186,694.46. That letter referred to purchases made from 11 of the Company's suppliers, Eurochoice Limited, Global Cash & Carry, Gujarr Limited, Seltran Trading Limited, Purity Supplies Limited, AK Suppliers Limited, Middlesex Wines Limited, Wentworth Drinks Limited, Fern Trade Limited, Soft Stream Limited and JJ General Trading Limited.

54. On 12 June 2017 Officer Oades issued the Company with a Notice of Penalty assessment, made under Schedule 24 of the Finance Act 2007 in the sum of £83,019.70 on the basis that there was an inaccuracy in the Company's VAT returns resulting from the deliberate behaviour of a company officer, Mr Powar. On 22 June 2017 Officer Oades issued the PLN to Mr Powar in the amount of £83,019.70.

55. The Penalty explanation provided with the PLN stated that HMRC considered that the behaviour leading to the issue of the PLN was deliberate and the disclosure was prompted as the Company/Mr Powar did not tell HMRC about the inaccuracy before it had reason to

believe it had been discovered or was about to be discovered. As such the penalty range was 35% to 70% of the potential lost revenue. A reduction was applied for the quality of the prompted disclosure at 70% (0% for Telling, 40% for Helping and 30% for Giving or allowing HMRC access to records). The difference between the minimum and maximum penalty, 35% was multiplied by the total reduction (70%) to arrive at the percentage reduction of 24.5% which was subtracted from the maximum penalty (70%) to give 45.5%, the percentage of the potential lost revenue at which the penalty was calculated.

56. Also, although considered, HMRC did not consider it appropriate to make any reduction for special circumstances.

Transactions

57. As during his research into the business, once the Company had been established Mr Powar continued to meet suppliers in cash and carries.

58. In most, if not all, of the transactions with which this appeal is concerned, Mr Powar would be contacted by telephone or text by suppliers offering a "one-time" deal. He would then contact potential customers and, if he was able to find one willing to accept those goods, would respond to the supplier accepting the goods at the price at which they were offered with the transactions – the purchase by the Company from the supplier and sale to its customer – taking place on the same day. There were no negotiations regarding price and, as he did not have the time to do so, no attempt by Mr Powar to source cheaper goods elsewhere.

59. In most cases Mr Powar collected the goods from suppliers in his van, a Mercedes Sprinter, and delivered them to his customers. On occasions the goods would be brought to the Company's registered office and transferred to his van there or he would meet the supplier somewhere else, such as a carpark, where goods would be transferred to his van for delivery to customers. Mr Powar did not check the credentials of the drivers but accepted that they were making deliveries on behalf of the business supplying the Company.

60. Officer Howse produced "deal sheets" setting out the details of the 179 transactions involving the Company on which input tax had been denied. These showed who had supplied the Company, who had supplied the Company's supplier and so on. They also contained a description of the goods (eg "alcohol"), the profit margins and the value of the goods (net, VAT and gross). Although Officer Howse accepted that, other than the Company's supplier, Mr Powar would not have known the other companies in the chain (ie who had supplied the Company's supplier and from whom the Company's supplier had acquired the goods etc), her evidence was that all of the deal chains in this case can be traced back to one of 31 defaulting traders and a fraudulent loss of tax. As this evidence was not seriously challenged – Mr Powar's evidence was that he could not have known of the source of the goods or any of the participants in the chain other than the Company's supplier – it is not necessary for us to reproduce the deal sheets in this decision.

61. However, it is clear from them that:

(1) None of these deal chains can be traced back to a manufacturer or distributer of the goods in question;

(2) Most, if not all, transactions in the chain are back-to-back transactions which take place on the same day;

(3) The length of the transaction chains varies with the shortest comprising the Company and two other wholesalers and the longest the Company and four other wholesalers;

(4) The Company was almost always able to match its customers' requirements with stock from its supplier; and

(5) Although the Company's profit margin was always around 2% irrespective of the product sold, giving it a profit of around 10p on each case of alcohol sold, the profit margins shown in each of the chains between the Company's suppliers were almost invariably between 0.24-0.27% irrespective of the type, quantity or time when the goods were sold.

62. Another common feature in the Company's transactions was the lack of any commercial documents, such as contracts between the parties to the transactions, other than invoices.

63. Even though most of the invoices issued to the Company by its suppliers contained a statement along the lines that "all goods remain the property of … until paid in full", the company did not make payment until it had sold the goods and received payment from its customer. When asked what would have happened if the goods had been damaged in transit Mr Powar said he would have told the supplier at the time of supply. However, he did not give any instance of this actually happening.

64. At the same time as the Company was engaged in the transactions which are the subject of this appeal, many of the same parties in those transaction chains were also engaged in a criminal missing trader intra-community ("MTIC") VAT fraud which resulted in a VAT loss to HMRC of £34.2 million leading to two criminal trials at Southwark Crown Court. The first of these took place between February and May 2019 and the second between June and July 2019. These trials resulted in convictions for ten of the individuals concerned with another four being acquitted.

65. The convicted defendants, part of an organised crime group that established and controlled at least 19 purported United Kingdom alcohol buffer traders, ran a "paperwork factory" manufacturing mainly paper transactions the purpose of which was to clean smuggled alcoholic stock and make it look as though it had been purchased legitimately from the first company in the manufactured supply chain before laundering the proceeds of the diverted alcohol back to a number of overseas entities.

66. The judge in the "sentencing remarks" at the conclusion of the first trial observed that:

> "… The offending took place in the wider context of the large-scale movement of smuggled, that is, non-duty paid, alcoholic drinks, mainly wines and beers onto the open market through outlets which have been generically described as cash and carries – the so called grey market in such goods. Inherent in that trade is the evasion of very substantial quantities of excise duty; but none of you is said to have been involved in that side of the business. The fraud which you carried out in effect provided a service to those involved in the wider activity while at the same time generating a second source of unlawful profit by cheating the public revenue of the VAT properly payable on the transactions between the companies which you ran, whether they were genuine transactions or, as seems now to be broadly accepted, mainly paper transactions the purpose of which was, in the words of Sarah Macdonald, the officer of HMRC who acted as the Officer in the Case "to clean the stock and make it look like it has been purchased legitimately" from the first company in the chain. The nineteen companies listed in count 1 were the vehicles for carrying out the fraud. The first purported supply in each chain would be made by a company which issued a VAT invoice to the purchasing company, the next in the chain, but never accounted for the VAT to the revenue and thereafter disappeared without

> trace – hence the term, "missing trader". The same consignment of drinks would then be purportedly sold on through one or more of the other companies, dubbed buffer companies for this reason with the final supply in the chain being to a cash and carry outlet. Each company in the chain would submit a VAT return showing closely matching input and output VAT so that little or no tax was due to HMRC. But because the original supplier could not be traced, HMRC never received the amount in VAT to which it was entitled and for which it gave credit to each of the companies in the chain. The cash and carry, on the other hand, remitted the VAT which it charged its customers back to its supplier, the last buffer in the chain, and therein lay the profit to the various Organised Crime Groups [OCG's], as they have been called, involved in the overall operation. The buffer companies were set up with the trappings of genuine traders, with registered offices, company officers, trading premises and registered for VAT."

67. Documents obtained by HMRC for the purposes of that criminal case include excel spreadsheet templates for invoices, purchase orders and delivery notes for companies named on the indictment. These spreadsheets, which were found in electronic devices belonging to the defendants, contained a table of products with formulas to pre-determine purchase and sale prices in addition to a "key tab" that automatically populated the invoices, purchase orders or delivery notes in the other tabs. Mr Powar was unable to explain why the Company appears in several of these spreadsheets.

68. Other documents in that case which referred to the Company included bank statements showing payments to the Company by two of the companies named on the indictment.

Due Diligence

69. Mr Powar understood that it was necessary to have undertaken due diligence to obtain the "paperwork" from suppliers. This included the supplier's VAT number, the director's name and copies of the director's identity document eg a passport or driving licence. Initially he thought that this was a legal requirement for the Company to be able to trade and said that he was not aware that it should be undertaken before commencing trade with a business.

70. During its VAT accounting periods from 11/12 to 05/16 the Company purchased goods from the 11 suppliers referred to in paragraph 53, above. Although Mr Powar claimed to have undertaken due diligence, ie requested VAT numbers etc from these suppliers, there was no documentary evidence produced to confirm that he had done so before July 2015. There is also no documentary evidence of the Experian checks on the financial position of the Company's suppliers that Mr Powar said had been undertaken in or around 2016-2017.

71. However, from around July 2015 he had instructed Sertorius and Hydra (EADD) Limited ("Hydra") to undertake due diligence on behalf of the Company. These companies would attend the offices of the relevant supplier to meet the director, obtain the documents for the company as well as identification documents for the director. Mr Powar, whose evidence was that this due diligence was usually updated every six to eight months, produced reports into six of the Company's suppliers.

72. One such report, dated 1 June 2016 (the "Safina Report"), was prepared by Hydra on Safina London Limited ("Safina"). In a section headed, "Company Overview" it was recorded that Safina had been incorporated on 20 November 2013 and its trading activity was the wholesale of wine, beer, spirits and other alcoholic beverages but until 2015 its trading activity had been automobile and sale of used cars. Although dormant accounts had been filed to 30 November 2011, Safina had not filed any trading accounts.

73. The Safina Report noted that:

> "… [Safina] is due to submit its 2015/16 accounts APE 30/11/15 on or before 20/08/16 and these will need to be analysed to show the financial health of the company as well as the growth and solidity of Safina … . These accounts are late as noted."

The accounts had not been filed at the time the report was updated in November 2016 by Mr Eugene Walsh of Sertorius who was assured by Safina's director that this "was being rectified".

74. Under the heading, "Site Visit" the Safina Report states that it was explained to the director of Safina on behalf of the Company that the Company expected all trading partners to "observe all compliance obligations" of HMRC and Companies House and that any failure to do so would result in Safina being held responsible for any resulting liabilities or tax loss. The Safina Report continues by recording that Safina's director accepted this:

> "… and subsequently signed the Indemnity for **Crystal City & Cash Ltd**." (emphasis added)

75. Mr Powar could not explain the reference to Crystal City & Cash Limited other than to say that he had instructed Hydra to prepare the report and trusted that it would have done so properly and correctly.

76. The Safina Report clearly states that it had been:

> "… compiled from information from a number of sources any inaccuracies within that information should be drawn to the attention of the party publishing said information. No liability is accepted by HYDRA Ltd for any damage or harm however caused to any party following the actions of the reports recipient. Any and all trading activity undertaken by the reports recipient is purely a commercial decision for that party and HYDRA Ltd accepts no liability for any losses of any nature that may be incurred.
>
> Within this document is a detailed appraisal of the company you requested Hydra to undertake Due Diligence on. <u>It is your responsibility</u> to ensure that you act in accordance with your own due diligence policy and requirements set down by HMRC.
>
> You <u>must</u> now objectively consider any risks you identify in the content of the report or the accompanying documents." (emphasis as in the original)

77. Despite such a warning the only action taken by Mr Powar was to ask Mr Walsh, who had prepared the Safina Report, if it was "OK to go", ie for the Company to trade with Safina and when told it was did so especially as it had not been told to do otherwise by HMRC.

78. A due diligence report prepared by Sertorius on 15 August 2015 on AK Suppliers Limited ("AK Suppliers") contained an almost identical warning to that in the Safina Report. The Company had first traded with AK Suppliers in February 2015. However, Mr Powar was unable to recall why trade had commenced before the due diligence report had been commissioned.

79. Documents attached to the report on AK Suppliers included a copy of the Companies House change of name certificate and a certificate of registration for VAT. The Companies House certificate showed that on 25 September 2014 Aircondirect 9 Limited had changed its name to AK Suppliers Limited. The trade classification on the VAT certificate was "wholesale radio/TV goods and Household Electric". Although Mr Powar was certain that he had asked questions of Mr Walsh about the change of name and was advised that this did not raise any concerns, he had no recollection of doing anything similar with regard to the trade classification.

80. Another due diligence report by Hydra, dated 17 July 2015, on JJ General Trading Limited ("JJ Trading") referred to the trading activity of JJ Trading as "Non-Specialist Wholesale Trading" and contained no reference to alcohol, something that did not concern Mr Powar because, as he explained in evidence, there was a clear reference to it being a "wholesale trader".

81. An update to that report completed on 4 February 2016 noted that although Hydra had left an Indemnity Declaration with the director who had stated he would scan and email it to Hydra he had not done so "despite numerous reminders, something which the report warned, "obviously represents a risk" for the Company.

82. However, although the Company did not receive the Indemnity Declaration from JJ Trading, Mr Powar was satisfied by a further update from Hydra on 10 February 2016 in which it was recorded (without any written confirmation from him) that the director of JJ Trading accepted that his company would be responsible for any liabilities or tax loss resulting from the failure of JJ Trading to observe and comply with all HMRC and Companies House compliance obligations arising out of the trade with the Company.

83. Similarly, inconsistencies between documents attached to due diligence reports and other correspondence did not have any effect on whether the Company traded with the supplier concerned. For example, it dealt with Mr Cash & Carry (see paragraph 35, above) even though it had received an undated introductory letter in which Mr Cash & Carry had described itself as a "leading international distributor of Spirits, Wines, Bears (sic) and Soft Drinks from around the world" despite the "Business activity description" in a VAT certificate that had been sent with the introductory letter being "Undifferentiated goods-producing activities of private household for own use".

84. A further example is the undated introductory letter from Blueray, another business with which the Company traded (see paragraph 35, above), and the documents attached to it. Although the letter stated that Blueray "aims to be one of the UK's leading suppliers with an outstanding collection of international brands across spirits, wines and beers", it had a "Yahoo.co.uk" email address and the "Business activity description" in the VAT certificate was "Take-away food shops and mobile food stands".

85. When asked if he had read the due diligence reports, Mr Powar said that although he had "briefly" looked at them, he had mainly relied on the advice of Mr Walsh, who had drafted the reports, as to whether the Company should continue to trade with the supplier concerned. When he was told that there was no reason why it should not continue to trade the Company did so. Mr Powar said that he now realised that he should not have believed his advisers and should have done more himself, saying that obtaining the reports had been "just a waste of money".

DISCUSSION

86. Mr Carey and Ms Stephenson, for HMRC, contend that the VAT returns filed by the Company were inaccurate as they contained a claim for a deduction of input tax to which the Company was not entitled. This was, they say, because the transactions on which input tax was claimed were connected to the fraudulent loss of VAT and that Mr Powar (and therefore the Company of which he was sole director) knew or should have known of that connection. Accordingly, because the Company knew or should have known of the inaccuracies but nevertheless filed the VAT returns the inaccuracies were deliberate and were attributable to Mr Powar who accepted he was responsible for everything done by the Company (see paragraph 38, above). They also contend that the PLN has been correctly calculated and, as such, the appeal should be dismissed.

87. Mr Powar's case is, in essence, rather than a being a participant he is an unwitting victim of the fraud in which the Company had become entangled and that his appeal should succeed. He says that at the time of the transactions he was running a legitimate business and had not known of the prevalence of fraud in the wholesale alcohol market, had not been aware of the extent and/or length of deal chains until receipt of documents for this hearing and did not and could not have known that the Company's transactions were connected to fraud. Although he accepted that he may have been somewhat naïve, he had only become aware the extent of the problem following visits from HMRC and had taken what he had been told on board and acted on it. For example, once he had realised its importance, he had engaged third parties to undertake due diligence on several of the Company's suppliers and had relied on the advice of the authors of those reports that there were no issues in trading with those suppliers. However, he now felt he had been let down by them.

88. HMRC bear the burden of proof in respect of all of the issues in this appeal, namely:

(1) Whether there were inaccuracies in the Company's VAT returns – this requires HMRC to establish that the Company was not entitled to the input tax claimed, ie that the *Kittel* test is satisfied in relation to the relevant purchases. This in turn requires the following to be determined:

(a) was there a VAT loss;

(b) if so, did this loss result from the fraudulent evasion of VAT;

(c) if so, were the Company's purchases on which input tax have been denied connected with that fraudulent evasion; and

(d) if so, did the Company know or should it have known that its purchases were connected with that fraudulent evasion of VAT. HMRC's position was that both of these alternative limbs were met;

(2) Whether such inaccuracies were deliberate.

(3) If so, whether such deliberate inaccuracies were attributable to Mr Powar; and

(4) Whether the penalty and PLN were correctly calculated.

Whether inaccuracies in VAT returns

89. Having considered the evidence before us, we find that there was a VAT loss, that it resulted from the fraudulent evasion of VAT and that the Company's purchases on which input tax was denied were connected with that fraudulent evasion.

90. Firstly, given the involvement of many of the same participants in not only the deal sheets produced by Officer Howse in this appeal but also the criminal proceedings and the observations of the trial judge in those proceedings (see paragraph 66, above), it would seem highly improbable that these were commercial transactions between unconnected parties. Indeed the evidence leads us to conclude that there was a contrived scheme for the fraudulent evasion of VAT with each of the transactions having been pre-arranged.

91. Secondly, it was not seriously disputed that a significant number of the Company's 179 transactions with which this appeal is concerned can be traced back to, and therefore connected with, a fraudulent loss of VAT (we have referred to a "significant number" rather than all 179 transactions, in the light of HMRC's acceptance that it could not be established that 45 of these could be traced to a fraudulent loss of VAT).

92. Finally, having regard to all of the circumstances we have come to the conclusion, for the reasons explained below, that at the very least Mr Powar, and therefore the Company,

should have known that the transactions in question in this case were connected to the fraudulent evasion of VAT.

93. There was no specific factor or "smoking gun" piece of evidence that led us to this conclusion. Rather, it was the overall circumstances surrounding the deals entered into by the Company and the comparative ease with which it was able to engage in transactions which, in our judgment, were "too good to be true" and bear features that we consider would concern a legitimate businessperson or trader but did not appear to have that effect on Mr Powar.

94. Firstly, it was not necessary for the Company to source its supplies. These were, on Mr Powar's evidence, offered to the Company by its suppliers seemingly without much, if any, effort by Mr Powar (see paragraph 58, above). Secondly, Mr Powar appears more often than not to have been able to find customers whose requirements exactly matched the goods the Company had been offered by its supplier (see paragraph 61(4), above). Thirdly, the Company did not add any value to the transactions and there was no commercial reason for its place in the supply chain or any explanation why the suppliers did not deal directly with the customer to which Mr Powar sold the goods on, something Mr Powar could not explain. His only response was to claim that he was running a legitimate business.

95. Additional reasons include, but are not limited to, the following (and no weight should be attached to the order in which they are listed):

(1) The absence of any commercial documentation, other than invoices, for the transactions (see paragraph 62, above);

(2) The absence of insurance on goods in transit and Mr Powar's statement that if goods were damaged he would simply tell the supplier, suggesting an improbably high level of trust in contradiction to his earlier evidence that no one trusts anyone in business;

(3) The consistency in the Company's 2% profit margin irrespective of the product sold (see paragraph 61(5), above);

(4) The payment to suppliers for goods being delayed until funds were received from customers despite invoices containing retention of title clauses (see paragraph 63, above);

(5) The absence of any documentary evidence of any due diligence before 2015 (see paragraph 70, above);

(6) The failure by Mr Powar to engage with and/or take any action in relation to issues raised in the due diligence reports prepared, on his instructions, by a third party, eg the lack of trading accounts which the due diligence report had noted were late (see paragraph 73, above) and the signed indemnity for a different company (see paragraph 74, above) notwithstanding the warning in due diligence that it was the Company's and therefore Mr Powar's responsibility to ensure he acted in accordance with the Company's due diligence policy and objectively consider any risks (see paragraph 76, above);

(7) The fact that the Company traded with AK Suppliers several months before it received a due diligence report on the business (see paragraph 78, above);

(8) The inconsistencies in evidence and new evidence given by Mr Powar at the hearing (see paragraphs 35 and 36, above);

96. For these reasons we consider that Mr Powar, and therefore the Company, not only should have known the transactions were connected to fraud but that it is more likely than not that Mr Powar actually knew of that connection.

97. It therefore follows that, at the time they were submitted to HMRC, the Company's VAT returns were inaccurate in that they contained a claim for a deduction of input tax to which it was not entitled and Mr Powar knew that.

Whether inaccuracies deliberate.

98. Given our conclusion that Mr Powar knew that the VAT returns submitted to HMRC were inaccurate, it follows that the inaccuracies in those VAT were deliberate.

99. As such, it is not necessary for us to consider the position in relation to "should have known" (as opposed to knew) of the connection to fraud other than to note it was not disputed in *Bachra* that if it had been found that there was actual knowledge that the transactions were connected to the fraudulent evasion of VAT, the inaccuracy would have been deliberate.

Whether attributable to Mr Powar

100. Mr Powar accepts that, as he was responsible for everything done by it, the actions of the Company were wholly attributable to him.

Whether the penalty and PLN were correctly calculated.

101. Given our conclusions in relation to the other issues it follows that Mr Powar is liable to the PLN. We agree with HMRC that as Mr Powar did not tell HMRC about the inaccuracies in the VAT returns before having any reason to believe that these had been or were about to be discovered that the disclosure was prompted.

102. The calculation of the PLN, including adjustments made for disclosure as required by paragraph 10 of schedule 24, is summarised above (see paragraph 55). We agree with the conclusion that there should be no reduction for "Telling" as Mr Powar has continued to maintain the VAT returns were accurate. We understand that the maximum deduction has been given for "Helping" and "Giving access", leading to the correct percentage of the potential lost revenue being applied, albeit to the revised and reduced amount of £164,448.37, in accordance with the calculations produced by HMRC during the hearing having accepted that it could not be established that several of the deal chains could be traced to a fraudulent loss of VAT.

103. We also agree with HMRC's conclusion that there are no special circumstances for which an additional reduction can be made.

CONCLUSION

104. Therefore, for the reasons above the appeal is dismissed and the PLN confirmed in the sum of £74,823,63.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

105. 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.

JOHN BROOKS

TRIBUNAL JUDGE

Release date: 17th May 2024