Neutral Citation: [2024] UKFTT 00909 (TC)

Case Number: TC09316

FIRST-TIER TRIBUNAL
TAX CHAMBER

Swansea Civil Justice Centre

Appeal references: TC/2022/00630
TC/2022/11970

VAT – Denial of VAT input tax – Whether transactions in Appellants 12/20, 04/21 and 05/21 VAT accounting periods were connected to a fraudulent loss of VAT – If so, whether Appellant knew or should have known of such connection – Whether Appellant held a valid VAT invoice to support input tax claim in her 07/21 VAT accounting period – If not, whether Respondents' decision not to exercise discretion pursuant to Regulation 29 Value Added Tax Regulations 1995 was one they could reasonably have made – Whether Appellant liable to penalties under s 69C Value Added Tax Act 1994 and/or schedule 24 Finance Act 2007 – Appeal dismissed

Heard on: 9 – 12 September 2024
Judgment date: 15 October 2024

Before

TRIBUNAL JUDGE BROOKS
TRIBUNAL MEMBER ROBERTSON JP

Between

ALEX HARRIES t/a GLAM TANNING AND BEAUTY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Christopher Foulkes of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Ms Alex Harries who traded as Glam Tanning and Beauty appeals against the following decisions of HM Revenue and Customs ("HMRC"):

(1) a decision dated 1 November 2021 to deny a claim for the deduction of input tax in the sum of £221,499. This was in respect of her 12/20, 04/21 and 05/21 VAT accounting periods on the grounds that she knew or should have known that transactions that she had entered into during those accounting periods were connected to a fraudulent loss of VAT (the "*Kittel* Decision");

(2) a decision dated 1 November 2021, which was upheld on 17 December 2021 following a review, to deny a claim for the deduction of input tax in the sum of £27,400 in her 07/21 VAT accounting period. This was on the grounds that she sought to support her claim for the deduction of input tax by a "falsified invoice" rather than a valid invoice or other appropriate evidence as required by Regulation 29 of the Value Added Tax Regulations 1995 (the "Regulation 29 Decision");

(3) a decision dated 3 February 2022 to impose a penalty in the sum of £66,450 pursuant to s 69C of the Value Added Tax Act 1994 ("VATA") in respect of VAT accounting periods 12/20, 04/21 and 05/21 (the "section 69C Decision"; and

(4) a decision dated 7 March 2022 to impose a penalty in the sum of £15,755 pursuant to schedule 24 to the Finance Act 2007 in respect of the accounting period 07/21 on the basis that Ms Harries had, as a result of deliberate and concealed behaviour, submitted an inaccurate VAT return to HMRC (the "Schedule 24 Decision").

2. Ms Harries represented herself and Christopher Foulkes of counsel represented HMRC.

3. Although we have carefully taken account of everything said by Ms Harries and Mr Foulkes during the hearing, as well as all of their submissions and all of the documents to which we were referred, we have not found it necessary to make specific reference to every submission made or all of the materials that were before us in our decision.

EVIDENCE AND FACTS

Evidence

4. In addition to an electronic Hearing Bundle and Supplemental Bundle comprising 1,972 and 210 pages respectively, we heard from HMRC Officers Eoin Francis and Samual Bowley as well as from Ms Harries herself.

5. Officer Bowley is a VAT Assurance Officer who has been employed by HMRC since February 2019. He was the officer allocated to verify Ms Harries' VAT returns and succeeded Officer Alison Vanstone in this role. Officer Bowley was the officer who issued the HMRC decision letters on 1 November 2021 in respect of the *Kittel* Decision and Regulation 29 Decision. It was also Officer Bowley who issued the section 69C Decision on 3 February 2022 and the Schedule 24 Decision on 7 March 2022.

6. Officer Francis is an Economic Crime Supervision Authorisations Manager for HMRC. However, between 2019 and 2022, he was a HMRC VAT Compliance Officer and had, in that role, been an allocated officer for a Laura Elizabeth Harries who was the sole proprietor of a tanning salon which traded as 'New Glam Rock Studio/Glam Tan' ("Glam Tan"). Officer Francis confirmed, when giving evidence, that he had only spoken to Laura Elizabeth Harries on the telephone and that he had never actually met or seen her.

Conflict of Evidence

7. HMRC say that Laura Elizabeth Harries and Ms Harries, the Appellant, are one and the same person and that it was Ms Harries who was registered for VAT as the sole proprietor of Glam Tan.

8. Ms Harries accepts that she set up Glam Tan with the help of her father, Wayne Harries, under whose name the business was originally registered for VAT. She also accepts that at that time her name was Laura Elizabeth Harries (which she changed to Alex Harries by deed poll in 2020).

9. Although Ms Harries explained that Glam Tan was a "very successful" business, she says that, because of personal issues she took the decision in 2017 to take a "step back" from it. This, she says, led to Glam Tan being run by her twin sister. Ms Harries says that she subsequently fell out with her sister to such an extent that they were not on speaking terms. This was, Ms Harries says, because she discovered that her sister had stolen and used her identity to acquire and expand the Glam Tan business for herself. It was, Ms Harries says, her sister that registered the business for VAT in August 2018 using her, Ms Harries' name, following its transfer to her as a going concern by their father. She says that it was her sister, not her, that dealt with Officer Francis in relation to that VAT registration.

10. As such, and because it was her twin sister and not her who ran Glam Tan, Ms Harries says that she had nothing to do with the registration of that business for VAT or had any dealings with HMRC during the time it was VAT registered. Ms Harries says her sister was able to do this because she knew "everything about her" and, for personal reasons, wanted to ruin her life.

11. Having carefully considered the evidence on this issue, we consider that it is more likely than not that HMRC are right, and that the Laura Elizabeth Harries who, as its sole proprietor, registered the business trading as Glam Tan for VAT in August 2018 and subsequently dealt with Officer Francis was Ms Harries the Appellant and not her twin sister.

12. First, the national insurance number stated on the application for VAT registration (the "VAT1") received by HMRC on 3 August 2018 which was completed on behalf of Laura Elizabeth Harries trading as Glam Tan, and the national insurance number on the VAT1 received by HMRC 30 June 2020 for Ms Harries trading as Glam Tanning and Beauty, are identical.

13. Second, both VAT1s also have the principal place of business at the same address. In evidence Ms Harries confirmed that it was her residential address, although explained that she was not living there during the covid lockdowns.

14. Third, a note written by Officer Francis recording a telephone conversation on 20 July 2020, between himself and Laura Elizabeth Harries, noted that she had two units and that VAT repayments claimed were in respect of "new premises – building a salon from scratch – builders, solicotors [sic] – New sunbeds, internal work for shop" and that it had increased "so much this quarter" because of the purchase of new premises which were on a "larger scale than other salon". We find this to be a clear reference to the development of the Glam Tanning and Beauty business by Ms Harries and is consistent with the establishment of that business as she described in evidence.

15. Ms Harries' explanation that her sister would have known about this through their parents and used it in an attempt to ruin her, Ms Harries', life is simply not credible as the assertions made to and recorded by Officer Francis were essentially correct.

16. Finally, an email of 16 November 2020 sent by Ms Harries' father to Officer Francis referred to the difficulties encountered by Ms Harries when trading as Glam Tan and asked

whether there was anything he could do to "sort this mess out" (see paragraph 73, below). The person to whom this email clearly referred, as she accepted in evidence, was Ms Harries herself and not her sister.

17. It is possible that we might have come to a different conclusion if either Ms Harries' sister or father had given evidence. However, they did not.

18. At one point, midway through the hearing, Ms Harries did ask if her father and sister could, even at such a late stage, be called to give evidence. She was told that before any decision could be made she would have to make an application, that HMRC would be entitled to respond to it and she could reply to HMRC's response. She was also warned that this could possibly delay proceedings, especially if an adjournment was sought by HMRC to consider any new evidence. Ms Harries did not pursue this matter further.

19. We should, before setting out our findings of fact, also address another conflict of evidence concerning a telephone number ending in 4807.

20. HMRC contend that this was Ms Harries' telephone number and used by her during the periods with which this case is concerned. Ms Harries says that her telephone number ends 4808 and that the 4807 number is that of her ex-wife who at the time was living with Ms Harries' twin sister. Ms Harries denies that she used the 4807 telephone number in connection with Glam Tan, Glam Tanning and Beauty or in her dealings with HMRC.

21. However, we find that it more likely than not that the 4807 telephone number was that of Ms Harries. This is the telephone number that is stated as being hers on an extract of a document from the Development Bank of Wales ("DBW"), a quotation dated 19 May 2020 by Revolution Interiors to undertake work on the development of Ms Harries' Glam Tanning and Beauty business and the record of a telephone response by HMRC on 17 August 2017 in which Ms Harries had been called on the 4807 telephone number by HMRC. The telephone number is also recorded as being hers on a note of a virtual VAT visit, dated 1 April 2021; an invoice dated 5 July 2021 from Aware Limited ("Aware"); and in an email sent by Ms Harries on 23 August 2021 to Officer Bowley asking him to call her on that number.

22. Therefore, with our conclusion that it was Ms Harries herself who was the sole proprietor of the business trading as Glam Tan in mind, we set out our findings of fact.

Facts

Background

23. In or around 2010 or 2011, having left the military, Ms Harries first met Marc Simpson ("Mr Simpson"). He was "in a relationship" with her friend and was engaged in building work on the site of a new construction in Pembroke. Ms Harries described Mr Simpson as "a building contractor who worked all over the world."

24. Mr Simpson told Ms Harries that there was money to be made in "health and safety" and suggested that this might be something in which she could get involved. Although, because of the time required to gain the necessary qualifications, this did not really interest Ms Harries she nevertheless agreed to explore he options in this field. This led to the incorporation, in Scotland on 19 April 2011, of Ecosafe EHS Limited ("Ecosafe"). Its sole director and shareholder on incorporation was Ms Harries. Mr Simpson was appointed director on 1 September 2011 with his occupation recorded as "consultant". The company was dissolved on 17 August 2012.

25. Ms Harries was unable to explain why Ecosafe had been incorporated in Scotland. She said that the company had been set up by Mr Simpson and although he had told Ms Harries that she was a director she had had very little to do with it.

Ultra Vanity Lounge Limited

26. Mr Simpson left Wales after his relationship with Ms Harries' friend had ended. In his absence Ms Harries decided against establishing any business in the health and safety field. Instead she established a beauty salon at the Foothold Enterprise Village, Llanelli, with the assistance of her stepfather and, on 14 November 2014 Ultra Vanity Lounge Limited was incorporated. The nature of its business was "Hairdressing and other beauty treatment". However, due to its success, Ms Harries' stepfather wanted the business for himself and to exclude Ms Harries from it. He sought to remove Ms Harries as a director but without her and because he had no knowledge of what Ms Harries described as the "tanning world" the business failed. The company was dissolved on 3 January 2017 having been compulsorily struck off the Companies House Register.

Glam Tan

27. As the tenancy of the property, a unit at the Foothold Enterprise Village from which Ultra Vanity Lounge Limited had operated had been in the name of Ms Harries, rather than the company, she decided, with the assistance of her father, to open her own business, Glam Tan, from those premises. Initially the business was in her father's name but to all intents and purposes it was her business.

28. On 3 August 2018, HMRC received a VAT1 from Ms Harries as a sole proprietor trading as Glam Tan. The VAT1, which was prepared by accountants on her behalf, stated that she had acquired the business as a transfer as a going concern from her father with an estimated annual turnover of £80,000. The application was accepted by HMRC and Ms Harries became registered for VAT with an effective date of registration of 1 August 2018. Although Ms Harries said that because of her efforts it became a very successful business, expanding into a second unit at the Foothold Enterprise Village, it nevertheless submitted repayment VAT returns.

29. However, as set out in greater detail below (under the sub-heading 'Contact with HMRC'), following the denial of claims for the deduction of input tax by HMRC, the business was ultimately unsuccessful. It was deregistered for VAT on 12 August 2020. On 24 August 2020, Ms Harries wrote to Officer Francis stating that she had now lost her business and she would have to accept it.

Glam Tanning and Beauty

30. In or around March 2020, when the Covid-19 lockdowns came into effect, Ms Harries had, what she described as a "dream" of setting up a business and creating local jobs by establishing the UK's largest hair, beauty and tanning salon. This was to be known as Glam Tanning and Beauty. Ms Harries drafted business plans and worked on these with the Welsh Government and the DBW from which she obtained an £825,000 loan.

31. On 30 June 2020, HMRC received a VAT1 from Ms Harries as a sole proprietor in relation to this business. The address on the VAT1 was Ms Harries' residential address in Llanelli. The application was accepted by HMRC and Ms Harries became registered for VAT on 1 September 2020.

32. Around July 2020, Ms Harries acquired property at Dafen Trade Park in Llanelli which she intended to develop for Glam Tanning and Beauty. However, because of the covid restrictions, which were different in Wales from those in England, Ms Harries found it difficult to find contractors to carry out the renovations required. Initially she had sought to engage BAPTT Shopfitters Limited ("BAPTT") but, although she was still in communication with BAPTT in December 2020/January 2021, she had decided to engage Aware to undertake the work having made a payment to it of £516,000 on 15 December 2020.

33. Ms Harries said she had engaged Aware because BAPTT were unable to commence work on the unit until May 2021, whereas Aware was not only able to start sooner but was also £100,000 cheaper than BAPTT. Ms Harries had contacted Aware through its director, Mr Simpson who, although he had been working in Albania, was now, because of covid living with his parents in Kent.

34. Having travelled to Wales to look at the Dafen Trade Park property Mr Simpson agreed to take on the refurbishment and renovation work. In the absence of any local hotel accommodation being available because of covid, Mr Simpson planned to live at the Dafen Trade Park property with his contractors whilst the work was being undertaken. However, the landlords of the property objected and it was agreed that Mr Simpson and the contractors would stay at Ms Harries' residential address as she was not living there at the time.

35. What Ms Harries described as "huge amounts of money" were paid to Mr Simpson and Aware. These included a payment of £1,000 to Mr Simpson on 14 December 2020, and payments to Aware of £516,000 on 15 December 2020, £491,493.84 on 28 April 2021, £321,507 on 31 May 2021 and £164,400 on 31 July 2021. Ms Harries explained that the last of these, the payment of £164,400 was actually meant to have been made on 19 June 2021 but that the payment had been delayed until 31 July 2021 because of issues with her bank.

36. However, Ms Harries explained that the refurbishment and renovation of the unit had turned out to be a "nightmare". Aware did not complete the work and left Ms Harries "in the lurch" by disappearing at the end of June 2021. Ms Harries subsequently instructed Dream Builders (which were not VAT registered) to complete the work at a cost of £32,000.

37. Glam Tanning and Beauty began trading on 9 August 2021. On 17 August 2021, *WalesNewsOnline* reported:

> "**Dafen trade park gets a glamorous new addition**
>
> THE old Avon Inflatables in Dafen, Llanelli, which has operated as "Dafen Trade Park" since 2015, has gained a glamorous new addition.
>
> Glam Tanning and Beauty will be a one-stop-shop for all things hair and beauty, creating over 30 jobs.
>
> Laura Harries, who previously ran a salon in the Machynys area, said she was delighted to be expanding:
>
> > 'When the opportunity for the large unit in Dafen came up I took it with both hands. We are recruiting a minimum of 36 new staff members, from experienced hairdressers, nail technicians, beauty therapists and customer service staff. They'll all have the opportunity to learn new skills and gain qualifications via local colleges. I had built up a loyal customer base in my previous salon, and I'm excited to be bringing them with me as well as attracting new customers here.'
>
> Visiting Glam Tan [sic] on their opening day, Lee Waters MS said:
>
> > 'It was great to pop into Glam Tan, to wish Laura Harries and her team good luck with their bold new venture in Dafen Trade park. She's put huge effort, and all she has, into creating what she says is the UK's largest hair; beauty and tanning salon all under one roof. She's had the backing of the Welsh Government's Development Bank for Wales and will be opening in phases over the coming weeks. Pob lwc Lauren [sic]!'

> Also visiting Glam Tan [sic], Nia Griffith MP said: 'Hats off to businesswoman Laura for her vision in setting up this stunning all-in beauty salon .... and I wish her and her great team of staff every success.'"

38. However, because of issues relating to the denial of input tax deductions, the subject of this appeal, which in the absence of VAT repayments led to cash flow difficulties, the business was unable to continue and has ceased trading.

Glam Rocks Limited

39. Glam Rocks Limited was incorporated on 11 May 2020. Its sole director was Miss Laura Harries and its registered office was the Foothold Enterprise Village address that had been used by Glam Tan even though Ms Harries, on her evidence, no longer had any connection with that address. She sought to explain this by saying that she thought that a company was required to have a "commercial address" and when she was able to do so, on 18 May 2020, changed the address of the registered office to the Dafen Trade Park address of Glam Tanning and Beauty.

40. On 25 May 2020, there was an application for a change of particulars for Director. The Director name changed from 'Miss Laura Harries' to 'Miss Alex Harries', with the date of change being 22 May 2020. This was around the time that Ms Harries said that she had changed her name from Laura Elizabeth Harries to Alex Harries by deed poll. She explained that she had done so to prevent local gossip about her financial affairs, which she understood would have had to have been published as she was a director of a company.

41. On 9 June 2020, the registered office address of Glam Rocks Limited was changed to Ms Harries' residential address in Llanelli. Although she did not live there during the covid lockdowns, she did return to collect post and said this was why the address had been changed. However, on 18 June 2020 the registered office address was changed back to the Dafen Trade Park address only to be changed again to Ms Harries' residential address on 29 July 2020. On 9 August 2020, the registered office address was changed back to that at Dafen Trade Park.

42. On 8 December 2020, a charge was registered with a creation date of 3 December 2020. Dormant Company accounts were filed up to 23 May 2021 on 23 February 2022. The company accounts for 31 May 2022 were to be filed by 28 February 2023, and the latest confirmation statement for 13 August 2023 was due by 27 August 2023. Both of these filings are overdue.

43. Glam Rocks Limited was dissolved on 15 February 2022.

Aware

44. Aware was incorporated on 16 November 2020 and is currently active with a proposal to strike it off. The business activity declared at Companies House was '96090 – Other service activities not elsewhere classified.' The company's sole director was Mr Simpson.

45. On registration, the company had a correspondence address in Kington, Kent which is where Ms Harries said Mr Simpson's parents lived.

46. On 3 February 2021, Aware submitted a VAT1 stating its main activity as "Construction and Construction Consultancy including HSE". The principal place of business shown on the VAT1 was Ms Harries' residential address in Llanelli. Initially, Ms Harris said that she was not aware of this. However, during the hearing she confirmed that she did know, in early 2021, that her address had been used and that this was on the advice of HMRC.

47. Aware was registered for VAT with effect from 1 January 2021. On 2 May 2021 the registered office address was changed to that of Ms Harries' residential address.

48. On 24 June 2021, Officer Vanstone wrote to Aware, at Ms Harries' residential address, regarding the 04/21 VAT period. This was because a VAT return had not been filed and a central assessment in the sum of £1,473 had been issued. Officer Vanstone explained that, based on the information she held, the assessment issued was too low and asked that the VAT return be submitted by 8 July 2021. If not, she would need to raise an additional assessment and warned that a penalty might also be issued.

49. Aware submitted its 04/21 VAT return on 3 July 2021. It showed output tax of £8,850 and input tax of £14,898 during the period with a repayment due to the company of £6,048. This was despite two invoices, shown in the table below, that Aware had issued to Ms Harries and which she had provided to HMRC:

Date	Invoice No	Net	VAT	Gross
21/11/2020	190276	£430,000.00	£86,000.00	£516,000.00
05/04/2021	001	£409,578.20	£81,915.64	£491,493.84

50. On 16 July 2021, Officer Vanstone wrote to Aware, again at Ms Harries' residential address, noting that the 04/21 VAT return should have shown higher sales and output tax figures. A copy of Aware's sales and purchase listing for the period from 1 January 2021 to 30 August 2021 was requested. No response was received from Aware. Therefore, on 8 September 2021, Officer Vanstone issued Aware with a "Notice to Provide". This required Aware to provide certain information by 22 September 2021. Aware did not respond to this either.

51. Aware filed its 07/21 VAT return on 8 September 2021. This was also a repayment return showing output tax of £5,188, input tax of £11,866 and a repayment of £6,678. However, it did not include two invoices, shown in the table below, that Aware had issued to Ms Harries which she had provided to HMRC.

Date	Invoice No	Net	VAT	Gross
05/05/2021	003	£267,022.50	£53,584.40	£321,506.90
05/07/2021	007	£137,000.00	£27,000.00	£164,400.00

52. On 7 December 2021, Officer Vanstone wrote to Aware to request the business records and information in support of the repayment claimed in its 07/21 VAT return. Aware did not respond to that letter.

53. On 18 December 2021, an 'Error correction Form' was sent to HMRC. Although it purported to be from Mr Simpson, it was attached to an email with a different address from that previously provided on the VAT1 or used in correspondence with HMRC. No reason was given for the change in contact details. In addition, the error correction form did not contain the information that would be expected, eg the details of the original VAT return submissions or the proposed corrected figures. Rather, it contained a lengthy explanation as to how Mr Simpson had to leave the construction contract at the end of June 2021 and had left his documents at Ms Harries' residential address, which he said he could not remember, but knew that it "was in a town called Llanelli".

54. On 22 December 2021, Officer Vanstone issued Aware with a Notice to provide the information that had been requested (and which was not provided) on 7 December 2021. However, no response was received. On 4 March 2022, Officer Vanstone issued Aware with a "pre-assessment letter" quantifying the output tax due from the sales invoices that had not been declared. Again no response was received.

55. Aware was issued with a VAT assessment for its 04/21 period on 4 April 2022 in the sum of £148,780.31. It was also issued with an adjustment letter for period 07/21, changing the position from a repayment value of £6,678.00 to a net tax due of £45,546.83.

56. In an email of 12 April 2022 to Officer Vanstone, Mr Simpson stated that he was in Albania and although he was paid in full for four invoices by Ms Harries he did not complete the work. He said that his business partner, Ray Massey was the person who completed the VAT returns. In reply, Officer Vanstone sought further information about Mr Massey's role in the business together with Aware's business records. Nothing was received from Aware.

57. On 24 June 2022, Officer Vanstone notified Aware that she was intending to charge a penalty in the sum of £116,178.16 on the basis that incorrect VAT returns had been submitted showing sales that were substantially lower than expected for 04/21 and 07/21. Aware were contacted on several occasions to allow it to provide the right figures for both sales and purchases for these VAT returns. However these details were never provided to HMRC.

58. On 4 July 2022, Aware Limited's registered office address was changed from one in Kington in England to Ms Harries residential address in Llanelli.

59. On 24 August 2022, HMRC issued Aware with a penalty, under schedule 24 to the Finance Act 2007, in the sum of £116,178.16. Penalties of £89,076.40 and £27,101.76 were subsequently imposed on Aware by HMRC for its 04/21 and 07/21 VAT periods.

Contact with HMRC

60. As noted above, Ms Harries, having acquired the business as a transfer as going concern from her father, became registered for VAT with an effective date of registration of 1 August 2018. All VAT returns filed during her VAT accounting periods from 10/18 to 03/20 (inclusive) showed that repayments were due, ie the input tax on purchases had exceeded the output tax on sales.

61. On 20 July 2020, because of these repayment returns, Officer Francis commenced a compliance check into the business by conducting a telephone call with Ms Harries. His note of that telephone conversation records that all of the input tax repayment claims up to then related to the construction work on the two salons.

62. On 21 July 2020, Ms Harries provided Officer Francis with various records and information via Dropbox.

63. Officer Francis wrote to Ms Harries on 22 July 2020. He confirmed receipt of the information she had sent and raised questions regarding the property she had acquired at the Dafen Trade Park to build a salon "from scratch". He noted that she had received funding from the Welsh Government but that this was a "small proportion of the funding for her business (Glam Tan) since it became VAT registered. He also noted that an invoice she had provided from 'Revolution Interiors' was addressed to 'Glam Tan New'. As this invoice was not addressed to Laura Elizabeth Harries, Officer Francis explained that the input tax claimed could not be deducted by her unless she could get the invoice reissued to the correct entity and all other evidence was satisfactory.

64. Also, on 22 July 2020, Officer Francis received and email from Ms Harries. In it she explained that Unit 2 Dafen Trade Park was her "newest and massive unit I'm undertaking currently." She explained that the new building was still under construction and that her planning consent was for change of use only. However, she had begun the interior refit as she had been assured that the planning would be approved shortly. The email was signed "Laura Harries Glam Tan".

65. Officer Francis spoke to Ms Harries on the telephone again on 24 July 2020. During that call he repeated his request for further evidence of the funding for the business from her. She clarified that although she had set up a limited company (Glam Rocks Limited) she was still trading as a sole proprietor. Ms Harries told Officer Francis that she had changed her mind about having the limited company and so passed ownership of this to her sister "Alex", who we have concluded for the reasons above (see under 'Conflict of Evidence) is more likely than not the same person as Ms Harries. She also said that the company would be shut down shortly.

66. On 29 July 2020, Ms Harries contacted HMRC to complain about the time it was taking HMRC to make repayments, particularly in relation to the £45,594 claimed in her 06/20 VAT accounting period which was being withheld whilst Officer Francis completed the enquiry. However, checks by him revealed that two invoices provided by Ms Harries in support of that claim were false and no such supplies had been made.

67. Ms Harries chased HMRC for the repayment again on 5 August 2020. She stated that she was in extreme financial difficulty and needed the money by the following Friday. In a telephone conversation with her on 11 August 2020, Officer Francis explained that he had carried out a number of different checks on the VAT repayment for 06/20 period and that the businesses concerned had stated that they had not issued the invoices Ms Harries had relied on in support of the claim to deduct input tax. Because of this, Officer Francis said that he would be disallowing the input tax that had been claimed as Ms Harries had provided fraudulent invoices. Prior to that telephone call, Officer Francis had issued Ms Harries with HMRC factsheets: CC/FS7a – 'Penalties for inaccuracies in returns and documents' along with CC/FS9 'The Human Rights Act and penalties'.

68. Ms Harries business, Glam Tan, was deregistered from VAT on 12 August 2020. There was no VAT outstanding on deregistration as all VAT returns submitted had been repayment returns.

69. On 18 August 2020, Officer Francis issued an assessment letter to Ms Harries. It explained that her VAT repayment submitted for the period ending 06/20 would be reduced by £47,594 because of the false invoices submitted in support of the claim. Also, as Officer Francis had discovered errors in the VAT return for this period, he advised Ms Harries that it was necessary to open a compliance check on each of the other periods for the business since the 10/18 period. This was to ensure the accuracy of the repayments made in the previous periods. He therefore requested that Ms Harries provide HMRC with VAT returns and supporting evidence for each VAT accounting period back to and including period ending 10/18.

70. Ms Harries responded by email on 24 August 2020 stating:

> "My business has gone so has everything else so not much I can do so accept ur letter and my vat registration is cancelled."

71. On 1 September 2020, Officer Francis made attempts to obtain the outstanding information that he had requested on 18 August 2020 from Ms Harries. He also referred her to VAT Notice 700/21 which relates to record keeping.

72. Officer Francis received a reply from Ms Harries on the same day explaining that she was moving away, and everything was "gone", and "I ain't coming back to the UK."

73. On 16 November 2020, Officer Francis received an email from Wayne Harries who explained that he was Laura Harries' father. The email described certain private matters relating to Ms Harries and concluded by asking, "Is there anything I can do Mr Francis to sort this [VAT] mess out with you." Officer Francis responded to Mr Harries

by email on 19 November 2020 in which he expressed his concern and said it was not his intention to cause any further stress. The email explained that HMRC was unable to deal with Mr Harries directly, as he was a third party, without Ms Harries' authority but that Officer Francis would periodically "keep in touch" with her.

74. On 9 September 2021, Officer Francis wrote to Ms Harries informing her of his intention to charge an inaccuracy Penalty of £38,075.20 for her 06/20 VAT period. The Penalty Schedule explained that during the course of the investigation Ms Harries had provided false invoices and bank statements to make a claim for input tax and that no evidence was provided to suggest that this was anything but a fraudulent claim.

75. On 16 September 2021, Officer Francis, as he had indicated, issued a Notice of Penalty Assessment, under Schedule 24 of the Finance Act 2007, to Ms Harries. She did not appeal against this penalty and the £38,075.20 is currently an outstanding debt to HMRC. Officer Francis could find no further evidence of any contact with HMRC by Ms Harries in relation to Glam Tan.

76. However, on 30 June 2020, HMRC received a VAT1 from Ms Harries in relation to Glam Tanning and Beauty. As noted above, this was accepted and she was registered for VAT from 1 September 2020.

77. On 14 December 2020, Ms Harries made a bank payment of £1,000.00 to Mr Simpson. Another bank payment was made by Ms Harries on 15 December 2020, this time of £516,000 which was paid to Aware.

78. Ms Harries filed her VAT return for the 12/20 accounting period on 3 March 2021. It contained a repayment claim of £86,466.29.

79. On 12 March 2021, Officer Vanstone sent, by email, a letter and factsheet to Ms Harries notifying her that the 12/20 VAT return was being checked and that further information was required. Ms Harries did provide some information to Officer Vanstone by emails on 13 March 2021.

80. Around that time Ms Harries instructed an accountant, Mr Mark Williams, as her representative. Although Ms Harries explained in evidence that the job was "too big" for him, Mr Williams did respond to Officer Vanstone's email request for further information on 18 March 2021. On 22 March 2021, Mr Williams provided Officer Vanstone with a VAT account, bank statements, asset list and a sales invoice from Aware relating to the refit of the Dafen Business Park unit.

81. Having spoken to Mr Simpson on 24 March 2021 to discuss the Aware sales invoice and been told that it contained an error which Mr Simpson would speak to Ms Harries about, on 25 March 2021, Officer Vanstone emailed Ms Harries to request further information regarding a £825,000 Bank of Wales loan payment going into her bank account. The email also advised that Mr Simpson would be in touch with Ms Harries regarding a discrepancy with the date of the invoice.

82. Officer Vanstone also made arrangements to carry out a virtual premises visit on 1 April 2021 (as an actual visit was not possible due to covid restrictions then in place) to discuss the repayments and verify records.

83. On 26 March 2021, Officer Vanstone sent, via e-mail, a letter to Ms Alex Harries regarding the VAT return for her 03/21 accounting period as this showed a repayment of £27,465.00. Ms Harries responded by sending Officer Vanstone two emails on 25 March 2021 and five emails on 26 March 2021.

84. The following emails were sent on 25 March 2021:

(1) At 18:10 – an email explaining Ms Harries was very upset and angry with Mr Simpson for declaring to Officer Vanstone the incorrect amount paid to him by her:

(2) At 18:50 – an email explaining the DBW payment;

(3) At 18:38 – an email with her Metro savings account;

(4) At 18:57 – an email advising that the January, February and March VAT Return was submitted early in error by her accountant. Ms Harries explained that there was a lot of expenses but that her annual turnover would be £1.8 million. She was looking at a second unit in Swansea and had hoped for a meeting with HMRC before 1 April 2021 and acknowledged that the two bank holidays (ie Good Friday and Easter Monday, 2 and 5 April 2021 respectively) posed a problem for HMRC. She said that she was looking forward to giving Officer Vanstone an in-depth virtual tour of the business "as she had nothing to hide"; and

(5) At 20:06 – an email with a picture of her social media pages.

85. The first of the 26 March 2021 emails, sent at 17:28, asked if Officer Vanstone was looking at the correct bank statement that Ms Harries had previously sent, advising that her accountant would send extra information in and explaining the scale and size of her venture. The second 26 March 2021 email, sent at 17.30, attached Ms Harries' Revolut bank statement for December 2020.

86. As part of the verification process for the repayment claims, Officer Vanstone and Officer Dan McKay carried out a virtual visit, using Microsoft Teams, of Ms Harries' business on 1 April 2021. The visit report records that this virtual tour of the business was undertaken to establish a "bona fide business" and notes that there were no irregularities found. It was also noted that Ms Harries' previous business was sunbeds and the new business was due to open in May 2021 but that there was currently building work being completed. The visit report also recorded that Ms Harries was in receipt of a DBW loan of £825,000.00 and that she had changed her name by deed poll to Alex Harries.

87. Aware paid £2,000, £300 and £300 into Ms Harries' bank account on 4, 5 and 17 June 2021 respectively. In evidence Ms Harries said that these payments had been made to cover expenses that she had incurred on Aware's behalf to subcontractors or suppliers to ensure work continued on the property.

88. Ms Harries' 05/21 VAT return claimed a repayment of £53,826.20. On 11 June 2021 Officer Vanstone telephoned and wrote to Ms Harries in respect of that return to advise that payment would be withheld until the figures on the return had been verified. Officer Vanstone requested further information in respect of this and the 04/21 VAT Return which was also subject to verification. On 13 and 14 June 2021, Ms Harries provided several documents to Officer Vanstone.

89. On 15 June 2021, Officer Vanstone emailed Ms Harries with various queries in relation to the 04/21 and 05/21 periods seeking evidence as to the source of certain payments shown in the bank statements. She also noted that invoices from Aware charging VAT of £81,915.64 in the 04/21 period and £53,584.50 in the 05/21 period did not have a VAT number and, as these were therefore invalid, requested corrected invoices. Ms Harries provided Officer Vanstone with a bank statement on 21 June 2021 showing a transfer of £500,000 from her father W G Harries.

90. A further virtual visit of the business took place on 22 June 2021. During that visit Ms Harries explained that it was due to open on 2 July 2021, later than planned due to a set back with the building work. Ms Harries also advised that she was trying to change the legal entity

from sole proprietorship to a Limited Company and that she was hoping to branch out and not only have additional businesses, in Swansea and/or Cardiff, in the future but also to manufacture and sell her own branded products around the UK. She believed that her first-year turnover would be between £1.5m – £2m and that she had a current customer base of around 6,000.

91. On 1 August 2021, Ms Harries filed her VAT return for the 07/21 accounting VAT period. This contained a repayment claim of £59,997.23. Because of the repayment claim the return was selected for verification. That task was allocated to Officer Bowley who, on 20 August 2021, wrote to Ms Harries asking her to contact him by 27 August 2021 to arrange a telephone meeting as HMRC were opening a check of the 07/21 VAT return.

92. Ms Harries emailed Officer Bowley on 23 August 2021 asking him to call her on the telephone number ending 4807. Officer Bowley called Ms Harries on that number on 24 August 2021. During the telephone conversation Ms Harries told Officer Bowley that she opened the business (Glam Tanning and Beauty) on 9 August 2021 and had begun making taxable supplies from that date. She also confirmed that the business had one business current account and two savings accounts with Revolut Bank. She said that the VAT repayment had been claimed as a result of a delay in the business opening for trade owing to covid restrictions in addition to the refurbishment costs she had incurred.

92. On 25 August 2021, Ms Harries provided Officer Bowley with purchase invoices, bank statements and purchase/sales listings in support of her input tax claims. These documents included an invoice from Aware dated 5 July 2021 for building work/refurbishment to the salon with a gross value of £164,400.00 which included VAT of £27,400.00. Ms Harries said that she had paid Aware £164,400 on 19 June 2021 although this had actually left her bank on 31 July 2021 (see paragraph 35, above). On 26 August 2021, Ms Harries provided Officer Bowley with the VAT account.

93. On 1 September 2021, Ms Harries sent a further email to Officer Bowley. In it she emphasised the urgency of getting the repayment resolved as she was getting chased by staff and contractors. They were asking if they would be getting paid and/or if she would be paying their invoices. Officer Bowley replied the same day. He noted Ms Harries' stress and concern about her financial position that had arisen as a result of the time taken for the compliance checks into the VAT returns. He explained that as some checks take longer than others he was unable to give an exact date that he would be able to complete the enquiry but would provide an update as soon as he was able to do so.

94. Ms Harries sent Officer Bowley an email on 3 September 2021. In it she said that she had been forced to close the business because of the delay in the payment of her repayment claim and that she had made a formal complaint to HMRC on 2 September 2021.

95. On 6 September 2021, Ms Harris submitted the VAT return for 08/21 accounting period 08/21. This included a repayment claim in the sum of £34,368.65. As the current enquiry was ongoing, this new claim was assigned to Officer Bowley to be verified.

96. On 9 September 2021, Ms Harries wrote, by email, to Officer Bowley asking if there was any update regarding the VAT repayments as she was:

> "… about to sign for a huge place in Swansea 3 x the size creating 74 jobs and this is really making me stressful as it's now having an adverse affect on my credit file as my business loan is now in arrears and if u find my 1st builder who has done me over pls throw the book at him as he has cost me in every way the evil man."

97. Officer Bowley wrote to Ms Harries on 13 September 2021 in relation to her 07/21 VAT return. He explained that the purchase invoice from Aware, dated 5 July 2021 in the sum of £164,400, was not sufficient evidence to support a claim for deduction of input tax as it did not meet all the required conditions to be considered a valid VAT invoice. It did not display the Supplier (Aware Limited's) VAT registration number and there was no sequential invoice number present. In addition, the invoice did not contain a detailed breakdown of the goods/services provided. As such, Ms Harries was asked to provide a supporting quotation for the building works completed or an itemised breakdown of this invoice showing the calculation of the total invoice being £137,000 + VAT (ie £164,400).

98. Despite the disappearance of Mr Simpson in June 2021 (see paragraph 36, above) Ms Harries responded to Officer Bowley, also on 13 September 2021, that she had:

> "… managed to sort Aware Invoice and got sent this just now so I forward to you with regards to Aware Ltd to stop any more delay I've requested other information from Aware Ltd but I'm yet to receive and I will hound him until it is done but here is the updated invoice."

99. In addition to the "new" Aware invoice, dated 5 July 2021, Ms Harries, in another email, of 13 September 2021, provided a quotation from Aware, dated 5 July 2021. This showed the costs of the works totalling £137,000. These documents raised concerns with Officer Bowley.

100. First, the amended "new" Aware invoice provided showed inconsistencies from the original invoice with the text font, invoice layout, invoice number and description of goods all differing from the original invoice provided. It also, under the 'Description' of the goods or services provided, included the following:

> "Apologies Miss Harries I Have now rectified the invoice to include my company & vat number & will do a further breakdown of invoice details later & forward you on ASAP as I understand it having an effect on your business sorry for you not being able to contact me I have been on another huge build & travelling back & forth to Albania."

101. Secondly, the 5 July 2021 quotation showed the same work to be completed as had a previous quotation that was provided to Officer Vanstone in November 2020.

102. Thirdly, a check of the VAT returns for Aware confirmed that the output tax declared did not quantify to a value that could include the input tax being claimed by Ms Harries. Additionally, the VAT1s for both Aware and Ms Harries t/a Glam Tanning & Beauty showed a link to the same address – Ms Harries residential address in Llanelli.

103. Officer Bowley therefore wrote to Ms Harris on 15 September 2021 to open a check on the 08/21 VAT accounting period. He requested various documents including:

(1) VAT account including purchase and sales listings for period 08/21;

(2) Bank statements for all the bank accounts used within the business between 1 August and 31 August 2021; and

(3) The ten largest VAT value purchase invoices for period 08/21.

104. On 19 September 2021, Ms Harries wrote to Officer Vanstone and explained that she had received Officer Vanstone's letter addressed to Mr Simpson at her residential address. Ms Harries explained that Mr Simpson was living at her residential address in Llanelli while the building work was being carried out but that he had:

> "… upped and left in middle of night in July and haven't seen him since. I've since learned he is back in Albania and left me in a mess and I have paid him a small fortune and he has done me right over."

Ms Harries also provided some undated excerpts of screenshots chasing Mr Simpson. These included an undated hostile reply from him asking her to leave him alone.

105. Ms Harries continued to chase Officer Bowley regarding the VAT repayment. Between 2 and 14 October 2021, HMRC received a number of messages from her complaining of the delay in processing her repayment claims and stating that the business was collapsing. In these Ms Harries said that she was going to have to cease trading as she had no money, and that HMRC had caused safety issues for her and her staff.

106. On 1 November 2021, HMRC issued the *Kittel* Decision and Regulation 29 Decision letters to Ms Harries (see paragraph 1(1) and (2), above).

107. Following further correspondence between Ms Harries and Officer Bowley, in which Ms Harries had requested the repayment to be released as she was struggling financially, on 10 December 2021, Ms Harries sent Officer Bowley an email stating:

> "I'm permanently closing the salon tomorrow 5pm it's to [sic] late and I can't even afford a meal HMRC have done everything to ruin an amazing business nothing I can do."

108. The Section 69C Decision (see paragraph 1(3), above) was issued on 3 February 2022. On 7 March 2022 the Schedule 24 Decision was issued (see paragraph 1(4), above).

LAW

109. 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 provisions have been incorporated into UK domestic law by ss 24 – 26 VATA.

110. HMRC may require the production of evidence as a condition to allowing or repaying input tax (see paragraph 4(1) of Schedule 11 to VATA).

111. Regulations 13 and 14 of the Value Added Tax Regulations 1995 (the "1995 Regulations"), which were made under VATA, require a person making a taxable supply to provide a VAT invoice containing particulars including a sequential number, the date of the invoice, the name, address and registration number of the supplier, the name and address of the person to whom the goods or services are supplied, a description sufficient to identify the goods or services supplied and the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency.

112. Under Regulation 29, a person claiming a deduction of input tax must hold such an invoice or "such other evidence of the charge to VAT" as HMRC may direct.

113. Therefore, a trader with an invoice, or alternative evidence allowed by HMRC in support, is entitled to claim a deduction of input tax and either set it against their output tax liability or, if the input tax credit due to them exceeds the output tax liability, receive a repayment.

114. However, there are exceptions to this principle.

(1) The right to deduct cannot be relied upon for fraudulent or abusive ends. It is a matter for the national court to determine whether this is the case (see *I/S Fini H v Skatteministeriet* [2005] EUECJ (C-32/03) ("*Fini*") at [32] – [34]).

(2) The right to deduct is also precluded 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. 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]).

115. 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* .
>
> [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."

116. 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 to consider the totality of the evidence.

117. 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]).

118. 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."

119. 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]).

Invalid/False invoice

120. Where an invoice is held that is valid on its face, ie it complies with the requirements set out in the 1995 Regulations, it is for HMRC to establish that the invoice is false (see Advocate General Slynn in *Lea Jorion (née Jeunehomme v Belgian State* ECJ 31.05.1988 C-123/87).

121. However, as noted above, where no valid invoice is held HMRC may, under Regulation 29 of the 1995 Regulations, instead of a valid invoice allow "such other evidence" to be produced in support of a claim for an input tax deduction. On an appeal against the refusal by HMRC to exercise that discretion to allow a claim, the jurisdiction of the Tribunal is supervisory, it must consider only the material available to HMRC at the time the decision was made. It is for the Appellant to establish that HMRC's decision was one that could not reasonably have made (see *Kohanzad v Commissioners of Customs and Excise* [1994] STC 967).

122. In such an appeal, as is clear from *Scandico Ltd v HMRC* [2018] STC 153 at [43], the Tribunal should not consider whether there has been a taxable supply, but must only address:

> "… the decision which is before it, namely HMRC's decision that, in the absence of the VAT receipts, they were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer as to whether there had been a taxable supply."

123. The effect of a failure to provide a valid VAT invoice and the exercise of HMRC's discretion was considered by the Court of Appeal in *Tower Bridge GP Ltd v HRMC* [2022] EWCA Civ 998. In relation to the exercise of their discretion, the Court observed (Lewison LJ) at [123]:

> "In my judgment, however, there are in fact two exercises of discretion embedded within the proviso. The first is whether to entertain an application to establish the right to deduct otherwise than by a compliant invoice ("where the Commissioners so direct"). The second, if the first discretion is exercised in the taxable person's favour, is the discretion to specify the documentary evidence that HMRC require in order to prove that the input tax has been incurred ("such other documentary evidence of the charge to VAT as the Commissioners may direct."

Penalties

Section 69C VATA

124. The penalties against which Ms Harries has appealed were imposed under s 69C VATA (for VAT accounting periods 12/20, 04/21 and 05/21 in relation to the *Kittel* Decision) and schedule 24 to the Finance Act 2007 (for the 07/21 VAT accounting period which relates to the Regulation 29 Decision).

125. Section 69C VATA provides that a person, whose claim for a deduction of input tax has been denied by HMRC on the basis they knew or should have known that a transaction

entered into was connected to the fraudulent evasion of VAT, is liable to a penalty of 30% of the "potential lost VAT" (see s 69C(1) – (7) VATA).

126. The potential lost VAT is defined by s 69C(8) VATA as:

> (a) the additional VAT which becomes payable by T as a result of the denial decision,
>
> (b) the VAT which is not repaid to T as a result of that decision, or
>
> (c) in a case where as a result of that decision VAT is not repaid to T and additional VAT becomes payable by T, the aggregate of the VAT that is not repaid and the additional VAT.

127. Where a person is liable to a penalty under this s 69C VATA, HMRC may assess the amount of the penalty and notify it to them accordingly. Such a penalty may be made immediately after the denial and notice of the penalty and denial decision may be given in the same document (see s 69C(9) and (11) VATA). However, a penalty may not be issued "more than two years after" the issue of the denial decision (see s 69C(10) VATA).

128. No liability to a penalty arises under s 69C VATA if, because of their action in making a claim for deduction of input VAT, a person is liable to a penalty under paragraph 1 of schedule 24 to the Finance Act 2007 (see below) or convicted of an offence (see s 69C(12) VATA). However, this does not assist Ms Harries in the present case because the liability to a penalty under paragraph 1 of schedule 24 to the Finance Act 2007 arises out of different circumstances to the liability under s 69C VATA, namely the Regulation 29 Decision as opposed to the *Kittel* Decision.

129. A penalty imposed under s 69C VATA may be reduced by HMRC or, on appeal, by the Tribunal under s 70 VATA "to such amount (including nil) as they think proper". However, in reducing the penalty HMRC and/or the Tribunal are precluded (by s 70(3) – (5) VATA) from taking into account "the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty."

Schedule 24 Finance Act 2007

130. 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).

131. 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.

132. Paragraph 3(1)(c) provides that an inaccuracy in a VAT return is "deliberate and concealed" if the inaccuracy is deliberate and arrangements are made "to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

133. 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.

134. 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.

135. 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".

136. 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".

137. 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.

138. 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).

139. 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.

140. 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).

DISCUSSION

141. The facts and applicable law, described above, give rise to the following four issues:

(1) In respect of the *Kittel* Decision (for VAT periods 12/20, 04/21 and 05/21):

(a) whether the transactions with Aware were connected to the fraudulent evasion of VAT; and

(b) if so, whether Ms Harries knew or should have known of that connection, or

Alternatively, was the right to deduct VAT exercised fraudulently or abusively by Ms Harries.

(2) In respect of the Regulation 29 Decision (for the 07/21 VAT period) whether, in the absence of a valid VAT invoice, HMRC's decision not to exercise their discretion, pursuant to Regulation 29 of the 1995 Regulations, to accept the alternative evidence provided by Ms Harries was not one they could reasonably have made.

Alternatively, was the right to deduct VAT exercised fraudulently or abusively by Ms Harries.

(3) In respect of the section 69C Decision (for the VAT accounting periods 12/20, 04/21 and 05/21):

(a) As Ms Harris entered into transactions involving receiving a supply from Aware, whether those transactions were connected with the fraudulent evasion of VAT by Aware (whether occurring before or after Ms Harries entered into the transactions)?

(b) did Ms Harries know, or should she have known, that the transactions were connected with the fraudulent evasion of VAT by another person?

(c) have HMRC issued a decision in relation to the supply which—

(i) Prevents Ms Harries from exercising or relying on a VAT right in relation to the supply,

(ii) is based on the facts which satisfy conditions (a) and (b) above in relation to the transaction, and

(iii) applies the principle of EU case law established by the European Court of Justice in Cases C-439/04 and C-440/04 *Axel Kittel v. Belgian State; Belgium v. Recolta Recycling*?

(4) In respect of the Schedule 24 Decision, whether the decision of HMRC that the 07/21 VAT return filed by Ms Harries contained an inaccuracy was correct?

Kittel Decision

142. HMRC contend that Ms Harries' transactions with Aware were connected to the fraudulent evasion of VAT and that Ms Harries knew or should have known of that connection.

143. We agree. In our view there is little doubt that the conduct of Mr Simpson, and therefore Aware, as described above (see paragraphs 48 – 57), resulted in fraudulent VAT losses. In particular, those fraudulent VAT losses were caused by the failure of Aware to account for, or declare on its VAT returns, the VAT on the invoices issued to Ms Harries on 21 November 2020 in the sum of £430,000, on 5 April 2021 in the sum of £409,579, on 5 May 2021 in the sum of £267,022 and on 5 July 2021 in the sum of £137,000.

144. It is also clear that the transactions with which this appeal is concerned, ie those between Ms Harries and Aware, are connected to that fraud. In addition, we find that there are further connections between Ms Harries and Aware and/or its director Mr Simpson. They were both directors of Ecosafe (see paragraph 24, above), Aware was registered for VAT at Ms Harries' residential address in Llanelli (see, eg paragraph 46, above) and despite Ms Harrries' assertion that she had been left "in the lurch" by Mr Simpson who disappeared at the end of June 2021 (see paragraph 36, above), Aware changed its registered office address to her residential address on 4 July 2022 (see paragraph 58, above).

145. Having concluded that Ms Harries was the sole proprietor of both Glam Tan and Glam Tanning and Beauty, we consider that, given her contact with HMRC and Officer Francis and her experience of being denied an input tax deduction when trading as Glam Tan, particularly in relation to her 06/20 accounting period where her claim was denied as it was supported by false, ie fraudulent, invoices (see paragraph 74, above), she should and would have been aware of the necessity of obtaining valid invoices to support her claims to deduct input tax and the potential of fraud at the time she established Glam Tanning and Beauty.

146. Because of this we would have expected her to take extra care before engaging Aware to undertake the building and renovation work on the Dafen Business Park Unit. However, it is clear she did not. The payment of £516,000 to Aware on 15 December 2020 (see paragraph 32, above) before it was registered for VAT (see paragraph 47, above) is clear evidence of this.

147. Given the connections between Ms Harries and Mr Simpson/Aware, and having regard to all of the circumstances, particularly in regard to the payments she made to Aware (see paragraph 35, above) some of which were after HMRC had raised concerns about the validity of Aware's invoices, we have come to the conclusion that, as a result of her previous knowledge and experience of having received fraudulent invoices, Ms Harries should, at the very least, have known that her transactions with Aware were connected to the fraudulent evasion of VAT.

148. Accordingly, it follows that her appeal against the *Kittel* Decision cannot succeed.

Regulation 29 Decision

149. HMRC contend that the evidence described above establishes that not only the first invoice, that dated 5 July 2021, provided in respect of the 07/21 supply to Ms Harries was invalid, but the replacement invoice, and probably the first invoice, she produced in support of her claim for a deduction of input tax were false.

150. Given the absence on the 5 July 2021 invoice of Aware's VAT number, a sequential invoice number or detailed breakdown needed to identify the work undertaken (see paragraph 97, above) we agree with HMRC that it was not a valid invoice and could not therefore support a claim for the deduction of input tax.

151. We also consider that the decision of HMRC not to exercise their discretion to accept the replacement invoice provided by Ms Harries was one that could reasonably have been made.

152. In reaching such a conclusion, HMRC did not take into account any irrelevant matters or fail to take all relevant matters into account. This included Ms Harries' evidence, which we have accepted, that Aware had left her in the lurch and had not completed the work for which she had been invoiced (see paragraph 36, above).

153. It follows, therefore, that Ms Harries' appeal against the Regulation 29 Decision falls to be dismissed.

Section 69C Decision

154. Having found against Ms Harries in her appeal against the *Kittel* Decision her appeal against the Section 69C Decision also cannot succeed. This is because we have concluded that HMRC correctly denied Ms Harries a deduction of input tax on the basis that her transactions with Aware were connected to the fraudulent evasion of VAT and that she should have known of that connection.

155. Although the Tribunal has the power, under s 70 VATA, to reduce the penalty, we agree with HMRC that, having regard to all the circumstances, no further mitigation is appropriate. We therefore confirm the penalty in the sum of £66,450.01.

Schedule 24 Decision

156. HMRC contend that Ms Harries made an inaccurate VAT return for her 07/21 accounting period. They say that this inaccuracy was caused by her "deliberate and concealed" claim for input tax by use of a false invoice. HMRC further contend that the disclosure of the of the inaccuracy was "prompted" as Ms Harries did not tell HMRC about it until it was discovered.

157. Accordingly, the penalty range was set at 50% – 100% of the potential lost revenue ie the amount of VAT denied. To this HMRC allowed the following reduction for the quality of the disclosure given by Ms Harries:

(1) Telling HMRC about it 15% (although a disclosure was not made during the enquiry, information relating to the inaccuracy was disclosed);

(2) Helping HMRC understand it 40% (positive assistance was given regularly throughout the enquiry); and

(3) Giving access to records 30% (all business records and information relating to the inaccuracy were provided by Ms Harries when requested).

158. This led to a total reduction of 85% with the penalty being calculated as follows:

85% x (100% - 50%) = 42.5%

Penalty percentage is therefore 100% - 42.5% = 57.5%

Penalty is 57.5% x £27,400 = £15,755

159. HMRC concluded that no special circumstances were found to exist.

160. We agree with HMRC that the behaviour of Ms Harries leading to an inaccuracy in her 07/21 VAT return was deliberate. It contained an inflated claim to a repayment of VAT relying on an invalid invoice in support. We consider that, given her previous experience with the 06/20 Glam Tan VAT return where a claim for input tax was denied because it had been supported by invalid invoices, Ms Harries would have known that she was not entitled to claim input tax without a valid invoice but not only did so but provided HMRC with another invalid invoice to support the inaccurate claim when the first invoice had been rejected by HMRC.

161. As a result, we agree with HMRC that in addition to being deliberate the inaccuracy in the return was also concealed. HMRC have therefore applied the correct range of penalty to the potential lost revenue.

162. Having carefully considered all of the circumstances, we see no reason to interfere with HMRC's mitigation and calculation of the penalty in the sum of £15,755. We also agree with HMRC that there are no special circumstacnces that warrant a reduction in the penalty.

DECISION

163. Therefore, for the reasons above, we dismiss the appeals and confirm the penalties in the amounts as stated above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

164. 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: 15th OCTOBER 2024