[2021] UKUT 118 (TCC)

Appeal number: UT/2020/0004

INCOME TAX / VALUE ADDED TAX— whether FTT erred in not weighing probability of HMRC's assessment based on unidentified deposits representing appellant's trading income against appellant's case – whether FTT erred in contractual interpretation – whether FTT erred in impermissibly reaching own view on original document that had been translated – whether FTT erred in concluding no transaction had taken place and refusing appellant input VAT in circumstances where supplier had been wound up for non-payment of output VAT – appeal allowed in part – case remitted to FTT to address appellant's argument that deposits could not have been trading income due to lack of trading activity

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

GOLAMREZA QOLAMINEJITE (aka ANTHONY COOPER)	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE ANDREW SCOTT

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 15 February 2020

Ross Birkbeck, counsel, for the Appellant

Marianne Tutin, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. The appellant, who, in accordance with his preference, we refer to as Mr Cooper, appeals against the decision of the First-tier Tribunal ("FTT") published as *Golamreza Qolaminejite (aka Anthony Cooper) v HMRC* [2019] UKFTT 713 (TC). That decision covered a wide range of issues arising out of a long-running and wide-ranging enquiry into Mr Cooper's tax affairs. Mr Cooper arrived in the UK in 1996 from Iran where Mr Cooper had inherited valuable assets. He had a background and interest in ships, aircraft and engineering. He later set up business as a sole trader and subsequently also a limited company. The FTT decision concerned income tax and VAT assessments raised on Mr Cooper for multiple years and associated income tax and VAT penalties, some of which Mr Cooper was successful in overturning. This decision concerns Mr Cooper's appeal in relation to certain of the income tax assessments and a VAT assessment which the FTT upheld. He challenges the FTT's conclusion on these on a number of discrete grounds. In brief those are:

> (1) The FTT upheld certain of HMRC's assessments on the basis Mr Cooper had not shown on the balance of probabilities that various deposits in his account were not trading income. Did the FTT err in omitting to balance the probability of HMRC's case that the income was trading income against Mr Cooper's case the income was not trading income but derived from other sources (loans or transfers from other accounts)? (**Ground 1**)
>
> (2) The next three grounds concern the FTT's interpretation of a contract relating to the sale of three barges, the identity of the parties, and the capacity in which the selling party entered into the contract:
>
> > (a) Was the FTT correct to find a pre-payment was non-refundable? (**Ground 2**).
> >
> > (b) The FTT concluded that Mr Cooper as sole trader, rather than his limited company, was the relevant party to the contract. In so concluding did the FTT err in impermissibly substituting its own interpretation of the original contract, disregarding the professional translator's version? (**Ground 3**).
> >
> > (c) Even if it was the limited company which was the party, the FTT considered the company entered into the contract as Mr Cooper's agent. Did it err in so concluding? (**Ground 4**).
>
> (3) Lastly, the FTT concluded HMRC were correct to refuse Mr Cooper input VAT on the purchase of a boat design because it was not satisfied the transaction had taken place. He argues that because the FTT found that the company which sold the design was wound up by HMRC on the basis

> of unpaid VAT in relation to that transaction, the FTT was legally compelled, in essence for reasons of neutrality, to accept the transaction had taken place. (**Ground 5**)

2. Mr Cooper was granted permission to appeal on Grounds 1-3 by the FTT and on Grounds 4 and 5 by the Upper Tribunal.

Background FTT Decision

3. In the course of dealing with the many issues before it, the FTT made a number of findings of fact. Our decision concerns a much narrower compass of issues and we set out the parts of the decision relevant to the grounds under the relevant grounds of appeal. When doing so the paragraph numbers refer to those in the FTT's decision. Save as dealt with in these grounds the findings were not in dispute. The only other person we need to introduce, given the role he or his company plays in some of the grounds, is Mr Sami Evans. Mr Cooper stayed in the hotel owned by Mr Evans' family after arriving in the UK. They had a shared interest in engineering and became good friends. Mr Cooper entered into various contracts with Mr Evan's company ("SDS").

Grounds of Appeal

Ground 1: The Tribunal misapplied the standard of proof in relation to the Unidentified Deposits

FTT Decision.

4. The years of assessment relevant to this ground (because Mr Cooper was unsuccessful in overturning them) were 2007-8 and 2008-9. However, we begin with the FTT's reasoning in relation to 2006-7 even though for that year Mr Cooper was ultimately successful, because the assessment was found to be out of time. That is because the reasons the FTT gave for rejecting Mr Cooper's case for 2007-8 were the same as those for the earlier year 2006-7.

5. The issue was whether Mr Cooper could establish the amounts assessed did not represent trading income ([61]). Mr Cooper received nine deposits totalling £47,360. He argued that one deposit (of £25,000) was a bank loan to him and that the remainder were interest free loans made by Mr Cooper. In particular he pointed to the following:

> (1) The receipt of £25,000 referred to what appeared to be a NatWest sort code. Payment out of the account, a few days later, was to an account with the same sort code. It was, he submitted, inherently unlikely that if the amount was trading income that he would be paying a customer back a few days later. The FTT rejected this: the sort code was different to that given in relation to a documented NatWest loan made in May 2008. That credit for that loan was also clearly marked "new loan". Had it been a

loan, the FTT would have expected Mr Cooper to be able to provide evidence of that loan ([69]-[71]).

(2) In respect of the other payments he referred to the correspondence between receipts for cash payments from Mr Evans to Mr Cooper and entries in Mr Cooper's and Mr Evans' bank statements. At [80] the FTT noted that on the evidence:

> "it [was] difficult for [it] to come to a conclusion (even on the balance of probabilities)…The result of this is that Mr Cooper has not shown on the balance of probabilities that these deposits were loans from Mr Evans or that that they had some other source which does not represent trading income."

(a) No weight could be attached to the receipts which the FTT considered were produced after the event (given their identical form apparently with the same handwriting, the same pen used, the lack of wear and tear and as they were not produced until the day of the hearing) ([82]).

(b) There was almost no overlap between Mr Evans' and Mr Cooper's bank statements to reconcile, with the exception of one payment, a withdrawal from Mr Evans' account to a deposit in Mr Cooper's account.

(c) Mr Cooper's and Mr Evans' witness statements and oral evidence contradicted their position as recorded in a meeting note where it was suggested the sums were remittances from Iran.

(3) There was no contrary evidence to Mr Cooper's and Mr Evans' unchallenged evidence. There was no evidence of any trading activities so it was overwhelmingly likely the payments were loans ([76]).

6. The FTT concluded:

> "88. In relation to the source of the deposits in question, given the clear inconsistency between the repeated statements that Mr Cooper has funded himself out of his assets in Iran and the subsequent statements that the funds derived from loans provided by Mr Evans, we are not satisfied on the balance of probabilities that the deposits can be explained by either of these sources. Given that the explanation has changed as the years have gone by, it is perfectly possible that there could be some other explanation for the deposits which has not been revealed.
>
> 89. In conclusion, Mr Cooper has not satisfied the burden of proof of showing that, on the balance of probabilities, the deposits into his bank account which HMRC have treated as trading income have some other source."

7. For this year, in order to show the assessment was in time, HMRC had to show the loss of tax was brought about deliberately. The FTT considered this required HMRC to satisfy it that the unidentified deposits did in fact represent trading income. That was not something however that HMRC had even set out to prove. Their case therefore failed and the assessment was out of time. ([90]-[96]).

8. For 2007-8 Mr Cooper similarly argued that various unidentified deposits totalling £25,840 were loans from Mr Evans. The FTT rejected his case on that for the same reasons as it had rejected his case on 2006-7. The FTT did not "accept that Mr Cooper [had] discharged the burden of proof of showing that [the] payments [were] anything other than trading income"([98]).

9. As regards 2008-9 the FTT upheld the assessment based on unidentified deposits representing 39 payments into Mr Cooper's bank accounts totalling £228,000 which HMRC treated as trading income arriving at a taxable profit of £90,355 after deduction of estimated expenses and capital allowances ([199]–[212]). The FTT rejected Mr Cooper's argument the deposits were transfers from other accounts as that was not supported by documentary evidence such as bank statements that would have been straightforward to obtain ([208]). It could not, as was suggested, arise from being able to access £730,000 as a deposit in a deal for the sale of three barges (which we come on to discuss under Grounds 2-4). Only £150,000 of that was transferred to Mr Cooper's personal accounts and there was no evidence from the statements for those accounts of other significant transfers ([209]). Even if the amounts were transfers this did not show the deposits were not trading income as there was no information on the source of the amounts in the bank accounts from which the money was transferred ([211]).

10. Mr Birkbeck's case, on behalf of Mr Cooper, in essence, is that the taxpayer must show their proposition is *more* likely than HMRC's – not that it is, on its own account, likely or probable. The FTT should compare which of two parties' accounts is to be preferred. Only then can it reject the taxpayer's case as less likely, or that neither is more likely, in which case the taxpayer would not have met his or her burden. The FTT did not balance the probabilities of HMRC's case against the appellant's. The evidence, Mr Birkbeck submitted, revealed HMRC's case to be highly unlikely given: 1) the evidence detailing the appellant's failed attempts to start an engineering business; 2) in the ten years in which the appellant had cooperated with the enquiry, no evidence turned up of production of goods, customers or sales except two failed sales and aborted transactions with Mr Evans.

Discussion on Ground 1

Law

11. There was no dispute that the burden of proof lies on the taxpayer in relation to appeals against tax assessments.

12. The tribunal must set aside or vary a tax assessment if it finds that it overcharges or undercharges an appellant. This is clear from s50(6) TMA, which provides, insofar as it relates to overcharges, that:

> "If on appeal to the tribunal the tribunal decides a) that…the appellant is overcharged by a self-assessment…c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment…shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

13. The burden of proof to establish that they are overcharged rests on the taxpayer. Ms Tutin's skeleton helpfully drew together the authorities on the point.

14. The Court of Session in *Rouf v HMRC* [2009] STC 1307 discussed the effect of s50(6) as follows at [29]:

> "In understanding the effect of [s.50(6) TMA 1970], in our opinion, it is helpful to recall the observations made by Lord Hanworth, M.R., in *Haythornthwaite & Sons Ltd v Kelly* at page 667. There he said:
>
> > "Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject - the appellant - establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside".
>
> Thus the general onus to show an overcharge lay upon the appellant. If the appellant had succeeded in showing that he had been over-charged, then, it would have been the responsibility of the Commissioners to make their own judgment, upon the evidence before them, as to the proper level of the assessment, to which the assessments would have required to have been reduced accordingly… However, before the Commissioners in this case came under an obligation to make the best judgement that they could of the appellant's liability, on the basis of the evidence, plainly they had to be satisfied that the appellant had been overcharged in the assessments made."

15. Similarly, in *Brady Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 Mustill LJ at 643j-644c explained that:

> "[the burden of proof]… remains on the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment".

16. There is also no dispute the test is the civil standard: the balance of probabilities.

17. Mr Birkbeck thus accepts the burden to show the assessment overcharged Mr Cooper rested on him as the taxpayer. Nevertheless, in his submission the tribunal must balance the probabilities of the taxpayer's case against the probabilities of HMRC's.

18. For that proposition he relies on the Court of Appeal's judgment in *Stephens and another v Cannon* [2005] EWCA Civ 222. The facts concerned a disputed property price valuation which arose in the context of a damages assessment by a Master in the proceedings under appeal. The Master was unable to decide which of the parties' expert opinions he preferred. He considered the case fell to be decided by reference to the burden of proof. The claimants bore the burden and had not satisfied it. He adopted the view of the defendant's expert ([31]). Mr Birkbeck relies in particular on the following excerpt:

> "had the Master asked himself not "which of the two valuations should I accept?" but "what, in the light of the evidence of the two valuers, was the probable value of the property?" and had he then not merely noted some of the specific differences between the valuers but sought to adjudicate in relation to them, he might well, I believe, have been able to answer it."

19. However, we disagree that the point made here supports Mr Birkbeck's proposition. In fact, it appears contrary to it. The court was not saying that the role of the judge was to choose between which of the versions put forward by the parties was the more probable version. It was simply highlighting that, where the issue concerned the probable value of the property, the judge had to reach a view on that probable value. The court specifically rejected an approach whereby the judge should balance which of the two versions was to be preferred.

20. The issue here is not whether the FTT has to consider both parties' evidence. It is clear that it should. There is also no issue about the exceptionality of resorting to the burden of proof to determine a case: see [24] of *Verlander* which makes it clear that "exceptional" in that context just means that such resort is only necessary where the evidence is "conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the Claimant has not proved [his or her] case".

21. The specific issue raised by this ground is whether, in considering an issue upon which a party bears burden, the tribunal must look at the party's proposition in its own terms to see whether it proves that party's case on the disputed issue to the requisite standard, or whether, as Mr Birkbeck submits, that party's case should be balanced against the probability of the opposing party's case. We consider that it is instructive to

step back and consider what is meant by saying a party bears the burden of proof on an issue.

22. In this regard Mustill LJ's judgment in *Brady* (at 643j-644c) neatly encapsulates the significance of a burden of proof lying on a particular party albeit that the particular context of that case involved allegations of fraud:

> "It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof. So also here. It may well be that, if the taxpayer companies' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that, by traversing the taxpayer companies' case, the Revenue have taken on the burden of proving fraud. Naturally, if they produce no cogent evidence or argument to cast doubt on the taxpayer companies' case, the taxpayer companies will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. The contention that, by traversing the taxpayer companies' version, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the commissioners are left in doubt. In the world of fact there may be only two possibilities: innocence or fraud. In the world of proof there are three: proof of one or other possibility, and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned."

23. In the particular context of a tax assessment, the issue is: has the tax assessment overcharged the taxpayer to tax? The burden of proof rests on the taxpayer. That means it is open to HMRC to put forward no case, yet for the tribunal nevertheless to determine that the taxpayer has not met its burden. As Ms Tutin, for HMRC, correctly points out, the appellant's argument that the FTT ought to have balanced the probability of the deposits' sources being as Mr Cooper suggested against the probability of the amounts being trading income, effectively undermines the proposition that the burden of proof is on the taxpayer. It suggests that HMRC, the party who does not bear the burden, do have to advance evidence to support their case when it is clear they do not (although they may choose to do so for the reasons Mustill LJ gives in *Brady*).

24. The tribunal will decide the question whether the assessment overcharged the taxpayer on "the balance of probabilities". Mr Birkbeck says that term means what it says. But deciding something on the balance of probabilities does not, we consider, equate to balancing which, as between the appellant's case and HMRC's case, is the more likely. In showing the assessment overcharges the taxpayer, the taxpayer might

advance positive propositions (e.g. the deposit had a particular explanation, it was received by someone else) or a negative one (it was not the sort of income that would give rise to the charge under assessment, or no deposit was in fact received). Whether the proposition is positive or negative, all that balancing probabilities means is that the FTT need not be sure X was *definitely* the case – it is enough that X is more likely to be the case than "not X".

25. Thus, the tribunal must weigh up which is the more probable as between the proposition advanced and the negative of that proposition. So, the probability the deposit was a loan versus the probability it was not a loan. As discussed, even if HMRC put forward no arguments or evidence for some of those counterfactual propositions ("the not X"), it is still open to the tribunal to consider that the taxpayer has not shown X is more likely that "not X". Because the burden is on the taxpayer it is entirely for the taxpayer to do the running on showing X is more likely than "not X". That is not to say that HMRC might not still have to "exert" themselves, as the extract from *Brady* above suggests, if HMRC fear the taxpayer's case was strong enough to get across the threshold of proof.

26. So, for instance, when considering Mr Cooper's arguments that the source of the deposit was a loan, the FTT had to balance the probabilities that the deposit was a loan against the probability that it was not a loan. The FTT was not satisfied that it was more probable than not that the deposit source was a loan. There was no error in it not weighing up, as Mr Birkbeck submits it ought to have, whether the deposit was not a loan because it was trading income. HMRC did not in that respect advance an argument or adduce evidence on the "it's not a loan" side of the scales. It could have done so but did not need to because the burden on the issue was always on Mr Cooper.

27. We therefore disagree with the narrow legal principle put forward by Mr Birkbeck regarding the comparative balancing of the probabilities of the parties' cases in support of his ground. However, that is not the end of the matter. The ground, properly understood, evinces a wider point that the FTT did not address itself to the probability of HMRC's case as it ought to have in order to deal with the totality of Mr Cooper's case. His case was not restricted simply to arguing the deposits were loans or account transfers. It also encompassed the argument that the deposits could not have been trading income because the business had completely failed. In that respect Mr Birkbeck rightly drew attention to the FTT's recording of his submission (at [76]) that there was no evidence of any trading activities. This submission could be viewed either in terms of bolstering Mr Cooper's case that the deposits were "not loans" or as making a free-standing point as to why it was said the assessment overcharged him (because the income could not have been trading income due to the lack of trading activity). Either way there is no indication the FTT dealt with the submission. So, while there was no error of legal approach in the FTT omitting to balance the probability of Mr Cooper's case that the deposits were loans against the probability of HMRC's case that the deposits were trading income, there was an error in omitting to deal with an important component of Mr Cooper's case. That was that, irrespective of whether the deposits

were loans or account transfers, they could not have been trading income due to the lack of activity that could be said to amount to activity of a trading nature. Mr Cooper's case on that needed to be balanced against the countervailing proposition that the income was trading income, even if HMRC had not advanced any case on that countervailing proposition. (For the reasons explained that did not mean HMRC had to advance a positive case to show the income was trading income but they might have done so if they feared Mr Cooper had done enough to meet the burden on him).

28. The absence of reasoning on the point is all the more conspicuous because of the tribunal's later reasoning as to why the assessment for 2006-7 was invalid. The FTT was not satisfied HMRC had shown the loss of tax had been brought about deliberately. It considered HMRC needed to show Mr Cooper knew he had trading income and made a deliberate decision not to declare it. That, the FTT thought, logically required HMRC to satisfy it that the unidentified deposits were trading income and the FTT noted (at [94]) that HMRC had not set out to prove the unidentified deposits were trading income. There is of course no inconsistency, given the different burdens of proof, in the FTT not being satisfied on the one hand that HMRC had shown the amounts were trading income, and on the other hand upholding HMRC's assessment based on the income being trading income because the appellant had not met its burden of proof. But the fact the FTT was so alive to the issue of trading income, albeit in the context of time limits, does appear to suggest that, if the FTT had dealt with Mr Cooper's argument on that issue in the context of the substantive issue in the assessment, it would have said something explicitly on the matter. The fact it did not suggests the FTT did not specifically consider the issue.

29. It is also notable that in its discussion of Mr Birkbeck's arguments in relation to 2008-9 it recorded his submission (at [204]) in relation to the lack of trading transactions:

> "Mr Birkbeck again made the point that there is no evidence of any trading transactions being undertaken in this period and so it would be surprising if, all of a sudden, there were numerous receipts representing trading income. He argues that the fact that all of the deposits are round figures would also support the conclusion that the payments do not represent trading income but instead represent transfers from other accounts. He also suggested that the deposits cease after April 2009 and that this again would suggest that the deposits are not trading income as it would be odd for the trade suddenly to come to an end at that stage with no further payments into the accounts."

30. The following paragraph, [205], explains the conclusion sought on the back of the above argument "that the deposits represent transfers from other accounts is more plausible than them representing trading income". To the extent the argument, regarding the need to perform a comparative balancing exercise, is the same as that which Mr Birkbeck makes before us then it was flawed for the reasons we have explained. Nevertheless, we consider there was an error in the FTT confining itself to

rejecting Mr Cooper's arguments that the deposits were account transfers but not then also addressing the substance of Mr Birkbeck's reasons as to the improbability of the sums being trading income.

31. In summary, although we disagree with Mr Birkbeck's submission that the FTT erred in not balancing the probability of HMRC's case against Mr Cooper's case that the deposits were loans on the basis of the legal principle he advances, we agree that there is merit to the essence of his ground. There was a need to consider the respective probabilities of the deposit being trading income on the one hand or it not being trading income on the other. That arose because of Mr Cooper's case that the amounts could not have been trading income. The error may thus better be understood as a failure to consider all of Mr Cooper's case rather than a failure per se to consider the probabilities of HMRC's case.

32. We set out the steps to take in relation to the error once we have concluded on the remaining grounds.

Grounds 2 to 4

33. The next three grounds concern the assessment for the tax year 2007-8 and the FTT's interpretation of a contractual provision concerning the refundability of a pre-payment sum (Ground 2), which party entered into the contract (Ground 3), and in what capacity (principal or agent) (Ground 4). Under the contract, three barges were to be sold to a company in Iran for a total payment of $9 million. An amount of £730,000 representing 15% of that amount was paid into Ship and Ocean Limited's bank account. Mr Cooper disputed HMRC's case that the £730,000 was Mr Cooper's taxable trading income because the deal never completed; the sum was refundable and was refunded.

34. Although there was no discussion in the FTT Decision of the principles relevant to interpretation of contracts we did not understand there to be any real dispute about those. The principles, as explained in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619, and *Wood v Capita Insurance Services Limited* [2017] AC 1173 were helpfully set out in the Upper Tribunal's decision in *Ingenious Games LLP and others v HMRC* [2019] UKUT 0226 (TCC) (see: [79] to [80]). In *Wood v Capita*, Lord Neuberger said this about looking at the text of the contract and the surrounding factual matrix (at [13]):

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual

> analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…"

35. We turn then to the specific points of disputed interpretation as set out in Mr Cooper's grounds.

Ground 2: The Tribunal was wrong to find that the 15% deposit was not refundable under the terms of the Three Barges deal.

36. Under Ground 2 Mr Cooper argues the FTT was wrong to conclude that the 15% amount was not refundable under the terms of the contract. The terms from the English translation to the contract which was written in Farsi were:

> **"Article 3 - Price of the Contract**
>
> Price of the contract is 9,000,000 (9 million) American dollars which will be paid to the seller by the buyer as follows;
>
> A- Prepayment 15%
>
> B- 80% at the time of delivery which will be paid as letter of credit
>
> C- 5% good performance, which will be paid 45 days after receiving goods
>
> …
>
> **Article 7 - Guarantee**
>
> The seller is obliged to issue real estate collateral or bank collateral with a price 1.10 time more than the price of contract under the name of the buyer. This will be mentioned in purchase contract between the two parties.
>
> …
>
> 7.2. The seller will receive 5% of the price of the contract two months after delivering the barges as good performance, and if the agreed commitments are not demonstrated as planned, once the buyer identify that the seller has violated the provisions he is allowed to reimburse the aforementioned amount to compensate for the incurred damages.

> 7.3. If the goods are not technically verified according to the technical appendix of the contract, the buyer should provide the reason of mismatch between demanded regulations to the seller, and if the seller does not do any action in appropriate time, the buyer is allowed to do the required actions and reimburse the amounts mentioned in paragraph 7.2." (emphasis added)

37. The FTT considered the 15% prepayment amount was not refundable:

> "120. Looking first at the terms of the contract, it is clear to us that on a natural reading article 7.2 is dealing only with the 5% good performance payment and does not relate to the 15% deposit. The reference to "the aforementioned amount" at the end of article 7.2 is the 5% amount which is mentioned at the beginning of article 7.2.
>
> 121. This is reinforced by article 7.3 which allows reimbursement of "the amounts mentioned in paragraph 7.2". The only amount which is mentioned in article 7.2 is the 5% good performance payment. It would be odd if article 7.2 [*there did not appear to be any dispute this reference should have been to 7.3*] allowed reimbursement of all payments whereas article 7.2 only allowed reimbursement of the 5% good performance payment. Had the parties intended that the deposit or the 80% of the purchase price payable on delivery of the barges should be subject to reimbursement, we would have expected article 7.3 (and therefore article 7.2 as well) to cross-refer to article 3."

38. Mr Birkbeck's first criticism is that the FTT's view that the only amount which was mentioned in article 7.2 was the 5% good performance payment was circular: it assumed article 7.2 did not refer to amounts in article 3 which was the point in issue. He also highlights the reference in article 7.3 to "amounts" (in the plural) mentioned in article 7.2. That pointed to the "aforementioned amount" in 7.2 not being the same as the 5% good performance payment. The FTT's interpretation made no sense. It suggested the 5% payment was refunded if performance was not good. But if performance was not good, the 5% would not have been paid so there would be nothing to refund. In contrast the appellant's interpretation made sense commercially: the final 5% was paid if performance was good, or if it was not, the amounts already paid under the contract under article 3 were refundable.

39. By way of preliminary observation, it is apparent that the translated document contains a number of errors. Some errors seem more likely to have arisen in the source document; for others it is not clear whether the error arises from the translation. In the introduction, the counterparty, Pars Company, is referred to as the seller despite the same address specified in relation to that company being referred to under "Place of residence of the buyer" in Article 15. Article 3 refers to payment of the 5% after 45 days, article 7.2. to payment after two months. The reference to the buyer being allowed "reimburse" must, in the context of the provisions, mean the buyer is entitled to reimbursement rather than that the buyer is permitted to reimburse the seller. The errors

also suggest the document may not have been professional drafted, or even if it was that it is the sort of professionally drawn contract which lacks clarity for the reasons explained Lord Neuberger's judgment (see [34] above). While nothing turns on the errors themselves, they do illustrate that some caution may be required in making inferences from the precision of, for instance, whether terms are used in the singular or plural.

40. Mr Birkbeck also argues that article 7.2 must refer to the amounts in article 3 as otherwise there would be no provision regarding the circumstances where there was no delivery. The FTT's interpretation would not cover the circumstances where there was no delivery. He also argued that if article 7.2/7.3 did not cover the circumstances where there was no delivery then one would look to the wider contract to see if there was a right to repayment of the 15%.

Discussion:

41. The parties' respective arguments were grounded in the wording of the provisions reflecting that there was no dispute here that the primary source of what the parties meant was the language they used.

42. We agree with Ms Tutin that the FTT was right to consider the reference to "aforementioned" in 7.2 meant the 5% amount, and that the absence of a reference to the 15% amount would be odd given that specific earlier reference to the 5% amount. Mr Birkbeck's submission that the 5% is only paid if there is good performance is correct in so far as good performance concerns delivery of the barges – the payment is only due once the barges delivered. But, to the extent he was arguing there would not be any 5% payment unless there was good performance of the contract as a whole, that would not reflect that there were post-delivery contractual obligations. While article 7.3 concerned technical specifications in respect of goods article 7.2 was clearly broader. The reimbursement of the 5% would make sense if those other obligations were not complied with. It is clear the 5% is paid after a period after delivery but that does not mean it is paid once there is good performance of the obligations going beyond delivery. The plain commercial sense of the provision is that if, post-delivery, the extra obligations are not complied with the buyer gets the 5% amount back.

43. As to Mr Birkbeck's point that 5% would be insufficient if the barges were not delivered we have no way of knowing that. There is no presumption the 15% prepayment would be refundable under the contract. It is entirely conceivable that the protection, where the barges were not delivered, would simply be that the buyer would seek to recover an amount representing the 15% when suing for breach of contract. (The FTT found there was no evidence that happened, and no challenge is made to that.)

44. Mr Birkbeck also sought to argue that, whatever the terms of the contract, the contract was terminated by frustration and that amounts paid were recoverable from the seller under s1 Law Reform (Frustrated Contracts) Act 1943. This was a new point that

was not raised until the appellant filed its skeleton before the UT. It was not an issue that was argued before the FTT and there was, furthermore, no mention of it in the grounds of appeal before the UT. Mr Birkbeck sought to argue it was not a new point as he had put in arguments on the evidence regarding the sanctions situation in Iran – the reference to the 1943 Act simply set out the relevant law. It is correct that his skeleton before the FTT stated (at [57]) that, due to international sanctions imposed on Iran after the first payment, completion of the contract was no longer possible and the contract was terminated. However, none of the legal argument which followed relied on the legal consequences of a contract that was terminated by frustration.

45. We considered whether we should, as Mr Birkbeck submitted, grant permission for the new point to be argued but concluded that we should not. The point was not a pure issue of law. It would be one reliant on evidence. As Ms Tutin submitted, whether the frustration would have been foreseen, what amounts would have been recoverable under s1(2) of the 1943 Act (in relation to which the party from whom recovery was sought could retain expenses it incurred, in or for the purpose of performance of the contract, thus raising the question of whether any such expenses had been incurred) were factual matters. The evidence advanced and the testing of that might well have taken a different turn if the issue had been exposed at the outset. It would also need to be established the sanctions led to frustration of the contract. The fact that there was evidence that there were sanctions and that that was not challenged does not address this gap.

Ground 3: The Tribunal, with no expertise or evidence to the contrary, expert or otherwise, disregarded a professional translation of a foreign language contract, and substituted its own interpretation. That is not a finding of fact that any reasonable tribunal could make.

46. Under Ground 3 Mr Cooper argues that, even if the deposit was trading income, the contract was entered into by Ship and Ocean Limited; the income was that company's income, not Mr Cooper's. He submits the FTT erred in finding that the contract was with Mr Cooper personally because it disregarded the professional translation and substituted its own interpretation.

47. At [132] the FTT noted that the contract referred to "Ship & Ocean Co". From the context of the following paragraphs that must, we think, mean the original Farsi version. That version was principally in Farsi script but in it there were elements of text in Roman script – these were the references to "Ship & Ocean Co". The FTT went on to note:

> "In the parties section of the agreement this has been reproduced by the translators as Ship & Ocean Limited. However, in the other two places where the seller is referred to by name, the translators have referred to "Ship & Ocean Co".

48. The FTT then (at [133] to [147]) set out the parties' submissions from Mr Cooper in support of the company being the party and, for HMRC's part, that Mr Cooper was the party. This included Mr Cooper's evidence that, in Iran, "Co" effectively meant the same as "Limited" in England.

49. The FTT then said at [148]:

> "We are not convinced that the contract for the sale of the three barges was entered into by SOL rather than by SO. The original Farsi version of the contract clearly refers to "Ship & Ocean Co" and not "Ship & Ocean Limited". Whilst Mr Cooper's evidence was that, in Iran, "Co" is the same as "Limited", this is to some extent inconsistent with the fact that the translators have referred to "Ship & Ocean Limited" in one place but to "Ship & Ocean Co" in two other places."

50. The FTT went on to consider the surrounding circumstances noting Mr Cooper had been clear throughout that SOL had not traded and all of his trading activities were in his own name. That was consistent with the status of SOL at Companies House and in HMRC's records, that expenses (premises and staff) were paid for by Mr Cooper, not the company, other contracts of sale in relation to other vessel equipment and designs were all entered into by SO not SOL ([149] to [153]). Taking "all of this into account" the FTT concluded, at [154], that it was not satisfied that "Ship & Ocean Co" in the contract for the sale of the barges can be interpreted as meaning "Ship & Ocean Limited".

51. Mr Birkbeck submits the FTT erred because it could not reasonably prefer its own guess as to the proper translation of "Co" in the context of the commercial contract to the evidence of experienced professional translators. The FTT did not profess knowledge of Farsi or Iranian corporate law and custom. HMRC did not offer any alternative evidence of the translation.

52. The correct translation of a document required expert evidence. Where that was not challenged by contradictory expert evidence the FTT was not entitled to conclude the translation was wrong. The reason the FTT gave for rejecting the translation was that at other places (this was actually three places rather than the two the FTT mentioned) the translators had not translated the document but had rather copied out the original words "Ship & Ocean Co." That did not explain why the translator was wrong to interpret the first instance of "Ship & Ocean Co." as "Ship & Ocean Ltd." Nor did it explain why a better translation was "Mr Cooper t/a Ship Ocean".

Discussion

53. The essence of Mr Cooper's ground is that the FTT was not entitled to conclude that the translation was wrong. Mr Birkbeck referred us to the decision of the High Court in *Sobrinho v Impresa Publishing* [2015] EWHC 3542 (QB). That case concerned

a libel action and the disputed English meaning of words of Portuguese in a magazine. The court considered that:

> "23…Any evidence of what foreign words mean in English is expert evidence, if it comes from a person who has a basis in training or experience sufficient to enable them to give reliable evidence on the issue.
>
> 24. The issue, whether it is described as one of fact or opinion, is one the court is not equipped to decide without help from a person skilled in the process of translation, that is to say, in both languages and the way in which they interrelate."

54. There was no dispute about these propositions. However, we consider they do not help Mr Cooper and that this ground must fail. His ground is based on the incorrect premise that the FTT went behind the professional translation to reach its own view on how the original version should be interpreted. At [148] the FTT posed the issue as between two alternatives preferring SOL rather than SO because "the original Farsi version of the contract refers to "Ship & Ocean Co" and not "Ship & Ocean Limited"". But at [149] all the FTT found was that the position "was not clear from the written terms of the contract itself" and that it was therefore "necessary to look at the surrounding circumstances". The written terms the FTT was referring to were plainly to the translated English version of the contract.

55. The finding the written terms were "not clear" was, we consider, one that was clearly open to the FTT and did not represent any error of law. It could not be said "Co" in the translated English version necessarily referred to Mr Cooper personally. It could not be ruled out it referred to the company as there was also a reference in the English translated version to "Ltd.". In the light of that lack of clarity, the FTT was justified in going on to look at the surrounding circumstances. That approach was only reinforced by the wider context that the contract contained various other errors and ambiguities and might not have been professionally drafted or if it had been nevertheless had other areas of imprecision.

56. In fact, the only recourse the FTT made to the underlying Farsi document was by way of answer to Mr Cooper's evidence that in Iran "Co" was the same as "Limited". Even in that regard the FTT was not preferring its own translation of the Farsi document - it was rebutting the comparison advanced by Mr Cooper by pointing out the inconsistent usage. The FTT was doing no more than noting the extent to which the Roman script words "Ship & Ocean Co." had been carried across in the translation. That did not of course mean that the reference to "Co" had to have meant Mr Cooper personally. But the FTT was not saying that it did. No challenge is made to the FTT's rejection of Mr Cooper's evidence in any case.

57. Mr Birkbeck drew attention to the fact that the contract referred to "Ship & Ocean Ltd…..represented by [Mr Cooper]…" (emphasis added). While we agree those words

are supportive of Mr Cooper's interpretation, they do not mean it was not open to the FTT to find that the contractual terms were unclear, so as to warrant looking at the surrounding circumstances, given the remaining references in the translated version to "Ship & Ocean Co" rather than "Ship & Ocean Ltd." In any case this is a point of interpretation which is based on the English translated version. No concern thus arises that the FTT impermissibly sought to interpret the original Farsi version for itself.

Ground 4: The Tribunal was wrong to find that SOL was acting as an agent of the Appellant when entering the Three Barges deal because: (a) There was insufficient evidence of agency for a reasonable tribunal to make that finding; and (b) It is incompatible with the terms of the contract for SOL to have been acting for an undisclosed principal.

58. In the light of our conclusion on Ground 3, that the FTT did not err in its finding that Mr Cooper, not his limited company, entered into the contract it is not necessary to deal with this ground.

Ground 5: Finding that a transaction on which Mr Cooper claimed input tax (supply of boat design to Mr Cooper by another entity SDS) not open it to it 1) on law 2) on finding of fact

59. This issue was not argued before the FTT. It was one where Mr Cooper was subsequently granted permission to argue it by the Upper Tribunal. The essence of the appellant's ground is that HMRC were wrong to deny the appellant's input tax on a purchase transaction, on the basis that no transaction took place, in circumstances where HMRC had obtained a winding up of the seller in respect of output tax on that transaction.

60. Mr Cooper claimed £56,000 in VAT period 09/10 in respect of Mr Cooper's purchase of the design of a "wing-in-ground" ("WIG") boat, from Mr Evan's company, SDS, as shown on an invoice dated 5 September 2010. The FTT recorded Mr Birkbeck's submissions explaining why the appellant considered HMRC were wrong to deny Mr Cooper's claim. It was suggested that HMRC's refusal was based on HMRC's belief the transaction had not taken place and that that was incorrect for various reasons. This ground, however, relates to the point the FTT set out at [242]:

> "242. One final point made by Mr Birkbeck is that HMRC do not appear to have questioned whether or not the sale of the WIG boat design was genuine when looking at the VAT position of SDS. That company was required to account for the output tax. However, it was unable to pay the VAT due to the inability to extract funds from Iran and the company was ultimately struck off."

61. HMRC made no submission in response to the specific point. The FTT identified, at [246], that Mr Cooper had to satisfy it on the balance of probabilities that SDS did in fact make a taxable supply of the WIG boat design but concluded for the reasons it went

on to set out at [247] to [253] that SDS did not in fact supply a WIG boat design to Mr Cooper. In summary this was because of lack of documentation regarding the design, the intellectual property rights in relation to it and protection of such rights, and as to how the appellant would finance the development and manufacture of the boat.

62. In accordance with the terms of the permission granted by this Tribunal (Judge Richards), the appellant argues that the FTT erred in law: (1) in failing to conclude that its findings of fact at [242] of its decision, as a matter of law compelled the conclusion that SDS did supply a WIG boat design to Mr Cooper; and/or (2) in reaching a conclusion (at [253]) to the effect that the supply of the WIG boat design did not take place that was not available to it in the light of its findings of fact at [242].

63. Mr Birkbeck argues the FTT made a finding at [242] that SDS had a liability to VAT arising on the WIG transaction that was accepted by the court in the winding up. As to 1) the FTT was not legally permitted to find the WIG transaction did not happen when it had accepted that SDS was wound up in respect of VAT on it. That offended the fundamental principle of neutrality of VAT.

64. Ms Tutin, on behalf of HMRC, does not accept that the FTT made any finding at [242] that SDS was required to account for the output tax and was ultimately struck off due to its apparent inability to pay the VAT. The FTT was in that paragraph recording Mr Birkbeck's submission. She highlights that the FTT had little to no evidence regarding SDS's position and in particular regarding the winding up proceedings and any findings of fact by the High Court or any other regarding the genuineness of the transaction.

65. We note that the FTT, when refusing permission on Ground 5 (which at that point was couched in terms of issue estoppel) stated that it was accepted that SDS had been wound up as a result of HMRC's insolvency petition but that the tribunal had no evidence as to the basis of the winding up or the extent to which any another court might have considered the genuineness of the WIG boat transaction. We also note that when the Upper Tribunal granted permission, it did so on the basis that the appellant was confined to the "four corners" of the FTT's decision, that it was noted that the appellant was not seeking permission to adduce new evidence and that HMRC were not required to adduce any further factual evidence to meet the ground.

66. The only findings on which Mr Birkbeck relies on, however, for his ground are that: (1) SDS had a liability to VAT arising on the WIG transaction, and (2) that liability was accepted by the court in the winding up. We are content these were findings that were made. When [242] is read together with what the FTT has said in its refusal of permission decision, we consider the findings the FTT found extend to the following: 1) SDS was required to account for the output tax on the WIG transaction 2) HMRC petitioned the High Court for insolvency 3) SDS was wound up as a result of the petition. The findings do not, however, go as far as confirming SDS's VAT liability in respect of the WIG transaction was accepted. There was, it appears, no detail regarding

what issues were considered, or findings made, in the winding up proceedings. We also do not consider any finding was made that SDS could not pay the VAT because of an inability to extract funds from Iran.

67. The factual basis underpinning Ground 5 is therefore not made out. There was no finding SDS was wound up because of non-payment of output VAT on the WIG boat design transaction. That is sufficient to dispose of this ground but in case we are wrong on that we will deal with the substance of the arguments made.

68. In granting permission, Judge Richards had pointed out a potential obstacle for Mr Cooper's argument in that there were circumstances where an amount of VAT shown on an invoice could be recovered even if the supply shown on the invoice had not actually taken place. The provisions were paragraph 5 of Schedule 11 VATA, which provides:

> "(1) VAT due from any person shall be recoverable as a debt due to the Crown.
>
> (2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person who issued the invoice an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as is to be taken as representing VAT on the supply.
>
> (3) Sub-paragraph (2) above applies whether or not-
>
> > (a) the invoice is a VAT invoice issued in pursuance of paragraph 2(1) above; or
> >
> > (b) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or
> >
> > (c) the person issuing the invoice is a taxable person;
>
> and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT be recoverable as such and shall otherwise be recoverable as a debt due to the Crown."

69. Sub-paragraph (3)(b) makes it clear that HMRC can recover a sum if it appears on the VAT invoice even if the transaction has not taken place, and the words at the end of sub-paragraph (3) make it clear that a sum is recoverable even if it is not VAT. That SDS was wound up for non-payment of VAT on the invoice would not therefore necessarily mean it was accepted that a transaction had taken place. Mr Birkbeck argues paragraph 5, which he submits is targeted at VAT evasion, should not be read at face value as to do so would mean that a taxpayer who had incorrectly but honestly charged VAT would be liable to account for the sum under paragraph 5(2). He relies on a decision of the FTT, *St Martin's Medical Services v HMRC* [2012] UKFTT (485) (TC),

which held that persons assessed under paragraph 5(2) must, in certain situations, have a right to recover VAT or "equivalent VAT" charged under that paragraph. There was a defence to liability under paragraph 5(2). He also submits the tribunal held that abusive or fraudulent behaviour is also required before a 5(2) liability could arise.

70. So interpreted, paragraph 5(2) does not mean the winding up of SDS for non-payment of output VAT is compatible with refusal of input VAT. Moreover, even if a 5(2) liability did arise on SDS, despite no transaction having taken place, then HMRC were required under the relevant case-law (*Halifax*) to redefine the transaction so as to re-establish the situation that would have prevailed absent entry into the abusive transaction. That situation would have been one where SDS was not liable to VAT unless SOL had recovered it – which it had not. Therefore, HMRC and the court could not have wound up SDS on this basis.

71. The above provision finds its context in Article 203 of Directive 2006/112 (the predecessor to that was Article 21(1)(c) of Sixth Council Directive 77/388/EEC). Article 203 appears in Section 1 ('Persons liable for payment of VAT to the tax authorities') of Chapter 1 ('Obligation to pay') of Title XI ('Obligations of taxable persons and certain non-taxable persons'). The Article states:

> "VAT shall be payable by any person who enters the VAT on an invoice."

72. The interrelationship of the provision and fiscal neutrality was considered in a CJEU decision which Ms Tutin referred us to: *LVK 'Stroy Trans'* [2013] (C-643/11). In her submission, the case shows that tax neutrality does not inevitably require identical treatment as between the supplier and recipient in order for neutrality to be maintained.

73. There the tax authorities refused the recipient, LVK, input tax on the basis of missing or incorrectly completed documentation and that it had not been established the invoiced supplies had been carried out. The question arose as to whether it could nevertheless be inferred, from notices addressed to LVK's suppliers, that the tax authorities had acknowledged the invoice in issue corresponded to transactions that had actually been carried out.

74. Elements of the referring court's questions were interpreted (at [44]) as including the question of whether fiscal neutrality precluded the recipient of an invoice from being refused input VAT even though the invoice issuer's VAT was not adjusted. On that, the CJEU explained:

> "45. This raises the question whether European Union law requires the issue as to whether a supply of goods or services actually exists to be determined identically in respect of the issuer of the invoice and its recipient.

> 46 So far as concerns the treatment of VAT that has been improperly invoiced because there is no taxable transaction, it follows from Directive 2006/112 that the two traders involved are not necessarily treated identically in so far as the issuer of the invoice has not corrected it, as is apparent from paragraphs 33 to 37 above.
>
> 47 On the one hand, the issuer of an invoice is liable to pay the VAT entered on that invoice even if there is no taxable transaction, in accordance with Article 203 of Directive 2006/112. On the other hand, exercise of the right of deduction by the recipient of an invoice is limited solely to tax corresponding to a transaction subject to VAT, in accordance with Articles 63 and 167 of that directive.
>
> 48 In such a situation, compliance with the principle of fiscal neutrality is ensured by the possibility, to be provided for by the Member States and noted in paragraph 37 above, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue."

75. Earlier, the CJEU noted the obligation in Article 203 to pay VAT solely because it was mentioned on the person's invoice and irrespective of whether a transaction subject to VAT had taken place. The article's objective was to eliminate the risk of loss of tax revenue. The paragraph 37 referred to in the extract above explained that obligation was limited:

> "by the possibility, to be provided for by the Member States in their national legal systems, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue (see, to that effect, *Genius*, paragraph 18; Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I 6973, paragraphs 56 to 61 and 63; and Joined Cases C-78/02 to C-80/02 *Karageorgou and Others* [2003] ECR I 13295, paragraph 50)"

76. We therefore agree with Ms Tutin's submission that the case-law confirms a recipient could be refused input tax on the basis no transaction had taken place without offending fiscal neutrality even though the output tax on the supplier had not been adjusted to reflect the lack of transaction.

77. Mr Birkbeck argued *LVK* could be distinguished. The suppliers there had the opportunity to "fix the situation". We disagree that the principles confirmed in *LVK* can be distinguished. Whether it chose to avail itself or not, SDS would similarly have had the opportunity to argue that the output tax needed to be adjusted.

78. As mentioned above, Mr Birkbeck relied on the FTT's decision in *St Martins Medical* as a means of glossing the interpretation of paragraph 5(2) Schedule 11 VATA. In that case HMRC resisted the refund of amounts the trader had wrongly invoiced as VAT and which HMRC claimed was chargeable under paragraph 5(2). The FTT

described (at [47]) how the provision's role in defeating fraudulent arrangements (for instance through a non-taxable person issuing a bogus VAT-inclusive invoice which an innocent VAT registered buyer would be attracted to by reason of the VAT deduction that could be claimed and which would allow the seller to sell at a higher price than otherwise). In considering HMRC's liability to refund an amount due under para 5(2) – the FTT noted there appeared to be no rules on this [100]. It looked at various European cases: *Genius*, *Schmeink* and *Strobel* and *Stadeco* – and summarised the principles from those at [106]. Those cases, we note, were also referred to in the *LVK* decision, which post-dated *St Martins Medical*. It identified the single test the FTT considered to be the most important was that if the invoice issuer had done everything in time to enable the transactions to be reversed, such that there was no ultimate breach of neutrality, then any tax initially charged should be refunded. The FTT concluded at [115] that on the facts the taxpayer had acted entirely in good faith and afforded HMRC every opportunity to eliminate any lack of neutrality.

79. We are not persuaded the decision advances Mr Birkbeck's case. While the FTT in *St Martins' Medical* clearly considered that paragraph 5(2) ought to be targeted towards situations in which the VAT system was fraudulently abused, it did not suggest that the actual words of paragraph 5(2) were so limited. On the contrary it specifically noted (at [97]) that paragraph 5(2) was not confined to the type of abuse which the FTT considered was the principal target of the provision. There is nothing in the FTT decision restricting the scope of the initial liability to abusive situations. To the extent the FTT's decision can be viewed as articulating a possible defence to VAT sought under paragraph 5(2) then that too does not assist in showing the FTT's decision in Mr Cooper's case was incompatible with the position that it is argued must be taken to follow from the High Court's decision. As it was possible that a paragraph 5(2) claim (which was not dependent on any transaction having taken place) was raised, and as, for the purposes of this part of the decision, it is assumed the High Court accepted the liability, any defence based on the circumstances being non-abusive must be presumed to have been unsuccessful. It therefore remains the case that the High Court could have accepted the liability without accepting that a transaction took place.

80. Therefore, even if we had been satisfied that it was shown the High Court had found SDS was wound up because of non-payment of output VAT on the WIG boat design transaction, that would not mean the FTT in Mr Cooper's case was prevented as a matter of law, for reasons of fiscal neutrality, from finding the WIG boat design transaction had not taken place. We therefore reject this ground of appeal.

Decision

81. In summary we accept Mr Cooper's Ground 1 but on the basis which we have explained. We reject Mr Cooper's Grounds 2, 3 and 5. In view of our conclusion on Ground 3 it was not necessary for us to decide Ground 4.

82. We found, in relation to Ground 1, that the FTT erred in law in not considering the totality of Mr Cooper's case that the deposits could not have been trading income because such activity as had taken place was not of a trading character. As we consider that error to be material (in that if the submission is accepted it will affect the outcome) we exercise our discretion to set aside the FTT decision but do so in a way which leaves intact the findings and reasoning which are unrelated to the identified error. The decision is thus set-aside only in respect of the conclusions the FTT reached that Mr Cooper had not discharged the burden of proof in relation to the assessment for 2006-7 and in turn its conclusion in upholding the assessment to the extent of the deposit amounts of £25,850 for 2007-8 and in upholding the 2008-9 assessment.

83. The decisions on the income tax penalties for 2006-7 to 2008-9, to the extent those were based on the FTT's conclusions that Mr Cooper had not met the burden of showing the relevant amounts were not trading income, also need to be set aside. The findings and the reasoning in the remainder of the FTT decision, which will include the FTT's findings and reasoning for rejecting the appellant's case that the deposits were loans, or account transfers, is preserved.

84. In the event of success on Ground 1, neither party invited us to decide the matter. Both considered it was appropriate for us to remit the matter for decision by the FTT. We agree. The FTT had (unlike us) heard the oral evidence first-hand and was referred to the detail of the underlying documents whereas we were not. We consider that the FTT panel which heard the matter is best placed to consider the remainder of Mr Cooper's case, to make any findings as necessary and any consequential changes as regards the determination of the penalty appeals.

85. The decision, in so far as it is set aside as described above, is remitted to the FTT. The FTT is directed to consider, and make any necessary findings and conclusions, on the appellant's case that, in relation to the tax years 2006-7 to 2008-9, the assessment overcharged him on the deposits on the basis that those could not represent trading income because there were no trading activities as the business had completely failed. Although Mr Cooper was successful in overturning the 2006-7 assessment because it was out of time and therefore could not appeal against the decision in respect of that, we note that the reasoning for that year informed the reasoning for 2007-8 and 2008-9. Also, if Mr Cooper is successful in persuading the FTT that the relevant deposit amounts in 2006-7 were not trading income, we consider it just that the FTT ought to be able to re-determine the incorrect return penalty (the FTT had upheld that on the premise that the 2006-7 assessment liability was correct albeit that the assessment was out of time).

86. The case is to be determined on the basis of the evidence that was before the FTT at the time of the hearing. We leave it to the discretion of the FTT panel to direct the timing and form of any submissions and the mode of any hearing that may be required in order to re-make the decision. We encourage the parties to seek to agree draft directions for the FTT to consider in that regard.

Mr Cooper's appeal is therefore allowed in part.

Signed on Original

JUDGE SWAMI RAGHAVAN

JUDGE ANDREW SCOTT

UPPER TRIBUNAL JUDGES

Release Date: 21 May 2021