



TC02774

Appeal numbers: TC/2011/01810 & TC/2011/02228

VALUE ADDED TAX – civil evasion penalty – attribution to officers of company – were officers dishonest – yes - sections 60 and 61 Value Added Tax 1994 – appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MR TERENCE WALKER (1)
MRS DAWN WALKER (2)**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON
RUTH WATTS DAVIES**

**Sitting in public at 45 Bedford Square, London WC1 on 5, 6 and 7 December
2012**

**Charles Newington-Bridges, Counsel instructed by Pitman, Blackstock & White
for the Appellant**

**Sarabjit Singh, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. The Appellants, Mr Terence Walker (“Mr Walker”) and his wife Mrs Dawn Walker (“Mrs Walker”) appeal against a penalty of £194,214 for VAT evasion imposed by the Respondents (“HMRC”) on 12 July 2010 on Europa Building Services Limited (“Europa”) under section 60(1) of the Value Added Tax Act 1994 (“VATA”). Under section 61(1) of VATA, HMRC decided, also on 12 July 2010,
10 that the conduct giving rise to the penalty was attributable to the dishonesty of Mr Walker, the sole director of Europa, and Mrs Walker, its company secretary, and served notices on the Appellants to that effect, which indicated that each Appellant was liable for 50% of the penalty amount.

2. The issues in the appeals are whether as contended by HMRC:

15 (1) Europa acted dishonestly by failing to submit VAT returns on time for eight VAT periods between 03/06 and 09/08, by paying only a proportion of the VAT it was required to account for and by failing to correct central assessments of their VAT liability for the periods in question; and

20 (2) If there was a failure on the part of Europa, whether its conduct was attributable to the dishonesty of Mr and Mrs Walker.

3. Mr Walker contends that he was not dishonest as his duties as director of the company were to tender for contracts and manage these contracts on-site. The accountancy function of Europa’s business was outsourced to an accountancy firm, Tamsons, who should have made the necessary returns. Mrs Walker contends that
25 she was not dishonest as her role was to provide a collation service whereby she gathered the paperwork and passed it on to Tamsons. Mr and Mrs Walker contend that if there was a failure on their part it was as a result of disorganisation and oversight. They also contend that in any event they cannot have any responsibility for what happened after a point in 2007, when responsibilities for the management of
30 Europa was transferred to a Mr Luigi Sassi (“Mr Sassi”) along with all the business records of Europe then in Mr and Mrs Walker’s possession.

4. In the alternative, Mr and Mrs Walker contend that the penalties should be mitigated beyond the 15% mitigation applied by HMRC.

5. We consider below the relevant legislation and authorities in relation to civil
35 evasion penalties. We then make findings of fact based on the evidence before us before setting out our decision and the reasons for it in the light of the submissions of the parties.

Relevant legislation and authorities

6. Section 60 of VATA states as follows, insofar as is relevant:

“(1) In any case where –

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

5 (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable ... to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

10 (2) The reference in subsection (1)(a) above to evading VAT includes a reference to obtaining any of the following sums ... (b) a VAT credit ... in circumstances where the person concerned is not entitled to that sum.

(3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person’s conduct shall be construed -

15 (a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated ...”

7. Under section 60(7) of VATA the burden of proof as to the matters specified in sections 60(1) (a) and 60(1) (b) is on HMRC; it is therefore for HMRC to prove there was dishonest conduct for the purpose of evading VAT.

8. Section 61 of VATA provides as follows:

20 “(1) Where it appears to the Commissioners –

(a) that a body corporate is liable to a penalty under section 60, and

25 (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a “named officer”),

the Commissioners may serve a notice under this section on the body corporate and on the named officer.

(2) A notice under this section shall state –

30 (a) the amount of the penalty referred to in subsection (1) (a) above (“the basic penalty”), and

(b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

35 (3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

(4) Where a notice is served under this section –

40 (a) the amount which, under section 76, may be assessed as the amount due by way of penalty from the body corporate shall be only so

much (if any) of the basic penalty as is not assessed on the notified to a named officer by virtue of subsection (3) above; and

(b) the body corporate shall be treated as discharged from liability for so much of the basic penalty as is so assessed and notified.

5 (5) No appeal shall lie against a notice under this section as such but –

(a) where a body corporate is assessed as mentioned in subsection 4(a) above, the body corporate may appeal against the Commissioners' decision as to its liability to a penalty and against the amount of the basic penalty as if it were specified in the assessment; and

10 (b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection 1(b) above is, in whole or part, attributable to his dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

15 (6) In this section a "managing officer", in relation to a body corporate, means any manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity or as a director; and where the affairs of a body corporate are managed by its members, this section shall apply in relation to the conduct of a member in connection with his functions of management as if he were a director of the body corporate."

25 9. Under section 61(1) (b), Mr Walker as director of Europa was within the scope of this provision and Mrs Walker is also within its scope by virtue of section 61(b) being a managing officer because she was the company secretary.

10. Section 70 provides for mitigation of penalties levied under section 60 which so far as relevant provides as follows:

30 "(1) Where a person is liable to a penalty under section 60, the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) In the case of a penalty reduced by the Commissioners under subsection (1) above, a tribunal, on an appeal relating to the penalty, may cancel the whole or any part of the reduction made by the Commissioners.

35 (3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are –

40 (a) the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty;

(b) the fact that there was, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf as acted in good faith."

11. The reform of the penalties regime for various taxes, including VAT, was effected by section 97 and Schedule 24 of the Finance Act 2007 (“FA 2007”). Paragraph 29(d) of Schedule 24 FA 2007 (“Schedule 24”) provides that sections 60 and 61 VATA “are omitted”. Part 5(5) of Schedule 27 FA 2007 makes provision for sections 60 and 61 of VATA to be repealed.

12. Section 97 FA 2007, which introduces Schedule 24, makes provision for an order to commence Schedule 24 and that order may include incidental, consequential or transitional provisions. This power has been exercised through the Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 (“the Transitional Order”). It should be borne in mind that Schedule 24 makes provision for penalties to be imposed where there are errors in a taxpayer’s document submitted to HMRC or where there is an under-assessment by HMRC and the taxpayer fails to notify that fact within 30 days of the assessment. Accordingly, Article 2 of the Transitional Order makes provision for the commencement of the provisions in Schedule 24 relating to under assessments and states that these come into force on 1 April 2008. This has potential relevance to that part of the penalties imposed in this case which relate to the period 09/08. Mr Newington-Bridges submits that as sections 60 and 61 were repealed on 1st April 2008 in relation to failure to notify an over-assessment by HMRC by virtue of Article 2 of the Transitional Order there is no power to levy a penalty in respect of the period 09/08 under section 61.

13. Article 3 of the Transitional Order states that notwithstanding Article 2, no person shall be liable to a penalty under Schedule 24 in respect of any tax period for which a return is required to be made before 1 April 2009. Article 4 of the Transitional Order provides a saving for sections 60 and 61 of VATA as follows:

“Notwithstanding paragraph 29(d) of Schedule 24 (consequential amendments), sections 60 and 61 of the Value Added Tax Act 1994(a) (VAT evasion) shall continue to have effect with respect to conduct involving dishonesty which does not relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC.”

Mr Newington-Bridges submits that HMRC are in this case seeking to impose a penalty for failure to notify HMRC of an under-assessment. Consequently, the saving in Article 4 of the Transitional Order does not apply.

14. For a number of reasons we reject this submission.

15. First, HMRC in this case do not rely only on what they allege are dishonest failures to notify under-assessment. They rely also on the repeated failure to submit returns at the appropriate time and the use of monies that Europa should have paid over as VAT in order to fund its business which they maintained were dishonest acts of omissions. In our view were HMRC able to make good their case on these grounds then the saving in Article 4 of the transitional order would apply as these matters do not relate to inaccuracies in documents or under-assessments. We reject Mr Newington-Bridges’ submission that where there is also an under-assessment the grounds are conflated and all the failures should be regarded as a failure to correct

under-assessments; in our view the various grounds can operate independently of each other.

16. Secondly, even if Mr Newington-Bridges were right and the failures must be regarded as relating to under-assessments in our view it is not clear that section 60 and section 61 were actually repealed on 1 April 2008. The Transitional Order contains no express provision repealing these provisions as opposed to merely commencing the Schedule 24 provisions on that date and Mr Newington-Bridges was unable to refer us to a specific provision effecting that repeal. The implication must therefore be that the provisions remain in force until penalties under the new provisions are capable of being levied, that is 1 April 2009. We take the view that in the absence of clear language to the contrary, Parliament must be assumed to have intended to continue the existing provisions until the new provisions came into effect and not give taxpayers a year's "holiday" from dishonesty related penalties concerning inaccurate documents or under-assessments.

17. This view is fortified by the provisions of section 17 of the Interpretation Act 1978. This provides:

"Where an Act repeals a previous enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force."

We accept Mr Singh's submission that the effect of this is that when FA 2007 repealed sections 60 and 61 of VATA (assuming that to be the case) and substituted provisions in Schedule 24 for those sections, sections 60 and 61 remained in force until the various dates that the substituted provisions in Schedule 24 came into force.

18. We have to say that the statutory provisions in this regard are not at all user friendly to say the least. We cannot understand why they could not have been clearly set out so that it was absolutely clear what has been repealed and when and what continues to be in force. We have reached our conclusion on this point through a process that can be likened to solving a very difficult jigsaw puzzle when one of the pieces is missing. We therefore conclude that if HMRC are able to make out their case on the grounds they have put forward then there is statutory power for any resulting penalty to apply to the period 08/09.

19. It is common ground that the standard of proof to be applied is the usual civil standard; that is the balance of probabilities. As stated by Lady Hale in paragraph 70 of her speech in *Re B* [2008] UKHL 35:

"Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

20. HMRC accept in their guidance at VATCEP 2060 that in civil evasion penalty cases where dishonesty has to be proved extra evidential ingredients are required

because an act involving dishonesty will, in the nature of things, be impossible of a normal person.

21. It is also common ground that the test for dishonesty in civil penalty cases is the same as that in criminal cases. The test was established by Lord Lane in *R v Ghosh* [1982] 2 QB 1053. In *Ghosh* Lord Lane held that the test was a two stage test: the first stage an objective test and the second stage a subjective test. Lord Lane stated at page 1064:

10 “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, this is the end of the matter and the prosecution fails.

15 If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly.”

22. In the context of civil evasion penalties it has been specifically held that mere carelessness, even recklessness, does not constitute dishonesty: see *Stuttard v HMRC* [2000] STC 342.

23. The two elements of a penalty under sections 60 and 61 of VATA were the subject of consideration by the Court of Appeal in *R v Dealy* [1995] STC 217 where McCowan LJ cited, implicitly with approval, the following direction on law of His Honour Judge Crabtree to the jury:

“Well, what does ‘evasion’ mean? Evasion is an English word that means to get out of something. If you evade something, you get out of its way, you dodge it ...

30 What is dishonesty in English Law? It is a common English word and it carries its ordinary English meaning. You [the Jury] must decide for yourselves, first of all, whether ordinary, right-thinking people would describe what Mr Dealy did as dishonest. If the answer is “No, ordinary, sensible people would not regard what he did as being dishonest” then he is not guilty. However, if you decide that ordinary, reasonable people would see his conduct as dishonest, you must then go on to decide what he thought about it. If you come to the conclusion that Mr Dealy might have thought, quite honestly, that he had a perfect right to do as he did, and that no-one would regard it as dishonest, then he is not guilty. If he was convinced, throughout, that he was doing the right thing, and that other people would agree with him, that is not dishonesty.”

24. We therefore assess the conduct of Europa and Mr and Mrs Walker against the background of these principles.

Findings of Fact

25. We had before us various documents relating to the affairs of Europa and two other entities, Hounslow Scaffolding Co Limited and Hounslow Scaffold (a Partnership) which were associated with Mr and Mrs Walker. The documentation
5 consisted mainly of correspondence and other documents relating to these entities' VAT returns and financial affairs, including notes of meetings and telephone conversations.

26. We had witness statements from four HMRC officers, Ms Jane Roberts, Mr Daniel Pitcher, Mr Gregory Ansell and Mr Roger Reed each of whom gave oral
10 evidence and were cross-examined. We found all the HMRC officers to be honest and reliable witnesses, doing their best to recollect events from some years ago.

27. Mr and Mrs Walker submitted witness statements. They also gave oral evidence and were cross-examined. Mr Walker's evidence was generally unsatisfactory and in many respects lacked credibility. Mrs Walker's evidence was also unsatisfactory in a
15 number of respects and, as we find, is contradicted by some of the documentary evidence. We have therefore approached their evidence with caution and have been reluctant generally to accept their evidence where it is not supported by corroborating written material.

28. From the documents submitted and the oral evidence we make the following
20 findings of fact.

29. Europa carried on business as a construction and scaffolding company. Mr and Mrs Walker were director and company secretary of Europa respectively and its sole shareholders, holding one share each. Although Mr and Mrs Walker maintain that they intended to resign as officers of the company in 2007, it became common
25 ground, as we find later, that they remained as officers of the company until it went into administration in 2009. Mr Walker's primary responsibility was working on site, managing the day to day business of the company and dealing with customers and conclusion of contracts. Mrs Walker had responsibility for Europa's administration. In that regard a firm of accountants, Tamsons, were appointed by Europa to prepare
30 Europa's VAT returns from paperwork submitted to them by Mrs Walker which were then signed by Mrs Walker before submission. Europa's registered office was at Tamsons' office, 177 Kingsley Road, Hounslow, Middlesex, although Europa's trading address for much of the period which is relevant to this appeal was Mr and Mrs Walker's home at 53 Wrens Avenue, Ashford, Middlesex ("the Wrens Avenue
35 address") and HMRC corresponded with and from time to time made contact or tried to make contact with Mr and Mrs Walker at that address.

30. Mr and Mrs Walker have been involved with entities in the scaffolding business from at least 1985, all of whom have been registered for VAT purposes. Based on information contained in a recommendation prepared by a Ms J Taylor of HMRC in
40 January 2006 that Europa should provide security for its VAT obligations, we find that Mr and Mrs Walker have been associated with the following entities:

5 (1) T R Construction Limited, where Mr Walker was the sole director and Mrs Walker the company secretary. This company was registered for VAT on 1 July 1985 and went into insolvency proceedings on 29 January 2003 with a debt of £41,819.36 shown as owing to HMRC. The debt consisted of some returns submitted without payment and assessments in respect of missing returns. We have no information as to whether any of this debt was recovered following the insolvency proceedings.

10 (2) Hounslow Scaffold, which was a partnership between Mr and Mrs Walker. The partnership was registered for VAT on 12 April 1993. Other information not referred to in Ms Taylor's recommendation and Mr Walker's evidence confirms that this entity ceased trading in 2003 and was wound up on HMRC's petition on 16 April 2008, HMRC's petition being based on a debt of £48,397 in respect of unpaid VAT. Ms Roberts' recommendation records that the debt consisted of central assessments being raised for missing returns and that Mrs Walker had promised to bring the outstanding returns to a meeting arranged for 5 December 2005 but she did not attend. It does not appear that the returns were ever made or that the outstanding debt was paid.

15 (3) Hounslow Scaffold Co Ltd, where Mr and Mrs Walker were the directors and Mrs Walker the company secretary. This company was registered for VAT on 1 April 2001. At the time of Ms Roberts' recommendation it had an outstanding VAT debt of £148,857.79, including surcharges, which consisted of returns submitted without payment. This company went into voluntary liquidation on 19 July 2006. The company's statement of affairs as submitted to its statutory meeting of creditors and which was sworn by Mr Walker showed a debt of £78,775 owed to HMRC in respect of VAT, and an overall deficiency to creditors of £201,402. Again it does not appear that the outstanding debt was paid.

31. Mr Newington-Bridges submitted that we should not draw any adverse inferences concerning Mr & Mrs Walker's honesty from the VAT history of these entities as we have no details of when payments were actually made when the entities were operating. We accept that submission and we do not seek to infer that Mr and Mrs Walker acted dishonestly in relation to any VAT that remained unpaid in respect of these entities. We do, however, rely on this evidence as showing a history of late returns and a lack of compliance as well as considerable experience of how VAT operates. In particular we find that Mr and Mrs Walker would have been aware throughout the period that they managed Europa of the requirement to submit VAT returns and make payments of any VAT due in a timely fashion. They would also know that surcharges would be payable in respect of any defaults. Mrs Walker confirmed that she was aware of these requirements as did Mr Walker, although he denied (which we do not accept) that he was not aware of the imposition of surcharges where there had been defaults. In our view any businessman who had been operating in a business subject to VAT for the length of time that Mr Walker had would be aware of all of these basic provisions.

45 32. Europa was registered for VAT on 1 December 2003. From August 2004 until August 2005 HMRC made unsuccessful attempts to contact Mrs Walker, through

letters and personal visits to the Wrens Avenue address, including an abortive visit on 18 August 2005 which Mrs Walker had previously been notified of in a letter dated 27 July 2005 to which she did not respond. HMRC, through Ms Roberts, wished to discuss the outstanding VAT returns of Europa and Hounslow Scaffold Co Limited.

5 33. A meeting eventually took place on 3 November 2005 at Tamsons' offices at
which the outstanding returns for the two entities mentioned in paragraph 32 above as
well as those for Hounslow Scaffold (the Partnership) were discussed. Mrs Walker
accepted it was her fault that the returns were outstanding because of "family
problems" but stated that the outstanding returns for Europa and Hounslow Scaffold
10 Co Limited had been completed and were ready for submission and that those for the
Partnership would be completed over the next few weeks.

34. During the meeting held on 3 November 2005 Mrs Walker gave Ms Roberts the
completed VAT returns for Europa for VAT periods 09/04 to 06/05 and Hounslow
Scaffold Co Ltd for VAT returns periods 02/04 to 05/05. She also agreed to bring Ms
15 Roberts the outstanding returns for the Partnership, the outstanding 08/05 return for
Hounslow Scaffold Co Limited and the outstanding 09/05 return for Europa on 6
December 2005 but did not turn up for the scheduled meeting and did not respond to
subsequent telephone calls or a letter dated 15 December 2005 chasing the
outstanding information.

20 35. We find that Mrs Walker would have been aware that all of these returns were
late. We accept that Mrs Walker was not proactive in progressing Europa's VAT
affairs; she would provide Tamsons with the necessary evidence and wait for them to
prepare the returns for her signature, and did not appear to be diligent in chasing them
for completed returns for signature. Nevertheless she knew from her experience of
25 dealing with VAT matters over the years that returns would not be filed unless she
signed them and that they had to be filed within prescribed deadlines and payments
made with the returns. Mrs Walker accepted in her oral evidence that she knew from
the time of the meeting in November 2005 the importance of putting returns in on
time but persisted in putting them in late and did not deliver the outstanding returns to
30 Ms Roberts as agreed.

36. On 12 January 2006 Ms Taylor of HMRC prepared the recommendation that
Europa should be asked for security for its VAT obligations. Mr Ansell's evidence
was that this was as a consequence of Mr and Mrs Walker's involvement in the three
entities that had entered insolvency whilst owing significant amounts of VAT and the
35 failure to submit the VAT returns following Ms Roberts' investigations. Europa was
notified of the requirement to provide security on 23 February 2006 in a letter which
was sent both to Tamsons and to the Wrens Avenue address. It and further reminders
elicited no response. These letters warned Europa that if the security requested
(£71,023.56) was not provided the company was liable to prosecution if it continued
40 to make taxable supplies. Mrs Walker in her evidence confirmed that she did not
discuss day to day VAT matters with Mr Walker but would expect to do so if a
problem out of the ordinary arose, such as a threat of prosecution.

37. Although no security was provided, the requirement was withdrawn in January 2007 because of ongoing recovery action which was by then being taken by HMRC's Civil Recovery Team in response to unpaid assessments.

5 38. Ms Roberts' review of the late returns that Mrs Walker did provide at the meeting on 3 November 2005 led her to produce a VAT audit report during the early part of 2006. She concluded from the returns that had been submitted that there was an under-assessment by the central assessments that had been issued in the absence of the returns of approximately £45,700. The report records that after further chasing the outstanding returns were submitted on 24 April 2006 following action from HMRC's
10 Debt Management Unit. Ms Roberts' report concludes as follows:

15 "Credibility was tested by applying the checks listed above. We found nothing to cause us to doubt the credibility of the returns. However, the large difference between the central assessments and true amount of tax, the lack of response to initial attempts to arrange a visit and the high number of missing returns show a lack of compliance and I would recommend an early return visit to this and the associate registration."

20 39. Mr Newington-Bridges put it to both Ms Roberts and Mr Ansell that this demonstrated that there was no reason to doubt Mr and Mrs Walker's honesty; their behaviour at this stage could be characterised as disorganised and non-compliant but the returns were eventually submitted and where they were submitted there was no reason to doubt their accuracy. Mr Newington-Bridges submitted that the conclusion that should be drawn from this is that the behaviour in eventually submitting accurate returns demonstrated all the attributes of honest traders.

25 40. We do not think this conclusion can readily be drawn from the conclusions reached by Ms Roberts. As she pointed out in her evidence, her note was limited to chasing the returns and assessing them when received. She was not conducting an investigation into whether dishonest evasion was occurring in the context of the circumstances she was looking at at that time. We therefore regard Ms Roberts' conclusions on the credibility of the returns she received as being entirely neutral on
30 the question of whether Mr and Mrs Walker were engaged in dishonest evasion in the manner alleged by HMRC.

35 41. Mr Ansell, an officer employed in or within the Enforcement and Compliance Directorate of HMRC, became involved in the VAT affairs of the entities associated with Mr and Mrs Walker in May 2007. He became involved as a result of Europa's registration being highlighted on HMRC's systems as having multiple overdue returns. At that stage HMRC's records showed that none of the four returns for 2006 had been submitted. Consequently, central assessments were issued for each of the relevant periods, the amount being calculated as a best estimate of what might be due at that time, a calculation which is performed by a central computer which increases
40 the amount assessed as the periods go on.

42. Europa paid the sums due for the central assessment and default surcharge liabilities for VAT periods 03/06 to 03/07 on 31 July 2007 (£48,060.80). This led Mr Ansell to consider that Europa was exhibiting characteristics suggestive of evasion

because by paying central assessments in preference to rendering VAT returns Europa had previously and significantly under-declared its tax liability (as detailed in paragraph 38 above). Mr Ansell therefore decided to institute an enquiry into Europa's VAT affairs.

5 43. Mr Ansell had difficulty in making contact with Mr and Mrs Walker. He first attempted to do so by visiting the Wrens Avenue address in September 2007 but he was told that Mr and Mrs Walker no longer lived there. By this time, as is common ground, Mr and Mrs Walker had moved to France, sometime in the summer of 2007. Mr Ansell obtained information through HMRC's missing trader section that Mr and
10 Mrs Walker were living in France but was unable to obtain their address. Mr Ansell therefore visited Mr Flora of Tamsons on 27 March 2008. His note of that visit, which we have no reason to doubt, records that Mr Flora confirmed that he was expecting to see the Walkers in due course.

15 44. Mr Ansell's visit seems to have prompted some action because on 3 April 2008 the overdue VAT returns for periods 03/06 to 06/07 were received stating a VAT liability which was £143,566 more than the central assessment amounts which had been issued in their stead.

20 45. We have a copy of Mr Ansell's case notes which record details of his numerous telephone contacts with Mr Flora between April and September 2008 during which he was chasing the submission of outstanding returns. These notes show (and we have no reason to doubt their accuracy) that Mr Flora knew that the Walkers were in France but he did not know their address. The Walkers contacted him from time to time and submitted records to him on an ad hoc basis from which the VAT returns were prepared. Mr Ansell also obtained a mobile number for Mrs Walker from Mr Flora in
25 August 2008. After a number of attempts to set up a meeting with Mrs Walker, a meeting did take place on 31 October 2008 at Mr Ansell's office which was attended by Mr Ansell and Mr Reed of HMRC, Mrs Walker and Mr Sivanadarash of Tamsons.

30 46. There is a written note of the meeting prepared by Mr Ansell a few days after the meeting took place from handwritten notes that Mr Ansell took at the meeting. Mr and Mrs Walker contend that this meeting note is inaccurate in two important respects. Mr Ansell's handwritten notes are not a verbatim account of what was said but, as Mr Ansell explained, were a series of "memory joggers" to be used in preparing a detailed note after the event.

35 47. The first issue arising out of the notes is a number of statements regarding the current management of Europa. Mr Ansell records Mrs Walker as having stated that Mr and Mrs Walker:

"are semi-retired – the operation of the business has been devolved to a "manager", although they remain the directors of the company."

40 The note also records that "the period of control" by the manager started approximately one year ago and that "the manager is PAYE and not a director of the company". All of these statements are consistent with Mr Ansell's handwritten notes.

48. These statements are clearly in conflict with the evidence given by Mr and Mrs Walker regarding the arrangements they had made for the running of Europa's business when they left for France in the summer of 2007.

5 49. Mr Walker's evidence was that in 2006, through contacts made while working on an important contract on the tube network in London, he met Mr Sassi who was working as a site manager on another project. Mr Walker said that he was impressed with Mr Sassi's management skills. Some months later Mr Sassi, who was now running his own business, according to Mr Walker, expressed an interest in helping run Europa if Mr Walker wished to spend more time abroad. Mr Walker's evidence
10 was that Mr Sassi proposed that the office functions of Europa be moved to his business address in Dorking so he could look after Europa in tandem with his own business while Mr and Mr Walker retired to France. According to Mr Walker, this arrangement was tried for a period of 6 months and worked so well that by July 2007 he decided to allow Mr Sassi to take over the whole of Europa, with Mr Sassi being
15 made a signatory on the bank accounts and what records Mr and Mrs Walker had being passed to him with any remaining records staying with Tamsons.

20 50. Mr Walker's evidence was that there was to be no consideration paid at the time in respect of the sale but Mr Sassi would receive Europa's goodwill and whatever money was left in its bank accounts, but Mr Walker made clear to him that this would only be after collecting outstanding debts and paying any of Europa's creditors. If Europa's business performed as Mr Walker had claimed then in return Mr Sassi agreed to pay Mr Walker amounts from time to time as a form of pension. Mr Walker contends that he left signed Companies House forms with Tamsons recording the resignation of himself and Mrs Walker as officers of the Company and
25 appointing Mr Sassi in their place and gave Mr Sassi instructions to visit Tamsons to sign his appointment. This would at the same time give Mr Sassi an opportunity to introduce himself to Tamsons. Thereafter, Mr Walker envisaged that Tamsons would take care of all the statutory formalities, as he had always asked them to do in the past.

30 51. Mr Walker's evidence was that early in 2009 he was contacted by Mr Sassi who informed him that he had received a winding up petition for Europa from HMRC which was in respect of unpaid VAT and fines. Mr Walker contends that he did not understand why he was being contacted over Europa's affairs because the business was now Mr Sassi's and he had clearly understood, upon taking over, what sums of
35 money recovered from debtors was due to creditors, if any – and should, by this time, have been paid – and what of the remainder was for Europa.

40 52. During the course of his conversation, Mr Walker's evidence was that Mr Sassi informed him that Tamsons accountants had closed down so he had changed the Company's accountants to a local firm he used for his own business (Specific Projects Limited), namely C. Swift & Co. of Dorking but did not state whether or not he had personally attended Tamsons' offices to take care of the transfer of officers and other statutory obligations, only that that Mr Swift had looked at Europa's books for him. Mr Walker stated that as he had not been privy to any of Europa's records since handing the business over to Mr Sassi in the summer of 2007, he replied that as

Europa is now his, Mr Sassi could do whatever he wished about making such decisions. However, he did say that Europa had been left with a healthy order book, a good bank balance and a reasonable sum of money owed so it should have easily been able to meet its commitments.

5 53. Mr Walker states that a few days later he discovered that the documents
necessary to transfer the control of the business to Mr Sassi had never been completed
and that Mr and Mrs Walker remained on the register at Companies House as officers
and owners of the business. Consequently he resumed control of Europa's affairs and
the negotiations with HMRC over the winding up petition, as described in more detail
10 below.

54. Mrs Walker's evidence was to the same effect as Mr Walker's with regard to
the transfer of responsibilities for Europa to Mr Sassi. Mrs Walker's evidence was
that when she was contacted by HMRC in 2008 to attend the meeting which took
place on 31 October 2008 she understood this to be a meeting about tax returns
15 submitted for Europa (and the previous entities with which she had been involved)
during the period they were under hers and Mr Walker's control. She said that after
the meeting she returned to France leaving Tamsons to complete any paperwork that
might be necessary. Her evidence is that she stopped off at Europa's new offices in
Dorking and advised Mr Sassi about the meeting and that she had answered questions
20 about Europa that involved the period before he took over and that Mr Sassi made no
material comment about the business.

55. Mrs Walker's evidence is that after Mr Sassi informed Mr Walker about the
winding up petition in 2009 that it was Mr Sassi who suggested Europa engage Go-
Legal who were situated in the same office block as Europa to negotiate with HMRC
25 and that it was Mr Sassi who engaged C Swift & Co as accountants in succession of
Tamsons and had control of all of Europa's books and records.

56. With regard to the statements of Mr Ansell's meeting note regarding the
appointment of a manager, Mrs Walker's evidence was that the reference was to a Mr
Tony Myatt, who was a scaffolding manager at Europa, who on the basis of Mrs
30 Walker's evidence would have been reporting to Mr Sassi rather than to Mr Sassi
himself. Mr Ansell was clear in his evidence that no mention of any particular
manager by name was made, whether it was Mr Sassi or Mr Myatt. At that stage we
accept that he had no knowledge himself of who might be managing Europa other
than Mr and Mrs Walker.

35 57. As a consequence it is not surprising that Mr Ansell did not seek to investigate
Mr Sassi's involvement with Europa at that time. We find, based on Mr Ansell's note
of the meeting on 31 October 2008, that Mrs Walker had not disclosed to Mr Ansell
any information that might lead him to believe that Mr Sassi was involved with
Europa in any way.

40 58. HMRC did make contact with Mr Sassi in 2010, after Europa had gone into
administration and Mr Ansell had received copies of Europa's bank statements
covering the period from November 2008 to May 2009 from Europa's Administrators.

Mr Ansell had noted from these statements a payment of £210,000 had been made to Specific Projects Limited, (“Specific”) of which Mr Sassi was a director, and following a meeting Mr Ansell had with the Administrator on 18 February 2010 during which the Administrator had discussed other payments made to Specific he
5 decided it was necessary to investigate Specific Projects’ involvement with Europa.

59. Accordingly Mr Pitcher of HMRC was asked by Mr Ansell in March 2010 to establish why large sums of money were paid to Specific by Europa shortly before Europa went into administration.

60. Mr Pitcher interviewed Mr Sassi on 21 April 2010 at Specific’s offices at the
10 Atrium, Curtis Road, Dorking, Surrey (“The Atrium address”). We were shown a hand written note of that interview prepared by Mr Pitcher and a typed visit report which Mr Pitcher told us was prepared no later than a few days after the meeting. We have no reason to doubt the accuracy of Mr Pitcher’s notes and visit report as a true record of what was discussed at the meeting.

61. Mr Pitcher’s evidence was that Mr Sassi explained that he (Mr Sassi) was never
15 employed by Europa and made it very clear that he was not involved in the administration of Europa’s financial affairs, which remained the sole responsibility of the directors who were based in France. Consequently, Mr Sassi told Mr Pitcher that he did not realise that Europa was experiencing cash flow difficulties and had no other
20 knowledge of Europa’s financial records or status.

62. Ms Sassi explained to Mr Pitcher that Specific was engaged by Europa to project manage all works carried out by Europa, including restructuring, project tenders, marketing, promotions, site management, health and safety and the preparation of all on site project works.

63. Mr Sassi provided Mr Pitcher with copies of various invoices covering some of
25 the work carried out by Specific for Europa and we were shown these. They describe the services provided which can be summarised as being in the nature of project management and supervisory services. They are therefore fully consistent with a contractor/sub-contractor or principal/agency relationship, that is that Specific were
30 performing Europa’s obligations under contracts that Europa had entered into, either as a sub-contractor or as Europa’s agent. They therefore corroborate the explanation Mr Sassi gave to Mr Pitcher of Specific’s role. There were no written arrangements governing the relationship between Specific and Europa.

64. With regard to the payments made by Europa to Specific, at the meeting it was
35 explained that although Specific commenced work for Europa in November 2006, the first invoice was only issued in September 2007 because Europa had not yet been paid by its own customers but they were issued at regular intervals thereafter. Mr Pitcher requested further information from Mr Sassi after the meeting and on 24 May 2010 Mr Sassi informed Mr Pitcher in an email that initially Mrs Walker was responsible
40 for sales invoices, and then Specific took over responsibility but under the instructions of the Directors. With regard to purchase invoices, Mr Sassi stated that purchase

invoices were checked and passed by Specific Projects and Mr and Mrs Walker authorised all payments.

5 65. Again, this evidence is consistent with Specific having a project management role, either as a sub-contractor or an agent, acting under the ultimate supervision of Mr and Mrs Walker and with Specific's business still remaining separate from Europa. It is also consistent with what Mr Ansell records Mrs Walker having said at the meeting of 31 October 2008, namely that Mr and Mrs Walker were semi-retired but remained as the officer of Europa with the operations of the business having been devolved to a manager.

10 66. Mr Newington-Bridges submits that there is evidence to show that Mr Sassi's role went further than this and that Mr Pitcher was misled by Mr Sassi as to his role. First, Mr Newington-Bridges referred Mr Pitcher to a copy of a Hire Purchase Agreement entered into in September 2008 between BNP Paribas and Europa which Mr Sassi had signed on behalf of Europa. Mr Newington-Bridges submits that this is
15 clear evidence of Mr Sassi administering Europa's financial affairs. However, we note that under Mr Sassi's signature his position is described as "G Manager" which we take to be shorthand for "General Manager". This is therefore consistent with Mr Sassi having a managerial role reporting to Mr and Mrs Walker and we therefore find that it is more likely than not that this agreement was signed by Mr Sassi under
20 delegated authority by either or both of the Walkers. It does not go so far as Mr Newington-Bridges suggests to show that by the time of this agreement Mr Sassi was controlling Europa's financial affairs.

25 67. Secondly, Mr Newington-Bridges referred Mr Pitcher to an Electronic Funds Transfer Customer Authority given on behalf of Europa on 23 March 2009 to HSBC authorising that bank to transfer £210,000 to Specific. Again, this authority was signed by Mr Sassi but it did not indicate the capacity in which he was signing. There is also a hand written note on the authority which appears as "Auth Tr 23/3/09" which we take to mean that the transfer was authorised on 23 March 2009. It is unclear
30 whose annotation that was; whether it was Mr Sassi's so as to indicate he had authority from the Walkers to make the transfer, or whether it was made by the HSBC staff member processing the transaction to indicate that the necessary authority had been obtained. Either way, it appears that some form of authority beyond Mr Sassi's signature was necessary to make the transfer and that being the case in our view it was more likely than not that such authority would have to have come from one of Mr or
35 Mrs Walker.

40 68. In any event, even if Mr Sassi had authority on his own to authorise a transfer of this kind it does not indicate that he was administering all the financial affairs of Europa. It is to be noted that the transfer relates to operational business matters namely, payment to Europa's project manager and therefore relates to the matters over which control had clearly been delegated to Specific. It says nothing about whether Europa's general financial administration and in particular its VAT affairs had been delegated. What it does indicate is that, consistent with Mr and Mrs Walker's evidence, Mr Sassi had been made a signatory to one of Europa's bank accounts. It also appears that this was not disclosed by Mr Sassi to Mr Pitcher although it is not

clear that Mr Sassi was specifically asked whether he had any authority over Europa's bank accounts. Mr Newington-Bridges submits that in view of this authority Mr Sassi's statement to Mr Pitcher that he was "not involved in financial administration for Europa which was the sole responsibility of the directors who were based in France" was untrue, although it is possible that Mr Sassi was drawing a distinction in his own mind between operating the business on a day to day basis as project manager and dealing with back-office administration such as submitting VAT returns. We can therefore draw no conclusion that the signed authority shows, first that Mr Sassi was a director of Europa or secondly that he was responsible for all of Europa's financial administration. It is of course entirely possible for a person to be given authority over a company's bank account without being made a director.

69. There are two further pieces of evidence that Mr Newington-Bridges relies on to corroborate Mr and Mrs Walker's evidence regarding the role of Mr Sassi.

70. First, there is the fact that the principal place of business of Europa was changed to The Atrium address. It is not clear whether the registered office was changed (the Annual Return of Europa that Mrs Walker signed in September 2008 which is mentioned below shows the registered office as still being Tamsons' address in Hounslow) but when details of The Atrium address were given to Mr Ansell at the meeting on 31 October 2008 by Mrs Walker Mr Ansell arranged for Europa's principal place of business for VAT records purposes to be changed to the Atrium address from the Wrens Avenue address. We see nothing in this that gives further support to Mr Newington-Bridges' submission. As Europa's operations on a day to day basis were being carried on by Specific which was based at The Atrium it is not surprising that this address should replace the Wrens Avenue address. After the meeting on 31 October 2008 Mrs Walker also gave authority for HMRC to correspond with Tamsons at the Hounslow address, specifically with regard to Europa's VAT affairs, so we do not see that the change of address for Europa's day to day business operations demonstrates that all Europa's financial matters were being dealt with under Mr Sassi's control from that office as well.

71. Secondly, there is correspondence between the Insolvency Service and Mr Sassi in 2010 regarding his involvement with Europa. In its letter of 22 November 2010 the Insolvency Service concluded:

"although you were not formally appointed as a director of [Europa], it would appear that you acted in the capacity of a director of it, in that you were involved in its general management and control, operating in a similar capacity as the formally appointed director."

72. Subsequently, on 8 February 2011 the Insolvency Service notified Mr Sassi by letter that the Secretary of State intended to apply to the Court for an order disqualifying Mr Sassi (as well as Mr and Mrs Walker) from acting as a company director based upon his conduct as a director of Europa. Amongst the conduct highlighted was the failure to determine Europa's correct VAT liabilities.

73. We do not know the basis on which the Insolvency Service concluded that Mr Sassi was a director, although the passage we have quoted from their letter of 22

November 2010 indicates that they found him to be involved in the company's "general management and control" rather than that he was involved in all Europa's affairs. The fact that he was held responsible for the VAT failings is the inevitable consequence of him being found to be a director regardless of whether in practice he actually had any involvement in Europa's VAT affairs. Nevertheless, even if Mr Sassi was a director that does not absolve Mr and Mrs Walker for responsibility if they remained officers (which the Insolvency Service clearly believed to be the case) and therefore potentially liable to penalties under sections 60 and 61 of VATA if they acted dishonestly. It is therefore still necessary to establish the extent to which Mr and Mrs Walker continued to have responsibility for Europa's VAT affairs even if, and in our view the evidence before us does not clearly establish it to be the case, that Mr Sassi is to be treated as a director of Europa.

74. In our view the evidence points overwhelmingly to the conclusion that Mr and Mrs Walker remained the owners of Europa and as its sole director and company secretary respectively, with ongoing responsibility for its financial administration, including its VAT affairs, up to the point that Europa went into administration. Our reasons for this conclusion are as follows.

75. First, Mr Ansell's notes of the meeting held on 31 October 2008 do not record Mrs Walker saying anything about the fact that complete responsibility for the ownership and management of Europa had passed to Mr Sassi. Mrs Walker's evidence was that she understood the meeting was to be a meeting about Europa and the previous entities with whom the Walkers had been involved during the period these entities were under her control. Mr Ansell was clear in his evidence that this was not the case and that the meeting was arranged to discuss the VAT affairs of the various entities generally without limitation as to period. We accept Mr Ansell's evidence on this point and reject Mrs Walker's explanation. If Mrs Walker was clear that she had no responsibility for the period after she had moved to France it would have been in her interest to make that absolutely clear to Mr Ansell either when she agreed to attend the meeting or at the very latest at the outset of the meeting. It was clear that she did not do that and that Mr Ansell was given no details of who was managing the company. We find that Mr Ansell was told that there was a manager in place and although he was not named the person referred to by Mrs Walker was Mr Sassi (not Mr Myatt as alleged by Mrs Walker) and that Mr Ansell was correct when he recorded that Mr and Mrs Walker were "semi-retired but remained the officers of Europa". This is consistent with the evidence regarding Mr Sassi's role obtained by Mr Pitcher and the underlying documentation we reviewed in paragraphs 58 to 67 above.

76. Secondly, we reject Mr and Mrs Walker's evidence that completed Companies House forms were left by them at Tamsons' office resigning as officers and appointing Mr Sassi and that they arranged for Mr Sassi to attend at Tamsons' office to sign the necessary documentation. Mrs Walker accepted that she signed an Annual Return (Form 363s) for Europa on 28 September 2008. The form showed the registered office to be at Tamsons' office in Kingsley Road, Hounslow and that Mr and Mrs Walker were the sole director and secretary respectively and also the sole shareholders. If Mr and Mrs Walker were right about ownership and management

having passed to Mr Sassi we find it implausible that she would be signing, in her capacity as company secretary, a document which states the opposite of what she believed to be the position since she moved to France. We do not accept her explanation that she merely signed what the accountants asked her to sign without
5 examining it. She would be familiar with the contents of an Annual Return Form from many years experience and it is inconceivable that she was not aware that she was being asked to sign it as an officer of the company. Had she believed that ownership and management was now Mr Sassi's responsibility it is not credible that she would not have questioned why she as being asked to sign this form when
10 according to her evidence forms to record her resignation had been deposited with Tamsons over a year ago.

77. Mr and Mrs Walker did not provide any evidence that suggested they had actually transferred their shareholdings to Mr Sassi. Mr Walker's evidence on this point lacked any credibility. He accepted that at the time of the alleged transfer
15 Europa's net assets were relatively healthy, amounting to some £600,000 in total. Mr Walker's evidence therefore was to the effect that he and Mrs Walker transferred the benefit of such assets without payment but on the basis of a verbal assurance from a person, Mr Sassi, who he had only known and worked with for a short period that he would be paid a pension for life as and when Europa could afford it. Mr Walker
20 sought to explain a payment of £15,000 that was made to him in March 2009 as monies due in respect of the pension agreement. In our view it is more likely to be a payment to Mr Walker in his capacity as a continuing director of the company and therefore was received as director's remuneration. We think that it is inconceivable that Mr and Mrs Walker would have transferred what was on his evidence a valuable
25 business on this basis and therefore reject their evidence that ownership of Europa was transferred to Mr Sassi in any respect.

78. Thirdly, Mr Walker's evidence was that Mr Sassi contacted him when the winding-up petition against Europa was received in early 2009. We see no reason why Mr Sassi would make contact with Mr Walker at that point if Mr Sassi had sole
30 responsibility for dealing with Europa's affairs and we find that the reason Mr Sassi did contact Mr Walker was because Mr Walker remained responsible as the sole director. It is also telling that Mr Walker appears to have made no effort to implement the arrangements for Mr Sassi to take over as sole director after he learned, on his evidence, that Mr Sassi had not visited Tamsons to complete the formalities to
35 transfer responsibility to Europa to him. He appears to have accepted the situation without demur and then dealt with the winding-up petition and the negotiations over it representing himself to be the sole director of Europa. This is apparent from the letter that Go Legal, who were acting as Europa's solicitors, wrote to HMRC on 19 March 2009 putting forward proposals to pay the outstanding VAT debt over a period of time
40 in return for withdrawal of the petition. This letter bore a statement at its foot by Mr Walker confirming that he agreed with the proposal in his capacity as sole director of Europa. In our view the reason Mr Walker did not challenge Mr Sassi over his failure to take over the directorship and represented himself as sole director in the Go Legal letter was that he had always remained as the sole director and knew that to be the
45 case. We reject Mr Walker's evidence that he did not know who the directors of

Europa were after the winding-up petition was presented and he took control of the situation because he knew it was his responsibility to do so.

5 79. Fourthly, Mrs Walker agreed, as recorded in Mr Ansell's note of the meeting held on 31 October 2008, to submit five outstanding VAT returns by 7 November 2008. In the event, Mrs Walker did submit three of the outstanding returns on 18 November 2008 and another return on 12 December 2008. Mrs Walker signed all of the relevant returns, even those that related to the period after she had left for France. Had she believed that Mr Sassi had responsibility for the relevant returns and had all the books and records relating thereto and had she believed that she stated in her evidence, which was that she believed the meeting with Mr Ansell was to discuss only matters which occurred when the VAT affairs of Europa were under her control, she would have asked Mr Sassi to deal with these returns. She did not, and her evidence was that she only had a brief meeting with Mr Sassi after the meeting with Mr Ansell and did not discuss Europa's affairs in any detail. We find that the previous arrangements for the completion of the returns continued to apply, that is Mrs Walker gave Tamsons all the relevant records and Tamsons prepared the returns for Mrs Walker's signature. This explains why the returns were completed relatively quickly after the meeting on 31 October 2008; Tamsons clearly were able to prepare them without any assistance from Mr Sassi.

20 80. We therefore reject Mr and Mrs Walker's evidence that they had ceased to have responsibility for Europa's financial affairs and in particular responsibility for its VAT affairs or that they passed the relevant books and records to Mr Sassi.

25 81. It is clear that at some point after the meeting on 31 October 2008 Tamsons were replaced as Europa's accountants by Mr Swift. Mr Ansell was made aware of this in a telephone call he held with Mr Harvic of Go Legal on 26 January 2009, in a call in which Mr Harvic indicated that he was going to review the books and records of Europa before they would be made available, as requested by Mr Ansell, to HMRC. There is no evidence, however, despite Mr Swift also being Mr Sassi's accountant, that this indicated any transfer of the responsibilities for Europa's VAT affairs to Mr Sassi. Indeed the record we were shown of Mr Ansell's conversation with Mr Swift clearly indicated that the Walkers continued to have responsibility. Mr Ansell's note of a telephone conversation he had with Mr Swift on 10 December 2010 at a time when Mr Ansell was still trying to locate the books and records of Europa indicated that Mr and Mrs Walker had given him some records; he made no reference to receiving any information from Mr Sassi. In addition, as we have found, Mr Walker took responsibility for dealing with the winding-up petition, advised by Go Legal.

82. We therefore find that responsibility for Europa's VAT affairs remained with Mr and Mrs Walker up to the point that Europa went into administration in 2009.

40 83. The second issue arising out of the notes of the meeting held on 31 October 2008 are the following confirmations that Mr Ansell records Mrs Walker as having given:

“- that the reason the debt on file is so large is because of payment issues with several major clients ...

- that as a result where payment of VAT was received it was put to other uses by the business – specifically:

5 a. Payment of wages – Prime – including Mr and Mrs Walkers salary (n.b. 1 year ago they affected a move to ‘dividends only’ drawings and have taken a dividend since being in France)

10 b. Payment of overheads and suppliers – There are no significant creditors as the business is a good payer;

That as a result the VAT was knowingly **not** paid to HMRC when due.”

15 84. Mr Ansell’s handwritten “memory jogger” from which these notes were prepared records the phrase “VAT gone on costs”. The references to the various items which he records the VAT having been spent on appear in a different part of his note to this statement. Mr Newington-Bridges put it to Mr Ansell that what was meant by this phrase was that with costs of Europa’s business escalating the VAT inputs it was receiving were getting close to the output tax it was due to pay HMRC,
20 and not that the VAT that should have been accounted for to HMRC was being used to defray other business expenses.

25 85. We reject this submission. First, it is clear from the VAT returns in question that the VAT claimed as inputs does not reach a point at which they match the outputs. In any event, Mrs Walker accepted in cross-examination, contrary to her witness statement, that the type written note of the meeting was accurate when it recorded that monies were used to pay other debts and outgoings, rather than earmarking it for payment of VAT debts. In particular, Mrs Walker accepted that there were times when due to cash flow difficulties payments needed to be made to third parties so that payments to third parties would be made at times when sums
30 payable to HMRC for VAT were overdue, although she stressed that it was never her intention not to pay the VAT that was due, and it would be paid when money was available.

35 86. We therefore accept Mr Ansell’s typed written note as an accurate record of what Mrs Walker said at the meeting on 31 October 2008 on this point. It is also corroborated by Mr Reed, who was present at the meeting and confirmed that in his view it was correct, although he had no notes of his own.

40 87. We infer from Europa’s approach to the payment of VAT and the submission of VAT returns in respect of the periods relevant to these appeals that its strategy, as confirmed by the remarks that Mrs Walker made at the meeting on 31 October 2008, was to pay its VAT liabilities when it had cash available to do so and where it had cash available to meet other liabilities and those liabilities were due it would make those payments even where it knew that sums in respect of VAT would be due and payable to HMRC.

88. In that regard, we find the following facts with respect to Mr and Mrs Walker's knowledge of the VAT system and how it operates and the state of Europa's business at the time the relevant VAT returns were filed and payments of VAT made.

5 89. Mrs Walker confirmed in her oral evidence that she was aware of her responsibilities to ensure that VAT returns and payments due in respect of those returns were made on time and that if there was a failure to comply the trader would be in default and would fall into the default surcharge regime. This was based on her experience of dealing with VAT registered entities over a period of more than 25 years, a number of which, including T R Construction Limited, Hounslow Scaffold, 10 Hounslow Scaffold Co Limited as well as Europa itself, fell into default.

90. Mrs Walker admitted that she was not proactive in responding to HMRC's requests for information. Mrs Walker accepted that every VAT return filed by Europa was late except for the first one. We accept that Mrs Walker's approach was to provide Tamsons with all the necessary invoices and other documentation to enable 15 Tamsons to prepare the returns for Mrs Walker's signature. Mrs Walker maintains that she relied entirely on Tamsons work to satisfy herself that the figures prepared were accurate and what payment would be required in respect of the returns and would not seek to verify the figures herself.

91. With regard to the periods in respect of which the penalties have been assessed 20 on Mr and Mrs Walker, HMRC's records show the following:

- 25 (1) By July 2007 Europa had a VAT debt due of £48,060.80, although this understates the true debt as it was based on central assessments and subsequent to the submission of the missing VAT returns after the meeting on 31 October 2008 it was clear that the debt owed was much higher;
- (2) On 3 July 2007 HMRC's civil recovery unit wrote to Europa at Tamsons' address notifying them that if the debt referred to above was not paid within 7 days a petition to wind-up Europa would be presented;
- 30 (3) On 31 July 2007 a payment sent by Tamsons for the outstanding debt was cleared which resulted in a nil balance on HMRC's books;
- (4) On 8 January 2008 Europa was notified that VAT of £32,160.90 was due, warning it that proceedings would be instituted in the County Court if it was not paid within 7 days. Again this sum understated the true debt as it was based on central assessments rather than Europa's own VAT returns;
- 35 (5) This debt of £32,160.90 was paid on 2 April 2008;
- (6) The last VAT payment made by Europa was in January 2009 when it made a payment of £100,000 on account of its outstanding liabilities. After the winding-up petition was presented in March 2009 as referred to in paragraph 51 above Go Legal had offered to make various stage 40 payments towards clearing the outstanding debt in an attempt to obtain agreement to the petition being withdrawn but it does not appear that any payments were made;

- 5 (7) In respect of each of the periods in question, a central assessment was issued in the absence of a return from Europa. In respect of all but three of the periods the central assessments were substantially less than the true amount of VAT due, based on Europa's own assessment. In respect of three periods the central assessments were in relatively small amounts higher than the amount shown on Europa's own returns. Consequently, the amount which became due as a result of the reconciliation of the amounts assessed under the central assessments to the amount shown on Europa's return when submitted was £223,299.54;
- 10 (8) When Europa did make payments it did so by reference to the amounts shown on the central assessments; and
- (9) Each central assessment when issued (on Form VAT 152) contained a prominent statement on its face as follows:

15 "If this tax assessment understates your liability and you do not draw this to the Commissioners' attention within 30 days you may become liable to a financial Penalty and Default Interest. You are advised to render your return without delay. Please see the notes overleaf."

The notes referred to in this statement provided, *inter alia*:

20 "The Commissioners are empowered to make an additional assessment if it is discovered that the amount of tax you have paid is less than the true amount due.

You may become liable to a misdeclaration penalty if you fail to tell Customs and Excise within 30 days that this assessment of tax is too low.

25 If you are found to have dishonestly evaded VAT you may be liable to a Civil Evasion Penalty equal to the amount of VAT evaded."

92. Mrs Walker confirmed in her oral evidence that she was aware of Europa's turnover as she issued the company's sales invoices. She also confirmed that she was aware of the applicable rate of VAT applicable to the price shown on the invoice and therefore would have been roughly aware of the amount of VAT that would become due in respect of its sales. Mr Singh therefore put it to Mrs Walker that at the time the payment of £48,060.80 was made on 31 July 2007 she would have known that at the relevant time, based on its turnover, that Europa owed significantly more than this and that paying only this sum in respect of a 15 month period of trading amounted to a serious underpayment, the true liability at the time being four times that amount. Mrs Walker initially denied this and also maintained that she was unaware of the wording on the central assessments quoted in paragraph 91(9) above and therefore did nothing to draw the underpayment to HMRC's attention. She also maintains that she made such payments as she was advised by Tamsons to make.

40 93. Eventually, Mrs Walker conceded that the payment on 31 July 2007 was made in the context of her move to France and her instructions to Tamsons were to bring Europa's VAT position up to date and pay what was then due, so that she would have known that the payment actually made would amount to a serious underpayment.

94. We also find that Mrs Walker would have been aware of the wording on the central assessments and the relevant notes, based on her long experience of dealing with VAT affairs. We do not accept her assertions that she relied entirely on the accountants and never read any of the material she was asked to sign or questioned how much needed to be paid. Mrs Walker admitted that cash flow was always a problem for Europa so she would be keen to know what liabilities Europa would need to settle and that the amounts she was being asked to pay were correct.

95. Although there was evidence that Tamsons were not particularly proactive in taking the initiative to deal with Europa's affairs, we find that there was a deliberate strategy not to pay VAT until the last minute, as shown by the fact that the payments made in July 2007 and April 2008 were only made under threat of legal action, in the first case under the threat of a winding-up order.

96. Mr Newington-Bridges submitted that Mrs Walker's behaviour was consistent with that shown in respect of the earlier period following Ms Roberts' intervention, that is there was a history of late returns and a lack of compliance but all returns were eventually submitted, and there was nothing to impugn the credibility of those returns. The failures were therefore down to inefficiency or at worst recklessness, rather than a deliberate course of conduct. We reject those submissions. The combination of the fact that Mrs Walker admitted that VAT was paid when resources were available but in the meantime sums due may be used to defray other costs, the history of only making payments when legal action was threatened and paying against central assessments when to her knowledge the actual liability would have been much higher, lead us to conclude that the failure to submit returns and only pay the amount shown on the central assessments, shows a clear pattern of deliberate behaviour and cannot be characterised as mere inefficiency and disorganisation or even recklessness.

97. With regard to Mr Walker, he denied even basic knowledge of Europa's VAT affairs. Whilst he accepted that he knew that there was a requirement to file VAT returns and pay VAT on time, he denied that he knew there would be a default surcharge if payments were not made on time, or that all of the entities with which he had been associated were subject to such surcharges. He denied that he ever knew that Europa's returns were not made on time and denied looking at any correspondence that was sent to him regarding Europa's VAT affairs. Although Mr Walker admitted that monies received in respect of sales invoices and which included sums payable in respect of VAT could be used to defray Europa's expenses he denied that he would have known that was the case. He admitted that using monies due in respect of overdue VAT for other purposes was wrong but did not accept that it was dishonest. He also denied all knowledge of the central assessments and that payments were made against them. Mr Walker also admitted that he had a rough idea of Europa's turnover and was aware that VAT was a percentage of the price of each sale, but, implausibly, denied that because of this he would have known roughly the amount of VAT owed in respect of Europa's turnover. He asserted he did not have this knowledge because he had nothing to do with Europa's books.

98. We reject Mr Walker's evidence on these points as being inherently implausible. He was responsible for the commercial side of Europa's business and

negotiating its contracts and agreeing appropriate prices to ensure that Europa was profitable. Whilst we accept he did not have day to day conduct for them he would have needed to discuss Europa's financial affairs with Mrs Walker from time to time in order to ensure that the contracts he was concluding would generate sufficient cash flow to meet Europa's liabilities. Mrs Walker confirmed that she would have discussed significant matters concerning Europa's VAT affairs with Mr Walker, particularly if there was a threat of prosecution. Therefore it is more likely than not that she discussed the correspondence regarding the request for security in early 2007, and would have discussed the fact that Europa was threatened with legal action in respect of overdue payments, including the threat of a winding-up order in 2008.

99. As a result of these discussions, his knowledge of Europa's turnover and the amount represented by sales invoices that would have to be accounted for in respect of VAT, his experience of being an officer of VAT registered companies for over 25 years, whilst not necessarily being aware of the precise figures owing Mr Walker would have known that Europa was consistently late with its VAT returns and its VAT payments. He would therefore also have known that the amounts being paid amounted to serious underpayments. We find that as sole director in a small business he would have been fully aware of the strategy adopted by Europa which was only to submit VAT returns and make payments (to the minimum amount possible) when put under pressure by HMRC to do so with a threat of legal action.

100. We need not deal in detail with the events that followed the submission of the VAT returns requested following the meeting on 31 October 2008. We note that the return for 12/08 was never submitted. As mentioned above, there were attempts through Go Legal to negotiate a settlement of HMRC's action to wind-up Europa which were unsuccessful. Mr Ansell made unsuccessful attempts to obtain access to the books and records of Europa during 2009 and the early part of 2010. Europa's administrators indicated to Mr Ansell that all formal requests to Mr Walker for these books and records were ignored by Mr Walker and the Administrators did not intend to incur costs in taking enforcement action.

101. Accordingly, Mr Ansell focused his attention on pursuing civil penalty proceedings against Mr and Mrs Walker. Mr and Mrs Walker were unco-operative in meeting Mr Ansell to discuss this process, his first request for a meeting being in May 2009 and although a meeting was arranged for 6 October 2009 it did not go ahead and a statement promised by Go Legal from Mr and Mrs Walker as to their explanation of the reasons for the delay in submitting VAT returns and making VAT payments late did not materialise.

102. Mr Ansell prepared a report in July 2010 recommending that a penalty under section 60 of VATA should be imposed on Europa and specifically on the officers under section 61 of VATA. This recommendation was accepted, subject to a small amendment to the mitigation levels. The penalty was calculated by reference to the amounts of VAT underpaid in respect of the periods 03/06 to 09/08, namely £228,491 which after mitigation of 15% resulted in a penalty of £194,214 divided equally between Mr and Mrs Walker.

103. The imposition of this penalty was upheld on review following which Mr and Mrs Walker appealed to this Tribunal.

104. We can therefore summarise our principal findings of facts as follows:

- 5 (1) Mr and Mrs Walker have been involved for a period of over 25 years with various VAT registered entities providing construction and scaffolding services, the most recent of which was Europa, which traded from 2003 until going into administration in 2009;
- 10 (2) Through this experience, Mr and Mrs Walker were fully aware of the need to submit VAT returns and make VAT payments on time and that surcharges would be payable in respect of defaults in that regard;
- (3) All the VAT registered entities with which Mr and Mrs Walker were involved in this sector were consistently late with their returns and making VAT payments;
- 15 (4) HMRC chased Mrs Walker for late returns in 2005 which were eventually submitted. This pattern of behaviour persisted even after Europa were threatened with imposition of a requirement to provide security for its VAT obligations;
- 20 (5) HMRC through Mr Ansell made contact with the Walkers because of concerns that the pattern of consistently late returns and making payments against central assessments suggested possible evasion;
- (6) Mr Ansell after many attempts eventually met Mrs Walker to discuss Europa's VAT affairs on 31 October 2008. At that meeting Mrs Walker disclosed that she and her husband were semi-retired and living in France but remained as Europa's officers with the operation of the business being devolved to an (unnamed) manager;
- 25 (7) Contrary to Mr and Mrs Walker's evidence the ownership of Europa was not transferred to Mr Sassi (the manager who was referred to but not named at the meeting of 31 October 2008) when Mr and Mrs Walker left for France in the summer of 2007 and neither was Mr Sassi formally appointed as a director. Mr and Mrs Walker remained as sole directors and company secretary respectively and retained responsibility for Europa's financial affairs, and in particular its VAT returns and payments;
- 30 (8) Mrs Walker confirmed at the meeting held on 31 October 2008 and in her oral evidence that when payments were received for VAT they were put to other uses where necessary with the result that VAT was knowingly not paid to HMRC when due, although Mrs Walker denied that this was dishonest;
- 35 (9) Although Mrs Walker had delegated responsibility for the preparation of VAT returns to Tamsons on the basis of information she provided to them both she and Mr Walker was aware of in rough terms of Europa's VAT liability in respect of each period. Europa's strategy with regard to VAT as known to both Mr and Mrs Walker was to make no payments unless
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threatened with legal action and to make payments against central assessments when knowing that those assessments understated Europa's true liability at the relevant time;

- 5 (10) We find that this was a deliberate strategy and reject the submission that the behaviour demonstrates no more than gross inefficiency, or at worst, recklessness; and
- (11) There was no substantial co-operation with HMRC's investigation after the meeting on 31 October 2008 other than to submit some of the overdue returns.

10 Discussion

105. As is apparent from the provisions of sections 60 and 61 of VATA there is a two stage approach to be followed in order to determine whether or not Mr and Mrs Walker are liable for a penalty under section 61. First, we have to determine whether Europa's conduct involves dishonesty, as provided in Section 60(1). Secondly, if we
15 find that to be the case we have to determine whether the conduct on Europa's part which is found to be dishonest can be attributed, in whole or in part, to the dishonesty of Mr and Mrs Walker who, we have found, were at all material times "named officers" of Europa for the purposes of section 61 of VATA.

106. In fact, as we have found that at all material times Mr and Mrs Walker remained
20 responsible for Europa's VAT affairs, notwithstanding the management of its operations by Mr Sassi after the summer of 2007 and the involvement of Tamsons in the preparation of the returns, it is only if we find either of Mr and Mrs Walker's behaviour to be dishonest that Europa could be held to be dishonest on the basis that they were the only persons through whom Europa acted in relation to its VAT affairs.
25 Therefore, if we find any of the behaviours of Mr and Mrs Walker to be in relation to Europa's VAT affairs to be dishonest then it follows that Europa should be determined to be dishonest in that regard and it consequently follows that for the purposes of section 61 VATA Europa's dishonesty would be attributable to the conduct of either or both of Mr and Mrs Walker, as the case may be.

30 107. It is also necessary for us to determine whether the relevant acts or omissions of Europa were for the purpose of evading VAT (see section 60(1) (a) VATA).

108. In our view there are three aspects of Europa's behaviour which we have found as facts that fall to be considered in the context of dishonesty and evasion:

- 35 (1) the failure to submit any of the VAT returns for the periods in question on time as a consequence of a deliberate decision, to which both Mr and Mrs Walker were a party, not to submit returns unless pressed by HMRC;
- (2) the failure to draw HMRC's attention to the fact that most of the central assessments made for the periods in question significantly under-stated Europa's VAT liability and the practice of making payments only up to
40 the amount of the central assessments and then only under the threat of legal action when both Mr and Mrs Walker knew that the amounts paid

were significantly less than the true amount of VAT which was overdue;
and

- (3) the payment of other creditors in preference to settling its VAT liabilities at a time when Mr and Mrs Walker knew that Europa's VAT liabilities were overdue for payment.

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As we have found, these matters occurred as a result of a deliberate strategy not to pay Europa's true VAT liabilities unless and until threatened by legal action, and in particular, a winding-up order.

109. Mr Newington-Bridges submitted that these failures were due to carelessness, even recklessness but they do not show dishonesty. We have rejected the submission that the behaviour can be regarded as careless or reckless. In our view the evidence that the behaviour was deliberate is cogent and compelling, based as it is on the Walkers' knowledge of how VAT operates, the knowledge of the turnover of the business, the fact that the amounts paid for VAT were usually well below the amounts of the central assessments, the fact that returns and payments were never made unless pressure was brought to bear, and Mrs Walker's admission at the meeting of 31 October 2008 and her oral evidence.

110. Mr Newington-Bridges submits that the offer to pay all outstanding VAT in Go Legal's letter of 19 March 2009 which he characterises as a "relatively early stage" in these proceedings goes to the fundamental honesty of Europa. This, he submits, shows that Mr and Mrs Walker made an offer to pay all of the VAT outstanding more than 18 months before the civil evasion penalties were imposed. This offer consisted of a lump sum of £75,000 in addition to the lump sum of £100,000 which had already been paid to HMRC in January 2009 and monthly payments of £20,000 until the debt was cleared, but the offer was rejected because HMRC would only accept an offer that paid off the debt in full. Mr Newington-Bridges submits that the offer is strong evidence of the honest approach that Europa took to these matters from an early stage.

111. With regard to the alleged personal dishonesty of Mr and Mrs Walker, Mr Newington-Bridges submits that the accountancy function was entirely outsourced to Tamsons with the relevant paperwork being collated by Mrs Walker and provided to Tamsons. The misfeasance of Tamsons cannot mean that Mr and Mrs Walker can be held to be dishonest. The evidence in totality on which Mr Ansell based his decision to impose penalties points to a history of non-compliance and failure to attend interviews over the years but is not sufficient to demonstrate (the burden being on HMRC) that the failure to correct under-assessments for 8 specific VAT returns was the result of personal dishonesty.

112. Before dealing with these submissions, we shall deal first with the question of evasion. It is clear that mere negligent or reckless acts will not suffice in this context; there must be intent on the part of the person concerned to evade VAT. On the basis of our findings of fact as to a deliberate strategy on the part of Mr and Mrs Walker it is inevitable that we conclude that there was intent in this case. The question that arises is whether if the intent was only to delay the payment of the correct amount of VAT until pressed whether that was sufficient to amount to evasion, where (as contended by Mrs Walker) there was always an intention to pay the overdue VAT

when funds were available. We have no hesitation in finding that such a strategy amounts to evasion. We find, consistent with McCowan LJ's reasoning in *Dealy*, quoted in paragraph 23 above, that by deliberately delaying the correct payment until pressed Europa was dodging its responsibilities and getting out of the way of performing its obligations in a timely fashion.

113. We reject Mr Newington-Bridges submission that the offer contained in Go Legal's letter of 19 March 2009 demonstrates honest behaviour. It is a travesty to describe this letter as being sent at a "relatively early stage in the process". It may be that Mr Ansell had only just then focused his efforts on the question of civil penalty proceedings against the Walkers rather than pursuing the outstanding corporate matter, but this letter followed a long period of deliberate evasion of responsibility on the part of the Walkers in their capacity as officers of Europa. The offer is consistent with the strategy that we have found they followed which was only to engage with HMRC when legal proceedings are threatened but goes no further than that.

114. We also reject Mr Newington-Bridges' submission that responsibility must be laid at the feet of Tamsons. Our findings were that Tamsons, although not proactive, were dependent on Mrs Walker instructing them to prepare the necessary returns which clearly they could only do on the basis of co-operation from her in the form of providing the necessary documentation and then it was the responsibility of Mrs Walker to review the completed returns and sign and submit them. As we have found, she did so in full knowledge that the amounts declared on the returns was in most cases well in excess of the central assessments that had previously been received.

115. We therefore turn to the question as to whether Mr and Mrs Walker's behaviour can be characterised as dishonest. As we have identified in paragraph 21 above, on the authority of *Ghosh*, this is a two stage test.

116. First we have to determine whether according to the ordinary standards of reasonable and honest people what was done was dishonest. We have no hesitation in finding that it was. It was contended by Mrs Walker that there was always an intention to pay the VAT eventually when resources allowed and no intention to deprive HMRC of the monies due permanently, and therefore she did not regard herself as dishonest. We reject that contention; the behaviour would be dishonest even if there was no intent to deprive HMRC of the sums due permanently. The fact is that underpayments were made at a time when Mr and Mrs Walker both knew that to be the case. That is not the behaviour of an honest trader. Neither is it honest to delay submitting returns deliberately until pressure is brought by HMRC. Neither is it honest to prefer other creditors with payment always to be made to HMRC at the end of the queue. An honest trader faced with financial difficulties such that he did not have sufficient resources to pay all his due debts would be open and transparent with HMRC and his other creditors and try to negotiate a solution. It was the strategy of Mr and Mrs Walker to do the complete opposite.

117. Secondly, we have to determine whether Mr and Mrs Walker must have realised that what they were doing was dishonest. Did they think, quite honestly, to echo McCowan LJ's words in *Dealy*, that they had the perfect right to do what they did and

nobody would regard it as dishonest? It is clear to us that they did not. They would have known that honest traders would not have adopted the strategy that they did and such traders would have considered it dishonest. As stated in *Ghosh*, where the actions are obviously dishonest by ordinary standards, it will be obvious that the defendant himself knew that he was acting dishonestly. We find that to be the situation in this case. It follows that we reject Mr Newington-Bridges' submission that the failure to correct the under-statements did not demonstrate dishonesty. In the context of the strategy pursued by Mr and Mrs Walker it clearly was.

118. We therefore find that Europa evaded VAT dishonestly in respect of the periods which are the subject of this appeal and that dishonesty was attributable to the dishonesty of Mr and Mrs Walker. There was no argument on the quantum of what HMRC contended was evaded and no submissions made on whether assignment of the penalty assessed to Mr and Mrs Walker equally was inappropriate.

119. We are therefore left to consider the question of mitigation. Mr Newington-Bridges submits that there should be further mitigation to take account of the offer made on 19 March 2009 as detailed in paragraph 110 above. He submits that the offer was evidence of a willingness to co-operate with HMRC and pay the VAT outstanding more than a year prior to the penalty being imposed.

120. We reject that submission. As we found in paragraph 113 above the offer was consistent with the strategy of only engaging with HMRC when pressure was brought to bear in this case and pressure of a winding-up petition. It cannot therefore be regarded as a genuine attempt to co-operate. Furthermore, as Mr Singh aptly put it, to give credit in this situation is akin to a thief offering to hand back stolen goods and thereby avoid being sentenced for his crime. Mitigation for co-operation is properly available where HMRC is assisted in coming to the truth, for example by providing information and books and records in a timely fashion when sought. The Walkers' record in that regard and in ignoring requests for meetings and then not appearing at scheduled meetings was appalling and we see no basis on which the penalties should be subject to any further mitigation.

30 **Disposition**

121. The appeals are dismissed.

122. 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.

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**TIMOTHY HERRINGTON
TRIBUNAL JUDGE**

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RELEASE DATE: 3 July 2013