[2016] UKFTT 0399 (TC)

TC05153

Appeal Numbers:
TC/2014/01533
TC/2014/01534

VAT - Inaccuracy Penalties - Schedule 24 Finance Act 2007 - Whether inaccuracies? - Yes - Whether deliberate and concealed? - No - inaccuracies in returns 03/12 and 04/12 careless - inaccuracies in returns 05/12 and 06/12 deliberate but not concealed - Whether First Appellant's conduct attributable to Second Appellant? - Yes, but only in relation to 05/12 and 06/12 - Appeals allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) CHANGTEL SOLUTIONS LIMITED **Appellants**
(formerly Enta Technologies Limited)
(in Liquidation)
(2) MR JASON TSAI

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS BEVERLEY TANNER

Sitting in public at Tribunals House, Parsonage Gardens, Manchester on 25 and 26 August 2015

(with Respondent's closing submissions in writing dated 16 September 2015 and 8 November 2015; Mr Tsai's closing submissions on 30 October 2015 and 10 November 2015)

No appearance on behalf of the First Appellant

Mr Andrew Young, Counsel, directly instructed, for the Second Appellant
Mr James Puzey and Mr Joseph Millington, Counsel, instructed by the General Counsel and Solicitor of HMRC, for the Respondents

DECISION

Introduction

1. The First Appellant appeals against a notice of penalty assessment dated 26 February 2014. The Second Appellant appeals against a notice of liability to pay a penalty also dated 26 February 2014. The two appeals were joined by a direction of the Tribunal dated 27 May 2014.

2. HMRC's case in relation to both appellants is set out in a single Statement of Case dated 28 July 2014.

The proceedings against the First Appellant

3. The First Appellant is a limited company, registered in England and Wales with number 02526028. It was incorporated on 27 July 1990 and was registered for VAT with effect from 13 November 1990. Until 16 January 2014 it was known as 'Enta Technologies Limited' but in this decision, and for the sake of clarity, we shall refer to it as 'the Company' or 'Changtel', even though its trading name was different during the periods relevant to its appeal.

4. The Company made claims for input tax credits in relation to the four periods 03/12, 04/12, 05/12 and 06/12.

5. HMRC did not accept those claims, and in July and August 2012 issued assessments for each of those periods. The potential lost revenue ('PLR') amounted to £1,953,046, as follows:

(1)	03/12	£501,600	(assessed 16 July 2012)
(2)	04/12	£496,900	(assessed 16 July 2012)
(3)	05/12	£485,178	(assessed 28 August 2012)
(4)	06/12	£469,368	(assessed 28 August 2012)

6. Each of those four assessments was issued on the basis that the goods traded were held in France, with the supply of goods taking place outside the UK.

7. All four assessments referred to above became the subject of appeals to the Tribunal. The assessments for 03/12 and 04/12 were appealed on 28 September 2012 under reference TC 2012/09107. The assessments for 05/12 and 06/12 were appealed under reference TC 2012/02391. However, in November 2013, both appeals, against all four assessments, were withdrawn, and all four assessments were paid, together with interest.

8. By a letter dated 14 January 2014, HMRC informed Changtel that it intended to issue a grouped inaccuracy penalty under Schedule 24 of the Finance Act 2007 ('the 2007 Act') due to inaccuracies in the VAT returns rendered for those four periods.

9. HMRC's position was that these inaccuracies were deliberate and concealed and that disclosure of the inaccuracies was prompted 'because the company did not tell HMRC about the inaccuracies before the company had reason to believe that HMRC had discovered them, or were about to discover them'.

10. In calculating the penalties, HMRC applied a reduction on PLR to take account of assistance provided to it in the course of its investigation. The outcome was that the inaccuracy penalties against the Company were issued at 75% of PLR. HMRC considered whether there were any special circumstances which would permit further reduction of the penalties but concluded that there were none.

11. Accordingly, on 26 February 2014, the Company was issued with penalty assessments under Schedule 24 of the 2007 Act, amounting to £1,464,784.50, as follows:

(1) 03/12 £376,200

(2) 04/12 £372,675

(3) 05/12 £363,883.50

(4) 06/12 £352,026

12. On 7 June 2013, a petition had been presented for Changtel's winding-up. On 28 January 2015, the Court of Appeal ordered (in the circumstances set out in more detail below) that Changtel should be wound-up under the provisions of the Insolvency Act 1986. Changtel sought permission to appeal, which was refused by the Supreme Court on 29 May 2015. On 5 June 2015, Nicholas Edward Reed and Julie Anne Palmer of Begbies Traynor (Central) LLP were appointed Changtel's liquidators.

13. On 10 August 2015, the liquidators' solicitors wrote to the Tribunal. They confirmed that the liquidators would not be present or represented at the hearing. They had 'not formed a view' as to whether the Company's appeal should be pursued. There were no funds to instruct Counsel to give an opinion or to appear. The liquidators' solicitors noted that 'from the court bundles the issues in question at the appeal appear to be relatively narrow and Mr Tsai has set out his position ... Although these statements have been made on behalf of Mr Tsai and not the company, it appears that the position put forward by Mr Tsai is likely to be directly relevant to the liability of the company.' Having discussed the position, the liquidators had decided not to request a formal stay.

14. Considering that letter, we were satisfied that notice of the hearing had been given, and that it was in the interests of justice to proceed with the First Appellant's appeal: Rule 33 of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) Rules 2009.

The proceedings against the Second Appellant

15. Mr Tsai was appointed a director of Changtel in 1990. At all times relevant to this appeal, he was Changtel's sole director. He was its sole director during the

periods 03/12 to 06/12. Therefore, he had been a director of Changtel for about 22 years.

16. On 26 February 2014, HMRC issued Mr Tsai with a notice of liability to pay a penalty under Schedule 24 of the Finance Act 2007 and Schedule 41 of the Finance Act 2008. The penalty was the same sum - £1,464,784.50 - assessed against Changtel and 'deliberate inaccuracy and a deliberate failure to notify or wrongdoing' was referred to. The notice stated: 'HMRC pay [sic] pursue you personally for all or part of this penalty as it is all or in part attributable to you. This notice specifies the penalty you are liable to pay personally under Para 19(1) of the Finance Act 2007 and Para 22(1) Schedule 41 of the Finance Act 2008'.

17. That notice related to the inaccuracy penalties, amounting in full to £1,464,784.50, referred to above.

18. In his Notice of Appeal, dated 14 March 2014, Mr Tsai accepted that he was a director of Changtel 'at the material time', but he challenged the penalties on a number of grounds, as follows:

(1) The assessment against Changtel was raised solely under Schedule 24, for deliberate inaccuracy. There was no reference to Schedule 41;

(2) Para 19(1) of the Finance Act 2007 cannot apply since it relates to Stamp Duty Land Tax relief for new zero-carbon homes;

(3) Mr Tsai could not be made personally liable under Paragraph 22(1) of Schedule 41 when Changtel itself had not been assessed for a penalty;

(4) Changtel's conduct was not, in whole or in part, attributable to Mr Tsai's behaviour.

19. In a document headed 'Further Information of Mr Tsai's Appeal', dated July 2015, Mr Tsai 'agreed' as follows:

(1) There were inaccuracies in all four VAT returns (that is, 03/12, 04/12, 05/12 and 06/12);

(2) At the time of entering into the purchases both Changtel and Mr Tsai knew that the goods were outside the UK;

(3) Mr Tsai was 'in control of the transactions which led to the inaccuracies';

(4) The disclosures were prompted.

Fairness - Article 6 - issues of translation and adequate time

20. At the hearing, Mr Tsai appeared before us without solicitors, but represented by directly-instructed Counsel. It is important to set out in some detail how this situation had developed.

21. On 18 August 2015, Dass Solicitors emailed HMRC and the FtT that they were no longer instructed by Mr Tsai in this appeal.

22. By way of a document headed Notice of Application, also dated 18 August 2015, Mr Tsai, describing himself as an 'appellant in person' asked, amongst other matters, for the hearing on 25 and 26 August 2015 to be vacated, for a Mandarin interpreter to be provided at any or all future hearings, and for *'any materials upon which the Respondents wish to rely be translated into Mandarin and served upon me directly'*.

23. The Grounds were extensive. However, the substance was as follows:

> "Although I do speak English, English is not my first language and I do not adequately understand the charges against me and/or the Appeal proceedings before the Tribunal. I understand that Dass Solicitors have today notified the Tribunal to indicate they are no longer instructed in my appeal, this is not strictly correct. I have not dis-instructed them, they have withdrawn since they have a conflict of interest. I have now instructed Counsel through the Public Access to Barristers scheme. Counsel initially declined to act because he was not satisfied that I had sufficient understanding of English to understand the case against me and give him adequate instruction to defend me. It is a condition of my agreement with Counsel for representation and advice that a Mandarin interpreter is engaged".

24. On 21 August 2015, the Tribunal (Judge Berner) refused the application for a postponement, with leave to re-apply at the hearing. The Tribunal advised that unless the Tribunal at the hearing directed otherwise, 'all parties should be prepared to present their substantive cases at that hearing'.

25. Notwithstanding the refusal of a postponement, the Tribunal (Judge McNall) did, on 21 August 2015, did direct the provision of a Mandarin interpreter, and a Mandarin interpreter did attend the hearing.

26. On 21 August 2015, Mr Tsai filed a witness statement in support of a renewed application that the hearing be vacated, a Mandarin interpreter be provided (that was done in apparent - and understandable - ignorance that a Mandarin interpreter had already been ordered) and any materials upon which the Respondent sought to rely be translated into Mandarin.

27. He wrote:

> "My application notice sets out the legal basis for my request for an interpreter. Given the gravity of the charges against me and the fact that I am now through no choice of my own a Litigant in Person, I must make it clear that I will not waive my Article 6 rights. If I understood the charges against me and was afforded an interpreter I would relish the opportunity to clear my name and continue with the appeal."

28. He went on to write:

> "I do not understand in English the nature and cause of the accusation against me."

29. Article 6(1) of the ECHR provides, in so far as relevant, that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

30. We are guided by the decision of the Court of Appeal in *Han & Yau v HMRC* [2001] EWCA Civ 1048, referred to by Mr Tsai in his Notice. We agree with him that the imposition of penalty assessments amounts to a criminal charge for the purposes of Article 6(3).

31. Article 6(3) provides further 'minimum rights' for those facing criminal charges, including:

> a. The right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. The right to have adequate time and facilities for the preparation of his defence;
>
> [...]
>
> e. The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

32. We also had before us at the hearing, and considered at the time (and have since been provided with an additional copy) of the Guide on Article 6 - Right to a Fair Trial (Criminal Limb) produced by the European Court of Human Rights in 2014.

33. It is entirely uncontroversial that the Tribunal is under a duty to assess the whether these rights are being respected. This is part of our judicial function. It is also reflected in the overriding objective, as set out in the Tribunal's Rules, to deal with cases fairly and justly.

Interpreter

34. Article 6(3)(e) - provision of an interpreter - cannot genuinely have been in issue. Mr Tsai asked for, and was provided with, the free assistance of an interpreter in the language of his choosing.

35. In the course of his cross-examination, on the second day of the hearing, Mr Tsai produced two documents, written in fluent and confident English, which he insisted that the interpreter read to us in full. These were each in the form of letters addressed by Mr Tsai to his Counsel. We canvassed with Counsel for Mr Tsai (who had not himself seen the documents) whether these documents were in fact in the nature of instructions, and therefore subject (or potentially subject) to privilege. Counsel (entirely properly) took the view that, once Mr Tsai was being cross-examined, there was very little (if indeed anything at all) that Counsel could do to guide Mr Tsai as to the form or manner of evidence which Mr Tsai chose to give.

36. Those documents were then handed up, at Mr Tsai's insistence. Those documents were written by Mr Tsai. Mr Tsai complained that, as far as he was concerned, the Mandarin did not faithfully reflect the English. He was not complaining that he could not understand the interpreter. It is a curious criticism for him to have made if he did not follow the hearing. It is certainly paradoxical that only someone with a good understanding of the English language could have ventured the criticisms made by Mr Tsai as to the adequacy of the translation into Mandarin.

37. We did not accept that any criticism could properly be levied at the interpreter. The interpreter was court-appointed and provided by a professional body. At no point did the interpreter herself (as opposed to Mr Tsai, speaking through her) indicate to the Tribunal (as she could have done) that she was struggling to follow proceedings or to interpret what was being said. Likewise, there was no indication before us that Mr Tsai did not understand the questions which he was being asked. Whilst none of the composition of the Tribunal speaks Mandarin, our impression, formed on the basis of our experience of interpreters in other cases, was that the interpreter was doing exactly what she was engaged to do - interpreting what was being said.

38. Accordingly, we reject any challenge on that basis.

Language and time

39. In relation to Articles 6(3)(a) and (b), in our view, Mr Tsai, at the date of the hearing, had adequate time and facilities for the preparation of his defence, and that his rights had been properly respected.

40. Mr Tsai had engaged solicitors - Dass Solicitors - from at least 14 March 2014 (being the date of Mr Tsai's Notice of Appeal). That was over 17 months before the hearing. During that period, Dass Solicitors, instructed by Mr Tsai, had done the following things:

(1) Prepared and filed a Notice of Appeal (14 March 2014);

(2) Engaged in correspondence in relation to costs liability (29 May 2014);

(3) Wrote, in response to inquiry from HMRC, that 'the Appellants' Notices of Appeal make it clear that what is being appealed are the Commissioners' decisions as to the imposition of the penalty and the amount of the penalty' (29 July 2014);

(4) Gave disclosure by list (4 September 2014);

(5) Gave Further Information as to Mr Tsai's appeal (July 2015);

(6) Prepared a witness statement (9 February 2015);

(7) Prepared a second witness statement and exhibit (18 February 2015);

(8) Prepared the bundle for the hearing.

41. At the hearing, Mr Tsai was represented by specialist Counsel. The circumstances in which Mr Tsai parted company with his solicitors remained somewhat opaque. He had parted company with them only days earlier. But, at that

point, his appeal had been ongoing for well over a year. During that entire lengthy period, Dass Solicitors, acting on Mr Tsai's behalf, and to all intents and purposes with his complete knowledge and approval, had prepared formal documents, setting out his case, and had otherwise been complying with directions leading to a contested hearing in August 2015.

42. The two witness statements filed on behalf of Mr Tsai in February 2015 are written in English. They were not (for example) written in Mandarin with a certified translation. They are factually detailed. They are both supported with signed Statements of Truth in the conventional form for a witness who has read and understood the witness statement without any intermediate translation: 'I believe that the facts stated in this witness statement are true'.

43. As such, we were unable to accept Mr Tsai's assertion, made only on 21 August 2015 that *'I have subsequently revisited some of my statements which have been explained to me, although this is still without the benefit of an interpreter. I am not confident that my statements properly reflect what I wanted to say. However, before I make any formal challenge I have been advised that I need to view properly translated documents. So I do not wish to say more than I should at this time'*.

44. This passage is set out in full since it gives the impression of being very carefully crafted. Mr Tsai stops short of actually impeaching or challenging either of his statements. He does not even expressly allege any inaccuracy in either of those statements. Even if that were simply a semantic point, Mr Tsai does not point to any particular fact or matter in either of the two statements which he had come to consider, even provisionally, did not properly reflect what he had wanted to say. He does not say that anything in those two statements failed to correspond with the instructions which he had given to his solicitors. Moreover, in August 2015, those statements had been in existence for over six months (since February 2015). Mr Tsai did not set out how he had come to sign both statements with Statements of Truth, nor did he say when and in what circumstances he had come to realise that his two statements did not 'properly reflect' what he wanted to say.

45. Moreover, even if it was right that the statements did not properly reflect what he wanted to say, Mr Tsai did not say what it was he did want to say.

46. Hence, on the face of it, there is significant doubt as to the integrity of Mr Tsai's position.

47. Moreover, the two documents (referred to above) which were read out by the translator and then handed up to the Tribunal by Mr Tsai in the course of his cross-examination comprehensively falsify Mr Tsai's assertion that he did not understand the nature of the case against him. One of the documents is in the form of a detailed critique of HMRC's case. Whether this came directly from the pen of Mr Tsai, or was translated for him into English by someone else overnight, makes no difference. Those documents show clear, detailed, and insightful awareness, consistently with Mr Tsai's Notice of Appeal and the Further Information given in support of his appeal, of the nature of the penalties, and the case which Mr Tsai was being called upon to meet.

48. Furthermore, when it came to Mr Tsai's alleged lack of comprehension, we note that, during the period of this appeal (March 2014 to August 2015) Mr Tsai had been heavily involved in other litigation. We do consider the fact and subject-matter of that litigation to be of some relevance when it comes to the question of assessing the weight of Mr Tsai's alleged want of comprehension of his appeal before us.

49. In November 2014, an appeal brought by Changtel (TC/2011/04444) against HMRC's decision to deny Changtel's claim for input tax credit was being heard by the FtT (Judge Blewitt and Mrs Akhtar). We were shown a professionally prepared verbatim transcript of Day 8 of those proceedings, 27 November 2014. Changtel had been represented by Counsel, instructed by Dass Solicitors. Mr Puzey and Mr Millington had appeared for HMRC. Mr Tsai gave oral evidence. The transcript of his oral evidence is over 200 pages long. Mr Tsai was cross-examined and re-examined from 10am to about 4.45pm, with a break for lunch.

50. Mr Tsai accepted that he had given his evidence that day in English, without the use of an interpreter.

51. The very strong impression which the transcript gives of Mr Tsai (and bearing in mind, as we must, that the transcript does not record matters such as tone or hesitancy) is of an individual who was fluent and comfortable in both spoken and written English. Mr Tsai was asked to consider many documents during the course of that day. He did so. Read objectively, it is obvious that he understood the questions being asked of him. His answers were far from monosyllabic. They were often detailed and intricate, using technical vocabulary and language consistent with a skilled businessman - for instance (and referring only to two pages, simply to illustrate) pp16-17 ('marketing strategy', 'product portfolio'; 'regional manufacturing'; 'fancy packaging').

52. We reject Mr Tsai's evidence before us, when asked by Mr Puzey about that hearing, that he had not really understood what was being asked of him, and had been answering questions only to play along with things, and that it had not really reflected his knowledge of English. We do not consider that to be credible. We consider it to be untruthful. We reject his evidence that he was being forced to answer questions on that occasion. It simply cannot be reconciled with the transcript, in which there is nothing recording any complaint by Mr Tsai that he did not understand the questions, or that he wished to use a translator.

53. We were also referred to the decision of the Court of Appeal in *HMRC v Changtel Solutions UK Limited (formerly Enta Technologies Ltd)* [2015] EWCA Civ 29, handed down on 28 January 2015. In that case, the Court (Vos, Longmore and Patten LJJ) considered a petition presented by HMRC against Changtel in respect of 15 VAT assessments relating to some £15.5m including interest. HMRC had issued a total of 36 VAT assessments against Changtel between 4 February 2010 and 11 March 2013, all but two of which were unpaid. The appeal related to 6 particular assessments, amounting to approximately £2.5m, for the each of the six months between July and December 2012 (that is, the six months immediately postdating the

four underlying assessments in these appeals) on the basis that certain goods allegedly exported by Changtel had not in fact left the UK as had been claimed.

54. HMRC's case was that Changtel "had engaged in a pattern of activity since 2006 whereby it had purportedly entered into a small number of extraordinarily high value export transactions each just sufficient to reduce to a minimal level what would otherwise have been a substantial VAT liability to HMRC arising from its normal trading": see [5].

55. There was a three day hearing before David Donaldson QC, sitting as a Deputy Judge of the High Court, at the end of January 2014. Shortly after the hearing it came to HMRC's attention that the hearing had proceeded on an entirely false premise: in fact, Changtel had become dormant several months earlier and its remaining business had been sold as recently as 10 January 2014 - that is, a fortnight before the hearing.

56. Mr Tsai made two statements - on 19 September 2014 and 14 November 2014 - in which, in essence, Mr Tsai accepted that a series of statements made to the judge about the substantial nature of the company's business in January 2014 were false. He apologised. He also accepted that he had not told the judge that the company had sold its assets on 24 December 2013 and had itself been sold on 10 January 2014. He apologised that 'at the hearing, financial information was presented regarding projected figures which were not accurate"': see Para [26] of the judgment of the Court of Appeal.

57. The entire witness statement of 19 September 2014 was put before us. In it, Mr Tsai accepted that certain submissions were not correct. Mr Tsai knew of the true position, but had not shared that with his advisers. In fact, the entire share capital in Entatech, which was Changtel's owner, had been sold on 10 January 2014 for £600,000 to a Taiwanese businessman. Changtel had sold its freehold premises even earlier - on 24 December 2013 - to Entatech for £2.25 million. Mr Tsai had not told his legal team of this either. Mr Tsai told his solicitors that Changtel's turnover was £11m a month, when in fact its turnover in December 2013 was only £6,500. On any view, Mr Tsai had deliberately misled his representatives, and had allowed them - wholly unwittingly - to mislead the court.

58. Vos LJ went on to say:

> "[62] I do not think that these facts could possibly lead to the conclusion that the July 2012 dispatch assessment was disputed in good faith on substantial grounds. I say this for the following reasons:
>
> i. It is necessary first to consider Mr Tsai's admission that he misled the court. This is a serious matter because it was done deliberately in respect of matters that were crucial to (Changtel's) solvency. It means that Mr Tsai's evidence and the evidence that he has procured for submission to the court must be regarded with circumspection.

59. Vos LJ also remarked:

> [65] I do not intend to recite in detail the facts of the other supposed export transactions, but there are the same or even more glaring discrepancies in relation to each. It seems to me that it is inescapable that the CMRs and the information contained in them are fabricated, and that Mr Tsai and (Changtel) were fully aware that this was the case ...
>
> [66] ... The evidence that the company has produced is simply incredible.

60. At the end of that hearing, Vos LJ (with whom the other members of the Court agreed) made an order winding up Changtel, but stayed that order pending any application to the Supreme Court for permission to appeal. Changtel did make such an application, which was refused by the Supreme Court on 29 May 2015. That brought that litigation to an end.

61. We take from the report of the Court of Appeal's decision that Mr Tsai, throughout the period in question, had been personally and intimately involved in extremely heavy litigation, in the High Court, the Court of Appeal, and the Supreme Court. The factual allegations against Changtel were very strongly akin to those being made in this case. It is fair to say that Changtel, with Mr Tsai as its sole director, and giving instructions on its behalf, was a determined and tenacious litigator.

62. During that litigation, Mr Tsai made a number of witness statements, referred to above, which dealt with the substance of the litigation. Indeed, his involvement with Changtel's litigation was so close and strong that the Court of Appeal saw fit to make Mr Tsai a party to those proceedings for the purposes of costs. The Court of Appeal went so far as to remark that HMRC was entitled to seek an order that Mr Tsai pay the costs of the petition personally (a 'Bathampton Order': see *Re Bathampton Properties* Ltd [1976] 1 WLR 168).

63. It is also the case that the Company had been the subject of HMRC investigation into its VAT affairs for all periods from 07/06, giving rise to at least 5 separate appeals, relating to approximately £15m of denied input tax. We accept that the Company had extensive contact with HMRC and was well aware of the investigations being undertaken into its tax affairs and its VAT returns.

64. Given that background, it is not even remotely credible, and we unhesitatingly reject the suggestion, that Mr Tsai found himself, scarcely days before the hearing before us, in a position where he could genuinely and in good faith say that he did not understand the nature of the case and the allegations against him. That proposition is completely unarguable.

65. It was also our view that the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him - had been properly respected. Counsel for Mr Tsai accepted (in our view, quite properly, and consistently with the ECHR Guidance) that there is no requirement under the ECHR for all documents to be translated into a written form. However, the Tribunal, mindful of the overriding objective, afforded Mr Tsai the whole of the first

day of the hearing in which to avail himself, in private, together with his Counsel, of the interpreter's service.

66. Overall, we consider that Mr Tsai had the opportunity to organise his defence in an appropriate way and without restriction on his ability to put all relevant arguments before the Tribunal so as to influence the outcome of proceedings. We reject the suggestion that Mr Tsai was a naive who had been 'dropped in it' by his solicitors on 18 August 2015.

67. In our view, and for the reasons which we have set out above, there was no unfairness in the hearing proceeding, nor was there any failure to respect Mr Tsai's Convention rights. We do not accept that there is any genuine substance in Mr Tsai's criticisms. We do not consider that these have been advanced in good faith. In our view, the objections made by Mr Tsai amounted to a course of conduct done at a time and in a manner calculated by him (and him alone - we do not impute anything to his former solicitors, or to his Counsel) to frustrate these proceedings.

The parties' cases

68. HMRC's case against Changtel was, in summary, as follows:

(1) Between 03/12 and 06/12, Changtel was wrongly reclaiming VAT to which it was not entitled since goods were being bought and sold outside the UK, and were therefore outside the scope of UK VAT;

(2) The four returns in question contained inaccuracies;

(3) Those inaccuracies were all deliberate and concealed;

(4) Those inaccuracies were prompted.

69. HMRC's case against Mr Tsai was, in summary, as follows:

(1) Mr Tsai was the sole director of Changtel during the periods 03/12 to 06/12;

(2) The conduct alleged against Changtel should be attributed to Mr Tsai since he was the sole director and all the transactions to which the inaccuracies relate were under his personal control.

Mr Tsai's case

70. Mr Tsai's case, in summary, was as follows:

(1) All four returns contained inaccuracies;

(2) At the time of entering into the purchases Changtel and Mr Tsai knew that the goods were outside the UK;

(3) The disclosures were prompted;

(4) Mr Tsai was in control of the transactions which led to the inaccuracies;

(5) The 03/12 and 04/12 inaccuracies were innocent, since Changtel did not know that the transactions were not subject to UK VAT;

(6) If not innocent, then they were careless. But, in any event, they were not deliberate and concealed;

(7) The 05/12 and 06/12 inaccuracies should not be attributed to Mr Tsai since, on becoming aware of HMRC correspondence, he expressly instructed Mr Yeo not to claim the VAT credits in the returns. In any event, the inaccuracies were not concealed;

(8) For all periods, more relief should have been allowed for disclosure.

The Law

71. Insofar as material, Schedule 24 of the Finance Act 2007 reads as follows:

1(1) A penalty is payable by a person (P) where—
(a) P gives HMRC a document of a kind listed in the Table below, and
(b) Conditions 1 and 2 are satisfied.

1(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
(a) an understatement of P's liability to tax,
(b) a false or inflated statement of a loss by P, or
(c) a false or inflated claim to repayment of tax.

1(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

Degrees of culpability

3(1) Inaccuracy in a document given by P to HMRC is—
(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
(b) "deliberate but not concealed" if the inaccuracy is deliberate but P does not make arrangements to conceal it, and
(c) "deliberate and concealed" if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

3(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate when the document was given, is to be treated as careless if P—
(a) discovered the inaccuracy at some later time, and
(b) did not take reasonable steps to inform HMRC.

Reductions for disclosure

9(1) A person discloses an inaccuracy or a failure to disclose an under-assessment by—

(a) telling HMRC about it,
(b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

9(2) Disclosure—
(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and
(b) otherwise, is "prompted".

9(3) In relation to disclosure "quality" includes timing, nature and extent.

10(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.
10(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.
10(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.
10(4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.
10(5) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.
10(6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure.

Companies: officers' liability

19(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company—
(a) the officer as well as the company shall be liable to pay the penalty, and
(b) HMRC may pursue the officer for such portion of the penalty (which may be 100%) as they may specify by written notice to the officer.
19(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.
19(3) In the application of sub-paragraph (1) to a body corporate "officer" means— (a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)), or (b)a secretary.
19(4) In the application of sub-paragraph (1) in any other case "officer" means—

(a) a director,
(b) a manager,
(c) a secretary, and
(d) any other person managing or purporting to manage any of the company's affairs.
19(5) A reference to P in this Schedule (including paragraph 15) includes a reference to an officer of the company who is liable for a portion of the penalty in accordance with this paragraph.

72. The Tribunal's powers are set out in Paragraph 17:

17(1) On an appeal under paragraph 15(1) the appellate tribunal may affirm or cancel HMRC's decision.
(2) On an appeal under paragraph 15(2) the appellate tribunal may—
(a) affirm HMRC's decision, or
(b) substitute for HMRC's decision another decision that HMRC had power to make.
(3) If the appellate tribunal substitutes its decision for HMRC's, the appellate tribunal may rely on paragraph 11—
(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
(b) to a different extent, but only if the appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

The evidence

73. We heard evidence from Officer David Hancox, who had prepared a witness statement dated 18 December 2014, together with a lengthy exhibit, and a second witness statement dated 20 February 2015.

74. We heard evidence from Mr Tsai. We have also considered his two witness statements (9 and 18 February 2015) and the witness statement (19 September 2014) which had been put before the Court of Appeal.

75. Mr Tsai confirmed the truth of the statements of 9 February 2015 and 18 February 2015. Those had been prepared by his solicitor as a result of what Mr Tsai had told the solicitor.

76. In his evidence in chief, Mr Tsai complained that he was not familiar with this case. We do not accept that evidence, for the reasons set out above. Indeed, Mr Tsai immediately undermined his assertion that he did not understand the case against him by embarking, without prompting, on an extempore oral critique of HMRC's case and the evidence of Officer Hancox, concentrating on the key point - namely, Mr Tsai's knowledge of the transactions in question and their VAT implications.

77. Mr Tsai accepted that he was the sole director, but asserted that he was 'only the director' and that his 'main role' was 'signing all the documents'. Even if the intention of this evidence was to minimise his involvement with the Company, or the

transactions in question, he nonetheless accepted that he took responsibility for the documents which he signed.

78. Mr Tsai asserted that, at the time of the transactions, he did not know what was meant by 'input VAT' and had only found out later what it meant. He said that it was all dealt with by his staff and that he personally had never got involved with VAT returns. He was asked who 'oversaw' returns. His answer was Andy Adams and Albert Yeo.

79. Mr Tsai sought to rely on a witness statement from Mr Albert Yeo, dated 19 March 2015. My Yeo stated that he had been the group accountant between 23 June 2004 and 31 October 2013 when he had resigned, owing to ill-health. He said that he took instructions from Mr Tsai. He said that he recalled that in 2012, although he could not remember the exact date, he had been told by Mr Tsai not to claim the VAT on purchases of stock from iForce. Mr Yeo's statement said that he - Mr Yeo - had meant to pass this on to Andy Adams, 'whose job it was to complete the Company's VAT returns', but he (Mr Yeo) had forgotten to do so.

80. Mr Tsai sought to rely on a witness statement from Ming Sze, dated 27 March 2015. He said that he had carried out accounting and auditing work for the companies between 1991 and 2013, when employed by a firm of accountants and auditors called Simmonds Gainford LLP. He recalled that, in 2012, perhaps after June 2012, Mr Tsai phoned him telling him that HMRC had told him they were going to disallow input VAT on some purchases, 'as the goods being bought, although sold by a UK company, were not in the UK at the time of purchase'. Mr Sze said that he would consult with colleagues, 'who advised me that if, at the time of purchase, the goods were not in the UK, UK VAT was not applicable. I contacted Mr Tsai and made him aware of this'.

81. Neither Mr Yeo nor Mr Sze attended for the purpose of cross-examination. The only indication (given in a letter dated 22 April 2015) was that, according to Mr Tsai, Mr Sze was going to be away from the UK 'owing to family and holiday commitments' from 1 May and 20 September (5 1/2 months) and that, according to Mr Tsai, Mr Yeo would not be fit to appear 'owing to illness and hospital commitments' from 1 May to 31 December (8 months). No further information was given. No direct information was given by either Mr Yeo or Mr Sze.

Discussion and Decision

82. This is an appeal against penalties. In general terms, the burden of establishing that the penalty is due lies on the Respondents.

83. In relation to these appeals, given Mr Tsai's acceptance that he was in personal control of the transactions which give rise to the assessments and the penalties, and the fact that he was the sole director of Changtel, in our view there is no distinction which, in general terms, can realistically be made between his position and that of Changtel.

84. We reject the First Appellant's submission (contained in its Notice of Appeal) that it had not been given sufficient information to understand how the penalty had been assessed. We consider that sufficient information was given by HMRC to enable the First Appellant to understand how the penalty had been calculated.

85. We reject the Second Appellant's submission (contained in his Notice of Appeal) as to the form of the penalty, and the reference to Paragraph 19(1) of the Finance Act 2007. That was obviously intended to refer to Paragraph 19(1) of Schedule 24 of the 2007 Act. Acts of Parliament have 'sections' and not 'paragraphs'. Schedules have 'paragraphs'. It is not even remotely arguable that any confusion can ever possibly have arisen from this.

86. We reject the Second Appellant's argument (advanced in his closing submissions) that the Notice of 26 February 2014 is 'defective and ambiguous', and should therefore be declared void and of no effect, insofar as it says: "HMRC pay pursue you personally for all or part of this penalty..." (emphasis added). Applying the guidance given by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, we consider that the use of the word 'pay' instead of 'may' is an utterly inconsequential inaccuracy, which would not have occasioned any confusion to the reasonable recipient, and which did not in fact occasion any confusion to Mr Tsai or his advisers as to its meaning or intent. It certainly does not render the notice invalid.

87. Mr Tsai sought to argued that HMRC's failure to include the VAT returns in the bundle meant that his appeal should succeed.

88. The details of the relevant VAT returns (although not the returns themselves) are included in the bundle (at pages 135 to 142, with the figures for the periods in question at pages 141 to 142). They are part of exhibit DBH/15 which is described as follows: 'Enta's claim that the company was used to being charged VAT on all purchases was also incorrect. Enta had frequent and major purchases from other EU traders and from traders outside the EU throughout its trading history, this is demonstrated by the VAT return figures for the periods 03/07 - 06/12' (in fact, the dates are both mistaken, since the VAT figures run from 03/08 to 07/12).

89. The accuracy of the figures was not challenged at the hearing, nor indeed in the lengthy correspondence which preceded it, whether by Mr Tsai or by Changtel (whether originally, or, latterly, by the liquidators).

90. Mr Tsai took the point in closing submissions that HMRC's failure to exhibit the actual returns (or, rather, copies of them) in the bundle means that HMRC has failed to prove its case. It was submitted that the point was 'fatal' to HMRC.

91. We disagree. Not only were the figures unchallenged, but they were drawn from HMRC's database. The VAT returns for the relevant periods were all submitted electronically (an e-VAT return). We do not apprehend any material difference, in evidential terms, between these figures (being in the form of an electronic schedule of information submitted electronically) and the original e-VAT returns (which

themselves would have to be produced by way of an electronic copy, since no original physical hard copy ever existed). The schedule of the e-VAT returns is either made by HMRC under public authority and is receivable as primary evidence of the original e-VAT returns, or is admissible secondary evidence of the e-VAT returns. In either event, we admit the schedule into evidence. We consider that HMRC has discharged the burden upon it, to the appropriate standard, of demonstrating the VAT figures.

92. Much of Mr Tsai's argument (and, foreshadowing it, the cross-examination of Officer Hancox) was directed at demonstrating that there had been no overall tax loss, and that the penalty regime accordingly violates the principles of fiscal neutrality.

93. We disagree with these submissions. We do not regard them as well-conceived. Schedule 24 deals with 'penalties for errors'. The trigger event for a penalty is an inaccuracy amounting to or leading to an understatement of liability to tax, a false or inflated statement of a loss, or a false or inflated claim to repayment of tax. The application of the penalty regime in principle therefore clearly turns on the accuracy or otherwise of the document in which the inaccuracy is contained. It is only the quantification of the penalty, once the regime has been engaged, which depends on potential lost revenue. The key word is 'potential'. Schedule 24 Paragraph 6(5) provides that in calculating PLR in respect of a document given by or on behalf of a person ('P') 'no account shall be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person'. Schedule 24 Paragraph 11(2)(b) makes a similar point when it comes to 'special circumstances': it is not a special circumstance if the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

Inaccuracy

94. It was not disputed by Changtel or Mr Tsai that the relevant returns contained inaccuracy.

Deliberate and concealed

95. Paragraph 3 of Schedule 24 reads:

> 3(1) Inaccuracy in a document given by P to HMRC is—
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate but P does not make arrangements to conceal it, and
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

96. When it comes the imposition of a penalty, inaccuracy is not, in and of itself, enough. That is simply the act. There has to be more - namely, a mental element. The penalty regime is fault-based ('degrees of culpability'). The basic structure is to divide inaccuracies into 'careless' (less serious) and 'deliberate' (more serious).

Unfortunately, the legislation does not provide any further guidance as to where the dividing line between the two classes of inaccuracy is to be found. It is an important line to draw, or to discern, since the penalties are levied with reference to that element. It is clear by inference that there must be some inaccuracies which are neither careless nor deliberate, and in connection with which no level of culpability can be fixed upon the taxpayer.

97. We consider that 'careless' for these purposes can be equated with 'negligent conduct' in the context of discovery assessments, which is to be judged with reference to the reasonable taxpayer, and what the (hypothetical) reasonable taxpayer, exercising reasonable diligence in the completion and submission of his return, would have done. Hence, careless does connote some fault, sufficient to attract censure when measured against an objective standard.

98. 'Deliberate' goes beyond that. In terms of inaccuracy, we consider it to mean 'done with a set purpose'. That purpose must be to produce an inaccuracy, within the meaning of Schedule 24. There is an element of intent in 'deliberate' which is not present in 'careless'. It represents a higher degree of fault.

99. We are reassured that reasoning is correct given that the draftsman of the Schedule provides that concealment aggravates deliberate conduct, but is not a factor at all in careless conduct.

100. As to concealment, this means 'hidden' or 'disguised'. Concealment is to be treated as a significant aggravating feature - the penalty increases from a maximum of 70% of the PLR to 100% of the PLR. We accept HMRC's description of concealment, set out in its 'Compliance Check Series: Penalties for inaccuracies in returns and documents' as '*where you knew that a return or document was inaccurate and you took active steps to hide the inaccuracy from us, either before or after you sent it to us*'. This seems to chime with Mr Tsai's closing submissions that concealment connotes some positive action ('active steps') and is more than simply lack of transparency.

101. All cases of this character are inevitably fact-sensitive. The present appeals are no different. It therefore falls to us to assess, with reference to the facts, and the inferences to be fairly derived from those facts, into which band, if indeed any, the conduct falls.

102. HMRC's position is that the inaccuracies in all four returns were deliberate and concealed.

03/12 and 04/12

103. The key element of Mr Tsai's case in relation to these two returns is that he did not know that the transactions were not subject to UK VAT.

104. The goods were purchased by Changtel from iForce Technologies Ltd ('iForce') a UK company whose registered office was in Wolverhampton.

105. All the goods were apparently located in Paris, France and were sold to Munch Marketing Aps, a Danish registered company, and were allegedly delivered to Spain at the address of a Bodegas International Logistics SL, Valencia. At no time during these transactions did the goods enter the UK.

106. For the sake of completeness, we note that an argument, pursued by Changtel's representatives in July 2012, that the place of supply rules in place in 03/12 and 04/12 meant that the supply was deemed to have been in the UK. That argument was not subsequently pursued insofar as Changtel's appeal against the 03/12 and 04/12 assessments (TC/2012/09107: 28 September 2012) was withdrawn and the assessments paid.

107. For the periods 03/12 and 04/12, there were 7 transactions: three on 29 March 2012 (all with iForce), three on 3 April 2012 (all with iForce), and one on 11 April 2012 (with CPS Logistics Limited in Telford). Those on 29 March 2012 had successive iForce and Changtel invoice numbers. Similarly, those on 3 April 2012. iForce did issue one invoice (123607) between the two dates, but that does not seem to have been to Changtel.

108. The VAT element for the three 29 March 2012 transactions amounted to £501,600.

109. The VAT return for 03/12 was submitted on 7 May 2012.

110. The VAT element for the three 3 April 2012 transactions amounted to £496,500. The VAT element for the 11 April 2012 transaction was £400.

111. The VAT return for 04/12 was submitted on 6 June 2012.

112. Our strong and abiding impression of Mr Tsai is that he is, on any view, an extremely intelligent individual and a talented businessman. He speaks three languages. He founded and built up the Company in an extremely competitive business environment. Under his sole direction, the Company was extremely successful, doing significant business with companies such as Microsoft, for whom it was one of the few UK authorised resellers. At the time the Company registered for VAT in 1990, Mr Tsai expected that the annual value of taxable supplies would be £1m. By August 2013, the Company was turning over almost £10m per month.

113. We find that Mr Tsai was the governing mind of the Company. He gave it direction, and he controlled its business, especially in terms of large orders, and payments, and in terms of the transactions which are the subject matter of this appeal. We reject any suggestion that he was a helpless or naive participant in the transactions which form the subject matter of this appeal. We reject any suggestion that the transactions which are the subject matter of this appeal were done without his knowledge or approval. We find that Mr Tsai, as sole director, not only knew about them, but instigated them. We find that, because of the amounts involved, that he was paying close personal attention to them.

114. We reject Mr Tsai's evidence, repeatedly asserted, that he was 'only a director'. We assess that this assertion was put forward, and falsely, as an attempt to distance himself from the transactions.

115. We find that, on or about 13 April 2012, Mr Tsai wrote 'OK' and initialled an Invoice for £2400, dated 11 April 2012, to the Company from CPS Logistics, in relation to transport of goods from France to Spain. We find that the very fact that an invoice for this extremely modest sum was placed before Mr Tsai for his personal approval shows that he was personally involved in this transaction.

116. On 1 May 2012, Dragita Price, a Stock Controller at the Company, emailed three people, including Mr Tsai, and his assistant, Ms Linda Stephenson, attaching a scanned CMR document dated 4 April 2012: pages 71 and 72 of the bundle. That CMR deals with a grouped load from Paris to Spain. We find that the fact of the email shows that Mr Tsai was taking a personal interest in the transaction.

117. On 18 May 2012, Dragita Price emailed one of her colleagues, copied to Mr Tsai and Ms Stephenson, concerning the March and April shipments. Again, this shows that Mr Tsai was taking a personal interest in the transaction.

118. Mr Tsai's own case is that he knew that the goods were not in the UK, and did not enter the UK. His case was that he personally spoke with Sanjay Patel from iForce before the transactions *'to make certain, as far as I could, that VAT was properly charged on these transactions. Mr Patel assured me that VAT was properly chargeable because the supply was 'UK to UK' (meaning that both the supplier and purchaser were UK based). Mr Patel told me that he was certain of this as he had checked with their accountant ... I believed the assurance given to me by Mr Patel and relied on his words.*'

119. There was no evidence from Mr Patel. There was nothing to corroborate that this alleged discussion had ever even taken place, let alone its alleged content. We note the record of the visit which HMRC paid to Mr Patel on 12 June 2012 (of which there is a record at page 160 of the bundle) to discuss these transactions. It records no mention of any such discussion or understanding between Mr Patel, Changtel or Mr Tsai.

120. The letter from RSM Tenon dated 11 July 2012 stated that Mr Tsai had tried to speak to his accountant 'to check', but Mr Tsai was unable to do so 'because he (his accountant) was out of the country'.

121. We are entirely satisfied that the inaccuracies on the 03/12 and 04/12 returns were brought about by a failure to take reasonable care on the part of Changtel, acting through its director Mr Tsai.

122. Mr Tsai knew that these transactions were wholly outside the UK. We accept that in earlier periods (and as recently as the immediately preceding month, 02/12) the transactions were UK to EU. Therefore, the transactions for 03/12 and 04/12 were obviously, and materially, different from those which had gone before. Moreover, these were a small number of very high value transactions. The VAT element was

almost £1/2million per month. The financial consequences of any mistake were correspondingly serious.

123. We consider that the reasonable hypothetical taxpayer would, in these circumstances, have taken steps, before entering into these unusual, high-value, transactions, to establish, from an authoritative source, the correct VAT position. We do not accept Mr Tsai's evidence that he (and through him, Changtel) had 'made certain, as far as he could'. He had done no such thing. The counter-party, Mr Sanjay Patel, even if he was consulted, was not such an authoritative source.

124. Mr Tsai admits that he did not consult his accountants in relation to the 03/12 and 04/12 transactions before they took place. Even if Mr Sze's evidence was taken at its highest, and he was indeed abroad (and, although he does not say so, completely uncontactable by any means such as 'phone or email) between (unspecified) dates in March and June 2012, and even if Mr Sze was indeed qualified to give advice on the matter (since he does not mention his professional qualifications or his position in Simmonds Gainford LLP) Mr Tsai could still have spoken either to another member of that firm or to another accountant entirely. He has not given any reason why he did not. Mr Sze was not a sole practitioner. As Mr Sze says in his witness statement, he had colleagues, who he says that he consulted (although he does not say when and there is no other corroborative evidence of this consultation). There is no good reason why Mr Tsai did not consult another accountant.

125. We accept that checks on IForce's VAT status and number were done on 28 March 2012 (i.e., the day before the transactions) on the VIES system: the document at page 85 of the bundle. We accept that an online check of some sort was done some minutes later with the Danish tax authorities as to the status of Munch Marketing ApS: the document at page 86 of the bundle. But those checks were not enough because the VAT status of iForce and Munch Marketing were not the point. The point was whether the transactions, with goods located abroad, moving from France to Spain (as the document at page 88 of the bundle indicates), and not coming at any point in that transaction into the UK, entitled Changtel to reclaim UK input VAT. It was not reasonable to rely on the checks which were done.

126. In relation to Mr Tsai's knowledge that goods were outside the UK at all times, this is perhaps inconsistent with the letters from Dragita Price at Changtel to CTS Logistics which refer to EuroTunnel tickets - one does not use the EuroTunnel to get from France to Spain. There was no evidence from Dragita Price, nor from anyone at CTS Logistics. However, it seems clear to us that Mr Tsai was not, at any time, asserting physical movement of the goods into the UK, and so we cannot be satisfied that those letters were produced so as to deceive or mislead HMRC.

127. But HMRC's case goes further. When it comes to whether these inaccuracies were deliberate and concealed, HMRC relies on the wider circumstances in which the transactions were undertaken - not only that these were wholly outside the UK, but they were carried out in a specific manner, with a small number of high value wholesale, brokerage transactions, with invoices raised using a system unique to these transactions rather than the general sales invoicing system used for Changtel's other

transactions. The payments were made and received via an overseas credit union based in Sweden in the name of Mr Tsai, albeit a small amount of the funding was made using the usual UK based Changtel bank account.

128. There is an account with TCS Credit & Savings in Stockholm, Sweden ostensibly in Mr Tsai's name. There are print-outs at pages 126 to 129 of the bundle. As we read these documents, they appear to refer to transfers from an account ending #079 to an account ending #086 described as 'Enta Technologies Ltd c/o Ji-Chuen Jason Tsai', 'Corporate Account'. We accept that the print out at page 129 for account ending #086 is an account of Enta Technologies Ltd c/o Mr Tsai and appears to have been a corporate rather than a personal account. We note that iForce also had an account with TCS, and that transfers to it were made from Changtel's 'corporate account' to its account (ending #133). We also note an Corporate Account Application Form from TCS to Mr Tsai which clearly specifies that the account was to be a trading account for Changtel. The application is signed by Mr Tsai as a director. The account was opened in December 2009 pursuant to a resolution by Changtel: well before the claims which gave rise to the inaccuracy penalties presently under appeal.

129. Mr Tsai's evidence in relation to this account was not readily intelligible. His evidence was that this account had been opened in order to make payments more convenient. This might conceivably make sense if dealing with companies in the European Union, but it does not make sense when dealing with another UK based company. Despite our doubts, we have on balance concluded that the simple existence of the Swedish accounts cannot be taken as an indicator of deliberate wrongdoing. They had existed for some years before the transactions in question, and were set up pursuant to a regular company resolution. They were not in false names: they bore Mr Tsai's name and the name of the Company. However, these were accounts which were separate from the Company's other - UK-based - accounts and which, we find, were under Mr Tsai's personal control.

130. The Swedish authorities confirmed that Trapizetal Credit and Savings exists, and we note that deposits are apparently limited to a maximum of 50,000 Swedish Kroner per customer. The fact that this limitation was easily exceeded in this case is a matter for the Swedish authorities and the management of TCS. We do not consider it has any bearing on this appeal. Likewise, the asserted fact that Swedish savings and loan associations have often been used for payments in relation to VAT-fraud is (even if true) a matter for the Swedish authorities, and does not have any evidential bearing in this case.

131. We do not accept Mr Tsai's evidence that UK VAT was not important to him, or that he wanted to be charged UK VAT on the transactions so as to reduce the Company's monthly tax bill. The Company was paying a monthly VAT bill of about £1/2m. We have no doubt but that the transactions were entered into by Changtel, and Mr Tsai, with the purpose of reducing Changtel's VAT bill for those periods to zero, or practically zero. In 03/12 the net assessed tax was £2,944; in 04/12 it was £5,545; in 05/12 it was £17,289; in 06/12 it was £1,044. We have no hesitation in rejecting Mr Tsai's evidence that it was 'impossible' that the transactions in question were arranged to assist the Company's VAT position.

132. But, in our view, the above features are not the same as saying that the inaccuracies were deliberate for the purposes of Schedule 24. Reduction of the VAT payable is an intelligible commercial purpose. Despite his denials, we do not doubt that was Mr Tsai's purpose. Had the transactions been of a kind which would have permitted the VAT treatment as claimed, then that purpose would have been accomplished. We also take account of the further findings of fact which we make below in relation to the 05/12 and 06/12 penalty assessments.

133. We therefore reject HMRC's case that the returns for 03/12 and 04/12 contained deliberate (as opposed to careless) inaccuracies.

134. In our view, and taking account of the above, the inaccuracies in those two returns were careless.

135. The effect of that conclusion is that Mr Tsai's appeal in relation to those two periods must succeed since Paragraph 19 of Schedule 24 of the 2007 Act only imposes liability on an officer of the Company where the inaccuracy is 'deliberate'.

05/12 and 06/12

136. The thrust of Mr Tsai's case in relation to these two returns is that he had been told that the transactions were not subject to UK VAT, and gave instructions that the VAT should not be reclaimed, but those instructions were not carried out.

137. For 05/12, the goods were purchased from iForce Technologies Ltd, a UK company. All the goods were apparently located in France and were delivered to Profitrade Baltic OC, an Estonian registered company, at the address of a freight forwarded Transports Venderoel SA in Belgium.

138. For 06/12 the goods were subject to identical arrangements as for 03/12 and 04/12.

139. At no time during these transactions did the goods enter the UK.

140. In relation to 05/12, there were five transactions, all on 31 May 2012, between Changtel and iForce. The VAT element amounted to £485,178.

141. In relation to 06/12, there were two transactions, both on 1 June 2012, between Changtel and iForce. The VAT element amounted to £469,368.

142. The 05/12 return was submitted on 7 July 2012.

143. The 06/12 return was submitted on 7 August 2012.

The letter of 13 June 2012

144. We find that Changtel was warned by HMRC prior to completion of the 05/12 and 06/12 VAT returns that it should not include transactions of a type similar to those which had been included in the 03/12 and 04/12 returns. That is clear from the

letter of 13 June 2012, which Mr Tsai accepted had been received by Changtel, even though in his oral evidence, Mr Tsai initially denied that the letter had been received at all. Moments later, he asserted that the letter had actually been received on 20 June 2012.

145. It is a very important letter. Amongst other matters, it says:

> "I refer to your recent VAT returns for the periods 03/12 and 04/12. It would appear that there are significant errors within these returns. From information contained within the documentation that you have provided to HMRC in support of these returns it would appear that a number of the transactions took place outside the UK. As you are well aware, transactions that do not take place within the UK are not subject to UK VAT and should not be declared on your UK VAT returns...The documentation purports to show that the amounts are UK VAT, however, you have confirmed these transactions took place in France and therefore this is not UK VAT.
>
> I am aware that you have also provide documentation to HMRC relating to transactions that have occurred in May 2012 and that the VAT return for this period is not yet due. I would remind you that should these transactions be similar to those that you undertook in March and April VAT would also not be recoverable via your UK VAT return and they should not be included on it".

146. Mr Tsai instructed advisers on 2 July 2012, who wrote on his behalf on 11 July 2012. The letter of engagement makes the scope of RSM Tenon's involvement clear: it was to provide VAT consultancy services in relation to HMRC's letter of 13 June 2012.

147. HMRC's letter of 13 June 2012 gave a clear warning. That warning was ignored. On his own evidence, Mr Tsai accepted that the letter had been received, and he accepted that he and Mr Yeo had discussed it. He said that Mr Yeo advised Mr Tsai to seek advice from RSM Tenon.

148. Even giving Mr Tsai the benefit of the doubt, and accepting that the letter had been received as late as 20 June 2012, Mr Tsai knew, well before the submission of the 05/12 and 06/12 returns, what HMRC's position was. He knew that it was very likely that HMRC would challenge any claim for input tax arising from a similar transaction to those which it had already challenged in relation to 03/12 and 04/12. Nonetheless, the Company went ahead and filed the 05/12 return.

149. Mr Tsai seeks to rely on the witness statements of Mr Yeo and Mr Sze. We have decided to admit these into evidence. However, neither Mr Yeo or Mr Sze were available for cross-examination and so the weight which can be given to their statements is limited. Their statements are both extremely vague as to what is said to have happened and when. Neither statement seeks to rely on any contemporary records or documents (such as, for example, the Company's internal memoranda, or the accountant's working papers). Both statements are therefore uncorroborated. There is no evidence (which presumably would have been available both to Mr Yeo and Mr Sze) as to when they were (in the case of Mr Yeo) off-work, and (in the case of Mr

Sze) out of the UK. Thus, and although we have admitted them, we give them no weight except where the evidence of Mr Yeo and Mr Sze is corroborated by contemporary documents.

150. Mr Tsai said that he had again contacted Mr Patel to ask him if he was sure that Changtel was able to reclaim VAT on its purchases. We do not accept Mr Tsai's evidence on this point. There was no evidence from Mr Patel nor any other document to corroborate that this alleged discussion had ever even taken place.

151. We reject Mr Tsai's evidence that he told Mr Yeo not to claim the VAT for 05/12 and 06/12. We were not told of any reason why Mr Yeo, if so instructed by Mr Tsai, would not have done exactly as he was told. He was an employee, and we have no doubt that the personal and professional consequences of deliberately disobeying Mr Tsai in relation to such an important matter would been extremely serious. We reject Mr Tsai's account that, when he found out that a claim had been made, he asked Mr Yeo why he (Mr Yeo) had made such a claim, *'but Mr Yeo did not answer my question'*. It simply does not ring true. We consider that, if this had been true, Mr Tsai would have demanded an answer from Mr Yeo.

152. We also reject Mr Tsai's evidence that Mr Tsai had not checked the 05/12 and 06/12 returns before they were submitted. If, as he says, he had told Mr Yeo not to claim the VAT for 05/12 and 06/12, and knowing, in mid-June 2012 that HMRC were challenging the 03/12 and 04/12 returns, we are confident that Mr Tsai would have checked the returns.

153. We find that Mr Tsai, despite being warned, took the decision that the Company would make the claims in 05/12 and 06/12, and gave instructions that those claims be made, and he did so in full knowledge of the likely treatment by HMRC of any claim.

154. There is no direct evidence from Mr Adams, who, according to Mr Tsai, was the employee who physically completed the VAT returns. The only thing said by Mr Tsai is hearsay at best: that Mr Adams told Mr Tsai that he (Mr Adams) had not been told by Mr Yeo not to claim the VAT in May and June 2012. As evidence, it has no weight.

155. Just before the 06/12 return was submitted, Mr Tsai phoned Mr Hancox on 5 July 2012. He had his number, and used it. He could have asked for Mr Hancox's view at that time, but he did not.

156. Mr Yeo makes no mention of the letters from HMRC dated 16 July 2012 and 1 and 8 August 2012 in his witness statement at all. We find that these letters were shown to Mr Tsai. It makes no sense for Mr Yeo, a long-standing and important employee of the Company (or indeed any other employee) to have suppressed these letters or kept their content from Mr Tsai.

157. Mr Tsai undoubtedly did see HMRC's letter of 16 July 2012. He made express reference to it in his own letter of 25 July 2012. The 06/12 return was filed on 7 August 2012. Hence, a fortnight before that filing, as the letter of 25 July 2012 shows, Mr Tsai not only knew HMRC's position but was positively asserting that HMRC was

wrong, which readily explains why the 06/12 claim was made in the way that it was. This supports our rejection of Mr Tsai's evidence that he gave instructions to Mr Yeo not to claim the VAT for the period 06/12.

158. In our view, Mr Tsai had been given fair warning by HMRC as to what might happen if claims were made in relation to 05/12 and 06/12 as they had been on 03/12 and 04/12 - in the letter of 13 June 2012, and the letter of 16 July 2012. He chose to ignore that warning, and made the claims regardless.

159. In conclusion, the inaccuracies contained in the 05/12 and 06/12 return were deliberate and not careless.

Concealed?

160. Having found that the inaccuracies for 05/12 and 06/12 were deliberate, we must therefore also consider whether they were concealed.

161. We do not consider that they were concealed.

162. The only evidence of concealment is slight. It perhaps comes only in Mr Tsai's letter to HMRC dated 25 July 2012, at page 144 of the bundle. That falls between the 05/12 and 06/12 returns. That stated that Changtel had traded with IForce *'for nearly 20 years'*. Mr Tsai had said the same in his Notice of Appeal in 2012/09107 dated 28 September 2012, and his witness statement of 9 February 2015. But it was untrue, and was corrected in his statement of 18 February 2015 - Mr Tsai had conducted business with Mr Sanjay Patel since 1992, but had only begun buying stock from IForce in 2010 or 2011.

163. When the 05/12 and 06/12 returns were filed, both Changtel and Mr Tsai knew, because they had been told, that HMRC was challenging the transactions for 03/12 and 04/12 (which were materially indistinguishable to these). Nonetheless, despite that challenge, Changtel and Mr Tsai persisted and filed the returns. This was not concealment.

164. The letter of 16 July 2012 throws a revealing insight on the approach of Officer Hancox at the time. He fairly pointed out that Mr Tsai's actions 'in apparently ignoring my letter of 13 June 2012 are likely to lead to a more significant penalty'. We conclude that the mention of 'a more significant penalty' must refer not only to significant in monetary terms (i.e., two penalties are more significant than one) but also to significant in terms of escalation from 'careless' to 'deliberate'. On that view, if it was careless in 03/12 and 04/12, it was going to become deliberate once the letter of 13 June 2012 was ignored.

165. It was entirely appropriate to have pursued Mr Tsai for in relation to the entire penalty sum actually charged to the Company given Mr Tsai's role in the Company, as its sole director, and also given his role in the transactions giving rise to the penalties.

Deduction

166. HMRC calculated the penalty percentage as 75% of PLR, applying discounts of 5% 'telling us about it'; 40% 'helping us understand it', and 5% 'giving us access to records'. This was applied equally in relation to the penalties for each of the four periods.

167. Mr Tsai argues that he should have been given more credit for co-operating.

168. Mr Tsai telephoned Officer Hancox on 5 July 2012 stating that he had instructed new tax advisers, and asking for more time in which to reply to the letter of 13 June 2012.

169. The letter from RSM Tenon dated 11 July 2012 did give some important information, not least that Changtel had conducted a VIES check on IForce, and a check on Munch, on 28 March 2012, albeit, as we have found, those checks were not really what was needed. That letter also made the important point that the transactions were personally overseen by Mr Tsai.

170. Mr Tsai's letter of 25 July 2012 was not only brief but uninformative. Moreover, it was misleading when it stated that Changtel had traded with IForce for nearly 20 years, when, as Mr Tsai would have known, it had not. That particular statement was repeated in Mr Tsai's first statement, and it was not formally corrected until February 2015.

171. In the meanwhile, the return for 05/12 had been filed.

172. In our view, the disclosures were prompted.

173. When it comes to the discounts applied by HMRC, and having considered the circumstances, we do not see that there is any reason why we should substitute our view for that of HMRC under Paragraph 17(2)(b) of Schedule 24.

174. As such, we decline to interfere with the deduction for co-operation of 25% applied by HMRC.

Proportionality

175. We were addressed on proportionality. HMRC has imposed what are, on any view, and even when adjusted to take account of careless rather than deliberate behaviour, significant penalties in financial terms. We were not informed of any reported decisions in which the FtT has considered the proportionality aspects of Schedule 24. However, the Upper Tribunal has considered this question in relation to the VAT default surcharge regime: *HMRC v Trinity Mirror PLC* [2015] UKUT 0421 (TCC). We consider that to be a strongly analogous context, although there are some differences.

176. Nonetheless, and in our view, the remarks of the Upper Tribunal in *Trinity Mirror* (Rose J. and Judge Berner) give valuable guidance:

> A wide discretion is conferred on the Government and Parliament in devising a suitable scheme for penalties, and a high degree of deference is due by courts and tribunals when determining its legality. The state has a wide margin of appreciation, so wide as to allow the imposition of taxes, contributions and penalties unless the legislature's assessment of what is necessary is devoid of reasonable foundation: see Gasus Dosier-und Fo□rdertechnik GmbH v Netherlands (1995) 20 EHRR 403, [1995] ECHR 15375/89, ECt HR, at [60]. A court or tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed: at [15]

177. With this in mind, and insofar as we are called upon to decide the same, we respectfully adopt the reasoning of the Upper Tribunal at Paragraphs [56] to [67] of its decision.

178. We agree that, for a penalty to be disproportionate, it must be so disproportionate to the gravity of the infringement that it becomes an obstacle to the underlying aims of the Directive. In this regard, the Tribunal remarked (at [60]):

> It is a necessary concomitant of a system that provides for a system of deduction and collection of tax at each stage in the process, that tax should be accounted for, and paid, on a timely basis. That essential neutrality can itself be undermined by a failure of a taxable person to comply with its obligations. It is in that context that the legislative measures adopted by member states to ensure collection and to deter default, and the question whether those penalties, either generally or in an individual case, are so disproportionate as to constitute an obstacle to fiscal neutrality, must be viewed: emphasis added.

179. We agree. In our view, that passage not only supports the imposition of the Schedule 24 penalty regime but justifies the levels of penalties which it imposes. Fiscal neutrality is not simply an arithmetical or empirical exercise in balancing the books, conducted in the abstract. It depends absolutely on the integrity and accuracy of the information furnished by the taxpayer. We bear in mind that the Schedule 24 scheme does not penalise all inaccuracies; only those to which - as in this case - some degree of culpability can properly be said to attach. That is why, even if the system is harsh, its operation cannot - at least, in the circumstances of this case - be described as so plainly unfair that it simply cannot be permitted: see *Trinity Mirror* at [63].

Conclusions

180. We consider that the inaccuracies for 03/12 and 04/12 were careless, and attract a penalty of 30% of the PLR (to which should be applied the deduction for co-operation referred to above).

181. However, given the restricted operation of Paragraph 19 of Schedule 24 to cases of 'deliberate' inaccuracy, Mr Tsai's appeal against the penalties for 03/12 and 04/12 must be allowed.

182. In relation to each Appellant, we consider the inaccuracies for 05/12 and 06/12 were deliberate, but not concealed, and attract a penalty of 70% of PLR (to which

should be applied the deduction for co-operation referred to above). We are satisfied that the inaccuracy was attributable to Mr Tsai, as an officer of the Company and that he is therefore also liable to the penalties imposed in relation to 05/12 and 06/12.

183. HMRC shall recalculate the penalty assessments accordingly.

184. The First Appellant's Appeal is therefore allowed in part.

185. The Second Appellant's Appeal is therefore allowed in part.

186. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 7 June 2016