[2016] UKFTT 0577 (TC)

TC05326

Appeal number: TC/2013/08159

VALUE ADDED TAX – procedure – application to reinstate appeal after strike-out for failure to comply with directions – cross-application to strike out on grounds that appeal has no reasonable prospect of success – application to reinstate refused – Rule 8(5), Tribunal (First Tier Tribunal)(Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD GALVIN **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at The Royal Courts of Justice on 6 June 2016

Benjamin Douglas-Jones, counsel, instructed by Altion Law Limited, for the Appellant

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Galvin's appeal was struck out by an order of the Tribunal released on 29 September 2015. Mr Galvin applies for reinstatement of his appeal under Rule 8(5) of the Tribunal (First Tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules"), and if such reinstatement is ordered, he applies for permission to be able to rely on a further ground of appeal - that HMRC's decision was in part achieved by applying non-existent law. In the event that reinstatement is ordered, HMRC applies to strike-out the appeal under Tribunal Rule 8(3)(c) on the ground that it has no reasonable prospect of success.

2. At the hearing, Mr Galvin was represented by Mr Douglas-Jones and HMRC were represented by Mr Watkinson. I first heard Mr Galvin's applications for reinstatement and for permission to rely on a further ground of appeal, on which I reserved my decision. I then went on to hear HMRC's strike-out application in the event that my decision were to allow Mr Galvin's application and reinstate his appeal.

Background

3. The procedural history to these applications is involved, and relates to proceedings both in Mr Galvin's own name, and in the name of Reddrock Ltd ("Reddrock"), a company of which Mr Galvin was the sole director.

4. In April 2010 HMRC wrote to Reddrock notifying it of their decision to disallow credit for input tax of £273,059.67 relating to supplies in 2008 and 2009 of plant hire, consumables, materials, consultancy services and gas oil which Reddrock said were used in the course of its business as a property refurbishment and development company. The decision was made on the basis that the supplies described in the relevant VAT invoices had not taken place, that Reddrock could not prove that the supplies were made, or that the invoices did not satisfy the requirements of Regulation 29 of the VAT Regulations 1995. The decision was appealed to the First Tier Tribunal ("the Original Appeal").

5. Reddrock's skeleton argument in the First Tier Tribunal records HMRC's allegation as being that the relevant invoices were "not genuine", and refers on several occasions to "allegations of fraud" being made against Reddrock.

6. The First Tier Tribunal dismissed Reddrock's appeal. At the trial, Reddrock offered no documentary evidence in support of the validity of the invoices, other than the invoices themselves, and in some cases written records of the orders. In particular, there was no documentary evidence of orders being made by third parties. In the absence of documentary evidence, Reddrock needed to rely on its witness evidence, especially the evidence of its chief witness, Mr Galvin. The Tribunal found Mr Galvin to be an unsatisfactory and unreliable witness, and found that the transactions recorded in the invoices were fictitious and recorded transactions that did not take place.

7. It is worth setting out in full the relevant paragraphs of the Tribunal's decision[1] in this regard:

> **Reasons for our finding Richard Galvin's evidence unsatisfactory and unreliable**
>
> 15. The following are the main reasons for the Tribunal's finding Richard Galvin's evidence unsatisfactory and unreliable.
>
> 16. First, he was unsure as to which companies were in fact involved in the "barter system". His initial response in cross-examination was that J Fowler 'could be' involved. He changed this later to say that J Fowler was involved. He did not initially include New Ventures Europe Limited ("New Ventures") among the companies involved, but then suggested that it was – although there appear to be no onwards sales invoices from the Appellant to New Ventures, or any other evidence to corroborate Richard Galvin's evidence that New Ventures was involved in the operation of the "barter system". New Ventures appeared to us to have been a company to which the Appellant introduced business in return for a commission.
>
> 17. Secondly, Richard Galvin claimed to have carried in his head a rolling balance for a five-way inter-company netting agreement in relation to the operation of the "barter system". This was his explanation for the absence at the appeal of any written records of the operation of the "barter system". However the evidence of Officer Wells and Officer Pink was that at a meeting on 31 March 2009 Richard Galvin mentioned that he kept a record in a 'little black book'. HMRC wrote in a letter dated 3 April 2009 that 'you keep a separate record of who owes what in a book'. Richard Galvin replied to that letter on 29 April 2009 saying 'Thank you for your letter dated 3 April 2009, the contents of which have been noted' and not contradicting HMRC's statement referring to a record book.
>
> 18. Richard Galvin's oral evidence on this point was surprising, particularly given his evidence in chief that anything he did he wrote down in his diary because he was 'quite anal like that'. Furthermore the diary for 2009, when examined by HMRC, contained nothing about the supplies said to have taken place in January or February 2009.
>
> 19. We find that Richard Galvin did keep a record book recording any transactions which the Appellant had entered into. The reasons for this finding are (1) the evidence of the Officers regarding the meeting on 31 March 2009 and the subsequent correspondence, added to inherent improbability that anyone would keep a rolling balance of this kind in his head, rather than write it down when he was able to do so; and (2) Richard Galvin's admission in regard to the diaries that he usually wrote down anything he did.
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> 20. Thirdly, there was a series of duplicated supporting documentation which was brought to our attention. At least four of the invoices on which the Appellant relies for its input tax claims (being

[1] [2012] UKFTT 46 (TC)

invoices from MJJ) were supported by two sets of documents being orders and instructions from the Appellant to MJJ. An example is MJJ's invoice issued to the Appellant (number 00320) dated 1 August 2008 in the amount of £15,161.69. It was supported by both a confirmation of a verbal order on the Appellant's notepaper and dated 1 April 2008 and a document on MJJ's notepaper headed 'Instruction' and dated 25 February 2008, apparently evidencing an order in the same amount but for a slightly different set of goods at different prices. Richard Galvin had no explanation for this and the other duplicate sets of supporting documents. We cannot accept that two orders for different goods at different prices could, on multiple occasions, tally exactly with the same purchase invoice. We conclude that these documents were produced in order to match the amounts shown in the Invoices in question and that the supporting documents were duplicated in error. We regard this as significant evidence showing that the Invoices relied on by the Appellant recorded fictitious transactions – i.e. transactions which did not take place.

21. Fourthly, we accept the submission of Mr. Jones for HMRC that the lists of supplies in the documentary evidence supporting the Invoices (order confirmations and purchase orders or instructions) which routinely conclude with an item inadequately described and of relatively low value (for example, "fittings @ £54.11") do not refer to small items actually ordered and supplied, but were a mechanism used to manufacture documentary evidence to support the invoices by bringing up the apparent price of goods ordered to the invoice totals. Richard Galvin had no satisfactory explanation for these items. In connection with the similar apparent purchases by the Appellant of odd amounts of 'gas oil' from J Fowler, Richard Galvin's explanation was that all these items were for stock and he said that the oil was supplied free of charge to yard owners as part of an arrangement he had with them. No evidence supporting this unusual arrangement was produced and we were not satisfied that the apparent purchases of odd amounts of 'gas oil' in fact took place.

22. Fifthly, at the meeting on 31 March 2009 between Richard Galvin and HMRC, Richard Galvin was asked by Officer Wells to produce all the supporting documentation for the Invoices in relation to which input tax was claimed by the Appellant in the 5 VAT periods concerned. All the supporting documentation was apparently available in the Appellant's files but it took just over 6 months before it was all provided to HMRC. In the circumstances we consider that this delay was unusual and invited an explanation. Richard Galvin's explanation was that he was busy with other matters, but we do not find that convincing. The delay was, we conclude, occasioned by the fact that time was needed to create documentation which appeared to support the Invoices.

23. Sixthly, substantial Invoices were apparently rendered to the Appellant for consultancy services. Stephen Donelly gave evidence that he had, on behalf of One Vision, produced a report to the Appellant and a copy letter dated 14 October 2009 to HMRC was with our papers purporting to substantiate this. The letter covered the report

apparently regarding development projects in which the Appellant was interested. However, not only did HMRC deny ever having received the letter or the report, but the letter specifically referred on its face to the fact that copies of the report had not been kept (which we regard as odd and unusual and requiring an explanation which was not forthcoming). We also find it noteworthy that no copy of the report was kept, and so neither HMRC nor the Tribunal was supplied with one. These facts, together with HMRC's evidence that they had not received a copy of the report persuade us that no such report ever existed. This is more likely that the explanation offered by Stephen Donnelly that the report had been lost in the post or in HMRC's internal mail arrangements. We add that no other evidence corroborating the provision of consultancy services by One Vision was supplied to us.

24. Seventhly, the Tribunal has seen no convincing evidence of what use was made of the supplies which the Invoices apparently evidence. There is no reliable evidence of relevant onward supplies by the Appellant, there is no reliable evidence of an enhanced stock of materials retained by the Appellant, nor is there any reliable evidence that the Appellant used the materials itself.

25. This ties in with the Tribunal's difficulty in establishing from the evidence what activities the Appellant actually undertook in the relevant VAT periods. Some evidence pointed to it being involved in property development, while Richard Galvin accepted that the Appellant had not in fact engaged in property development but was a facilitator or broker of deals by others. As late as 7 December 2009, in a letter to HMRC, Richard Galvin stated that "Reddrock Ltd. neither owns nor leases plant", yet there are numerous invoices specifying plant hire. In evidence, Richard Galvin sought to resolve this contradiction by suggesting that Reddrock used his (Richard Galvin's) own plant for the purposes of hire, but this is inconsistent with the Appellant's statutory accounts, in which one of its principal activities is listed as plant hire. The Tribunal experienced a parallel difficulty in determining what activities (if any) were undertaken by the Appellant at the addresses given by Richard Galvin including:

5 Cranford Road, Burton Latimer;
Brook Farm House, Yelling;
Gazely House, Huntingdon;
7-8 Market Hill, Huntingdon;
Martin's Yard, Spencer Bridge Road, Northampton.

Both Cranford Road and Brook Farm House were the subject of substantial Invoices from One Vision for consultancy amounting to £54,201 and £108,482 (including VAT) respectively. The witness evidence of Officer Wells cast doubt on the extent of the Appellant's involvement in these developments and Richard Galvin's evidence was inconsistent and vague. He said of Cranford Road that it was a drop-off point for delivery of materials to One Vision, but denied knowledge of what One Vision did with the materials, which was odd, and could have been disingenuous, in light of the fact that he was a director of One Vision. He said the same of Brook Farm House, and again denied

knowledge of what One Vision did with the materials allegedly dropped off there.

26. Cranford Road was, from the photograph we were shown, an unremarkable residential address. We are not persuaded that it (or anywhere nearby) was used as a drop-off point for materials, as Richard Galvin claimed.

[…]

Conclusions

31. The Appellant has, as indicated above, sought to discharge the burden of proof by reference to the Invoices and supporting documentation supplemented by the oral evidence of its witnesses, principally Richard Galvin.

32. We have accepted the criticisms of the Invoices and supporting documentation which HMRC advanced at the hearing and we have found Richard Galvin to be an unsatisfactory and unreliable witness. Our chief reasons are set out above. We would say that the fact found by us that Richard Galvin did keep a record book, which in oral evidence he denied, and which he failed to produce at the hearing, was particularly important in persuading us that the transactions which the Invoices are claimed to record did not in fact take place (although in strictness the significance of this aspect as a reason for dismissing the appeal is that the Appellant has failed to discharge the burden of proof on it that the transactions did in fact take place).

33. We find that the Appellant claimed amounts of input tax on its VAT returns for the five periods in question (i.e. 02/08, 05/08, 08/08, 11/08 and 02/09) and then subsequently generated invoices and supporting documents in order to substantiate those claims.

8. The First Tier Tribunal subsequently awarded HMRC their costs on the basis that Reddrock had acted unreasonably in bringing an appeal in circumstances where it knew that the supplies in issue had not taken place. Reddrock made no representations in response to HMRC's application for a costs order.

9. Reddrock applied for permission to appeal to the Upper Tribunal. This application was refused by the First Tier Tribunal, but limited permission was granted by the Upper Tribunal for Reddrock to appeal on the following two grounds only:

(1) That the First Tier Tribunal had failed to give proper consideration to the evidence of witnesses other than Mr Galvin, and failed to give adequate reasons for rejecting their evidence; and

(2) That the First Tier Tribunal erred in ordering costs against Reddrock.

10. Reddrock's skeleton argument in the Upper Tribunal records that the First Tier Tribunal had made a *prima facie* finding of fraud against Reddrock.

11. In its decision released on 7 February 2014[2], the Upper Tribunal records that there was no challenge to the First Tier Tribunal's analysis of Mr Galvin's evidence nor to the First Tier Tribunal's conclusion that his evidence was unsatisfactory and unreliable (paragraph 17). The Upper Tribunal goes on to describe Reddrock's appeal as "unmeritorious" (paragraph 27). The Upper Tribunal dismisses Reddrock's appeal and upholds the First Tier Tribunal's award of costs. At paragraph 29 of its decision, the Upper Tribunal states:

> The ground on which the FTT made an order for costs in favour of HMRC was that Reddrock acted unreasonably in bringing the appeal in circumstances where it knew that the supplies in issue had not in fact taken place. This appears to us to be a compelling ground on which to exercise the discretion to order costs. As Reddrock has failed in its appeal on the substantive ground and we have upheld the decision that the alleged supplies in fact never occurred, there is no basis for interfering with the exercise by the FTT of its discretion to make an order for costs against Reddrock.

12. The Upper Tribunal ordered Reddrock to pay HMRC the costs of the Upper Tribunal proceedings.

13. On 28 June 2013, HMRC issued a notice assessing Reddrock to a penalty of £259,402 under s60(1) Value Added Tax Act 1994 ("VAT Act"). The penalty assessment related to the same supplies that the First Tier Tribunal had found to be fictitious and HMRC gave notice to Reddrock that they proposed to recover the penalty from Mr Galvin under s61 VAT Act as its director. They wrote to Mr Galvin on the same day to the same effect. Following a review, by a letter dated 23 October 2013, HMRC upheld the penalty and its recovery from Mr Galvin.

14. On 22 November 2013, Mr Galvin and Reddrock appealed to the First Tier Tribunal against the penalty and the apportionment of the penalty to him. Mr Galvin did not appoint a representative to act for him in relation to this appeal.

15. Mr Galvin's grounds of appeal were that:

(1) HMRC had not proved that (a) Reddrock was liable to a penalty or that (b) the conduct giving rise to the penalty was at least in part attributable to his dishonesty as a director;

(2) Reddrock's appeal was still in progress before the Upper Tribunal;

(3) There had been no findings of dishonesty against Mr Galvin;

(4) The penalty had been issued in breach of his human rights;

(5) The penalty was issued outside the statutory time limit; and

(6) In any event the penalty should have been further reduced.

16. On 24 November 2014, HMRC applied for both appeals to be struck out. On 26 March 2015 the Tribunal wrote to Mr Galvin enclosing HMRC's application and

[2][2014] UKUT 0061 (TCC)

asking for any representations to be made within 28 days. As no response was received, on 1 September 2015 the Tribunal issued an "unless order" against both Reddrock and Mr Galvin stating that unless they notified the Tribunal by no later than 4pm on 15 September 2015 that they intended to pursue the appeals, then they would be struck out, and that unless by the same date they notified both the Tribunal and HMRC of the grounds on which they would oppose HMRC's application, their appeals may be struck out.

17. On 11 September 2015 Mr Galvin e-mailed the Tribunal stating:

> I disagree with HMRC's statement, as I believe that I do have a reasonable prospect of success in these matters and we intend to pursue those matters …

18. However Mr Galvin did not set out the grounds on which he would oppose HMRC's strike out application. Mr Galvin also notified the Tribunal that Reddrock was in liquidation.

19. On 29 September 2015 the Tribunal released a direction striking out Mr Galvin's appeal for failure to comply with the direction to provide grounds.

20. On 27 October 2015, Altion Law Limited were appointed as Mr Galvin's legal representatives, and they applied on his behalf to have the appeal reinstated.

21. On 10 November 2015 the Tribunal directed that unless Reddrock (in liquidation) notified the Tribunal by 24 November 2015 that it intended to pursue its appeal then it would be struck out, and that unless by the same date Reddrock (in liquidation) notified the Tribunal of the grounds on which it would oppose HMRC's application, its appeal may be struck out.

22. On 3 December 2015 the Tribunal wrote to Reddrock (in liquidation) stating that it was of the preliminary view that its appeal had been struck out automatically, and asked whether the company sought to assert that it had complied with the Tribunal's directions and whether it wished to apply for reinstatement.

23. As at the date of the hearing, Reddrock (in liquidation) had not sought to challenge the striking out of its appeal nor applied for reinstatement.

Penalties for VAT evasion

24. Sections 60 and 61, VAT Act (insofar as they are relevant to this appeal) were as follows:

> **60 VAT evasion: conduct involving dishonesty**
>
> (1) In any case where—
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

(2) The reference in subsection (1)(a) above to evading VAT includes a reference to obtaining any of the following sums—

(a) a refund under any regulations made by virtue of section 13(5);

(b) a VAT credit;

(c) a refund under section 35, 36 or 40 of this Act or section 22 of the 1983 Act; and

(d) a repayment under section 39,

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—

(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; and

(b) in relation to the sums referred to in subsection (2)(a), (c) and (e) above, as a reference to the amount falsely claimed by way of refund or repayment.

[…]

(6) Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence (whether under this Act or otherwise), that conduct shall not also give rise to liability to a penalty under this section.

(7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners

61 VAT evasion: liability of directors etc

(1) Where it appears to the Commissioners—

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

(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—

(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.

(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—

(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 and 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) 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

(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.

(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. Mr Douglas-Jones submitted, in relation to all three applications before me, that these provisions were repealed, with effect from 1 April 2008, as a result of the reform of the penalties regime for VAT effected by s97, Finance Act 2007 ("FA 2007"), and Schedule 24 to that Act ("Schedule 24"). It is convenient to address this point now.

26. Part 5(5) of Schedule 27 FA 2007 makes provision for s 60 and s61, VAT Act to be repealed and paragraph 29(d) of Schedule 24 FA 2007 provides that s60 and s61

"are omitted" from the VAT Act. 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 was exercised through the Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 ("the Commencement Order").

27. Article 2 of the Commencement Order makes provision for the commencement of the provisions in Schedule 24 in relation to relevant documents relating to tax periods commencing on or after 1 April 2008 and assessments falling within 2007, and states that these come into force on 1 April 2008. Mr Douglas-Jones submitted that the effect of Article 2 was also to bring into force paragraph 29(d), with the effect that s60 and s61 are omitted from the VAT Act in respect of relevant documents relating to tax periods commencing on or after 1 April 2008 and assessments falling within 2007.

28. Article 3 of the Commencement 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.

29. Article 4 of the Commencement Order provides a saving for s60 and s61 VAT Act as follows:

> Notwithstanding paragraph 29(d) of Schedule 24 (consequential amendments), sections 60 and 61 of the Value Added Tax Act 1994 (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.

30. Mr Douglas-Jones submitted that HMRC are in this case seeking to impose a penalty for an inaccuracy in a document or a failure to notify HMRC of an under-assessment. Consequently, the saving in Article 4 of the Commencement Order does not apply. Accordingly no penalties can be levied under s60 or collected under s61 VAT Act in relation to relevant documents relating to tax periods commencing on or after 1 April 2008 and assessments falling within 2007, and no penalties can be levied under Schedule 24 for any tax period before 1 April 2009. The period between 1 April 2008 (when s60 and s61 are repealed) to 31 March 2009 (when Schedule 24 comes into force) was described by Mr Douglas-Jones as a "period of grace".

31. Mr Douglas-Jones referred me to the decision of this Tribunal in *Walker and Anr v Revenue and Customs* [2013] UKFTT 375 (TC), but submitted that it was wrongly decided (and that as it was a decision of the First Tier Tribunal, it was not binding on me). However he did not articulate in any detail why he found the reasoning of the Tribunal to be wrong.

32. Mr Watkinson submitted that Mr Brown-Jones's arguments on the repeal of sections 60 and 61 VAT Act were misplaced, and that the repeals effected under FA 2007 only related to VAT returns and claims, and the provisions continued to have effect for other documents. In particular, s97 FA 2007 brought Schedule 24 into force

to impose penalties on taxpayers who "make errors in certain documents sent to HMRC" (s97(1)(a) FA 2007). Paragraph 1 of Schedule 24 provides for a penalty to be payable in certain circumstances in relation to documents listed in the table at the end of the paragraph – and in relation to VAT, the documents listed in the table are VAT returns and claims. Schedule 24 does not apply to falsification of VAT invoices and other underlying documents, and therefore, submitted Mr Watkinson, these continued to be subject to s60 and s61 VAT Act.

33. Article 3 of the Commencement Order provides: "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." According to Mr Watkinson, there is nothing in this Article to suggest that s60 and s61 VAT Act are repealed insofar as they relate to matters outside the scope of Schedule 24, and the residual scope of these sections was subsequently addressed on the enactment and bringing into force of Schedule 41, Finance Act 2008.

34. I do not find Mr Watkinson's argument entirely convincing. In particular, the table in paragraph 1 of Schedule 24 extends beyond just VAT returns and claims, and includes "Any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about […] repayments, or any other kind of payment or credit, to P." and I considered whether this might be apt to describe a VAT invoice used to evidence a claim for credit for input VAT. However, for such a document to fall within the Schedule 24 penalty regime, it must be a document that P gives to HMRC (see paragraph 1(a)(a)). In my view, the falsified invoices on which Reddrock claimed input VAT credits were not ones that it gave to HMRC, and therefore did not fall within the scope of the penalties imposed by paragraph 1 of Schedule 24.

35. Nonetheless, paragraph 29(d) of Schedule 24 states in terms that sections 60 to 64 VAT Act are to be omitted and the Commencement Order does not clearly address how and when the omission is to take effect in relation to documents other than those listed in the table at the end of paragraph 1. Mr Watkinson's explanation does not satisfactorily address why s60 and s61 survive the Commencement Order in relation to such documents.

36. But I am satisfied that s60 and s61 were not repealed by the Commencement Order for the reasons adopted by this Tribunal in the *Walker* case (which are different to the reasons given by Mr Watkinson). I therefore find that the provisions of s60 and s61 VAT Act were in force at all relevant times.

Mr Galvin's application for reinstatement

37. The Tribunal has power to strike out an appeal under Tribunal Rule 8, the relevant elements of which provide as follows:

> **Striking out a party's case**
>
> 8.—(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a

> direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> […]
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> […]

38. Mr Galvin's appeal was struck out under the powers in Tribunal Rule 8(3)(a)

39. Tribunal Rule 8(5) provides:

> If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

40. In exercising its powers under Tribunal Rule 8(5), the Tribunal must seek to give effect to the overriding objective to deal with the appeal fairly and justly, as set out in Tribunal Rule 2(2):

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

41. There has been some debate as to the correct approach to be adopted by the Tribunal when considering applications for relief from sanctions. That debate was initiated by changes to the Civil Procedure Rules ("CPR") in 2013, and in particular the introduction of a new CPR 3.9 which was designed to ensure that time limits and similar requirements were enforced more strictly in the courts.

42. The new CPR 3.9(1) provides:

> On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.

43. Although the CPRs do not apply directly to this Tribunal, the impact of judgments of the courts in this respect, such as *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Denton v TH White Ltd (and related appeals)* [2014] EWCA Civ 906, have been considered by the Upper Tribunal, first in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 (not cited to me) and, post-*Denton*, in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC) (not cited to me). Prior to the introduction of the new CPR 3.9 in 2013, the practice had been to follow the approach described in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) (not cited to me) where Morgan J had applied by analogy the matters referred to in the old version of CPR 3.9. In *Leeds City Council*, the Upper Tribunal (taking a different view from that taken by the Upper Tribunal in *McCarthy & Stone*) held that until a change is made to the relevant tribunal rules which reflected the terms of the new CPR 3.9, the approach set out in *Data Select* should continue to apply.

44. This difference of view was resolved by the Court of Appeal in *BPP Holdings v Revenue and Customs Commissioners* [2016] EWCA Civ 121. The Court of Appeal held that, with the Tribunal Rules being silent on the question, it was appropriate that the Tribunal accord significant weight to the efficient conduct of litigation at a proportionate cost, and compliance with rules, practice directions and orders, as part of its consideration of the overriding objective set out in Tribunal Rule 2. The Senior President of Tribunals said at [37] of his judgment:

> There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

45. So the correct approach to Mr Galvin's application for reinstatement is to consider the overriding objective and all the circumstances of the case and in that context to apply by analogy the provisions of CPR 3.9, as interpreted in *Mitchell* and *Denton*. This requires the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, as set out in CPR 3.9, to be given particular weight when considering all the circumstances of the case. Consequently, the Tribunal will take a stricter approach than might have been the case

before the new CPR 3.9 was implemented, but it is still the case that a consideration of all the circumstances must be made before deciding the application.

46. In giving the judgment of the court in *Mitchell*, the Master of the Rolls stated at paragraph 36 that the requirements set out in CPR 3.9 "should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule". He went on to note that, whilst it was true that the reference to "all the circumstances of the case" meant that a broad approach should be adopted in such circumstances, "the other circumstances should be given less weight than the two considerations which are specifically mentioned".

47. In the *Denton* case, the Court of Appeal agreed with the principles set out in the *Mitchell* case and went on to say that an application for relief from sanctions should be addressed in three stages

> The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].

Submissions on behalf of Mr Galvin

48. Mr Douglas-Jones submitted on behalf of Mr Galvin (as regards the first and second stages identified in *Denton*), that the breach was neither serious nor significant. Mr Douglas-Jones drew my attention to the fact that the Tribunal's direction gave Mr Galvin only two weeks within which to respond, and that to expect fully particularised grounds within such a short space of time was unreasonable. Mr Galvin had endeavoured to comply with the order and in his e-mail gave his grounds as having reasonable prospects of success, and these were particularised subsequently. The default occurred because Mr Galvin was acting as a litigant in person, and was in that position as his former solicitors were in liquidation.

49. As regards the third stage, Mr Douglas-Jones referred me to Article 6 of the European Convention of Human Rights and (in relation to the Original Appeal) to the indirect findings of Officer Wells that the underlying supplies did not take place and to the Tribunal's decision that Mr Galvin's evidence was unreliable. Mr Douglas-Jones also made submissions about the repeal of s60 and s61 VAT Act.

50. Mr Douglas-Jones noted that the limb of the order under which the appeal was struck out was discretionary ("may be struck out"), and, unlike the other limb ("would be struck out") was not in mandatory terms. He submitted that it would be contrary to the principles of fairness and justice to allow the appeal to remain struck out where a litigant in person sought to comply with an order by filing a notice of a ground, but

failed to comply with the order in the view of the Tribunal because he failed to infer from the order that the ground needed to be particularised.

51. Article 6 of the European Convention addresses the right of individuals in relation to criminal charges to a fair trial. It is not in question that civil evasion penalties (of the kind in issue in this appeal) are within the scope of Article 6. Mr Douglas-Jones drew an analogy between a strike out and the position at a criminal trial where a defendant fails to appear and the court has to decide whether to proceed in his absence. I was referred to the decision of the Court of Appeal in *R v Hayward, R v Jones and R v Purvis* [2001] EWCA Crim 168 and to the decision of the House of Lords in *R v Jones* [2002] EWHL 5. In these cases, it was held that although the courts had discretion to commence a trial in the absence of the defendant, this was to be exercised with caution – particularly if the defendant was unrepresented.

52. Mr Douglas-Jones also noted that for penalties under sections 60 and 61 VAT Act, the burden shifts to HMRC to prove dishonesty for the purpose of evading VAT. However, Mr Douglas-Jones submitted, the First Tier Tribunal made no finding of dishonesty in relation to the Original Appeal.

53. As regards the Original Appeal, Officer Wells was the HMRC officer who investigated the supplies on which Reddrock had claimed input tax, and which were found to be fictitious. Officer Wells subsequently investigated input tax credits claimed by Reddrock on later VAT returns and found that these were fictitious and a VAT assessment was raised in order to recover the overclaimed input tax. However this assessment was subsequently overturned by a review decision letter dated 17 May 2011 (which was after the First Tier Tribunal's hearing of the Original Appeal). Mr Douglas-Jones submitted that the fact that Officer Well's later assessment was overturned on review brings into question the reliability of his evidence in the Original Appeal.

54. Mr Douglas-Jones also submitted that even if a penalty was in point, the amount of tax evaded would need to recognise both outputs and inputs. As Reddrock was operating a "barter" system, if supplies to it were fictitious, there would be a reduction in both its input and output tax – and so the amount of tax evaded would be considerably less than the amount on which the penalty was assessed.

Submissions on behalf of HMRC

55. Mr Watkinson noted that Mr Galvin had made an application for reinstatement of his appeal under Tribunal Rule 8(5), rather than appealing against the striking out order. Mr Watkinson submitted that if Mr Galvin's position was that the decision had been improperly made, he should have appealed against it. In *Mitchell* the Master of the Rolls states at paragraph 44 of the judgment:

> An application for relief from a sanction presupposes that the sanction has in principle been properly imposed. If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under CPR 3.1(7).

56. The Master of the Rolls went on to say at paragraph 45 "On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective".

57. Therefore, submitted Mr Watkinson, Mr Douglas-Jones cannot submit that the striking out order was wrongly made, or that Mr Galvin had complied with the Tribunal's directions. Nor is there any question that Mr Galvin did not receive the Tribunal's directions, as he responded to them.

58. Mr Watkinson went on to make submissions on the nature and purpose of unless orders, and the manner in which I should exercise my discretion when considering relief from sanctions. He referred me to the decision of the Court of Appeal in *BPP Holdings* (which I discussed above), and referred me also to the decision of the Court of Appeal in *Hytec Information Systems Limited v Council of City of Coventry* [1996] EWCA Civ 1099 and the following summary from the judgment of Ward LJ of the issues to be considered in any consideration whether to grant relief from an unless order:

> 1. An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;
>
> 2. Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed;
>
> 3. This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;
>
> 4. It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred), flouts the order then he can expect no mercy;
>
> 5. A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;
>
> 6. The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice;
>
> 7. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two;

59. Nor, submitted Mr Watkinson, does Mr Galvin's status as a litigant in person excuse him from compliance. Mr Watkinson drew my attention to the fact that the principal director of Altion Law (Mr Galvin's current legal representatives) is his son, and Mr Galvin gave no reason as to why he did not take legal advice at the time he received the Tribunal's directions. Mr Watkinson also asserted that Mr Galvin is not a "naïf abroad", as he has been engaged in multiple legal actions. Although Mr

Watkinson acknowledged that Mr Galvin's status as a litigant in person ought to be a factor taken into consideration, it is not enough to excuse Mr Galvin's non-compliance.

60. As regards Article 6 of the European Convention, Mr Watkinson submitted that this cannot be a lifeboat that saves Mr Galvin from an ocean of his own making, and that Mr Galvin's Article 6 rights are not engaged where his own failings have led to his appeal being struck out.

61. In relation to the amount of the penalties, the penalties are measured by reference to the amount of VAT evaded or sought to be evaded by the taxpayer's conduct (s60(1) VAT Act). Mr Watkinson noted that the findings of the First Tier Tribunal in the Original Appeal was that invoices on which credit for input tax had been claimed were entirely fictitious and that no supplies had been made to Reddrock in relation to them, and therefore it must follow that the amount of tax sought to be evaded was the input tax on the fictitious invoices. The amount of output tax incurred by Reddrock was irrelevant to the measure of tax evaded or sought to have been evaded by Reddrock's conduct. Mr Watkinson went on to say that if Mr Galvin now wished to claim that Reddrock had not made the supplies recorded on its VAT return (and therefore wanted to receive a refund of the output VAT it had apparently overpaid), then he would need to explain why these incorrect entries had been made on Reddrock's VAT return.

62. As regards the conduct of Officer Wells, a decision taken by an officer for later VAT periods can, submitted Mr Watkinson, have no logical relevance to Mr Galvin's conduct in prior VAT periods. The fact that Mr Galvin may have subsequently received genuine taxable supplies on which he could genuinely claim input VAT credit is irrelevant to his earlier conduct.

63. Mr Watkinson submitted that for Mr Galvin to succeed in his application for reinstatement of his appeal, Mr Galvin will need to satisfy the Tribunal that something beyond his control caused his failure to comply with the Tribunal's directions. Mr Galvin has made no submission to this effect, and therefore Mr Watkinson submitted that the application must be dismissed.

Discussion

64. I note that Mr Galvin has not appealed against the striking out of his appeal, but has instead applied under Tribunal Rule 8(5) for his appeal to be reinstated. Following the decision of the Court of Appeal in *Mitchell*, my starting point is that the striking out was properly imposed and complied with the overriding objective. For that reason, I have taken no account of the fact that Mr Galvin was given only 14 days to respond to the Tribunal's directions.

65. I then turn to the three stages identified in *Denton*: first, the seriousness and significance of Mr Galvin's failure; secondly, the reason for the default; and finally all the circumstances of the case.

66. The making of an unless order is a serious matter. As stated by Ward LJ in *Hytec*, it is an order of last resort, and the applicant will need to advance the most compelling reasons to explain his failure.

67. The reason for the default advanced by Mr Douglas-Jones was that Mr Galvin was a litigant in person – and that he had not appreciated that he needed to particularise his grounds for opposing HMRC's application to strike out the appeal. Mr Douglas-Jones told me that the reason why Mr Galvin was unrepresented was because his previous solicitors (Dunham Solicitors LLP) had gone into liquidation (although I note that Altion Law – Mr Galvin's current lawyers – represented Reddrock in his appeal to the Upper Tribunal against the Original Appeal decision). The fact that Mr Galvin was, at the relevant time, a litigant in person, may in some circumstances be relevant to a decision to make an unless order, or to order a strike out. Although I am aware that Mr Galvin is now represented by his son's firm, it cannot be the case that a litigant should be expected to obtain informal legal advice from friends or relatives (and indeed, there are often compelling reasons why obtaining advice from legally qualified friends or relatives may be inappropriate). Nonetheless, in the circumstances of this case, I consider that the fact that Mr Galvin was a litigant in person does not, of itself, excuse his behaviour. I note that the Senior President, in his judgment *BPP Holdings* at paragraph 39 states that

> I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders …

68. I note that Mr Douglas-Jones does not assert that there were any factors outside Mr Galvin's control that caused his failure to comply with the Tribunal's direction.

69. I agree with Mr Douglas-Jones that the imposition of civil penalties under s60 and s61 VAT Act are criminal proceedings for the purposes of Article 6 of the European Convention. However the fact that this appeal is within the scope of Article 6 does not prevent the Tribunal from exercising its case management powers, including the power to strike out the appeal for failure by the appellant to comply with directions.

70. I find Mr Douglas-Jones argument relating to the quantum of tax evaded to be nonsense. He submitted that Reddrock's barter system means that where fictitious input VAT claims have been made, there must also have been corresponding fictitious output VAT – leading to a reduction in the overall amount of VAT evaded (and therefore in the penalty suffered). However when he was asked by me to explain in more detail why this was so, he was unable to do so. Even if there was some merit in this argument, I agree with Mr Watkinson that the measure of VAT sought to be evaded by the creation of fictitious inputs is not reduced merely because the amount of outputs has been overstated.

71. I also agree with Mr Watkinson that the fact that subsequent VAT assessments made by Officer Wells were reversed on review is irrelevant to the issues before me. The mere fact that assessments were overturned on review does not of itself bring into question the reliability of Officer Wells as a witness in the Original Appeal, or

provide grounds to re-open the Original Appeal. Even if it did, it is clear that the Tribunal's finding that invoices were fabricated was not based on the uncorroborated evidence of Officer Wells.

72. I have addressed the submissions made by both parties in respect of the repeal of s60 and s61 VAT Act earlier in this decision.

73. I have considered also Mr Douglas-Jones submission that the Tribunal in the Original Appeal made no express finding of dishonesty on the part of either Reddrock or Mr Galvin. I disagree, as I consider that the factual findings of the Tribunal amount to findings of dishonesty. In the Original Appeal the Tribunal found that Reddrock had claimed credit for input tax on fictitious transactions, and lists subsequently produced by Reddrock in support of the invoices did not refer to items actually ordered and supplied, but were a mechanism used to manufacture documentary evidence to support the invoices.

74. Although the Tribunal did not describe Reddrock's actions in terms as "dishonest", I am in no doubt that Reddrock's actions were dishonest and amounted to fraud – it is impossible to read the Tribunal's findings in the Original Appeal in any other way. Indeed, this was acknowledged by Reddrock in its appeal to the Upper Tribunal. Paragraph 24 of its skeleton argument before the Upper Tribunal states that "there would appear *prime facie* to be a finding of fraud by the FTT [in the Original Appeal]".

75. I am satisfied that the Tribunal made findings of fraud in the Original Appeal. Alternatively, they are findings of fact, but the only conclusion that can follow from a finding that Reddrock created fictitious invoices, is that it was dishonest. In either case, the burden of proof that falls on HMRC was amply discharged. The Tribunal made unequivocal factual findings, and there is no suggestion that HMRC were given any benefit of any doubt.

76. Nor do I consider that it makes any difference that it was Reddrock (and not Mr Galvin) that was a party to the Original Appeal. He was the sole director of Reddrock, and entered into each of the relevant transactions that relied upon the fictitious invoices. Mr Galvin was the controlling mind of Reddrock (there is no suggestion that there was some other person acting as a shadow director who controlled Reddrock). Reddrock was Mr Galvin's *alter ego* and any knowledge possessed by Mr Galvin must be imputed to the company. Any fraud perpetrated by Reddrock can only have been undertaken by and through Mr Galvin.

Conclusion

77. Having considered all of the factors, I have decided to dismiss Mr Galvin's application for reinstatement, and his appeal remains struck out.

HMRC's application to strike out Mr Galvin's appeal

78. As HMRC's cross-application was argued before me, and in case this decision is appealed, I set out below the reasons why (if I had reinstated the appeal) I would have allowed HMRC's application to strike it out on the ground that it has no reasonable prospect of success.

79. I have power under Tribunal Rule 8(3)(c) to strike out an appeal if it has no reasonable prospect of success. The Upper Tribunal has considered the exercise of this power in *HMRC v Fairford Group plc and anr* [2015] STC 156:

> [46] In our judgment an application to strike out in the FTT under r8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A "realistic" prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Products Limited v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a "mini trial". As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all.

80. The principal issues to be considered in relation to HMRC's application are essentially these:

> (a) Did the findings of the Tribunal in the Original Appeal amount to findings of dishonesty? And if they did, did such findings satisfy the burden of proof, which falls on HMRC in the case of penalty appeals?
>
> (b) Is it an abuse of process for Mr Galvin (who was not a party to the Original Appeal) to challenge findings made by the Tribunal in the Original Appeal?
>
> (c) Are Mr Galvin's rights under Article 6 of the European Convention engaged?

81. There are in addition a couple of other subsidiary points.

Dishonesty

82. For HMRC to be able to assess penalties under s60, the conduct must involve dishonesty. And in the case of penalties, the burden of proof to show dishonesty rests with HMRC.

83. Mr Douglas-Jones submitted that the issues to be determined in relation to s60 and s61 VAT Act are different to the issued that were considered in the Original Appeal. In particular there are different elements to the statutory provisions, a

different burden of proof, and Mr Galvin was not himself a party to the Original Appeal. Mr Galvin could not have raised in the Original Appeal issues relevant to s60 and s61.

84. Mr Douglas-Jones submitted that the Tribunal in the Original Appeal made no express finding of dishonesty on the part of either Reddrock or Mr Galvin. To the extent that the Tribunal made findings, these related to the question of HMRC's assessment for VAT. In such cases, the burden of proof rests on the taxpayer to displace HMRC's assessment. For these reasons, the question of whether Reddrock's actions amounted to dishonesty for the purposes of s60 VAT Act was not determined in the Original Appeal.

85. Mr Douglas-Jones also submitted that Mr Galvin has an arguable case that the invoices produced by Reddrock in the Original Appeal supported actual supplies in the light of the evidence that Officer Wells' assessment for later VAT periods was overturned on review.

86. In the Original Appeal the Tribunal found that Reddrock had claimed credit for input tax on fictitious transactions, and subsequently produced by Reddrock in support of the invoices did not refer to items actually ordered and supplied, but were a mechanism used to manufacture documentary evidence to support the invoices. Although the Tribunal did not describe Reddrock's activities in terms as "dishonest", for the reasons I have given earlier in this decision in relation to Mr Galvin's application for reinstatement, I am in no doubt that Reddrock's actions were dishonest and amounted to fraud.

87. Nor is it relevant that assessments made by Officer Wells in relation to subsequent VAT periods were reversed on review. The fact that Reddrock may have made actual supplies in later periods does not affect the findings by the Tribunal that it was fraudulent in the periods considered in the Original Appeal.

Abuse of process

88. So the question arises whether Mr Galvin can challenge the findings of dishonesty made by the Tribunal against Reddrock (and against him also) in this appeal – or whether to do so would amount to an abuse of process.

89. The law relating to abuse of process was helpfully summarised in Judge Mosedale's decision in *Foneshops Ltd v Revenue and Customs* [2015] UKFTT 0410 (TC):

> 29. […] the doctrine of abuse of process is not part of the doctrine of *res judicata*, and it is still applicable to tax cases. In *Littlewoods*[3], Henderson J held that HMRC were unable to advance the position that the tax was not due in defending the claim for interest because to do so would be an abuse of process, irrespective of the non-application of issue estoppel to tax cases: [250]. So the fact that issue

[3] [2014] EWHC 868 (Ch)

estoppel does not apply to tax cases appears to be no bar to a court concluding that re-opening a decided issue is an abuse of process.

30. HMRC relied on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 for a statement of what abuse of process was:

> "…[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" page 536 C per Lord Diplock.

31. The statement in *Hunter* is very general and there might be room for doubt whether it extends to the circumstances in this case. However, the authorities of *Littlewoods* at §250 and *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028 are more specific. Abuse of process appears to be very like issue estoppel save perhaps for flexibility where there are special circumstances:

> "a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal…..
>
> …it would be an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings…" page 1049 C-F, per Ralph Gibson LJ delivering the unanimous judgment of the Court of Appeal, also citing Lord Kilbrandon in the Privy Council that abuse of process
>
> " 'is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.' "

And unlike issue estoppel, abuse of process applies to tax cases. So I find that abuse of process does prevent previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances.

90. The fact that Mr Galvin was not directly a party in the Original Appeal does not prevent the doctrine of abuse of process from applying. This point was considered by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. Lord Diplock in his speech says the following (at 32D):

> Two subsidiary arguments were advanced by Mr. ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v. Henderson* did not apply to Mr. Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr. Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to

issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V.-C. in *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 W.L.R. 510 at 515 where he said:

> "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the *alter ego* of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest . . . .'"

On the present facts that test was clearly satisfied.

91. In this case, as Mr Galvin was the sole director of Reddrock, Reddrock can only have acted as his *alter ego*. In the light of the decision of the House of Lords in *Johnson* I find that it would therefore be an abuse of process for Mr Galvin to be able to re-litigate factual issues that were previously decided in the Original Appeal.

92. Mr Douglas-Jones made the point that it is not an abuse of process in a criminal trial to reconsider findings made in a previous civil trial. But that is to miss the point. In a criminal trial the standard of proof is "beyond reasonable doubt", whereas in a civil trial it is on the "balance of probabilities" – so it is perfectly feasible for a finding to be made by the civil court on the balance of probabilities, but for that finding not to be supported beyond reasonable doubt. That issue does not arise in this case. Even though penalties may be "criminal" for Article 6 purposes, the standard of proof remains the balance of probabilities.

Article 6

93. Mr Douglas-Jones submitted that to strike out Mr Galvin's appeal would breach his rights under Article 6 of the European Convention. But as I discussed above in relation to Mr Galvin's application to reinstate his appeal, his rights under Article 6 do not fetter the case management powers of this tribunal, and no authority was cited to me that would indicate that Article 6 would trump the doctrine of abuse of process. In this context I note that the Tribunal Rule 8(4) provides that the Tribunal can only exercise its powers under Rule 8(3)(c) after having given the appellant an opportunity to make representations – as indeed has been done in this very application. I therefore find that Mr Galvin's Article 6 rights are not breached by the striking out of his appeal on grounds that is has no reasonable prospect of success.

Other matters

94. Mr Douglas-Jones also argued that the impact of the finding by in the Original Appeal that invoices were fictitious would have the effect of reducing not only Reddrock's input tax credit, but would also reduce its output tax because of the barter system that it operated. As a consequence, the amount of VAT evaded (and therefore the amount of the penalty) would be reduced below the amount assessed by HMRC.

95. This point was raised by Mr Douglas-Jones in relation to the application for reinstatement, and for the reasons that I have given above, I find Mr Douglas-Jones submission misconceived.

96. Mr Douglas-Jones also made submissions relating to the repeal of s60 and s61 VAT Act, which I have addressed above, and which I also find to be misconceived.

97. I note that no submissions were made on behalf of Mr Galvin as to the recovery of the penalty from him under s61 VAT Act. Given that Mr Galvin was the sole director and controlling mind of Reddrock, it must follow that the allocation of any penalty under s61 could only be to Mr Galvin.

Conclusions

98. I have found that the findings of the First Tier Tribunal in the Original Appeal amounted to a finding that Reddrock's conduct was dishonest. As Mr Galvin was the controlling mind of Reddrock and it was his *alter ego*, the dishonesty of Reddrock reflected the dishonesty of Mr Galvin. It therefore follows that the conduct of Mr Galvin was also dishonest.

99. I found also that it would be an abuse of process for Mr Galvin to re-litigate these findings.

100. As Mr Galvin was the sole director of Reddrock, there can be no question but that under s61 VAT Act, the penalties assessed on Reddrock can and should be allocated only to Mr Galvin.

101. I have found that s60 and s61 VAT Act were in force at the relevant times. I have also found that the barter system operated by Reddrock does not give rise to any reduction in the amount of tax evaded, and there is therefore no corresponding reduction in the amount of penalties.

102. I have found that Mr Galvin's rights under Article 6 are not breached by the use of this Tribunal of its case management powers, including the power to strike out an appeal which has no reasonable prospects of success.

103. For these reasons, I find that Mr Galvin's appeal has no reasonable prospect of success, and therefore (if Mr Galvin had been successful in his application to have his appeal reinstated) I would have ordered that it be struck out.

Amendment to grounds of appeal

104. Mr Galvin also applied for permission to rely upon a further ground of appeal, namely "that the impugned HMRC decision was in part achieved by applying non-existent law".

105. I can deal with this quickly, as it relates to Mr Douglas-Jones submission that s60 and s61 VAT Act were repealed. I have addressed this argument in detail earlier in my decision. Given my finding that these provisions were in force at all material times, and that Mr Douglas-Jones's submissions were without merit, it must follow that Mr Galvin's application in this regard must fail.

106. I note that the application was only made in Mr Douglas-Jones's skeleton argument, and no reasons were given as to why it was not included in the original grounds of appeal, or not made earlier. But given that I have in any event refused permission, I do not propose to take these points further.

Decision

107. Mr Galvin's application to reinstate his appeal is dismissed.

108. But even if I am incorrect in dismissing Mr Galvin's application for reinstatement, I would have struck out his appeal in any event on the ground that it has no reasonable prospect of success.

109. Finally, I would not have given permission for Mr Galvin to amend his grounds of appeal.

110. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 16 AUGUST 2016

Cases to which reference was made in skeleton arguments but not referred to in the decision:

R v Ghosh [1982] QB 1053

In re H and others (minors) [1996] AC 563

Han v Customs and Excise Commissioners [2001] 1 WLR 2253

R v Jones (Anthony) [2002] UKHL 5

Re B (children) [2008] UKHL 35

Activ8 Alarms Ltd v Revenue and Customs [2010] UKFTT 48 (TC)

Brookes v Revenue and Customs [2016] UKUT 214 (TCC)

Infocom IT (UK) Ltd v Revenue and Customs [2016] UKFTT 319 (TC)