



TC05867

Appeal number: TC/2014/04702

VALUE ADDED TAX – invoice issued by a construction company to an associated company – whether the VAT noted on the invoice was attributable to an identifiable supply – yes – whether the description on the invoice was sufficient to constitute the invoice a valid VAT invoice – no – whether in all the circumstances the right to deduct the VAT as input tax should have been denied – held no, the substantive conditions for deduction being fulfilled – whether the amount shown on the invoice had been paid – yes – whether in any event the input tax deduction should be denied on the basis of connection with fraud by application of the Kittel principle – held, no – whether the penalty imposed on the basis of deliberate and concealed behaviour should be upheld – no – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OVAL ESTATES (BATH) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
MRS CLAIRE HOWELL**

**Sitting in public at the Civil and Family Justice Centre, Bristol on 22, 23 and 24
March 2017**

Leslie Allen, Mishcon de Reya, for the Appellant

**Natasha Barnes, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The Appellant, Oval Estates (Bath) Limited (“OE Bath”), appeals against a
5 decision of the Respondents (“HMRC”), dated 3 July 2013, to deny to OE Bath the
right to deduct as input tax an amount of £33,349.58, claimed by OE Bath for
deduction as input tax in its quarterly VAT period 03/13 (ending 31 March 2013).
2. OE Bath also appeals against a decision of HMRC to issue a penalty to OE Bath
10 in the amount of £28,346 on the basis that the input tax claim in dispute was caused
by OE Bath’s ‘deliberate and concealed behaviour’. The penalty assessment was
dated 30 May 2014.
3. The input tax claim in dispute related to a single invoice (number 265) in the
15 amount of £200,097.48 (inclusive of VAT at the standard rate of 20%), which was
dated 30 September 2012 and issued to OE Bath by an associated company, Oval
Building Contractors Limited (“OBC”).
4. We heard oral evidence from two witnesses, Matthew Benedict Unwin, the
Officer of HMRC with responsibility for the case, and Alan Geoffrey Broadway, the
20 managing director of OE Bath since 1998. Officer Unwin and Mr Broadway had each
made two Witness Statements. We also had with our papers a Witness Statement
from another officer of HMRC, Philip Roger Nunn, who was not called to give oral
evidence and whose Witness Statement evidence was accepted by both parties. The
important element of his evidence was that, where SAGE accounting was used (as in
this case), it was not possible to take account of an invoice in a VAT return until the
period in which it was posted in the SAGE accounting system.
- 25 5. Besides the witness evidence we had before us extensive documentary evidence.
From the evidence, we find facts as follows.

The evidence

6. In this section of this Decision we set out what we regard as the relevant evidence,
30 which we accept, and find facts accordingly, insofar as we do not indicate that we do
not accept it.
7. OE Bath is one of a number of companies under the control of Mr Broadway and
his family, which carry out functions in the property sector. Many of these companies,
most, if not all, of which feature “Oval” in their names (and to which we refer as “the
35 Oval Companies”), are single purpose vehicles set up for the purposes of carrying out
specific developments. OE Bath is not one of these but it did carry out the function of
developer in relation to a specific commercial building, Unit 3, St Peters Business
Park, Wells Road, Radstock (“Unit 3”). The Oval Companies are, however, primarily
involved in residential development.
8. Unit 3 was part of a larger development, for which planning permission was
40 obtained between 2006 and 2008. It is commercial warehouse premises, a steel-frame

building on a concrete slab with a surfaced yard, staff car park, associated landscaping and ancillary work.

9. OE Bath engaged OBC to construct Unit 3. The construction commenced on 27 June 2011. We had with our papers the “Employer’s Requirements” for the construction of Unit 3, dated October 2011 (Version 3) naming OE Bath as Employer.

10. Mr Broadway explained that there were multiple versions of the “Employer’s Requirements” because they had to be revised each time the funding arrangements for the building of Unit 3 were changed. This had happened at least twice before October 2011. This also explained why the “Articles of Agreement” with our papers – the agreement for the design and build of Unit 3 between OE Bath and Oval Commercial Investments Limited (“OCI”) as employer, and OBC as contractor – was dated 1 July 2011, before the date of the 3rd version of the “Employer’s Requirements”.

11. Mr Broadway explained that OCI owned the freehold of the site and was regarded as the ‘client’, OE Bath was regarded as the ‘developer’ and OBC was regarded as the ‘contractor’ in relation to the construction of Unit 3.

12. We also had with our papers the “Form of Tender” addressed by OBC to OE Bath relating to the construction of Unit 3 and dated 1 June 2011. This document included the tender in the following words:

‘To [OE Bath]

Dear Sirs

I/We, having read the Conditions of Tender, the Conditions of Contract, the Employers requirements and the Pre-construction Information submitted to me/us and having examined the Drawings contained therein do hereby offer to execute and complete in accordance with the conditions of contract the whole of the works described for the sum of: [£488,596].’

13. The invoice with which the appeal is concerned (number 265) quoted OBC’s VAT Registration number and was in the following form:

‘Quantity 1.00 Details Works carried out on Unit 3 Unit Price 166,747.90 Net Amount 166,747.90 VAT Rate 20.00 VAT 33,349.58 Total Net Amount 166,747.90 Carriage Net 0.00 Total Tax Amount 33,349.58 Invoice Total 200,097.45’

14. This figure (£166,747.90) appeared to be supported by a schedule of valuations for the construction of Unit 3, which was with our papers. In particular, the total of the figures given on the schedule for the 4th Valuation (£75,421), the 5th Valuation (£74,552) and the 6th Valuation (£16,775) was £166,748. The schedule of valuations was undated and referred to the form of contract as being “JCT Design and Build Contract 2005”, the contract period being “20 weeks”, the date of possession being “7th June 2010”, the date for completion being “29th October 2012” and the tender return date “Revision A” being “Mar – 12”.

15. The 4th Valuation was a valuation ‘as at 14th July 2012’, the 5th Valuation was a valuation ‘as at 14th August 2012, and the 6th Valuation was a valuation ‘as at 14th September 2012’.

16. The 4th Valuation detailed works as follows:

5	Preliminaries	£6,500
	Site Set Up	210
	Site Clearance	500
	Foundations/Piling	6,563
	Substructures/ring beam	6,108
10	Floor Slab	13,550
	Superstructures	7,560
	Carpentry/Woodwork	1,000
	Electrical installation	1,550
	Plumbing/Mechanical	1,500
15	External Windows/Doors	1,850
	Floor, Wall, Ceiling Finishes	200
	Services	2,000
	Drainage	2,430
	Landscaping	2,000
20	Roads & Sewers	5,000
	External Works	12,400
	Lifts	2,500
	Contingency	2,000

25 17. The 5th Valuation detailed works as follows:

	Preliminaries	£500
	Superstructures	4,440
	Upper Floors	598
	Carpentry/Woodwork	755
30	Decorations	1,000
	Services	2,976
	Steelwork	45,938
	External Works	5,245
	Lifts	10,350
35	Contingency	2,750

18. The 6th Valuation detailed works as follows:

	Preliminaries	£400
	Roof Coverings	11,515
40	Floor, Wall, Ceiling Finishes	276
	Decorations	1,000
	Landscaping	2,000
	Cleaning	400
	Ceramic Tiling	500
45	Roads & Sewers	684

19. The “Estimated Nett Cost” and the “Gross Tender” given by the schedule of valuations was £904,290 – significantly higher than the figure of £488,596 given in

the “Form of Tender” dated 1 June 2011. Mr Broadway explained that the original tender had not taken into account certain works which were eventually carried out.

20. The schedule of valuations for the construction of Unit 3 also gave details of (1) the valuation of works completed “as at 30-04-10” (£115,858) with the note that these works were “not included in UTB funding”; (2) details of the valuations of works completed “as at 14-03-2012” (£361,991) with the note that this was the date of “new loan with UTB”; (3) details of the valuation “as of 17th May 2012”, called the 2nd Valuation (£50,279); and details of the valuation “as of 14th June 2012”, called the 3rd Valuation (£70,024). (“UTB” refers to United Trust Bank.)

21. These figures, for the valuation of works completed “as at 30-04-10”, the valuation of works completed “as at 14-03-2012”, the 2nd, 3rd, 4th, 5th and 6th Valuations, together with an analysis of “Balance to Complete”, totalling £139,391, totalled the stated “Estimated Nett Cost” of £904,290.

22. Mr Broadway’s evidence was that he had more than 25 years of experience in the construction industry. His understanding of the way construction contracts worked was that the works to be carried out would be identified by way of a list or schedule (as in Section G to the “Employer’s Requirements” in our papers – entitled ‘Particular Building Specification’). As the project continued, usually the contractor would produce a list or schedule of the measured works completed. Once the monitoring surveyor was satisfied that the listed works had been completed, he would issue a payment certificate to the funding bank (not to the contractor) and the company obtaining the funding could then draw down the amount certified by the payment certificate. Payment would then be made by that company to the developer, who would in turn make payment to the contractor. The contractor would have raised an invoice corresponding to the amounts certified by the payment certificate. He said that, in OE Bath’s case, the surveyor attended the site monthly to assess how much work had been done and to agree an amount to be paid for the work. This amount was then paid to OCI, which paid OE Bath, which used the funds to pay OBC’s suppliers. There was no formal agreement between OBC and OE Bath providing for this to be done.

23. Mr Broadway said that OBC invoiced OE Bath an amount which included a mark-up on base cost, being OBC’s profit. The amounts were checked by a Mr Vause, the construction manager, and agreed by him (Mr Broadway). The figures were passed to the funder’s monitoring surveyor so that a payment certificate could be produced as above. Correspondence between Mr Broadway and W.T. Hill Ltd., Chartered Quantity Surveyors, acting for United Trust Bank, was with our papers.

24. Mr Broadway’s evidence was that in his experience the description on the invoice in these ‘design and build situations’ is never a full description of the works carried out but is instead a reference to the certificate number for the particular payment and a general description of ‘something like works carried out on said project and a reference to the payment certificate’. In the case of invoice 265, the position was that ‘it was necessary to raise some invoices from time to time to bring the invoices up to date, as happened in this case’ He said that ‘[a]s such, the invoicing did not refer to

the payment certificate but was in all other respects the standard invoice one would expect for the industry'. The amount on invoice 265 had been agreed between himself and Mr Vause and passed on to the accounts team.

5 25. Mr Broadway said that '[a]s a result of an administrative oversight, the invoice was not raised in September or October [2012], but was instead raised in November, at the time the accounts staff were also assisting the insolvency practitioner' in relation to the proposed Creditors' Voluntary Arrangement ("CVA") for OBC.

10 26. In cross-examination Mr Broadway emphasised that the amounts on invoice 265 tied in with the totals of the 4th, 5th and 6th Valuations on the schedule of valuations with our papers. He was, however, unable to show us an invoice corresponding to the 3rd Valuation. In regard to the valuation of works completed as at 14 March 2012 (£361,991), we were shown an invoice issued by OBC to OCI dated 12 April 2012 in the amount of £322,508 plus VAT of £64,501.60. In regard to the 2nd Valuation (£50,279, according to the schedule), the invoice we were shown was one addressed
15 by OBC to OCI in the amount of £55,973 plus VAT. He said that it was a mistake by the accounts staff to address the invoice to OCI rather than OE Bath. He said that the position as between OBC and OCI was not corrected by the issue of a credit note because 'it didn't seem worth it'. A print out list of OBC's invoices with our papers did suggest that there had been some duplicate invoicing which had sometimes been
20 corrected by the issue of credit notes.

25 27. Officer Unwin's Second Witness Statement contained evidence relating to invoices issued by OBC to OCI, relating to construction works on Unit 3. Officer Unwin's comment was that evidence he had examined 'show that a total of £1.339m was spent on a project quantified at £500k' and that '[t]his does not make commercial sense and also does not include any charges made by Oval Contractors (South West) Limited, the successor business to OBC, which also allegedly made construction supplies to [OE Bath] on Unit 3'.

30 28. Mr Broadway's evidence was that he did not know when invoice 265 had been raised (although it had been dated 30 September 2012), and that it could have been raised at any time up to 13 November 2012. He said that the reason for raising the invoice was so that it could be in place at the time of a meeting of creditors of OBC to consider a proposed CVA. That meeting took place on 26 November 2012.

35 29. At that meeting, the CVA was rejected by a very large majority – the largest creditor voting against it (and guaranteeing its defeat) being HMRC. OE Bath, as a creditor for £18,544.38, voted in favour of the CVA. In consequence of the rejection of the CVA, on 29 November 2012 OBC went into liquidation and, on that date, OBC's debt to OE Bath of £18,544.38 was written off.

40 30. Mr Broadway's evidence was that 'no monies were actually transferred from [OE Bath] to OBC' but that invoice 265 had effectively been paid by an intercompany transfer by which OBC's indebtedness to OE Bath was reduced.

31. We were shown extracts from the Sage accounting records of OBC which showed that on 23 October 2012 an amount of £798,598.66 was both credited to OBC's debtors' account as a "Sales Receipt" (a Sales Ledger entry) and debited to OBC's creditors' account as a "Purchase Payment on Account" (a Purchase Ledger entry).
5 This was consistent with that amount being recognised as both a sale by OBC to OE Bath and as purchases by OBC from OBC's suppliers, subcontractors and employees.

32. Mr Broadway's evidence was that there was no written loan agreement between OBC and OE Bath, because the two companies were related and it was therefore unnecessary for the loan from OE Bath to OBC to be 'formalised' by way of a written
10 loan agreement. He informed us that the terms of the loan arrangement were that the loan was repayable on demand and that the loan was 'short term', and, apparently, not interest bearing.

33. Mr Broadway's evidence was that the loan was built up because OE Bath paid OBC's suppliers on OBC's behalf. This was because OBC had cash flow difficulties.
15 OE Bath had, however, not been able to produce at the hearing the invoices which it had paid on OBC's behalf because they had been provided to the Official Receiver following OBC's liquidation and copies of the invoices had not been retained.

34. Mr Broadway produced a schedule of payments made by OE Bath on behalf of OBC and a summary of such payments, which he said built up the intercompany loan
20 balance. The summary was as follows:

	Payments made to OBC's suppliers by OE Bath		
	(a) by cheque payments	£210,226.55	
	(b) by bank payments	<u>£225,860.87</u>	
			£436,087.42
25	Payments made to OBC's subcontractors and salary payments	<u>£362,509.08</u>	
	Total:		£798,596.50

35. That total figure (£798,596.50) closely approximates to the amount of the entries to OBC's Sales Ledger and Purchase Ledger on 23 October 2012 as noted above (£798,598.66).

30 36. However, Mr Broadway's evidence was also that the total intercompany loan balance was £830,643.04 (owed by OBC to OE Bath). This loan balance was, he said, reduced by £798,598.66 on 23 October 2012 and by a further £13,500 on 25 October 2012, leaving the balance of £18,544.38, which was written off on 29 November 2012.

35 37. During the hearing, Mr Allen, on behalf of OE Bath, produced analyses of the cheque payments, bank payments and payments made to OBC's subcontractors and salary payments referred to in paragraph 34 above, together with cross-references to

the relevant debit entries in the statements of OE Bath's bank account with Handelsbanken. Ms Barnes did not cross-examine on these analyses and Mr Allen, in his written closing submissions, identified 5 minor inaccuracies. Although we were not taken to the invoices giving rise to these payments (as we had been told that these were delivered to the Official Receiver and had not been retrieved), we conclude from this evidence that payments totalling (at least) £798,596.50 were made by OE Bath on behalf of OBC.

38. We were shown a 'screen shot' of OE Bath's Sage accounting record of invoice 265. This stated that the invoice was raised on 30 September 2012 and was posted on 13 November 2012 but that, at the time the 'screen shot' was taken (on 24 October 2014) it remained unpaid. Mr Broadway explained that the 'screen shot' showed that the amount stated on the invoice (being an element only in the reduction of the balance on the intercompany loan account) had not been matched off against the loan account in the Sage system.

39. We find on the evidence that invoice 265 was created on 13 November 2012. As stated above, OE Bath made a claim to deduct input tax in relation to invoice 265 in the VAT period 03/13, which covered the three months between 1 January and 31 March 2013. Mr Broadway described the fact that the input tax claim was made in the VAT period subsequent to the date when the invoice was created as an 'administrative error'.

40. OBC did not declare the VAT shown on invoice 265 as its output tax in its VAT returns.

41. Officer Unwin was informed by email dated 12 June 2013 by Grant Thornton (a Mr Mark Robson), the replacement insolvency practitioners dealing, as liquidators, with the liquidation of OBC, that they could not 'assist much in the short term' with identifying invoice 265. Mr Robson added that 'any books and records which may be available are not yet under our control'. Officer Unwin, in his Witness Statement, summarised this correspondence as information that Grant Thornton 'only had a small amount of documentation and that the Invoice [invoice 265] was not present'. When asked about this in cross-examination, he said that he had received a later email from Mr Robson. This was dated 25 March 2015. In it, Mr Robson said that Grant Thornton had reviewed 'a bundle of invoices (the only such invoices) which appear to cover the period early 2011 to late 2012' and that the bundle did not contain invoice 265. It was pointed out to Officer Unwin that he had received this information a long time after the date of the decision to deny the right of input tax deduction (3 July 2013) and the date of the penalty assessment (30 May 2014).

42. Mr Broadway gave evidence about the business conditions at the time of the construction of Unit 3. He told us that Barclays Bank had had a charge over the development but had stopped supporting the business from 2007. Matters had come to a head in 2010 and between then and 2012 OBC, as constructing company, had been unable to get funding. This problem had been dealt with by OE Bath effectively paying OBC's bills and building up an intercompany credit balance. A supplier had issued a winding up petition against OBC in August 2012 and the group's advisers

had recommended that a CVA should be entered into, if one could be agreed by OBC's creditors. OE Bath had started to make payments on behalf of OBC in January 2012.

5 43. We also heard evidence about HMRC's investigation. Officer Unwin took part in three meetings, on 23 May 2013, 21 June 2013 and 4 July 2013. Those meetings were with Mr David Sloggett, the group accountant for the Oval Companies. Mr Broadway also attended the meetings on 23 May 2013 and 4 July 2013. Officer Unwin completed one visit report for the three visits, but he told us that he had made contemporaneous notes which he updated to make the report.

10 44. Invoice 265 was specifically raised at the meeting on 23 May 2013. Officer Unwin asked why the input tax claim had been put in late and his note states that 'Sloggett didn't answer'. He also asked for proof of payment of the invoice. On 5 June 2013, Mr Sloggett emailed Officer Unwin informing him that payment had been made by adjustment 'via the intercompany debt'.

15 45. At the meeting on 21 June 2013, Officer Unwin told Mr Sloggett that he would be disallowing the input tax claim relative to invoice 265 on the basis that 'no payment details had been provided'.

20 46. After the meeting on 21 June 2013, Officer Unwin discussed internally within HMRC the appropriate action to take in terms of penalty in respect of the disallowed input tax claim. He started off with the view that OE Bath had displayed 'deliberate and concealed behaviour' because the claim had been made in the 03/13 VAT return in respect of an invoice dated 30 September 2012 issued by OBC and OBC had become insolvent on 29 November 2012, there being no evidence that the invoice had been declared as an output in OBC's VAT return. It was also part of Officer Unwin's
25 thinking that Mr Sloggett (who had acted as finance manager for both OE Bath and OBC) had chosen not to check that the invoice had been declared as an output by OBC, despite admittedly having the relevant SAGE back-ups in his possession.

30 47. The meeting on 4 July 2013 was held, according to Officer Unwin's note, in order to give Mr Sloggett and Mr Broadway an opportunity 'to fully disclose the inaccuracy'.

35 48. Mr Broadway made the point at the meeting on 4 July 2013 that OE Bath had been paying for supplies made to OBC and that invoice 265 was raised to reflect that. Officer Unwin responded that he 'wanted details of invoices that had been paid on OBC's behalf so that the value of the claimed invoice could be substantiated'. Officer Unwin also asked for details of who raised the invoice, the date it was raised, what detail was given to value it, and under whose instruction the invoice was raised.

40 49. On 24 July 2013 Mr Sloggett responded by email to Officer Unwin. He informed Officer Unwin that the invoice had been raised 'in SAGE' to 'correct intercompany transactions'. He stated that 'the invoice was raised between January to March 2013. The audit trail in OBC does not give a date, other than 30/09/2012'. He also stated that junior accounts staff had raised the invoice and that their work had been

unchecked because ‘we have all been under considerable pressure of work as we have had to shed a number of staff over the last few years’. He also stated that ‘we acknowledge that the invoice should not have been included in the VAT return’.

50. Officer Unwin regarded the information that the invoice had been raised between
5 January and March 2013 as significant because that was after the time that OBC had gone into insolvency. However, we are satisfied that this information was incorrect as a matter of fact and that the invoice had been raised on 13 November 2012, before OBC went into liquidation.

51. Despite his concerns, Officer Unwin decided at that point that he could not defend
10 a penalty raised on the basis of ‘deliberate and concealed behaviour’ because of the information given by Mr Sloggett that a junior member of staff had raised the invoice in error.

52. However, further investigations into associated companies appeared to reveal
15 further inaccuracies where output tax had not been declared in respect of intercompany transactions. Officer Unwin’s Witness Statement details an instance of the issue of an invoice in 2010 for management charges by Oval Estates (Manchester) Limited (“OE Manchester”) (of which Mr Broadway was a director) to Reamcraft Limited. This invoice was unpaid and OE Manchester made a claim for bad debt relief, which was denied because OE Manchester had not accounted to HMRC for the
20 VAT concerned. Officer Unwin’s Witness Statement also details an instance of an invoice issued by Oval Construction (South West) Limited (“OC South West”) to OE Bath in 2013 not being accounted for, for output tax purposes, by OC South West, despite a claim for input tax in respect of the invoice being made by OE Bath. Officer Unwin also raised a concern with Mr Broadway that the VAT returns for Oval
25 Residential Investments Limited for June to August 2013 were incorrect.

53. Officer Unwin mentions a further instance of inaccuracy in his Second Witness
Statement. This involved a failure by OBC to account for output VAT on an invoice issued to OCI. However, as he accepted in cross-examination, this error had been
30 accepted by the officer investigating (Officer Parfitt) as having been an ‘error despite taking care’.

54. The responses from Mr Broadway and Mr Sloggett to the concerns raised with them did not satisfy Officer Unwin and in consequence the penalty imposed on OE Bath in relation to invoice 265 was reviewed and revised on the basis of ‘deliberate and concealed behaviour’.

55. The Statement of Case in this appeal was originally settled on 3 November 2014.
35 In that Statement it was alleged that on the balance of probabilities invoice 265 was raised in 2013. An Amended Statement of Case was settled on 27 March 2015. In that Amended Statement of Case it was alleged that OE Bath’s ‘behaviour was considered to be concealed because the invoice was created after OBC became
40 insolvent’. A Second Amended Statement of Case was settled on 21 January 2016. In that Second Amended Statement of Case, the allegation that invoice 265 was created after OBC became insolvent was removed (it was not persisted in by Ms

Barnes at the hearing of the appeal). Instead, the following grounds for the allegation that the alleged inaccuracy in OE Bath's VAT returns was concealed were relied on:

5 'The inaccuracy is concealed because [OE Bath] 'made arrangements' to conceal it, beyond merely completing an inaccurate return and not disclosing it. Either they used an invoice which they knew did not represent an actual supply, or else (even if there was an actual supply as shown on the invoice) they were complicit with OBC in using the repayment claim in their own return to reap the benefit of the fraudulent under-declaration in OBC's return. 'Complicity' in this case derives from the fact that Mr Broadway was director of both companies. 10 On either showing, an invoice was knowingly used to support a claim known to be false, and this constitutes making arrangements to conceal.'

The parties' submissions

15 56. Because HMRC were presenting a case that OE Bath, through Mr Broadway, had engaged in dishonest conduct in relation to the input tax claim in issue, we invited Ms Barnes to open her case first.

57. Ms Barnes explained that HMRC did not doubt the existence of the Unit 3 building or that one or more of the Oval Companies provided the building services to erect it. She submitted that the appeal raised six issues for our decision. HMRC's case on each of those issues was as follows.

20 58. First, HMRC contended that the amount claimed as input tax on invoice 265 was not directly attributable to an identifiable supply made by OBC to OE Bath.

59. Secondly, HMRC contended that, in any event, the description on invoice 265 of the services supplied, *viz*: 'Works carried out on Unit 3' was not sufficient to rank the invoice as a valid VAT invoice.

25 60. Thirdly, HMRC contended, on the basis that invoice 265 was not a valid VAT invoice, that their decision not to allow a deduction as input tax of the amount of VAT stated on the invoice was not unreasonable in the relevant sense (that is, it was not a decision which no reasonable body of Commissioners could have made on the basis of the information before them – cf *Associated Provincial Picture Houses Ltd v* 30 *Wednesbury Corporation* [1948] 1 KB 223) and should be upheld in the exercise of the Tribunal's supervisory jurisdiction.

35 61. Fourthly, HMRC contended that OE Bath had not been able to show that the amount shown on invoice 265 had in fact been paid by OE Bath. This brought into play the application of section 26A VAT Act 1994 ("VATA") pursuant to which an entitlement to credit for input tax in respect of the VAT that is referable to unpaid consideration is cancelled.

40 62. Fifthly, HMRC contended that in any event deduction of the input tax stated on invoice 265 was precluded by the principle in *Axel Kittel v État belge* (Case C-439/04) in that OE Bath, through Mr Broadway and/or Mr Sloggett knew or should have known that the transaction recorded on invoice 265 was connected with a fraud

committed by OBC in not accounting to HMRC for the VAT element as its output tax.

63. Sixthly, HMRC contended that the penalty imposed on OE Bath should be upheld on the basis that OE Bath had engaged in ‘deliberate and concealed behaviour’.
5 There was otherwise no issue as to the quantum of the penalty charged.

64. Dealing with Ms Barnes’s first issue, Mr Allen contended that there was demonstrably a supply made by OBC to OE Bath answering to the description contained in invoice 265.

65. Dealing with Ms Barnes’s second issue, Mr Allen referred to the industry practice
10 on building works, which was to refer, when invoicing, to a schedule itemising the works completed. He submitted that the schedule in this case showed the works completed to 14 September 2012, which were the subject of invoice 265. He cited the Tribunal’s decision in the appeal of *Deadoc Construction Limited* [2015] UKFTT 433 (TC), the decision of the Court of Appeal in *Revenue and Customs Commissioners v Infinity Distribution Ltd (in administration)* [2016] EWCA Civ 1014 and the
15 decisions of the European Court of Justice in *Barlis 06 – Investimentos Imobiliarios e Turisticos SA v Autoridade Tributaria e Aduaneira* (Case C-516/14) and *Senatex GmbH v Finanzamt Hannover-Nord* (Case C-518/14).

66. As to Ms Barnes’s third issue, Mr Allen contended that HMRC’s decision not to
20 allow the deduction of input tax as stated on invoice 265 was unreasonable, having regard to all the circumstances and, in particular, to the fact that the VAT charged by OBC to OCI on the invoices of works included in the valuation of works completed as at 14 March 2012 and 17 May 2012 (the 2nd Valuation) had been allowed by HMRC as deductible input tax.

67. In relation to Ms Barnes’s fourth issue (payment), Mr Allen referred to the Sage
25 accounting records of OBC showing a set-off of £798,598.66 sales receipt against purchase payments on account on 23 October 2012. This, he submitted, showed payment of an amount which included the amount of £200,097.45 invoiced by OBC to OE Bath on invoice 265. He also contended that section 26A VATA did not, in
30 any event, authorise a denial of input tax in the period ended 31 March 2013.

68. In relation to Ms Barnes’s fifth issue (connection with fraud), Mr Allen contended
that invoice 265 had been raised by OBC (on 13 November 2012) in a period for
which the liquidator had responsibility for filing VAT returns – OBC having gone
into liquidation on 29 November 2012. Mr Allen submitted that HMRC were wrong
35 to submit that on 13 November 2012 Mr Broadway knew or should have known that the VAT shown on invoice 265 would not be accounted for as output tax by OBC because at that time it was not known that the proposal for the CVA would not succeed. Mr Allen further submitted that Officer Unwin had been wrong to regard Mr Broadway as being a director of Reamcraft Limited (this having been put to Officer
40 Unwin in cross-examination and the officer having accepted that he might have mistaken Mr Broadway for another, different, Mr Broadway).

69. In relation to Ms Barnes's sixth issue (the penalty), Mr Allen submitted for the same reason that there had been no fraud that OE Bath had not engaged in 'deliberate and concealed behaviour'.

Discussion and Decision

5 70. A useful place to start is the decision of the Court of Justice in *Barlis 06*. That was a case where the right to deduct VAT stated on invoices mentioning the supply of 'legal services rendered from [a particular date] until the present date'. In one case the invoice mentioned the supply of legal services only 'until the present date', that is, it did not mention the date from which the legal services had been supplied.

10 71. The Court drew a distinction between the formal conditions for deduction of input tax, contained in Article 226 of Directive 2006/112/EC (the Principal VAT Directive, or "PVD"), which deals with the content of VAT invoices, and the substantive requirements for the right of deduction of input tax, which are contained in Article 168, PVD.

15 72. In *Barlis 06*, the Court held that the formal conditions had not been complied with in that the description 'legal services rendered' was too vague and, in one case, the period over which the legal services rendered had not been specified, because the invoice did not mention the date from which they had begun to be rendered.

20 73. It is clear, in this case, that invoice 265 does not satisfy the formal conditions laid down by Article 226(6) and (7), PVD or the VAT Regulations which implement that Article in UK law. Article 226(6) requires 'the quantity and nature of the goods supplied or the extent and nature of the services rendered' to be stated on a VAT invoice, and Article 226(7) requires 'the date on which the supply of goods or services was made or completed ... in so far as that date can be determined and differs from the date of issue of the invoice' to be similarly stated.

25 74. However, the Court of Justice made it plain that 'the tax authorities cannot refuse the right to deduct VAT on the sole ground that an invoice does not satisfy the conditions required by Article 226(6) and 97) of [the PVD] if they have available all the information to ascertain whether the substantive conditions for that right are satisfied'. (*Barlis 06* at [43])

30 75. In our judgment, the schedule referred to at paragraph 14 above, with the details of the work included in the 4th, 5th and 6th Valuations, recited at paragraph 16 above gave HMRC the information to ascertain whether the substantive conditions for the right to deduct the VAT stated on invoice 265 were satisfied. That information was specific enough to persuade HMRC that those substantive conditions were satisfied.

35 76. Those substantive conditions are that the identified goods and/or services are used for the purposes of the taxed transactions of a taxable person (OE Bath) and are the subject of a supply to that taxable person by another taxable person (OBC) – see: Article 168(a), PVD.

40 77. Ms Barnes submitted that it was unclear whether the supply referred to in invoice 265 was made by OBC to OE Bath or OCI. We disagree. Invoice 265 was addressed

to OE Bath. This, in our judgment, makes it clear that the services were supplied to OE Bath, with whom OBC was in contractual relations for the construction of Unit 3. It is true that previous invoices had been addressed by OBC to OCI. This, however, in our judgment, does not displace the conclusion that the services to which invoice 5 265 referred were supplied to OE Bath.

78. Ms Barnes also submitted that it was unclear that the supply (if made) by OBC to OE Bath was used for the purposes of taxed transactions of OE Bath, because OE Bath's role in the development of Unit 3 was unclear, no contract between OE Bath and OCI having been produced, and no fee paid by OCI to OE Bath having been identified. We take the view that it is clear from the evidence, particularly the Articles of Agreement referred to in paragraph 10 above and Mr Broadway's evidence referred to in paragraph 22 above that the company obtaining funding (OCI) could draw down the amount certified by a payment certificate and then pay the developer (OE Bath), who would in turn make payment to the contractor (OBC), that the development of 10 Unit 3 was a commercial enterprise, that OE Bath did not receive the construction services of OCB for its (OE Bath's) own consumption, and that OE Bath used or 15 objectively intended to use those services for the purpose of making taxable supplies.

79. Accordingly, we conclude that, although invoice 265 did not satisfy the formal conditions required for it to be a valid VAT invoice, OE Bath has established its right 20 to deduct the VAT stated on invoice 265. This disposes of the first three of the issues raised by HMRC.

80. The fourth issue concerns whether OE Bath has paid the amount shown on invoice 265. In response to OE Bath's case that the offsetting of £798,598.66 in OBC's books on 23 October 2012 of purchase payments against debtors, that is, of payments to 25 suppliers, subcontractors and employees (made by OE Bath on OCB's behalf) against the intercompany loan from OE Bath to OCB which had been built up, together with a similar offsetting of £13,500 on 25 October 2012, amounted to payment of invoice 265, Ms Barnes submitted that there was insufficient evidence to demonstrate that such payment had in fact been made.

81. Ms Barnes pointed out that the schedule of payments made by OE Bath on behalf of OBC and the summary referred to above at paragraph 34 included payments made after 23 October 2012, which, she submitted, suggested that the offsetting was not, or was not wholly, related to payments to suppliers, subcontractors and employees referred of OBC. It is true that 12 of the cheques payable to suppliers totalling 35 £210,226.55, 31 of the payments of salaries and payments to subcontractors totalling £362,509.82 and one of the bank transfer payments to suppliers totalling £225,860.87 bore dates after 23 October 2012. However the latest payments bore the date of 29 November 2012 (the date when OBC went into liquidation). The payments bearing this date were 6 payments of salaries or payments to subcontractors.

82. Mr Broadway explained in evidence that the payments made after 23 October 40 2012, a small minority of the total, were payments known to be due as at 23 October 2012 and were anticipated when the offsetting entries were made on 23 and 25 October 2012. He also said that the payments made by OE Bath on behalf of OBC

represented in the offsetting entries did not all relate to Unit 3, but to other projects as well.

5 83. We accept this explanation and find that the supplies invoiced on invoice 265 were paid for by an amount included in the offsetting entries made on 23 and 25 October 2012.

10 84. This finding precludes any application of section 26A VATA as the consideration for the supplies in issue was not unpaid at the end of the period of 6 months following the ‘relevant date’, which in this case was 14 July 2012 in the case of the works included in the 4th Valuation, 14 August 2012 in the case of the works included in the 5th Valuation and 14 September 2012 in the case of the works included in the 6th Valuation.

15 85. We turn now to Ms Barnes’s fifth and sixth issues which relate to the alleged deliberate conduct of OE Bath in relation to the obtaining of a fraudulent VAT advantage arising out of the claiming of input tax relative to invoice 265 coupled with OBC’s failure to account for that VAT as output tax.

86. Ms Barnes based her case on these issues on a submission that the evidence showed that there was an intentional failure on OBC’s part to declare the output tax due by reference to invoice 265, and that OE Bath, through Mr Broadway and/or Mr Sloggett, was responsible for that intentional failure.

20 87. She submitted that there was no evidence that invoice 265 or the financial Sage records of OBC (which would have included invoice 265) had been provided to the liquidator of OBC following the liquidation on 29 November 2012. She also submitted that no adequate explanation had been given for why invoice 265 had not been posted immediately by OBC following the date on the invoice (30 September 25 2012), noting that the delay meant that the invoice could not be included in the returns for the VAT periods 09/12 and 10/12 of OBC, over which the Oval Companies had control. Connected with this was a query as to why OE Bath had not claimed the input tax deduction in its VAT period 12/12, rather than the succeeding period 03/13.

30 88. She reminded the Tribunal that there had been inconsistencies in the account given to HMRC of these matters, pointing particularly to Mr Sloggett having at one point accepted that invoice 265 had been raised after the liquidation of OBC (on 29 November 2012).

35 89. Accepting that invoice 265 had been raised before the liquidation, she made the point that OBC had posted the invoice at a time when they knew that they would not be able to account for the relative output VAT.

90. She also relied on the alleged pattern of behaviour demonstrated, as recorded in paragraphs 52 and 53 above.

40 91. She referred to the recent decision of this Tribunal in the appeal of *Victoria Walk Limited* (TC05416 [2016][UKFTT 0687 (TC)), a decision of Judge Greenbank and Ms Gable. In that decision, the Tribunal said that they had concluded ‘on balance’

and ‘only marginally’ that the director of the appellant company and an associated company had acted dishonestly (*ibid.* [136]) and they counted against the appellant that ‘it was extremely likely’ that the company which issued the invoice in question would be put into liquidation owing the output tax, even though, at the relevant time it could not be said for certain that this would happen (*ibid.* [137]).

92. We take the view that an allegation of fraud or dishonest conduct should only succeed if the evidence shows on the balance of probabilities that there was fraud or dishonest conduct rather than that there was an innocent explanation for OBC’s failure to account for output tax on invoice 265.

93. In this case, we accept Mr Broadway’s evidence that invoice 265 was not raised in September or October 2012 as a result of an administrative oversight and because the accounts staff were assisting the insolvency practitioner in relation to the proposed CVA for OBC. The delay in posting invoice 265 was, we find, innocent and, although this had the consequence that it was eventually posted after OBC had entered into liquidation, we find that this was not the result of any dishonest arrangement.

94. The apparent failure to pass invoice 265 to the liquidator of OBC (or to pass to the liquidator accounting records that would have disclosed invoice 265) was also, we find, due to administrative error rather than dishonest behaviour. In our judgment, the evidence indicates muddle and confusion among the accounting staff rather than fraudulent or dishonest intent. This comment applies particularly to Mr Sloggett’s apparent acceptance that invoice 265 had been raised after the liquidation of OBC.

95. In our judgment, the evidence indicates that the Oval Companies had a genuine hope that the CVA for OBC would be successful up until 29 November 2012, and we find that the reason for the delay in posting invoice 265 was administrative error rather than the hope that the obligation to account for the output tax would be avoided by OBC by reason of the failure of the CVA to take effect.

96. In the light of these conclusions we decline to find that OE Bath was guilty of dishonest or fraudulent conduct in this case by reference only to the alleged pattern of behaviour relied on by HMRC.

97. The consequence of our conclusions on these (fifth and sixth) issues is that HMRC have not demonstrated any fraudulent evasion of VAT which could cause the principle in *Kittel* to apply to the facts of this case.

98. For the reasons given above, the appeal succeeds and we hold that the deduction of the input tax of £33,349.58 claimed by OE Bath ought to be allowed. This means that the appeal against the penalty is also allowed in its entirety. We add, in this regard, that we find that OE Bath did not engage in any ‘deliberate and concealed behaviour’ in relation to invoice 265.

99. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax

Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

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RELEASE DATE: 10 MAY 2017