Neutral Citation: [2023] UKFTT 00977 (TC)

Case Number: TC08996

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2020/04120
TC/2022/00097

VAT – Failure to keep documents necessary to verify returns – Substitution of 'best judgment' assessments – Penalty – Deliberate and Concealed – Director's Personal Liability Notice – Determination on the papers under Rule 29(1) – Appeals dismissed

Judgment date: 16 November 2023

Decided by

TRIBUNAL JUDGE AUSTEN

Between

CONDITIONAIRE ENERGY SAVERS LTD

PETER ERNEST WILLIAMS

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeals on Friday 10 November 2023 without a hearing under the provisions of Rule 29(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (determination without a hearing) having first read the Notices of Appeal dated 3 November 2020 and 20 November 2020 (with enclosures), HMRC's Statement of Case dated 14 February 2022 (with enclosures) and the bundle of papers prepared for the Tribunal by HMRC.

DECISION

INTRODUCTION

1. On 3 November 2020, Conditionaire Energy Savers Ltd (**the Company**) appealed to the Tribunal against:

   (1) A 'best judgment' assessment dated 12 February 2020 for the periods 12/16 to 02/19 inclusive (excluding periods 01/17, 02/17, 03/17, and 04/18) in the amount of £117,409, issued pursuant to s.73 VAT Act 1994 (**VATA** – all statutory references are to this Act unless specified to the contrary), which was confirmed by letter following an independent HMRC review on 22 August 2020 (the **s.73 Assessment**); and

   (2) A penalty assessment dated 24 February 2020, issued pursuant to Schedule 24 Finance Act 2007, in the amount of £99,797.65, which was which was also confirmed by letter following the independent HMRC review on 22 August 2020 (the **Sched. 24 Assessment**).

2. On 20 November 2020, Peter Ernest Williams, styled in correspondence as "Colonel P E Williams TD DL" (**Mr Williams**) (the Company and Mr Williams together **the Appellants**), appealed to the Tribunal against a Personal Liability Notice issued to him on 21 February 2020 pursuant to Paragraph 19, Schedule 24, Finance Act 2007 as to 100% of the penalty notified to the Company, i.e., £99,797.65 (the **PLN**) (the Company's appeal against the s.73 Assessment and the Sched. 24 Assessment and Mr Williams' appeal against the PLN together the **Appeals**).

3. On 3 December 2020, the Tribunal wrote to the Company to notify it that its appeal against the s.73 Assessment could not proceed unless either the tax in dispute was paid or a successful hardship application was made. It appears that the Company did subsequently make a hardship application, which was apparently accepted, so that the tax in dispute remains unpaid pending this decision.

4. On 14 January 2021, HMRC made an application to the Tribunal to hold a preliminary hearing to determine whether the Company was under any legal constraints in their ability to provide factual evidence about its VAT position (discussed below) or, in the alternative, to strike out the Company's appeal against the s.73 Assessment under Rule 8 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273, as subsequently updated) (the **Tribunal Rules**). That application was refused by Judge Kim Sukul on 21 September 2021 and directions were issued for the case to be prepared for its final determination.

5. The Appeals were conjoined by Directions issued by the Tribunal on 7 January 2022.

6. By Directions issued by Judge John Brooks on 15 March 2022, and confirmed in correspondence from the Tribunal to the parties on 15 June 2022, the Appeals were directed to be determined on the papers, without a hearing, as a result of the poor health of Mr Williams, which precluded him taking part in any hearing.

7. Whilst it appears from some copy e-mail correspondence included in the Tribunal's bundle that Mr Williams (personally, and/or on behalf of the Company) received at least some professional support from an accountant in 2020, both he and the Company are unrepresented in these appeals. HMRC's case was prepared by a member of its Solicitors Office, apparently without the support of counsel.

8. The general lack of evidence (and the relatively poor quality of the evidence which was available), together with the limited legal submissions by both parties, have hampered me in deciding these appeals. Some – or most – of those shortcomings might have been rectified by

a hearing, but that had previously been discounted in favour of a decision on the papers because of Mr Williams' health.

9. Whilst conscious of that background, I considered whether it was necessary for me to issue new directions under Rules 5(2) and 6 of the Tribunal Rules, superseding the directions issued by Judge Brooks on 15 March 2022, so as to require the holding of a hearing – especially in the context of the overriding objective to deal with cases fairly and justly (at Rule 2(1) of the Tribunal Rules). Ultimately, however, I decided against doing so. That was because: (1) both parties had agreed to the Appeals being determined on the papers; (2) the parties were responsible for the preparation and presentation of their respective cases; and (3) there was no indication that Mr Williams' health had improved such that he would be able to participate in oral proceedings.

10. This decision therefore proceeds on the basis of the limited documentary evidence and written submissions received by the Tribunal from the parties.

11. Among the categories of evidence which could – and in my view should – have been provided to the Tribunal were copies of the relevant Companies House records. As will become apparent below, and having first given careful consideration to the point, I have taken judicial notice of those documents on the basis that they are publicly available statutory records (as did the Queen's Bench Division (Technology and Construction Court) in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC), at [27], *per* Fraser J (affirmed by the Court of Appeal on a different point in [2018] EWCA Civ 2695)).

12. For the reasons given below, I have decided that the s.73 Assessment, the Sched. 24 Assessment, and the PLN are all upheld and the Appeals are refused.

BACKGROUND

13. The Company was incorporated on 26 May 2016. It was described as being in the business of the manufacture and sale of air conditioning energy saving devices. Mr Williams has been the sole director and registered shareholder of the Company since its incorporation; he is listed as the Company's sole "Person with Significant Control" (for the stated reason that he has the right to appoint and remove directors).

14. The Company applied for VAT registration on 25 September 2016 on the basis that it intended to make taxable supplies in the future. The application form anticipated zero-rated supplies of £90,000 over the next 12 months, with an estimated turnover over the same period of £100,000. No amounts were specified for the total estimated value of goods bought by the Company and imported from other EU member states, or for sales of goods to other EU member states.

15. The Company applied to cancel its VAT registration on 21 May 2019, because "…the assets of the Company have been sold to our distributor in the United Arab Emirates and [an] application will be made to Companies House to dissolve the Company." The application form added that the Company was still trading, but only making supplies which were either exempt or outside the scope of UK VAT, and recorded that the Company stopped making taxable supplies on 29 March 2019 (which was the date of the sale agreement included in the Tribunal's bundle).

16. On 12 January 2017, an HMRC officer, Miss Seymour, had sent an e-mail to Mr Williams to enquire into the Company's VAT return for the period 12/16. She asked:

> Please can you confirm the main business activity?
>
> Does the business hasbe [*sic* for "have"] a commercial unit?
>
> What are the non-VATable sales being made?

> Please can you give details as to why the registration is requesting a refund of VAT?
>
> Please provide a copy of the VAT return build-up along with a the [*sic*] largest VAT value purchase invoices against which you are reclaiming
>
> How is the business being funded?
>
> Will future returns also show repayments?

17. On the same day, Mr Williams replied by e-mail with the following answers:

> 1. Business activity is manufacture and supply of the AIRCON ENERGY SAVER which is a device which saves between 20% and 30% of electricty used by air conditioning units. See: www.conditionaireinternational.com.
>
> 2. Commercail [*sic*] unit as in 1 above.
>
> 3. Our markets are in; Asia, Africa, Middle East and South America with very few sales in UK
>
> 4. We have the product made by a factory in UK which attracts VAT.
>
> 5. I will send VAT return build-up along with largest VAT value purchase invoices on my return.
>
> 6. The business is funded by myself personally.
>
> 7. Future returns will show repayments.

18. On 23 January 2017, Mr Williams wrote back to the HMRC officer to confirm that "the VAT return sent from my office was incorrect. This is due to the fact that the person sending on my behalf was not familiar with the system and, as it was the first return, had nothing to guide him. Future purchases and sales were included prematurely and therefore this revised return results in a repayment."

19. HMRC wrote to the Company on 24 January 2017, and concluded that the Company was "not entitled to a VAT credit for this period, so no credit will be applied to your account. Instead, there is now an amount of VAT due." HMRC accordingly issued an assessment under s.73 VATA in the amount of £110.71. It does not appear that penalties were applied because of that inaccuracy.

20. On 18 June 2019, a different officer of HMRC, Mr Jason Michej, sent an e-mail to Mr Williams to arrange an inspection of the Company's VAT records at the Company's premises. Mr Michej wrote, "I appreciate that prior to the end of May you had applied for VAT de-registration. You may be aware that VAT records need to be kept for 6 years." Mr Michej notified Mr Williams that he required sight of "purchase and sales invoices, as well as bank records and other supporting documents" relating to the Company's VAT returns.

21. For the reasons discussed below, and despite repeated attempts by HMRC to encourage and enable compliance (including the offer of a confidential meeting, requests for alternative sources of corroborative information, and, finally, on 9 October 2019, a formal information notice issued pursuant to Schedule 36, Finance Act 2008), Mr Williams remained unable or unwilling to provide HMRC with the documentary evidence they required. As at the date of this decision, none of the Company's VAT records (or other corroborative evidence) have been produced to HMRC or the Tribunal by the Company or Mr Williams.

22. Accordingly, HMRC issued the Company with the s.73 Assessment and the Sched. 24 Assessment, and Mr Williams with the PLN.

23. Mr Williams wrote to HMRC on 9 March 2020 (though the letter was mis-dated 9 February) to request an independent HMRC review of the s.73 Assessment and the Sched. 24 Assessment.

24. Following the conclusion of HMRC's review of the s.73 Assessment and the Sched. 24 Assessment by Ms Rachel Smith of HMRC, Ms Smith wrote to the Company on 22 August 2020 to confirm that she had upheld the same. It was the decisions in that letter which were amenable to appeal by the Company.

25. The ordinary appeal deadline was 30 days from the date of the review letter, i.e., 22 September 2020. But as a result of the Covid-19 pandemic, HMRC took the general position that it would not object to late appeals made within 3 months of the end of the normal 30-day appeal period, i.e., in this case, by 22 December 2020.

26. The Appeals were made out of time, but within HMRC's 3-month 'grace period'. HMRC have therefore not objected to the late appeals, and I have allowed them to proceed (applying *Martland v HMRC* [2018] UKUT 178) because of: (1) the general social conditions then occurring as a result of Covid-19; and (2) Mr Williams' reported state of health.

BURDEN AND STANDARD OF PROOF

27. In their Statement of Case, HMRC correctly identified that the burden of proof is on the Company in respect of the s.73 Assessment, but that the burden of proof is on them in respect of the Sched. 24 Assessments and the PLN, and that the standard of proof in each case is the civil standard, i.e., on the balance of probabilities. The Appellants have not addressed the burden or standard of proof.

28. In the context of this case, HMRC's brief statement on these points requires expanding as follows.

Burden of proof – the s.73 Assessment

29. The s.73 Assessment was made pursuant to s.73(1), which provides:

> Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> [my emphasis]

30. In the absence of any evidence having been provided by the Company to substantiate the input tax claimed in its VAT returns, Mr Michej notified the Company that he exercised his "best judgment" in determining the amount of this assessment. Mr Michej explained how he reached that amount in the notice of assessment dated 12 February 2020 and in its enclosed spreadsheet, which showed his calculations.

31. The onus is on the Company to displace the s.73 Assessment by providing evidence which proves to the Tribunal's satisfaction (on the balance of probabilities – see below) that the assessment is incorrect. If relevant, that includes the burden of showing that the assessment was not, in fact, made to the best of Mr Michej's judgment (*Bustard v. HMRC* [2015] UKFTT 546 (TC), at [2]).

32. It has been held that a 'fundamental' defect is required so as to invalidate an assessment (*Pegasus Birds Ltd v. CEC* [2004] EWCA Civ 1015, *per* Walker, Chadwick and Carnwath LJJ), and, in *Mithras (Wine Bars) Ltd v Revenue & Customs Commissioners* [2010] UKUT 115 (TCC) (Judge Sir Stephen Oliver), that "[t]he circumstances in which the Tribunal can decide

that the assessment was not raised to the best of the Commissioners' judgment, and therefore should not have been made at all, are very limited, essentially being restricted to cases where the Commissioners have acted perversely or in bad faith" (applied in *Morrella Ltd v. HMRC* [2017] UKFTT 13 (TC) (Judge Jonathan Richards), at [96(2)]). Innocent mistakes (i.e., those which are not perverse or made in bad faith) do not make the assessment void: *Foneshops Ltd v. HMRC* [2015] UKFTT 410 (TC) (Judge Barbara Mosedale), at [78].

Burden of proof – the Sched. 24 Assessment and the PLN

33. Conversely (for the reasons summarised in paragraphs [35]-[37] below), the burden of proof is on HMRC in respect of the Sched. 24 Assessment and the PLN. HMRC accept that, writing in their Statement of Case: "In regards to [*sic*] the penalty, the burden is on HMRC to demonstrate that the penalties are due and correctly issued as deliberate and concealed."

34. In respect of the Sched. 24 Assessment (to which the PLN is appendant), there are thus two primary elements which HMRC must prove:

(1) That the Company's VAT returns contained inaccuracies which amounted to an understatement of its liability to tax; and

(2) That the inaccuracies were deliberate and concealed on the Company's part.

Standard of proof

35. It is trite law that there is only one standard of proof in civil cases: that being the balance of probabilities. However, that is not the end of the matter. *Phipson on Evidence* says this at §6-57:

> Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard… <u>However, the civil standard is flexible in its application. Thus if a serious allegation is made then more cogent evidence may be required</u> to overcome the unlikelihood of what is alleged, in order to prove the allegation. It has also been held that the more serious the consequences for an individual if allegations are proved, the stronger the evidence must be before a court will find the allegation proved.
>
> (my emphasis)

36. Tax-geared penalties are quasi-criminal, e.g., for the purposes of Article 6 of the European Convention on Human Rights – see, for example, *Han & Yau Martins & Martins Morris v Commissioners of Custom and Excise* [2001] EWCA Civ 1048; *King v Walden (Inspector of Taxes)* [2001] STC 822 (*per* Jacob J), at paras 62–79. Penalties levied on the basis that the alleged conduct of the taxpayer was "deliberate" (and "concealed") are especially grave – essentially the equivalent of an allegation of fraud, albeit dealt with by this Tribunal and not the criminal courts (indeed, until 1 April 2010, the statutory language referred to "fraudulent", instead of "deliberate", conduct).

37. Although the cases cited in [36] above do not deal with penalties under Sched. 24 FA2007 (which, for VAT purposes, largely came into force for periods after July 2008), I consider it axiomatic that a penalty under Sched. 24 ought to be treated as criminal in nature, especially where the penalty is imposed for allegedly "deliberate and concealed" behaviour. The consequences of that are that the rights granted under Article 6 of the ECHR apply in relation to the penalties assessed. Relevantly here, Article 6(1) gives the Appellants the right to a fair trial, and Article 6(2) provides that there is a presumption of innocence until they are proven guilty (to the civil standard of the balance of probabilities).

38. Furthermore, this Tribunal, when assessing whether the standard of proof has been met, should be careful to ensure it is satisfied that it has "cogent evidence" of the salient facts. It is for me, in my evaluative judgment, to determine what is "cogent evidence" in this context.

THE TRIBUNAL'S JURISDICTION

39. In respect of the s.73 Assessment (i.e., an appeal brought under s.83(1)(p)), the Tribunal has a general review jurisdiction, giving power to increase the amount specified in the assessment if it determines that that amount "is less than it ought to have been" provided that a direction is given specifying the correct amount: s.84(5).

40. In respect of the Sched. 24 Assessment and the PLN, the Tribunal's jurisdiction arises from paragraph 15, Sched. 24 FA2007, relevantly:

> (1) The Appellants may appeal HMRC's decision that a penalty is payable (paragraph 15(1)); and
>
> (2) The Appellants may appeal HMRC's decision as to the amount of the penalty (paragraph 15(2)).

41. As set out in paragraph 17, Sched. 24, FA2007, the Tribunal's jurisdiction varies according to which paragraph or paragraphs the Appellants' appeals are made under:

> 17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 15(2) the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b)substitute for HMRC's decision another decision that HMRC had power to make.

42. If the appeal is made under paragraph 15(2) Sched. 24, FA2007 then the Tribunal has a general supervisory power under paragraph 17(2)(b), Sched. 24, FA2007, enabling it to decrease or increase the amounts specified in the penalty notices as required by the facts found by the Tribunal. Otherwise, on an appeal under paragraph 15(1) Sched. 24, FA2007, the Tribunal's power is simply to affirm or cancel the penalty issued by HMRC.

43. I have reviewed the Appellants' Grounds of Appeal to ascertain under which paragraph or paragraphs the appeals against the Sched. 24 Assessment and the PLN were brought. Mindful that the Appellants are unrepresented (thus there being a risk that they have not articulated their grounds of appeal so precisely as an expert professional would have done), I have also carefully reviewed the correspondence and documents in the Tribunal's bundle to the same end.

44. The Grounds of Appeal make no mention of any appeal against the amounts of the various assessments. Insofar as I have been able to tell from the material before me, an objection to the *amounts* of the Sched. 24 Assessment and/or the PLN (as distinct from the fact that HMRC issued them at all) seems never to have formed part of the Appellants' case. It follows, in my judgment, that the Appeals against the Sched. 24 Assessment and the PLN are to be construed as if they were made only pursuant to para. 15(1) Sched. 24, FA2007, and not also pursuant to para. 15(2) of the same. As a result, I have concluded that the Tribunal's only powers in respect of the Sched. 24 Assessment and the PLN are either to: (1) affirm them in their stated amounts; or (2) cancel them in their entirety. The Tribunal has no power to vary their amounts as it would have done had I concluded that the Appeals had also been brought under para. 15(2) Sched. 24 FA2007.

EVIDENCE

45. The evidence available to the Tribunal consists chiefly of: a Witness Statement (with exhibits) by Mr Michej of HMRC; copies of correspondence between the parties (and occasionally with others, chiefly the Appellants' tax advisor); internal HMRC correspondence; various HMRC forms and computer records relating to the Company; HMRC's earlier application to the Tribunal; and the Sale Agreement and associated documents, including a Stock Transfer Form dated 29 March 2019 (the **STF**).

46. I have reviewed and considered all the documentary material available to me. As noted at [11] above, I have also taken account of the relevant Companies House filings.

The s.73 Assessment

47. The essential issue is helpfully set out in Mr Michej's Witness Statement as follows:

> On 30 January 2020 a colleague sent me export data for [the Company] which showed that when VAT registered between December 2016 – March 2019, it exported £40,915 worth of goods to Mexico, Brazil, Israel and the USA. On the VAT returns over the same period were declared outputs of £761,055 net and VAT of £2,480. Which means that there were net sales of £720,140 without any VAT but not exported. It is not known where these zero-rated supplies were made, if at all, because there were no figures entered as 'EC Supplies / Dispatches' (Box 8 of the VAT form). In summary, the VAT figures are apparently showing there to have been limited exports, no EC sales and minimal UK sales with VAT.

48. I have reviewed the spreadsheets exhibited to Mr Michej's Witness Statement, which substantiate these points.

49. So the fundamental factual question which the Tribunal must determine is whether or not the Company did in fact make those supplies – especially of the zero-rated non-export sales of £720,140 during the relevant period as claimed in its VAT returns. HMRC's 'best judgment' s.73 Assessment was issued on the basis that the Company has failed to provide the documents and information required to 'verify' its returns, and so HMRC disallowed the input tax claimed.

50. Because the burden of proof is on HMRC, the Appellants are not under any obligation to provide any positive evidence in support of their case: they may, if they prefer, "put HMRC to their proof", in which case the outcome of the case will depend upon whether HMRC have met their burden.

51. Of course, in general terms, it is far easier for a Tribunal to find in favour of appellants if they do adduce positive evidence which seeks to undermine HMRC's case and which can potentially introduce the necessary level of doubt in the Tribunal's mind such that the Tribunal would have to decide that HMRC has failed to meet its burden.

52. In this case, the Appellants – either by choice or necessity (they say the latter) – have adduced almost no positive evidence: indeed, their case is predicated on the unavailability of the relevant evidence as a result of the Company's records having been transferred to Envirotech Limited of Abu Dhabi (**Envirotech**) pursuant to a sale agreement dated 29 March 2019 (the **Sale Agreement**) – a copy of which was included in the Tribunal's bundle.

53. In essence (and putting HMRC's case and the evidence they have supplied in support to one side for a moment), the Appellants seem to be asking the Tribunal to take on trust that the Company's VAT returns were correct, notwithstanding the lack of corroborative evidence.

54. In that context, the Tribunal's view of the Appellants' credibility plays a part in its deliberations. In particular, an appellant's evidence-in-chief and on cross-examination can be instrumental in helping the Tribunal to form a view of the respective merits of the parties'

cases. It is, then, particularly regrettable that the Tribunal has not had the benefit of an oral hearing in these Appeals. In lieu of that, I have had to come to a view on the Appellants' reliability on the papers before me alone.

55. The Appellants have said throughout that it was not possible to provide the Company's records to substantiate the input tax amounts claimed because of the terms of the Sale Agreement. However, even if that is the case, there is nothing preventing the Appellants from making a narrative statement setting out in broad terms the nature of its sales and explaining the circumstances in which the Company made its supplies – especially of the zero-rated non-export sales amounting to £720,140. From what I can determine of the Company's trade as a whole, those sales would have been the largest part of the Company's business.

56. Other than dormant company accounts for the period 1 September 2019 to date, the Company only filed substantive statutory accounts with Companies House for two financial periods, between 26 May 2016 and 31 August 2018. Those accounts were prepared on the basis that the Company qualified for the "micro-entity" reporting basis (requiring that it had two or more of the following: a turnover of £632,000 or less; £316,000 or less on its balance sheet; 10 employees or fewer). As far as can be ascertained from the simplified balance sheets in the Company's filed accounts, its trade seems to have been negligible. There is certainly no information in the accounts which credibly substantiates the claims in its VAT returns that it made taxable UK supplies of £2,480, export supplies of £40,915 to Mexico, Brazil, Israel and the USA, and other zero-rated non-export sales of £720,140. It is worth noting in passing that these amounts are considerably greater than the more modest estimates provided in September 2016 when the Company applied for VAT registration with an anticipated annual turnover of £100,000 (see [14] above).

57. In the above context, I find it impossible to believe that Mr Williams is incapable of describing how the purported zero-rated non-export sales arose – irrespective of whether or not he is able to substantiate his narrative with corroborative documents. The lack of any attempt to do so is especially striking. Absent any evidence to persuade me otherwise, I find it inherently improbable that the Company could have made such substantial zero-rated non-export supplies in the context of its overall trade.

The Sale Agreement

58. The Appellants' case, as put in their Grounds of Appeal, is that:

> …the Company was sold to [Envirotech]… which prevented us from disclosing any Company information to any third party including Statutory Authorities.
>
> As part of the Sale Agreement all correspondence and accounting records were handed over to the purchaser.
>
> It was not appreciated at that time that it was incumbent on the Company to keep copies of all accounting records with the Company being sold to an overseas purchaser. We are aware that "ignorance of the law is no plea" and very much regret that we did not take copies of the records.
>
> We tried to persuade the purchaser to return the accounts records for VAT inspection but they steadfastly refused as they considered that this was a breach of the signed [Sale Agreement]. They also made clear that they would take legal action within the United Arab Emirates if the contract was breached. This would have involved any representative of the Company being arrested on the next visit to the country.

> We have kept the purchaser informed of the difficult situation regarding accounting records for VAT and believe it may now be possible to obtain a letter from them confirming the facts of the matter to assist in the appeal…

59. The Sale Agreement was included in the Tribunal's bundle, as a copy of it was evidently belatedly supplied by Mr Williams to HMRC.

60. There are several notable features and oddities about the Sale Agreement:

(1) It is on Envirotech headed paper and its operative provisions amount to less than one side of type.

(2) The date is typed at the head of the document in the same font and size as the rest of the agreement.

(3) The parties are expressed to be Envirotech and the Company (and not Mr Williams).

(4) It is written in English, and expressed to be subject to the laws of the United Arab Emirates.

(5) It is expressed to be a type of asset purchase agreement in respect of the Company's "Intellectual Property Rights of the AIRCON ENERGY SAVER", and not – contrary to Mr Williams' representations to HMRC and this Tribunal – a sale and purchase of Mr Williams' shares in the Company.

(6) The purchase consideration is expressed to be "…the sum of £1 (one pound sterling UK) and 20% (twenty per cent) of all nett profits arising from the sale of the AIRCON ENERGY SAVER for a period of five years from the date of signing the Agreement." But no methodology is set out explaining how the 20% profits are to be calculated, nor are any terms included as to their payment. More puzzling still, in light of the requirement in what I take to be clause C (see paragraph [60(7)] immediately below) that the Company be struck off from the Companies House Register is that upon being struck off, the Company would not be able to receive its 20% profits for the next five years. The Sale Agreement does not resolve that tension. In any event, the Company's statutory accounts as filed at Companies House do not indicate that Envirotech has actually made any consideration payments pursuant to this clause – the Company returns on the basis that it is dormant and not trading, and consideration payments by Envirotech would of course be trading income. To my mind, this fact calls into question the reality of the terms expressed in the Sale Agreement; at the very least, it requires an explanation, of which none has been forthcoming.

(7) The first bullet point after clause B (which I infer ought to be clause C) specifies: "[the Company] undertakes to cease production of the AIRCON ENERGY SAVER immediately and to arrange [to] have [the Company] removed from the Register of Companies within the United Kingdom…".

(8) That clause continues, adding that the Company must "…hand over all documents relating to the operation of the Company to [Envirotech]."

(9) The next bullet point (which I infer ought to be clause D) states:

> [The Company] further undertakes not to disclose any information contained in this Agreement to any third party whether it be commercial, legal or statutory without the express consent of [Envirotech] and any actions in this respect will be considered a direct breach of this Agreement and attract damages as calculated by [Envirotech].

(10) It was that clause which Mr Williams – it seems correctly – considered prohibited him from disclosing information about the Company to HMRC when they opened their enquiry into the Company's VAT returns. In that regard, clause F provided that the Company was to "deliver all company correspondence and accounts to [Envirotech] on the signing of this Agreement". (Subject to any relevant provision of UAE law,) one infers that the widely-drafted damages provision in clause D enabled Envirotech to specify any such damages as it determined in its absolute discretion

(11) Notwithstanding the undertaking given by the Company to have itself removed from the Companies House register, clause E requires the Company to "…continue to provide [Envirotech] with full technical support for the sales of the AIRCON ENERGY SAVER." The conflict between those provisions is nowhere explained.

(12) The signatories are Mr Williams for the Company and Rania Abo Baker (who signed "R.A.B.") for Envirotech as its General Manager. Her signature is accompanied by Envirotech's stamp.

61. It may be the case that asset sale and purchase agreements in the form of the Sale Agreement are unexceptional in UAE law: this Tribunal is not in any position to judge that one way or the other. But by comparison with typical English law examples, the Sale Agreement seems to me to be a conspicuously poor document. Whilst it is not impossible that a company might conceivably conclude a contractual agreement in such a form, especially *in extremis*, it would be so unwise as to invite explanation. Unfortunately, no explanation of the Sale Agreement or its circumstances has been provided by the Appellants.

62. Adding to the confusion is that fact the STF accompanies the Sale Agreement, even though the Sale Agreement itself is expressed to be in respect of the Company's intellectual property rights in the "Aircon Energy Saver" rather than over Mr Williams' shares. The STF, which is dated 29 March 2019 (in common with the Sale Agreement), purports to transfer Mr Williams' shares in the Company to Envirotech. The STF is defective in two respects: first, it does not specify the consideration money for the transfer; secondly, the signature box which Mr Williams was required to complete to authorise the transfer of his shares is instead completed with the words "ENVIRO-TECH LIMITED – UAE" (in block capitals). Mr Williams has, though, clearly seen the STF, as he signed the Stamp Duty exemption certificate on the reverse (as "Transferor"). I note in passing that a somewhat idiosyncratic use of block capitals seems to be typical of Mr Williams' written style (e.g., in respect of product names), found variously in the Grounds of Appeal and in correspondence. It is also – coincidentally or otherwise – a feature of both the Sale Agreement and the STF.

63. The inclusion of the STF is presumably intended to demonstrate that the transfer of Mr Williams' shares in the Company to Envirotech was a term of the Sale Agreement – which has been Mr Williams' case throughout, despite the apparently clear terms of the Sale Agreement itself to the contrary. Nevertheless, it is clear that the STF has never been registered, as Mr Williams still remains the sole registered shareholder – even though Mr Williams, as the Company's sole director, had absolute control over the company enabling him to act as he saw fit, including by registering the apparent transfer of shares to Envirotech. It is telling that in his correspondence with his tax adviser, Mr Williams apparently considered himself able to put the Company into liquidation – seemingly without the involvement of Envirotech, for whom (if we are to believe him that the Sale Agreement was in respect of his shares in the Company) he presumably held the shares on bare trust. As a result, I doubt that the STF was required or intended by the Sale Agreement and its inclusion is question-begging.

64. HMRC's application to the Tribunal of 14 January 2021 raises another point which calls for explanation: HMRC alleged that "Envirotech Limited" had an office in the UK, located in

Tunbridge Wells, of which a "Mr Paul Williams" and a "Mrs Rania Baker Williams" (whom I infer to be the same person as the Rania Abo Baker who signed the Sale Agreement on behalf of Envirotech) were directors. Additionally, as HMRC went on to note, Mr Williams, "Paul David Williams", and "Rania Abo Baker Williams" were all co-directors of another company, Green Park Consultancy Limited, which had its registered office in Sevenoaks. The filing address for Mr Williams and "Rania Abo Baker Williams" was the same.

65. It is possible that it is a simple coincidence that all or some of Mr Williams, Paul David Williams, and Rania Abo Baker Williams apparently share a name and addresses and have directorships of multiple companies in common. In the absence of further evidence, it is impossible to tell. But whatever the actual circumstances of the Sale Agreement, it seems a reasonable inference to draw from the Companies House records that there may be more to the relationship between Mr Williams and the "Rania Abo Baker" who signed the Sale Agreement on behalf of Envirotech than the Appellants have acknowledged in these Appeals, and an explanation is, in my view, called for – though none has been provided.

66. Having set out the evidence above, I briefly return to this point at [76] below.

Further Issues

Confidentiality

67. In addition to his argument that the Company's records were no longer under his control, having been transferred to Envirotech, Mr Williams justified his lack of disclosure to HMRC on the prohibition in clause D of the Sale Agreement on disclosing information relating to the agreement "to any third party". A typical competent English law asset sale and purchase agreement might well include confidentiality provisions binding on the seller – though those will almost invariably specifically *exclude* making disclosures required by law to a statutory authority. I have never before seen a provision specifically *including* statutory authorities such as HMRC in a confidentiality clause with the apparent intention of prohibiting a party from complying with its statutory obligations. The inclusion of such a provision in the Sale Agreement is certainly one which requires explanation.

68. In correspondence with HMRC, Mr Williams elaborated luridly on the consequences for him if he breached clause D of the Sale Agreement by providing information to HMRC in lurid terms. He wrote to Mr Michej on 5 August 2019, saying: "…the owner of [Envirotech] is close to the Ruler and I do not want to risk being accommodated by the Ruler in a prison cell!" On 20 August 2019, Mr Williams wrote again to Mr Michej saying:

> This issue is further complicated by the fact that we are still supplying products to the UAE such as the FRIDGESAVER, CHILLERSAVER and SOLAR STREET LIGHTING all of which are manufactured in the UK. To this end I have to travel to the UAE and if there is any dispute with the signed [Sale] Agreement then on my arrival in the UAE my passport will be retained and I will be delivered to a prison cell where I will stay until the damages calculated bt [*sic* for "by"] [Envirotech] are assessed and paid. Obviously I cannot take this risk so wee [*sic*] have to accept that the documents will not be returned.

69. He added:

> This unfortunate situation would have been avoided if only I had known a few months earlier of the intention to carry out the audit when I would have retained the documents and sent them on later but this is only hindsight.
>
> I am sorry we have not achieved a more satisfactory outcome.

70. To my mind, in adopting this attitude, Mr Williams was remarkably phlegmatic about the apparent impossibility of retrieving the Company's own records. His inference appears to be that HMRC ought to be similarly accepting of the state of affairs which the Sale Agreement had brought about – and presumably to drop their enquiry into the Company's VAT affairs.

71. I have not had the benefit of legal argument on the enforceability of clause D of the Sale Agreement, and I proceed on the working assumption that it was valid and bound the Company according to its terms. In that case, the Company must inevitably accept the consequences that follow from that. Whatever its *inter partes* effect as a matter of UAE law, Clause D of the Sale Agreement certainly does not absolve the Company of its English law statutory obligations to maintain its VAT records, or to provide them to HMRC upon request to substantiate its VAT returns, and nor does it entitle the Company to ignore a Schedule 36 Information Notice. When faced with the choice of complying with its statutory obligations or meeting its contractual obligations to a third party, there is only one possible outcome: the statutory obligations must always take priority. Any contractual consequences arising from the breach of such an ill-considered contractual agreement are those which the Company – and/or its officers – must accept.

"Commercial Approach"

72. In his letter to Mr Michej of 24 October 2019, Mr Williams mentioned that he was shortly to travel to the UAE "…to conclude a sale of British goods of considerable value" as a justification for not being able to breach the terms of the Sale Agreement.

73. In his submissions to HMRC in advance of the review decision, Mr Williams wrote:

> The tribunal should be interested in the fact the UAE Company, with whom you have been pressing me to provide information which would have resulted in a breach of contract, have been instrumental in the award of a £160 million contract in Egypt which our Prime Minister thought important enough to celebrate the signing in a reception at Downing Street on Thursday 27 February. The Company made it quite clear that if we had breached our contract the project in Egypt would have been awarded to a Company from Holland who were a close competitor. We assume the members of the tribunal will take a more commercial approach.

74. In a further letter to HMRC dated 3 April 2020, Mr Williams returned to this point, writing:

> 1. The reason we were not able to provide the information you requested has been well documented but it involved a breach of contract between this Company and the purchasing Company in the United Arab Emirates. Although you are still entitled to demand this information regardless it would have opened this Company to litigation and, more importantly, affected future business in the middle east.
>
> 2. During the time we have been involved in correspondence with your department we were actively involved in negotiating a £160 million contract which closely involved the purchasing Company and it was made clear that if we breached the purchase contract we would be excluded from further negotiations.
>
> 3. This contract has now been concluded with a UK Company and was thought to be important enough for the Prime Minister to give a few minutes of his valuable time to host a short reception at Downing Street to thank the parties involved on Thursday 27 March. It is the first of a number of contracts to be awarded.

> 4. We are well aware that rules and regulation of the HMRC must be observed but there should always be room to consider how commercial situations should be regarded as an exception to the rule. Especially when there has been no financial loss to the government. On the contrary a substantial order has been obtained.
>
> 5. With the now added commercial misery of the result of the coronavirus it is essential that we make every effort to secure orders for the future of the country even if it means that certain rules and regulations have to be relaxed. Indeed it is the only way to survive[.]

75. Mr Williams seems to have been inviting HMRC to waive "rules and regulation" in respect of the Company's VAT affairs with a view to securing what he considered the greater overall financial benefit to the UK. If so, that was a scandalous suggestion which does Mr Williams' credibility considerable damage. HMRC was quite right to ignore it, and Mr Williams is wholly mistaken if he believes the Tribunal can – or will – take a "commercial approach" of absolving the Company from tax obligations in the hope of facilitating cross-border trade. Self-evidently, the rule of law requires all taxpayers in the same position to be treated alike, and no exception can be made for Mr Williams or the Company as a result of "commercial situations".

NO FINDINGS ON THE CIRCUMSTANCES OF THE SALE AGREEMENT

76. On careful reflection, I came to the view that to dispose of the issues in the Appeals, it was not necessary that I reach a concluded view on the circumstances surrounding the Sale Agreement, and I therefore refrain from doing so. In particular, it is not necessary to decide whether the Sale Agreement was a sham for me to be able to determine the Company's appeal against the Sched. 24 Assessment. I have expressed above my concerns about the Sale Agreement and the issues that arose as a result of its terms. I have said that the surrounding circumstances, including the possibility of a personal or familial relationship between Mr Williams and Rania Abo Baker Williams, call for explanation – though none has been provided. But I allow the possibility that the shared surname and address are coincidental, and that the terms of the Sale Agreement were innocent. Either way, I am satisfied that the true position does not alter the disposition of the Appeals.

DISCUSSION

77. Having rehearsed above the background and the salient evidence, I now turn to considering the Appeals in their factual and legal context.

s.73 Assessment

78. Logically, the s.73 Assessment must be dealt with first, because if I decide that there was no insufficiency in the Company's VAT returns, then the Sched. 24 Assessment and the PLN would fall away.

Was there an inaccuracy?

79. I find that there was an inaccuracy leading to an underassessment of tax because the Company has failed to discharge its burden of proof that its VAT returns were correct and/or that the 'best judgment' assessment issued by Mr Michej was defective.

80. I am not persuaded by the Company's apparent argument that its VAT returns were correct and that, if only they could recover their files from Envirotech, they could demonstrate so to HMRC and the Tribunal: I consider that far less likely than the alternative, which is that the Company's VAT returns overstated the input tax claimed, as argued by HMRC.

81. Accordingly, I uphold the s.73 Assessment in the amount notified to the Company by Mr Michej, which I take to be the correct amount.

Sched. 24 Assessment

82. Having found that there was an inaccuracy in the Company's VAT returns, it is now necessary to determine whether that inaccuracy was 'deliberate' and 'concealed' in the context of the Sched. 24 Assessment.

Was the inaccuracy 'deliberate'?

83. The Sched. 24 Assessment was made on the basis that the Company's conduct in relation to the s.73 Assessment was "deliberate and concealed".

84. Paragraph 3(1), Sched. 24, FA2007 relevantly states as follows:

> (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
>
> …
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

85. My decision at [79]-[81] above is conclusive of the fact of the inaccuracy, which arose because the Company made VAT returns which understated its liability to tax. The question as regards the penalty is whether the inaccuracy was "deliberate and concealed".

86. Paragraph 3(1)(c), Sched. 24, FA2007 requires that the inaccuracy must be "deliberate on [the Company's] part", but the meaning of "deliberate" is otherwise un-defined.

87. Of course, the word "deliberate" has a common meaning in the English language, defined in the *Oxford English Dictionary* (use 1.b.) as: "Of an action, undertaking, etc.: carefully considered; done with full awareness or consciousness. In later use also (chiefly in negative sense, of an action regarded as undesirable or reprehensible): intentional; done on purpose rather than by accident."

88. As the Tribunal in *Auxilium Project Management v HMRC* [2016] UKFTT 0249 (TC) (Judge Ashley Greenbank and Michael Bell) wrote at [62]-[63]:

> 62. Schedule 24 Finance Act 2007 does not further define the word "deliberate". HMRC's manuals state that "a deliberate inaccuracy occurs when a person gives HMRC a document that they know contains an inaccuracy" (HMRC Compliance Handbook CH81150). We adopt a similar approach.
>
> 63. In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.

89. The subsequent case-law was recently and conveniently summarised in *CPR Commercials Ltd v HMRC* [2023] UKUT 61 (TCC) (Miles J and Judge Greg Sinfield) at [19]-[21] as follows:

> 19. Following *Auxilium*, the issue of the correct meaning of "deliberate inaccuracy" came before the Supreme Court in *HMRC v Tooth* [2021] UKSC 17. In that case, the Supreme Court considered the correct approach to deliberate and careless conduct in the context of the discovery assessment provisions contained in section 29 of the Taxes Management Act 1970 ('TMA 1970') as interpreted by section 118(7) TMA 1970. Although *Tooth* concerned

a different provision, the Supreme Court noted, at [27] of the judgment, the "broadly similar differential treatment of careless and deliberate conduct … reflected in different levels of penalty which may be imposed … [pursuant to] Schedule 24 of the Finance Act 2007." In *Tooth*, the Supreme Court posed the following question, and provided its answer to that question:

> "42. The question is whether it means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.
>
> 43. We have no hesitation in concluding that the second of those interpretations is to be preferred …
>
> …
>
> 47. It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so."

20. The next case to consider the meaning of "deliberate inaccuracy" was *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) ('*CF Booth*'). In *CF Booth*, the UT (Mrs Justice Bacon and Judge Brannan) expressly approved of [63] and [64] of *Auxilium*. At [38] – [41], the UT said:

> "38. In *Tooth* the Supreme Court considered the test of 'deliberate inaccuracy' in section 118 Taxes Management Act 1970, which was required in order to enable HMRC to serve a 'discovery assessment' within a 20 year window. It held that the natural meaning of the phrase 'deliberate inaccuracy' meant a statement which, when it was made, was deliberately inaccurate, rather than a deliberate statement that was in fact inaccurate. 'Deliberate' attached a requirement of intentionality to the whole of that which it described, namely 'inaccuracy'. The required intentionality therefore attached both to the making of the statement and to its inaccuracy (§43).
>
> 39. At §47, Lords Briggs and Sales, delivering the judgment of the Supreme Court, said:
>
> 'It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of s118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.'
>
> 40. As the Court of Appeal held in *E Buyer*, it is not necessary for HMRC to plead or prove dishonesty in order to establish *Kittel* knowledge (i.e. that the taxpayer 'knew or should have known' that the transactions were connected to fraud). Mr McDonnell argued that a finding of dishonesty was, however, an essential element of deliberate inaccuracy for the purposes of the penalty assessment, such that the findings in the 2017 Decision could not suffice to establish deliberate inaccuracy.
>
> 41. We disagree. There is in our judgment no requirement for HMRC to plead or prove dishonesty when seeking to impose a penalty for deliberate inaccuracy under Schedule 24 FA 2007. As the FTT held in *Auxilium*,

> deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. We do not consider that anything said by the Supreme Court in *Tooth* calls that test into question."
>
> 21. As already explained, the parties agreed before the FTT that, as stated by the FTT in *Auxilium* and endorsed by the UT in *CF Booth*, the test for deliberate inaccuracy in Schedule 24 FA 2007 is a subjective one which requires proof that the taxpayer knowingly provided HMRC with a document which contained an inaccuracy, intending that HMRC rely upon it as accurate.
>
> [my emphasis]

90. The statement at [21] is binding on this Tribunal and I direct myself accordingly.

91. For completeness, I note that the Appellants have not sought to argue that the inaccuracy was less than deliberate – i.e., that it was either the result of innocent error, or was "careless" (within Paragraph 3(1)(a), Sched. 24, FA2007), or was "deliberate but not concealed" (within Paragraph 3(1)(b), Sched. 24, FA2007). Indeed, there has not been any acknowledgement of any inaccuracy at all: the Appellants' case is simply that the Company's records (which, one assumes, and the Appellants imply), could substantiate the position one way or the other) are no longer under the Company's control, having all been passed to Envirotech pursuant to the Sale Agreement. As a result, the Appellants say, it is impossible for them to comment substantively on any of the issues raised in the Appeals.

92. As I understand it, the Appellants' case is that the Company's VAT returns were correct but can no longer be substantiated because the necessary records are no longer under their control. They invite the Tribunal to find accordingly, such that: (i) there was no inaccuracy; (ii) the Schedule 24 Assessment must be dismissed; and (iii) that the PLN cannot arise.

93. Having reviewed the evidence provided to the Tribunal in light of the test outlined at [89] above, I have concluded that the Company's inaccuracy in its VAT returns – completed by or on behalf of Mr Williams – was indeed deliberate. This is because I find that the returns were submitted in the knowledge that they were inaccurate and it was intended that HMRC would rely on the returns as being accurate. I consider it likely, on the balance of probabilities, that the input tax claimed by the Company was not properly due, and, in particular, that the zero-rated non-export sales of £720,140 were not in fact made.

94. I do not consider it credible that, had the Company actually made those supplies, Mr Williams would not have been able to present at least some evidence in support of them. A simple narrative statement describing the Company's trade would have been a good start. Absent that, and having reviewed all the evidence before me, I conclude that HMRC have met their burden of proof in establishing the 'deliberate' nature of the Company's conduct, and the Appellants have done nothing to undermine that. It is not good enough for the Company to point to the putative impossibility of retrieving the Company's records from Envirotech and, essentially, to ask the Tribunal to take on trust the reliability of its VAT returns. I am fortified in reaching this conclusion by the general view I have reached about Mr Williams' credibility as a witness: on the basis of the papers before me (and albeit in the absence of oral testimony), I consider that Mr Williams' evidence (such as it is) is unreliable.

95. In reaching my decision on the deliberate nature of the Company' inaccuracy in its VAT returns, I am content that I have the "cogent evidence" referred to at [35] above which is required to satisfy me.

Was the inaccuracy 'concealed'?

96. As regards concealment, Paragraph 3(1)(c), Sched. 24, FA2007 requires that "[the Company] makes arrangements to conceal [the inaccuracy] (for example, by submitting false evidence in support of an inaccurate figure)."

97. But, similarly with "deliberate", Sched. 24, FA2007 does not further define what it means by "concealed" in this context. Again, the word has a common English meaning, which the *Oxford English Dictionary* (use 1.a.) defines as: "Hidden, disguised; kept secret."

98. It is well-known that the making of "arrangements" in a tax context is an intentionally very wide concept. From the parenthetical example in Paragraph 3(1)(c), we must infer that the arrangements in question must be external – and additional – to the inaccuracy itself.

99. The meaning of "concealed" in this context was previously considered in *Leach v HMRC* [2019] UKFTT 352 (TC) (Judge Anne Redston and John Robinson) at [105]-[109], who said as follows:

> 105. The meaning of "concealed" is also not defined in Sch 24. The Oxford English Dictionary ("OED") states that "conceal" as an intransitive verb means:
>
> > "To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from…others; to refrain from disclosing or divulging."
>
> 106. We noted that [the appellant] immediately told [the HMRC officer] that he had destroyed all the records: this was not something HMRC discovered subsequently, so he did not "refrain from disclosing or divulging" what he had done.
>
> 107. However, "conceal" has a slightly different meaning when it is used transitively (ie so that the verb has an object); it is then defined as:
>
> > "To hide (a person or thing); to put or keep out of sight or notice. Also: to prevent from being visible."
>
> 108. The statutory context here is Sch 24, para 3, which says:
>
> > "an inaccuracy in a document is…'deliberate and concealed' if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it."
>
> 109. An inaccuracy is therefore "concealed" if the person makes arrangements to conceal "it", ie the inaccuracy, so this is a transitive usage. <u>The question is therefore whether [the appellant] prevented the inaccuracy from being visible?</u>
>
> [my emphasis]

100. I agree that the question as formulated by the Tribunal in *Leach* at [109] is the right question for the Tribunal to ask when faced with a penalty predicated on alleged concealment.

101. As noted at [76] above, I have not had to decide whether the issues arising from the Sale Agreement were genuine or not. This is because I have concluded that, on the assumption that it was binding, clause D of the Sale Agreement was itself an "arrangement" which had the effect of "concealing" from HMRC and the Tribunal the deliberate inaccuracy in respect of the Company's VAT returns. If the Sale Agreement was instead a sham, it would follow that the whole endeavour to make out the sham would have been an arrangement. It follows that whether or not the Sale Agreement is thought to be genuine or a sham has no bearing on the outcome of this point.

102. In light of this conclusion, I have decided that the Company did conceal the deliberate inaccuracy in respect of its VAT returns. Again, I am content that the evidence before me is "cogent evidence" which justifies this decision.

103. As a result, HMRC has made out the several requirements in support of the Sched. 24 Assessment, and I conclude that the Assessment was correct and must stand.

Personal Liability Notice

104. In the Grounds of Appeal, Mr Williams "strongly question[ed]" the imposition on him of the PLN because it was "blatantly untrue" that he had benefitted from the VAT repayments to the Company, and he declared himself willing to disclose copies of his personal bank statements "to prove that I did not receive any benefits from VAT repayments." Mr Michej notes at paragraph 35 of his Witness Statement that no such statements were provided to HMRC, nor have they been provided to the Tribunal.

105. In fact, Paragraph 19, Sched. 24. FA2007 simply specifies:

> Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

106. An "officer", of course, includes a director (Paragraph 19(3)(a), Sched. 24, FA2007), and Mr Williams is (and has at all material times been) the sole director of the Company. The statutory question is therefore about the attribution to Mr Williams of the deliberate inaccuracy in the Company's VAT returns, rather than his purported financial benefit from the VAT repayments themselves.

107. The question for this Tribunal is therefore whether the deliberate inaccuracy was "attributable" to Mr Williams, being an officer of the Company. If so – and provided that PLN was intra vires of HMRC and properly issued – then it must stand.

108. It is indisputable that Mr Williams is an officer of the Company. I am also satisfied that the PLN was intra vires of HMRC, and there are no indications that it was not properly issued to Mr Williams. I find accordingly.

109. Consequently, if the PLN is to be displaced, HMRC must fail to show that the inaccuracy was "attributable" to Mr Williams.

110. For the avoidance of doubt, the necessary "attribution" to Mr Williams is only that of the initial deliberate inaccuracy: the subsequent concealment of that inaccuracy is irrelevant to this point.

111. Because the burden of proof on this point is on HMRC and not on Mr Williams, Mr Williams is under no obligation to adduce any evidence in an attempt to undermine the attribution of the deliberate inaccuracy to him personally. Mr Williams has not adduced any such evidence. It follows that if HMRC succeed in establishing that the Company's deliberate inaccuracy was attributable to Mr Williams on the balance of probabilities, then the PLN must be upheld.

112. Mr Williams was at all material times the sole director (and shareholder) of the Company. It was Mr Williams who was responsible for making the Company's VAT returns, which I have held at [93] and [101] above to have been deliberately inaccurate. I therefore have no hesitation in concluding that the deliberate inaccuracy in question must therefore be attributed to Mr Williams personally within the meaning of Paragraph 19, Sched. 24. FA2007, and that the PLN must accordingly be upheld. The relevant evidence on this simple point is self-evidently "cogent".

DISPOSAL

113. For the reasons set out above, I have concluded that the Appellants have failed to displace the s.73 Assessment, and that HMRC have established the Sched. 24 Assessment and the PLN.

114. I therefore dismiss the Appeals and confirm the s.73 Assessment, the Sched. 24 Assessment, and the PLN.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

115. 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.

JAMES AUSTEN
TRIBUNAL JUDGE

Release date: 16th NOVEMBER 2023